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ANNOTATED

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EDITED BY

C. E. T. FITZGERALD

C. B. LABATT *and*

I. FREEMAN

CONSULTING EDITORS

E. DOUGLAS ARMOUR, K.C.

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CASES REPORTED
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TABLE OF ANNOTATIONS

(Alphabetically Arranged)

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Re LEWIS.
Re HABEAS CORPUS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, Simmons and Hyndman, JJ.A. June 28, 1918.

CONSTITUTIONAL LAW (§ I D—82)—DELEGATED AUTHORITY—OPEN TO REVIEW BY COURTS—INVALID IF NOT WITHIN POWERS CONFERRED—ORDERS IN COUNCIL—HABEAS CORPUS.

Orders and regulations made by virtue of a delegated authority from a legislature are open to review by the courts and are invalid if they do not come within the powers conferred by the legislative enactment, or are inconsistent with the direct enactments of the legislature which conferred the delegated power.

Order in Council passed April 20, 1918, cancelling exemptions granted under the Military Service Act, 1917, held to be *ultra vires*.

[Review of legislation.]

[See annotation on Habeas Corpus, 13 D.L.R. 722.]

Statement.

APPLICATION by way of habeas corpus for the discharge of the applicant from military custody and service. Application granted.

A. Macleod Sinclair, for the applicant; *James Muir*, K.C., for the Minister of Justice.

Harvey, C.J.

HARVEY, C.J. (dissenting):—The applicant is 21 years of age and, being unmarried, is a member of Class I., under the Military Service Act, 1917, called for service in the present war. He applied for exemption in accordance with the provisions of the said Act and was granted exemption by the tribunal until he ceased to be employed as a farmer and received a certificate of such exemption from the registrar under the said Act, dated February 15, 1918. On May 8, while still engaged as a farmer, he was notified by the registrar to report for active service. He complied with the notice and was then put in uniform and placed in a military camp, where he alleges he is now detained against his will.

The detention is sought to be justified by virtue of an order-in-council of the Governor-General cancelling all exemptions such as that held by the applicant.

The validity of this order in council is questioned.

It is necessary, therefore, to consider its authority.

The order-in-council purports to be made "under and in virtue of the powers conferred on the Governor in Council by the War Measures Act, 1914, and otherwise."

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The War Measures Act, 5 Geo. V. 1914, c. 2, 2nd sess. by s. 6 provides that:—

6. The Governor in Council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

(*a*) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communications;

(*b*) arrest, detention, exclusion and deportation;

(*c*) control of the harbours, ports and territorial waters of Canada and the movements of vessels;

(*d*) transportation by land, air, or water and the control of the transport of persons and things;

(*e*) trading, exportation, importation, production and manufacture;

(*f*) appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

In 1917, parliament passed the Military Service Act, 7-8 Geo. V. 1917, c. 19, which modified the Militia Act and provided for calling to military service those persons not exempt from service, in the manner specified. Classes were defined and power given to the Governor in Council to call the members of any class or sub-class, who, upon being called, should "be deemed to be soldiers enlisted in the Military Forces of Canada." Provision was also made for the claiming and granting of exemptions from service temporarily or permanently. By s. 12 power is given to the Governor in Council to make regulations for the enforcement of the Act and, by sub-s. 5 of s. 13, it is provided that

Nothing in this Act contained shall be held to limit or affect the punishment provided by any other Act or law for the offence of assisting the enemy nor the powers of the Governor in Council under the War Measures Act, 1914.

The order-in-council in question contains the following paragraph:—

5. The Governor in Council may direct orders to report for duty to issue to men in any class under the Act of any named age or ages or who were born

in named years or any named year or part of a year and any exemption theretofore granted to any man of any such named age or year of birth shall cease from and after noon of the day upon which he is ordered so to report, and no claim for exemption by or in respect of any man shall be entertained or considered after the issue to him of such order, provided, however, that the Minister may grant leave of absence without pay to any man by reason of the death, disablement or service of other members of the same family while on active service in any theatre of actual war.

That order is dated April 20, 1918, and another order dated the same day directs that

orders to report for duty irrespective of any exemptions granted or any claim for exemption made, shall issue in such order as the Minister of Militia and Defence may direct to every man in Class I under the Military Service Act, 1917, who, at the date of the application for the exemption made by him or on his behalf, had attained the age of twenty years and had not attained the age of twenty-three years.

There is no room for doubt that the orders-in-council intended to apply to such persons as the applicant and it is contended that they are in direct conflict with the express provisions of the Military Service Act, 1917, and are, therefore, ineffective. It may be useful in the consideration of this case in order to ascertain the extent of the authority granted to the Governor in Council by the War Measures Act, 1914, to examine the situation under which the Act was passed.

In the last days of July and first days of August, 1914, Germany, the greatest military nation the world has ever known, after years of intensive preparation, both military and naval, had, in conjunction with her ally, Austria, forced war upon three of the world's greatest powers, including Great Britain, and shewn a ruthless disregard of the rights of neutrals standing in her way. The Parliament of Great Britain was then in session and it proceeded forthwith to prepare to raise a large army, it having theretofore made little preparation in this regard. It is a matter of such public knowledge as to be treated as authentic history that, at the moment almost immediately preceding the war, the most acrimonious controversy existed between the Government and the Opposition in the British Parliament but that, thereafter, all hostile opposition to the Government ceased and the leader of the Opposition in the House of Commons publicly announced that the Government of the day, because it represented the nation, would receive the full and loyal support of the Opposition in all its steps to carry on the war.

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The Parliament of Canada, which had prorogued on June 12, was called into extraordinary session, which lasted for just 5 days, from the 18th to the 22nd days of August. Eight Acts were passed, almost exclusively dealing with emergency matters having regard to the war. It is apparent that without the loyal support of the Opposition no such legislation could have been effected within the short time of the session.

The War Measures Act begins by ratifying

All acts and things done or omitted to be done prior to the passing of this Act and on and after the first day of August A.D. 1914, by or under the authority of or ratified by:—

(*a*) His Majesty, the King in Council;

(*b*) Any Minister or Officer of His Majesty's Imperial Government;

(*c*) The Governor in Council;

(*d*) Any Minister or officer of the Government of Canada;

(*e*) Any other authority or person;

which, if done after the Act, would be authorised by it or by orders or regulations under it.

It then provides that s. 6 and some of the other sections shall be in force only during war, invasion or insurrection, real or apprehended.

The next section declares that war has existed from August 4, 1914.

Two other sections, whose operation is limited in time as s. 6, provide that the Governor in Council may prescribe penalties for violation of orders or regulations under the Act but not exceeding a fine of $5,000 or imprisonment for 5 years and that any person held for deportation or under arrest or detention as an alien enemy or upon suspicion shall not be released on bail or discharged or tried without the consent of the Minister of Justice. These sections are emergency legislation, the terms of which indicate parliament's appreciation of the seriousness of such emergency and of its confidence in the government. Parliament was about to prorogue and did prorogue on the day upon which the Act was assented to.

Under our system of government parliament enacts the laws which the government is charged with executing. There was no occasion for parliament giving the government any executive authority, for it possessed it already, but, in the administration of affairs and the conduct of the war, it might be that the law would be insufficient or unsuitable and, since parliament alone would have authority to change it, serious inconvenience or, perhaps disaster,

might result if a change of law could not be effected promptly and, as parliament could not remain in session, its legislative power could not be exercised by itself, and, if exercised at all, must be exercised by some body to whom the authority could be delegated. The fact that, if the parliament were in session, the responsibility for the introduction and carrying through of such laws would be on the government of the day suggests that government as the proper body to whom to entrust the authority to make such laws as may be requisite, which could not be otherwise brought into existence.

There can be no doubt of parliament's right to delegate this authority. In *Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. 282, in which the validity of an order-in-council under a New South Wales statute was in question, Sir Robert P. Collier, in delivering the judgment of the Judicial Committee of the Privy Council, at p. 290, says:—

> These two cases (viz *Reg.* v. *Burah*, 3 App. Cas. 889, and *Hodge* v. *The Queen*, 9 App. Cas. 117) have put an end to a doctrine which appears at one time to have had some currency, that a colonial legislature is a delegate of the Imperial legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate,

and again on p. 291:—

> It is argued that the tax in question has been imposed by the Governor and not by the legislature, who alone had power to impose it. But the duties levied under the order-in-council are really levied by the authority of the Act under which the order is issued. The legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him.

Parliament, then, having the power and the need to delegate some of its authority, what is the extent of such delegation, under s. 6 of the War Measures Act, 1914?

The words of authorisation are very wide but are, of course, restricted by the purpose specified, viz., anything that the Governor in Council may deem necessary or advisable for the security, defence, peace, order and welfare of Canada, by reason of the existence of real or apprehended war, invasion or insurrection. It is clear that would not authorise any act that had no relation to the war or any apprehended invasion or insurrection but this present order-in-council is clearly one which has relation to the war and the security of Canada and that the Governor in Council has

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passed it, indicates that he considers it necessary or advisable. Then, are the general words to be restricted by reference to the specified classes of cases? I think not. There appears no room for the application of the *ejusdem generis* rule. It is a rule usually applied to cases of general words, following particular, and is, as pointed out in Craies' Hardcastle (2nd ed.), at p. 183, "a mere presumption in the absence of other indications of the intention of the legislature." Parliament has indicated in this section as plainly as words can state it that the enumeration of the special classes is not to restrict the generality of the preceding terms. The question then arises, has any subsequent Act of the parliament qualified the authority so granted? The Military Service Act, 1917, is the only Act that it is suggested has had that effect but, as already pointed out, that Act distinctly confirms the powers given to the Governor in Council by the War Measures Act.

The later Act recites the need for obtaining more reinforcements to support the Canadian Expeditionary Force Overseas and then proceeds to enact certain provisions to that end.

It is stated by counsel for the applicant that it took 40 days of parliament's time to pass the Military Service Act, 1917, and as he was a member of parliament at that time, he, no doubt, speaks from personal knowledge.

The order-in-council which was passed about 8 months after the Military Service Act, 1917, recites that "there is an immediate and urgent need of reinforcements for the Canadian Expeditionary Force, and that the necessity for these reinforcements admits of no delay" and that "it is deemed essential that, notwithstanding exemptions heretofore granted, a substantial number of men should be withdrawn forthwith from civil life for the purpose of serving in a military capacity," and that "having regard to the number of men immediately required and to the urgency of the demand, time does not permit of examination by exemption tribunals of the value in civil life, or the position of the individuals called up for duty." The order provides that it shall come into force as soon as approved by resolution of both Houses of Parliament and it amends the Military Service Act by extending classes 1 and 2 so as to make them include men of 19 years, who before were excluded and by authorising the revocation in part or in whole of exemptions authorised and granted by the Act, which latter is the part now objected to.

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Counsel for applicant does not question the order having been approved by resolution of both Houses of Parliament but stated he assumed that to be the fact. I, therefore, take it for granted, as he does. The votes and proceedings of the House of Commons for April 19, printed by the King's printer, are before us and they shew that it was approved by resolution of that House on that day after two amendments to the resolution had been defeated. The resolution is one of approval of the order in the exact words in which we find it in the official "Gazette."

Inasmuch as the purpose of conferring the extraordinary power of legislation upon the Governor in Council was apparently that there might be a legislative body at all times capable of acting promptly, why, parliament being in session, should it not have enacted this legislation (because it cannot be effective except as legislation) in the usual way? The answer is, of course, contained in the recitals as to urgency and the knowledge of the delays in enacting contentious legislation under the usual procedure.

While it may be that, notwithstanding that the two Houses of Parliament, in the resolution, and the third branch of the legislature, the Governor, in the order, are all participants in the provisions of the order which is declared in terms to be "enacted," that does not give it the status of an Act of Parliament or any more authority than if the resolution had not been passed, yet, if it is within the terms of s. 6 of the War Measures Act, 1914, it is, as was pointed out in *Powell* v. *Apollo Candle Co.*, 10 App. Cas. 282, by the authority of Parliament. It is a general rule of construction that resort may be had to other Acts of a legislature to determine the intent and meaning of a particular statute because, of course, it is for the legislature to say what it means. It seems to me that the resolution passed by the two Houses is a perfectly good declaration by parliament that the order-in-council is within the terms of the powers conferred on the Governor in Council by the War Measures Act under which it purports to be made and that it is of value for that purpose at least, though, without the resolution, I see no reason to doubt that the order is within the terms of the Act.

For the reasons stated I am of opinion that the order-in-council is *intra vires* and that the application should be refused.

Stuart, J.

STUART, J:—On August 4, 1914, His Majesty, upon the advice of his responsible Ministers in Great Britain, declared war upon the

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German Empire. Thereupon the Dominion of Canada was also at war with the German Empire. The Parliament of Canada was summoned in special session and met on August 18 and was prorogued on August 22, after deciding to assist in every possible way in the prosecution of the war. A statute called the War Measures Act was passed which, after declaring that war had existed since August 4, proceeded to place special and extraordinary powers in the hands of the Governor in Council. S. 6 declared that (see judgment of Harvey, C.J.). Here follows an enumeration of certain classes of subjects of which the raising and enrolling of military forces is not one. There was then upon the statute book of Canada an Act called the Militia Act, being c. 41 of the Revised Statues of 1906. By s. 10 of this Act it was enacted that:

> All the male inhabitants of Canada of the age of eighteen years and upwards and under sixty, not exempt or disqualified by law and being British subjects, shall be liable to service in the Militia: provided that the Governor-General may require all the male inhabitants of Canada capable of bearing arms to serve in the case of a *levée en masse*.

By s. 69 it was provided that

> The Governor in Council may place the militia, or any part thereof, on active service anywhere in Canada and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency.

The existence of this law, which obviously placed practically unlimited power in the hands of the executive for enrolling an army for defence accounts undoubtedly for the omission from the powers specially mentioned in the War Measures Act of any reference to the calling of men for military service. No such special grant of power was then needed because it already existed. The Militia Act, while making provision for compulsory service, also provided for voluntary enlistment and this latter method was followed and found to be sufficient for three years. Then it was considered that the voluntary method was not working satisfactorily and so, in the session of 1917, parliament passed an Act called the Military Service Act, which, in its recital, declared that it was expedient to secure the men still required, not by ballot as provided by the Militia Act, but by selective draft. The Act then made new laws as to the men liable for service and as to the classes into which they were to be divided. It provided for the creation of tribunals to which power was given to grant certificates of exemption, to men applying therefor, mainly upon the grounds

that national interests would be better served by their remaining in other employment.

S. 2 of the Act declared, in effect, that no one should be liable to be called out who came within the exceptions set out in the schedule to the Act and the first exception in the schedule was, "men who hold a certificate granted under this Act and in force, other than a certificate of exemption from combatant service only."

By s. 12 the Governor in Council was given power to make regulations to secure the full, effective and expeditious operation and enforcement of the Act; all such regulations were to be published in the "Canada Gazette;" were to be laid before parliament at the earliest possible date, and were to have the same force and effect as if they formed part of the Act.

By s. 13 it was enacted that the Militia Act, the Army Act (of the United Kingdom) and the King's Regulations and Orders for the Army should, so far as not inconsistent, apply to and form part of the Act, and also (sub.-s. 5) that nothing in the Act contained should be held to limit or affect . . . the powers of the Governor in Council under the War Measures Act, 1914.

The applicant in this case applied to the proper local tribunal for, and was granted, a certificate of exemption in the form prescribed by the regulations, wherein it was certified that he was exempted from being called up for duty as a soldier while engaged in the occupation of farming. It then stated, as in the form prescribed, "This certificate may be varied, renewed or withdrawn at any time during its currency by the local or appeal tribunal under whose direction it was issued. It expires on the dates above mentioned, if any. If none is mentioned it expires thirty days after the circumstances referred to have altered."

On April 20, 1918, His Excellency the Governor-General in Council passed an order-in-council which stated that it was passed "under and in virtue of the powers conferred on the Governor in Council by the War Measures Act and otherwise," and which declared that it should come into force "as soon as approved by resolution of both Houses of Parliament." This order-in-council gave, in its recital, reasons for urgency for its passing and it added to classes 1 and 2 certain men not placed in those classes by the Military Service Act. It then purported to give to the Governor

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in Council, that is, to the authority which passed the order itself, certain power. This power was to "direct orders to report for duty to issue to men in any class under the Act of any named age or ages or who were born in named years or any named year or part of a year," and it declared that "any exemption theretofore granted to any man of any such named age or year of birth shall cease from and after noon of the day upon which he is ordered so to report."

Then on the same day, April 20, 1918, an order-in-council was passed in pursuance of the foregoing, ordering and directing that orders to report for duty, irrespective of any exemptions granted, should issue in such order as the Minister of Militia and Defence may direct to every man of Class 1 under the Military Service Act, who, at the date of the application for exemption heretofore made by him or on his behalf, had attained the age of twenty years and had not attained the age of twenty-three years.

The present applicant, Lewis, fell within the class of men thus referred to, being between the specified ages. He was, therefore, ordered to report for duty, his exemption certificate was taken from him and he was put into a regiment and sent to a training camp in military uniform.

He now applies upon *habeas corpus* proceedings for an order of this court discharging him from a detention which he claims is illegal.

As Low, J., said in *Rex* v. *Superintendent of Vine Street Police Station*, [1916] 1 K.B. 268, at 279:—

> This court is specially charged as between the Crown and the subject to exercise the greatest care in safeguarding the subject's liberty.

No consideration other than the pure question of the law, which we are sworn to administer, can be for a moment entertained upon such an application as this. The applicant is admittedly deprived of his liberty and the sole question is whether this has been done in accordance with the law or not. If it has not, then he must be discharged, quite regardless of any extraneous consequences that might ensue. With these we have here nothing whatever to do. As Barton, J., of the High Court of Australia, in *Farey* v. *Burvett*, 21 C.L.R. 433, at p. 449, suggested, the matter must be decided "not because of enthusiasm or excitement but by compelling reason," and as Lord Reading, Lord Chief Justice of

England, said in *Rex* v. *Denison*, 115 L.T. 229, at p. 231, a case under the Defence of the Realm Regulations in England,

> It is for us to construe language in accordance with the principles of law laid down in times of peace, even in time of war.

Now, one observation I think ought to be made at the outset and that is with regard to the argument of emergency. I should not be disinclined to give some weight to this consideration if we were asked to enquire whether the terms of the War Measures Act furnished any legal foundation for many of the other orders-in-council not relating to the military forces which have doubtless been made under it. But the Militia Act itself was not passed for peaceful times. It was passed for the emergency of war. Resort to its provisions was specially intended to take place in time of war as its terms declare. So also with the Military Service Act passed after three years of war. Both Acts provide for rules and regulations being passed by the Governor in Council. Those Acts enacted laws, and particularly stringent ones, in regard to calling up men for service in the army. In the face of these Acts I, for my part, cannot see my way clear to adopt any more extended rule of interpretation of the meaning of the War Measures Act merely on the suggested ground of emergency or expediency.

Now, my opinion is that the existence on the statute book of the Militia Act, with all the exceedingly stringent and extensive powers that are therein granted to the Governor in Council, furnishes the very strongest possible reason for concluding that parliament never intended, when enacting the War Measures Act in August, 1914, to grant to the Governor in Council any further powers with regard to the raising of military forces beyond those contained in that Act and certainly none inconsistent therewith. If parliament had intended to grant power to override and repeal its own Acts I think it would have said so specifically and would have inserted the words "notwithstanding anything contained in any Act of Parliament," though I do not think parliament would have passed the Act with such words in it, even if it had been asked to do so. At any rate the words are not there, although we are asked now to interpret the Act as if they were there.

Fortunately, we were not, at the beginning of the war, living in a country where our actions and lives were regulated in great detail by laws. We were a free people and the field given to

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individual liberty of action by the absence of detailed legislation and regulation was enormous. Thus, the field, where new regulations quite consistent with existing statutes, could be made and applied, was also enormous. In my opinion, it was in that field, not in fields where parliament itself had already acted, or might thereafter act, that the Governor in Council was given power and was intended to operate.

At the opening of the war the Parliament of the United Kingdom passed an Act—subsequently, it is very worthy of notice, enlarged, amended and consolidated in much detail—called "The Defence of the Realm Act," and later "The Defence of the Realm Consolidation Act" (November 27, 1914). Then in 1915 that parliament passed in succession a number of Acts in amendment. See cc. 34, 37 and 42 of the statutes of 1915. Inasmuch as the earlier Acts gave to the King in Council in broad terms the power to issue regulations for securing the public safety and defence of the realm, it is noteworthy that, nevertheless, from time to time, it was considered necessary to enact statutes giving specific powers, such for example, as c. 42, dealing with the question of liquor control.

Many regulations were passed by the King in Council under the powers thus given. Cases came up in the courts wherein the validity of particular regulations was questioned and so far as I can discover it was never suggested that the regulations could not possibly be *ultra vires*. In *Ex parte Norman*, 114 L.T. 232, Avory, J., deals with the objection that a certain regulation was *ultra vires* and while rejecting the objection, did not do so on any such ground that the Acts authorised the making of any regulation whatever, whether in conflict with a statute or not. So also in *Cannon Brewery Co* v. *Central Control Board*, [1917] W.N. 290, Younger, J., decided that regulations for the compulsory acquisition of property was subject to the Land Clauses Consolidation Act.

So far as I have been able to discover it was never attempted in Great Britain, where bombs are dropping from zeppelins and the guns of the war can be heard, to use the powers given in the Defence of the Realm Acts to make orders and regulations in order to infringe upon and modify the specific Acts of Parliament which dealt with the question of the compulsory calling of men into the

army. And the reason is, I think, that Great Britain is the home of constitutional liberty.

It is contended, however, that the effect of s. 13 (5) of the Military Service Act, above quoted, is to prevent the application of this principle inasmuch as it says that nothing therein shall limit or affect the powers of the Governor in Council under the War Measures Act, 1914. The answer to this seems to me to be clear. Owing to the existence of the Militia Act the Governor in Council was given no power under the War Measures Act to do what was done by the order-in-council here in question. I think, for the reason I have given, that parliament never dreamt of giving a power to repeal or modify the Militia Act and that, under the words of the War Measures Act, no such power was, in fact, given. I think it is, perhaps, true that had the Militia Act remained untouched the Governor in Council could have passed the order-in-council in question under that Act. But it was not in fact passed under the Militia Act, unless the use of the words "or otherwise" has that effect, nor, as matters stood on April 20, 1918, could it be so passed because, by that time, the power to do so had been taken away by the complete change in the law which was effected by the Military Service Act. Had the section said that nothing in the Act should limit or modify the powers of the Governor in Council under the Militia Act and had the order-in-council been passed under the Militia Act, as possibly it should be held to be, I think it would, in all probability, have been valid but inasmuch as that is not the question with which we have here to deal, it is neither necessary nor material to express a final opinion upon it.

It is also suggested that the parliamentary resolution of April 20, 1918, has some effect in giving validity to the order-in-council. I do not intend to discuss this question at length. It is sufficient, it seems to me to say, that there is not to be found any authority for the proposition that a mere parliamentary resolution can take away the right of the liberty of the subject unless some valid statute of parliament has declared that it shall do so. Nor can a parliamentary resolution, in my opinion, be used as an aid to the interpretation of an Act of Parliament. The courts, I am sure, would never dream of paying attention to a mere resolution of parliament declaring that in its opinion a certain section, say, of

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the Bank Act, meant so and so. This is the principle upon which the court would undoubtedly act in time of peace and, as Viscount Reading said, the same principle should be applied in time of war. For the same reason the principle of *Clowes* v. *Edmonton School Board*, 25 D.L.R. 449, 9 A.L.R. 106, where the court held that a regulation of the Lieutenant-Governor in Council was invalid as being inconsistent with an existing statute, ought to be applied in the present case. Under the statute, the Military Service Act, and by a tribunal or authority legally constituted under that statute, the applicant was given a certificate of exemption, which has not yet expired. In my opinion, for the reasons I have given, there has been no legal ground shewn for interference with or the defacing and cancelling of that certificate and it is still in force.

The applicant is, in my opinion, therefore, entitled to an order for his discharge.

Beck, J.

BECK, J.:—This is an application for an order in the nature of a writ of *habeas corpus* made on behalf of a man who was exempted from service by one of the tribunals established under the Military Service Act and has since, under the assumed authority of an order-in-council passed under the War Measures Act, been called up for service.

The Governor-General in Council passed an order-in-council on April 20, 1918 (P.C. 919).

It recited that there was an immediate and urgent need of reinforcements for the Canadian Expeditionary Force and that "it was deemed essential that, *notwithstanding exemptions theretofore granted*, a substantial number of men should be withdrawn forthwith from civil life for the purpose of serving in a military capacity."

The order then proceeded:—

Therefore His Excellency, the Governor-General in Council, on the recommendation of the Right Honourable the Prime Minister, and *under and in virtue of the powers conferred on the Governor in Council by the War Measures Act, 1914, and otherwise*, is pleased to make the following regulations, which shall come into force as soon as approved by resolution of both Houses of Parliament and the same are hereby made and enacted accordingly.

The order then proceeded to "enact" amongst other things that:

The Governor in Council may direct orders to report for duty to issue to men in any class under the Act (the Military Service Act, 1917) of any named age or ages or who were born in named years or any named year or

part of a year and *any exemption theretofore granted to any man of any such named age or year of birth, shall cease from and after noon of the day upon which he is ordered so to report and no claim for exemption by or in respect of any man shall be entertained or considered after the issue to him of such order*, provided, etc.

On the same day another order-in-council (P.C. 962) was made:

On the recommendation of the Minister of Militia and Defence and in pursuance of the provisions of the order-in-council dated April 20, 1918 (P.C. 919), giving authority in that behalf (whereby it was ordered and directed) that orders to report for duty, *irrespective of any exemptions granted or any claim for exemption made*, shall issue in such manner as the Minister of Militia and Defence may direct, to every man in Class I. under the Military Service Act, 1917, who, at the date of the application for exemption heretofore made by him or on his behalf, had attained the age of 20 years and had not attained the age of 23 years.

Order P.C. 919 was submitted to the two Houses on April 20, and each House—so it is alleged—passed a resolution that it was expedient that it should be passed.

In my opinion these resolutions cannot possibly have any bearing upon the question of the validity in law of the order-in-council and one can only suppose them to have been passed solely as a political expedient. They are not and do not purport to be an Act of Parliament. They were not passed in the form or under the procedural safeguards which, in the course of constitutional development, parliamentary custom, tradition and rules have imposed for the protection of the lives, liberties and property of the subjects of the Crown, with the view to full discussion and consideration of the measures proposed.

The Bill of Rights (1 W. & M., c. 2) expressly rejects the assumed power of the Crown of "dispensing with and suspending of laws and the execution of laws" without the consent of parliament. There was not then, nor has there since been any mode known to the law whereby the consent of parliament can be declared save by an Act expressly declaring it to be enacted by the Sovereign "by and with the advice and consent" of both Houses. An Act of Parliament requires no proof. A resolution of one or both Houses of Parliament is a matter solely of the internal economy of the body which passes it. It is not even yet known to the law and while the Canada Evidence Act (R.S.C., c. 145) provides for methods of proving a "proclamation, order, regulation or appointment" no provision is made for the proof of a resolution.

The order was passed professedly under the authority of the "War Measures Act, 1914, or otherwise."

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I shall have occasion to refer incidentally to other statutes which have been mentioned in relation to the question of the authority of the Governor in Council to pass the order; but in addition to statutes it was hesitatingly suggested, though not seriously argued, that the order might be supported as an exercise of the Royal prerogative. It is impossible, in my opinion, to sustain the order on any such ground. There is, undoubtedly, a considerable field in which the Royal prerogative can still be exercised (see Prerogative Legislation: Ency. Laws of England, 2nd ed.) but I can see no portion of that field which would include such a case as this, in which the statute expressly places the jurisdiction to make orders in the constitutional tribunal of the Governor in Council.

It is sought to justify the order under the provisions of s. 6 of the War Measures Act which reads as follows (see judgment of Harvey, C.J.).

Several observations immediately occur to one as to the interpretation of this section. First of all, the enumeration of the particular subjects of jurisdiction is obviously made in order to remove doubts which might possibly arise as to whether or not the particularised subjects would fall within the general statement of the subjects of jurisdiction. Again, such an enumeration of particular subjects, being deemed expedient for the avoidance of doubts, must necessarily be taken as interpretive and illustrative of the general words which must consequently be interpreted as intended to comprise only such subjects, in addition to those particularly specified, as fall within a generic class of which the specified instances are illustrative and definitive of the general characteristics of the class; and so, the words—used evidently *ex abundanti cautelâ*—"and for greater certainty, but not so as to restrict the generality of the foregoing terms"—must be taken to have been inserted merely to preserve beyond doubt the jurisdiction to deal with subjects coming within a class of subjects of a character similar to those particularly specified.

Looking at the specified subjects one sees that they are all subjects in respect of which there is large room for many orders or regulations of an administrative and directory and even of a subsidiary legislative character which need in no respect come in to conflict with any existing statutory provision.

Doubtless within the limits indicated an order might contain

positive legislative enactments but it seems to me impossible to contend that any such enactments are valid if they are inconsistent with the primary and substantive provisions of any statute, whether passed before or after the order or the statute under which the order is made.

This court had occasion to consider in some respects the question of the limitations upon a delegated authority to pass orders or regulations in *Clowes* v. *Board of Trustees for Edmonton School District*, 25 D.L.R. 449, 9 A.L.R. 106.

The effect of that decision was in substance that orders and regulations made by virtue of a delegated authority from a legislature are open to review by the courts and are invalid if they do not come within the powers conferred by the legislative enactment; that is, if they are not merely ancillary, subsidiary and subordinate to the legislative enactment and for the purpose of the more convenient and effective operation thereof or are inconsistent with the direct enactments of the legislature which conferred the delegated power or of any superior legislative body or the principles of the common law.

Obviously, there is an unusual peculiarity in the War Measures Act inasmuch as in reality it enacts no provisions of a primary and substantive character to which the making of orders-in-council can be merely ancillary, subsidiary and subordinate, but obviously intends to give to the Governor in Council the power to legislate for the security, defence, peace, order and welfare of Canada, not however unrestricted but within the limit of subjects I have indicated.

The Military Service Act, s. 13, enacts that the Militia Act, the Army Act and the King's Regulations and Orders for the Army shall, so far as not inconsistent therewith, apply to and form part of this Act and that *nothing in this Act shall be held to limit the powers of the Governor in Council under the War Measures Act, 1914.*

This latter provision creates no difficulty in my mind. I have already pointed out that, in my opinion, the War Measures Act, conferring power upon the Governor in Council to make orders, contains within its own terms very considerable restrictions upon that power.

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It would be an astounding proposition that parliament, after having spent many weeks in a discussion of the Military Service Act, which, perhaps, more than any other Bill ever the subject of debate there, was the occasion of such fierce antagonisms both within and without parliament, deliberately meant by the insertion of the common-place clause, "nothing in this Act shall limit the powers of the Governor in Council under the Military Service Act, 1914" to leave it open to the Governor in Council to revoke, in whole or even in part, the Act the passing of which had so stirred the whole people of Canada. Rather the inference to be drawn is that parliament never dreamed that it would be even suggested that the powers of the Governor in Council under the War Measures Act were so extensive; but that parliament was assuming and inferentially declaring in effect the limitations upon the order-making power which I have already indicated. Thus the clause in question is, it seems to me, confirmatory of those limitations.

This being my opinion upon the extent of the powers of the Governor in Council under the War Measures Act, it follows as a necessity that I must hold that the order in council in question, inasmuch as it in effect repeals a primary and substantial provision of the Military Service Act, is ineffective and invalid.

The Military Service Act provided for the granting of exemptions to persons otherwise subject to that Act and the granting of certificates to that effect. Furthermore, the Schedule to that Act —referred to in s. 2 as containing the exceptions of persons liable to be called on active service in the Canadian Expeditionary Force—contains the words:—

1. Men who hold a certificate granted under this Act and in force, other than a certificate of exemption from combatant service only.

The applicant is a person within the terms of this exception. Clearly to my mind the order-in-council in question is ineffective against him.

I would, therefore, make the order asked for.

Simmons, J.

SIMMONS, J.:—S. 5 of the order-in-council in question purports to repeal certain sections of the Military Service Act, and it is claimed that the authority for doing so is s. 6 of the War Measures Act, 1914. The Parliament of Canada, however, did not consider that the War Measures Act covered the ground in question, as the Military Service Act itself was passed for the purpose of modify-

ing the Militia Act in regard to the method of selecting men for the military service.

The order-in-council has the approval, by way of resolution of both Houses of Parliament, and, for that reason, aside from the question of constitutionality, the objectionable features, which might otherwise be argued against it, are largely minimised. The question before the court, however, is one of legality or constitutionality of the order-in-council in question and I do not think it can be defended unless it is claimed that it is paramount to an Act of Parliament; in other words, it must be claimed that the parliament has adopted a new and novel method of legislating by way of resolution approving of an order-in-council, instead of by passing a Bill in the usual form. I do not think it can be contended that parliament, by approving of the order-in-council in question by way of resolution in both Houses, ever intended to introduce such a principle which would, at least, be an innovation in regard to the method of making laws or enacting laws by a Parliament of Canada.

Simmons, J.

I am, therefore, of the opinion that the order-in-council is *ultra vires*.

HYNDMAN, J.:—It is hardly necessary to refer to the very serious responsibility resting upon the court in considering a question of this character which may possibly have a far-reaching effect on the war. Nevertheless, as a court of law it is incumbent upon us to decide the matter upon purely legal principles and to extend relief to the applicant if in the opinion of the court his rights have been invaded.

Hyndman, J.

The real and, in my opinion, only point in the case is whether or not the order-in-council as approved by resolution of the Senate and House of Commons is effective to alter or amend an Act of Parliament, *i.e.*.., the Military Service Act. I agree with what Beck, J., has said with regard to the powers conferred by the War Measures Act. I am satisfied it was never intended that the Governor in Council would be empowered thereunder to conscript troops and even to set aside exemptions provided for by the Militia Act. If such powers were conferred, then, I can see no necessity for the Military Service Act at all, except to obtain the endorsement of parliament which might as easily have been secured by a resolution approving of an order-in-council as in the case

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under review. The Militia Act makes provision for the calling out of troops according to specified classes by ballot and for certain exemptions. It was quite competent for the Governor in Council pursuant to the powers conferred by the Militia Act to raise such troops as might be required. Parliament, however, by the Military Service Act, thought it advisable to alter the method provided for in the Militia Act and substituted therefor the so-called selective draft, taking also into consideration the advisability of exempting certain persons and classes of persons in addition to those mentioned in the Militia Act. As pointed out by Duff, J., in *Re Rowntree* (Serial No. 794819 B.C., Dec. 6, 1917, manual 2, March, 1918, pp. 9, 103)—

> Such exemptions are not granted as concessions on account of personal hardship, still less as a favour to a class. The sole ground of them is that the national interest is the better served by keeping these men at home. The supreme necessity (upon the existence of which, as its preamable shews, the policy of the M. S. Act is founded) that leads the State to take men by compulsion and put them in the fighting line, also requires that men shall be kept at home who are engaged in work essential to enable the State to maintain the full efficiency of the combatant forces, and whose places cannot be taken by others not within the class called out.

In order, then, to insure that this principle would be observed and objects attained, the statute provided for the constitution of tribunals to decide as to who and who not should be exempted, guided by the principle already referred to, and those whom such tribunals did exempt so long as the certificates of exemption remained in force were by the terms of the Schedule of Exceptions just as effectually relieved from service as any of the other classes of exempted persons. In other words, men holding exemption certificates granted by lawfully constituted tribunals are by statute exempt from service. It is, therefore, a right derived by statute and in my opinion can only be taken away by statute. I know of no authority for the proposition that a statute can be altered, amended or repealed by an order-in-council unless express statutory authority is so given. The argument that the resolution of both Houses validates the order-in-council is in my view untenable. The resolution does not in any way amount to an enactment, but is exactly what it purports to be—a mere expression of approval of the action of the executive. It does not in any way alter the fact that what was done was on the part of the Executive and not by Parliament.

The authorities are clear on the point that laws are enacted by the King's Most Excellent Majesty by and with the advice and consent of the Senate and House of Commons in Parliament assembled and by the authority of same (see 6 Hals. p. 388). On the very face of the document in question it is not an Act of Parliament, but an order-in-council pure and simple, and I cannot agree that a mere approval by way of a resolution by each House can give it the force of a statute. It cannot be said that the parliament was enacting a law, but rather was merely expressing its approval of what the Executive was in a given instance doing or purporting to do. Hyndman, J.

Being firmly of the opinion that the order-in-council under which the applicant is held is *ultra vires*, I would order that he be released, but without costs. *Application granted.*

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Manitoba Court of King's Bench, Curran, J. May 20, 1918.

INSURANCE (§ III D—71)—ACCIDENT POLICY—CONSTRUCTION.

The words of an accident insurance policy should be construed according to their popular sense, not their strictly philosophic or scientific meaning; if the words are susceptible of two interpretations the one will be adopted which is most favourable to the policyholder.

ACTION to recover the amount due under an accident insurance policy. Statement.

H. F. Tench, for plaintiff; *R. B. Graham*, for defendants.

CURRAN, J.:—This action is brought by the plaintiff (insured) against the defendant company (insurers) upon an accident policy issued at the City of Winnipeg by the defendant to the plaintiff on March 7, 1917, and the matter comes before me for determination of the question of liability upon a stated case in which it is agreed that my judgment will depend upon the answers given to certain questions therein propounded. Curran, J.

The policy is peculiar in this, that it not only protects the insured, but also protects a third party, called a beneficiary under certain conditions. Here the claim is founded upon the death of the beneficiary Edmund Robb, a brother of the plaintiff, who accidentally was killed in the City of Chicago, U.S.A., whilst being conveyed in a passenger elevator operated in the 20-storey building known as the Marshall Field Annex. The deceased had

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occasion to visit a dentist who was a tenant of the building and took the passenger elevator known as No. 83, for the purpose of ascending to the floor of the building upon which this dentist's offices were situated. In some way not explained, the deceased, in attempting to leave the elevator car, missed the landing and fell down the elevator shaft, being instantly killed. The injuries from which the beneficiary died were not due directly to or in consequence of the wrecking of the elevator, which was not wrecked or injured.

The clause in the policy, upon which the claim for the money sued for is based, reads as follows:—

Part R. In case a beneficiary being one person over 16 years and under 65 years of age and bearing relationship to insured is specifically named in the schedule of warranties indorsed on this policy then and not otherwise this policy shall also in consideration of the premium insure the person named as beneficiary in the said schedule as follows: Against any of the following losses resulting within thirty days from date of accident and *caused* solely and exclusively by injuries covered by this policy and *sustained by such beneficiary while riding as a passenger within the enclosed part* of any public passenger conveyance provided for the exclusive use of passengers and *propelled by steam, compressed air, gasoline, cable or electricity,* or while riding as a passenger on board a steam or gasoline vessel licensed for the regular transportation of passengers and such injuries shall be due directly to or in consequence of *the wrecking of such car or vessel* then the amount specified below, etc.

Part E. of the policy, which provides for a double indemnity for injuries sustained by the *insured* is very similar in its provisions to Part R. As it may be necessary to consider this part relatively to Part R. I set it out in full:

Part E. But if such injuries are sustained by the insured (1) while passively riding as a passenger within the enclosed part of any *railway passenger car* provided for the exclusive use of passengers and propelled by steam, cable, compressed air or electricity.

(2) or while so riding as passenger on board a steam vessel licensed for the regular transportation of passengers and such injuries shall be due *directly to or in consequence of the wrecking* of such car or vessel, then the company will pay double the indemnity, etc.

The questions to be answered are as follows:—

(1) Was elevator No. 83 a public passenger conveyance within the meaning of those words as used in Part R. of the policy?

(2) Can the plaintiff recover at law under such Part R. of said policy in view of the fact that the injuries from which the said Edmund Robb died were not due directly to or in consequence of the wrecking of the elevator No. 83?

If the answer to both questions is "Yes," judgment is to be

entered for the plaintiff for $1,500 and costs, otherwise, judgment is to be entered for the defendant with costs.

The defendant contends that the passenger elevator in question was not "a public passenger conveyance" within the meaning of Part R., and furthermore that even if it was, the injuries which caused the death of the beneficiary were not due directly to or in consequence of the wrecking of such conveyance, upon which event only, it is contended, can the defendant company be made liable.

The plaintiff, on the other hand, contends that, upon the admitted facts pertaining to the use of the elevator in question by the public, it was and is a public passenger conveyance within the meaning of Part R. of the policy, and also that the limitation contained in this Part of the policy to liability for injuries due directly to or in consequence of the wrecking of such car or vessel does not apply to the case of a beneficiary riding as a passenger within the enclosed part of any public passenger conveyance because the use of the word "car" in the limitation clause is too narrow and restricted in its meaning to be held to refer to the wider and more comprehensive precedent term "public passenger conveyance." The limitation clause to this part as to the wrecking of the car or vessel is in the identical language of such clause to Part E., and be it noted is properly and grammatically used as a rider to Part E., where two modes of travel only are guarded against, viz: (*a*) in a railway passenger car propelled by steam, cable, compressed air or electricity, and (*b*) in a steam vessel licensed for the regular transportation of passengers. Is it applicable to Part R., where the expression "*railway car*" or "*car*" is not used, but instead thereof the more comprehensive term *public passenger conveyance*. Strictly speaking according to the language used, the limitation in Part R. as to the wrecking of "such car or vessel" seems applicable only to travel on steam or gasoline vessels licensed, etc., and not to all public passenger conveyances which may or may not be cars, railway or otherwise. The change in phraseology in Part R. from that used in Part E. seems intentional and cannot be attributed to accident. Part E. applies only to the insured, and by it he is protected, whilst on a journey by water only if travelling on a steam vessel, whereas the beneficiary under Part R. is permitted to use a vessel driven by either steam

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or gasoline. Again, the insured under Part E. is protected only whilst travelling in the enclosed part of any "railway passenger car," whereas the beneficiary is permitted to travel within the enclosed part of any "public passenger conveyance." The draftsman of the policy form, when he came to draft Part R., apparently used the identical limiting clauses which he had appended to Part E., without due consideration as to its applicability in view of the different phraseology used in Part R.

It is sought by the defendant, by the use of the limited term or expression "car" to include all modes of conveyance which might properly fall within the wider term or expression "public passenger conveyance."

In view of the well-known rules of construction applied by the Courts to documents prepared wholly by one party, viz., that all such, where any ambiguity arises, must be construed strictly against such party rather than favorably to it, I do not think any such meaning as is contended for by the defendant can be logically adopted here.

In *North West Com. Travellers Assoc.* v. *London Guar. & Acc. Co.*, 10 Man. L.R. 537, at 543, it was laid down that where

> it was the company itself which prepared the contract (as is the case here) any ambiguity there may be found in it will be taken most strongly against the company. In other words, that will be held to be the true meaning which the company desired the other party to put upon it.

Now, applying this principle to the policy in question and considering the difference in the language of the two Parts E. and R., could the insured have reasonably understood that "car" and "public passenger conveyance" meant one and the same thing; in short, were interchangeable terms? I do not think so, and I would not so consider them, for while the greater undoubtedly includes the less, the less does not include the greater. A car is only one mode of conveyance, whereas a public passenger conveyance may and does in fact include many modes.

I think, then, that the restriction in Part R. of liability for injuries due directly to or in consequence of the wrecking of such car does not apply generally to all modes of travel which are included in the expression "any public passenger conveyance," and particularly to the case at bar, where the beneficiary was injured whilst riding in the passenger elevator in question; so as

to render it a condition of recovery that such injury should be due to the wrecking of such elevator.

If, then, the answer to q. 1 is to be in the affirmative, the answer to q. 2 will also be in the affirmative.

I will now consider the answer to be made to q. 1—Was elevator No. 83 a public passenger conveyance within the meaning of Part R. of the policy? I think it was, and would answer this question in the affirmative also.

I adopt the language of Bain, J., in the case before referred to:—

> In construing a contract like this, the rule that should be followed is that the words of the policy are to be construed not according to their strictly philosophic or scientific meaning but in their ordinary and popular sense. It is popular language that is used and popular language should be construed popularly.

In May on Insurance, 4th ed., vol. 1, p. 175, it is laid down that:—

> No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted.

In 10 Hals. 441, it is laid down that: "Generally an instrument must be read most strongly against the party who prepares it, and offers it for execution by the other. . . . But the rule . . . is subject to the general principle that the instrument must be construed in accordance with the expressed intention."

It has been argued on the part of the defendant that the words "public passenger conveyance" mean or include only such conveyances as are operated by common carriers for hire, to which the whole body of the public would have access as of right, and that here the elevator in question had only a limited use by a part of the public at limited times, that is, during the usual hours of business, and that because the owners of the building could, with the consent of their tenants, at any time close the doors of the building and permit no one to enter same, or could withdraw all passenger service, such elevator was not a "public" conveyance.

The case of *Oswego* v. *Collins*, 45 S.C.R. (N.Y.) 171, was cited in support of this contention. In this case the majority of the

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Court held that an omnibus owned by the proprietors of an hotel and used to convey free of charge guests of the hotel to and from the different railroad stations and steamboat landings was not a public conveyance within the meaning of an ordinance prohibiting all hacks, baggage wagons and public conveyances from standing on certain streets.

I do not think the same rules of construction, such as are applicable to certain municipal by-laws and public statutes, should be generally applied to written instruments between private individuals. The reasoning adopted by the Court in this case could hardly be used here. The ordinance was one in derogation of personal rights and liberty of action, and must be construed strictly as penal consequences followed its violation. The general words "public conveyances" used in the ordinance under consideration must be considered as *ejusdem generis* with the particular language which preceded them, viz., hacks and baggage wagons, which were manifestly vehicles open to the public use on terms of hire and therefore the general expression "public conveyances" would fall within the same class of vehicles and not such as were open only to certain of the public free of charge, such as guests of the defendants' hotel. The Court said that inasmuch as the public were not entitled to use the conveyance in question as the public at large is entitled to use a "public conveyance," it did not fall within the class named in the ordinance.

I do not consider this case in point, as the facts and circumstances are so entirely different from those in the case at bar. Here the enquiry ought to be directed to the question what meaning did the words of the policy "public passenger conveyance" as popularly understood, convey to the mind of the insured? Surely not the technical and restricted meaning that they only included such modes of conveyance as the public generally had the legal right to use for hire. I should think he would reasonably have understood them to mean all such conveyances as were apparently from visible user by the public open to public use. The hallways of the building in question giving access to the elevators actually used by the public to ascend to the upper floors of the Marshall Field Building were as a matter of fact open to the use of the public during business hours, as also were the elevators, one of which was the elevator entered by the deceased.

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No restraint was imposed upon any one desiring to use such elevators during business hours. They were free to any one who wished to use them, subject, of course, to those implied conditions attaching also to the use of vehicles of transport operated by common carriers, orderly conduct and decent behaviour on the part of those so using them.

The deceased, having business with a tenant of the building, had a right to use the elevator for that purpose. These elevators were installed for the convenience and use of the public, and their public use could not be interfered with during business hours without the consent of the owner of the building and all of the tenants.

I think, then, I should be unduly straining the language of the policy if I gave to it the narrow and restricted meaning contended for by the defendant. It was open to the defendant by express language to impose such a construction and so limit its obligations to insured persons, but in my opinion it has failed to do so by the language used.

I would therefore answer the first question in the affirmative, and, as before stated, the second also, and in accordance with the case stated, in such event enter a verdict for the plaintiff for $1,500 and costs. *Judgment for plaintiff.*

ROYAL BANK OF CANADA v. McLENNAN.

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British Columbia Court of Appeal, Macdonald, C.J.A., Martin, McPhillips, and Eberts, JJ.A. January 28, 1918.

STATUTES (§ II A—96)—SUPREME COURT ACT—AMENDMENT—CONSTRUCTION. The amendment to the Supreme Court Act of 1915, was intended to ameliorate the position of a defendant against whom a judgment is recovered. The amendment does not give the court power to commit a debtor for contempt of court in not obeying an order for the payment of money by instalments in cases not provided for by secs. 15 and 19 of the Arrest and Imprisonment for Debt Act (R.S.B.C. 1911, c. 12).

Statement.

APPEAL by plaintiff from a dismissal of an application to commit the defendant for disobedience of an order directing him to pay a judgment in instalments. Dismissed.

Sir Charles Hibbert Tupper, K.C., for appellant; *C. M. Woodworth*, for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I think the appeal should be dismissed. The matter is very clear, to my mind. The amendment to the

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Supreme Court Act which was made by c. 17 of the statutes of 1915 was intended, in my view of the provisions there found, to ameliorate the position of a defendant against whom a judgment is recovered. Without those sections, judgment would go, and process could be issued to enforce it forthwith, and for the whole amount due.

The legislature apparently thought it desirable to give to the court the power either to stay execution or to order that the judgment should be payable in instalments so as to lighten the burden. Complementary to that, the legislature thought it right and just that the judgment creditor should be entitled to come to the court from time to time to obtain a variation of the special terms imposed. If the variation were made, for instance, that the debtor should pay a larger sum, the order would not, as was suggested by Sir Charles Tupper, be an idle one; it would permit the judgment creditor to issue execution or other process for the larger amount instead of for the smaller amount provided for by the previous order.

In this view of said c. 17, I think, even if it stood alone we could not put the construction upon it which the appellant asks for. But it does not stand alone.

We have s. 2 of the Arrest and Imprisonment for Debt Act, R.S.B.C., 1911, c. 12, s. 1; that section provides that "no person shall be detained, arrested, or held to bail for non-paymnet of money, except as hereinafter in this Act is, or in any other Act of the Legislative Assembly may be, provided."

In simple language, that means that no person shall be arrested for non-payment of money unless in the Act itself, or in some other Act, it is provided that he may be arrested for non-payment of money. Now there is no such provision in the Supreme Court Act; it is not there provided that a person may be arrested and detained for non-payment of money.

The County Court Acts, R.S.B.C., c. 53, which contains sections similar to the ones which we have under consideration in c. 17, goes further, and provides that the debtor may be arrested and detained for non-compliance with an order for payment of money. That alone would indicate that apart altogether from what I consider very clear language in both these Acts, the legislature did not intend to go as far in enacting said c. 17, as it had already gone in the County Courts Act.

I think, therefore, the appeal must be dismissed.

MARTIN, J.A.:—In my opinion, it was clearly the intention of the legislature to confer upon the Supreme Court an additional power to meet the special case, where justice should seem to require it to be done, of those debtors, who, while not able to pay forthwith, yet could do so within a reasonable time, by instalments. That is a very merciful and appropriate provision, which would save many a man from bankruptcy. And it must be borne in mind that that section was passed after this war began, and is of the same nature as the other very beneficial section passed during the same session of the legislature, and assented to on the same day, namely, c. 35, relating to contracts for land. It is significant that these two measures of relief both as to land contracts and as to personal contracts for the payment of money, were passed at the same time; it affords, as I say, a very valuable indication of what the legislature had in its mind.

Now it must not be forgotten that in the carrying out of that mediation the second sub-section, 53b, is not as might be suggested, something which would be futile. Far from that, it is clearly apparent that it gives a power to the court or a judge to alter or rescind, in chambers or in court, as the case might be, an order previously made in court by the presiding judge under s. 53a, the only stipulation being that that order shall not be made until after such examination as is therein provided for. Now it would be necessary to have a provision of that kind; because, otherwise something which has not been alluded to must be borne in mind, which is, that by s. 19 of the Arrest and Imprisonment for Debt Act, R.S.B.C. c. 12, the power given therein would not extend to the newly created situation, and therefore the court or judge being applied to after judgment would not by virtue of any pre-existing power be able to reform its order duly pronounced in court. And therefore sub-s. 53b has a very valuable effect, and one which would be necessary to meet the new situation which might either be in favour of the creditor provided the debtor's financial position would improve, or in favour of the debtor, if his financial situation should get worse. There are four classes provided for in s. 19 of the Arrest and Imprisonment for Debt Act, wherein power of committal is given: (1) failure of the debtor to attend, without sufficient excuse; (2) refusal to disclose his property; (3) unsatisfactory answers; or, (4) matters proved to satisfaction of the

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judge under s. 15, which would justify a committal thereunder. Now bearing in mind that those four classes of powers of committal already existed in the Supreme Court, it would require something very far reaching to shew me that the legislature wished to extend those powers and add another one. I find myself quite unable to take that view. And I join with the chief justice in saying that on the consideration of this new section alone, I should feel it quite impossible to say that any new power over the person is given to the court. But the matter is abundantly clear when one considers s. 2 of the Arrest and Imprisonment for Debt Act, which has been already referred to, both by bench and bar. And reading that also in that second connection, with s. 19, it seems to me absolutely impossible to escape from the same conclusion that was reached by the learned judge below. I would therefore dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I also agree in dismissing the appeal. It is always with some hesitancy that I approach the determination of a matter where the legislature has intervened, and apparently intended, in the interests of the public, to change the law or practice. But then we have an organic statute which is the declared policy of parliament, that no one shall be affected in his liberty and imprisoned for contempt for non-payment of money: see s. 2 of the Arrest and Imprisonment for Debt Act, c. 12, (R.S.B.C., 1911).

I think that the legislature has here failed to do that which it was called upon to do in proper pursuance of that organic statute because it provides that "process of contempt for mere non-payment of any sum of money, or for mere non-payment of any costs payable under any judgment, decree, or order, is abolished; and no person shall be detained, arrested, or held to bail for non-payment of money, except as hereinafter in this Act is, or in any other Act of the Legislative Assembly may be, provided."

It would seem to me that the statute standing there and speaking, as it always is held to be speaking, affects the legislature in its future legislation, *i.e.*, we must find some express provision. And when we note the fact that this legislation, 53b of the Supreme Court Amendment Act, 1915, is drawn from the legislation as applicable to the County Court, and halts at the special provision found in the County Courts Act, considering the declared policy

of parliament, I can only assume that parliament halted and hesitated, and in fact, decided not to so provide. In this particular case it cannot be other than an order for payment of money. That is the order that has been made. Now if it had been any other order, *i.e.*, within the zone of a contumacious act with respect to an order of the court the inherent power of the court is exercisable to see that its orders are always obeyed. That, of course, the court is very jealous of, and rightly so; otherwise courts would be brought into contempt. But in this particular case it is an order for the payment of money. And as I have indicated, where it is an order for the payment of money there must be some express legislation fulfilling the requirement as to consequences of disobedience. To indicate that even the payment of the money would not purge the contempt, if it were a contempt other than the non-payment of money, I refer to the case of *Jones* v. *Macdonald*, 15 P.R. (Ont.) 345. There Rose, J., pointed out, "The imprisonment was not in any sense in execution." But there it was a contumacious act, the refusal to answer questions. And further said, "the imprisonment was not in any sense in execution; the payment of the debt and costs would not entitle the defendant to his discharge; this was decided as long ago as 19 U.C.R. in *Henderson* v. *Dickson*, p. 592; and at the expiry of the three months the defendant would be entitled to be discharged without payment of any portion of the debt and costs."

So that with respect to orders others than those within the purview of s. 2 of the Act the powers of the court relative to contempt will remain. But it would appear that where a judge or the court makes an order for the payment of money, nothing can follow on that order in the way of contempt for non-compliance with it, unless parliament has undertaken to say what shall be the responsibility, and what shall follow.

EBERTS, J.A.:—I have very little to say in addition to what my learned brothers have said. I am firmly of the opinion that s. 2 of the Act was passed with a very firm intention indeed, and that was that no person should be committed for contempt for mere non-payment of any sum of money. There is not any doubt about it that the judgment of the court is an order for non-payment of a sum of money. In s. 19 of the Arrest and Imprisonment for Debt Act, the legislature had made certain suggestions relative to

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how far they could go in the direction of imprisonment for debt; and that is for the non-answering of questions, and certain other things. But so anxious was the legislature at that time—I know particularly well, because I was in the legislature then—to abolish imprisonment in the province for non-payment of debt, that they preserved the right of the County Court—because the County Court had special power to commit for contempt of court—and under s. 20 of the Arrest and Imprisonment for Debt Act they kept that power in the County Court and kept certain other powers also.

Under the circumstances I would agree, and dismiss the appeal. *Appeal dismissed.*

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Exchequer Court of Canada, Prince Edward Island Admiralty District. Stewart, L.J. in Adm. February 18, 1918.

DUTIES (§ I—18)—CUSTOMS REGULATIONS AFFECTING VESSELS—WHAT VESSELS LIABLE FOR CUSTOMS DUTIES.

A ship or vessel and its equipment built in a foreign country for show purposes only is not subject to customs duty under items 589 or 590 schedule A of the Customs Tariff Act (Can. Stats 1907, c. 11); it may be sold or disposed of within Canada, so long as it is not to be used in Canadian waters.

[See also *Neville Canneries* v. *"Santa Maria,"* 36 D.L.R. 619.]

Statement.

ACTION arising out of the sale of the S.S. "Santa Maria" and to determine whether said ship and its equipment was liable for customs duty.

D. Edgar Shaw, and *A. B. Warburton*, K.C., for Neville Canneries, Ltd.; *W. E. Bentley*, K.C., and *J. J. Johnston*, K.C., for Dr. Leo Frank; *J. D. Stewart*, K.C., for W. B. Robertson.

Stewart, L.J. in Adm.

STEWART, L.J. IN ADM.:—On December 31 last I granted an order on the application of Mr. W. E. Bentley, K.C., of counsel for Leo Frank, and on his affidavit made in this cause on day of December 28 last ordering Walter B. Robertson, the collector of customs at Charlottetown, to appear before this court on January 21 last to show cause why he should not state and present to the court the nature and amount of any claim for customs duties or otherwise which he had, as collector of customs, upon the said ship "Santa Maria," her sails, apparel, dunnage and equipment, including the Columbus relics, and in the event of any such claim being established, why an order should not be made for the pay-

ment of same out of the proceeds now in court of the sale of the said ship and her equipment, and why in any event the said Walter B. Robertson as such collector of customs should not be ordered to deliver up to the purchaser the said ship and articles claimed by him to be in bond and subject to customs duties, and why he should not pay the costs of the application. A copy of the order was directed to be served on the attorneys for the above named plaintiff.

It appears from the said affidavit that by a decree of this court made in the above suit on September 21, last, the said ship "Santa Maria," her sails, apparel, dunnage and equipment, including the Columbus relics, were condemned in the sum of $940.40 and costs, and that the plaintiff had, since the arrest of the said ship, and at the time of pronouncing said decree, a valid lien and charge on the said ship, her said articles and equipment, for the said sum and costs under the warrant issued in the above suit, and it was by the said decree ordered that in default of payment of the said sum and costs the said ship, her said articles and equipment, should be sold by public auction by the marshal of the said court, and that the proceeds of the sale thereof should be paid into court to abide the court's further order.

It further appears that default having been made in the payment of the said sum and costs, the said ship, her sails, apparel and equipment, including the Columbus relics, were on October 23 last sold to the said Leo Frank for the sum of $800 under a commission of sale issued in this cause out of this court on October 3 last.

It also appears that previous to the day of the said sale, to wit, on October 22 last, the said marshal received a letter from the said Robertson notifying him that the said ship and all her equipment were in bond and subject to duty, and that the duty must be paid before delivery would be made.

The said Leo Frank states in his said affidavit that he duly paid to the marshal the purchase money of the said ship and articles and that the same has been paid into court by the marshal, and that a formal bill of sale of the said ship and articles was on November 12 last executed and delivered to him by the said marshal.

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He also states that on November 10 last he received a letter from the said Robertson notifying him that the said ship and articles were in bond and subject to certain customs duties. It appears from this letter (a copy of which is annexed to the affidavit) that the duty is only claimed if the property is landed or disposed of within Canada, and the letter added that if anything was landed it would have to be placed in a suitable warehouse, approved of by the customs, until exportation.

He further states in his said affidavit that he removed certain of the articles so purchased comprising 4 cases containing wax figures and other articles and also two copper wine jugs from the said ship to the provincial government building for safe keeping, with the consent of the Attorney-General of the province, and stored them in said building in a room which was kept under lock and key, and that subsequently, on November 26, last, the said Robertson, as the said deponent is advised and believes, broke into the said room and seized and took away the said articles so stored, and still retains the same.

He further states that on or about December 7 last he received a letter from the said Robertson in which he informs the said Leo Frank that: "I am instructed that if you give us an undertaking to pay duty or export within 6 months these goods can be returned to the building and placed in the custody of the person in charge."

The "Santa Maria" is a vessel said to have been built in Spain as a replica of the original "Santa Maria" in which Columbus set out over 400 years ago upon his great historical voyage which resulted in the discovery of the great continent of America. This replica is said to contain much of the original ship's equipment, such as anchors, guns, and various other articles which, if not of the time of Columbus, at any rate are intended to be representations of what the original "Santa Maria" had as her equipment. She was exhibited at the World's Exposition in Chicago in the year 1893, where her headquarters have been since then. Late in the autumn of 1916 she was on her way back to Chicago, where she appears to have been owned, when she was arrested in Charlottetown, whither she had put in for shelter, under a warrant issued out of this court in an action for towage instituted by the above-named plaintiff. (36 D.L.R. 619.)

One of the questions arising in this case is whether this ship and her equipment was, at the time of her sale by the marshal of this court, subject to customs duty.

In the view I take, it may be unnecessary to decide this question, but as the claim for the payment of duty lies at the bottom of all the tangles into which this case has got, it may be as well to dispose of it at the outset.

It was decided in the case of *Vanderbilt* v. "*The Conqueror*," 49 Fed. R. 99, that, unless ships or vessels are mentioned in the Customs Tariff Act or in the Dutiable Schedule to the Act they are not dutiable. In that case the customs authorities of the United States claimed the right to collect customs duties upon a yacht bought in England by Vanderbilt, a citizen of the United States. The court held that the yacht was not dutiable expressly upon the ground that in none of the tariff Acts of the United States were ships or vessels mentioned in the schedule of imports. It further held that ships or vessels were and had always been regulated by statutes independent of the customs laws and under a different system of legislation and did not fall within the scope of the tariff upon importations.

Our Customs Tariff Act, however, deals with ships and vessels, but in a limited way.

By s. 3 of the Customs Tariff Act (6-7 Edw. VII. c. 11) 1907, it is, among other things, provided that there shall be levied, collected and paid upon all goods enumerated or referred to as not enumerated in Schedule "A" to the Act when such goods are imported into Canada or taken out of warehouse for consumption therein, the several rates of duties of customs set forth and described in such schedule.

The only reference made to ships or vessels in said Act is in items 589 and 590 of Schedule "A."

Item 589 is as follows:—

Ships and other vessels built in any foreign country, if British registered since September 1, 1902, on application for license to engage in the Canadian coasting trade . . . on the fair market value of the hull, rigging, machinery, boilers, furniture and appurtenances thereof, 25 per cent. ad valorem.

Item 590:—

Vessels, dredges, scows, yachts, boats and other water-borne craft, built outside of Canada, of any material, destined for use or service in Canadian waters (not including registered vessels entitled to engage in the coasting

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trade, nor vessels in transit between Canada and any place outside thereof) n.o.p.:—on the fair market value of the hull, rigging, machinery, boilers, furniture and appurtenances thereof, on arrival in Canada, 25 per cent. *ad valorem*.

The "Santa Maria" is undoubtedly a foreign-built ship. It seems to me to be impossible to bring her and her equipment within the terms of either said item 589 or 590. There is no evidence whatever that will enable me to do so. All the evidence is the other way; and unless she can be brought under either of these items there is no other provision of the law which renders her liable to the payment of duty. Following the law as decided in *Vanderbilt* v. "*The Conqueror*," and observing the limited provision contained in the Customs Tariff Act with respect to the duties to be exacted of foreign-built ships, and applying the principle contained in the maxim *expressio unius est exclusio alterius*, I hold that the "Santa Maria" and her equipment when sold under the commission of sale issued upon the judgment rendered in this suit were not liable to the payment of customs duty, and that the claim made by the collector of customs on the marshal was unwarranted and without authority.

I fully agree with Mr. Bentley in his contention that the purchaser Leo Frank obtained a perfect title as against the world on the completion of his purchase of the "Santa Maria" and her equipment. The proceeding that resulted in her sale was one *in rem*. The court decreed the ship to be sold in default of payment of the amount of the judgment. This judgment was binding upon all the world. In pursuance of the judgment given she was sold and the purchase money obtained has been regularly paid into court. This money represents the ship and is answerable, so far as it will go, for all demands and claims against the ship, from whatever quarter they may come. The sale has the effect of shutting out and destroying all previous titles and claims. The purchaser's title is absolute and free from all claims of every kind. *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414; *Att'y-Gen'l* v. *Norstedt*, 3 Price 97, 146 E.R. 203.

What was sold, however, was a ship and her equipment. This court has no jurisdiction to deal with any other kind of property. If the ship and her equipment were liable to duty at the time of the sale, the customs authorities must seek the payment of such

not from the purchaser of the ship, but from the proceeds of sale in court.

Mr. Bentley, in a brief which he left with me since the argument in the return of the order, referring to Collector of Customs Robertson, states:—

> On the day of the sale by the marshal of the court he carried the goods from the Customs House and placed them on board the ship, removing all locks which had previously been placed there by his orders, and was actually present while the sale took place, making no protest or claim whatever. He stood by and allowed Dr. Frank to become the purchaser of the property, with no intimation whatever to the purchaser of any claim for customs duties or that the property might be held liable in respect of such.

The marshal appears to have had possession and full control of the ship and its equipment, and was in a position without hindrance to complete the sale with the purchaser.

I fail to find in the evidence that Collector Robertson has interfered with the carrying out of the decree of this court, and with the completion of the sale made by the marshal to the purchaser Leo Frank and with the delivery of the said ship and articles to the latter as claimed by him in his said affidavit. I would hesitate to hold that the mere writing of a letter to the marshal notifying him that the ship and all its equipment are in bond and subject to duty and that before delivery is effected the duty will have to be paid, was such interference, especially when I find Mr. Frank's solicitors in a letter to Collector Robertson (a copy of which is annexed to said affidavit) stating that "formal delivery of the ship and articles has been made to Dr. Frank by the marshal of the Admiralty Court."

Ample powers are given the court to prevent interference with property seized by the marshal if such interference takes place before the completion of the sale of such property to the purchaser, but I know of no power that enables this court to make the order asked for in this application after the purchaser has obtained complete delivery and possession of the property and paid the purchase money. Mr. Bentley, in his brief, calls Collector Robertson a trespasser. I presume he refers to the breaking of the door in the provincial building and removing the articles stored there by his client. He will not, I think, contend that this court has jurisdiction in trespass. It is quite true that the Admiralty Court has in a proper proceeding jurisdiction to

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take a ship out of the power of a wrongdoer and give it to the right owner. *Re Blanshard*, 2 B. & C. 244, 107 E.R. 374. But this can scarcely be called a case of that kind.

As I have already stated, what the marshal sold Mr. Frank was a vessel and its equipment. I have already held that so long as the "Santa Maria" and her equipment preserve the status they possessed when sold, they are not dutiable. It is not necessary to express any opinion here whether the taking of certain articles, part of the "Santa Maria's" equipment, from her and storing them in a locked room in the provincial building with the Attorney-General's consent is such a change of the status of such articles as to make them liable to the payment of duty. The mere fact of storing the equipment of a vessel late in the autumn, when navigation was over for the winter season, should not in itself be looked upon as a presumption that the purchaser had intended to divorce the equipment from its regular function and convert it into goods and merchandise. It may be—I express no opinion—that the taking of these articles and locking them up in a room in the provincial building gave grounds for suspicion that they would no longer be used as part of the equipemnt of the "Santa Maria," but would be sold for other purposes.

The contention was put forward by Mr. J. D. Stewart, counsel for Collector Robertson, that this matter cannot be brought before the court as part of, or as ancillary to, this suit. I feel that the point is well taken.

The sale and delivery of the ship and her equipment took place without any interference on the part of the collector of customs. It is true he made a claim of duty before the sale but did not follow it up by any overt act. The sale appears to have been finally completed on November 9 last. On the following day a letter was written by the collector to the purchaser notifying him that the ship and all its equipment were in bond and thus subject to duty if landed or disposed of within Canada, and anything landed therefrom would have to be placed in a suitable warehouse approved of by the customs until exportation.

Subsequently, but in the same month, certain articles claimed to be part of the equipment were by the purchaser removed from the ship and stored under lock and key in a room in the provincial building. This room, it is claimed, the collector of customs

broke open on November 26 last and removed therefrom these articles, which he has since retained.

As I understand it, this is substantially what gave rise to the case which the purchaser presents against the collector for determination in this suit. It is not a matter, I take it, that relates in any way to the matters litigated in this case. What interest can the plaintiff in this suit have in a contest between the purchaser and collector arising out of the breaking into the room in the provincial building? The collector of customs is in no wise different from any other person who might see fit to seize and appropriate these articles. For any trespass committed or any grievance suffered the courts are open to the purchaser to obtain redress, but he cannot, I take it, come in under cover of a suit in which he is not a party to secure such redress. This is not, in short, a matter that is in the usual course of things connected with or ancillary or incidental to the conduct of this case. On the contrary, it is the claim of an infringement of a legal right made by a party against a party, neither of whom is in any way connected with this suit.

The order made by me on December 31, 1917, will be discharged.

I am always inclined to grant costs to a successful litigant, but this seems to me to be a case for an exception. The collector of customs, zealous no doubt in the performance of his duty in claiming the payment of customs duty, went beyond his powers. It is true he did not, before the sale, go further than the letter he wrote to the marshal, but we find him on November 10, after the completion of the purchase, writing the purchaser that the ship and all its equipment were in bond and thus subject to duty if landed or disposed of within Canada. There is nothing in the law to prevent the purchaser from disposing of his ship and its equipment in Canada so long as they are not to be used in Canadian waters, nor can I understand what is meant by this vessel being in bond. There will be no costs.

Judgment accordingly.

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S. C.

REX v. KIMBROUGH.

Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck, and Hyndman, JJ.A. June 19, 1918.

THEFT (§ I—3a)—MORTGAGOR—BAILEE—SALE OF GOODS—SEC. 355 C.C.
A mortgagor who gives an undertaking to hold goods seized under a mortgagee's warrant of distress, as agent and bailee, but who subsequently sells the goods and gives no account of the proceeds, cannot be convicted of theft under sec. 355 of the Criminal Code.

Statement. CASE reserved by Simmons, J., on a conviction for theft under s. 355 of the Criminal Code. Conviction quashed.

A. L. Smith, for the Crown; *Gordon Fraser*, for appellant.

The judgment of the Court was delivered by

Harvey, C.J. HARVEY, C.J.:—This is a case reserved by Simmons, J. The accused was the mortgagor of certain grain under a mortgage which had become in default. The mortgagee gave a warrant of distress to a sheriff who sent his bailiff who purported to make a distress and then the accused gave an undertaking to hold the goods seized as agent and bailee. He, thereupon, and apparently in pursuance of an intention formed at the time when he gave the undertaking, sold the grain and made no account of the proceeds to the bailiff or sheriff. He was convicted of theft under s. 355 and the question reserved is whether the case falls within that section.

Assuming that the facts constitute the receiving by the accused of the grain on terms requiring him to hold it and deliver it to the bailiff or sheriff, and that is the most that the Crown contends, the question to be considered is whether that is receiving something on terms requiring him to account for it within the meaning of s. 355.

The section provides that

> Everyone commits theft who, having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security or other thing received, fraudulently converts the same to his own use or fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid.

It is contended on behalf of the accused that the case does not come within s. 355 both because the goods received were not of a like nature to money or valuable security as Newlands, J.A., considered essential in *R.* v. *Fraser*, 40 D.L.R. 691, and because the accounting was not to be to a third person other than either

the person charged or the one from whom the goods were received as considered essential by Lamont, J.A., in the same case. While I have the greatest respect for the opinion of both judges mentioned I do not feel satisfied with their reasons in the case cited, but would be more disposed to accept the reasons of Elwood, J.A., who dissented. The facts of that case, however, are not parallel to the facts of this, but in a very important particular the case of *R.* v. *Shyffer*, 17 Can. Cr. Cas. 191, is very similar to the present. In that case the accused received a ring on terms requiring him to deliver it to a particular person but instead of delivering it he converted it to his own use. Clement, J., points out that he was required to deliver it in specie and that in his opinion that was not an accounting for it within the meaning of the section. While I do not wish to express the view, as he seems to, that the term "accounted for" is not an appropriate term to express the obligation on the accused in that case, yet I am of the opinion that it is not used in that sense in the section, but I come to that conclusion rather from the other portions of the section and from a consideration of the state of the law when the section was passed.

The section appears in much the same words in the original Criminal Code in 1892, where it appears as s. 308. There is an absence of reference to any former statutory provision indicating that, at least in its present form, it is a new enactment. The section relating to theft generally, s. 305, however, is shewn to be taken from an earlier enactment. A reference to some of the earlier decisions shews that the converting of a chattel which a person had received on terms requiring him to deliver it to some person other than himself was theft (see *Reg.* v. *Davies* (1866), 10 Cox 239) while the converting by the person charged of money received but which was not to be delivered in specie was not theft (see *Reg.* v. *Hoare* (1859, 1 F. & F. 647, *Reg.* v. *Garrett* (1860), 2 F. & F. 14). In the last case Willes, J., said: "It seems to me that the bailment referred to in the statute is one in which the same property is to be returned, not one in which different property is to be returned." The statute referred to in these two cases was in the same terms as s. 4 of R.S.C., 1886, c. 164. This section did not appear when the law was codified in 1892, but the definition of theft as given in s. 305 was made wide enough to include it, and s. 308 was enacted apparently for the first time. We find then

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that it was not necessary to include in s. 308 the case of a person converting something which he had received on terms requiring him to deliver the identical thing, unless, of course, possibly because it involves a more severe penalty, for that was already theft. Having regard to that fact, and to the facts that it would have been quite simple to insert the word "delivered" before the word "account" if it had been intended to extend the application to the case of delivery of the specific article but that instead the section uses the term "account for" an expression commonly applied to financial transactions and that the other words "pay" and "proceeds" are only applicable generally speaking to money, I am of opinion that the somewhat ambiguous word "though" is used in the sense of "but" and that the expression "though not requiring him to deliver over in specie the identical money, valuable security or other things received" definitely excludes from, or at least shews the intention not to include within, the operation of the section the cases where the specific article delivered is to be re-delivered by the person receiving it.

This reading appears to make everything in the section consistent and interprets the section as declaring all new law and not incorporating old law already included in another section with new law to provide for cases not before provided for.

The result of this interpretation involves the conclusion that the section does not apply to the facts of the present case and that therefore the conviction should be quashed. It may be that the accused was guilty of theft under the general section but we are not asked to determine that.

Conviction quashed.

B.C.

C. A.

WESTHOLME LUMBER Co. v. G.T.P. R. Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, and McPhillips, JJ.A. April 2, 1918.

DAMAGES (§ III K—221)—CONSTRUCTION OF RAILWAY—OBSTRUCTION OF ACCESS TO SEA—RAILWAY ACT—WATERS.

The obstruction of a right of access to the sea by reason of the construction of a railway is within the meaning of sec. 306 of the Railway Act., R.S.C. 1906, c. 37, and an action for damages occasioned thereby must be brought within one year of the placing of the obstruction.

Statement.

APPEAL from a judgment of Murphy, J., dismissing an action for damages for the illegal obstruction of access to navigable waters. Affirmed.

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C. A.

WESTHOLME LUMBER CO. v. G.T.P. R. CO.

The judgment appealed from is as follows:—

Murphy, J.:—I find as facts that the fill was made by defendant in its corporate capacity and *bonâ fide* for the purpose of the construction of its railway. I find also that defendant had not taken the necessary steps to make its action lawful. I find that a longer period than 1 year elapsed between the completion of the fill and the bringing of these proceedings. On these findings I am bound, I think, by the cases of *McArthur* v. *Northern and Pacific Junction R. Co.* (1890), 17 A.R. (Ont.) 86, and *Lumsden* v. *Temiskaming and Northern Ontario R. Com.*, 15 O.L.R. 469, to hold that the plaintiff is debarred from pursuing this action if the case be not one of "continuation of damage." The case of *Chaudière Machine and Foundry Co.* v. *Canada Atlantic R. Co.* (1902), 33 Can. S.C.R. 11, decides, I think, this point adversely to the plaintiff. The act there complained of was illegal from its inception, and the plaintiff's cause of action arose once for all when it was committed. Had it been legal, then the case cited shews that the cause of action would arise only when damage occurred. The distinction is that in the one case the cause of action is the illegality of the act complained of, whereas in the other it is damage resulting from a lawful act negligently performed.

The only answers made to these cases are, first, that the case last recited lays down the rule that 6 years is the period of limitation, but s. 306 of the Railway Act was not raised, and therefore this case cannot be held to overrule the first two cases cited above; secondly, some distinction was attempted to be made between the words "continuation of damage" in s. 306 of the Railway Act and the language construed in the authorities relied upon in *Chaudière Machine and Foundry Co.* v. *Canada Atlantic R. Co.*, *supra*, but I am unable to see any in substance. The action is dismissed.

Mayers, for appellant; *E. P. Davis*, K.C., and *Patmore*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I cannot agree with Mr. Mayers' contention that the case does not fall within s. 306 of the Railway Act, c. 37, R.S.C. (1906), nor with his submission that the damage was continuing damage within the true meaning of said action.

I entirely agree with the reasons for judgment of Murphy, J., who tried the action, and would, therefore, dismiss the appeal.

B.C.

C. A.

WESTHOLME LUMBER CO. v. G.T.P. R. CO.

McPhillips, J.A.

MARTIN, J.A., dismissed the appeal.

McPHILLIPS, J.A.:—In my opinion it has not been established that the trial judge, Murphy, J., came to a wrong conclusion in dismissing the action upon the ground that the action was barred under s. 306 of the Railway Act (c. 37 R.S.C., 1906).

The action was not brought within the 1 year limitation and when the pleadings are looked at it cannot be said that any cause of action was alleged which would admit of its being considered whether the injury complained of was in its nature "continuation of damage" nor would it appear that the jury allowed any sum upon any such claim or for recurrent damage from time to time occurring beyond the time of the construction of the obstruction —but went wholly upon the claim as advanced that the appellant suffered special damage by reason of the closure of access to the sea, and by reason thereof was compelled to make other provision upon other lands for shipping facilities, *i.e.*, construction of wharf, retaining wall, electric hoist and other works necessary and proper under the circumstances, and the jury allowed damages therefor. There can be no question that the obstruction of access to the sea was by reason "of the construction or operation of the railway" and within the meaning of s. 306, as the railway, one of the trans-continental lines of railway of Canada, passes over the *locus in quo*, and in its construction caused the damage complained of. Since the original construction, in compliance with an order of the Railway Board of Canada, the obstruction has been removed to the extent of a fairway of 28½ ft., the order being to leave a clear way of 30 ft. It is not clear how it comes about that the opening is 6 inches short in width, but there is no evidence of any special damage consequent upon this, and if it were a question to consider might be disposed of by applying the maxim *de minimis non curat lex* (but see *Pinder* v. *Wadsworth* (1802), 2 East 154, 102 E.R. 328; *Harrop* v. *Hirst*, L.R. 4 Ex. 43).

The case which would appear to be conclusive upon this appeal and upon which—amongst others—the trial judge proceeded is *Chaudière Machine and Foundry Co.* v. *Canada Atlantic R. Co*, 33 Can. S.C.R. 11, and it being a decision of the Supreme Court of Canada is binding upon this Court. That was a case of obstruction —the building of an embankment and the raising of the level of the street. The judgment of the court was delivered by the then

Chief Justice, the Right Hon. Sir Henri Elzéar Taschereau, at pp. 14 and 15. He said:—

If an action had been taken by the then owner, when the respondents built this embankment, for the damages to this property, a judgment in his favour in that action would be a bar to any subsequent action for subsequent damages either at his instance or at the instance of the subsequent owners of the property. *Goodrich* v. *Yale*, 8 Allen (Mass.) 454.

The cases of *Backhouse* v. *Bonomi*, 9 H.L. Cas. 503, 11 E.R. 825, and of *Darley Main Colliery Co.* v. *Mitchell*, 14 Q.B.D. 125; 11 App. Cas. 127, relied upon by the appellants, are clearly distinguishable. In these two cases, the acts which had caused the damages were, when done, lawful, so that clearly no action for damages could be thought of till the damages accrued. Here the appellants' claim rests upon their allegation that the works done by the respondents at the outset constituted a nuisance and a trespass on their lot.

In the case of *McCrimmon* v. *B.C. Electric R. Co.* (1915), 24 D.L.R. 368, 22 B.C.R. 76, a decision of this court, the head-note reads:—

The cause of action was the negligent construction or inefficient working of the second culvert which was a continuing cause of action, arising from time to time as damage was done, and the period of limitation of action dated from the cessor of such damage.

It was with some hesitation though that I came to the conclusion that even in that case it was one of continuance of damage. But that was a case of the interference with a natural watercourse, and by reason thereof and its inefficiency there was recurrent damage (see at p. 372, also see *Corp. of Greenock* v. *Caledonian R Co.*, [1917] A.C. 556).

S. 306 of R.S.C. (1906), c. 37, reads:—

Shall be commenced within one year next after the time when such supposed damage is sustained or if there is continuation of damage within one year next after the doing or committing of such damage ceases and not afterwards.

Here the act done was not done upon the lands of the appellant—it was the doing of an act which was in the disturbance of a public right of way or access to the sea and alleging special damage by reason thereof accruing to the appellant but not in its nature alleged to be continuing and it can rightly be said—that the cause of action arose with the placing of the obstruction and interference of access (see *Offin* v. *Rochford District Council*, [1906] 1 Ch. 342). It may be said that "the effect of the damage may continue but this does not extend the time of limitation" (see Lightwood on the Time Limit of Actions (1909), at p. 399).

This appeal, therefore, in the way I view it, calls for no opinion as to the right of the appellant to damages or compensation under

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the Railway Act, and my conclusion is that the limitation of action is effective and is a complete bar, not being brought within 1 year, and were it open to consider any question of continuation of damage, none having been claimed, proved or allowed by the jury, it is not a case of continuation of damage.

I would, therefore, upon the whole, dismiss the appeal.

Appeal dismissed.

SASK.

S. C.

REX v. ROBINSON.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Elwood, and McKay, JJ. November 24, 1917.

LOTTERY (§ II—5)—FREE DISTRIBUTION OF OPTION CERTIFICATES—CR. CODE SEC. 236.

It is not a lottery offence under sub-sec. (*a*) of Cr. Code sec. 236 to publish a scheme for the drawing, without payment or obligation to pay, of certificates giving a privilege of purchase of a class of article at a fixed price alleged to be lower than the value, where no sales of such article are made except to those who draw certificates and they are under no obligation to purchase.

[See annotation, 25 D.L.R. 401.]

Statement.

CROWN case stated by S. A. Hutchison, Esquire, acting Police Magistrate in and for the City of Swift Current, in respect of a conviction upon the following information :

"The information and complaint of Enoch B. Borthwick, Chief of Police of City of Swift Current, taken this 26th day of May, in the year 1917, before the undersigned acting Police Magistrate for the City of Swift Current, in the Province of Saskatchewan, and one of His Majesty's Justices of the Peace in and for the said Province, who saith that one F. G. Robinson, agent, of Toronto, on or about the 23rd day of May, A.D. 1917, and on divers other dates since that date did at the City of Swift Current in the said Province of Saskatchewan, publish a proposal, scheme or plan, namely, a drawing for a certificate to be accepted as a $5 payment on a new $12 opal convex portrait and one hand-painted pearl inlaid scene, issued by the Dominion Art Co., Ltd., for the purpose of advancing or tending or giving or selling or disposing of certain property, to wit, one finely finished portrait, by lots, cards or tickets, contrary to the Criminal Code of Canada, section 236."

The case stated was as follows:—

"1. The accused came before the undersigned, Police Magistrate in and for the City of Swift Current, in the Province of Saskatchewan, upon a summons duly issued by the undersigned

as such Police Magistrate, a copy of which summons is hereto attached marked exhibit 1.

"2. Upon the date named in said summons the hearing of the case was by me adjourned to Monday, the 4th day of June, 1917, upon which date the accused appeared before me and consented to be tried summarily by me upon the charge in said summons set out.

"3. The accused pleaded not guilty and the trial proceeded.

"4. The only evidence submitted upon said trial was the admissions subscribed by both the prosecuting counsel and the counsel for the accused, together with the certificate and order attached to said admissions, copies of which admissions, certificate and order are hereto attached, marked exhibits 2, 3, and 4 hereto, respectively.

"5. After hearing read the said admissions, certificate and order and hearing argument by counsel for the accused as well as counsel for the prosecution, I found the accused guilty.

"6. Upon the application of counsel for the accused I have reserved the following questions of law arising upon the said trial of the accused for the opinion of the Supreme Court of Saskatchewan *en banc*:

"(*a*) Can the accused be convicted of an offence under section 236 of the Criminal Code upon the said evidence?

"The admissions, dated June 4th, 1917, were signed by the solicitor for the informant and for the accused respectively and were as follows:—

"It is admitted that—

"(1). The canvasser gives the person canvassed an opportunity to make a drawing without the deposit of any money or the obligation to pay any whether drawing a certificate or not.

"(2). The envelopes, one in three, are represented to contain a certificate entitling the person canvassed to a $5 credit on an enlarged portrait to be made represented as of the value of $12.

"(3). The person who draws a winning certificate has the opportunity only of contracting for the purchase of $7 for such an enlarged portrait to be made.

"(4). The person canvassed, unless drawing a certificate, has no opportunity to purchase such picture unless a certificate is given him by the canvasser.

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"(5). No sale is made to anyone who does not get a certificate, and no sale is made to any one at any other price than $7.

"(6). Coupon and order to go in as exhibits.

"(7). On the dates mentioned in the information and complaint, persons canvassed by the accused made drawings in the manner indicated and persons drew certificates and gave orders for such portraits to be made."

H. E. Sampson, K.C., for the Crown.

The judgment of the Court was delivered by—

McKay, J.

McKAY, J.:—From a perusal of the information it will readily be seen that it is laid under ss. (*a*) of sec. 236 of the Criminal Code, which is as follows:—

"236. Lotteries—Everyone is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars who—

"(*a*) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever;"

On a careful perusal of the whole section it will be seen that the basic idea underlying the section is the prohibition of any disposal of property where the passing of the property is determined by chance, and ss. (*a*) prohibits the making, printing, advertising or publishing or causing or procuring to be made, printed, advertised or published any scheme or plan for advancing such purpose, that is, the disposal of property by chance, and, in the case under consideration, the charge states that the property to be disposed of is "one finely finished portrait."

Let us now consider whether in the case at bar, in the scheme or plan published by the appellant there was any scheme or plan for advancing the disposal of the said finely finished portrait *by chance*.

The evidence shows that one envelope in three contains a certificate entitling the person drawing the same to a $5 credit on an enlarged portrait to be made, represented as of the value of $12. The drawing of this certificate is a matter of chance, but when a person does draw it, it does not pass any interest or property in the portrait to him. In fact, the portrait is not yet in existence. Having obtained the $5 credit certificate, the successful drawer

may rest there and he will never get the portrait. Whatever element of chance there may be in the successful drawing of this certificate, it does not pass any interest or property in the portrait or dispose of it in any way. Nothing is paid by the drawer for the privilege of drawing, and he cannot compel the appellant or his principals to make the portrait for him after a successful draw, or dispose of it to him in any way. Nor can the appellant or his principals compel the successful drawer to order or pay anything for the portrait.

According to No. (3) of the admissions, the successful drawer of a certificate simply has the opportunity of contracting with the appellant or his principals for the making of the portrait in question. That is, it is simply a matter of contract between the successful drawer and the company as to whether the drawer will order the making and the company will agree to make the portrait. There is, in my opinion, no element of chance in the entering into this contract for the disposal of the portrait.

It is to be further noticed that the word "Lotteries" is used at the beginning of the section, and in ss. 5 the word "lottery" to designate, as I take it, the class of transactions aimed at by the section.

In 15 Halsbury, p. 299, the learned author states:—

"A lottery has been described as a scheme for distributing prizes by lot or chance." And he cites *Taylor* v. *Smetten* (1883), 11 Q.B.D. 207, and *Barclay* v. *Pearson*, [1893] 2 Ch. 154, as authorities. In the latter case, at p. 164, Sterling J., in his judgment, is reported as follows:—

"In delivering the judgment of the Divisional Court in *Taylor* v. *Smetten*, Mr. Justice Hawkins says: "In Webster's Dictionary a lottery is defined to be a 'distribution of prizes by lot or chance,' and a similar definition is given in Johnson; such definitions are in our opinion correct, and in such sense we think the word is used in the statute!" I am bound by that expression of opinion; but I think it right to say that I entirely agree wth it.

Again, in 15 Halsbury, p. 300, the learned author states:—

"But it seems that when the chances of a prize are obtained wholly gratuitously, and when, therefore, none of the adventurers risks anything, the scheme would not be a lottery."

The authority for the foregoing statement is the judgment of

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S. C.

REX v. ROBINSON.

McKay, J.

Darling, J., in *Willis* v. *Young*, [1907] 1 K.B. 448, which is as follows:—

"But I wish it to be clearly understood that I am not prepared to hold that an absolutely free and gratuitous distribution of chances by lot, none of which have been paid for, would be a lottery."

It would appear, then, from the above authorities, that the three essential elements of a lottery are, consideration, prize and chance.

I have carefully examined all the cases cited by counsel for the Crown, and find that in all these cases these three things were present, which are all absent from the case at bar.

I will more particularly refer to *Bartlett* v. *Parker*, [1912] 2 K.B. 497, 81 L.J. M.C. 857, 23 Cox C.C. 16, and *Wallis* v. *Young*, [1907] 1 K.B. 448.

In the *Bartlett* case a club circulated a bill, announcing that on a certain day in a certain field a dance and concert would be held, and that the admission would be by ticket at 6d. each, and that a bicycle would be given to the holder of the ticket corresponding with a number secretly selected by drawing, which was to be announced on the field. Each ticket was numbered, and on it was printed a statement that the holder was entitled to compete for a bicycle. The bicycle was not purchased out of any money obtained from the sale of the tickets, but was presented by a cycle company as an advertisement. The entertainment was held and the numbers drawn, and the bicycle was given to the holder of the winning number. It was held this was a lottery, and the person selling the tickets and the person publishing the scheme were guilty under the Lotteries Act.

It is to be noted in the above case the tickets for the drawing were paid for, the ticket for admission included right to draw. There was a prize—the bicycle—and there was the chance, some one ticket by chance entitling the holder to the prize.

In *Willis* v. *Young*, [1907] 1 K.B. 448, the Court held that, although the medals were distributed gratuitously among the members of the public, which medals gave them a chance of winning a prize, yet the persons who received the medals contributed collectively, through some of them buying the newspaper containing the winning numbers, sums of money which went towards

paying for the chances and prizes. Justice Darling, in his concurring opinion, is thus reported:—

"In the present instance all the chances are paid for in the mass, by the general body of purchasers of the paper, although an individual purchaser may not pay for his chance. The person who distributes the chances is therefore paid if the sale of the newspaper be looked at as a whole, though some chances are given away."

In the foregoing case there were also prizes to be won by chance.

Counsel for appellant stated that the Magistrate relied on *Hall* v. *McWilliam* (1901), 85 L.T.R. 239.

This case is also distinguishable from the case at bar. In this *Hall* case, the Court held that the person who bought the paper for a halfpenny bought the chance as well. The two things, the newspaper and the chance, were sold together. And there was also a prize to be won by chance.

The appellant is charged under ss. (*a*) of sec. 236 as above stated, and the evidence submitted was to meet that charge.

The Magistrate, therefore, submits the question too broadly to this Court when he asks:—

"(*a*) Can the accused be convicted of an offence under sec. 236 of the Criminal Code upon the evidence?"

This question should, in my opinion, have been restricted to ss. (*a*) of said section. And, in answering the question, I treat it as so submitted.

For the reasons above given, I am of the opinion that the appellant cannot be convicted of any offence under subsection (*a*) of said section 236, on the evidence submitted, and the conviction made by the Magistrate should be quashed.

There will be the usual order of protection to the Magistrate and any other officers acting under said conviction.

Conviction quashed.

ALTA.

S. C.

REX v. BISSETTE.

(Annotated).

Alberta Supreme Court, Hyndman, J. September 19, 1917.

CERTIORARI (§ II—20) — FILING AN AMENDED CONVICTION — DEFECT NOT CURABLE UNLESS SUPPORTED BY THE DEPOSITIONS.

Leave to file an amended conviction on the return of a *certiorari* motion to quash will be refused where it was essential to the offence under a provincial law that it should have taken place in an electoral district constituting a restricted locality and the description of the place of offence in the first conviction did not shew that it was within the restricted locality, unless the amendment intended to cure the defect is supported by the evidence and proceedings before the magistrate.

[See Annotation on Amendment of Summary Convictions, at end of this case.]

Statement. MOTION by way of *certiorari* to quash a conviction made on the 23rd day of June, 1917, by P. H. Belcher, Police Magistrate in and for the "Electoral Divisions of Grouard and Peace River," whereby the said Joseph Bissette was convicted for that he, between the 15th day of March and the 15th day of April, 1917, at Battle River Settlement, in the said Province, did unlawfully sell intoxicating liquor, contrary to the provisions of the Liquor Act, and was ordered to pay a fine of five hundred dollars and $4.95 costs, and in default of payment forthwith, to imprisonment for four months, said offence being charged as a second offence.

H. H. Hyndman, for applicant.

J. F. Lymburn, for the Crown.

Hyndman, J. HYNDMAN, J.:—The principal objection relied on at the argument was that the said magistrate had no jurisdiction to make the conviction. The formal conviction first returned by the magistrate did not state that the Battle River Settlement was within the Electoral Divisions of Grouard and Peace River, and immediately after the motion came before me in Chambers Mr. Lymburn, counsel for the Crown, tendered an amended one, adding after "Battle River Settlement" the words, "in the Electoral Divisions of Grouard and Peace River." Counsel for the applicant objected to the reception by me of this amended conviction on the ground that it did not comply with the facts of the case as brought out at the trial. There is no doubt but the magistrate has the right to make out and return an amended conviction at any time even up to the moment before the conviction is quashed, provided such amendment is according to the truth and supported by the facts of the case. (See *R.* v. *Barker*,

1 East 186, 102 E.R. 73; *Selwood* v. *Mount*, 9 C. & P. 75.) I therefore examined all the proceedings, including the evidence, carefully to ascertain if such an amended conviction was warranted by the proceedings, but I failed to find any reference whatsoever to the fact that the Battle River Settlement is within the Divisions of Grouard and Peace River over which Mr. Belcher had jurisdiction.

I think, therefore, it would be improper for me to allow the amended conviction to be filed under these circumstances. There is absolutely no evidence upon which I can conclude or even infer that the Battle River Settlement is within the territorial jurisdiction of the convicting magistrate. The information does not mention the fact so as to bring it possibly within the case of *Rex* v. *Marceau*, 8 A.L.R. 510, 22 D.L.R. 336, or *Rex* v. *C.P.R.*, 1 A.L.R. 341, 14 Can. Cr. Cas. 1, cited by counsel for the Crown: That the right to *certiorari* always exists on the ground of want of jurisdiction by the magistrate, even in cases where it is expressly taken away by statute, is too well established to be questioned. (See Seager's Magistrates' Manual, second edition, page 38; *Rex* v. *Oberlander*, 16 Can. Cr. Cas. 244.)

In the absence, therefore, of any evidence or proof, either directly or by inference, that the Battle River Settlement is within the territorial jurisdiction of the convicting magistrate, I must quash the conviction, but there will be the usual protection to the magistrate, and I think it is a proper case to order that there shall be no costs.

Conviction quashed.

Annotation—Amendment of summary convictions. **Annotation.**

There are various ways in which a summary conviction may be amended, although it has passed out of the custody of the justice or magistrate who made it. The magistrate himself may make out a new conviction correcting some defect in the first and indicating in it that the new record of conviction is in substitution for the one already returned, *R.* v. *Nelson*, 22 Can. Cr. Cas. 301, 17 D.L.R. 305, 7 S.L.R. 92; *R.* v. *Barre*, 11 Can. Cr. Cas. 1; *Ex parte Giberson* (No. 1) 16 Can. Cr. Cas. 66; *Ex parte Giberson* (No. 2) 16 Can. Cr. Cas. 70; *R.* v. *Smith*, 19 Can. Cr. Cas. 253, 45 N.S.R. 517. The amendment must, however, be supported by the evidence and conform to the actual

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adjudication which he had made as to what offence he found the accused guilty of its commission, *Selwood* v. *Mount*, 9 C. & P. 75, 1 Q.B. 726; *R.* v. *McAnn* (1896), 3 Can. Cr. Cas. 110, 4 B.C.R. 587; *R.* v. *Whiffin* (1900), 4 Can. Cr. Cas. 141, 3 Terr. L.R. 3; *R.* v. *Bennett*, 3 Ont. R. 45; *R.* v. *Watchman*, 23 Can. Cr. Cas. 362, 20 D.L.R. 201, 7 S.L.R. 350. The magistrate may also by an amended conviction correct an illegally added punishment which he had erroneously included in the first; for instance, where the statute authorized imprisonment without hard labour and the original conviction purported to impose hard labour, an amended conviction to correct this was held to be legally returned in answer to a certiorari, *Reg.* v. *Whiffin*, 4 Can. Cr. Cas. 141, 3 Terr. L.R. 3. But it is said that this must be done before the accused has been put to hard labour by the enforcement of the illegal penalty, *R.* v. *McAnn* (1896), 3 Can. Cr. Cas. 110, at 121, 4 B.C.R. 587.

Where a minute of conviction stated that in default of payment of the fine and costs imposed the same was to be levied by distress, and in default of distress imprisonment, and a formal conviction was drawn up following the minute, and it appeared that distress was not authorized in the particular case, it was held that the fact of the minute containing such unauthorized provision did not prevent a conviction omitting such provision being drawn up and returned, in compliance with a certiorari granted. *R.* v. *Hartley* (1890), 20 Ont. R. 481; vide also *R.* v. *Richardson* (1891), 20 Ont. R. 514.

If the penalty in default of payment of the fine adjudged appears to be properly ascertained by the conviction the Court will not enquire when it was fixed, for if determined at any time before the conviction is formally drawn up and returned that is sufficient. *R.* v. *Smith* (1881), 46 U.C.Q.B. 442, 445.

An amended conviction may be made out and returned to the Court under certiorari even after a previous formal conviction has been returned to the clerk of the peace provided such new conviction is according to the truth, and is supported by the facts of the case as proved before the justice. *Chaney* v. *Payne*, 1 Q.B. 712, at 722; *R.* v. *Aikens*, 23 Can. Cr. Cas. 467, 21 D.L.R. 633, 48 N.S.R. 509.

Even after the filing of the return to certiorari process, the Court may give leave to file an amended conviction, so long as this is done before an order has been pronounced for the quashing of the first. *R.* v. *House*, 2 Man. R. 58; *R.* v. *Richardson*, 20 Ont. R. 514; *R.* v. *Lawrence* 43 U.C.Q.B. 168; *R.* v. *McDonald*, 26 N.S.R. 404.

It is not permissible to supply facts before the Judge on certiorari by means of *ex parte* affidavits in an attempt to have

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an amendment made and a defect cured as to something not shewn in the deposition, *R.* v. *Aikens*, 23 Can. Cr. Cas. 467, 21 D.L.R. 633, 48 N.S.R. 509.

On the return to a certiorari the justices are not only entitled but may be required to amend their conviction in matters of form. *Houghton's* case (1887), 1 B.C.R., Pt. I., p. 89. But as said by Begbie, C.J., in that case: "He cannot be allowed to convict a man of one offence and then on certiorari inform the Court that he convicted him of another;" he cannot be allowed to thrust into an "amended" conviction allegations of fact which the evidence disproves. Ibid., p. 92.

It would seem that the magistrate cannot change adversely to the accused the adjudication pronounced and noted in the minute of adjudication commonly written on the information, without citing the accused to again appear, although the magistrate had not yet signed and sealed a formal conviction; *R.* v. *Brady*, 12 Ont. R. 363; *R.* v. *Hartley*, 20 Ont. R. 485; but while the quantum of a fine imposed may not be increased in the absence of the defendant, any authorized method of recovering it may, it seems, be included in the formal conviction. *R.* v. *McAnn*, 3 Can. Cr. Cas. 110, 112.

Where an appeal is taken from a summary conviction, the evidence may be taken *de novo* and there is practically a new trial, although the conviction appealed against is defective on its face and although the punishment which is imposed by it is in excess of the lawful penalty. The Criminal Code makes it the duty of the Court hearing the appeal to again try the case on the merits, notwithstanding such defects; but his error in declining to do so cannot be corrected by mandamus to re-open the appeal so as to admit evidence the Judge had declined to hear before making his order quashing the conviction appealed from. *Strang* v. *Gellatly* (1904), 8 Can. Cr. Cas. 17.

The evidence to be given on the appeal is not limited to the witnesses called on the hearing below. *R.* v. *Colam*, 36 J.P. 101, 26 L.T. 561.

If a conviction is defective in awarding a longer term of imprisonment than the statute permits, the Court on certiorari has power under sec. 1124 to amend the conviction by reducing the term to the statutory limit. *R.* v. *McKenzie*, 12 Can. Cr. Cas. 435, 41 N.S.R. 178. It is not necessary that there should be a trial *de novo*, similar to that upon an appeal, for the purpose of fixing an appropriate punishment. Ibid.

The Judge hearing an appeal from a summary conviction has a statutory power to "modify" same or to make such "other conviction or order" as he thinks just, Cr. Code sec. 754. These

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powers are specially referred to in Part XXII. of the Code, and are made applicable to certiorari process as regards the amendments which a Court hearing a certiorari motion is authorized to make upon the depositions returned.

Section 1124 of the Criminal Code, 1906, provides *inter alia* as follows:—

1124. No conviction or order made by any justice, and no warrant for enforcing the same, shall, on being removed by certiorari, be held invalid for any irregularity, informality or insufficiency therein, if the Court or Judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence: Provided that the Court or Judge, where so satisfied, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section 754 conferred upon the Court to which an appeal is taken under the provisions of section 749.

By sec. 797 (2) (amendment of 1913) the provisions of sec. 1124 also apply to convictions or orders made under the provisions of Part XVI. This supersedes in part the decisions in *R.* v. *Shing*, 17 Can. Cr. Cas. 463, 20 Man. R. 214, and *R.* v. *Stark* (1911), 19 Can. Cr. Cas. 67, 18 W.L.R. 419 (Man.) to the effect that convictions under Part XVI. (summary trials for indictable offences) must stand or fall on the regularity or irregularity apparent on the proceedings, and that part of the decision in *R.* v. *Spooner*, 4 Can. Cr. Cas. 209, 32 Ont. R. 451, leading to the like inference upon the construction of the section before the amendment. See also *R.* v. *Randolph*, 4 Can. Cr. Cas. 165, 32 Ont. R. 212.

A conviction made by a magistrate under the summary trial provisions of the Criminal Code, is not in the same position as a conviction made by the sessions, and may be amended by the magistrate before the return to a certiorari. *Rex* v. *Graf*, 19 O.L.R. 238, 15 Can. Cr. Cas. 193.

If the conviction was removed under a procedure substituted by rule of Court for the common law procedure by writ of certiorari and motion to quash, the conviction may still be said to have been "removed by certiorari" in the words of sec. 1124. *R.* v. *Jackson*, 40 O.L.R. 173, at 188, per Meredith, C.J.C.P.

The Court under sec. 1124 has power to modify any illegal excess in the amount of punishment, if satisfied from a perusal

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of the depositions that the offence was committed. *R.* v. *Spooner*, 32 Ont. R. 481; *R.* v. *Gavin*, 1 Can. Cr. Cas. 59, 30 N.S.R. 162; *R.* v. *Rudolph*, 17 Can. Cr. Cas. 206, 1 O.W.N. 257.

Costs will not usually be ordered against the defendant applying to quash a summary conviction if the Court thereupon amends the conviction by reducing a sentence in excess of the statutory limit, although other objections to the conviction were overruled. *R.* v. *McGuire* (1908), 13 Can. Cr. Cas. 313.

Sec. 1124 has been held to give the Court power to amend as to items of costs illegally imposed by the magistrate because not warranted upon a summary conviction, by providing that the defendant is to pay only the proper costs. *R.* v. *Code*, 13 Can. Cr. Cas. 372, 1 S.L.R. 295.

The intention of the section is to prevent a guilty person escaping just punishment for an offence actually committed; to prevent such a person escaping upon any question of formality, regularity or sufficiency in the conviction, order or warrant of commitment. *R.* v. *Jackson*, 40 O.L.R. 173, at 188, per Meredith C.J.C.P.

Under Cr. Code sec. 1124 the Court may, on certiorari, adjudicate *de novo* on the evidence given before the magistrate, if the conviction would otherwise have to be quashed as irregular, but the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate. *R.* v. *Whiffin* (1900), 4 Can. Cr. Cas. 141, 3 Terr. L.R. 3; *Ex parte Nugent* (1895), 1 Can. Cr. Cas. 126.

Even after the magistrate has delivered to the defendant a copy of the conviction, etc., he is not thereby precluded from drawing up and returning a conviction in a formal shape, which is to be taken as the only authentic record of the proceedings; for the conviction returned is the only one of which the Court can take notice. *R.* v. *Allan*, 15 East 333, 346; *R.* v. *Huntington*, 5 D. & R. 588; *Basten* v. *Carew*, 5 D. & R. 558, 3 B. & C. 649. The Court gives credit to the magistrates for the truth of the facts recorded in the conviction, but it will hold them punishable for making a false statement. *Rex* v. *Allen*, 15 East 333, 346; *Reg.* v. *Simpson*, 10 Mod. 382. The remedy for a false return is by action on the case at the suit of the party aggrieved, or by criminal information. Paley on Convictions, p. 378.

The conviction may be amended whether brought up by certiorari in aid of habeas corpus, or on motion to quash the conviction. So, where the defendant was convicted of an offence under the Indian Act and was ordered to be imprisoned therefor for the maximum period permitted by the statute, viz., six months, and was also fined $50, to be levied by distress, followed by im-

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prisonment for six months in default of sufficient distress, the Court may amend the latter by changing it to imprisonment for the further term of three months only and for non-payment simply, unless the fine and costs ascertained by the order be sooner paid. *R.* v. *Murdock* (1906), 4 Can. Cr. Cas. 82, 27 A.R. (Ont.), 443.

The particular Acts constituting the offence found may be included by an amendment under sec. 1124 where these are required to make a good conviction under the particular statute and the evidence proves them. *R.* v. *Schilling*, 23 Can. Cr. Cas. 380, 21 D.L.R. 60, 8 S.L.R. 70; *R.* v. *Coulson*, 1 Can. Cr. Cas. 114; *R.* v. *Harris*, 13 Can. Cr. Cas. 393.

A conviction which varies from the minute of adjudication in omitting to provide for the payment of the costs and charges of the distress, in the event of the defendant being imprisoned for non-payment, may be amended if the costs of the distress are not in the discretion of the magistrate. *Ex parte Conway* (1892), 31 N.B.R. 405.

The mere omission to state scienter of the accused will not invalidate a conviction if the Court upon perusal of the depositions is satisfied that an offence of the nature described in the conviction has been committed. *R.* v. *Crandall* (1896), 27 Ont. R. 63; and see *Ex parte Daigle*, 18 Can. Cr. Cas. 211, 37 N.B.R. 492.

But the omission of the word "knowingly" from both the information and the conviction in a prosecution under the Alien Labour Statutes is a matter of substance and not a mere matter of form, and the defect is not curable upon certiorari as an "irregularity, informality or insufficiency" under Code sec. 1124. *The King* v. *Hayes*, 6 Can. Cr. Cas. 357, 5 O.L.R. 198.

Where it does not appear upon the face of the conviction that the offence was committed within the territorial jurisdiction of the convicting justices but it is clear upon the depositions that such was the fact, the defect will be cured by section 1124. *R.* v. *Perrin* (1888), 16 O.R. 446. *Aliter*, if the evidence did not shew it. *R.* v. *Young*, 5 Ont. R. 184; *R.* v. *Aikins*, 23 Can. Cr. Cas. 467, 21 D.L.R. 633, 48 N.S.R. 509.

But the powers of amendment conferred by this section do not apply where there is an inherent defect in procedure which has deprived the accused of a fair trial, ex gr., a view of the locus in quo taken by the magistrate in the absence of the parties. *Re Sing Kee* (1901), 5 Can. Cr. Cas. 86, 8 B.C.R. 20.

To authorize the amendment of a conviction under section 1124 the Court or Judge must from the depositions be satisfied that, if trying the defendant in the first instance, the Court or Judge would have convicted upon that evidence. *R.* v. *Herrell* (1898), 1 Can. Cr. Cas. 510, 12 Man. R. 15.

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It is essential in a conviction of a sailor under the Canada Shipping Act for continued wilful disobedience to state that the act charged was wilfully committed and the omission to do so is fatal to the validity of the conviction. The defect is not cured by stating the offence in the conviction to be "unlawful" disobedience. *R.* v. *Bridges* (1907), 12 Can. Cr. Cas. 548, 13 B.C.R. 67.

Where both fine and imprisonment were imposed in a conviction removed by certiorari, there is no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. *R.* v. *Foster*, 7 Can. Cr. Cas. 46, 5 O.L.R. 624; and see *R.* v. *Carlisle*, 7 Can. Cr. Cas. 481.

Where an excessive term of imprisonment has been imposed upon a plea of guilty at a summary trial of an indictable offence, the plea is not equivalent to a "deposition" for the purposes of reducing the sentence in *certiorari* proceedings by an amendment of the conviction; the latter must, therefore, be quashed where the punishment is excessive and there are no depositions from which the Court may, in the terms of Cr. Code, sec. 1124, satisfy itself that an offence of the nature described has been committed. *Rex* v. *Alexander*, *Rex* v. *Shouldice*, 21 Can. Cr. Cas. 473, 13 D.L.R. 385, 6 A.L.R. 227.

The award of costs to the owner of the dog on whose behalf his wife had laid the information instead of to the informant in a summary conviction matter, is a mere irregularity which is cured by sec. 1124 of the Code, *Ex parte Grey*, *R.* v. *O'Brien*, 12 Can. Cr. Cas. 481, 37 N.B.R. 604, 2 E.L.R. 68.

The fixing of the time or times for punishment by whipping ordered to take place during the convict's term of imprisonment is left by Cr. Code sec. 1060 in the discretion of the prison surgeon under whose supervision the whipping is to be done; and it is an excess of jurisdiction on the part of a magistrate holding a summary trial to order in the sentence that ten lashes be imposed six weeks after imprisonment and ten lashes six weeks before expiration of the term of six months imprisonment imposed; but the Court hearing a *habeas corpus* application may amend the conviction under Cr. Code sec. 1124 by imposing the proper sentence where satisfied of the offence.

Rex v. *Boardman*, 23 Can. Cr. Cas. 191, 18 D.L.R. 698, 9 A.L.R. 83.

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MAHONEY v. CITY OF GUELPH.

Ontario Supreme Court, Clute, J. December 1, 1917.

MUNICIPAL CORPORATIONS (§ II C—217)—OPERATIONS AUTHORIZED BY BOARD OF COMMISSIONERS—NEGLIGENCE OF ENGINEER IN CARRYING OUT WORK—INJURY TO MEMBER OF BOARD—DAMAGES.

Negligence on the part of the city engineer in carrying out blasting operations, authorized by the board of commissioners, does not render the city liable for personal injuries received by a member of the board, who was one of those in charge of the work who knew of the danger and took the risk, although the city would be liable for injuries to a stranger.

Statement.

ACTION for damages for personal injuries caused by the explosion by the defendants of dynamite in a cement-dam on the river Speed, with the object of blowing out a portion of the dam to save the bridge over the river from danger by flooding.

Sir *George Gibbons*, K.C., *W. E. Buckingham*, and *V. H. Hattin*, for the plaintiff.

I. F. Hellmuth, K.C., and *P. Kerwin*, for the defendants.

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CLUTE, J.:—This action is brought by the plaintiff, the Mayor of the City of Guelph, for damages alleged to be caused by an explosion of dynamite in a cement-dam on the river Speed, with the object of blowing out a portion of the dam to save the bridge over the river, which was endangered from flood at the time.

The defence in substance is, that the plaintiff at the time was *ex officio* a member of the Board of Commissioners duly elected under a by-law of the city, pursuant to an Act respecting the City of Guelph, 1 Geo. V. ch. 90. This Act provides (sec. 4) that the city council is authorised to pass a by-law to place certain matters in the hands of such Commissioners as may be elected pursuant to sec. 554, sub-sec. 1 *a*, of the Municipal Act, 1903, and subject to the approval and the assent of the ratepayers as provided by the Municipal Act, 1903.

By-law 883 was duly passed in 1911 and approved by the electors on the 1st January, 1912. Among the matters authorised by the Act to be submitted to the Commissioners are:—

(1) To consider and report on all matters relating to thoroughfares and bridges.

(4) To instruct the engineer in the discharge of his duties with respect to streets, thoroughfares, and bridges, and to report to the council from time to time on all matters connected with the performance by the engineer of his duties in the matters aforesaid.

(6) To expend the moneys appropriated by the council for thoroughfares, bridges, etc., and the maintenance and improvement thereof.

(7) To have charge of the execution and the carrying out of all works in connection with highways and bridges authorised by the council and the expenditure of all moneys appropriated by the council for the said purposes.

The above by-law recites the Act and specifies clauses 1 to 8 of sec. 4 inclusive, and enacts that there is placed in the hands of the Commissioners, pursuant to sec. 4, all matters concerning the said works of the City of Guelph set forth in such section. It further declares that the rights, powers, authorities, and immunities conferred upon the Corporation of the City of Guelph by statute, both with respect to the sewerage system and the city works set forth in sec. 4, shall be exercised and enjoyed by a Board of Commissioners to be called "The Board of Commissioners of Sewerage and Public Works," which Board shall consist of three Commissioners, of whom the head of the council shall *ex officio* be one, and the other two members shall be elected and shall hold office under the provisions of the said Act and amendments applicable thereto. A further by-law was put in appointing the said engineer; and a by-law to provide for the election of the Commissioners under the Act. The Commissioners were duly elected and the Board constituted for the year 1916.

The plaintiff was elected Mayor by the City of Guelph for the year 1916. On the 31st March of that year, the river Speed, which flows through the city, was in flood, and the engineer of the city reported to the Board, all being present, that there was danger of the bridge being carried away unless some remedy was obtained. This danger had appeared for several days, and an attempt was made to protect the piers of the bridge, but this proved insufficient, and a crack had appeared in the pier of the bridge caused by the flood. The engineer recommended that an additional part of the dam be blown out by dynamite, a portion already having been carried away by the flood, in order to divert the water from the pier. He thereupon received instructions from the Board to carry into effect his report. The occasion was urgent, and there was no time to have a formal meeting of the council; the bridge was in imminent danger of being carried away.

The engineer thereupon procured men accustomed to handle dynamite to carry out this order of the Board. A certain amount of water was flowing over the dam, and the men, to carry out the

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work, had to approach the dam by boat, let down by ropes from a point above the dam.

About three or four inches of water was at this time flowing over the dam, and a large volume through the opening of that portion of the dam already carried away.

The first charge was placed in the apron of the dam without much effect. A second charge was placed near the top of the cement-dam at an angle from the top on the other side. All this had occupied several hours; and, although the work was commenced in the morning, it was not until after 2 o'clock in the afternoon that the second discharge took place.

When the shot was ready, notice was given (it is said from 50 to 100 people had assembled out of curiosity, and among these the three members of the Board). The other two members of the Board declared that they were present because of their position as members of the Board. The plaintiff says that he was there merely from curiosity, and took no part in the work, but I do not think that this is entirely correct. His curiosity may have taken him there, but, being there, the engineer told him to take charge of the crowd at one end of the bridge, and he (the engineer) would take charge of the crowd at the other end, in order to put them back to a safe distance from the point of explosion. I find that the plaintiff acted upon the suggestion of the engineer, and that he did tell the crowd to remove to a distance of about 175 feet from the point of explosion, and that he and the crowd on that side of the river remained there, the people on the other side removing to about the like distance. The men in charge of the operation called out, after this was done, "All ready," and the engineer indicating that all was ready the shot was fired.

A piece of cement from the dam, about 4 or 5 inches in diameter, struck the ground just near where the plaintiff was standing, and struck him on the leg below the knee, breaking both bones and seriously injuring him. He was the only one hurt. He was confined in the hospital for twenty days, when he was removed to his own home, where he was in bed for six weeks, and was unfit for work for several months thereafter. He did not go to his place of business the first or second week in February, nor take much interest therein, although he was consulted from time to time by his partner. I think it may be taken as a fact that he could do

nothing in the way of work until after February, and from that time on he gradually did more and more work. He is a plumber by trade, and his leg is still in such a condition that he is not able to do the work at his trade he could do before. No doubt, his business was also seriously affected by his absence, although he had a partner. He says his money loss is from $1,500 to $1,800. He intends to make an allowance to his partner, and says that he cannot do by 40 per cent. as much as he could do before the injury. He "interferes" when walking, from injury to the foot, which is turned in, the circulation of the leg is still defective, and it swells and enlarges an inch every day that he is working. He still suffers some pain, which seriously affects his sleep.

The plaintiff was upon a highway within the city when he was injured. A good deal of evidence was given as to the proper method and care to be used in the case, the plaintiff taking the position that the danger could have been entirely avoided by properly covering the portion of the dam where the explosion was to take place. The defendants' engineer and other engineers and persons, more or less experienced in the use of explosives, contended that, having regard to the position in the river and the water flowing over the dam, it was impossible to cover the dam where the explosion was to take place so as to make it safe.

I accept the evidence of the plaintiff's witnesses, and particularly that of John E. Russell, of Toronto, contractor, who has had over twenty years' experience in the use of high explosives. He says: "Our first precaution is to drive people away; we drive them out of sight 400 or 500 feet every time we shoot; we drive the people away before we attach the wires; we adapt ourselves to the occasion." He also uses a cover; he thinks it could have been successfully used in the present instance, by putting planks on the walls and holding them down with stones or sand. He said: "I would have covered it up; could do it in half an hour or an hour or two; the water would have rendered it a little difficult, but we would not have stopped at that."

I am of the opinion, having regard to the location where the dynamite was being used being near the highway, and the nature of the explosive called "Racka-Rock," that extra precaution and care should have been taken to protect any persons passing on the highway from injury. This should have been done either by seeing

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that the people were removed to a proper distance, or that the place was properly covered and protected, or both: see *Citizens' Light and Power Co.* v. *Lepitre* (1898), 29 S.C.R. 1.

The defendants' witnesses, including their engineer, swore that the people were removed to a safe distance, but this is obviously not so. Pieces of rock flew over the tops of the trees beyond the point where the plaintiff was hurt. Had a stranger been passing along the highway, and been injured on this occasion from the explosion, I entertain no doubt that the defendants would have been liable for negligence for having caused or permitted such injury without due care and protection. Is the plaintiff in the same position as a stranger? I think not; he was a member of the Board; he was present, I think, as a member of the Board, as well as from curiosity, if that makes any difference. At all events he was there; and I find as a fact that, at the instance of the engineer, he requested the people to move back from the danger-area. He therefore knew there was danger, and exercised his own judgment where he would go to be free from that danger. In other words, in that sense he took the risk, believing that he was in safety where he was at the time of the injury.

He, as a member of the Board, authorised this work to be done, and was present when it was done. It is true that the work was in charge of the engineer. Under the Act, sec. 4 (7), the Board is "to have charge of the execution and carrying out of all works connected with . . . highways and bridges authorised by the council." It is said that here the work was not authorised by the council. I think that the Board was impliedly authorised to take such immediate action as was necessary for the preservation of the bridge; but, whether authorised or not, they assumed that responsibility, and therefore their liability would not be lessened. He then, as a member of the Board, was in charge of the execution and carrying out of this very work, and he was present. The corporation as such were bound to take all necessary care; but, having the matter immediately in hand, as a member of the Board, he was bound to see that that care was taken. It is no answer for him to say that the engineer alone is responsible for the manner of carrying out the work. The plaintiff, as a member of the Board, had charge of the execution and the carrying out of the work; and, being injured by reason of that want of care and protection, he became

the victim of his own negligence in the sense, not that he had full knowledge of the risk which he ran, in the place where he was at the time of the accident, but that from his position and overcharge of the work he cannot take advantage of the oversight or negligence of a person who is subject to his authority, and thereby render the defendants liable.

The following cases were cited, but none directly in point:—

For the defendants: *McDougall* v. *Windsor Water Commissioners* (1900), 27 A.R. 566, affirmed (1901) 31 S.C.R. 326; *Fairweather* v. *Owen Sound Stone Quarry Co.* (1895), 26 O.R. 604; *Woods* v. *Toronto Bolt Forging Co.* (1905), 11 O.L.R. 216; *Jackson* v. *Hyde* (1869), 28 U.C.R. 294; *Schwoob* v. *Michigan Central R.W. Co.* (1905), 9 O.L.R. 86, affirmed 10 O.L.R. 647; *Guelph Worsted Spinning Co.* v. *City of Guelph* (1914), 30 O.L.R. 466.

For the plaintiff: *Cope* v. *Sharpe*, [1912] 1 Q.B. 496; *Citizens' Light and Power Co.* v. *Lepitre*, 29 S.C.R. 1; *City of Montreal* v. *Gosney* (1903), Q.R. 13 K.B. 214.

In case my view of the defendants' non-liability should be held erroneous by another Court, I assess the plaintiff's damages at $1,100.

Action dismissed. It is not, I think, a case for costs. No order as to costs.

REX v. VAN FLEET.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Simmons and Hyndman, JJ. May 23, 1918.

1. INTOXICATING LIQUORS (§ III I—91)—ORIGINAL INFORMATION—AMENDMENT OF—CHANGING DATE AND INFORMANT.
A conviction under the Liquor Act (Alta.) is not invalidated, by amending the original information before any evidence is taken, by changing the date of the offence, and changing the informant to another constable who swears to the information as amended.
[*Rex* v. *Chew Deb*, 9 D.L.R. 266, distinguished.]

2. INTOXICATING LIQUORS (§ III J—94)—CONVICTION OF MAGISTRATE FOR SECOND OFFENCE—NO EVIDENCE TO SUPPORT FINDING—AMENDMENT OF CONVICTION.
The court may amend the conviction, so as to impose only the penalty for a first offence, where there is no evidence to support the finding of the magistrate that the accused had been previously convicted under the Liquor Act.

Statement.

APPEAL by the defendant from an order made by Harvey, C.J., refusing to quash a conviction made by a police magistrate. Affirmed.

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G. E. Winkler, for appellant; *J. F. Lymburn*, for respondent.

The judgment of the court was delivered by

STUART, J.:—The conviction, in its material parts, reads as follows:—

For that he the said Eugene Van Fleet between the 8th and 14th July, 1917, at Edmonton in the said province, did unlawfully permit or suffer drunken persons to meet on the premises of the Pendennis Hotel in the said city of which he is the tenant or occupier contrary to the Liquor Act of the said province, sec. 36. And the informant further states that this is the second offence of the said Eugene Van Fleet he having on the 23rd day of May, 1917, been convicted in the Police Court of the City of Edmonton of an offence against the said Act and been fined $60 and costs. And I adjudge the said Eugene Van Fleet for his said offence to forfeit and pay a fine of two hundred dollars and to pay to the informant James R. Irvine the sum of two dollars and ten cents as his costs in that behalf and in default of payment forthwith of the said fine the said Eugene Van Fleet to be imprisoned in the Prison Farm near Edmonton for the term of two months.

A number of objections were taken to the conviction before the Chief Justice, some of which are not continued on this appeal. Before us the first point raised was that the original information was sworn on June 13, 1917, by one Daly, a constable, and alleged the period between the 9th and 12th of July as the time of the offence, that the accused was brought before the magistrate on several occasions and properly remanded, but that on June 26 the information was amended by alleging the period between the 8th and the 14th of July as the date of the offence and by changing the informant from constable Daly to constable Irvine, the latter then swearing to the information as amended. It was contended that this was irregular, that the Daly information should have been dealt with and dismissed before anything was done under the Irvine information, and that if this had been done, the accused would have had a certificate of dismissal and so would, in the circumstances, have been enabled to plead *autrefois acquit*. The Chief Justice rejected this contention and I think properly so. As he points out, the case of *Rex* v. *Chew Deb*, 9 D.L.R. 266, 18 B.C.R. 23, is quite distinguishable. All the evidence had then been taken in the case, and of course the accused was entitled to demand a disposition of the case. Here it appears that constable Daly was not available when the necessity or desirability for an amendment of the dates appeared and so another constable swore to the information as amended. I think it is erroneous to treat the matter as if there were two separate informations. A single

document was used. The change in the dates was not really a change but an extension. The original period was included in the period alleged by the amendment. Under s. 710 (4) of the Code: "Every complaint or information may be laid or made by the complainant or informant in person or by his counsel or attorney or other person authorized in that behalf." Even if we consider Daly as being still an original informant, I think the circumstances were such that Irvine could properly be treated as being authorized to assert the amendment on Daly's behalf. S. 710 (2) says that the information does not need to be under oath, in any case. It is admitted that these two men were police officers but that, when the 26th June came, Daly had left the service. If they had been private individuals, not charged with official duties, there might be something else to consider but, in the circumstances, it was, I think, quite competent for Irvine to step into Daly's place and swear anew the original information as amended.

The other objection urged before us was that there was no proper evidence to support the conviction of a second offence, as such, and that, therefore, the whole conviction must fall to the ground. The Chief Justice agreed that there was no evidence to support the finding of a second offence or rather that the accused had been previously convicted under the Liquor Act, but he did not consider this fatal to the entire conviction. He ordered that it be amended so as to impose only the penalty for a first offence. Against this latter decision, the defendant has appealed.

In my opinion, it was perfectly correct to amend the conviction as it was amended instead of quashing it altogether. A charge that a person has committed an offence under the Liquor Act with the added allegation that he has previously been convicted of an offence against the Act, is not some special kind of individual offence of which the accused must be found guilty *in toto* or absolutely acquitted. Each offence against the Act is, so far as the offence itself is concerned, upon the same footing; but for the purpose of imposing a proper punishment, provision is made for alleging and proving that a previous offence had been committed. Clearly, if the latter, though alleged, is not shown, it merely means that no more than the punishment for a first offence can be imposed. The enquiry into the allegation of a previous conviction is not to prove any special kind of offence, but to

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establish aggravated circumstances in which under the Act an increased penalty may be imposed.

Therefore, assuming the Chief Justice to have been right that there was no proper evidence that a previous offence had been committed, he was, in my opinion, quite justified, under ss. 62 and 63 of the Act in refusing to quash the conviction entirely, and in reducing the penalty.

The question as to whether there was proper proof of a previous conviction is, therefore, one that we need not consider, inasmuch as the prosecution is content with the result arrived at and has not cross-appealed. The matter depends evidently upon certain questions as to what was said and done before and by the magistrate, and by him also in making up his record and his return, which are by the documents before us and by the statement of counsel left in some uncertainty, at any rate as to time. Into these questions it is unnecessary to enquire because it would not affect the result.

It may also be added that an exact reading of the conviction does not shew that the magistrate found that a previous conviction had been shewn. It merely says that "the informant further *states* that this is the second offence." Perhaps the words following are, by a stretch, capable of being interpreted as an adjudication by the magistrate, but it does not appear to me that, fairly read, they can be said to contain anything more than an allegation of what the informant stated. Evidently the information was too strictly followed in drawing up the conviction at this point. In this view, the whole reference to a second conviction is nothing more than surplusage, which, however, led to the imposition of an excessive penalty. On this view of the matter, also, I think the proper course was to amend the conviction by expunging the reference to a previous offence and by reducing the penalty.

The appeal, therefore, should be dismissed with costs.

Mr. Justice Simmons authorizes me to say that he concurs in the views I have expressed.

Appeal dismissed.

WILLIAMS v. KEELER.

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Manitoba King's Bench, Metcalfe, J. May 29, 1918.

MASTER AND SERVANT (§ II A—67)—ORDINARY RISKS OF WORK—DUTY OF MASTER—SAFETY AS TO APPLIANCES.

A servant assumes the usual and ordinary risks of his work and a master is not liable for injuries to such servant caused by horses with which he was working taking fright, if the horses are ordinary work horses and there is no evidence that the master knew them to be vicious or given to running away.

ACTION to recover damages for injuries caused by horses attached to a gang plow becoming frightened and running away. Statement.

P. C. Locke, for plaintiffs.

G. R. Coldwell and *H. C. Henderson*, K.C., for defendants.

METCALFE, J.:—Cooper Williams, by his father W. L. Williams as next friend, and W. L. Williams, as the father, sue the defendant for personal injuries caused to Cooper Williams by a 5-horse team attached to a gang plow, which he was operating, while in the employ of the defendant, a farmer, residing near Lauder. Metcalfe, J.

For some time prior to the spring of 1917, Cooper Williams had resided with his father at the City of Winnipeg. He had no experience in farming, having spent his boyhood in the city schools, and in some occupation in the Grain Exchange where for about a year and a half he had been earning from $50 to $60 per month, a part of which he, from time to time, gave to his mother.

Thinking he would like some outdoor employment, in the spring of 1917, being then 18 years of age, he, of his own free will, left his employment and proceeded to Hartney, Manitoba, where he received employment from his uncle, at $1.50 a day and his board, his uncle's business being that of driving about and scrapping iron.

Cooper Williams and his uncle proceeded with a team of "bronchos" to drive about on their business, in the course of which they stayed overnight at the defendant's farm, where a younger brother, Lloyd Williams, had, for about a month, been in the employ of the defendant, as a farm labourer, driving horses and using plows, and other machinery commonly used on a farm in the springtime. A few days later, one of the defendant's men left, and Lloyd Williams having given satisfaction and wishing to have his brother with him, Keeler arranged with the uncle that Cooper Williams should come to him, try the work for a time, and, if satisfactory, he was to receive a man's wages.

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Cooper Williams went to the defendant's farm. As a matter of fact, outside of his experience with his uncle in driving the "bronchos," he had no experience with horses. These "bronchos" had once run away with him and thrown him out, but he held on to the lines and eventually controlled them. He was big for his age, and strong.

The first morning that he was at the farm, the defendant helped him to harness his horses, and then the boys went off together, each with his separate 4-horse teams to do their farm work.

Prior to this, Lloyd Williams had become thoroughly acquainted with the farm work, was abe to quickly and correctly harness and unharness his horses, and had used successfully the packer, the harrow and the gang plow.

The farmer did not instruct Cooper Williams as to his work, no doubt thinking, if he thought of it at all, that by this time Lloyd Williams would see that his brother did the work properly. In any event, there were no direct instructions either as to the work or as to any danger.

For two days Cooper Williams continued to use the packer without difficulty or trouble. At noon on the third day he was instructed to take the 4 horses and another horse, making a 5-horse team, to hitch them to a gang plow, and to follow Lloyd, who was already plowing in the same field. The two boys thereupon taking Lloyd's 5-horse team to the plow, untied Lloyd's plow team, which had been tied thereto, and hitched Cooper's horses. Cooper then got on the plow seat and drove over to the rear of Lloyd's plow which was already in the ground; here for about 5 minutes he says he awaited Lloyd's hitching up, so that when Lloyd would proceed he could swing in behind, and simply follow him around the field.

He says that while he was waiting, the horses became restive; that he got off his seat on the gang plow, wrapped the lines around the seat and went to the head of the centre horse to try to quiet them. In the meantime, Lloyd had passed, and his horses having overstepped the front of his plow he had some delay in getting hitched up, during all which time Cooper says he remained at the head of the horses.

In the meantime, a motor car had come along the road, which

passed a short distance from the plow. Just as the motor car got opposite Cooper's horses, they ran away, knocking him down; the plow passed over him, and he received serious injury, from which he was wholly incapacitated for about 6 months; he no doubt suffered great pain. Lloyd did not see the accident.

McDowell, the driver of the motor car, says he thinks that as he came opposite the plow, the horses were standing, and that a man was in front of them; that they started to run and ran over the man; and that he immediately stopped his car, after which he went for the doctor.

Harvey Shillington says he was in his own field about 400 yards from the accident and that he saw Cooper Williams go forward from his own team to Lloyd's plow about 20 yards ahead; that when the team started to run, Cooper ran back, grabbed at the horses and was run over.

John Shillington says that the morning after the accident he was in conversation with Cooper who told him that Lloyd had a little trouble hitching his team; that he had gone to help him; that a motor came and frightened the team; that the team started up and he ran back to stop it; that he had been foolish, and that he knew it now and he did not blame Mr. Keeler, but that he should have known enough to go behind the horses.

Cooper Williams, on being recalled, said that he made no such statement to John Shillington. He admitted that John Shillington did have a conversation with him the following morning, but denied positively and categorically the statements of John Shillington as to leaving his team, and as to his being foolish, and not blaming Keeler; he still stoutly maintained that he never left the head of his team.

In the face of this contradictory evidence, I am in no way assisted by the demeanour of the witnesses.

The main claims of negligence are as follows: (1) That the horses were unbroken, or improperly broken, and were vicious, and given to running away, of which Cooper Williams was unaware, but of all of which the defendant was well aware; (2) lack of instruction; (*a*) in the use and management of the gang plow; and (*b*) to tie a wheel so as to act as a brake on the plow and thus prevent the whiffletree hitting the horses' heels while driving over to Lloyd's plow.

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Dealing with lack of instruction first, the plow is not a dangerous machine unless one remains in front of it while in motion forward. Counsel for the plaintiff has cited cases dealing with dangerous plants, manufacturing, mining, etc., but I do not think the cases cited apply to these circumstances. While the boy was inexperienced in farming, yet he appeared unusually apt and intelligent. While working with the plow, he was to be with his brother, who by this time had become well instructed. Under all the circumstances, I do not think the farmer is liable for lack of instruction.

As to tying the wheel, there was only a short distance to go. I am not satisfied that it was necessary. In any event, the horses, before they ran away, were standing for about 5 minutes.

I can recall no evidence from which I should infer that the horses were not properly broken.

There remains only the claim that the horses were "vicious and given to running away."

At common law the master's duty to his servant is just the same that he owes to every other person with whom he has business relations. He must not *conceal* from him any dangerous circumstances, which, if known, might cause him to alter his position, nor personally be negligent in any way.

There are two presumptions: (1) That the master has discharged his duty by providing suitable appliances; (2) that the servant has assumed all the usual and ordinary hazards of the business. Beven on Negligence, vol. 1., p. 609.

Horses not "vicious" do sometimes run away. The team of "bronchos" had run. I must hold that the boy either knew or ought to have known that even farm horses might run, if sufficiently encouraged or frightened, and that, in front of a 5-horse team attached to a gang plow, was a bad place to be when the running started. A horse is a suitable "appliance" and is not naturally vicious or dangerous. I think the presumption in the farmer's favour and that the onus is on the plaintiff.

No cases on the application of the general principle to the business of agriculture were cited.

A vice is a bad *habit*. To be dangerous the vice should be shewn in the temper of the horse: Oliphant, Law of Horses, p. 65.

It is well settled that a master is liable for any resulting in-

juries where he furnishes one of his servants with a horse which he knows to be vicious provided the employee does not know and is under no obligation to know of the animal's viciousness.

See notes to *Arkansas Smokeless Coal Co.* v. *Pippins*, 19 A. & E. Annot. Cases, at 863. The 11 cases cited in support of the note all deal with cases of personal injury inflicted by horses and mules kicking. and where there was evidence to go to the jury that the horses and mules were habitual kickers. See also exhaustive note, 44 L.R.A., at p. 33; also 41 L.R.A., at p. 33.

Here the horses were ordinary farm horses of the Clydesdale breed. While there is evidence that 4 of these horses had at one time "run away" I do not think that the evidence is such as to place them in the vicious class in the sense above indicated. See *Cooper* v. *Cashman*, 3 L.R.A., N.S. 209 (Mass.), citing *Eastman* v. *Scott*, 182 Mass. 192; 64 N.E. 968, and *Arkansas* v. *Pippins*, *supra*, and the cases cited in the notes thereto.

I have great sympathy for the plaintiffs. The boy must have suffered great agony. The father is a poor man and upon him must rest all the expense of hospital and medical treatment.

There will be judgment for the defendant. I think justice will be done if I allow no costs. *Judgment for defendant.*

REX v. FIOLA.

Quebec Sessions of the Peace, Langelier, J.S.P. January 18, 1918.

SEDUCTION (§ II—7) — PREVIOUSLY CHASTE CHARACTER — CR. CODE SECS. 211, 212.

"Previously chaste character" of a girl, as it concerns the offence of seduction (Cr. Code secs. 211 and 212), is not limited in its meaning to the physical condition of virginity, and notwithstanding that condition at the time of the alleged offence it may be shewn in defence of the charge by her admissions or otherwise that the girl had previously committed acts of gross immorality with a man and had exhibited a disposition for lewdness.

Statement.

TRIAL of a charge of seduction of a girl between fourteen and sixteen years of age under Cr. Code, sec. 211.

Arthur Lachance, K.C., and *Arthur Fitzpatrick*, for the Crown.

J. A. Lane, K.C., for the accused.

Langelier, J.

LANGELIER, J.:—The accused are prosecuted in virtue of sec. 211 of the Criminal Code for having, on the 17th September last, seduced Yvonne Collier of the age of more than fourteen years of a previous chaste character.

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Let us first state what is the jurisprudence in this matter.

One of the essential ingredients of the crime consists in the prosecutrix having a previous chaste character. The doctrine is clearly laid down in vol. 25 Am. & Eng. Ency., p. 240, sec. 7:—

Where chastity is an essential element of a criminal offence, as in case of seduction, such chastity, like other elements of the offence, should be proved by the prosecution in the first instance.

What is meant by *previous chaste character?*

We have to be guided by our own jurisprudence and the one adopted in the United States Courts, because in England seduction does not exist in criminal law.

And before all, what is chastity? Here is the definition I find in Larousse's Great Dictionary :—

"Chastity is a virtue which makes one abstain from the prohibited carnal pleasures and repel even the thought of it.

"Purity is the most perfect chastity.

"As far as the three words *honour, wisdom, virtue* are applicable to woman, *honour* supposes the determination to remain estimable to the eyes of the world; *wisdom* brings the idea of prudence with which a woman must avoid the dangerous occasions; *virtue* suggests the courage with which a woman shall resist the seducer's attacks."

In certain States it has been decided that so long as the prosecutrix was a virgin, *virgo intacta,* at the time of the offence, she was entitled to the protection of the law, even if her moral conduct had not been without reproach. But the jurisprudence now settled in the United States is to the effect that the defence is allowed to prove that the prosecutrix has committed lascivious acts and has a disposition for lewdness. This is found in vol. 25 Amer. & Eng. Ency., p. 240, sec. (*b*).:—

"In a trial for seduction, it is proper for the jury to take into consideration any evidence tending to show that the woman was of a lewd disposition or lascivious nature, this evidence being material in determining the question whether she was or was not in fact virtuous at the time of the alleged seduction, and similarly any act or statement made by the prosecutrix which tends to show the want of virtue would be admissible."

Wigmore On Evidence, in vol. 1, p. 254, says:—

"Where the statute applies to women of '*chaste character,*' does

this signify the actual inward character or disposition? If so, particular acts of unchastity are certainly relevant to disprove this actual character. Although the objection of unfair surprise is here as elsewhere a serious one, the practical necessity for resorting to this kind of evidence, and its cogency if believed, are perhaps greater than in any of their kindred topics. *Accordingly it is generally conceded that such instances may be offered by the defendant.*"

After having quoted a number of judgments Wigmore adds, p. 255:—

"In the first and third cases preceding, does a '*chaste character*' mean merely the *physical condition of virginity* or does it signify the moral disposition to be chaste? If the former, then nothing short of intercourse would be relevant. . . . The latter interpretation is generally accepted."

At the same page Wigmore cites the opinion of Judge Smith in a case of *Polk* v. *The State*:—

"In every prosecution for seduction, the character of the seduced female is involved in the issue; and character means in this connection, not her general reputation in the community, but the possession of actual personal chastity. . . . . the Legislature never intended to send a man to the penitentiary for having had illicit connection with a prostitute or a woman of *easy virtue* where she had consented, even under promise of marriage."

In the American and English Annotated Cases, vol. 19, p. 446, are two interesting decisions on the matter. In a case of *André* v. *The State*, the Courts said:—

"We suppose the word character was designed to have its proper force, and that according to its true signification. If the statute is understood to require actual chastity, then, a woman of lewd conversation and manners, guilty of lascivious acts, and of indecent familiarity with men, is an object of its protection equally with one who is pure in mind and manners; and all the presumption arising from the commission of the act would attach to the defendant in the one case as strongly as in the other. We cannot think that a female who delights in lewdness, who is guilty of every indecency and lost to all sense of shame, and who may be, even, the mistress of a brothel, is equally the object of the statute with an innocent and pure woman."

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In another case of *The People* v. *Nelson*, decided in New York, and cited at the same page, 446, the Court said:—

"We do not think that the Legislature meant constructive chastity when it said previous chaste character, but that it meant chastity in fact, according to the practical sense of that word. Character pertains to the person, and is the distinguishing mark of what the person is. It is not founded on presumptions of law, but on good conduct and pure thoughts, and only one who is morally and physically pure can be said to have a chaste character within the meaning of the statute under consideration."

(See Lawyer's Reports, Annotated, vol. 14, pp. 727 to 731.)

Now let us examine our own jurisprudence and let us see whether it is in discord with the United States.

In a case of *Rex* v. *Lougheed*, 8 C.C.C. 184, 186, decided by the Supreme Court of the N.W. Territories, Mr. Justice Prendergast said:—

"Previous chaste character does not mean 'previous chaste reputation,' but points to those acts and that disposition of mind which constitute an unmarried woman's virtue or morals."

In the case of *Rex* v. *Comeau*, 5 D.L.R. 250, 19 C.C.C 350, decided by the Supreme Court of Nova Scotia, Judge Drysdale said:—

"I agree with the New York Court of Appeals in the case of *Kenyon* v. *The People*, where it is said that, in a statute similar to this, 'chaste character' as here used means actual personal virtue, not reputation. The woman must be chaste in fact."

And Chief Justice Graham added:—

"By a person of 'chaste character' if Parliament had meant in the case of *virgo intacta* it was easy to have said so."

The defence has cited two cases, one decided recently by the Alberta Supreme Court, *Rex* v. *Rioux*, 17 D.L.R. 691, 22 Can. Cr. Cas. 325, but that tribunal did not express any opinion on the matter. Judge Walsh said:—

"I have carefully refrained from expressing an opinion upon the meaning to be given to the words 'of previous chaste character,' that as to whether or not actual physical unchastity must be proved by the accused to entitle him to be acquitted, for a *determination* of that question is not necessary to the disposition of the case."

The other one is *Rex* v. *Farrell*, decided by the Ontario Supreme

Court, 29 D.L.R. 671, 36 O.L.R. 372, 26 Can. Cr. Cas. 273. There the accused was convicted on the second trial because the testimony of the prosecutrix had been sufficiently corroborated. At the end of his remarks, Chief Justice Meredith said:—

"If the question to be determined was whether or not upon the whole evidence the prosecutrix was proved to be not of a previous chaste character, my conclusions might be different."

I think I have shown that our jurisprudence on the interpretation to be given to the words "previous chaste character" is in accord with that which prevails in the United States Courts.

During the trial the detectives Gagnon and Beaudoin have proved that Yvonne Collier had confessed to them that before the 17th September last she had committed with a man acts of gross immorality. Such evidence was objected to by the Crown. Is it admissible?

The Crown says: The young girl having sworn in her testimony that she had never before committed any act of indecency, she cannot be contradicted and her case is assimilated to one of rape. In a case of rape the prosecutrix may be asked whether she has not before the alleged offence committed immoral acts with a person named (other than the accused) and if she denies it, she cannot be contradicted by calling the person, because such evidence is irrelevant to the issue. It is different here, because the prosecutrix's chastity constitutes an important element of the offence. (See *Gross* v. *Brodrecht*, 24 Ont. App. R. 687.)

The whole question in the present case is based on the prosecutrix's character, which is an essential element of the offence.

Archbold on Criminal Pleading, p. 180, says:—

"Where the general issue is pleaded it is incumbent on the prosecution to prove every fact and circumstance constituting the offence as stated in the indictment or information. And under this plea the defendant may give in evidence, not only everything which negatives the allegations in the indictment, but all matters of excuse and justification."

Roscoe on Criminal Evidence, p. 857, cites the case of *Rex* v. *Riley*, 18 Q.B.D. 481, where it was a question of rape, and says:—

"If the prosecutrix denies having had connection with the prisoner prior to the assault, evidence to contradict her is admissible, because such a fact would be material to the issue."

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Our law, Canada Evidence Act, sec. 11, says:—

"If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it. . . ."

Everything tending to establish the bad character as far as morals are concerned prior to the seduction is admissible in evidence, as it is stated in vol. 25, Amer. & Eng. Ency., p. 241, sec. 2, as follows:—

"Declarations or admissions made by the prosecutrix after the alleged seduction as to her prior practices would be admissible in evidence to show her prior unchastity."

We also find the same opinion expressed in Lawyers' Reports Annotated, vol. 14, p. 753, first column, where it is said, in speaking of seduction:—

"If she testifies in her own behalf, she may be cross-examined and compelled to answer queries concerning specific acts of fornication between her and other men prior to her alleged seduction."

Basing myself on those authorities I am of opinion that the evidence of these two detectives must be received.

The evidence was pretty long. I will only give a short summary of it, which will be sufficient to understand the judgment.

[After reviewing the evidence the learned Judge continues]:

She has shown a lewd and lascivious disposition by offering herself to prostitution and showing by her manners that she could not be put on the same footing with pure women for the protection of whom the law has been framed.

I am of opinion that the prosecutrix, at the time she was seduced, was not of a chaste character as contemplated by the law. The prisoners are acquitted. *Judgment of acquittal.*

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MAGILL v. TOWNSHIP OF MOORE.

Ontario Supreme Court, Clute, J. December 22, 1917.

HIGHWAYS (§ IV A—145)—LOW TELEPHONE WIRES—OBSTRUCTION—NUISANCE—INJURY—DAMAGES.

Rural telephone wires so placed that a person driving on to the highway with a load of hay has to stoop when passing under them, constitute an obstruction in the highway and amount to a nuisance; where the position of the wires is the proximate cause of an accident the owner or trustee of the system is liable for damages under the Fatal Accidents Act; the fact that the line was erected and continued under statutory authority is no bar to the action.

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ACTION by the father and mother of James Magill, deceased, against the Municipal Corporation of the Township of Moore, the Municipal Telephone Association, and the Brigden Rural Telephone Company Limited, to recover damages for the death of the plaintiffs' son, alleged to have been caused by the negligence of the defendants.

J. R. Logan, for the plaintiffs.

R. I. Towers, for the defendant township corporation.

A. Weir, for the other defendants.

Clute, J.

CLUTE, J.:—The action is brought by the plaintiffs, father and mother of James Magill, who received injuries by being thrown from a load of hay which he was driving from the field on the south of the highway to the barns which were situate a little to the west and north, in exchanging work with his brother John. The entrance from the field to the highway had been used in connection with farm-work for many years. In passing out from the field on to the highway, it was necessary to pass under the telephone wires, which were vested in and held in trust by the Municipality of the Township of Moore for the various members of the Municipal Telephone Association.

It is alleged on behalf of the plaintiffs that the wires so erected were too low, and that, James Magill being unable to pass thereunder and properly manage his team at the same time, the load of hay on which he was riding was upset, and he was thrown violently to the ground, sustaining injuries from which he died on or about the 16th September, 1916. His death is charged to the negligence of the defendants in erecting and maintaining wires, and it is alleged that the wires so placed constituted a nuisance.

James Magill was unmarried and 22 years of age. He resided and worked for his parents upon the farm, without wages. The plaintiffs claim $10,000 damages.

The defendant the Corporation of the Township of Moore denies negligence and pleads contributory negligence, and, in case of liability, asks relief over against its co-defendant the Municipal Telephone Association, which was organised under the provisions of the Telephone Act, with the approval of the Ontario Railway and Municipal Board, and was duly authorised to con-

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struct, maintain, and operate a telephone system within the township of Moore, and says that what it did was legally done.

The defendant the Municipal Telephone Association denies liability and pleads the authority of a by-law for the erection of the poles and wires, and also contributory negligence.

It was proved that the telephone system was first organised by the Brigden Rural Telephone Company; that it sold out its plant to an association formed for the purpose; and that the plant is now held by the Municipal Corporation of the Township of Moore as trustee in trust for the various members of the association.

At the time of the accident, James Magill was driving the team. The hay was put upon the waggon by a loader, and was spread by James Magill, while a lad, 14 years old, Alfred Hird, was driving.

The principal witness was this lad, who is a bright boy, had been attending high school, and seemed to have a clear recollection of what took place. His evidence was commended by counsel for the plaintiffs and defendants, and was, I think, quite truthful.

He says: "I was working on the John Magill farm with James Magill, hauling hay to the barns of John Magill on the north side of the road. James Magill worked with his brother. We have to go under the wires. James loaded, and I drove the horses. After the load was on, he unhooked the loader, and took the reins to drive. I got back to the middle of the load; it was after sundown, but the moon was shining. He said, 'Look out for the wires.' I was holding a pitch-fork; he was standing up, but I crouched down; if I had not, I would have been thrown off; he crouched down too. It was a fair-sized load. The waggon started down under the wires; the horses began to trot; the waggon swayed to the south, and James jumped to save it, and the load went over into the ditch. He stood up after we passed the wires; the horses would be getting on to the crown of the road. I went with the load into the ditch and crawled out. I went up to the top of the road and found James Magill on the crown of the road. He asked me if I was all right, and told me to call a doctor. I ran down the road and met John Magill, and he called back to his wife to call a doctor. James was forced to crouch down so low that before he could get up again the load swayed back and forth so violently that

it overturned. I had helped with the hay before that. We had not used this gate before this date. The hay was a foot higher than the ladder. The team was quiet: I had no trouble in driving them. I had gone under the wires before, but had not noticed; it always rocked a good deal; he would try to balance it. We had brought one load at least. The load rocked when we were coming at an angle. I though it was going over every time we came out. We both stood up except under the wires, and then we ducked. It was the unevenness which caused it to rock; one wheel struck the rise before the other; there was loss of control of the horses when they went under the wires; the whiffletrees struck the horses' heels."

This is the only eye-witness of what had occurred. The waggon was a low truck farm-waggon, with a flat rack. The horses were said to be quite quiet, though one was a colt of three years old, and was on the near side, and so might be nearer to the load in turning to the left going out of the gate on to the highway. Exhibit 1 shews the plan of curve of the road. It will be seen that the slope down is comparatively slight; some earth had been taken from the side of the road to form a grade, and a single furrow had been run to carry off the water: the furrow was from 4 inches to 5 inches deep and was about half filled up with earth. The crown of the road was likewise raised, although the inequalities in the road were comparatively small.

It was agreed by witnesses on both sides that taking the curve over these inequalities would cause the load to oscillate first to the left, then to the right, then again to the left and again to the right, and finally, in crossing the crown of the road, again to the left and to the right. The load was thrown off on the right hand side, the rack going with the load and landing upside down, resting upon the top of the ladders both front and rear. The horses ran away with the wheels of the truck waggon, without the rack.

The effect of the evidence was, and I find as a fact, that the wires were so placed on the highway as to form an obstruction and interfere with the driver on the top of an ordinary load of hay in driving out from the field on to the highway, that is, he would have to stoop to go under the wires; that it was necessary to drive with great care in order to prevent upsetting from oscillation, owing to the unevenness and curve of the approach to the road

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from the gateway. To enable a person so to drive it was necessary for him to stand up; he could not drive with the necessary care sitting down in the load of hay; and having to stoop or crouch when passing under the wires would necessarily interfere, in my opinion, with that due care which was necessary in order to drive safely.

It is contended, however, for the defence, that the plaintiffs are not entitled to recover because, even if the wires offered an obstruction, they were placed there under statutory authority, by competent workmen, and so the defendant the Corporation of the Township of Moore is not liable. It will, therefore, be necessary to trace the history of the building of the telephone line and the extent of the authority for placing the wires as they are.

At the gate through which the deceased passed with his load, the wires on the lower cross-bar are 13′ 6″ from the ground.

Mr. Shaw, the Reeve of the Township, was called by the plaintiffs, and he states that putting the load above the rack at 6′ 2″ and the rack at 3′ 7″ from the ground, the height of the top of the load would be 9′ 9″, leaving headway of 3′ 9″ below the wire. The witness Hird, who was on the load, stated that the load was a foot above the ladder. John Magill, brother of the deceased, gave also 3′ 9″ for the height of the rack above the ground, but he was mistaken, I think, in the height of the load, as he took the measurements from figures in some book, placing the load at 9′ 9″; evidently a mistake, probably meaning that the height of the top of the load from the ground was 9′ 9″, which would correspond with the evidence of Shaw. The ladder was 5′ 2″ or 3″; and, if Hird was right, the height of the load above the rack would thus be 6′ 2″; so that all the witnesses agree that the top of the load was within 3′ 9″ of the wires. It was pointed out that a man standing in the load would sink somewhat in the hay. The evidence still shews that in coming under the wire the driver standing would have to stoop or sit down.

It is thus clearly established that the telephone wires offered an obstruction for loaded waggons to pass under with the driver standing on an ordinary load, and so an obstruction to the legitimate use of the highway.

In January, 1909, the Municipal Corporation of the Township of Moore (herein called the "township") entered into an agree-

ment (see minute-book, p. 143) with the Brigden Rural Telephone Company Limited (herein called the "company"), reciting:—

That the company do request the township to grant them the privilege of erecting or constructing a telephone line along the highways of the township and under and subject to any by-law of the corporation. It further recites that the township passed a by-law, No. 3, 1909, granting the company certain rights and privileges for the erection and maintenance of a telephone line.

The agreement then provides that the company accept the by-law and will conform thereto.

The principal provisions of the by-law are:—

1. The company is authorised to complete and operate a telephone line in the township on the highway.

2. That the telephone poles shall in every case be planted on the sides of the highway, and at such places thereon as the council shall locate, and in no case on the graded or travelled portions of said highway.

3. That, where the said telephone wire crosses the public highways, it shall be at least 20 feet clear of the travelled portion of the highway at that point, and in no case shall the poles or wires be erected or strung so as to interfere with the proper use of the highway, and shall be erected, kept, and maintained in an efficient manner, to the entire satisfaction of the said municipal council.

5. That the said company, in erecting or repairing any of the said telephone lines, shall not unnecessarily obstruct or injure any ditch or highway or public place; and, immediately after such line is erected or repaired, shall restore such ditch, highway, or public place to its former condition, and so maintain the same, to the satisfaction of the municipal council.

8. That the said company shall indemnify the said township from all loss, costs, damages, and expense of any kind which may be incurred in consequence of any litigation in connection with anything done or permitted under the provisions of this by-law, or in consequence of the passing thereof, or in consequence of the construction or operation or existence of the company's lines within the said corporation.

10. The by-law is not to take effect until accepted by an agreement between the parties, which agreement was duly entered into by the parties.

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In February, 1912, upon the petition of some 200 ratepayers, asking that the council take steps to institute a municipal telephone system, the council entered into negotiations to purchase the Brigden Rural Telephone Company Limited; and, in the April following, the petition was entertained, and the by-law No. 5 was passed. It provides:—

1. "That a local telephone system in the said township of Moore, to be known as the "Moore Telephone System," be and the same is hereby established, and all works and property acquired, erected, or used in connection therewith, shall be vested in the Municipal Corporation of the Township of Moore in trust for the subscribers.

2. "The cost of establishing and maintaining the said system shall be defrayed by special rate to be levied upon the subscribers, and such rate may be collected by action as an ordinary debt against the persons liable therefor, or may be added to the collector's roll of taxes due from them, and may be collected in the same manner as other taxes."

The history of the road is as follows:—

In 1908, certain persons applied to the council for permission to erect telephone poles along certain highways in the township, which request was granted, subject to an agreement to be entered into between the council and the telephone company, when the roads will be defined (see p. 12 of the minute-book of the township). It provides the sum of $18,200 for the purchase of the Brigden Rural Telephone Company Limited system and the plant and appliances thereof, and authorises debentures of the township for the purchase of these and other lines, to be extended over ten years.

Under an agreement (exhibit 9) dated the 17th April, 1912, between the township corporation and the Brigden Rural Telephone Company Limited, the township corporation purchased the telephone system known as "the Brigden Rural Telephone Company" for $16 per share. They assumed all the assets and liabilities of the said company and undertook to pay a dividend on the stock issued, at 10 per cent. per annum, at the time of the transfer. The contract was subject to the approval of the shareholders, which approval was obtained.

An order (exhibit 10) of the Ontario Railway and Municipal

Board approving of the purchase was made on the 21st October, 1912, after an examination of the road by the Board's expert, whose fees and expenses the township corporation paid. After the purchase, the township corporation took over the telephone system, and continued to operate the same until the present year, when a Commission was appointed to manage the same, prior to the accident.

The first statutory powers given to municipalities was in 1892, and various amendments extending the powers were introduced from time to time; and, by 6 Edw. VII. ch. 41, these powers were extended to townships. The present law applicable to townships is found in the Ontario Telephone Act, R.S.O. 1914, ch. 188, as amended by 4 Geo. V. ch. 32; 5 Geo. V. ch. 33; 6 Geo. V. ch. 38; 7 Geo. V. ch. 40.

In 1908, the Local Municipal Telephone Act, 8 Edw. VII. ch. 49, was passed, under which Act the defendant the Brigden Rural Telephone Company Limited obtained permission to erect its poles, by agreement and by-law already referred to.

Part I. of the Ontario Telephone Act, R.S.O. 1914, ch. 188, deals with the general powers of municipal corporations. Section 3 (1) declares that the corporation of every municipality may carry on a telephone business; sub-sec. (2), with power to acquire or expropriate telephone systems. Section 4 gives general powers as to the carrying on of the business. Section 7 limits the time for bringing actions for anything done or omitted in the carrying on of such business, or in the exercising of the powers under the Act, to six months after the cause of action rose. Section 8 authorises the council to grant to the company the right to use highways.

Part II. of the Act provides for local municipal telephone systems.

Section 15 provides that all works done at any time under this Part shall be deemed to be works done by the initiating municipality, and in carrying out the same, and in the construction, management, maintenance, control and extension of any system established under this Part or under any former Act the initiating municipality shall have and may exercise all or any of the powers conferred upon municipal corporations by Part I.

Section 17 provides for the issue of debentures of the initiating corporation or municipality to pay the cost of the work.

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The word "Board" used in the Act means (sec. 2 (*a*)) the Ontario Railway and Municipal Board, to which important matters may be referred.

Section 21 provides that, upon a petition of the majority of the subscribers, the council shall place the system under the supervision of a Board of three Commissioners who shall be responsible for the construction, maintenance, and operation of the system. The various sub-sections of sec. 21 provide for the meeting of the Board of Commissioners and the transaction of business. Sub-section (7), added by 7 Geo. V. ch. 40, sec. 10, provides that, after the election of Commissioners as thereinbefore provided, all powers, rights, authorities and privileges which are by the Act conferred upon the initiating municipality and exercisable by the council, shall be exercised by the Board of Commissioners and not by the council of the initiating municipality. Sub-section (8), also added by 7 Geo. V. ch. 40, sec. 10, declares that nothing contained in this section shall affect the power and obligation of the council to provide from time to time the money required for the establishment and maintenance of any system or any extension thereof, and the treasurer of the municipality shall, upon the request in writing of the Board of Commissioners, pay over any money so provided.

By sec. 22, the Ontario Railway and Municipal Board is authorised to superintend the carrying out of Part II., and advise any municipal corporation or assessed land-owners in the establishment or operation of any works authorised by the Act.

Part III. of the Act refers to the regulation of telephone companies and systems, and defines the powers of the Board. Section 26 enacts that the Board may prescribe standard conditions and specifications for the construction and equipment of all telephone systems, but such standard conditions and specifications shall not apply to the existing plant or equipment of a telephone system in course of construction, or operated by any company prior to the 30th June, 1911, but only to the renewal or replacement thereof whenever such renewal or replacement may, in the opinion of the Board, become necessary as a result of depreciation or obsolescence.

It was urged by Mr. Towers that, the present system having been erected prior to June, 1911, sec. 26 has no application; I

shall refer to this later. Sub-section 5 of sec. 26 authorises the Board to make examination of and to report upon existing systems, and to make such orders for the maintenance and operation of any telephone system as may be deemed desirable or necessary in the public interest.

Section 28 provides for the erection of poles and wires upon the highway, upon such terms and conditions as may be agreed upon between the council of the municipalty and the company, or as shall be prescribed by the Board in case they cannot agree.

The Board on the 20th April, 1914, issued specifications fixing the minimum standard requirements for the construction and equipment of telephone systems under the provisions of sec. 26 of the Ontario Telephone Act. They provide among other things:—

That the poles shall not be less than 20 feet in length and 5 inches in diameter at the top, and at road-crossings the poles must be of such length as will give the wires a clearance of not less than 20 feet above the crown of the road.

A line to carry one 6-pin cross-arm shall consist of poles not less than 25 feet in length, 5 inches in diameter at the top, which will be sufficient to carry three metallic circuits.

A line to carry one 10-pin cross-arm shall consist of poles not less than 25 feet in length, 7 inches in diameter at the top, which will be sufficient to carry five metallic circuits.

All lines to carry more than one cross-arm shall consist of poles not less than 25 feet in length, 7 inches in diameter at the top.

In the present case, the poles contained two cross-arms and were 20 feet in length, with 4 inches below the surface of the ground; the first cross-bar 5 inches below the top of the pole and the second cross-bar 22 inches below the first. This would leave about 13 feet 6 inches above the ground, at the centre of the gateway in question.

It was said by the poleman of this system that 25-foot poles were used at the gateways leading into farm-houses, to allow sufficient room for loads to pass in and out, but that elsewhere 13 feet 6 inches was the common height of the poles above the surface of the ground.

The specifications further provided that in towns and villages and at road-crossings no wire or attachment to the poles should be of a less height than 20 feet from the crown of the road.

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In the present case, the crown of the road opposite the gate through which the load was driven was 1 foot 5½ inches.

The specifications further provide that the cross-arms shall be 10 inches from the top of the pole, and the second cross-arm not less than 18 inches below.

It was urged on behalf of the plaintiffs that sec. 26 and the regulations thereunder, referring to poles, cross-bars, and wires, were applicable to the present case. I do not think they do apply in so far as the original plant was concerned. This consisted of one cross-arm bar, and would have left 22 inches additional to the 3 feet 9 inches between the wire and the load, making 5 feet 9 inches, which, with the depression caused by the person standing upon the load, would, according to the evidence, have made a clear headway permitting the driver to stand on an ordinary load and drive without stooping, i.e., when the line was first erected.

Charles Capes, one of the linesmen who helped to put up this line, states that the upper cross-bar, with the wires thereon, was put up in 1908, and in the year 1911 the lower cross-bar and wires were put up. In 1917, more wires were added to the lower cross-bar, making six in all.

Section 15, in Part II., provides for the control and extension of the system established under Part II. or under any former Act. "Extension," under clause (*j*), added to sec. 2 of the Act, by 4 Geo. V. ch. 32, sec. 3, means and includes all works necessary for the purpose of furnishing telephone service to persons who, after the passing of the by-law providing for the establishment of the system, may sign the petition praying for the extension of the same.

No date, as far as I have noted, was given when the cross-bar was put on in 1911. It would appear that, at the time the line was put up in 1908, no obstruction was caused in passing in and out of this gateway; that, if the lower cross-bar was put on after the 30th June, 1911, and the wires placed thereon, it would be an erection upon a pole 20 feet in height instead of 25 feet, contrary to the standard specifications above referred to, which provide that all lines to carry more than one cross-arm shall consist of poles not less than 25 feet in length.

If this erection took place prior to the 30th June, 1911, then I

find as a fact that it was an obstruction and shewed negligence and want of reasonable and proper care in its construction. That the men in charge of this line, passing the premises in question, were aware of the height necessary to enable an ordinary load with the driver standing thereon to pass under, is evidenced by the fact that they made provision by using poles 25 feet in length in all entrances to farm-houses and premises. As to whether or not competent persons were engaged to erect the line, very little evidence was given, and it was not established in the affirmative that skilled and competent persons were engaged for that purpose.

Two witnesses were called: Charles Capes, who apparently commenced work of this kind when the line was put up; and Edward Nickel, who had been a linesman since 1911; but there was no evidence that either of them had previous experience, knowledge, or skill in that kind of work.

Does the fact, then, that the line was erected and continued under statutory authority disentitle the plaintiffs to succeed if the line in fact created an obstruction and amounted to a nuisance and was the proximate cause of the accident?

Mr. Towers, who presented the case on behalf of his client with exceptional care and ability, referred to a number of cases, and referred particularly to *Roberts* v. *Bell Telephone Co. and Western Counties Electric Co.* (1913), 4 O.W.N. 1099. This case was settled between the plaintiff and the Bell Telephone Company, without prejudice to the plaintiff's claim against the Western Counties Electric Company. Middleton, J., says (pp. 1100, 1101): "I find as a fact that the electric company . . . did not take adequate precautions . . . to prevent the increase of the sag in their wire, and that they did not inspect the wire, or they would have discovered the contact . . . It is contended on behalf of these defendants that, however short of perfection their construction may have been, and however negligent their inspection may have been, they had no duty to the telephone company or its employees to protect the wire improperly placed by the telephone company in a dangerous position; and that the accident being in truth caused by the negligence of the telephone company, in placing its wires in undue proximity to the electric wires, neither the telephone company nor its employee is entitled to recover." The learned Judge felt compelled to give

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effect to this contention. He took the view that the construction which permitted the wires to sag to the extent they did did not amount to negligence; that negligence must be founded upon a breach of duty; and, when these wires were placed upon poles 29 feet above the highway, no wires being then under them, he did not think that there was any duty owing to the telephone company calling for such stability of construction as to prevent what was, after all, a very slight increase in the sag of the wire. He further found that there was no duty to inspect the wires periodically for the purpose of seeing that other wires had not been improperly placed in undue proximity.

There is an obvious distinction, I think, between the *Roberts* case and the present one. In the present case, the duty arises in reference to a highway. The owners of lands adjoining the highway have a right to reach it from any part of their lands which is contiguous thereto, and, for any reasonable or necessary purpose, have the right to pass over any part of it. There is therefore a duty, in the case of construction of a telephone line upon or along the same, not to create an obstruction or nuisance that would interfere with such right, unless specially authorised or permitted by statute so to do. And any want of ordinary care in the construction of the line would amount to such interference and obstruction as a breach of duty and negligence as against the owner of adjoining lands.

There is no liability in consequence of the erection of poles on the highway authorised by the Legislature, unless negligence is shewn: *Eastern and South African Telegraph Co. Limited* v. *Cape Town Tramways Cos.*, [1902] A.C. 381; *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186. These cases refer to the escape of electricity. *Fletcher* v. *Rylands* (1866), L.R. 1 Ex. 265, and *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, are referred to in them. In the *Baker* case it was held that where a tramway company, acting under a provisional order and using the best known system of electrical traction, caused electrical disturbances in the wires of a telephone company acting under license from the Postmaster-General, they were protected from liability for nuisance. Kekewich, J., at p. 203, points out that the defendants were expressly authorised to use electrical power, "and the Legislature must be taken to have contemplated it, and to have condoned by anticipa-

tion any mischief arising from the reasonable use of such power . . . It is within the competence of the Legislature to delegate its authority; and, when once that delegated authority has been properly exercised by the agent to whom it is entrusted, the sanction is that of the Legislature itself, just as much as if it had been expressed in the first instance in an Act of Parliament."

This authority does not go so far as to justify the construction of a line in disregard of the rights of the adjoining owners, when ordinary care might have conserved such right; does not, in short, cover the case of negligence.

In *Weir* v. *Hamilton Street R.W. Co.* (1914), 32 O.L.R. 578, 22 D.L.R. 155, it was held by the majority of the Court that to leave a pole erected in such a place (as described) on the highway unlighted at night where it would be likely to afford obstruction to a passing vehicle is to create a dangerous nuisance; and the jury may well consider the pole an obstruction to the highway, and so leaving it an act of negligence. Hodgins, J.A., points out (p. 593): "It is not consistent with our theory of municipal government to hold that the exercise of those powers, when exercised *bonâ fide*, can be controlled or interfered with by the Courts" and (dissenting from the majority of the Court) was of opinion that there should be a new trial. The case went to the Supreme Court of Canada, where it was held, reversing the judgment appealed against, that the location of the poles was authorised by the Legislature and did not constitute an obstruction of the highway amounting to a nuisance; the company was, therefore, not liable for injury resulting from an automobile while driven at night coming in contact with the pole: *Hamilton Street R.W. Co.* v. *Weir* (1915), 51 S.C.R. 506, 25 D.L.R. 346.

These cases, I think, are distinguishable from the present; it is not contended that the line was not authorised or the poles not properly placed, but that ordinary care had not been used in protecting a place which, for many years and at the time the line was laid, was a place of exit from the fields upon the highway.

I do not accept the evidence of one of the polemen, Charles Capes, who stated that there was a lane, and the gate was 30 rods east. He is clearly mistaken—this gateway and the lane had been used and in existence long prior to the erection of the telephone line.

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The right of access of the owner of private property to the highway was recognised in *Rose v. Groves* (1843), 5 M. & G. 613; and in *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; and in *Fritz* v. *Hobson* (1880), 49 L.J.Ch. 321; and in *Thomas* v. *Western Union Telegraph Co.* (1888), 100 Mass. 156, where it was held, under the facts in that case, that the wire offering obstruction to the highway was in itself evidence for the jury on the issue of negligence; and in *Ward* v. *Atlantic and Pacific Telegraph Co.* (1877), 71 N.Y. 81, it was held that a telegraph company, having the right to place its line in the streets of the city, is not liable for an injury resulting from the breaking of one of the posts supporting the line, save upon proof of culpable negligence. The company is bound to use reasonable care in the construction and maintenance of its line.

Of course the evidence must connect the negligence proven with the accident: *Wakelin* v. *London and South Western R. W. Co.* (1886), 12 App. Cas. 41; *Dominion Cartridge Co.* v. *McArthur* (1901), 31 S.C.R. 392, reversed by the Privy Council, *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72. This was a case between employer and employee, but is useful as to the law tracing the connection between negligence and the accident.

In *Thompson* v. *Bradford Corporation and Tinsley*, [1915] 3 K.B. 13, the corporation, under powers conferred upon them by a local Act, determined to widen the highway by setting back the kerbstone and throwing the causeway into the road. On the edge of the causeway nearest the road there was a telegraph pole, which it was necessary to remove, and the corporation wrote to the Post Office authorities asking them to set back the pole to the improved street line. The Post Office accordingly had the pole removed and the hole filled in. Shortly afterwards the corporation threw the road open for traffic. A steam waggon passing along the highway, one of its wheels sank into the hole, and the waggon was damaged. In an action brought by the plaintiff against the corporation and the Post Office authorities, it was held that the defendants the corporation were liable upon the ground that they were altering the character of the old road, and their duty was to make it reasonably safe for traffic; the Post Office authorities upon the ground that,

having done, perhaps voluntarily, a piece of work, they did it negligently. It was held, further, that the Telegraph Act of 1863 did not take away any responsibility which the corporation might be under independently of it. Bailhache, J., says (p. 22): "If a person does a piece of work negligently, although he need not have done it at all, he is liable for the consequences of his negligence. If he undertakes to do it he must do it with reasonable care, and the Post Office authorities appear to have neglected their duty in that respect, and on that simple ground, apart from statute, it seems to me they are liable."

It comes within the principle of *Connell* v. *Town of Prescott* (1892), 20 A.R. 49, affirmed in *Town of Prescott* v. *Connell* (1893), 22 S.C.R. 147, and cases there cited. The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though these consequences be immediately and directly brought about by the intervening agency of others, provided that the intervening agents were set in motion by the primary wrong-doer, or provided that their acts causing the damage were the necessary or legal and natural consequence of the original wrongful Act.

The *Connell* case was followed in *Ferguson* v. *Township of Southwold* (1895), 27 O.R. 66, where it was held that anything which exists or is allowed to remain above a highway, interfering with its ordinary and reasonable use, constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway. A branch of a tree growing by the side of a highway, to the knowledge of the defendants, extended over the line of travel at a height of 11 feet. The plaintiff, in endeavouring to pass under the branch, on the top of a load of hay, was brushed off by it and injured: Held, that the jury having found the highway was out of repair, the defendants were liable. *Embler* v. *Town of Wallkill* (1890), 57 Hun (64 N.Y.S.C.) 384, is specially referred to. In that case the branches of a tree hung over the travelled portion of the road so low as to leave a space insufficient for the passage of a load of hay, and that condition had existed for more than ten years. Ferguson, J. (27 O.R. at p. 71), quotes the language of the Judge, who said: "Those facts presented a case of inexcusable negligence, and there is no

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principle which will exonerate the town from the liability resulting therefrom." As to contributory negligence, the learned Judge (Ferguson, J.) said (p. 73): "The plaintiff . . . was not called upon to do the very best and wisest thing." Meredith, J., said: "Nor was it contended . . . that there is no liability in respect of a nuisance because of its being overhead, instead of, as usual, under-foot. If there were . . . I would unhesitatingly express my entire concurrence in the learned trial Judge's view of the question as expressed in his charge to the jury." Robertson, J., concurred.

I think that the position of the wires causing the deceased to stoop or crouch down in passing under them was the proximate cause of the horses getting from under that control which was necessary to secure the safe passage of the load. It is a case of a man acting as a reasonable man would rationally do under the circumstances, and the chain of cause and effect is continuous. The wires being where they are, the man is compelled to stoop; in doing so, he loses control of the horses; the horses, moving to a trot, cause the load to oscillate sufficiently to upset the waggon, thereby throwing off the deceased and causing his death.

The latest statement of the law in respect to highways is found in *Papworth* v. *Batersea Corporation*, [1916] 1 K.B. 583, where Pickford, L.J., at p. 590, quotes Lush, J., in *McClelland* v. *Manchester Corporation*, [1912] 1 K.B. 118, 129, 131: "It is no doubt true that when a road is dedicated as a highway the public, or the road authority, if they accept it, take it as it is with all its defects. But if a road authority undertake a duty with regard to it, and make it up, and open it to the public as a made-up street, they must, in my opinion, exercise due care and have due regard to the safety of those who will use it. It is, I think, clear law that when a local authority undertakes and performs a duty, whether they are bound by statute to do so or whether they have an option to perform it or leave it unperformed, however it arises, they are bound to exercise proper and reasonable care in its performance, and that there is no difference in this respect between a public body and a private individual who does an act which if carelessly done may cause injury to others."

In *Bell Telephone Co.* v. *City of Chatham* (1900), 31 S.C.R. 61, it was held that a person driving on a public highway who

sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent, uncontrollable speed was the proximate cause of the accident. That case is clearly distinguishable from the present case. Uncontrollable speed was caused by losing control of the horses in consequence of the wire being too low; it is the converse of the *Chatham* case. This case is also referred to in Meredith & Wilkinson's Canadian Municipal Manual, 1917, p. 628, where Dillon on Corporations, 5th ed., sec. 1712, is quoted:—

"*Default.* The ground of the action is either positive misfeasance on the part of the corporation, its officers or servants, or by others under its authority in doing acts which cause the streets to be out of repair, in which case no other notice to the corporation of the condition of the street is essential to its liability, or the ground of action is the neglect of the corporation to put the streets in repair or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, in which cases notice of the condition of the street or what is equivalent to notice is necessary . . . to give the person injured a right of action against the corporation.

"The 'equivalent to notice' referred to is notice of 'facts from which notice . . . may reasonably be inferred or proof of circumstances from which it appears the defect ought to have been known and remedied by it:' *ib.*, sec. 1717."

The learned authors then remark: "This is the view as to the liability of corporations under the Municipal Acts which has been uniformly adopted by the Courts of Ontario, and when actions were tried with a jury, the instructions to the jury were always given in accordance with it."

I find that, having regard to the facts in this case, hereinbefore stated, the township corporation had notice of the obstruction in question. I further find that the notice of action was proven, and that the deceased was not guilty of contributory negligence.

The evidence was not very full, but there was some evidence that the township corporation had purchased the stock of the Brigden Rural Telephone Company Limited: the township cor-

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poration had, at all events, purchased the entire assets of the company. It was urged on behalf of the defendant association and of the Brigden Telephone Company that they were not necessarily parties to this action, and that the action should be dismissed as against them with costs. As a matter of fact, the association has no legal entity separately from the township corporation. The Brigden Rural Telephone Company Limited transferred all its interests to the township corporation. Since 1912, the township corporation has held and still holds the system of telephones within the township, as trustee under the Act; and the Commission authorised by the statute to manage it is so related and identified with the township as a corporation, that it has in fact no separate legal entity. From the inception of telephone systems in municipalities, they have been identified with the municipal corporations; and, if the township corporation is liable in this case, the question of being indemnified by the subscribers to the telephone system can be worked out under the provisions of the statute. In the present form of the case as to parties and pleadings, a judgment for relief over cannot be made effective. There would have to be a rate levied to provide the amount to cover the damages, as provided by statute. I do not think it necessary formally to dismiss the action against the telephone association or the Brigden Rural Telephone Company.

The evidence was rather meagre as to damages. The age of the male plaintiff is 71 and of the female plaintiff 59. No evidence was given as to the prospects of life. The husband was said to be in poor health. The wife appeared to be strong and in good health for her age. The deceased was living at home and working upon the farm without wages. There is no evidence one way or the other as to the probability of marriage. The case was left quite at large upon the bare facts of his remaining at home and contributing to the support of the father and mother by his work. It was said that wages in that locality were now $50 per month and board. The father is unable to do much work on the farm. It is therefore necessary that a man should be hired to take his place.

I allow $500 to the father and $1,000 to the mother, $1,500 in all, and costs of action. *Judgment accordingly.*

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., White and Grimmer, JJ. November 23, 1917.

CERTIORARI (§I B—12)—EXISTENCE OF OTHER REMEDY.

If there is a right of appeal from a summary conviction but it has not been taken advantage of, certiorari will not be granted unless there are exceptional circumstances.

[*Ex parte Doucet*, 24 Can. Cr. Cas. 347, 43 N.B.R. 361, and *Ex parte Young*, 32 N.B.R. 178, followed.]

Statement.

MOTION to make absolute a rule nisi to quash a summary conviction made by a Gloucester County Magistrate, for interference with an officer in the performance of his duty under "The Intoxicating Liquors Act, 1916."

On the return of the writ of certiorari on argument that the rule should be made absolute, the question arose whether certiorari was the proper remedy, or should the defendant have proceeded by way of appeal. The Court, without looking into the merits of the case, decided the proper remedy was appeal from the magistrate's decision. The facts are set out in the judgment of the Court.

P. J. Hughes shewed cause against the rule.

J. J. F. Winslow in support of rule.

The judgment of the Court was delivered by

Hazen, C.J.

HAZEN, C.J.:—This is an application on the part of the defendant Theriault to have a conviction made against him on the 10th day of August, 1917, by Edward L. O'Brien, Police Magistrate in and for the Town of Bathurst, set aside and quashed under writ of certiorari issued by order of this Court, on the 11th day of September last, and an order nisi to quash the conviction made returnable to this Court.

The complaint, which was laid on the 4th August last, charges that the defendant at the Parish of New Bandon, in the County of Gloucester, on the 3rd day of August, A.D. 1917, did resist and wilfully obstruct John B. Blanchard, then being a liquor inspector under "The Intoxicating Liquors Act, 1916," and acting as such, in the lawful execution of his duty, in making a lawful seizure of liquor there being contrary to the provisions of the said Act.

It did not appear from the return under what statute the complaint had been laid or the conviction made, and when the case

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came before the Court it was pointed out by counsel for defendant that the offence charged was an offence under the Criminal Code of Canada, sec. 169, and possibly also under "The Intoxicating Liquors Act, 1916," and the preliminary objection taken that in either case certiorari would not lie.

Section 169 of the Criminal Code provides that—"Every one who resists or wilfully obstructs—

(*a*) any peace officer in the execution of his duty or any person acting in aid of such officer; or

(*b*) any person in the lawful execution of any process against any lands or goods or in the making of any lawful distress or seizure;"

is guilty of an offence punishable as therein provided.

Section 153 of "The Intoxicating Liquors Act," N.B. Stats. 1916, c. 20, reads as follows:—

"Any peace officer, policeman or constable or inspector of licenses shall for the purpose of preventing or detecting the violation of any of the provisions of this Act, at any time, have the right to enter into any and every part of any place other than a private dwelling house, whether under license or not, and make search in every part thereof, and of the premises connected therewith, and examine any document that may contain entries or memoranda in connection with liquors he may think necessary for the purpose aforesaid;

(1) every person being therein or having charge thereof who refuses or fails to admit such peace officer, policeman, constable, or inspector demanding to enter in pursuance in this section in the execution of his duty or who obstructs or attempts to obstruct the entry of such peace officer, policeman, constable or inspector or any such search as aforesaid, shall be guilty of an offence against this Act."

If the conviction was made under the Criminal Code, I am of the opinion that certiorari should not be granted, as an appeal is provided under the Criminal Code, Part 15, Section 749, to the County Court of the County where the cause of the information arose. It was laid down by Sir John Allen, C.J., in *Ex parte Young* (1893) 32 N.B.R. 178, that where there is review a certiorari should not be granted, unless under exceptional circumstances; and in the case of *The King* v. *O'Brien, Ex parte Doucet* (1915), 24 Can. Cr. Cas. 347, 43 N.B.R. 361, it was held that

where the right of appeal from a summary conviction was not taken advantage of, and it appeared upon return of an order nisi to quash the conviction removed by certorari, that there were no exceptional circumstances in thecase, no certiorari should issue.

I see no reason in this case for interfering with the judgment of the Court below. The principal that where an appeal lies which can be prosecuted outside of certiorari, the Court ordinarily does not interfere, is therefore well established, and will not be departed from unless for some unusual and extraordinary circumstances. Section 153 of "The Intoxicating Liquors Act, 1916," has already been quoted.

I am not expressing any opinion as to whether the charge against the defendant would be an offence under the language of this section, although I entertain very serious doubts upon the subject, but if it is an offence under this section, and certiorari was made thereunder, certiorari will not be granted, as the right to proceed in that way is taken away by section 111 of the Act, which states in express terms that—"No conviction, judgment or order in respect of any offence against the Act shall be removed by certiorari."

Being of opinion, therefore, that there is no exceptional circumstance in the case, that would justify the departure from the well-established rule, that where the right of appeal from a summary conviction exists, and has not been taken advantage of, certiorari will not lie, and that if the conviction was made under the provisions of "The Intoxicating Liquors Act, 1916," there being no question as to the magistrate's jurisdiction, the right of certiorari in such case is taken away by statutory enactment, the order nisi should be discharged and the conviction confirmed.

Conviction affirmed.

NOBLE v. TOWNSHIP OF ESQUESING.

Ontario Supreme Court, Mulock, C.J. Ex. December 24, 1917.

PLEADING (§ III D—325)—DOG TAX AND SHEEP PROTECTION ACT—STATEMENT OF CLAIM—SUFFICIENCY OF.

A statement of claim which alleges that within the time mentioned in sec. 18 of the Dog Tax and Sheep Protection Act (R.S.O. 1914, c. 246), the plaintiff applied to the council for compensation and satisfied the council that he had made diligent search and inquiry to ascertain the owner or keeper of the dog "without result" sufficiently states a cause of action for a mandamus requiring the council to award compensation.

[*Re Hogan* v. *Township of Tudor* (1915), 34 O.L.R. 571, distinguished.]

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NOBLE v. TOWNSHIP OF ESQUESING.

Mulock, C.J.Ex.

MOTION by the defendants, the Municipal Corporation of the Township of Esquesing, to strike out the statement of claim.

H. S. White, for the defendants.

J. M. Bullen, for the plaintiff.

MULOCK, C.J.Ex.:—This is a motion by the defendants to strike out the plaintiff's statement of claim, on the ground that it discloses no cause of action. The action is brought under the Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, as amended by 6 Geo. V. ch. 56, to recover the value of sheep killed by dogs.

In his prayer for relief the plaintiff asks for payment of $835 damages, or for a mandamus directing the defendants' council to award and pay to him the amount of his damages, as found by the valuer, or a mandamus directing the defendants to award and pay to the plaintiff the amount of damages sustained by him, as provided by sec. 18 (as amended) of the Act, or for a mandamus ordering the defendants to carry out the provisions of the Act.

The question involved in this motion is, whether the allegations contained in the statement of claim shew the plaintiff to be entitled to any of the reliefs asked for. The plaintiff has no cause of action except such as the Act gives him. Section 17 provides for the appointment by the council of sheep-valuers, and declares that it shall be their duty "to inspect the injury done to sheep by dogs in cases where the owner of the dog or dogs committing the injury cannot be found, and the person aggrieved intends to make claim for compensation from the council of the municipality;" and (2) that "the sheep-valuer shall investigate the injury . . . and shall forthwith make his report in writing to the clerk of the municipality, giving in detail the extent of injuries and amount of damage done, and the report shall be acted upon by the council in adjusting the claim."

Section 18 (as amended) provides that the owner of any sheep killed or injured by dogs may apply to the council for compensation; "and if the council is satisfied that he has made diligent search and inquiry to ascertain the owner or keeper of such dog, and that he cannot be found, they shall award to the aggrieved party for compensation a sum equal to the amount of the damage sustained by him; and the treasurer shall pay over to him the amount so awarded."

The Act also declares (sec. 18 (2)) that "the council may, before determining, examine parties and witnesses under oath."

The defendants, relying on *Re Hogan* v. *Township of Tudor* (1915), 34 O.L.R. 571, contend that the plaintiff has no cause of action. That case does not go that far, but decides merely that the amount of damages must be determined in manner provided by the Act, and not by the Court. The Legislature has given jurisdiction, not to the Courts, but to the municipal council alone, to award compensation, and the plaintiff can recover only the amount which the council awards. (In saying this I do not wish to be understood as meaning that the council may award an amount less than the damage sustained by the plaintiff.)

The statement of claim does not allege an award; and therefore the plaintiff has not stated a case which, if proved, would entitle him to judgment for the sum claimed as damages. But, if the council are satisfied that the plaintiff "has made diligent search and inquiry to ascertain the owner or keeper of such dog, and that he cannot be found," then the statute imposes on the council the duty of awarding to the plaintiff for compensation a sum equal to the amount of the damage sustained by him.

The plaintiff in his statement alleges that, within the time mentioned in sec. 18, he applied to the council for compensation and satisfied the council that he had made diligent search and inquiry to ascertain the owner or keeper of the dog "without result."

Having regard to the context, I think the words "without result" are to be interpreted as meaning that "the owner or keeper cannot be found." (It would be better pleading if the plaintiff followed the words of the statute, and, if so advised, he may so amend his statement of claim.) On being thus satisfied, it became the duty of the council to award for compensation to the plaintiff a sum equal to the amount of his damage. Further, sec. 17, sub-sec. (2), declares that the report of the sheep-valuer, giving in detail the extent of injuries done and the amount of damage done, "shall be acted upon by the council in adjusting the claim."

The direction to the council to award compensation is mandatory; and the council, not having obeyed the statute, may by mandamus be required to do so, and to that extent the plaintiff is entitled to relief; and therefore this motion fails and is dismissed with costs. *Motion dismissed.*

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REX v. SPARKES.

Nova Scotia Supreme Court, Graham, C.J., Russell, Harris, and Chisholm, JJ. June 2, 1917.

HOMICIDE (§ II—17)—PROVOCATION—DIRECTING JURY ON QUESTION OF MANSLAUGHTER ON MURDER CHARGE.

Where there are no circumstances in evidence which could reduce the charge of murder to manslaughter, such as sudden provocation, the trial Judge need not direct the jury that they have the alternative power to find a verdict of manslaughter.

[*R.* v. *Jagat Singh*, 28 D.L.R. 125, 25 Can. Cr. Cas. 282, considered; *Eberts* v. *The King*, 20 Can. Cr. Cas. 273, 7 D.L.R. 538, applied.]

Statement.

MOTION for leave to appeal.

The prisoner Sparkes was tried on a charge of murder and was convicted and sentence imposed. Subsequently application was made to the presiding Judge (Drysdale, J.) to reserve a case for the opinion of the full Court, and from his refusal to do so the present appeal was taken. The points involved appear fully from the judgments.

Jas. Terrell, K.C., and *Bruce Graham*, for the prisoner, appellant.

A. Cluney, K.C., for the Crown.

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—I think that the learned Judge in this case practically excluded from the jury the consideration of the question whether the homicide might not be reduced to the offence of manslaughter. If there is any evidence at all for the jury which would sustain a verdict of manslaughter it must be submitted. That is clear from the cases of *Rex* v. *Jagat Singh*, 28 D.L.R. 125, 21 B.C.R. 545, 25 Can. Cr. Cas. 281, and *Rex* v. *Hopper*, [1915] 2 K.B. 431, in which a short cut of the Judge telling the jury it must be either murder or acquittal was reviewed by the appellate Court.

Here the learned Judge told them:—

"There is not very much, I think, to say further, except to say that it is a question of fact for you entirely. Of course killing in the heat of blood or in a fight would reduce it to manslaughter, but where is the evidence for reducing it to manslaughter in that way? None of the people say there was a fight going on or that this killing was the result of hot blood before a man had time to cool; that would reduce the case to manslaughter, but it is not in this case. If a man kills a man in a fight or after a fight, before the blood has had time to cool, that reduces it to manslaughter, but I cannot see it in this case. It is a question

of fact whether it is or not, but I do not see any evidence of hot blood arising out of a row, even in his own story."

Later, he said:—

"I see no midway course in this case. It is a question of guilty on the indictment or of accepting his story and finding him not guilty."

I must say I have some doubt about these parts of the summing up; whether this should not have gone to the jury.

It is not contended that the prisoner had a quarrel with Dixon, the deceased, which would afford provocation. But that evening he did have a quarrel with the woman he slept with, Pricilla Dixon, the deceased's sister. It was a quarrel with violence, choking and striking with a cup which produced bleeding. Thereupon Pricilla Dixon removed the bedclothes from the room in which they slept together and removed it to the adjoining room where there were some five other females, seeking to exclude him and refusing to go to his bed. The defendant went out and borrowed a revolver. I really think it was obtained for the purpose of frightening the woman, or perhaps all of the women, so that he might have his way. He broke into the room where they were by forcing the bolt, One of the occupants of the room went across the road for this woman's brother, the deceased, who came and apparently took sides against him in the conversation and returned again to his own house. Apparently the woman Pricilla was screaming, and a person passing by on the road, hearing it, went for the deceased, who came over and remonstrated with the prisoner and tried to get his sister to leave the house and go home with him. Their mother arrived at the house also, and she talked about the police. Then followed the shooting. The defendant testifies that the deceased also had a revolver which he produced, and he has set up the defence of self-defence. There is a statement in the testimony of a witness for the Crown which suggests that the deceased may have had a revolver, but all of the witnesses deny that he had. But the prisoner's own testimony hardly suggests that he made a sufficient use of it to justify the use he made of his own pistol. He also puts forward in his evidence a case of accidental shooting caused by one of the women seizing his arms when he had the pistol cocked. This too was denied, and the matter was submitted to the jury.

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But I think the main question here is whether there was evidence tending to show a case of provocation and hot blood from the deceased's participation in the quarrel between the sister and the prisoner.

Under section 261 of the Criminal Code—

"Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

"(2). Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

"(3). Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked, was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided, &c."

But I have come to the conclusion that this case does not come up to the requirements of this provision. The heat of passion must be produced by "sudden provocation" and the offender must act upon it "on the sudden and before there has been time for his passion to cool."

The coloured witnesses are quite incapable of giving one an idea of the time consumed in this matter, but there is evidence tending to show that the shooting must have taken place about 4 a.m. of Monday. And if the provocation had stopped with the physical quarrel between the prisoner, which must have occurred in the evening, and the woman Pricilla, the passion would have had time to cool in the ordinary case before the shooting took place.

On the whole I think that at the time of the shooting there was not evidence of facts and circumstances adequate to produce such a degree of passion as would deprive an ordinary person of the power of self-control. They lack the element of suddenness.

I think the leave to appeal must be refused.

Russell, J.

RUSSELL, J., concurred.

Harris, J.

HARRIS, J.:—The accused was indicted and tried for murder by a jury before Mr. Justice Drysdale. He was convicted of

murder and sentenced to be hanged. His counsel applied to the learned trial Judge to reserve certain questions arising out of the direction of the learned trial judge for the opinion of the Court of Appeal. The application was refused, and the Court of Appeal has been moved for leave to appeal. Some thirteen grounds were stated in the notice of appeal, but only two were urged before the Court on the argument, and they may be stated briefly as follows:—

First: That there was misdirection as to what degree of drunkenness would reduce the crime from murder to manslaughter.

Second: That there was misdirection in not putting to the jury the alternative that they might find the accused guilty of manslaughter.

It was urged that the learned trial Judge had put the case to the jury as one of conviction for murder or acquittal without any alternative, and that this was misdirection.

In dealing with the first question I quote one paragraph from the charge of the learned Judge:—

"Murder may be reduced to manslaughter if a man is so drunk as to make him unable to form any intention—a drunken intention is just as bad as a sober intention—but where the murder depends on intent, the proper inference to be drawn from a man's acts, and if he is so drunk as to be unable to form an intention, then the jury may reduce it from murder to manslaughter. That is the law on the subject, but where is the evidence in this case that this man was so intoxicated that he could not form an intention? He may have been drinking, but there is no pretence that he was so intoxicated that he could not form an intention. He went round and tried to borrow a gun from Carvery, he went to the Fertilizer Works and told his story to the man in charge and came back home, and you heard his actions in the house described. There was no pretence even by himself that he was so drunk that he could not form an intention. He seems to have been able to form any kind of intention; he could come and go where he pleased; I think that is all the evidence disclosed, so there is no bottom here for the theory that the murder might be reduced to manslaughter because he may have been drinking."

We must take the charge as a whole, and so viewing it, I think it is unobjectionable so far as the question under consideration

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is concerned. *Regina* v. *Doherty*, 16 Cox. 306; *Rex* v. *Meade*, [1909] 1 K.B. 895; *Rex* v. *Wilson*, 21 Can. Cr. Cas. 448.

Quite apart from the question as to the law, I agree with the learned Judge there was no evidence the accused was intoxicated when he committed the murder. The most he will say about the matter himself is that he had been "drinking all the afternoon." This obviously extravagant language may mean anything. He does not say, nor does any witness say, that he was drunk. Unless there was evidence which would justify a finding to that effect the Judge was not obliged to discuss the law on the subject any more than he would be obliged to discuss the law upon the subject of insanity in a case where no evidence of insanity had been given.

As Lord Alverstone, C.J., put it in *Rex* v. *Hampton* (1909), 2 Cr. App. Cas. 276:—

"A summing-up is not a dissertation upon the law, but must have reference to the way in which each case has been conducted at the trial."

The other contention of the counsel for the accused is that the jury should have been told that they might find the accused guilty of manslaughter, and that this alternative was not given to them. The question in this case is whether there are any circumstances which would justify a verdict of manslaughter. If there are, then, as I understand the authorities, the trial Judge should have left to the jury the question as to whether the crime was manslaughter only.

In the cases of *R.* v. *Jagat Singh*, 28 D.L.R. 125, 25 Can. Cr. Cas. 282; *Rex* v. *Hopper*, [1915] 2 K.B. 431, the Court of Appeal thought there were facts and circumstances upon which a verdict of manslaughter might have been justified, and *Gilbert* v. *The King*, 38 Can. S.C.R. 284, 12 Can. Cr. Cas. 127, and *Eberts* v. *The King*, 47 Can. S.C.R. 1, 20 Can. Cr. Cas. 273, 7 D.L.R. 538, were cases in which the Court of Appeal reached the conclusion that the trial Judge was justified by the facts and circumstances in evidence in not leaving the question of manslaughter to the jury.

There is no new law in the *Hopper* or *Jagat Singh Cases*. The Courts were applying exactly the same rules and tests as in the *Gilbert* and *Eberts Cases*. The results differed only because in the two former cases there was evidence of provocation and in the two latter there was no such evidence. This case must be decided by the same test.

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After carefully examining the whole of the evidence in the case, to quote the words of Mr. Justice Davies in the *Eberts Case*:—

"I am not able to bring myself to the conclusion that any jury of reasonable men could fairly find that the prisoner shot the deceased while 'in the heat of passion caused by sudden provocation.'"

In my opinion such a verdict could not properly have been returned by any jury, and I therefore think the learned trial Judge was right in directing the jury as he did. Any other direction would simply have perplexed the jury and would probably have resulted in a mis-trial.

I would refuse the application for leave to appeal.

Chisholm, J.

CHISHOLM, J., concurred with HARRIS, J.

Leave to appeal refused.

ARNOLD v. THE DOMINION TRUST Co.

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin, and Brodeur, JJ. April 15, 1918.

INSURANCE (§ IV B—170)—BEQUEST OF—WRITING IDENTIFYING POLICIES—B.C. LIFE INSURANCE ACT.

A bequest to the testator's wife of "the first $75,000 collected on account of policies of life insurance," is ineffective for not "identifying the policies by number or otherwise" as required by the Life Insurance Act, R.S.B.C. 1911, c. 115, sec. 7.

[*Arnold* v. *Dominion Trust*, 35 D.L.R. 145, affirming 32 D.L.R. 301, affirmed.]

Statement.

APPEAL from a decision of the Court of Appeal for British Columbia, 35 D.L.R. 145, affirming, by an equal division of opinion, the judgment at the trial, 32 D.L.R. 301, in favour of the defendants.

The action was brought to recover the sum of $75,000 bequeathed to the appellant by the will of her husband, W. R. Arnold. The questions raised on the appeal were, first, whether or not leave of the court or a judge as provided by s. 106 of the Winding-up Act was necessary; secondly, whether or not the declaration in writing required by s. 7 of the Life Insurance Policies Act can be made by will; and thirdly, whether or not the devise identified the policy under the provisions of s. 7.

S. S. Taylor, K.C., for appellant; *Lafleur*, K.C., for respondents.

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Fitzpatrick, C.J.

FITZPATRICK, C.J.:—At the hearing of this appeal an application was made by counsel for the respondent to quash the appeal for want of jurisdiction. The ground put forward was that the respondent company being in liquidation, no appeal could, under ss. 22 and 101 of the Winding-up Act, be brought without leave of the Court.

In my opinion, this was founded on a misconception of the nature of the action; it is not one against the company or the liquidator properly speaking, but only as executor of Wm. Arnold deceased. It involves the construction of the will of the deceased. In such an action it cannot be decided what the plaintiffs can recover against the liquidator as such, but only what part of the estate of the deceased which can be so recovered the plaintiff is entitled to. If there are two persons each claiming to be entitled under a will the liquidator as executor may be a necessary party to a suit to determine their rights, but it must obviously be a matter of indifference so far as the company is concerned which of the two is entitled. I have been assuming that the estate of the deceased would only have a claim on the assets of the company in liquidation, but of course if there were specific trust funds in the hands of the liquidator as executor the case would be very much stronger. The matter is complicated by the plea which the defendants have put in that the estate of the deceased is insolvent and that they are creditors against it, but clearly the fact that they may have such a defence could not be any ground for preventing the action being brought against them as executors.

Therefore I am of opinion that the action is not one which is within the prohibition of the Winding-up Act at all, and no leave being required, the application against the jurisdiction fails.

I am of opinion that the appeal must be dismissed on the ground that the will makes no such declaration of a trust as s. 7 of the Life Insurance Policies Act, R.S.B.C., c. 115, calls for. This section enables a man to declare that a policy effected on his life is for the benefit of his wife and children, but here we have nothing but a bequest to the testator's wife of $75,000 out of the moneys which may be collected on account of policies of life insurance.

It is suggested that "the Act should receive such fair, large and liberal construction and interpretation as will best ensure the attainment of its object," but this does not help us, for apart from

the fact that the courts ought, if possible, to place such construction on every Act as will best ensure the attainment of its object, I think the object of this Act is, broadly speaking, to enable a man during his lifetime to make out of his earnings a provision for his family which shall be beyond his own or his creditors' reach. I do not think it was intended to enable him to retain his insurance as his own absolute property even after his death and under cover of the special protection afforded by the Act upon distinct conditions bequeath the proceeds, which may be the whole of his estate, in fraud of his creditors. This involves to a certain extent the question into which I do not wish to enter whether the declaration called for by the Act can be made by will.

The Chief Justice in his reasons for the judgment appealed against, says: "Assuming the will to be such a writing as is contemplated by the Act." I gather from this that he probably shares the doubts which I certainly entertain whether a will is such a writing as the statute contemplates.

The only case in which the point seems to have received much consideration is one before the Ontario courts in which province the statute is similar to the one in British Columbia. In *McKibbon* v. *Feegan*, 21 A.R. (Ont.) 87, a majority of the court concluded that the declaration could be made by will, but Osler, J., dissenting, delivered what appear to me to be weighty reasons for holding the contrary view.

It is not necessary to decide this point in the present case because, as I have said, I do not find that the will identifies any policy by its number or otherwise as the statute requires.

Since writing the above, my attention has been called to a newspaper report of a decision of Meredith, C.J., in the Province of Ontario, in the matter of the will of John Wesley Monkman, a soldier who was killed on active service. The Chief Justice held that a postscript to the will, though it may not be valid as part of the will, is a sufficient declaration for the purposes of the Insurance Act. (See 14 O.W.N. 29.)

This is a step further in the liberal construction and interpretation of the Act. The writing could be no declaration during the life of the deceased, and as a general rule at any rate the law does not recognize any testamentary disposition made otherwise than by will.

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Davies, J.

DAVIES, J. (dissenting):—This appeal coming on for hearing, respondent moved to quash on the ground that leave to appeal had not been obtained under s. 106 of the Winding-up Act and that such leave was necessary to give this court jurisdiction.

I am of the opinion that the sections of this Winding-up Act relating to appeals are, as expressed in s. 101 of the Act, confined to "orders or decisions of the court or a single judge *in any proceeding under this Act*."

This appeal from the judgment of the court of final resort in British Columbia is one conferred upon litigants by the Supreme Court Act itself and is not, in my opinion, a "proceeding" under the Winding-up Act requiring the leave of a judge before being taken, but an ordinary appeal from the final judgment of a court of last resort in the province in an action originating in a superior court. Leave to bring that action in the first instance was obtained under s. 22 of the Winding-up Act. Thereafter the litigants had their statutory right of appeal under the Supreme Court Act. I think, therefore, the motion to quash for want of jurisdiction fails and must be dismissed with costs.

The question to be decided on the appeal is whether the sum of $75,000, being part of the proceeds collected from life insurance on the life of William Robert Arnold, deceased, belongs to the appellants who are the widow and infant children of the deceased or constitutes part of his general estate.

The determination of that question depends first upon the construction to be given to s. 7 of the Life Insurance Policies Act of British Columbia (R.S.B.C. (1911), c. 115). The Act itself is entitled: An Act to secure to Wives and Children the Benefit of Life Insurance and to Regulate and Prohibit Insurance without an Interest in the Life of the Insured.

S. 7, upon the construction of which this appeal depends, provides that where an assured "by any writing identifying the policy by its number or otherwise" makes

> a declaration that the policy is for the benefit of his wife or of his wife and children or any of them, such policy shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them, according to the intent so expressed or declared.

The deceased Arnold made a declaration in his will that the first $75,000 collected on account of his life insurance policies should be for appellant's benefit.

If the declaration required to be made by the statute can be made by will, then the only question remaining is whether or not the testator has complied with the statute in the matter of identifying his policies.

Mr. Lafleur, for the respondent, contended that the statutory declaration required could not be made by will, and even if it could that this will had failed to identify the policies of insurance.

I am not able to agree with either contention. The British Columbia statute is in all material points of s. 7, which we have to construe, substantially the same as s. 5 of the Ontario Act, 47 Vict. c. 20, securing to wives and children the benefits of insurance, while s. 8 of the former statute is substantially the same as s. 6 of c. 136 of the R.S.O., 1887, as amended by 53 Vict. c. 39, s. 6.

By a series of judicial decisions in the Province of Ontario, including those of the Court of Appeal of that province, before the British Columbia legislature enacted the statute in question, it had been decided that the words "any writing" included a last will, and I think it must be assumed what when the Legislature of British Columbia enacted the statute in question they did so with the knowledge of the judicial interpretation which had been authoritatively placed upon the Ontario statute on that point and with the intent that such interpretation would be followed in British Columbia.

I may say that, while the question is one not free from all doubt, I agree with the conclusion the courts of Ontario had reached that the words "any writing" in the section in question included a will.

As to the question whether the will in this case sufficiently identifies the policies of insurance, I am of opinion that it does. I cannot accept the argument that the maxim *ejusdem generis* should be applied to the language of the statute, and that the words "any writing identifying the policy by its number or otherwise" should be construed so as to limit the identification to something akin or similar to the number of the policy. On the contrary, I think that any language which sufficiently identified the policy or policies so as to prevent any mistake being made with respect to the declaration of trust would be sufficient. In the case now before us, the words of the testator's bequest were: "The first $75,000 collected on account of policies of life insurance I give to

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my wife, Laura," etc. There were ten insurance policies on Arnold's life in force at the time of his death amounting to $425,000, and of this sum $207,054, it is stated, had been collected. It does seem to me, alike on authority and principle, that the terms of the above bequest are sufficient to comply with the statute. The object of requiring identification of the policy or policies with respect to which a declaration of trust in favour of testator's wife or children might be made was to insure such certainty as would avoid any trouble or dispute as to the particular policy or policies of insurance as to which any such declaration applied. Any language insuring this result, however general, would, in my judgment, suffice. "The first $75,000 collected on account of policies of life insurance," means, of course, the testator's life insurance; and in my opinion, embraces all of testator's life insurance, and does not leave any doubt as to testator's meaning or the sources from which the fund he was creating for his wife and children was to come. His object was to make a declaration of trust with respect to a specific portion of that life insurance for his wife and children. I am unable to appreciate the distinction attempted to be drawn between a bequest of *all* of his policies of insurance, which under the Ontario authorities, would undoubtedly be sufficient, and a bequest of a specific amount "first collected on account of those policies." The question to my mind is: Has language been used so identifying the policies as to place the question of their identity beyond doubt? I cannot see how the limitation of the amount as to which the declarations of trust was applicable, namely, the first $75,000 collected out of testator's policies, could affect the identification of the policies from which the amount was to be collected. The fact was proved that at his death Arnold had ten life policies in force. The $75,000 was declared to be the first $75,000 collected from those policies. There could be no doubt in my judgment as to the identity of the policies out of which the fund declared to be in trust for the widow and children was to come. It is true that fund might come from one or more of these ten policies, but that possibility cannot alter the fact that the language of the bequest covered and identified each and all of the policies as those from which the fund bequeathed might come. It would be a narrow construction which determined that, although the words of the bequest covered and

included all of the policies and so identified them, nevertheless as the $75,000 might be collected out of one of the $100,000 policies or two of them, that fact operated to destroy the identification.

The fund, $75,000, testator settled on his wife and children was to be the first $75,000 collected on any or all of the policies, but each and all of the policies were identified as being the sources or one of the sources from which the $75,000 might come. Nor can I see that because one or more of the companies which issued the policies resisted payment successfully of the amount insured, such fact could affect the question of identification. The argument would be equally strong if he had identified the policies by their numbers.

I agree with the conclusion of Martin, J., who, after citing several of the Ontario cases, says: "It is but a short, easy and logical step from these cases where all of the policies or only one policy are or is dealt with, to this case."

My conclusions are, therefore, that we have jurisdiction to hear and determine this appeal; that the words of the statute "any writing" embrace and include a last will of a testator; and that the testator has in the present case sufficiently identified the policies out of which the fund he desired to settle upon his wife and children was to come. I would, therefore, allow the appeal and direct judgment to be entered accordingly for the plaintiff.

Idington, J.

IDINGTON, J.:—I think this appeal should be dismissed with costs. I am of the opinion that the motion to quash the appeal should have prevailed.

The action was begun after the Trust Company, respondent, had been put in liquidation by an order under the Winding-up Act.

Presumably s. 22 of that Act, which prohibits the institution of any suit against a company after a winding-up order is made "except with the leave of the court and subject to such terms as the court imposes," was duly observed. No such order, however, appears in the case now presented for our consideration. If it was properly obtained then the whole litigation is a proceeding under the Act. But, if it was not obtained, the whole proceeding is void and there can be no appeal allowed to help one so acting.

It is provided by s. 101 of the Act that except in the North West Territories, any person dissatisfied with an order or decision

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of the court or a single judge in any proceeding under the Act may, by leave of a judge of the court, appeal therefrom.

Three classes of cases are made thus appealable. One is if the question to be raised on the appeal involves future rights; another if the decision is likely to affect other cases of a similar nature in the winding-up proceedings; and a third if the amount involved in the appeal exceeds $500.

S. 102 provides for such appeals being carried to the respective appellate courts of the provinces named.

S. 103 provides for cases in the North West Territories being allowed an appeal to this court by leave of a judge thereof.

Sec. 106 is as follows:—

106.—An appeal, if the amount involved therein exceeds two thousand dollars, shall, by leave of a judge of the Supreme Court of Canada, lie to that court from:

(*a*) The Court of Appeal for Ontario (amended 9-10 Edw. VII. c. 62);

(*b*) The Court of King's Bench in Quebec; or

(*c*) a superior court *in banc* in any of the other provinces or in the Yukon Territory.

No leave to appeal this case from the Court of Appeal for British Columbia has been given.

Having regard to the care taken by parliament in the foregoing enactments for safeguarding any estate in liquidation under the Winding-up Act from becoming involved in unnecessary litigation and the consequent delays and expenses thereof, I have no doubt that it intended to limit appeals to this court in the way provided by this sec. 106.

If that was not its purpose in thus enacting, it puzzles one to understand what conceivable object could have been had in view; for the two thousand dollar limit named would cover almost any conceivable case and enable the parties concerned to come here by virtue of the provisions of the Supreme Court Act without special leave.

To hold, as I understand the ruling directing the argument to proceed would mean if adhered to, opening the way to appeals here in any litigation the judge in charge of the winding-up proceedings may, as I presume he did herein, permit; whenever the amount in controversy or thing involved in any way of a claim against the company or its liquidators reaches the limit set by the Supreme Court Act for the particular province in which the litigation may have been permitted.

It was suggested in argument that the restriction in s. 106 upon appeals here was designed to be applied in cases of a proceeding under the Act.

That is answered by the express language of the s. 106 which contains no such language as to support the argument.

There is, I submit further, no litigation with the company or its liquidator which can be permitted except by virtue of s. 22 and everything permitted thereunder is a proceeding under the Act in the language used in s. 101.

On the merits of the questions raised in argument, I am of the opinion that the Life Insurance Policies Act (R.S.B.C. 1911, c. 115) by its s. 7 never was intended to cover any case or a bequest by will or indeed any revocable instrument whatever.

The first sentence of that section is as follows:—

7. In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore indorsed, or may hereafter indorse, or by any writing identifying the policy by its number or otherwise has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, such policy shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed or declared; and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration.

It is expressed in the most imperative terms that in such cases, thus defined, the policy "shall enure and be deemed a trust . . . according to the intent so expressed," and so long as any object of the trust remains the money payable "shall not be subject to the control of the husband or his creditors, or form part of his estate."

It was obviously designed that the declaration should be irrevocable and once made should not only protect the objects of the trust, but also protect the husband making it from the importunities or pressure of creditors.

It is urged that the Act in question herein was copied from an Ontario Act of the like import and that the Court of Appeal for that province upheld an appointment or declaration made by will. That decision does not bind us. With unfeigned respect for the court which so decided, I cannot follow the decision. I prefer the

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reasoning of Osler, J., who dissented therefrom. Indeed, I may be permitted to adopt the views he expressed and forbear enlarging further on that aspect of the case.

Even if I could find any revocable instrument such as a will continues to be until the maker of it is dead, there seems to me insuperable obstacles in appellant's way, in the adherent nature of the will in question.

He fails to identify the policy or policies upon which it might operate. The ascertainment thereof is left to the chances of the development of circumstances that cannot arise until some weeks after the testator's death. For there could be no payment of any policy until after probate had been obtained by the respondent Trust Company, or someone in its place, after its renunciation.

Moreover, no part of the bequest is made payable to the appellant by any insurance company, but it forms part of the estate and is payable out of the estate. The language of the section expressly prohibits that sort of thing.

S. 15 of the Act provides for the appointment by the husband of a trustee or trustees to receive the money, but that is very far from what was done in this case.

And I may add that the express provisions of that section for the nomination by a husband or father by his will of such trustees, seems to me instead of helping the appellant in her argument for the declaration required by s. 7 being possible by will, destroys the argument.

If the legislature had ever contemplated such a thing surely it would have so expressed itself.

The purpose it had in view in enacting s. 7 could not be accomplished by any will or other revocable instrument. But some of those purposes could be promoted by adding the nominating power in s. 15, without encroaching in the slightest degree upon the permanence and sanctity of the trust that had been created by virtue of s. 7.

Anglin, J.

ANGLIN, J.:—The respondent moved to quash this appeal on the ground that the leave of a judge of this court to bring it was necessary under s. 106 of the Winding-up Act (R.S.C., ch. 144), and was not obtained. This contention rests on the view that, owing to an order for the winding-up of the defendant Trust Company, executor of the insured, having been made before this

action was begun, "leave of the court" to commence it was required and was obtained under s. 22 of the Winding-up Act. The like leave to proceed with the action, had it been already commenced before the winding-up order was pronounced, would have been necessary. The court disposing of an application for leave under s. 101 determines whether the pending or proposed action is one which should be permitted to go on—whether having regard to the nature of the action and all the circumstances the interests of justice will be better served by allowing it to proceed, or, when that is possible, by requiring that the subject matter shall be dealt with by the judge or officer charged with the winding-up in the course of the proceedings before him. When the leave is given the action is brought or proceeds in the court in which it is instituted subject to whatever incidents, including rights of appeal, the law attaches to it. The granting of this leave, whether it be to bring an action or to proceed with one already brought, does not make of it a "proceeding under this Act" within the meaning of s. 101 of the Winding-up Act. By "any proceeding under this Act" is meant a proceeding in the winding-up itself, *e.g.*, the making of the winding-up order, or the allowance or disallowance of a creditor's claim, or the determination of the liability of a contributory by the judge or delegated officer under whose direction the liquidation is carried on. The right of appeal in this action is conferred not by the Winding-up Act, but by the Supreme Court Act; and it is the ordinary appeal given by the latter Act from a final judgment of a court of last resort in the province in an action which has originated in a superior court. The motion to quash therefore fails.

The right of the plaintiff to the $75,000 insurance money in question as a preferred beneficiary under the Life Insurance Policies Act (R.S.B.C. (1911), c. 115) is contested on three grounds —that a will is not a "writing" within the meaning of s. 7 of the statute by which a declaration of trust for preferred beneficiaries may be made; that the testator did not purport to declare such a trust, but merely to make a bequest or give a legacy to his wife; that the will does not identify the policy or policies "by number or otherwise" as s. 7 requires.

The material part of s. 7 of the British Columbia statute, first passed in 1895 (c. 26), is a reproduction of s. 5 of the Ontario Act

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to secure to wives and children the benefit of insurance, enacted in 47 Vict. as c. 20, and carried into the R.S.O. (1887), as c. 136. S. 8 of the British Columbia statute is substantially, and so far as material, a reproduction of s. 6 of c. 136 of the R.S.O. (1887), as amended in 1890 by 53 Vict. c. 39, s. 6. It had been decided by the late Chancellor Boyd, in *Re Lynn* (1891), 20 O.R. 475, and again in *Beam* v. *Beam* (1893), 24 O.R. 189, that a will is a "writing" within the Ontario section; and in *McKibbon* v. *Feegan* (1893), 21 A.R. (Ont.) 87, these decisions had been approved by the Court of Appeal (Hagarty, C.J.O., and Maclennan, J.A., Osler J.A., dissenting). I think it must be assumed that the legislature of British Columbia was apprised of the judicial interpretation that had been thus definitely placed on the statutory provision under discussion when it adopted it in 1895, and that it intended that that interpretation should be followed in British Columbia. *Casgrain* v. *Atlantic and North West R. Co.*, [1895] A.C. 282, at 300; see also authorities collected in Maxwell on Statutes, 5 ed., at p. 500, and in 27 Hals. Laws of England, at p. 142. The Interpretation Act of British Columbia (R.S.B.C. 1897, and 1911) does not contain a provision excluding the application of this well-established rule of statutory construction such as we find in the R.S.C. (1906), c. 1, s. 21 (4), and in the R.S.O. (1914), c. 1, sec. 20. Without expressing any view as to what should have been the construction of the British Columbia statute had the matter come to us as *res integra*, I am of the opinion that we must now act upon the assumption that the construction placed upon the similar provision of the Ontario Act was intended by the legislature of British Columbia to be that which should be given to s. 7, and that a will, if otherwise in compliance with the requirements of that section, must therefore be deemed a "writing" within its purview.

In numerous cases in Ontario dispositions by will in the form of bequests or legacies of insurance have been held to be sufficient as declarations to meet the requirement of the statute. The *Lynn* case, 20 O.R. 975, and *McKibbon* v. *Feegan*, 21 A.R. (Ont.) 87, already cited, *Re Cheeseborough*, 30 O.R. 639, and *Book* v. *Book*, 32 O.R. 206; 1 O.L.R. 86, are instances. Once it is accepted that a declaration under the statute may validly be made by will, I think it follows that words of bequest or gift are sufficient in

form. It would scarcely accord with the liberal construction which should prevail in the interpretation of this legislation and would have a deplorably unsettling effect were we to hold otherwise and overrule now decisions that have stood unchallenged for twenty-five years and must have been acted upon very frequently since they were pronounced.

The question as to the sufficiency of the identification of the policies is in a different position. Induced no doubt by the desire to render as far-reaching as possible the scope and operation of what they deemed remedial legislation—to advance the remedy which it was designed to provide—the courts of Ontario have apparently refused to apply the well-known *ejusdem generis* and *noscitur a sociis* rules to the construction of the words "or otherwise" in the phrase "by any writing identifying the policy by its number or otherwise. They have held that where a testator had but one policy a bequest to a preferred beneficiary of his property "including life insurance" should be treated as a declaration under the statute sufficiently identifying that policy. *Re Harkness*, 8 O.L.R. 720; *Re Watters*, 13 O.W.R. 385. There are indications in the decided cases that a bequest of a definite portion of the proceeds of the testator's life insurance might be deemed sufficient where he had but a single policy. It has also been held that where there were several policies a bequest of "all my property real and personal and including life insurance policies and certificates" (*Re Cheeseborough*, 30 O.R. 643; see, too *Re Cochrane*, 16 O.L.R. 328), would satisfy the statute as to policies in force at the time of the making of the will and not made payable to named beneficiaries. Probably the most recent decision in *Re Monkman and Canadian Order of Chosen Friends*, 14 O.W.N. 29, goes further than any that preceded it. But in no reported case, so far as I am aware, has it been held that, where the testator has several policies, a bequest of a sum smaller than their gross amount to be paid out of his insurance or to be charged upon it, without any further identification of the policies to be so affected, is a good declaration of trust under the statute.

In going as far as they did in order to attain the purpose of the legislation under consideration, the courts of Ontario have, I think, reached, if they have not overstepped, the limit of what the legislature intended to permit when it prescribed, as a condition

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of the efficacy of "any writing" designed to take life insurance out of the assets available to satisfy creditors and make of it a trust fund exclusively for beneficaries of the preferred class, that such "writing" should identify the policy or policies so dealt with "by number or otherwise." Any method of identification, however widely different from identification by number, has apparently been treated as sufficient.

But the decided cases have not gone the length of entirely dispensing with identification and that, I fear, would be the result of holding sufficient a mere charge by will of an amount representing a fraction of their face value upon all a testator's life insurance consisting of numerous policies. With respect I cannot accept Martin's, J., view that to do so would be to take "but a short, easy and logical step from these cases," *i.e.*, those already decided. Assuming that the identification prescribed is to be found in all of them, it would be the step from identification of some kind to no identification at all.

In the case at bar, the insurance, consisting of ten policies, two of them for $100,000 each, amounts in all to $425,000, of which $207,054.54 has been collected. The bequest is of "the first $75,000 collected on account of policies of life insurance." The first $75,000 collected might come entirely out of one of the $100,000 policies or it might come partly out of the proceeds of several policies. The policies might be paid in full in a single payment or only by instalments. Some might be found wholly uncollectable. The executors might proceed more promptly in making proofs of claim to one company than to another. The diligence or the readiness in meeting claims against it of one company might be greater than that of another. Upon some or all of these contingencies would depend the source or sources from which the $75,000 first collected would come, and the determination of what assets would be taken out of the estate and what would be available for creditors. It is, in my opinion, impossible to say that under such circumstances there has been any identification whatever of the policy or policies, the whole or part of which is to form the subject of the statutory trust for the preferred beneficiary. However ready or even anxious we may be to give to a statute designed "to secure to wives and children the benefit of life insurance," such construction as will tend to effect that purpose, we may not entirely dispense

with the identification which the legislature has seen fit to prescribe. To do so would be to legislate, not to construe.

I am, for these reasons, of the opinion that this appeal fails and must be dismissed with costs. The appellant, however, is entitled to her costs of the unsuccessful motion to quash which should be set-off against the costs of appeal to be paid by her.

BRODEUR, J.:—A motion to quash the appeal has been made by the respondent on the ground that this appeal has been taken without leave by a judge of this court.

The present action has been instituted by the appellant to claim a sum of $75,000, being part of the proceeds from life insurance of her husband, William Robert Arnold. The question to be decided in the case is whether that sum of $75,000 belongs to the preferred beneficiaries of the deceased or constitutes part of his general estate.

When the action was instituted against the Dominion Trust Company, which had been appointed executors of the will of Arnold, a winding-up order had been made against the company, and under the provisions of s. 22 of the Winding-up Act (c. 144, R.S.C.), the leave of the Supreme Court of British Columbia was obtained.

When the appeal came up before this court no leave was obtained, and it was contended by the respondent that the appeal should be quashed because no such leave was obtained.

S. 106 of the Winding-up Act, says that

> An appeal if the amount involved therein exceeds $2,000 shall by leave of a judge of the Supreme Court of Canada lie to that court from a Court of Appeal in the Province of British Columbia.

The appellant, on the other hand, claims that such leave is only required in proceedings under the Winding-up Act, and that the present action does not refer to any such proceedings.

I see that no such distinction as alleged by the appellant is to be found in s. 106; that section seems to be of a general nature. It is of importance that proceedings against a company being wound up should be expedited with rapidity, and it is also to be found in the general economy of the Winding-up Act that legal proceedings should not be taken unless by leave of the courts.

It is stated in s. 18 that proceedings might be taken in any action against a company.

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S. 22 provides, as I have already said, that no action might be instituted, except with the leave of the court and the same requirements are exacted in the case of appeals. Once the winding-up order has been given all the legal proceedings are under the control of the courts and must be instituted only with the leave of the courts.

In those circumstances, I have come to the conclusion that, the appellant having failed to obtain leave from a judge of this court before proceeding, the appeal should be quashed.

We have already decided in the case of *Ross* v. *Ross*, 53 Can. S.C.R. 128, that the appeal to the Supreme Court of Canada given by s. 106 of the Winding-up Act must be brought within 60 days from the date of the judgment appealed from and that after the expiration of the 60 days so stated neither the Supreme Court of Canada nor a judge thereof can grant leave to appeal.

As the respondent has not made his motion within the time prescribable by the rules he should be entitled to the costs of his motion only.

Appeal dismissed.

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McCARTHY v. MATHEWS STEAMSHIP CO.

Quebec Superior Court, Weir, J. December 24, 1917.

MASTER AND SERVANT (§ V—340)—FOREIGNER—TEMPORARY RESIDENCE IN CANADA—RIGHTS UNDER WORKMEN'S COMPENSATION ACT.

Temporary residence in Canada, while looking for a re-engagement on lake vessels, does not entitle a foreigner to the benefit of the Workmen's Compensation Act under article 7324, R.S.Que., 1909, as a resident of Canada.

Weir, J.

WEIR, J.:—It appears from the evidence, that the plaintiff, who is 57 years of age, was born in England. He became a naturalised citizen of the United States, where he resides with his aunt in Pennsylvania. For 13 years before the accident complained of he had been a fresh water sailor, or deckhand, on lake steamers plying for the major portion of the time between Port Arthur, Duluth, Milwaukee and Chicago. Prior to the accident he arrived in Montreal on the steamship "Wyoming." He missed its sailing and lodged for a few days on Common Street. Then he was engaged as a deckhand on defendant's ship "Steelton" and

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during the vessel's passage up the Lachine Canal the accident in question happened to him.

Art. 7324 of the R.S.Q. provides that a foreign workman is not entitled to the benefit of the Compensation Act unless at the time of the accident he resides in Canada. To reside means "to dwell permanently," or "for a considerable time." The fact of plaintiff living temporarily in Montreal while looking for a re-engagement on steamers plying to ports of the Great Lakes does not entitle him to say he was residing in the city of Montreal or in Canada at the time of the accident. Therefore, he is not entitled to claim the application of the Workmen's Compensation Act of this province to the circumstances alleged in the declaration.

Plaintiff has failed to prove his demand and defendant has proved that plaintiff was not, at the time of the accident, a resident of Canada. The court dismisses plaintiff's demand with costs, reserving him such recourse as, by law, may to him appertain.

Action dismissed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., and Riddell, Lennox and Rose, JJ. October 12, 1917.

STATUTES (§ II A—95)—DOG TAX AND SHEEP PROTECTION ACT—RIGHT OF CLAIMANT.

A claimant under the Dog Tax and Sheep Protection Act (R.S.O. 1914, c. 246) has a right of action to compel the council and valuer to comply with the provisions of the Act, as far as may be necessary to give effect to a valid claim; but has no right of action in the nature of an appeal against the determination of the council or the valuation of the valuer.

[Sec. 18 as amended by 6 Geo. V., c. 56 (3), considered; Re *Hogan* v. *Township of Tudor* (1915), 34 O.L.R. 571, distinguished.]

Statement.

APPEAL by plaintiff from a judgment of a County Court Judge dismissing an action for compensation for loss of sheep killed. Affirmed.

The plaintiff in his statement of claim alleged that on or about the 18th September, 1916, 7 of his sheep were injured or killed and 20 of them worried, while in an enclosed field, part of his farm, by a dog, the owner of which was not known; that the plaintiff thereby sustained damage to the amount of $202.50; that, within three months after the 18th September, 1916, to wit, on the 25th September, 1916, he applied to the council of the defendants, the Corporation of the township of Ernesttown, for compensation for the damage sustained by him, and then satisfied the council that

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he had made diligent search and inquiry to ascertain the owner or keeper of the dog, and that he could not be found; that money was collected and paid to the defendants, under the provisions of the Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, and amending Acts, during 1916, and the same constituted a fund for satisfying such damages as arose in 1916 from dogs killing or injuring sheep in the municipality, and the amount of the fund, supplemented by the amount collected and paid to the defendants in other years under the provisions of the said Act, and applied to the general purposes of the defendants, exceeded the amount of the plaintiff's claim; that the council of the defendants had refused and still refused to award the plaintiff for compensation a sum equal to the amount of the damage sustained by him. The plaintiff, therefore, claimed $202.50.

The defendants, in their statement of defence, said that, without admitting any liability to the plaintiff, they acquiesced in an application of the plaintiff made by him to the council that a sheep-valuer of the township should investigate the alleged injuries to the plaintiff's sheep, and the plaintiff himself chose one Wright, a sheep-valuer appointed by the defendants; and Wright, as such valuer, at the request of and in the company of the plaintiff, did investigate the injuries alleged to have been caused to the plaintiff's sheep; and, with the knowledge and concurrence of the plaintiff, Wright reported to the defendants that the amount of damage done to the plaintiff's sheep was $130; and the plaintiff admitted that the damages found should be reduced by $12.50, being the amount received by him for the carcasses of the injured sheep, leaving $117.50 as the amount of damages sustained by the plaintiff; and the defendants' council acted upon Wright's report in attempting to adjust the claim of the plaintiff, and tendered to the plaintiff, before action, the sum of $117.50 in satisfaction of his claim, but the plaintiff refused to accept it; and the defendants brought the said sum into Court, without admitting any legal liability, etc.

In reply, the plaintiff denied that he acquiesced in Wright's report.

The action was tried by LAVELL, Co.C.J., without a jury. At the trial, the defendants moved for a nonsuit; and the learned Judge granted the motion, giving reasons as follows:—

I cannot distinguish this case from *Re Hogan* v. *Township of Tudor* (1915), 34 O.L.R. 571, where it was held that there is nothing in the Dog Tax and Sheep Protection Act, or elsewhere, to create a liability for the amount of damages sustained by the owner of sheep killed or worried by a dog whose owner is unknown. I therefore allow the motion for a nonsuit made by the defendants' counsel, with costs.

In the event of an appeal being taken, and it being found that the defendants are liable, I find that the damages awarded are fair, and should not be increased, as claimed by the plaintiff.

The sum in Court may, as agreed by counsel for the defendants, be paid over to the plaintiff after he has satisfied the costs of the action, or may be applied *pro tanto* on such costs, if he so prefers.

The appeal was on the following grounds:—

(1) The council of the municipality did not award to the plaintiff for compensation a sum equal to the amount of damages sustained by him; nor did the treasurer of the municipality pay over to the plaintiff the amount which should have been so awarded, as provided by the Dog Tax and Sheep Protection Act, sec. 18 (1).

(2) The judgment of the trial Judge was contrary to the law and the evidence and the weight of evidence.

(3) The trial Judge was in error in finding that the damages awarded were fair and should not be increased.

(4) The trial Judge was in error in holding that there was no liability on the part of the municipality for the amount of the damages sustained by the owner of sheep killed or worried by a dog whose owner is unknown, under sec. 18 (1).

Sections 17 and 18 of the Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, are as follows (sec. 18 as amended by 6 Geo. V. ch. 56, sec. 3):—

17.—(1) The council of every township, town or village may at the first meeting in each year appoint one or more persons, to be known as sheep-valuers, whose duty it shall be to inspect the injury done to sheep by dogs in cases where the owner of the dog or dogs committing the injury cannot be found, and the person aggrieved intends to make claim for compensation from the council of the municipality.

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(2) The sheep-valuer shall investigate the injury within forty-eight hours after notice thereof is given to him and shall forthwith make his report in writing to the clerk of the municipality, giving in detail the extent of injuries and amount of damage done, and the report shall be acted upon by the council in adjusting the claim.

18.—(1) The owner of any sheep killed or injured by any dog, the owner of which is not known, may within three months after killing or injury apply to the council of the municipality in which such sheep was so killed or injured, for compensation for the injury; and if the council is satisfied that he has made diligent search and inquiry to ascertain the owner or keeper of such dog, and that he cannot be found, they shall award to the aggrieved party for compensation a sum equal to the amount of the damage sustained by him; and the treasurer of the municipality shall pay over to him the amount so awarded.

(2) The council may, before determining, examine parties and witnesses under oath, which may be administered by any member of the council.

Peter White, K.C., for the appellant, the plaintiff.

W. S. Herrington, K.C., for the respondents, the defendants.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P. (at the conclusion of the argument):—Apart from the provisions of the enactment in question, the plaintiff could not have any kind of valid claim upon the defendants for any kind of recompense for the loss he sustained through the worrying of his sheep by dogs.

Any such right which he may have is a new one, created and governed by that legislation: so that, unless the claim made in this action is supported by that enactment, this action was properly dismissed at the trial, and this appeal must be dealt with in the same manner now.

The enactment provides in a comprehensive manner for the adjustment of all such claims as that in question, without any kind of intervention by the Courts. The municipal council only is to determine whether the claim is a valid one under the Act, and for that purpose may examine parties and witnesses under oath; and the council may appoint one or more valuers who is or are to

ascertain the extent of the injury done and the amount of the damage sustained and to report in writing to the council his or their findings, which "report shall be acted upon by the council in adjusting the claim;" and the only ways in which, before the recent amendment of the enactment, it could have been acted upon was in ascertaining the amount of two-thirds of the claimant's loss as so valued and by payment to him accordingly, and now, as the payment is to be the whole loss instead of two-thirds, by payment only.

Legislation of this comprehensive character is not extraordinary. The Assessment Act affords an instance: see *Hislop* v. *City of Stratford* (1917), 38 O.L.R. 470, 34 D.L.R. 31; and *Foster* v. *Township of St. Joseph* (1917), 39 O.L.R. 114, 525, 37 D.L.R. 283; as also does the Ditches and Watercourses Act: *Otto* v. *Roger and Kelly* (1917), 39 O.L.R. 127, 40 O.L.R. 381, 35 D.L.R. 339, 38 D.L.R. 668. The purpose of the legislation, to prevent the opening of a new flood-gate of litigation, is evident here, as it was in those cases.

The trial of the case is to be by the municipal council without appeal. The valuation is a simple matter, and is to be made by official valuers, from whose report no appeal is given; quite in accord with the rule that a valuation is final, though an award is not.

A claimant has of course a right of action to compel council and valuer to comply with the provisions of the Act, as far as may be necessary to give effect to a valid claim; but he has no right of action in the nature of an appeal against the determination of the council or the valuation of the valuer; and so, in my opinion, the judgment appealed against was right; and, as the council were always ready and willing to pay according to the valuation, and offered to do so, and paid the money into Court in this action, I am also of opinion that the question of costs was properly disposed of at the trial; that it was right that the plaintiff should be ordered to pay the costs of the action, and is right that he be ordered to pay the costs of this appeal.

RIDDELL, J.:—The case of *Re Hogan* v. *Township of Tudor*, 34 O.L.R. 571, is not a case like this at all, nor is it to be taken as

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laying down the principle which the learned Judge seems to deduce from it.

Apparently in that case there was no valuation by a valuer under the statute, but an action was brought by the person against the township without this being done. The learned Chancellor was quite right in saying that there is not an immediate right of action by persons merely because their sheep are damaged. If, however, the sheep-valuer found the amount of the damage, and a proper claim had been made, then an action would lie against the township if they refused to pay over that sum. Whether that action would be a direct action for damages or an action for a mandamus, it is not necessary here to consider.

Lennox, J.

LENNOX, J.:—I agree that the appeal should be dismissed; but at present I prefer not to be understood as expressing any opinion as to the right in some cases of questioning the amount as found by the valuers. It is not necessary that I should consider that point in this case, because the learned Judge says: "In the event of an appeal being taken, and it being found that the defendants are liable, I find that the damages awarded are fair, and should not be increased, as claimed by the plaintiff." I take it that the finding cannot be readily disturbed; and, if that finding is correct, the questions whether, in any case, there can be a claim beyond the amount settled by the valuer, and whether the council, on the other hand, can dispute the amount, do not necessarily arise in this case.

I feel that it would be unfortunate if the statute had to be construed in that sense; that is, that, no matter what happened, the amount found by the valuer is final. It is open to the objection that it would be possible, if dishonesty in a municipal council is conceivable, to appoint a man who would in all cases make a ridiculously low valuation. It may be that the legislation is not clear, or that it requires amendment; but all that I wish to say at present is, that I have expressed no opinion as to the meaning of the sections.

Rose, J.

ROSE, J., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

DIAMONDE METAL Co. Ltd. v. STANDARD PAINT Co. OF CANADA.

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Quebec Superior Court, Guerin, J. December 19, 1917.

SALE (§ III C—74)—ACCEPTANCE OF DELIVERY WITHOUT INSPECTION—RESALE—GOODS UNMERCHANTABLE—RESCISSION OF CONTRACT.

A purchaser who accepts delivery and resells the material purchased, shipping it a long distance without making any examination as to its quality or condition, is guilty of imprudence; on the goods proving unmerchantable he is entitled to have the contract rescinded and the purchase money returned but not to damages for freight demurrage or loss of profits.

ACTION for rescission of a contract for the sale of goods which proved to be unmerchantable. Rescission ordered. Statement.

GUERIN, J.:—Plaintiffs, on May 21, 1916, purchased from the defendants a carload of compressed gunny bagging, and paid $751.40 cash for the same. Afterwards it was discovered that the material was not of the quality plaintiffs said they paid for. Therefore, they tendered it back to defendants from whom they sought to recover $1,275, made up as follows: $751.40 paid for the bagging; $159 loss of profits; $188.60, representing the extra amount plaintiffs had to pay in the open market for material to take the place of that purchased from defendants; $116 freight charges, and $60 demurrage. Guerin, J.

Defendants denied liability, pointing out that plaintiffs accepted and paid for the bagging and did not make any complaint of its quality until several weeks afterwards.

Plaintiffs paid for the compressed gunny bagging without any examination as to its kind, quality or condition. They sold it immediately at a quick profit of $159 to the Toronto Stock and Metal Co., shipping it as purchased and in the same car to the new purchaser, and as directed, to Chatham, Ont.

When the car reached its destination the Toronto firm, on examination, refused to accept the goods, giving for reason that the material sold was not fit to be used as gunny bagging. Plaintiffs acquiesced in this decision of their customer, the goods were returned to Montreal, and are now in possession of plaintiffs.

This material was originally purchased by the defendants as "damaged gunny bagging," a fact, however, which was not disclosed to the plaintiffs when the latter purchased the material. When sold by defendants to plaintiffs the material was wet in part and it had lost its fibre. It was in part material which never had been gunny bagging at all, and which in either case had no commercial value.

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Plaintiffs are justified in asking for the rescission of the sale on account of defendants' failure to fulfil the most important condition which the sale implied, namely, the delivery of a merchantable article which could be used as gunny bagging.

Defendants are, under the circumstances, in possession of $751.40 which they obtained from plaintiffs without consideration and of which the plaintiffs have a right to be reimbursed.

Plaintiffs were imprudent in taking delivery of this material and reselling and shipping it a great distance without making an examination of the goods sold by defendants, particularly as the latter had refused to accept a cheque implying a conditional payment only, viz., "subject to mill returns."

Plaintiffs have not justified their claim for freight demurrage and loss of profits, but have proved the essential allegations of their demand sufficiently to justify the court in rescinding the sale and in condemning defendants to return the purchase price—$751.40.

Judgment is accordingly rendered ordering defendants to return to plaintiffs the purchase price of the material in question, which material plaintiffs were ready to return to defendants. As to costs, the same must be granted against defendant on a basis of an action for $751.40, deducting two-thirds of the costs of stenography incurred at plaintiffs' enquête, and the cost of one of two trips made by one of the witnesses from Toronto.

Judgment accordingly.

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REX v. ILLSLEY.

Nova Scotia Supreme Court, Graham, C.J., Russell, Longley, Drysdale, Harris and Chisholm, JJ. July 27, 1917.

FORGERY (§ I—5)—INDICTMENT—DESCRIBING THE OFFENCE—CR. CODE SEC. 468.

A conviction on an indictment for forging a cheque on a bank is not bad by reason of the indictment charging that the forged cheque was one "made" by the person whose name was signed without authority, instead of describing the cheque as "purporting to be made" by him. The indictment sufficiently charged the crime of forgery to conform with Cr. Code secs. 852 and 853 as to stating the substance of the offence, and it was open to the prosecution to shew that the forgery consisted of making a false document (Cr. Code sec. 335 (*j*)) and not by altering a genuine document (Cr. Code sec. 466 (2)).

[*R.* v. *Stevens*, 5 East 244, 102 E.R. 1063, distinguished.]

CROWN case reserved.

The defendant was indicted for forging and uttering forged paper and was tried before Ritchie, E.J., with a jury at Kentville

and convicted. The indictment upon which the defendant was tried and convicted and questions reserved by the learned trial Judge for the opinion of the Court are set out in the judgments.

W. E. Roscoe, K.C., for the prisoner.

S. Jenks, K.C., Deputy Attorney-General, for the Crown.

SIR WALLACE GRAHAM, C.J.:—The defendant was convicted of forgery upon the following indictment:—

"That Le Roy Illsley on or about the 11th day of October, A.D. 1916, at Aylesford in the said county of Kings, unlawfully and knowingly did forge a certain bank cheque upon the Royal Bank of Canada, Berwick branch, for $200, dated Berwick, N.S., October 10th, 1916, made by S. B. Chute payable to N. Gates or order, and endorsed by N. Gates, with intent thereby to defraud, against the form of the statute in such case made and provided, and against the peace of our Lord The King, His Crown and Dignity."

There was also a count for uttering.

It will be noticed that the draftsman did not insert the words "purporting to be" before the word "made" and before the word "indorsed." The prisoner's counsel, therefore, contends that the indictment must mean actually made, etc., and that this so read is repugnant to the expression "unlawfully and knowingly did forge a certain bank cheque, etc." and that the repugnancy is fatal.

He further contends that this might be taken to mean a forgery by improperly altering a good cheque and of this allegation the evidence furnishes no proof, and this would amount to a surprise.

The jury convicted the prisoner, and this is a case reserved by the Judge.

The prisoner's counsel relies principally on the case of *The King* v. *Carter*, 2 East's P.C. 985, decided in 1800, where the allegation was "and signed by Henry Hutchinson" not "purported to have been signed," and the prisoner after conviction was discharged.

In my opinion the law in respect to pleading is not so strict as it was then. In fact, it has been very much changed.

By the Criminal Code, s. 466, paragraph 1, it is provided as follows:—

"Forgery is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or

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acted upon as genuine, to the prejudice of any one whether within Canada or not, or that some person should be induced by the belief that it is genuine, to do or refrain from doing anything, whether within Canada or not."

By section 335 (*j*) (1) it is provided:

"'False document' means:

"A document, the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of, the person who purports to make it, is falsely dated as to time or place of making, where either is material."

By section 852 it is provided:

"Every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified.

"Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

"Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged."

By section 853 it is provided:

"Every count of an indictment shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to; provided that the absence or insufficiency of such details shall not vitiate the count.

"A count may refer to any section or subsection of any statute creating the offence charged therein, and in estimating the sufficiency of such count the Court shall have regard to such reference.

"Every count shall in general apply only to a single transaction."

In my opinion this indictment is a sufficient compliance with the latter provisions. The statement in the indictment is in popular language and would amount to a popular description of the cheque: He forged S. B. Chute's cheque.

I refer to what is said by Miller J., in *U.S.* v. *Howell*, 11 Wallace,

page 436, where he uses the illustration of "false diamonds" and a "forged will."

It is sufficient to give the accused reasonable information of the offence charged against him. No one could reasonably imagine that he was being charged with forging a note actually made by the maker. That would be paradoxical and nonsensical. Whatever may be said about the law of pleading in 1800, I think that under the present system of pleading this part of the description or details of the offence, namely, "made by" or "purporting to be made by" is not a material averment and necessary to the validity of the indictment, and may be rejected as a false description. There is quite a sufficient description of the offence without such words. Omit those words and this indictment would be quite as precise and as good for notice as the forms given for example in and sanctioned by the Code for other offences. There happens to be none given for forgery.

The form given in Crankshaw's Code (4th ed.), 1278, for an indictment for forgery is as follows:

"At . . . . on . . . . A. knowingly did forge a certain document, to wit (describe the document by its usual name or set forth a copy of it.)"

In 2 Bishop on Criminal Procedure (2nd ed.), sec. 491, it is said:

"Where," to quote from Chitty (1 Chitty Crim. Law, 231), "the contradictory or repugnant expressions do not enter into the substance of the offence and the indictment will be good without them they may be rejected as surplusage. . . . . It is also laid down that where the repugnant matter is inconsistent with any preceding averment it may be rejected as superfluous."

He cites for that something said by Lord Ellenborough in *The King* v. *Stevens*, 5 East 244, at 255, 102 E.R. 1063 at 1067 which is as follows:

"If the subsequent repugnant matter could be rejected at all (which in this case it cannot for the reason before given), it might be so in favour of the precedent matter, according to what is said by Lord Holt in *Wyatt* v. *Aland*, Salk, 325, 'that where matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter, which is sense, shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected.'"

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The Code, sec. 466, provides:

"2. Making a false document includes altering a genuine document in any material part. . . ."

The remedy against surprise in such a case would no doubt be to ask for particulars. But if the general form of indictment will suffice in such a case, *i.e.*, of alteration, the surprise would be no greater in the case before us than in that.

I am of opinion that the indictment was sufficient and should not have been quashed and that evidence of its falsity was properly received, and I answer the questions accordingly.

Drysdale, J.

DRYSDALE, J.:—I am of opinion that the conviction herein ought to be affirmed and the case reserved quashed.

I think the indictment good. It contained so much detail of circumstances as was sufficient to give the accused reasonable information as to the act to be proved against him and this, by statute, is all that is necessary here. I think, under the Code, dealing with the sufficiency of indictments, it must be held good.

Harris, J.

HARRIS, J.:—The defendant was indicted and convicted of forgery. The indictment charged that the defendant "did forge a certain bank cheque upon the Royal Bank of Canada, Berwick branch, for $200, dated Berwick, N.S., October 10th, 1916, made by S. B. Chute payable to N. Gates or order and indorsed by N. Gates with intent thereby to defraud, etc."

There was a second count for uttering as genuine the same cheque knowing it to have been forged and in this count the cheque was described in the same way as in the first count.

Evidence was admitted on the trial to show that the cheque in question was not made or authorized by S. B. Chute and was not endorsed by N. Gates. There was no evidence of any alteration of the cheque and it did not appear to have been altered after signature. The learned trial Judge reserved for the consideration of the Court four questions, viz.:

(1). Whether the evidence referred to in relation to the signatures S. B. Chute and N. Gates was properly received.

(2). Whether in view of the repugnancy in the indictment alleging a forgery of a cheque made by S. B. Chute and indorsed by N. Gates the charge in the indictment is void and contains no offence.

(3). Whether if there is any offence alleged in the indictment, or if the defendant could be convicted thereunder, such offence could be more than forgery by alteration after signature.

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(4). Whether if in the opinion of the Court the evidence admitted as aforesaid was improperly admitted or the charge in the indictment is void and no offence alleged therein or no offence of which the defendant could be convicted except one of forgery by alteration the conviction should be quashed.

It was contended by counsel for the defendant that the indictment was bad because it was said that it alleged the cheque to have been made by S. B. Chute and indorsed by N. Gates, whereas, counsel contended, it should have been alleged that it "purported" to be made by Chute and indorsed by Gates, and very ancient authority was cited for the proposition that the indictment was bad and that the conviction should therefore be quashed.

I do not think these authorities apply. Sections 852 and 853 of the Criminal Code were passed to avoid the necessity of setting out many particulars in an indictment formerly held to be essential. These sections, so far as applicable here, are as follows:—

"852. Every count of an indictment shall contain and shall be sufficient if it contains in substance a statement that the accused has committed some indictable offence therein specified.

"(2). Such statement may be made in popular language without any technical averments or any allegation of matter not essential to be proved.

"(3). Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence or in any words sufficient to give the accused notice of the offence with which he is charged."

"853. Every count of an indictment shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to, provided that the absence or insufficiency of such details shall not vitiate the count."

Reference may also be made to section 855.

In Crankshaw's book on the Criminal Code, p. 1278, is given a statement of a charge of the offence of forgery as follows:—

"At . . . . . on . . . . . A. knowingly did forge a certain document, to wit (describe the document by its usual name or set forth a copy of it)."

It would apparently have been sufficient to say that defendant forged a cheque.

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The real question is whether the words used are sufficient to give the accused notice of the offence with which he is charged? In my opinion all the words in this indictment after the words "did forge a certain cheque" are to be read and understood as merely words of description of the false document (see sections 466 and 335 of the Criminal Code), which the defendant was charged with having made and are sufficient to give the accused notice of the offence in question. It was argued by Mr. Roscoe that the indictment would have been a good charge of the offence of forgery by altering a good cheque actually made or drawn by Chute and indorsed by Gates.

That may or may not be so. It is quite unnecessary to decide that question; but I agree with the argument of the learned Deputy Attorney-General that a fair reading of the indictment is that it is a charge of forging S. B. Chute's cheque, and I do not see how any one could understand it as being other than a charge of having forged a cheque purporting to be the cheque of S. B. Chute in favour of N. Gates and purporting to be indorsed by N. Gates. See *The King* v. *Ead*, 43 N.S.R. 53, 13 Can. Cr. Cas. 348.

I would answer the first question in the affirmative.

The answer to the second and third questions, in my opinion, should be that there is no repugnancy in the indictment, but the same sufficiently charged the defendant with the offence for which he was convicted.

It follows, therefore, in my opinion, that the conviction should not be quashed.

Russell, J. Longley, J. Chisholm, J.

RUSSELL, LONGLEY and CHISHOLM, JJ., concurred with SIR WALLACE GRAHAM, C.J. *Conviction affirmed.*

QUE.

C. R.

COMPUTING SCALE Co. of CANADA v. FORTIN.

Quebec Court of Review, Fortin, Greenshields and Lamothe, JJ. November 30, 1917.

INNKEEPERS (§ V—30)—LIEN ON BAGGAGE—DOES NOT APPLY TO TRAVELLER'S SAMPLES.

The lien on and right to sell the baggage and property of their guests, boarders or lodgers given to hotelkeepers by art. 1816a of the Civil Code (Que.), does not extend to samples taken to a hotel by a traveller who is not the owner of such goods.

Statement.

APPEAL from a judgment of the Superior Court in an action to revendicate goods seized for non-payment of hotel expenses.

Greenshields, J.

The judgment of the majority of the Court was delivered by GREENSHIELDS, J.:—The judgment of the Superior Court dis-

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missed the claim of the plaintiff to two computing scales and two sample cases, which had been retained and subsequently sold by defendant, hotelkeeper of Hull, to recover payment of the bill incurred at his hotel by one of the company's commercial travellers.

The respondent, Fortin, sought the maintenance of the judgment of first instance, relying on art. 1816*a* of the Civil Code. This article, in substance, makes provision that hotelkeepers have a lien on the baggage and property of their guests, boarders or lodgers, for the value or price of any food or accommodation furnished to them. It further states that they have, in addition to all other remedies, the right, in case the amount remains unpaid for 3 months, to sell such baggage and property by public auction, on giving due notice of such intended sale.

It was admitted that the goods in question when taken to the hotel were not baggage as understood by the article above referred to, and that the traveller who took the goods there never became their owner.

If then the respondent ever acquired or had a lien or privilege upon these scales, he had a lien upon goods—not baggage, and not the property of his guest or lodger. Judicial interpretation has been given to art. 1816*a*. Previous to the judgment in the case of *Lindsay* v. *Vallee*, 16 Que. S.C. 160, it had been held that this lien or privilege extended to goods belonging to third parties—not baggage. That of Langelier, J., was unanimously confirmed by the judgment of the Court of Review (Mathieu, Gill and Davidson, JJ.). This judgment has since been followed, and has never been disturbed by a higher court, and we propose to follow it, and following it, we are forced to the conclusion that the respondent never had by law any lien or privilege upon these goods, the property of the plaintiff-appellant.

Now, having no such lien or privilege given to him by law, none could be created by any act of his boarder, and certainly none could or was given to him by any act of the plaintiff. It follows, therefore, that when the respondent conceived the idea of bringing about a sale under the provisions of art. 1816*a*, to realise upon his security, or upon the goods on which he thought he had a lien, he had none. If he had no lien or privilege, the latter part of art. 1816*a* providing the machinery to realise upon his privilege or lien, had no application whatsoever.

In the opinion of the majority of the court, arts. 1490 and 2268

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of the Civil Code, denying the right to revendicate things sold under authority of law, do not apply in this case, for the reason that the sale cannot be said to have been made under the authority of law when the conditions necessary to make any law applicable do not exist. In the present case the respondent, having no lien or privilege on the goods, invokes in vain, in our opinion art. 1816*a* as an authority in law to make a sale.

To conclude, we are of opinion that the defendant never had any lien or privilege upon the goods, and in consequence had no right whatever to dispose of the goods in the manner in which he did, and that all proceedings had by him to bring about the sale by auction of these goods were illegal, and the sale and adjudication was absolutely null and void quoad the plaintiff-appellant and is utterly ineffective to defeat the claim of the plaintiff as formulated by his judicial demand. We are of the opinion that the judgment must be reversed. It is reversed, and the plaintiff-appellant's action is maintained with costs. *Appeal allowed.*

ONT.

S. C.

NOECKER v. NOECKER.

Ontario Supreme Court, Clute, J. December 10, 1917.

1. CONTRACTS (§ IV C—345)—ORAL AGREEMENT—MAINTENANCE OF MOTHER—PART PERFORMANCE—STATUTE OF FRAUDS.

Maintenance of his mother by an illegitimate son, presumably under an oral agreement, by which she promised to devise and bequeath to him her whole estate, in return for such maintenance, is not such an act of part performance of the agreement as to take the case out of the Statute of Frauds, as it might be referable to the relationship between them. The son is, however, entitled to remuneration for the maintenance.

2. LIMITATIONS OF ACTIONS (§ III—112)—ACTION BARRED—DEBT REMAINS—MAY BE RETAINED AS AGAINST CLAIM AGAINST ESTATE.

Although the remedy is barred by the Statute of Limitations, a debt consisting of the principal and interest due upon a mortgage, remains, and may be retained by the administrator as against any claim made by the debtor against the estate.

Statement.

ACTION for specific performance of an agreement alleged to have been made between plaintiff and his mother, whereby she agreed to devise and bequeath to him her whole estate; or, in the alternative, to recover $4,395 for his mother's support and maintenance and the occupation by her of a portion of his house

The action was brought against C. W. Noecker, administrator of the estate and C. T. Noecker, one of the next of kin, was added as a defendant as such next of kin and representing the other next of kin of the deceased.

C. R. McKeown, K.C., for the plaintiff.

J. M. Kearns, for the defendant Charles William Noecker.

J. A. Scellen, for the other defendant.

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CLUTE, J.:—The plaintiff asks specific performance and conveyance of the whole estate of the late Emma Noecker, his mother, to him, under a verbal agreement for support, or, in the alternative, the sum of $4,395 for her support and the occupation by her of a portion of his house.

The principal facts are not in dispute. The plaintiff is the illegitimate son of the late Emma Noecker, and was born and has always lived upon the farm he now occupies, and was always treated as one of the family.

The farm was owned by the plaintiff's uncle, Ferdinand Noecker. When the plaintiff married in 1896, the farm was conveyed to the plaintiff and a mortgage given back by the plaintiff to Emma Noecker and Ferdinand Noecker for $4,000.

In 1904, Ferdinand Noecker died, and by his will cancelled the mortgage so given by the plaintiff; and a new mortgage for $2,000 was given to Emma Noecker, the mother. Nothing had ever been paid either on the principal or interest of that mortgage to Emma Noecker, and the defendants conceded at the trial that it was barred by the Statute of Limitations.

After the brother's death, Emma Noecker desired to return and live upon the farm with her son; and I find that there was a verbal agreement entered into by the plaintiff with his mother, that, if she was permitted to live upon the farm with her son, at her death she would leave her estate to him, she never having been married and having no other child.

In fulfilment of this agreement, I find as a fact, Hans Noecker, the plaintiff, took and received Emma Noecker into his own home, and he did fulfil the said agreement by allowing and permitting her to remain there until her death, and supplying her with wood, clothing, provisions, and general support as she required; she using as she pleased for her own benefit and by way of gifts the small income which she had from an estate, exclusive of the mortgage or farm, of between $5,000 and $6,000.

I also find that Emma Noecker executed her last will and testament, and that the same was deposited in the Traders Bank in the village of Elmira, where it remained until April, 1911, when it was withdrawn by her, and she retained it for some time, but upon her death the administrator has not been able to find it; and its contents were not proven. Certain changes were made in the

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house, and three rooms were given up to the mother, Emma Noecker. For a time she lived with the defendant, and there was one common table; but she, desiring to be free from the noise of the children, for a time took her meals in her own apartments. This continued only a short time however, when she desired to take her meals as one of and with the family, which she did until her death.

The evidence was clear and satisfactory from many witnesses, as well as from the plaintiff, whose evidence I believed, that his mother intended her property, which consisted principally of 19 shares of the Royal Bank valued at $212 per share, to go to her son, the plaintiff, upon her death.

The Statute of Frauds is pleaded. It is alleged here that there was full performance of the contract by the plaintiff; but the acts of part performance must be such as to be not only referable to a contract such as that alleged, but not to be referable to any other title.

In the present case, the fact of the mother going to live with her son might be referable to their relationship as mother and son, so that the mere fact of her leaving her own place of abode and going to her son's to live is not, under the circumstances in this case, such an act as to constitute a part performance so as to take the case out of the Statute of Frauds: Fry on Specific Performance, paras. 578-582 inclusive; *Cross v. Cleary* (1898), 29 O.R. 542.

But I think the plaintiff is entitled, under the circumstances, to remuneration as upon a *quantum meruit* for the board, lodging, and care of the deceased for six years before the action; and I allow $8 per week for the same, which would amount to $2,496: see *Douglas* v. *Douglas* (1914), 15 D.L.R. 596; *Rycroft* v. *Trusts and Guarantee Co.* (1917), 12 O.W.N. 240.

Counsel for the defence very frankly admitted that the plaintiff was entitled to an allowance, but insisted that, although the right to recover upon the mortgage was barred, by reason of nothing having been paid on either the principal or the interest for over ten years (*McFadden* v. *Brandon* (1904), 8 O.L.R. 610), yet, when the plaintiff sought to recover for board and lodging etc., the defendant was entitled, by way of set-off, to have the amount which, but for the Statute of Limitations, would be due upon the mortgage, deducted from the amount so allowed; and referred to

the following authorities: *Courtenay* v. *Williams* (1844), 3 Hare 539, 552; *White* v. *Cordwell* (1875), 44 L.J. Ch. 746; *Gee* v. *Liddell* (1866), 35 Beav. 621, 625; *Coates* v. *Coates* (1864), 33 L.J. Ch. 448; Chitty's Equity Index, 4th ed., vol. 4, p. 3528.

In *Courtenay* v. *Williams*, which is the leading authority on this question, a suit was brought by a legatee to enforce payment of a legacy out of the assets of the testator's estate, in a due course of administration. It was held that the executor might retain so much of the legacy as was sufficient to satisfy the debt due from the legatee to the testator, at the time of his death, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations. Wigram, V.-C., points out (pp. 551, 552) that the statute which governed that case, 21 Jac. I. ch. 16, takes away the remedy against the debtor, unless the action be brought within 6 years after the cause of action arose; but it leaves the right untouched, differing in this respect from a more recent statute of limitations, by which the right as well as the remedy is barred. "In accordance with this construction of the Act, it has been repeatedly decided, and is settled law, that, if a creditor, by means of a lien or other lawful means, can pay himself without resorting to an action against the person of the debtor, he may lawfully do so." The Vice-Chancellor refers to the judgment of Lord Eldon in *Spears* v. *Hartly* (1800), 3 Esp. 81, where he says: "I am of opinion, that, though the Statute of Limitations has run against a demand, if the creditor obtains possession of goods in which he has a lien for a general balance, he may hold them for that demand by virtue of the lien." This judgment was affirmed by the Lord Chancellor: *Courtenay* v. *Williams* (1846), 15 L.J. Ch. 204, 207, 208, where it is said: "There is a debt due from one party—not a debt due from the other. The executor is in possession of the assets. He is to distribute those assets according to the will of the testator. Part of the assets are in the hands of the party who claims another portion of the assets. The executor says, 'You have assets sufficient to satisfy your demand; apply them for that purpose.' That was the rule laid down in a case, not indeed barred by the Statute of Limitations, but in a case cited at the Bar, in the course of this argument; it was a case where the legatee was indebted for maintenance to the testator. The defendants', the legatees' demand

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(the Court says) is in respect of the testator's assets, without which the executor is not liable; and it is very just and equitable for the executor to say, that the defendant, the legatee, has so much of the assets already in his own hands, and consequently is satisfied *pro tanto*."

In *White* v. *Cordwell*, 44 L.J. Ch. 746, "a debt due to an intestate's estate from one of the next of kin, barred by the Statute of Limitations, was set off against his share in the estate." Bacon, V.-C., said that "it did not matter that part of it was barred by the Statute of Limitations. It was the duty of the administrator to get in that debt which was part of the intestate's estate, and he was entitled to set the debt off against the share of . . . the intestate's next of kin."

Dingle v. *Coppen, Coppen* v. *Dingle*, [1899] 1 Ch. 726. In this case the *Courtenay* case was discussed, and it was held "that the executors were not entitled to retain the damages assessed for non-repair of the cottages in discharge of the statute-barred loans." Byrne, J., at p. 737, says: "Now *Courtenay* v. *Williams* was a case of a legacy, and the question was whether, where there was a statute-barred debt due from a legatee, the legatee was entitled to claim payment without bringing into the estate the amount of his indebtedness to the estate." And he refers to the judgment in the case cited. Byrne, J., then proceeds (p. 740): "What, then, do these decisions amount to? To my mind they come to this, that in the case of a legacy, the person indebted to the testator's estate is not entitled to claim that legacy unless he treats the legacy in one way or the other as being *pro tanto* satisfied, or being wholly satisfied, as the case may be, by the amount due from him to the testator, although barred by the Statute of Limitations. Mr. Ashbury, who argued the point with his usual ingenuity, was unable to refer me to any authority which would make it applicable to a case like the present, where there being a statute-barred debt due by a person to a testator, that testator being dead, an action is brought against his executors in respect of waste committed during the lifetime. If this had been a simple action brought for waste against the tenant for life during her lifetime, it would have been no answer to say, 'But you are indebted to me.' Of course that would have been simple set-off. Is there really any difference now? If a right exists at all, it appears

to me that it must be a right existing by reason of set-off either legal or equitable. In point of fact that is the way in which the case is pleaded, although the ingenuity of counsel sought to put it the other way. Counsel very properly admitted he was bound to say he could not put it on the ground of set-off; but what it comes to is, he thought he could find another equity or equitable principle by which he might get the benefit of a set-off. I am of opinion there is no foundation for the claim. In the absence of authority, I am not going to be the first to decide that there is any such right as is claimed in this respect."

Milnes v. *Sherwin* (1885), 53 L.T.R. 534: "W. became entitled to a share of the residue. . . . At the time of the testator's death there was a debt of W. to him remaining unpaid, recovery of which was, however, barred by the Statute of Limitations. *Held*, that the trustees and executors of M.'s will could retain and impound W.'s debt to the testator's estate out of so much of the residue coming to him as represented personal estate, but not out of the real estate which came to him as heir-at-law."

In *In re Akerman*, [1891] 3 Ch. 212, it was held "that the principle to be deduced from *Cherry* v. *Boultbee* (1839), 4 My. & Cr. 442, and *Courtenay* v. *Williams*, is that a person who owes an estate money—that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it . . . " Kekewich, J., pointed out that Lord Cottenham, L.C., in the case of *Cherry* v. *Boultbee*, took occasion to remark that the expression "set-off" is very naccurately used in cases of this kind, and adds that the word "retainer" is also inaccurately used, and interest was allowed in the *Akerman* case upon the amount due the estate from the date of the testator's death.

See also *In re Lloyd*, [1902] W.N. 224.

In *In re Bruce*, [1908] 1 Ch. 850, reversed, [1908] 2 Ch. 682, it was held in the first instance by Neville, J., that where A., being entitled to a share in the residuary estate of a testator, was also the sole residuary legatee of a debtor to the testator's estate, and no payment or acknowledgment on account of either principal or interest had been made for more than twenty years, A. must bring

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the debt and interest into account against his share in the testator's residuary estate: the principle of *Courtenay* v. *Williams* applied.

In the appeal, [1908] 2 Ch. 682, *Courtenay* v. *Williams* was distinguished upon the ground that there was no legal liability, and the whole foundation of the *Courtenay* case was that there was a legal liability.

The only case that seems to be directly in point is an unreported case cited by the Lord Chancellor in the appeal in *Courtenay* v. *Williams;* but I think the general principle applies to this case.

The $4,000 mortgage referred to was discharged, and a new mortgage dated the 30th April, 1904, was made by the plaintiff to his mother, Emma Noecker, and in that mortgage the interest was payable yearly at 5 per cent.; the principal at the expiration of ten years; and the mortgagor covenants with the mortgagee to pay the mortgage money and interest. There was, therefore, undoubtedly a debt, consisting of the principal and interest due upon the mortgage; and, although the remedy was barred, the debt remained and formed part of the estate of the intestate and could be retained by the administrator as against any claim made by the plaintiff against the estate.

In order to clear the plaintiff's title from any cloud, it should be declared that the said mortgage is barred by the Statute of Limitations; and a discharge, clearing any cloud upon the title, should be given by the administrator.

Having regard to the peculiar features and circumstances of this case, the rights of the parties could not, I think, be adjusted in respect of the estate without coming to this Court; and the costs of all parties should be paid out of the estate, the costs of the administrator as between solicitor and client. There being no sum due the plaintiff greater than the amount of the mortgage and interest, the plaintiff is not entitled to recover the sum of $2,496.

Judgment accordingly.

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Quebec Superior Court, Guerin, J.S.C. March 25, 1918.

BILLS AND NOTES (§ I D—28)—PROMISSORY NOTE—REAL CONSIDERATION ILLEGAL—APPARENT CONSIDERATION LEGAL—NOTE VOID.

Promissory notes which are in reality given to the holder of a public office as payment for his influence in obtaining a contract for the erection of a public building, although apparently given in payment for shares in a company, are illegal and void as contrary to public order.

ACTION to recover the amount of two promissory notes. Dismissed. Statement.

GUERIN, J.:—Plaintiff sues Joseph Trudel and Charles Jouvet to recover the sum of $2,567.12, being $2,000 and $500 alleged to be due on two promissory notes, and $67.12 interest and costs. Guerin, J.

Plaintiff Cloutier pretends that the two notes were given by the defendants on April 22, 1915, under the signature of Joseph Trudel and Co., and that the consideration for the notes was 25 shares in the St. Jerome Gravel and Sand Co., Ltd.

By his plea Trudel denied liability. He said the notes were not signed by him personally nor by Jouvet, nor did the notes bear the regular signature of the partnership existing between the defendants. No consideration, he added, was given for the notes, which were given in the first instance to a Mr. Martineau, grocer, Maisonneuve, to be transferred to the plaintiff who was at that time a member of the school commission of the municipality of Maisonneuve—after being signed by Jouvet and on condition that defendants obtained the contract for the construction of a new school in the municipality of Maisonneuve.

Jouvet made a similar plea, stating that the notes purported to be commission to be paid for obtaining the contract for the construction of the school—a contract which was not awarded to the defendants. Jouvet denied that he ever signed the notes nor was he ever willing to sign them on the conditions stated, which were contrary to the public order. It was likweise denied by defendants that 25 shares in the St. Jerome Gravel and Sand Co. had been received by them in consideration for the notes.

The court is of opinion that no legal consideration was given by the plaintiff for the two notes sued upon. It appeared from the proof that the notes were given to the plaintiff—who then occupied a public office as school commissioner in the municipality

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of Maisonneuve—as payment for obtaining his influence and protection, and on the condition that defendants obtained the contract for the construction of a new school at Maisonneuve. Twenty-five shares in the St. Jerome Gravel and Sand Co. were transferred by plaintiff to defendants in virtue of a resolution agreed to by the directors of this company on March 19, 1915, being the date of the last meeting of the directors of this company mentioned in the company's books. Apart from one new director who took his seat for the first time at this meeting of the board of directors, the other directors present were Trudel, one of the defendants, Martineau—who was the go-between between defendant and plaintiff, for the giving of the notes in question to the plaintiff for obtaining the contract for the construction of a new school—Real Cloutier, the plaintiff, and another school commissioner of Maisonneuve.

The shares thus transferred had no commercial value on March 19, 1915, and in the space of about 6 months from that date the company ceased business and was put into liquidation by court judgment.

The transfer and sale of shares thus made by plaintiff to the defendants on March 19, 1915, for the sum of $2,500, were only completed, with the object of concealing the fact that the defendants promised to pay to the plaintiff $2,500 for his influence as a school commissioner, and that plaintiff accepted the same for the purpose of obtaining for the defendants the contract in question. The whole transaction was illegal and against the public interest and gave no right of action to the plaintiff to recover $2,500, the amount he claimed by his present suit. Plaintiff and defendants were equally guilty and had no right to the protection of the court.

The parties were by the judgment put out of court, and no costs allowed. *Judgment accordingly.*

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Re HABEAS CORPUS.

Quebec Superior Court, Bruneau, J. July 5, 1918.

CONSTITUTIONAL LAW (§ I D—82)—HABEAS CORPUS—SUSPENSION OF—CONSTITUTIONALITY—WAR MEASURES ACT—MILITARY SERVICE ACT—ORDERS-IN-COUNCIL—REVIEW OF BY COURTS—ALIENS—MILITARY SERVICE.

1. S. 5 of the Order-in-Council of April 30, 1918, purporting to suspend the right of habeas corpus *ad subjiciendum* "Canada Official Gazette," May 18, 1918, t. 51, N. 46, p. 4027, is *ultra vires* of the powers of the executive because it is authorized neither by the War Measures Act of 1914 (5 Geo. V. c. 2), nor by the Military Service Act of 1917 (7-8 Geo. V. c. 19), nor by any express and formal law of the federal parliament;

2. In ordering that those who claim not to fall under the provisions of the Military Service Act of 1917 (whether on account of age, status, or nationality) should carry with them, at all times, their birth or marriage certificate, as the case may be, or a certificate, if aliens, signed by the consul or vice-consul of the country of which they are subjects—the said order-in-council of April 30, 1918, is *intra vires* of the powers which s. 6 of the said War Measures Act gives and confers upon the executive;

3. The only penalty which the federal parliament has permitted the executive to prescribe for infraction of the provisions of the order-in-council of April 30, 1918, is a fine or imprisonment, or both, by s. 10 of the War Measures Act of 1914, but not the suspension of the remedy of habeas corpus *ad subjiciendum*, accorded by s. 1120 of the Criminal Code to all persons incarcerated in criminal matters;

4. The issue of the writ of habeas corpus *ad subjiciendum* cannot be refused; the writ is of right, and is accorded *ex debito justitiæ;*

5. In all matters concerning the liberty of the subject, the acts of the Crown, its Ministers, the members of the Privy Council, or the executive are subject to revision and control by the court and its judges, by way of habeas corpus *ad subjiciendum*. (16 Chas. I. c. 10). The military tribunals and officers are also subject to this revision.

6. By sub-par. (*c*) of the first section of the said order-in-council of April 30, 1918, with s. 2 thereof, the presumption, *primâ facie*, of the liability of an alien for military service, when he has not in his possession the necessary consular certificate, establishing his nationality, can be rebutted and destroyed by contrary proof.

[See annotation on Habeas Corpus, 13 D.L.R. 722.]

Statement.

PETITION by way of habeas corpus for discharge of an alien from military custody and service. Application granted.

S. W. Jacobs, K.C., and *Louis Fitch*, for petitioner; *F. W. Hibbard*, K.C., for respondent; *P. B. Mignault*, K.C., for intervenant.

Bruneau, J.

BRUNEAU, J.:—The petitioner, who is the brother of Max Perlman, alleges that the latter, born in 1892, at Sckurin, in Russia, came to Canada in October, 1910; that he has never been naturalized, and that he is still a Russian subject; that the said Max Perlman, not being a British subject, does not come under the Military Service Act of 1917 (7-8 Geo. V. c. 19); that

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he was, nevertheless, apprehended, and taken into custody by the respondent, who detains him illegally, against his will and consent, without cause or reason, thus depriving him of his liberty, to which he is entitled. Petitioner asks for the issue of a writ of habeas corpus *ad subjiciendum*, addressed to the respondent, ordering him to shew cause for the detention of the said Max Perlman, in order that this court may decide whether it is justifiable.

When the petition was presented, Mtre. Hibbard appeared for the respondent, and contested petitioner's application, on the ground that the executive power of Canada had, by order-in-council, dated April 30, 1918, suspended the Habeas Corpus Act, in such cases as that alleged by the petitioner. The latter's attorney replied that he intended to attack the constitutionality of the said order-in-council, as being *ultra vires* of the powers of the executive. Demers, J., then presiding, being aware of the importance of the question raised by the respective parties, ordered the service of the petition upon the Minister of Justice, who is charged with the administration of the Military Service Act. The petitioner accordingly gave notice to the Minister of Justice, and to the Minister of Militia and Defence, for Canada, in accordance with the provisions of art. 114 of the Code of Procedure, that he would plead the unconstitutionality of ss. 5 and 6 of the orders-in-council bearing numbers 968 and 1013, published in the "Canada Official Gazette," on the 18th and 25th of May, respectively.

The Minister of Justice appeared, and filed an intervention. After having alleged that the order-in-council bearing No. 968, passed by His Excellency the Governor-General in Council, on May 25th, 1918, had been annulled by another orders-in-council, on May 29, 1918, and that it had no longer force and effect, although it was, nevertheless, *intra vires*, the intervenant invoked the following reasons:—

That the other order-in-council, No. 1013, being the order-in-council under which the said Max Perlman was apprehended and is being detained, and which was first published in the "Canada Gazette" on May 11, 1918, and was thereafter published in subsequent issues of the said "Canada Gazette," was validly adopted by His Excellency the Governor-General-in Council on April 30, 1918, for the more efficient enforcement of the Military Service Act, 1917, and as requisite measures in connection with the emergencies of the war, and in virtue of the powers conferred on the Governor-in-Council by the War Measures Act, 1914, and otherwise, and the same and the

several provisions and enactments thereof were duly made under the authority of the said Acts of Parliament and are and always have been *intra vires* and valid, and have and always have had force of law, and are and always have been binding on all courts and on all persons whatsoever;

That the subject-matter and the several provisions and enactments of the said order-in-council, No. 1013, as well as the said Acts of Parliament, the War Measures Act, 1914, and the Military Service Act, 1917, and the powers and authority thereby conferred, fall within the powers, authority and jurisdiction appertaining to the Parliament of the Dominion of Canada under and by virtue of the British North America Act, 1867, and its amendments, and the said order-in-council and the said Acts of Parliament override and prevail against any law of the Province of Quebec, or any other law whatsoever;

This Honourable Court, in view of the order-in-council, is without jurisdiction to issue the said writ of habeas corpus or to declare the same absolute;

Wherefore the intervenant *es qualité* prays that the said intervention be maintained, and that it be declared and adjudged that the said order-in-council, No. 1013, and the several provisions and enactments thereof are *intra vires*, valid and binding and have force of law, and that this Honourable Court do declare that it is without jurisdiction to issue the said writ of habeas corpus or to declare the same absolute, with costs against the petitioner.

Before examining and deciding upon the question raised in the foregoing intervention, it is well to show briefly the importance of the principles involved. It is a maxim of the English common law "that no person can be imprisoned or deprived of his liberty without legal cause." This principle was firmly established by the Magna Charta, wrenched from King John, and renewed, on many occasions, by his successors. Magna Charta still forms the chief basis of the English law of our time. It deals with all branches of the law, civil, political, and public, but what is particularly remarkable is the care with which Magna Charta guarantees and safeguards individual liberty; it lays down specific rules for the arrest and trial of citizens. Arbitrary imprisonment and confiscations are expressly and absolutely prohibited, and excessive fines are suppressed. Art. 42 declares:—

Nullus liber homo capiatur vel imprisonetur au dissaisiatur aut ullaghetur aut exuletur aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel legem terrae.

Art. 20 also safeguards the individual against arbitrary authority:—

Nulla predictarum misericordia ponatur, nisi sacramentum proborum hominum de vicineto.

What is characteristic in the Magna Charta is the practical sense with which it limits the action of the State, and determines the rights of the individual. It has been rightly considered the pivot of the civil and political liberties of English subjects.

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Les dispositions expresses de la Grande Charte sont aujourd'hui suranées (says Boutmy), mais son esprit est toujours vivant. C'est lui qui pénètre encore et anime l'Angleterre contemporaine.

The Magna Charta was not a unilateral act, emanating solely from the spontaneous will of the King, as the charters of the predecessors of John; neither is it a treaty; for we cannot say that it was concluded between two legitimate and independent sovereignties, nor between two nations; nor is it a law. The barons do not appear in it as subjects, for they were freed from their promise of fidelity, and the King, brought captive, placed before them, submitted to the conditions which the conquerors imposed upon him. Magna Charta is therefore a contract, but resembles a treaty concluded between two nations, in that one of the parties, in virtue of the law of war, can impose its will on the other. (Glasson, History of Law and Political, Civil and Judicial Institutions of England, vol. 3, pp. 51-52.)

From time to time, when they believed them to be in peril, the English Parliament reaffirmed the fundamental principles of Magna Charta: in the Petition of Right addressed to Charles First; in the Habeas Corpus Act, passed under Char. II. (31 Car. II. c. 2), and finally, in the Bill of Rights, a declaration passed by the two Houses, to the Prince and Princess of Orange, on February 13, 1688.

In the case of *Thaw* v. *Robertson*, the Chief Justice of the Court of King's Bench gave the history of the writ of habeas corpus, 13 D.L.R. 715 (annotated), 23 Que. K.B. 11. We can add nothing to this description. The Habeas Corpus Act is the contract between the King and the nation which guarantees the liberty of the people; it is rightly considered the cornerstone of the individual liberty of British subjects.

The petitioner also alleges that the order-in-council of April 30, 1918, which suspends remedy by way of habeas corpus is *ultra vires*, for the following reasons:—

1. Because the writ of habeas corpus, as provided for by the Imperial Statute of 1679 (31 Car. II. c. 2), forming part of the body of English public law, was introduced into this country after the Cession, and the Parliament of Canada can neither suspend nor abolish it.

2. Legislation relative to habeas corpus is exclusively within the jurisdiction of the province; there is no federal Habeas Corpus

Act. In suspending it, the executive of the federal government encroaches upon *civil rights*, which are under the domain of the provincial parliament, by virtue of the B.N.A. Act.

3. Even if the federal parliament had the right to legislate in this matter, it could only do so by a legislative Act, and not by a simple order-in-council. Parliament, moreover, has not the right, in this case, to delegate its powers to the executive.

4. The suspension of the Habeas Corpus Act is repugnant to the spirit of English law. "The Colonial Laws Validity Act," of 1865, passed by the Imperial Parliament, makes this clear.

5. The War Measures Act of the Dominion Parliament, passed in 1914 (5 Geo. V. c. 2) does not give to the executive the right to suspend the Habeas Corpus Act.

Many of these questions are not new. That of deciding whether English law was substituted for the old French law by the mere fact of the cession of the country to England, was necessarily presented for the consideration of the courts from the very beginning of the new régime. It was particularly raised, discussed and decided in 1857, by the Court of Appeal, in the case of *Wilcox* v. *Wilcox*, 8 L.C.R., p. 34. It was decided in the negative. The dissertation of Sir L. H. Lafontaine on this question, as all other writings of that great magistrate, is lengthy, explicit and well reasoned. He expresses the opinion, with former Chief Justice Hay and many other authorities, that the Proclamation of October 7, 1763, had not for effect the substitution of the laws of England for the former laws of the country, for "it is a well-known and indisputable maxim of the law of nations, adopted and confirmed by the law of England, that the laws of a conquered people continue in force, till they are expressly changed by the will of the conquering nation." But Sir L. H. Lafontaine admits, nevertheless, that the Proclamation of 1763 could be interpreted as having a different effect as to the English criminal law (*id.*, p. 52). The Habeas Corpus Act (31 Car. II. c. 2) forms part of the body of English criminal law. It was therefore introduced into Canada by the Proclamation of 1763. (Brunet on Habeas Corpus, n. 30, p. 14). It is true that at the enactment of the Quebec Act of 1774, the Imperial Parliament refused to insert in its provisions the privileges of the Habeas Corpus Act, but this decision of parliament could not change the effect of the Proclamation of

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October 7, 1763. Further, the Quebec Act enacted, or rather, confirmed the introduction of the English criminal law into Canada. If habeas corpus, in criminal matters, is a recourse under the criminal jurisdiction, it follows necessarily that the Act, 31 Car. II. c. 2, was likewise established and adopted as the law of Canada by the Quebec Act of 1774 (14 Geo. III. c. 83). This statute, by confirming the right to the criminal laws of England, by the inhabitants of Canada, likewise gave the force of law in this province, not only to the common law of England in criminal matters, but also to all English statutes which dealt with this matter. (Crémazie, p. 305, note "d.") This question presented itself in 1838, and was decided, in conformity with this latter opinion, by Panet, Bédard, and Vallières, JJ.

The Habeas Corpus Act having been suspended on November 8, 1838, on account of the disturbances in the province, Mtre. Aylwin applied for and obtained for his clients, John Teed and Pierre Chasseur, arrested at Quebec, on suspicion of treason, the issue of a writ of habeas corpus, in virtue of the Imperial statute, 31 Car. II. c. 2. Mr. Justice Vallières, de St. Réal, rendered a similar decision at Three Rivers, on December 3, 1838, on the petition of Célestin Houde, for a writ of habeas corpus. We may add, however, that Rolland, J., refused a writ of habeas corpus asked for by Joseph Guillaume Barthe, and that Stuart and Bowen, JJ., also decided against the petition of John Teed. (Crémazie, English Criminal Laws, p. 275 à 319.)

At all events, the Habeas Corpus Act passed into our legislation by the Provincial Ordonnance of 1784 (24 Geo. III. c. 1), in the same terms as the statute of the Imperial Parliament (31 Car. II. c. 2). In 1812 it was made to apply to the imprisonment of a person in all other cases, as well as in criminal matters. These two Acts were reproduced in c. 95 of the Con. Stat. of Lower Canada, the provisions of which in civil matters are to be found in art. 1114 *et seq.* of our Code of Procedure.

This is not the first time that the Habeas Corpus Act has been suspended. It was done, as stated, on November 8, 1838, by an Ordonnance of the Special Council (2 Vict. c. 4), during the troubles of that period, and in 1866 and 1870, during the Fenian Raids. (29 Vict. c. 1; 33 Vict. c. 1.)

The R.S.C. (1859), contain no provisions relating to habeas corpus for Upper Canada.

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The B.N.A. Act, of 1867, is likewise silent on this question. On this the petitioner bases his contention that there is no federal Act relating to habeas corpus; that the power of enacting, suspending, or abolishing it falls within the exclusive jurisdiction of the provinces, because it deals with the liberty of the subject, *i.e.*, with the exercise of civil rights, which fall under the domain of the provinces, being reserved for them by the constitution. We are not of this opinion. The B.N.A. Act (art. 91) gives the Dominion parliament power to enact criminal laws for the country. By the Proclamation of 1763, the Habeas Corpus Act of 1679 was introduced into Canada, because it formed part of the English criminal law. It is therefore not necessary for the federal power to enact specific provisions relative to habeas corpus in criminal matters. It has, however, provided for it. The 22nd part of the Criminal Code establishes, as an extraordinary remedy, the recourse, by way of habeas corpus, to examine into the legality of the imprisonment of any person (art. 1120). The federal power has, therefore, undoubtedly the right to legislate concerning habeas corpus in criminal matters. But how can it exercise this power? Can it not, for example, suspend the right of habeas corpus only by a legislative act? Can it delegate this power, if it possesses it, to the executive? The validity of the order-in-council of April 30, 1918, depends solely, in our opinion, on the powers conferred upon the executive by the War Measures Act of 1914 (5 Geo. V. c. 2). The petitioner contends that this power does not extend to authority to modify, suspend, or repeal existing laws, particularly the right of habeas corpus, because the federal parliament, or the executive, cannot abolish or do away with an Imperial statute, such as that of 31 Chas. II. c. 2, on habeas corpus. Consider first the general powers of parliament, and of the executive. We will then examine the effect of the War Measures Act of 1914, *i.e.*, the extent of the authority conferred upon the executive. We will also look in the Military Service Act, 1917 (7-8 Geo. V. c. 19), for the justification, if any, of the order-in-council in question: for the intervenant specially invokes certain clauses of these two Acts to prove that its action is legal, and *intra vires* of the powers of the executive.

The B.N.A. Act, sanctioned on March 29, 1867, created a general parliament for the Dominion of Canada, and a separate

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legislature for each of the provinces which compose it (30-31 Vict. c. 3). We may state as an established fact that all important questions affecting the interests of the Dominion are left to the federal parliament, while questions and laws of local interest are given to the jurisdiction of the provincial legislatures. The right to legislate on all matters of a general character, which are not specially and exclusively reserved for the control of the provinces, resides in the federal authority. The criminal law, as we have already mentioned, is a federal matter, except insofar as concerns the constitution of the courts of criminal jurisdiction, but including procedure in criminal matters (art. 91, p. 27). It is important that criminal law should be uniform throughout all the provinces.

Habeas corpus in criminal matters is, therefore, within the federal jurisdiction; in civil matters, it is within the provincial jurisdiction.

Here, as in England, the legislative power, which is called "parliament" or "legislature," has authority to make laws, and to change or abrogate existing laws. In their respective spheres, the federal parliament and provincial legislatures are omnipotent. They can accord to certain bodies the power to make laws, or by-laws.

The Governor-General of Canada, and the Lieutenant-Governors of the Provinces represent here the King, by delegation of authority. The Senate of Canada and the legislative councils of the provinces are modeled on the House of Lords. In the same way, the House of Commons of Canada and the legislative assemblies of the provinces are modeled on the House of Commons of Great Britain, but with this difference, however, that the Imperial Parliament is all-powerful, and can adopt any law which it thinks useful or necessary, while the provincial legislatures cannot pass any law contrary to the provisions of the Imperial Act which constituted them.

The executive power does not make laws, but it is charged with watching over their administration; and everything which results from the administration of laws already passed, as well as resolutions made by the legislative authority, therefore, enter into the domain of the executive power.

To the King is attributed the executive power in Canada. He

is represented by the Governor-General, who, in order to exercise the executive power in each of the provinces, names Lieutenant-Governors, and can name one or more deputies to exercise these functions.

As the executive power, the Governor-General of Canada, and the Lieutenant-Governors of the Provinces are assisted by counsellors or ministers; they could not act without this assistance. As in England, they reign in the name of the King, but do not govern. They are called collectively "the Crown," or "the Governor-in-Council," or the "Lieutenant-Governor in Council."

There are certain prerogatives which cannot be delegated to the Governor, and which the King exercises himself, directly, in all the colonies; such is the right of making war or peace, of concluding treaties, etc.

Contrary to the system in the United States, where the Senate is the great executive council, and watches the President in his relations with foreign powers, as well as in the distribution of offices, the executive, in Canada, as in England, must be guided by the directions of the House of Commons, which is its great council, and to which it must defer, as the popular chamber must defer to the general will of the people of the country.

Such are some of the elementary principles of the constitutional government of our country, and the explanation of these will help us to decide as to the legality of the order-in-council of April 30, 1918.

If parliament, in this political system, is the sole legislative authority, how can the executive pretend to have the right to suspend the English common law relative to habeas corpus, of which the Act 31 Car. II. c. 2, was only declarative (Short & Mellor, Practice of the Crown Office, p. 306), or, in virtue of what authority can the executive so legislate, and repeal the extraordinary remedy created by the Parliament of Canada by s. 1120 of the Criminal Code, relating to habeas corpus?

It is a well-established principle in English law that parliament alone, and not the executive, can suspend the Habeas Corpus Act. The following authorities are so emphatic on this point that there can be no doubt in the present case. First, let us cite, as absolutely *ad rem*, the following splendid page from Blackstone's Commentaries on the Laws of England (11th ed., 1791, vol. 1, c. 1, No. 2, t. 1, pp. 135 to 136):—

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Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whoever he or his officers thought proper (as in France it is daily practised by the Crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. *But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing;* as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the Republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat,*" was called the *senatus consultum ultimæ necessitatis.* In like manner, this experiment ought only to be tried in cases of extreme emergency; and in these, the nation parts with its liberty for a while, in order to preserve it forever.

May we not even argue, with the petitioner, that the suspension of the Habeas Corpus Act by the federal parliament would not prevent the subject from having recourse, as was done in 1838, to the Imperial Statute of 1679 (31 Car. II. c. 2), since the federal parliament cannot put aside any Imperial statute applicable to the colonies?

The history of the writ of habeas corpus in England shews that parliament alone can suspend it, or authorize its suspension. It has exercised this power many times. (*The King* v. *Earl of Orrery*, 8 Mod. 96, 88 E.R. 75, 11 Cox C.C. 64; 4 Green's History of England, 130, 315, 320), but in exceptional and extraordinary circumstances, for the safety of the state and of the country, as in the case of invasion, insurrection, or disloyalty of the population. (Cockburn, p. 97.) Also, May has well said (Const. Hist., c. 11) that the suspension of the right of habeas corpus constitutes the suspension of the Magna Charta itself, "and nothing but a great national emergency could justify or excuse it." In the United States, where the power of suspending the habeas

corpus is given to Congress by art. 9 of the constitution, this privilege is considered as an attribute of the legislative power, and the President can only exercise it if he is specially authorized by law. (*Ex parte Merryman*, 9 Am. Law Reg. 524; S.C. 14 Law Rep. N.S., 78; Taney, 246; *McCall* v. *McDowell*, 1 Abb. U.S. 212; *Ex parte Field*, 5 Blatch 63; Cooley, Principles of Const. Law (1880), p. 289).

The history of the writ of habeas corpus in the United States, relative to the right of suspension, is particularly instructive and interesting. The question as to whether the President could use the power of suspension without authority from Congress arose under the following circumstances:

A military officer, residing in Pennsylvania, ordered, in 1861, the arrest of a person named Merryman, of the State of Maryland, on a vague and indefinite charge, and without any proof in support of it. Merryman was arrested at night, at his house, made prisoner, and sent to Fort Henry, where he was secretly detained. A writ of habeas corpus was served on the commandant, ordering him to produce the body of Merryman before a judge of the Supreme Court of Maryland, in order that he might examine into the cause of detention. The officer answered that he was authorized by the President of the United States to suspend, at his discretion, the writ of habeas corpus, and that, in the exercise of his discretion, he believed it necessary to exercise this power, and had consequently suspended the right to habeas corpus. He refused, for this reason, to obey the order contained in the writ. But Taney, C.J., decided that, under the constitution of the United States, Congress alone had power to suspend the right to habeas corpus. Some time later, and without any Act of Congress authorizing it, President Lincoln issued a proclamation by which he suspended the right to habeas corpus, "in respect to all persons arrested, or who are now or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court-martial or military commission." In December, 1862, the Supreme Court of Wisconsin issued a writ of habeas corpus, ordering General Elliott to bring before it one Nicholas Kemp. The prisoner had been arrested for having taken part in a riot at Port Washington, in Wisconsin. The respondent pleaded

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that Kemp was under his custody by order of the President of the United States, and that the President had, on September 24, 1862, suspended the right to the writ of habeas corpus for such cases as that of the prisoner. The question of the power of the President to suspend the writ of habeas corpus therefore arose again, but the court held, as in the *Merryman* case, that the President of the United States had not the power which he had arrogated to himself, and that the suspension of the writ of habeas corpus, constituting as it did an exercise of a purely legislative power, Congress alone could exercise it. (*Kemp's* case, 16 Wisc., p. 382.)

It was under these circumstances, and while the War of Secession was raging, that the Congress of the United States passed a law, on March 3, 1863, authorizing the President to suspend the writ of habeas corpus for the duration of the war. On September 15, 1863, the President proclaimed the suspension of the habeas corpus. (Church on Habeas Corpus, pp. 41 to 45, and 50 to 53; Hurd, on Habeas Corpus, p. 116.)

It is parliament, and not the executive, which has always, in England, suspended the remedy of habeas corpus; the same thing took place in Canada, during the Fenian Raids; but it was the federal parliament, and not the provincial legislature, which passed the law. There are no precedents, we believe, in English constitutional law, at least none have been cited, where the executive has suspended the Habeas Corpus Act by an order-in-council such as that of April 30, 1918. Certainly, we do not contend that the executive could not have done it, but in such case that parliament would have had to formally and expressly authorize it. We will shortly examine into whether the claim of the intervenant is well founded, on this point, but first we will cite other authorities.

M. Brunet, in his excellent work on Habeas Corpus, expresses the opinion that in England and in Canada, it is parliament which has the right to suspend the writ of habeas corpus (p. 13, note 1).

If the suspension of this important statute has given rise, in our province, only to the judgments mentioned, rendered in 1838, we find in our jurisprudence expressions of opinion from distinguished magistrates.

In the case of *Gaynor & Greene*, 9 Can. Cr. Cas. 496 at 498, Ouimet, J., in the Court of Appeal, said:—

> I cannot admit that an Act of the importance of the Habeas Corpus Act can be amended, and the rights of the subject intended to be preserved

under it can be so curtailed, by a casual expression found in a subsequent statute. To amend an existing Act, there must be a clear and positive enactment; such amendment cannot be interpreted as resulting from mere implication or inference.

In the case of *Thaw* v. *Robertson*, 13 D.L.R. 715, at 719, the Chief Justice of the Court of Appeal said:—

I will not discuss the question as to whether our parliament can suspend or arrest in certain cases the operation of the Habeas Corpus Act. At first sight, my opinion is that it has this power. I do not say that our parliament can take away from Canadian subjects the privilege of the provisions of the Magna Charta which I have cited above. This privilege forms such a part of the English constitution that I do not believe any colonial parliament can suppress it, but I believe that the *Parliament of Canada* has the power to suspend the provisions of our Habeas Corpus Act, as it had the power to pass this law. But the provisions of this Act are so precious in the opinion of every British subject, as I have said, that a formal law would be necessary to suppress or abolish it.

The judge cited on this point the opinion, hereinbefore mentioned, of Ouimet, J.

The suspension of the habeas corpus being an act of legislation solely, does not enter, as we have seen, into the list of ordinary attributes of the executive power. There can be no doubt as to this. The executive could, therefore, order such a suspension only if parliament had expressly delegated its powers to it. This is the claim of the intervenant, who gives, as his authority, in his reasons for intervention:—1. The War Measures Act, 1914 (5 Geo. V. c. 2); 2. Military Service Act, 1917 (7-8 Geo. V. c. 19).

Let us examine first the War Measures Act. Not a single clause in that Act authorizes expressly and formally the executive to suspend the writ of habeas corpus. It is therefore by inference only that the intervenant proceeds to establish his contention. This method cannot avail when it is a question of the suspension of such a writ: an express law is necessary. At all events, let us examine his argument.

The order-in-council of April 30, 1918, enacts that those who allege that they are not subject to the Military Service Law of 1917, whether on account of their age, status, or nationality, must carry on their persons, or have with them, at all times, their birth certificate, or marriage certificate, as the case may be. And as to those, like the petitioner's brother, who claim exemption from military service on account of their nationality, they must have with them a certificate to that effect, signed by the consul or vice-

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consul of the country of which they are subjects. Such persons found, after June 1st, 1918, without having in their possession the documents mentioned, are presumed, *primâ facie*, to be liable to military service, and considered as deserters; they are liable, on summary conviction, to a fine not exceeding $50 and to imprisonment of not more than one month, or to both. Further, these persons may be arrested, put under military custody, and forced to do military duty, as long as their services are required, or at least until it has been established to the satisfaction of competent authority, that they are not liable for military service. And it is as sanction for these provisions, according to the intervenant, that the order-in-council (s. 5) decrees:—

> Notwithstanding anything contained in the Habeas Corpus Act or in any other law or statute, and notwithstanding any right or remedy of habeas corpus, or proceeding by way of habeas corpus, all persons who in fact are or hereafter may be in or taken into or held or detained in military custody shall be held, detained and remain in such custody, without bail, inquiry or mainprize, until released by discretion of the Minister of Militia and Defence, or delivered by his order to the civil authorities.

Let us repeat: there is nothing in the War Measures Act, of 1914 which authorizes the executive to give such sanction to its order. Far from it: parliament has authorized the executive to give a sanction to its orders-in-council, but it has never authorized it to suspend, in this manner, the remedy given by way of the writ of habeas corpus.

The only penalties which the executive can impose for infraction of its orders and regulations made under authority of the War Measures Act of 1914 are those provided for by s. 10, *i.e.*, a fine of $5,000, or imprisonment for a term not exceeding 5 years, or to both. The executive, under the same Act, can prescribe whether (as it has done by the order-in-council of April 30, 1918) this penalty is to be imposed by summary conviction or upon indictment.

It is in virtue of this provision of s. 10 that the order-in-council of April 30, 1918, imposed the penalties which it fixes, and that the executive has chosen the method of summary conviction, and not of indictment, for enforcing it.

Such is the sanction given by the War Measures Act, and the only one which parliament has permitted the executive to prescribe for the infraction of its orders and regulations, such as that

of April 30, 1918. It is thus that the War Measures Act, invoked by the intervenant, formally condemns his pretensions, since s. 10 limits the fine and imprisonment, the penalties which the executive can impose for such infractions of its orders and regulations.

The intervenant vainly invokes, by way of comparison, the Imperial statute of 1914, "To consolidate and amend the Defence of the Realm Acts" (5-6 Geo. V. c. 8). There is nothing in that statute which authorizes the executive to suspend the writ of habeas corpus. The case of *The King* v. *Halliday*, [1917] A.C. 260, which has interpreted it, and applied it to a particular case, has no application to the present case, in our opinion, relative to the suspension of the writ of habeas corpus.

We must not forget that the petitioner only contests the legality of par. 5 of the order-in-council, and that he recognizes that all the other provisions are legal, *i.e.*, *intra vires* of the power of the executive. We will return to this important aspect of the case before concluding.

There is no doubt, in view of the jurisprudence of the Privy Council, that the federal parliament has jurisdiction in all matters which are not within the exclusive right of the provinces, and that it may even, in the exercise of its powers, encroach upon civil rights, but this presupposes the right, the jurisdiction, to do such act or thing. (*Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; 56 L.J. P.C. 87; Clement's Canadian Const., p. 427; *Cushing* v. *Dupuy*, 5 App. Cas. 409; *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31. It is precisely this right, this power, this jurisdiction, which the petitioner contests, rightly, in the executive, to suspend, *proprio motu*, without the authorization of parliament, the Habeas Corpus Act.

The operation of the Habeas Corpus Act, 1679 (31 Car. II. c. 2) has at various periods been temporarily *suspended by the legislature* on the ground of urgent political necessity. *Such suspension has usually been effected by a statute* enabling persons to be arrested on suspicion of treasonable practices or certain other crimes of a political nature, and detained in custody, without bail or trial, notwithstanding any law to the contrary. 10 Hals. 44.

The War Measures Act of 1914 did not substitute the executive for the federal parliament. The object of the law—such is its title—is "to confer certain powers on the Governor-in-Council, and to modify the Immigration Act." The suspension of the Habeas Corpus Act is not of the number.

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The powers which the executive may possess in virtue of the War Measures Act have just been the object of litigation which has re-echoed throughout Canada. We know that the executive, relying on the said law, passed an order-in-council, on April 20, 1918, abolishing all causes of exemption for young men between the ages of 19 and 22, and setting aside the judgments of all the courts of the country, which exempted these young men, for one cause or another, from the obligation to military service. A young man named Norman Earl Lewis, who had been so exempted, being affected by this order-in-council, applied to the Supreme Court of the Province of Alberta for the issue of a writ of habeas corpus, alleging that the action of the executive was unconstitutional, and *ultra vires* of its powers, seeing that it annulled, in the case of men between the ages of 19 and 22 years, the judgments of the tribunals created by the Military Service Act, which had been rendered in conformity with its provisions. On June 29, last, the Supreme Court of Alberta (Harvey, C.J., dissenting) maintained the writ of habeas corpus, and declared the order-in-council in question to be *ultra vires*.

Let us examine now the Military Service Act. It is to be remarked, first of all, that it applies only to British subjects, and not to aliens. It would appear strange to us to invoke its provisions against aliens. At all events, there is no formal and express provision in this Act authorizing the executive to suspend the Habeas Corpus Act. To arrive at such a conclusion, the intervenant is obliged to resort to inference. The object of the order-in-council of April 30, 1918, is explained by reference, he says, to the Military Service Act, for the administration of which it was passed.

The preamble of the Military Service Act declares that it is necessary to provide for reinforcements for the Canadian Forces engaged on active service overseas, in order to maintain and support them in their struggle for the defence and security of Canada, the safety of the Empire, and human liberty. But, as this Act does not apply to aliens, it cannot be pretended that it is intended to be enforced, n respect to them, by the suspension of the Habeas Corpus Act. We look in vain in the various sections of the Military Service Act, cited and invoked by the intervenant, for ; tification for par. 5 of the order-in-council. Par. 6 of s. 5 of

the Act declares that no proceeding can be retarded, set aside or revised on account of irregularities, by way of injunction, prohibition, mandamus, or even habeas corpus, but it is a question in that paragraph of not hindering the action of the various exemption tribunals created by the Act. The right to the writ of habeas corpus is denied in that case only, which is entirely different from the present case.

All regulations made by the executive (s. 12, n. 2) must be submitted to parliament, if it is then in session, and if not, within the first 10 days following the opening of the next session of parliament, but the War Measures Act does not contain such a provision. It does not authorize the suspension of the writ of habeas corpus.

It has been argued, in justification of the order-in-council of April 30, 1918, as to the suspension of habeas corpus, that Canada is now at war. The United States were likewise at war when Lincoln suspended the Habeas Corpus Act in 1862. The tribunals of his country, nevertheless, declared that he had acted illegally, and contrary to the provisions of the constitution. The argument drawn from the fact that we are at war may be answered by those noble words pronounced, in 1838, by Valières de St. Réal:—

> In my opinion, the greatest possible good, the most pressing necessity, is the respect due to the law, even when it is opposed to our desires or our opinions; for the laws are the natural safeguard of governments and of peoples, and without them, neither society nor government could exist. (Crémazie, English Criminal Law, p. 302.)

These truths would become more palpable if the executive power, placing itself above the laws or above the parliament which made them, suppressed, by a stroke of the pen, the recourse to the courts by way of habeas corpus. We would then see born again the dark days of oppression which the English people wished to avoid for all time within the limits of its Empire, by inscribing in its statutes that beautiful and grand maxim of justice and of liberty: "No person shall be apprehended, detained, or imprisoned without just and legal cause."

In deciding, as we have done, that art. 5 of the order-in-council of April 30, 1918, suspending recourse by way of habeas corpus, is *ultra vires* of the powers of the executive, because it is authorized neither by the War Measures Act of 1914, nor by the

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Military Service Act of 1917, and that the federal parliament alone can suspend, or authorize the executive formally and expressly, to suspend, the Habeas Corpus Act, in criminal matters, we do not declare all the other provisions of the said order-in-council to be null, and unconstitutional. We are of opinion, on the contrary, that they are within the limits of the special powers conferred on the executive by s. 6 of the War Measures Act of 1914, and that art. 5 alone is illegal and *ultra vires*. It is a question of the arrest and detention provided for by par. *b* of the said s. 6, and in decreeing that those who pretend to be aliens must have in their possession a certificate to that effect signed by the consul or vice-consul of their country, under such penalties, the executive wished to provide against surprise, pretexts, and lies, which might be made and invoked to evade the obligation to military service. It has certainly this power, in virtue of said s. 6 of the War Measures Act of 1914. The petitioner had not in his possession, at the time of his arrest, proof of his nationality. Being a Russian subject, he should have had a certificate from the Russian consulate. He had, nevertheless, the right to the issue of a writ of habeas corpus *ad subjiciendum*, in order to show that he is a Russian subject, and consequently exempt from military service. The writ of habeas corpus is, in effect, a writ of right, and is grantable *ex debito justitiae*. (*Re Cowle*, 2 Burr. 834, 97 E.R. 587, *per* Lord Mansfield, C.J., at p. 855; *Crowley's* case, 2 Swan. 1, 36 E.R. 514, *per* Lord Eldon, L.J., at p. 48; Corner, Crown Practice, p. 10.)

We, therefore, considered that we were obliged to issue the writ, in order to have the body of the petitioner's brother brought before us, to decide definitely, on the return of the writ, after hearing the parties, and their respective pretensions, and examining into the cause of the detention, whether it is legal. For, in all matters affecting the liberty of the subject, the action of the Crown, its Ministers, the officers of the Privy Council or the executive power is subject to revision and to the control of this court, and of its judges, by way of the writ of habeas corpus (16 Car. I. c. 10). The tribunals and military officers are likewise subject to the courts. (*Douglas's* case, 1842; Manual of Military Law, War Office, 1914, p. 127. *Vide* also p. 120-121; Clement's Can. Const., p. 209; Anson, Law and Custom of the Constitution, vol. 2, pt. 2, pp. 186-7.)

There is no question as to the proof made by the petitioner. If sub-paragraph *c* of art. 1 of the order-in-council of April 30, 1918, exacts that the alien should have in his possession a certificate from the consulate of his country, establishing his nationality, art. 2 of the said order-in-council declares that in default of such certificate, there is a *primâ facie* presumption of the liability of the alien to military service, and he can be detained and required to enlist in the Canadian Army, "*unless or until the fact be established to the satisfaction of competent authority that he is not liable for military duty.*"

This presumption can be rebutted and destroyed by contrary proof. The petitioner is now before the competent authority. He produces in proof, to-day, the certificate of the Russian consulate, showing that he is a subject of that country. He is not, therefore, subject to military service here. But, as he was arrested when he had not with him or on his person any proof to show his nationality, he is liable to the penalties provided by the order-in-council of April 30, 1918; the petition is granted, the intervention rejected, the writ of habeas corpus *ad subjiciendum* maintained, and order is given to the respondent to restore the petitioner's brother, Max Perlman, to liberty; but without the ordinary recommendation to the Crown to pay costs.

Judgment accordingly.

BAND v. STURGEON CONSOLIDATED COLLIERIES, LTD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. June 25, 1918.

CONTRACTS (§ II D—145)—AGENT—COMMISSION—PARTICULAR WORDS—INTERPRETATION.

An agent whose commissions on sales are to be paid "on orders received through you" is not entitled to commission where from the evidence the only inference is that it was the act of the company's manager alone that secured the order, or where orders were received otherwise than through the agent's efforts.

APPEAL by defendant from a judgment of a District Court Judge in an action by an agent for commissions due under a contract. Reversed. Statement.

G. R. Porte, for plaintiff; *A. U. G. Bury*, for defendants.

The judgment of the court was delivered by

HARVEY, C.J.:—The plaintiff's action was for $253.21 for commission at the rate of 25 cents per ton upon coal sold by him as agent for the defendant. The action was tried before his Honour Judge Taylor, who gave judgment for the full amount but deduct- Harvey, C.J.

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ing some $55 allowed on a counterclaim. This appeal is only in respect of the commission allowed upon coal sold to the Hayward Lumber Co. amounting to $61.54 and to the North American Lumber Co. amounting to $69.19. There is no conflict of testimony which is of any consequence, but it is merely a question of the proper inference from the proved facts, and the Appeal Court is thus in as good a position as the trial judge to reach a proper conclusion.

The terms of the agency are set out in a letter from defendant's manager to plaintiff in which it is stated:—

> We shall be glad to receive orders through you for screened lump coal at $2.75 per ton, f.o.b. our mine at Carbon and nut coal at $2.00 per ton f.o.b. our mine at Carbondale. These prices shall protect you for a commission of 25 cents per ton . . . It is understood any orders which will come by mail or any way to the office from customers secured by you, you shall be entitled to the commission, but in order to avoid any possible misunderstanding it will be necessary that you report that you have interviewed the customers and that such report be in our hands prior to the receipt of the order.

The coal was supplied in respect to which the commission is claimed, and it is only a question of whether the business was secured by the plaintiff.

The plaintiff's evidence regarding the Hayward Lumber Co. is that he interviewed the company and was told that it had coal at present, but when it got busier it would send in an order. The company had in fact bought coal from the defendant during the previous season.

The plaintiff then sent the following memorandum to the defendant:—

> Hayward Lumber Company. 11th Sept. 1916.
>
> Mr. Duggan please note:
>
> I have quoted above for Vermilion, Vegreville and other branches. Lump $2.75, Egg $2.00, f.o.b. mine. (Sgd.) W. R. BOND.

This was all the plaintiff did regarding this, and no coal was ordered until Mr. Duggan, the defendants' manager, nearly 2 months later communicated with the manager of the Hayward Lumber Co., who came and inspected the coal, and then gave an order at the defendant's office.

The burden is on the plaintiff of shewing that the order or the customer was secured by him, and, in my opinion, the evidence falls short of establishing that fact. The trial judge expressed doubt as to this, but he came to the conclusion that the plaintiff having done what he did in interviewing the customer and having

notified the defendant, he was entitled to the commission. I am of opinion, however, that that is not enough. For all that appears in the evidence it seems to me that it is quite impossible to infer that it was not the act of the defendant's manager alone that secured the order. I do not think that it can fairly be inferred that it was the plaintiff's efforts which secured it and unless it was he is not entitled to the commission.

The orders from the North American Co. were in a different position. In November and December the plaintiff obtained orders from them which were filled by the defendant and in respect of which plaintiff was paid his commission. His agency for the purpose of obtaining new business was then terminated and the claim for commission is in respect of the orders received from the company thereafter as being secured by the plaintiff.

It is stated that this company was an old customer, but notwithstanding that fact the defendant recognized the plaintiff's right to commission. If there were no other evidence it seems to me that it would be a fair inference that the orders following those in November and December, which latter were recognized as having been secured by the plaintiff, were equally in consequence of the plaintiff's efforts.

The only evidence to meet that is the statement of defendant's manager that they paid another agent for these orders, and he produces a couple of orders with the name of this agent on them. If this were all I would hesitate to conclude that it was sufficient to displace the inference that the orders were secured by the efforts of the plaintiff. There is, however, more. The plaintiff states that the reasons given for dispensing with his services was that the defendant was raising its prices and was making new arrangements. The orders produced for which the plaintiff is now claiming commission are at prices much higher than those specified in the defendant's manager's letter above quoted, at which latter prices no doubt the orders for which the plaintiff received commission were placed. This, I think, is evidence of the orders having been given otherwise than by the plaintiff's efforts, and I think he should, therefore, fail in his claim for these commissions.

I would, therefore, allow the appeal with costs and direct that the judgment be reduced by the amount of the commissions appealed against, viz., $61.54 and $69.19, or $130.73 in all.

Appeal allowed.

SASK.

C.A.

REYNOLDS v. JACKSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Elwood, JJ.A. May 17, 1918.

SALE (§ III C—70)—MINERAL CLAIM—VENDOR HAVING TITLE—THIRD PARTY HAVING CLAIM UNDER ORAL CONTRACT—DELAY IN BRINGING ACTION—SETTING ASIDE.

A sale of a mineral claim, by a person having the right to convey title, will not be set aside at the instance of one claiming an interest under an unwritten agreement where there has been no fraud on the part of the purchaser, especially if there has been delay in bringing the action.

Statement.

APPEAL by plaintiff from a judgment dismissing an action to set aside a sale of a mineral claim. Affirmed.

G. A. Cruise, for appellant; *P. E. MacKenzie*, K.C., and *R. Carroll*, for defendant company.

The judgment of the court was delivered by

Elwood, J.A.

ELWOOD, J.A.:—The statement of claim alleges that in the month of October, 1915, the plaintiff and the defendant Jackson verbally agreed to enter into a partnership arrangement for the purpose of prospecting for minerals and mineral deposits in the northern part of the Province of Saskatchewan, and that, pursuant to such arrangement, they commenced work in the said month of October, the plaintiff to use his knowledge and experience as a prospector, and the defendant Jackson to provide all necessaries and to defray all expenses of the work of prospecting, the result of their work, and the minerals, or mineral deposits discovered, to be owned in equal shares by the plaintiff and the defendant Jackson. That, subsequently, they discovered a mineral deposit on Schist Lake, on which they marked out and staked a claim. On or about November 8, 1915, the defendant Jackson caused the claim to be recorded in his name as owner; that, since that date, the defendant Jackson has repudiated the partnership agreement; that the defendant company has entered upon the land occupied by said claim, and caused excavations to be made thereon and taken minerals therefrom, claiming to act under and by virtue of an agreement between the defendant company and the defendant Jackson.

The trial judge found that the defendant company on or about November 11, 1915, entered into an agreement with the defendant Jackson for the sale to the defendant company of the mineral claim in question, and that, at the time of entering into this agreement, the defendant company had no knowledge of the

plaintiff's interest, and dismissed the action as against the defendant company. From this judgment the plaintiff appeals.

The evidence shews that the mine in question was staked in Jackson's name with the knowledge and consent of the plaintiff, and, under the mining regulations, Jackson was the person clothed with power and authority to convey a title to the claim. The defendant company at the time it entered into the agreement with Jackson had no knowledge of the plaintiff's claim; so far as it knew, Jackson was the sole person interested. There is no evidence suggesting any fraud on the part of the defendant company. Apart from all this, the agreement which Jackson signed was signed on or about November 2, 1915. The evidence shews that the plaintiff learned of the agreement within a day or so of that date. Not later than November 9, 1915, the plaintiff received a letter from Haynes, who was one of the parties acting for the defendant company who procured the agreement from Jackson. In this letter Haynes asked the plaintiff for an option on a claim of his (the plaintiff's), on the same terms as the option received from Jackson, and to this letter the plaintiff replied that he was not then at liberty to do anything with his claim, but that he considered the proposition a fair one and might be in a position to do business later. The plaintiff was aware of the terms on which Jackson agreed to sell to the defendant company; he may have misconceived the effect of those terms, but that cannot affect the question. He never took any steps to notify the defendant company until in or about March, 1916. The agreement entered into between the defendant company and Jackson, although executed by Jackson in November, 1915, was never executed by the defendant company until January 11, 1916. During all the period prior to execution by the defendant company the plaintiff was aware of the agreement and of its terms, and took no steps to repudiate it, and, under these circumstances, I am of the opinion that the plaintiff cannot now be heard to say that Jackson had, in effect, no authority from him to enter into the agreement.

In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

B.C.

C.A.

Re KITSILANO ARBITRATION.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Gallihe McPhillips and Eberts, JJ.A. April 30, 1918.

ARBITRATION (§ III—17)—INTERPRETATION ACT—SUPERIOR COURT—MEANING OF—APPEAL.

According to the Interpretation Act (R.S.C. 1906, c. 1, s. 34 (26), the superior court to which an appeal may be taken in British Columbia against an award of arbitrators under the Railway Act (R.S.C. 1906, c. 37, s. 209) is the Supreme Court of British Columbia: there is no further appeal from such court to the court of Appeal.

Statement.

APPEAL by Harbour Commissioners of Vancouver from the judgment of Hunter, C.J.B.C., of June 27, 1917. Appeal quashed on ground that court has no jurisdiction.

A. H. MacNeill, K.C., for appellant, Harbour Commissioners; *Livingstone*, for respondents, Dominion Government.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The preliminary objection was taken that this court had no jurisdiction to hear the appeal.

The order appealed from is one setting aside an award made by arbitrators in what purports to be an arbitration between the Vancouver Harbour Board and the Crown in right of the Dominion respecting the acquisition by the Harbour Board of what is known as the Kitsilano Indian Reserve. The province claims a reversionary interest in the land. The consent of the Dominion to the Harbour Board's proposal to purchase the reserve and to ascertain its value by arbitration under the Railway Act was given conditional upon like assent on the part of the Crown in right of the province. Orders-in-council were accordingly passed and the Harbour Board served the Dominion government with notice to treat. No notice appears to have been served upon the provincial government.

When the proceedings opened, Mr. McPhillips appeared on behalf of the provincial government, and took part, for some time, in the proceedings. But then came a time when counsel for the Dominion government objected to Mr. McPhillips taking part in the examination of witnesses to the extent which he desired, and this led to Mr. McPhillips' withdrawal.

The arbitrators finally made an award fixing the price of the land in question and the Dominion government appealed to the Supreme Court of British Columbia. Hunter, C.J.B.C., made an order setting the award aside, basing his opinion, as I understand it, on the neglect of appellant to join the province as a party.

It is now sought to appeal from that order to this court. I am of opinion that there is no right of appeal. The right of appeal from an award given by s. 209 of the Railway Act, c. 37, R.S.C. (1906), is to a superior court, which, by the Interpretation Act, c. 1 of the same statutes, means in British Columbia the Supreme Court of British Columbia. There is no statutory provision giving a further appeal.

The question now under consideration has been dealt with in a number of cases, one of the most recent being *St. John & Quebec R. Co.* v. *Bull* (1913), 14 D.L.R. 190, 16 Can. Ry. Cas. 284, in which the older cases are referred to.

Counsel for the Harbour Board further argued that even if there was no right of appeal to this court, yet by sub-sec. (4) of said s. 209 it was provided that the right of appeal given by the section should not affect the existing laws or practice in the province as to setting aside awards, and it was submitted by them that the proceedings below might be regarded not only as an appeal pursuant to the section, but alternatively a motion to set aside the award under the laws and practice of this province which sanctions such motions on limited grounds.

Where an arbitration or an award has been improperly procured, the court may set it aside, but by the Supreme Court Rules such a motion must be made within two months after the parties have received notice of the award, and the appeal taken to the Supreme Court was not within two months, and if it is to be regarded as a motion to set aside the award it was too late.

Now the notice of motion to the Supreme Court states that His Majesty the King, in right of the Dominion of Canada, intends to and hereby appeals to the Supreme Court of British Columbia, and further that the said court will be moved by way of appeal for an order setting aside the award and for an order declaring that the compensation fixed is insufficient and ought to be increased. At the opening of the case, counsel for the Dominion government moved to set aside the award on the ground already stated. The judge said: "I do not see why this point was not taken by way of motion to set the award aside." Mr. MacNeill, counsel for the Harbour Board, then said:—

Our rule requires it to be made within two months.

The Court:—A point of jurisdiction may be taken at any time.

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Macdonald, C.J.A.

As I understand this observation, it means that the judge was of the opinion that he could deal with the point in the appeal, and, in that, I think he was right. In other words, the order made was one made in the appeal, and not as upon a motion to set the award aside on grounds upon which it could have been attacked under provincial law. I do not think we can treat what took place below as anything but an appeal under s. 209, and, therefore, this court has no jurisdiction to hear an appeal from the order there made.

The appeal should be quashed.

Martin, J.A. MARTIN, J.A., agrees in quashing the appeal.

Galliher, J.A. GALLIHER, J.A., agrees with MACDONALD, C.J.A.

McPhillips, J.A. MCPHILLIPS, J.A.:—In my opinion, the appeal to this court should be quashed. I am in agreement with my brother Martin, but merely wish to add that the Court of Appeal is not the superior court referred to in s. 209 R.S.C. (1906) of the Railway Act (also see the Interpretation Act, c. 1, R.S.C. (1906), s. 34 (26c); even if it were, and there was concurrent jurisdiction with the Supreme Court of British Columbia, the appeal having been brought to that court—*i.e.*, heard by the Chief Justice of that court (Hunter, C.J.B.C.)—the attempt in coming to this court would be "to appeal from the judgment in the court of concurrent jurisdiction" (see Riddell, J., in *Re Royston Park and Town of Steelton* (1913), 13 D.L.R. 454, at 455, 456). In the Province of Ontario it is a matter of election as to which court shall be gone to; in this province an appeal brought *under the provisions of the Railway Act* is incompetent to this court. It is to be remarked that very recently an award made under the provisions of the Railway Act relative to compulsory expropriation was carried by way of appeal from the Appellate Division of the Supreme Court of Ontario, to the Supreme Court of Canada, and then to the Privy Council (*Ruddy* v. *T.E. R. Co.* (1917), 33 D.L.R. 193), but in the Province of Ontario there is the right of appeal to the Appellate Division of the Supreme Court of Ontario, and that being "the highest court of last resort" in the province, an appeal laid to the Supreme Court of Canada, which is not possible as the Railway Act now stands with regard to the Province of British Columbia. Therefore, in that, no such appeal as is here claimed is given by the Railway Act; this court is without jurisdiction to entertain it.

EBERTS, J.A.:—An arbitration was held to ascertain the value of the Kitsilano Indian Reserve. An appeal against the award was taken by His Majesty the King against said award, under the Railway Act, c. 37, s. 209, R.S.C. (1906), to the Supreme Court of British Columbia, and was heard by Hunter, C.J., and which appeal was allowed and the award set aside.

This judgment was appealed from, and, at the outset, a preliminary objection was raised by motion by Mr. Livingstone, of counsel for His Majesty the King, that, as the judgment appealed from is a judgment of a superior court under the provisions of the Railway Act (above quoted), being the Supreme Court of British Columbia, and given on appeal from the award of arbitrators appointed under the said Act and no appeal is given by the said Act or by any other Act from the judgment of the said superior court. Under the Interpretation Act, R.S.C., c. 1, s. 34 (26), "superior court" means (*c*) in the Provinces of Nova Scotia, New Brunswick, British Columbia, the Supreme Court for each of the said provinces respectively.

I, therefore, am of opinion that the parties having invoked the practice and procedure under s. 209 and appealed to the superior court (which in British Columbia is the Supreme Court) have no further appeal to this court, and the objection to the jurisdiction of this court is sustained.

The appeal should be disallowed. *Appeal quashed.*

ROBERT v. MONTREAL TRUST Co.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 11, 1918.

COMPANIES (§ V F—262)—SUBSCRIPTIONS FOR SHARES—MISREPRESENTATION—DELAY IN REPUDIATING—ESTOPPEL.

Silence for an unreasonable time after notice amounts to acquiescence and laches which will estop a subscriber for shares in a company from attacking his subscription on the ground of fraud or misrepresentation.

APPEAL from a decision of the Superior Court of the Province of Quebec, sitting in Review at Montreal (36 D.L.R. 516, 52 Que. S.C. 73), affirming the judgment of Lafontaine, J., at the trial and maintaining the action with costs.

Statement.

The appellant subscribed for and agreed to purchase from J. A. Mackay & Co., 100 preferred shares of the Canadian Jewellers,

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Ltd., at 95% of the par value with 50% of the par value in bonus common stock of the company. It was also stipulated that the underwriting could be pledged or hypothecated with any banking institution or trust company as security for advances. Prior to the date of this agreement J. A. Mackay & Co. had borrowed from the respondent $131,103.10 and hypothecated the appellant's underwriting as collateral security for the advances already made and for further advances.

The action was brought by the respondent against the appellant to enforce payment by him of the amount of the shares subscribed, and was accompanied by a tender and deposit of certificates.

The principal defence set up by the appellant was that his signature was procured by misrepresentations made to him by J. A. Mackay as to the amount of preferred shares and common shares "to be issued" and as to the jewellery businesses to be acquired by the new company.

J. E. Martin, K.C., and *T. Rinfret*, K.C., for appellant; *G. H. Montgomery*, K.C., and *W. Chipman*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—The appellant agreed to take 100 shares of Canadian Jewellers, Limited, of the par value of $100 each at 95% of the par value with 50% of the par value in bonus common stock. The respondent sues in this action as assignee of the underwriting for $9,500 and interest.

The company was formed for the purpose of effecting a merger of jewellery businesses on a large scale, but the promoters were unable to carry out their intentions.

The form of subscription signed by the defendant had the following heading:—

Canadian Jewellers, Limited.

	Authorized Capital.	To be issued.
Preferred shares	$2,500,000	$1,500,000
Common shares	2,500,000	1,500,000

The amount of stock actually issued was $600,000 preferred and $671,000 of common.

Harry Timmis, the president of the company, who was the originator of it, says in his evidence:—

> We started out with the idea that we would make a very big company out of it, and that we would bring all the jewellery concerns that we could bring in on advantageous terms . . . The company unfortunately was not as strong as it should have been because what I had originally planned had not been carried out.

Q.—With all these concerns which I have mentioned to you which were to come in you would have had $1,500,000 preferred and $1,500,000 common? A.—Quite so.

It must be admitted that the purchaser is entitled to get substantially at any rate what he has bargained for by his contract. In the case of an agreement to take shares in a company, the capital issued, if not equal to that proposed, must at least be adequate for the purposes of the company. It would be impossible to enforce a contract entered into on the faith of the company having at least *primâ facie* a sufficient capital if this were so reduced as to render the success of the company's operations impossible and the loss of the purchaser's money certain.

Now the very nature of the scheme for the carrying out of which this company was organized called for a very large capital. Without it, it is obvious that whatever business they might be able to transact they could not be able to effect a consolidation of a number of the principal businesses in the jewellery trade.

The difference in this case between the capital to be issued and what was actually issued was not merely one of degree, did not merely involve the probability of the company being crippled for want of sufficient capital, it rendered the company incapable of accomplishing the avowed object of its existence.

The underwriting contained a clause agreeing that "this underwriting may be pledged or hypothecated with any banking institution or trust company as security for advances."

The respondent's main contention is that the appellant is estopped as if the instrument were a negotiable security. I think, however, the doctrine of equitable estoppel which he invokes can have no application where the subject matter of the contract has never come into existence. It is not a question of the assignee being unaffected by equities between the vendor and purchaser. The purchaser cannot be expected to give his money for nothing; he is entitled to his part of the bargain, and he is entitled to get substantially what he has agreed to purchase, not something essentially different and which may be of no value.

If I agree with a builder to put up a house for me for $20,000, and that he may pledge the contract for advances to enable him to carry out the work, this does not mean that the builder can put the $20,000 in his pocket without doing any work and leave me

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to be sued for this amount by the lender of the money. It does mean, on the other hand, that I cannot, after the house has been built, claim to set off against the contract price a debt owing to me by the builder.

It would be difficult to lay down any general rules as to the rights and liabilities of the purchaser and the lender in these cases; they must, I think, depend upon the particular circumstances of each; that the effect of the pledge of the contract could ever be the same as the indorsement by the purchaser of a negotiable instrument cannot, I think, be maintained. The respondent's error is in regarding it as such, and as being an absolute security regardless of the nature of the contract.

The appellant's case has been prejudiced by his refusal or omission to answer the communications addressed to him by the respondent; but unless there was some obligation upon him to do so, his legal liability can hardly be altered in consequence. The respondent quotes from the case in this court of *Ewing* v. *Dominion Bank* (35 Can. S.C.R. 133), where it was said:—"Where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent."

That is obviously assuming the obligation to speak or to keep silent.

Now what was the obligation in this case, if I am right in supposing that the company never offered the appellant, was never in a position to offer him, the shares which he had agreed to take? Was he not, strictly speaking, justified in doing nothing but waiting until this was done? Timmis, the president of the company, questioned as to the reduction of capital, says:—"I don't know that we ever reduced. We have not yet carried out all our intentions." And in respondent's factum it is said:—

> The reason for issuing a smaller amount was that the plans of the organizers were changed to suit the situation subsequently arising. The promoters' intentions had not yet been all carried out. Nothing would prevent the issue of further shares.

The appellant, we must suppose, is and always has been ready and willing to carry out his part of the bargain when the vendors offer him the shares for which he has subscribed. It is true that if a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation he must rescind it as soon as he learns the facts,

but that is not this case in which the appellant is not suing but only seeks to rescind his contract as matter of defence to the action, if and so far as he does seek to rescind the contract.

It is going a great deal too far to say that his (the appellant's) failure to say or do anything amounts to approval of the statement of his indebtedness to the respondent contained in the letters.

Fitzpatrick, C.J.

And then when it is complained that the appellant has done nothing why has the respondent done nothing all this time beyond writing three letters, the failure to obtain an answer to which was certainly notice to them that they ought to take some action to insist on such rights as they supposed they had against the appellant? Even if there be no excuse to be made for the appellant, there were laches on the part of the respondent.

I am disposed to think that the pleadings sufficiently cover the defence of the appellant, but if it were necessary they ought to be amended.

For these reasons I would allow the appeal.

Davies, J.

DAVIES, J.:—I would dismiss the appeal with costs.

Idington, J.

IDINGTON, J.:—Inasmuch as it has not been made quite clear that the respondent actually changed its position or did anything except procure the certificate of stock tendered by this action, and bring the action on the faith of the underwriting contained in the appellant's subscription for stock now in question, I am inclined to hesitate before adopting the grounds of estoppel in the strict legal sense of the term used in the court below as entirely sufficient to rest the judgment upon.

In another and wider sense than the technical application of the term "estoppel," and which I will proceed to explain, the case may well be made to turn and the judgment be rested.

The appellant has entirely failed to make out any case of fraud or misrepresentation of an existing fact whereby he was induced to sign the contract in question. He merely, according to his own evidence, sets up that the thing he bargained for was not the thing that had been tendered him. In other words, he says he had been led to understand that the stock he was subscribing for was in a company of greater importance than the company that actually resulted from the promotion of Mackay and others. He says that because it was a company having only an issue of 600,000 preferred stock with an issue of 600 and some odd thousand of common

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stock, instead of a company which had been hoped for of one million and a half preferred stock and one million and a half common stock, therefore he is relieved of his bargain.

I cannot accede to the proposition that as a matter of course the failure of realization of a man's expectations in this regard, apart from any express stipulation providing for such a condition of things as he expected, he can withdraw on account of a disappointment resting upon so little as appears in this case.

We have no such condition or stipulation existent as between the parties concerned, but we are asked, as it were, to engraft same into or on to that form of contract which they chose to adopt. There is nothing to help in the form of contract except the words "to be issued" at the heading which I would read "authorized capital to be issued."

I cannot infer from the use of such terms in the place it occupies in the instrument and read in light of the attendant circumstances, any such meaning as to imply that in default of that expectation being realized the subscription for stock should be null and void.

Then we have it made clear by the evidence that there were no persons present at the making and signing of the contract except the appellant and Mackay. The latter swears positively that the conversation did not last more than five minutes, and that he did not use any language properly giving rise to any such expectations.

The appellant failed to contradict this, or swear that it lasted longer. His memory fails, he admits, to serve him either as to that or the express language which passed between them.

Now I take it that in weighing evidence of that kind and determining which of these two parties is right, that the man to act in the way the appellant acted towards Mackay and towards the respondent in failing to answer one single word calling attention at different times, spread over many months, demanding payment, is not in a position to ask any court to accept his version of the understanding reached or such a construction as he seeks to put upon the transaction to which he subscribes his name, when that document, as I hold, neither expressly nor by implication bears it.

Common fairness and a straightforward mode of dealing with other men, as well as a proper regard for the rights of others on

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the part of a business man, renders it imperative, in my opinion, that under the circumstances detailed in the evidence herein the appellant should have spoken promptly and decidedly and explained why he was failing to pay.

It may not be estoppel *in pais* as usually understood, but it is the kind of thing that precludes a man from imputing to another conduct or expressions of a misleading character, which he absolutely denies, when there is nothing in the documents that passed entitling him to take that position. I think the effect of such denial stands good under such circumstances as presented by this case, and deprives appellant of any effective support for his understanding on which he rests his appeal.

And as to the ground of illegality of the common stock which he presents in his evidence, I fail to find it made good by anything in the case.

I, therefore, think that the appeal should fail with costs, and the judgment below be sustained.

Duff, J.

DUFF, J.:—I think the appeal should be dismissed with costs

Anglin, J.

ANGLIN, J.:—On or about the 30th December, 1911, J. A. Mackay, president of J. A. Mackay & Co., Ltd., procured the signature of the defendant Robert to the agreement sued upon, which is as follows:—

Canadian Jewellers, Ltd.

	Authorized Capital.	To be issued.
Preferred shares	$2,500,000	$1,500,000
Common shares	2,500,000	1,500,000

All shares of the par value of $100 each.

We, the undersigned, severally subscribe for and agree to purchase from J. A. Mackay & Co., Limited, preferred shares of the above company to the number and amounts set opposite our respective names. The price to be paid for said shares is 95% of the par value thereof with 50% of the par value thereof in bonus common stock of the company. The purchase price to be paid on the 15th day of September, 1912.

This underwriting may be pledged or hypothecated with any banking institution or trust company as security for advances. This agreement may be signed in counterpart and all counterparts taken together shall be deemed to be one original instrument,

Name of Subscriber.	Address.	No. of shares subscribed.	Total amount of subscription.	Witness
(Sgd.) E. A. Robert	Montreal.	One hundred.	$10,000.00	(Sgd.) J. A. Mackay.

The Canadian Jewellers, Limited, was incorporated by letters patent issued under the Dominion Companies Act.

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Prior to December 30, 1911, Mackay, who attended to its "financing" and the underwriting of its stock for the new company, had borrowed for that purpose from the plaintiff, the Montreal Trust Co., $131,103.10. On January 6, 1912, he hypothecated the defendant's agreement to purchase stock with the trust company as collateral security for the advances already made to him and for further advances. Further advances appear to have been made to Mackay after December 30, 1911. But, so far as appears, no advance was made after April 19, 1912.

This action was brought by the Montreal Trust Co. against Robert on January 21, 1915, to enforce payment by him of the amount of his underwriting ($9,500), with interest thereon at 7% per annum from September 15, 1912, the action being accompanied by a tender and deposit of a certificate issued in the name of the defendant for 100 shares of the preferred stock and another certificate for 50 shares of the common stock of the Canadian Jewellers, Limited.

Apart from formal pleas, the defences set up are that the signature of the defendant was procured by misrepresentations made to him by Mackay as to the amount of preferred shares and common shares "to be issued" and as to the jewellery businesses to be acquired by the new company; that the shares tendered were part of a block of stock illegally issued by the Canadian Jewellers, Limited, without consideration, and for illegal secret profits and commissions and are not fully paid up and are of no value; and that the company has mortgaged its assets, with the assent of J. A. Mackay & Co., for $70,000, and has thus rendered its stock worthless.

The last-mentioned plea, probably demurrable, was not pressed.

The evidence does not support the plea of illegality in the issue of shares. J. A. Mackay & Co. appear to have paid for those issued to them.

The company was in fact organized and has been carried on with a subscribed capital of only $600,000 in preference shares and $671,000 in common shares, and did not include two or three of the principal jewellery firms whose businesses the defendant claims it was represented to him would be acquired.

It may be noted that the defendant does not plead that it was

a term or condition of his subscription that he should be liable thereon only in the event of and upon $1,500,000 in preference shares and $1,500,000 in common shares of the capital stock being subscribed for. The plea in this connection is solely one of misrepresentation. Had it been of the former character, however, in view of the provisions of the Companies Act (R.S.C. c. 79) as to the commencement of business (s. 26) and the allotment of stock and liability for calls thereon (ss. 46, 80, 132, 140), I should hesitate to hold that a mere statement at the head of an underwriting agreement as to the capital to be issued implies that it is a term or condition of the subscriber's contract that he should be under no liability to take or pay for shares unless and until the amount so stated has been subscribed for, or that his liability should cease if the scheme of issuing the amount of stock thus stated should be changed and the issue of a smaller amount determined upon. *Ornamental Pyrographic Woodwork Co.* v. *Brown*, 2 H. & C. 63; *Lyon's* case, 35 Beav. 646, 55 E.R. 1048; Buckley's Law of Companies (1902), 569-70; but see *Elder* v. *New Zealand Land Improvement Co.*, 30 L.T. 285. In the case of a company incorporated under that statute, a subscription contract intended so to restrict or qualify the subscribers' liability must, I think, in view of its provisions above referred to, be couched in clear and explicit language. But it is unnecessary to pass upon a possible defence which has not been pleaded.

Neither is it pleaded that the shares for the price of which the defendant is sued are not the shares which he agreed to purchase, or that the company is not that a portion of whose stock he agreed to underwrite. That was the issue in *Windsor Hotel Co.* v. *Laframboise*, 22 L.C. Jur. 144.

Dealing with the case, therefore, purely as one of misrepresentation, it becomes material to consider the evidence given in support of that defence.

The testimony of the defendant is far from wholly satisfactory. Indefinite in his examination-in-chief, on cross-examination he probably deposed with sufficient distinctness and particularity to the making of the representation as to the amount of the stock to be issued, but he left quite vague and uncertain what he may have been told, if anything, as to the inclusion of the firms whose omissions he complained of. Mackay, called in rebuttal, dis-

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tinctly denied having made the statement that the acquisition of the businesses of these firms had been or would be arranged for, but did not deny that he had made the representation as to capitalization. With Martineau, J., I am of the opinion that the latter is the only misrepresentation the making of which has been at all satisfactorily proved. The defendant, however, did not pledge his oath either that he had been induced to subscribe by this representation or that he would not have done so had it not been made. Under the circumstances of this case, especially having regard to the defendant's failure to disaffirm or repudiate his contract for at least 2½ years after he had full knowledge of the falsity of the misrepresentation he alleges, I think strict proof that he had in fact been induced by it to subscribe should be exacted. Art. 993 C.C.; 4 Aubry et Rau (1902), No. 343 bis, p. 504; Larombière, art. 1116, No. 3; 24 Demolombe, No. 175; *Morrison* v. *The Universal Marine Ins. Co.*, L.R. 8 Ex. 197, at 206; *Smith* v. *Chadwick*, 9 App. Cas. 187, at 195-200. His defence upon both the alleged misrepresentations, in my opinion, therefore fails.

But had he made a case which otherwise would clearly entitle him to avoid his contractual obligations (*Bwlch-Y-Plwm Lead Mining Co.* v. *Baynes*, L.R. 2 Ex. 324), I incline strongly to the view that his delay in repudiating liability should, under all the circumstances, be taken to raise a presumption of acquiescence or confirmation—of an election not to avoid, which precludes his doing so. *Qui tacet consentire videtur.*

According to his own evidence, Robert made up his mind some time before the maturity of his underwriting on September 15, 1912, that he was not bound by it. He does not give more precisely the date when he learned of the falsity of the representations of which he complains. Although he was written to frequently—by the plaintiff, on September 14, 1912, December 13, 1912, and the 7th of August, 1913—and by J. A. Mackay & Co. on November 9, 1912, and May 5, 1914—pressing for payment of his subscription, he took no step to repudiate liability; he did not vouchsafe an answer to any of the letters so addressed to him. He simply allowed matters to rest in this position until after this action was begun in 1915. His first repudiation was that in his plea delivered on April 1, 1915. Under these circumstances he is,

in my opinion, debarred from setting up the alleged misrepresentations as a defence. I think he would be so debarred if this action were brought by J. A. Mackay & Co. or by the Canadian Jewellers, Limited, itself, as a transferee of his subscription; and his position is certainly not more favourable when sued by the plaintiff as pledgee for *bonâ fide* advances.

In the judgment of the Judicial Committee in *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A.C. 330 (a case from the Province of Quebec, in which, however, the defence of misrepresentation was rejected because of positive acts implying acquiescence), it is formally laid down that in order to maintain a plea that he was induced by false representations to make the contract sued upon, a defendant must establish (1) that the representations complained of were made; (2) that they were false in fact; (3) that the person making them either knew that they were false or made them recklessly without knowing whether they were false or true; (4) that the defendant was thereby induced to enter into the contract; and (5) that immediately on, or at least within a reasonable time after, his discovery of the fraud which had been practised upon him he elected to avoid the contract and accordingly repudiated it. Lord Atkinson says:—

> Of these the last is the most vital in the sense that it is the condition precedent which must be fulfilled before the respondents can escape from the obligation of the contracts they have entered into, however fraudulent those contracts may be. A contract into which a person may have been induced to enter by false and fraudulent representation is not void but merely voidable at the election of the person defrauded after he has had notice of the fraud.

This rule in regard to voidable contracts has always been held to apply *ratione subjectæ materiæ* with particular force to an agreement to take shares in a company.

Lord Davey, in his judgment in *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273, at 294, says:—

> Lapse of time without rescinding will furnish evidence of an intention to affirm the contract. But the cogency of this evidence depends on the particular circumstances of the case and the nature of the contract in question. Where a person has contracted to take shares in a company and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation, for this reason: the presence of his name on the register may have induced other persons to give credit to the company or to become members of it.

Mellor, J., in delivering the judgment of the Exchequer Cham-

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ber in *Clough* v. *London and North Eastern R. Co.*, L.R. 7 Ex. 26, so often quoted with approval, said, at p. 35:—

So long as he (the person on whom the fraud was practised) has made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst 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 wrongdoer is affected, it will preclude him from exercising his right to rescind.

And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive to shew that he has so determined.

We are not here dealing with an ordinary contract to acquire from a shareholder shares already issued in a company organized and carrying on business. The defendant's agreement was an underwriting contract. It is so characterized upon its face. He must have been fully aware that his subscription might operate as an inducement to others to take stock in the Canadian Jewellers, Ltd., or to a company or person in the position of the plaintiff either to give credit to it or to a person holding towards it the relation which J. A. Mackay & Co. occupied, or to extend the term of such a credit, if already given. His position was not materially different in that respect from what it would have been had he made application for his stock directly to the company itself.

A person seeking to set aside a voidable contract to take shares in a company on the ground of misrepresentation must take steps for that purpose immediately on discovering the misrepresentation.

He must proceed with the very utmost promptitude possible in such a case. *Oglivie* v. *Currie*, 37 L.J. Ch. 541.

If a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts or else he forfeits all claim to relief.

Sharpley v. *Louth and East Coast R. Co.*, 2 Ch. D. 663, 685.

It is impossible, said Lord Cranworth in *Oakes* v. *Turquand*, L.R. 2, H.L. 325, 369, to allow a person who has taken shares and has gone on for nearly a year taking his chance of profit to turn round when the speculation has proved a failure and claim to be released on the ground that he was ignorant of something with which the least diligence must have made him acquainted. Still more clearly must it be impossible where the case is one not merely of culpable ignorance, but of actual knowledge of the grounds of voidability.

As put by Riddell, J., delivering the majority judgment in the Ontario Appellate Division in *Morrisburg and Ottawa Electric R.*

Co. v. *O'Connor*, 23 D.L.R. 748, 34 O.L.R. 161, holding that repudiation of liability on a subscription for shares on account of matter entailing voidability must be made promptly after discovery of the facts, the subscriber is not bound, but may elect to approve or disaffirm—in short, the contract is voidable and not void. It is wholly immaterial on what ground or for what reason it is voidable—the important matter is that it is so. Compare the language of Lord Cairns in *Ogilvie* v. *Currie*, 37 L.J. Ch. 541, at the beginning of p. 546: See art. 1000 C.C.

The man who has learned facts which entitle him to avoid a contract cannot be allowed to defer indefinitely the exercise of an election in which others are interested. The time must come when he will be taken either to have foregone that right or to have exercised it in favour of affirming. In the case of subscriptions for shares in a company, as in that of contracts of a speculative character, a comparatively short delay will ordinarily be conclusive: *Bawlf Grain Co.* v. *Ross*, 37 D.L.R. 620, 55 Can. S.C.R. 232; *Directors of Central R. Co. of Venezuela* v. *Kisch*, L.R. 2 H.L. 99, at 125.

Viewed as a case of election, actual or presumed, prejudice to the plaintiff, to the Canadian Jewellers, Ltd., or to its creditors or other shareholders would seem to be immaterial and irrelevant to the answer to the plea of misrepresentation. If, on the other hand, that answer should be regarded as one of laches, such prejudice may be a material element. From this point of view it may be that if the subscriber's delay in repudiating after having acquired knowledge of grounds of voidability has caused no prejudice whatever to the company, to its shareholders or to its creditors, it would be excusable. But where, as in the case at bar, the circumstances give rise to a strong probability that some such prejudice must have been occasioned, I think the burden will be on him to make out that case—always difficult and under ordinary circumstances practically impossible. Or it may be that he will be required to establish that under the actual circumstances no such prejudice could have arisen. Nothing of the kind has been attempted here. Other subscriptions were hypothecated by Mackay with the plaintiff after that of the defendant had matured —some of them as late as February, 1913. Having regard to what appears to have been the course of business between Mackay

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and the plaintiff it would seem altogether likely that these subscriptions were procured after September, 1912. The plaintiff's loan to Mackay & Co. was allowed to run on. At the time of the trial it was slightly larger than at the end of December, 1912. It is impossible to say that these later subscriptions and this extended term of credit may not to some extent have been influenced by the fact that the defendant allowed himself to continue to be regarded as an underwriter liable to contribute $9,500 to the company's capital. That fact may likewise have affected the loaning of $70,000 to the company of which the defendant has complained.

Where a clear and gross case of laches has been made, such as the evidence here discloses, I very much doubt that the courts can be called upon to enter on the enquiry whether prejudice has or has not in fact resulted in any of the many directions in which it might be possible—an enquiry necessarily prolonged and far-reaching and as to the exhaustiveness of which the attainment of certainty must usually be impracticable. While I fully appreciate the force of the introductory observations of Sir Barnes Peacock upon the doctrine of laches in delivering the judgment of the Judicial Committee in *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221, at 239-240, I rather incline to the view that, in a case like that at bar, as in the case of a contract made with an agent to whom a secret commission has been paid, which we have had occasion recently to consider fully in *Barry* v. *Stoney Point Canning Co.*, 36 D.L.R. 326, 55 Can. S.C.R. 51, the possibility of prejudice will itself be deemed conclusive. It was the obvious impossibility of any such prejudice that led to relief being given the defendant in *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273, the delay there alleged having occurred only after the company had declared his shares forfeited.

Lest it might be thought to have been overlooked, I should perhaps refer to *Farrell* v. *Manchester*, 40 Can. S.C.R. 339, in which passages are to be found, notably one at p. 356, at first blush somewhat at variance with views I have expressed. That was a case where there had been prompt repudiation followed by some delay in suing for rescission. There were special circumstances which were held sufficiently to account for and to excuse this delay—and it is said, at p. 359:—"The case presents few of those characteristics that differentiate the usual stock cases cited

from others regarding fraud entitling to rescission, so as to render each day's delay strong evidence of (absence of) that promptitude justice in some cases demands."

Mere lapse of time may import acquiescence amounting to affirmation. If great, it may, without more, do so conclusively: *Clough* v. *London & N.W.R. Co.* L.R. 7 Ex. 26, at 35. Where the subject matter is highly speculative—where the possibility of others being affected is very great, a comparatively short time may suffice. A man entitled to avoid a contract cannot indefinitely withhold his election in order to exercise it as may ultimately prove advantageous to himself. Had the Canadian Jewellers, Limited, turned out a great success, as a subscriber for $10,000 worth of preference shares out of $600,000 worth issued, and of $5,000 worth of common shares out of an issue of $670,000 worth, Mr. Robert's position would have been much better than it would have been, with like success, had the issue capital been $1,500,000 preference and $1,500,000 common; and in that case we should have heard nothing of repudiation. He cannot be allowed to defer his repudiation for nearly 3 years, with full knowledge of the misrepresentation of which he complains, until satisfied that his interest lies in that direction, having meantime taken the full benefit of the chance of success of the venture.

Had the case at bar arisen in any of the other provinces of Canada, where English law prevails and there is no statutory prescription of the action of rescission for fraud, I should have been prepared to discard the defence of misrepresentation on the sole ground of delay under circumstances importing an election not to avoid, or the loss of the right to elect by acquiescence. The provisions of art. 2258 C.C. (art. 1304 C.N.),

> 2258.—The action (*s*) . . . in rescission of contracts for error fraud, violence or fear are prescribed by ten years. This time runs . . . in the case of error or fraud, from the day it was discovered.

and the doctrine of the civil law as to the requisites of tacit confirmation (3 Baudry-Lacantinerie, "Des Obligations," Nos. 2024-5 and 2004-5), however, are said to present obstacles to the application of this doctrine in the Province of Quebec. I assume art. 2258 to be applicable, at least by analogy, to a defence of fraud. Yet, we have the authority of the Privy Council in *United Shoe Machinery Co.* v. *Brunet*, [1909] A.C. 330, that unreasonable

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delay in repudiation affords an answer to a defence of misrepresentation in Quebec. In *Guyon* v. *Lionais*, 27 L.C. Jur. 94, where art. 2258 had been brought to their attention, their Lordships took the same view. At p. 104, they say:—

> The transaction . . . was one which, upon a suit brought in proper time, Dame Marguerite Roy might successfully have impeached on the ground of fraud.

At p. 107, they continue:—

> The action was no doubt commenced within, though only just within, the legal term of prescription. But that does not in such a suit relieve a party from the consequences of his own acts or laches. A court of justice will not give its aid to a person seeking to set aside his own solemn deed of sale, if it appears that he has acquiesced in it for years, lying by, until by circumstances and the expenditure of capital, the subject matter of the sale has greatly increased in value and new interests have been created in it. He must sue promptly, or explain the delay.

Lemerle, in his Treatise on *Fins de Non Reçevoir*, says at p. 186:—

> Quiconque aurait gardé le silence dans une circonstance où il devait parler, sur une action qu'il devait approuver, pourrait, dans certains cas, être réputé avoir donné un consentement, une approbation susceptible d'operer fin de non reçevoir.

And at p. 189:—

> A-t-on gardé le silence sur une exception d'incompétence, de nullité, ou sur demande susceptible d'être formé en première instance, ce silence est réputé approbation et emporte renonciation aux moyens qu'ona négligés.

No doubt, as put by Lord Wensleydale in *Archbold* v. *Scully*, 9 H.L. Cas. 360, at p. 383:—

> So far as laches is a defence, I take it that where there is a Statute of Limitations, the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches.

It implies an election to affirm or an abandonment of the right to elect to avoid. See, too, the language of Turner, L.J., in *Life Association of Scotland* v. *Siddal*, 3 De. G.F. & J. 58, at 72.

Moreover, it would seem eminently desirable that a subscription for shares in a company should entail similar obligations, and that the right to avoid or repudiate it should be subject to the same conditions throughout Canada. All our companies are constituted and organized on a somewhat similar basis, and shares in them are of the same nature in Quebec as elsewhere in Canada. Shares in the same company are very often underwritten or subscribed for in several provinces, including Quebec. The English idea as to the nature of the interest of the subscriber for shares or

the shareholder and the incidents attached to it runs through all our companies' legislation. Many of the questions which arise in connection with the formation and administration of companies are determined in the Province of Quebec as elsewhere in Canada, according to the principle established in the English courts. It would, I think, be most unsatisfactory if the right of a subscriber in Quebec for shares in a Dominion company to disaffirm his obligation to take or pay for them should endure for 10 years after he had fully learned the facts which render that obligation voidable, whereas the like right of a subscriber in British Columbia or Ontario for shares in the same company would be unavailable to him should he fail to repudiate his obligation with the utmost promptitude reasonably possible after discovering its voidability. While I should deprecate any attempt to modify or affect any doctrine of the civil law of Quebec or an established construction of any legislation of that province by an introduction of English law or by adopting English views or practice merely for the sake of securing conformity, I incline to think that in regard to subscriptions for shares in companies, "in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England" and other provinces of Canada, and in the absence of any jurisprudence or established practice to the contrary, the courts of Quebec might well accept and apply the English rule imposing prompt repudiation as a condition of maintaining a plea of misrepresentation or granting the relief of rescission on that ground, and that while the right to repudiate on that ground may there be held not to be legally extinguished until the expiry of the limitation period prescribed by art. 2258, the courts may decline to give effect to it in cases where that would be the attitude of courts administering English law. (*Cory* v. *Burr* (1882), 9 Q.B.D. 463, at 469.) The considerations which require the highest degree of diligence in the repudiation of voidable subscriptions for shares in companies under the English law apply with equal force in the Province of Quebec: *Préfontaine* v. *Grenier*, [1907] A.C. 101, 110.

I am, for these reasons, of the opinion that Mr. Robert could not have successfully defended this action had it been brought by J. A. Mackay & Co. or by the Canadian Jewellers, Limited, as assignee of his agreement to take shares. The position of the present plaintiff is, if anything, more favourable.

I would dismiss the appeal. *Appeal dismissed*

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Alberta Supreme Court, Walsh, J. June 21, 1918.

SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND—CLAUSE MAKING TIME OF THE ESSENCE—AGREEMENT TO EXTENSION OF TIME—FAILURE TO PROPERLY NOTIFY.

Specific performance of an agreement for sale of land will be enforced, notwithstanding a clause making time of the essence, and that the contract is to be null and void if the interest is not promptly paid when due; if the vendor agreed to an extension of the time of payment and the notice definitely fixing the time in which payment must be made is unreasonable in the circumstances.

[*Kilmer* v. *B.C. Orchard Lands*, 10 D.L.R. 172, [1913] A.C. 319, followed. *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, referred to.]

Statement. ACTION for specific performance of a contract for the sale of land.

Frand Ford, K.C., for Tooley; *N. D. Maclean*, for Hadwen.

Walsh, J. WALSH, J.:—Hadwen, by agreement in writing, agreed to sell to two men named Johnson and Smith the land in question and by subsequent assignment their interest in this land became vested in Tooley. He recorded a caveat to protect his interest in this land and Hadwen gave him notice to proceed under it pursuant to s. 89 of the Land Titles Act. The matter comes before me by way of originating notice upon the application of Tooley to substantiate the interest claimed by him in this land under his caveat.

The purchase price mentioned in the agreement was $3,000, of which $1,000 was paid down and the balance of $2,000 was made to fall due on September 1, 1919, with interest at 8% payable on September 1, in each of the years from 1915 to 1919 both inclusive. The year's interest which fell due in 1915 was paid in full and one-half of the interest which fell due in 1916 has been paid, but no more. The agreement contains the following printed clause:

> Time is to be considered the essence of this agreement

and the following clause written in with a pen:

> It is further agreed that if the interest is not paid promptly when due this agreement is null and void and the purchasers agree to peaceably give up possession.

Hadwen's contention is that the default in the payment of the interest due in 1916 has, in the face of the two clauses of the agreement above quoted, put an end to Tooley's rights under it and he is, therefore, entitled to have the caveat removed.

The assignment of this contract to Tooley was made on September 25, 1916. He knew, then, that $80 of the interest which had fallen due on the 1st of that month was in default but it was the

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expectation of both himself and the original purchasers that it would be paid out of the purchase price of a part of the land that had been sold to the Edmonton Dunvegan and British Columbia Railway Co., instructions having been given the company's solicitors to pay the same to Hadwen. On November 26, 1916, the first communication on the subject took place between the parties in the form of a letter from Tooley to Hadwen stating, amongst other things, that he had taken over this place from Johnson who had "assigned over to me all his rights in the place so that I have just you to deal with. I hope this will suit you." Hadwen replied to this under date of December 8, 1916, expressing his surprise that Johnson would sell without telling him and stating that $80 of the interest due on September 1, 1916, was still unpaid and continuing:

If you have bought him out you will be required to pay up the balance of the interest for this year at once which is $80, you can buy a draft there and mail it to me. You would get the copy of contract from him and you will see in it what the conditions are if the contract is not carried out in full and to the letter but I don't want to make trouble for anyone. You had better see if all taxes are paid, and pay balance of interest at once. You see I did not get high price for the land and gave long time for payment and I only received a small payment down so I cannot afford to let the payment drag. When did you buy out Johnson you should have had a caveat made out and file in the recording office and sent me notice of same but you shall see that all taxes are paid up to date also the interest. If these things are not done I can claim the land any time without recourse. I don't want to see you get in trouble so am warning you and telling you what to do.

Tooley wrote Hadwen acknowledging the receipt of this letter stating that he was surprised to hear that the interest was in arrear and explaining that he thought it would have been paid out of the railway money. He then continued:

I am well aware, Doc., that the interest must be paid by the present holder, myself, but would ask you to give me a while to investigate this matter from Short & Cross at Edmonton. Johnson claimed he had only received half the money for the right of way. However it is, Doc., I can assure you the interest will be forwarded as soon as I have found out the true facts . . The caveat is being made out and filed in the recording office.

The caveat was in fact recorded on December, 29,1916. Hadwen wrote Tooley the following reply from Thoeny, Montana:

P. J. Tooley, Esq., Jan. 8th, 1917.

Grand Prairie City, Alta.

Your letter at hand. The fact is I consider all rights under my contract with C. W. Johnson as void by his failure to comply with the terms thereof. However, if you want to accept and continue his agreement I have no objections

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but I want to say that unless the remittance for the interest and evidence of the payment of the taxes reaches me by February 1st I will not consider any deal you may have had with Johnson in any manner.

I do not know what deal you have had with Johnson but the matter of fact Johnson has failed to comply with the terms of agreement and he is virtually out of the deal but if you care to assume his liabilities with me and will make the payments of the interest due and show that the taxes have been paid I will let you have the land under the agreement I had with Johnson. The payment of the interest and your agreement to assume the terms of the contract of agreement being hereby made a condition precedent to you taking any right under the Johnson contract.

I do not want to appear as being too severe but I have to take care of my legal rights and unless you want to show good faith by doing business at once I cannot safely let this matter run and upon advice of my attorney I have to make this plain so I hope you will get the interest to me and see that the taxes are paid by Feb. 1st. (Sgd.) T. M. Hadwen.

Tooley did not receive this letter until about February 14, 1917, owing to his absence from home, but immediately upon his receipt of it he wrote Hadwen the following letter:—

Dear Doc., Grande Prairie, Alta., Feb. 14th, 1917.

Your letter to hand. I regret I have not been able to answer it before as have only just returned from Edmonton, your letter must have arrived at Grande Prairie just after I left and as I was gone two weeks to Edmonton and did not return until yesterday you will see there was a reason for the delay in answering you. While at Edmonton I found that the money owing $80 on the right of way, is still coming, The E.D. and B.C. not having registered their plans. Johnson did not let me know anything about this and has not been heard of since leaving here. However Doc. I am enclosing draft for interest up to September as could not collect from the E.D. and B.C. until they have registered their plan. I may require your assistance in the collection of this so that either you or I can get it and apply on the next six months' interest which is due by April. Do you know where Johnson is yet? I wrote to his relations but could get no satisfaction as to his whereabouts. Please send receipt for interest. P. J. TOOLEY.

A post office order for $80 payable at Hadwen's post office went with this letter and he received this letter and enclosure on February 23, 1917. He says that he handed the post office order over to the United States Commissioner and afterwards to the postmaster at the Montana town where he received it as he refused to accept it, and that he wrote a letter to Tooley, which he sent to his (Hadwen's) solicitor, Mr. Fraser, at Grande Prairie, for delivery to Tooley. Tooley says that he never received this letter and there is no proof of its contents before me. If Hadwen did write such a letter it was the only reply which he ever made to Tooley's letter and remittance until the following June. Tooley wrote him on March 29, and again on May 15,

1917, telling him that he had received no acknowledgment of his receipt of this interest and expressing the hope that everything was satisfactory. Hadwen did not pay any attention to either of these letters. He came from Montana to Alberta in June, 1917, and gave instructions to his solicitors in Edmonton under which they, on June 22, gave Tooley the notice to proceed under his caveat, which has brought about these proceedings. He then went on to Grande Prairie where he saw Tooley but there is no evidence before me as to what took place between them. While there he sent him the following letter:

Mr. P. J. Tooley, Grande Prairie, Alberta,
Grande Prairie, Alberta. June 25th, 1917.

You will please find enclosed a post office money order amounting to eighty dollars ($80) made payable to me by yourself. I am not prepared to accept this owing to the very late date same arrived as our agreement was null and void previous to that date. (Sgd.) T. M. HADWEN.

The post office order referred to in it is the order sent by Tooley to him in the preceding February and which had ever since been in the possession of either Hadwen or some one for him. That letter ended the communications between the parties.

Steedman v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, is the authority mainly relied upon by the vendor. If the provisions of this contract, making time of the essence, have not been expressly or by implication waived, it must, of course, be that the purchaser has lost all of his rights under it and his caveat must fail, for that is clearly what *Steedman* v. *Drinkle*, decides. The question, therefore, is whether or not there has been such a waiver, and if so, what the effect of it is.

There has unquestionably been a waiver of the provision of the contract calling for payment of a year's interest on the unpaid purchase money on September 1, 1916, and so *Steedman* v. *Drinkle* does not decide the case in Hadwen's favour. In Hadwen's first letter, that of December 8, 1916, he called for payment at once, without fixing any limit of time for it, of the amount then in default in respect of this sale of interest. If Tooley had met that demand promptly, Hadwen, most certainly, would not have been heard to say that he had not thereby preserved his rights under the contract. Again, by his letter of January 8, 1917, he expressly gave until February 1, following, as a period of grace, within which Tooley could save himself by making good his default,

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and payment within that time would unquestionably have put the contract in good standing. The payment, however, was made not within this extended period but 23 days after its expiration. Do the above quoted provisions of the contract apply to this extended period so as to entitle Hadwen to say that they became effective at the expiration of it to deprive Tooley of all interest in this land under it?

In *Barclay* v. *Messenger*, 43 L.J. Ch. 449, Jessel, M.R., held that where by an agreement time is originally of the essence an extension of the time to another definite date makes the substituted time also of the essence. Stuart, J., says of this in *Wilson* v. *Patterson*, 39 D.L.R. 642, at 644,

that decision has never been directly questioned as far as I can ascertain although the decision in *Kilmer* v. *B.C. Orchard Lands Ltd.*, 10 D.L.R. 172, [1913] A.C. 319, as explained in *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, would appear to do so.

I think that the effect of the judgment in the *Kilmer* case as explained in the *Steedman* case is not only to question but to destroy the authority of *Barclay* v. *Messenger*, upon this point. In the *Kilmer* case the defendant, the purchaser, not only resisted the vendor's attempt to rescind the contract because of his default in paying an instalment of the purchase money, but he counterclaimed for specific performance notwithstanding such default. Time was made of the essence by that contract which provided that, unless the payments were punctually made, it should be null and void and of no effect. An instalment of principal with interest fell due on June 14, but was not paid by that date and the time for payment was extended to July 7 following. On July 8, Kilmer wrote the company explaining the circumstances which prevented his making the payment on the 7th but promising to pay without fail on the 12th. On the 9th, the secretary of the company sent a telegram saying the deal was off and on August 1, following, the company brought its action and the money which should have been paid on July 7 was paid into court to the credit of that action.

The Judicial Committee restored the judgment of the trial judge who had decreed specific performance of the contract by the plaintiff as prayed by the defendant in his counterclaim. The judgment of the Board upon this branch of the case gives absolutely no reasons for the conclusion thus reached. The argument

of Kilmer's counsel was that "as they (the Company) had submitted to postpone the day of enforcing payment they were no longer entitled to say that time was of the essence of the contract. The rigid date having been altered they were not entitled to say that the substituted date was rigid to the extent of being unalterable." So that the precise point determined by *Barclay* v. *Messenger*, *supra*, was undoubtedly before the Board. The Judicial Committee was, of course, confronted with this judgment when it came to deal with the *Steedman* case and this is how Viscount Haldane explained it at p. 422:

> But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view and on that footing alone to have decreed specific performance as counterclaimed.

Under this authoritative explanation of the *Kilmer* judgment, I think that I am bound to hold upon the facts of this case that the vendor cannot insist that time was of the essence with respect to this overdue interest. The facts are, in my opinion, much stronger in the purchaser's favour here than in the *Kilmer* case. There, the purchaser was notified by wire two days after the lapse of the extended period that the deal was off and he apparently neither offered nor paid his arrears until after the action was commenced. Here the vendor gave the purchaser no such notice and no notice of any kind subsequent to the payment until four months from his receipt of the money had elapsed during which time he seems to have studiously refrained from even the courtesy of a reply to the purchaser's letters of enquiry as to his receipt of the money and during all of which time he kept in his possession or under his control the remittance sent to him by the purchaser. I do not think that the notice of the 8th of January was a reasonable one. Hadwen had already, by his letter of December 8 left the time for payment open in such a way that he could not without more put an end to the contract. If he was as I think

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within his rights in fixing a time within which this payment was to be made he was bound to give Tooley reasonable notice of it and afford him a reasonable opportunity to comply with it by making sure that he received it in time to enable him to do so. I do not think that a notice mailed in Montana on January 8, assuming this letter to have been mailed on its date, to a man in so remote a region of Alberta as that in which Tooley lived, calling for the receipt of this money by the writer in Montana by February 1, was a reasonable notice. Even if it was, I think Hadwen should have seen to it that it reached him in time to enable him to act upon it instead of trusting to the chance of its so reaching him through the mail, a course which the events have shewn to be most unreliable. When the notice to proceed was given which originated these proceedings Hadwen actually had in his possession the money sent him to remedy the purchaser's default and had so had it for four months without the slightest protest on his part or the slightest intimation of his intention not to keep it. I think that, from this fact alone, Tooley might well have concluded that his default had been condoned. And so applying the principle of *Kilmer* v. *B.C. Orchard Lands*, as I understand it, to the facts of this case I must hold that the contract is still on foot.

Since the commencement of these proceedings, the year's interest falling due under the contract on September 1, 1917, has matured. It has been neither paid nor tendered, for the obvious reason that it would not have been accepted by Hadwen. Tooley says that he is and always has been ready and willing to pay this interest and I believe him. No complaint of the non-payment of this interest is made by the vendor and so I apprehend no difficulty will arise over it if this judgment finally prevails. Hadwen will pay Tooley's costs of these proceedings under column 4.

Judgment accordingly.

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Ex parte CARROLL.

New Brunswick Supreme Court, King's Bench Division, McKeown, C.J. December, 1917.

1. ASSAULT (§ I—5)—OF PEACE OFFICER—CONSENT TO SUMMARY TRIAL.
A charge of assaulting a peace officer acting in the discharge of his duty is subject to the provisions of Part XVI. (summary trials) and a magistrate has no jurisdiction to try it without the consent of the accused under Cr. Code sec. 778 in provinces where such consent is not dispensed with by the Code.

2. HABEAS CORPUS (§ I C—11a)—POWER TO ORDER FURTHER DETENTION —CR. CODE, sec. 1120.

Apart from the provisions of Cr. Code sec. 1120 as to ordering further detention on a habeas corpus motion notwithstanding the irregularity of the commitment, the court has power to remand the accused to his former custody where there has been an abortive trial before a magistrate; but such power of remand is to be exercised only when it is necessary in the interests of justice.

[*R.* v. *Frejd*, 18 Can. Cr. Cas. 110, 22 O.L.R. 566, considered; see *R.* v. *Kolember*, 22 Can. Cr. Cas. 341, 16 D.L.R. 146.]

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EX PARTE CARROLL.

MOTION for discharge of prisoners in *habeas corpus* proceedings.

Statement.

Austin A. Allen, for the motion.

James Friel, K.C., contra.

McKEOWN, C.J.:—Each of the applicants is now confined in the County Jail at Richibucto, under separate warrants of commitment issued by Hugh M. Ferguson, a Justice of the Peace and Stipendiary and Police Magistrate in and for the County of Kent. On the 5th day of November, 1917, they were convicted before the said magistrate for assaulting a public officer, viz.: a local inspector under the Intoxicating Liquor Act, 1916, while engaged in the execution of his duty as such officer.

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The parties were properly before the magistrate charged with such offence, but, by some misapprehension or oversight, he omitted asking for, or obtaining their consent to a summary disposal of their cases by him and proceeded to try them separately without such consent in either case. Each pleaded guilty and each was thereupon sentenced to six months imprisonment in the county jail at Richibucto with a month additional imprisonment if the costs incident to their apprehension and trial were not paid.

At the instance of Mr. Austin A. Allen, acting for both applicants, I directed the keeper of the gaol to make return to me concerning their detention and the cause thereof under *habeas corpus*, which return is now before me.

Mr. Friel, who is resisting this application, has sought to draw a distinction between a conviction for assaulting a police officer in the discharge of his duty, and for resisting such officer under like circumstance, but notwithstanding his ingenious argument, I am of opinion that the proceedings throughout are defective because the consent of the accused was not obtained, and that the conviction must be quashed, and in probable anticipation of such decision he has drawn my attention to s. 1120 of the Criminal Code, which reads thus:—

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"1120. *Further detention of person accused on inquiry as to legality of his imprisonment.*—Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment enquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice, under whose warrant he is in custody, or any other judge or justice to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice."

There is a division of opinion in Canadian courts as to whether the above-quoted section applies after a conviction, and while a prisoner is serving a sentence thereunder. I am indebted to the industry of both counsel for a full review of all the decisions, and my view is that the section does so apply, and under proper conditions I would not hesitate to act under it. The reasoning of the Ontario Court of Appeal in the case of *The King* v. *Frejd*, 18 Can. Cr. Cas. 110, 22 O.L.R. 566, seems to me conclusive, and I readily acquiesce in the decision therein arrived at.

But like all other powers of this nature bestowed upon or inherent in the Judges of the King's Bench, it is not to be exercised as a matter of course, but, in my judgment, only when such action is necessary in the interest of justice. When criminal proceedings fall to the ground, as in the present circumstance, it does not necessarily follow that the wrongdoer goes unpunished. Such proceedings can be again immediately instituted, either by a private or public prosecutor. Cases are easily conceivable wherein even the brief time in which the accused would be at liberty might allow a most serious crime to go unpunished. In such cases I think a judge under the provisions of this section should not allow the prisoner his liberty at all. Quite apart from the section, I am of opinion that a judge has ample power to so deal with a prisoner under such circumstances, and therein I quite agree with the view expressed on that point by Meredith, J.A., in the *Frejd* case.

But this case does not seem to me to call for such action. The prisoners have been in jail over a month. As they pleaded "guilty," nothing is disclosed as to the severity of the assaults.

If the parties so assaulted do not feel the prisoners have been sufficiently punished, further proceedings can be properly instituted, and the only question which could then arise would be as to whether they had been adequately dealt with, as the pleas of guilty in each case confess the offence.

I think in both these cases the convictions must be set aside and the prisoners discharged, but no action shall be brought against the magistrate or gaoler or any person who has acted under the conviction or commitment.

There will be no order as to costs. *Discharge ordered.*

COUNTY OF WENTWORTH v. HAMILTON RADIAL ELECTRIC R. Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 26, 1917.

1. STREET RAILWAYS (§ I—1)—AGREEMENT WITH CORPORATION—CONSTRUCTION—EFFECT—LIABILITY—DAMAGES.

A railway company which is obligated under a by-law granting it the right under certain conditions to construct, maintain and operate an electric railway, to pay an agreed rate for every mile or *pro ratâ* for a portion of a mile of railway operated, is liable to pay only for the portion of railway actually operated; if, however, the effect of the by-law is that the whole railway is to be operated, the company is liable in damages for non-performance of this condition, the damage being equal to the amount the company would have had to pay had the whole line been operated.

2. JUDGMENT (§ II A—60)—FORMER ACTION—CAUSE OF ACTION NOT THE SAME—SAME QUESTION NOT IN ISSUE—RES ADJUDICATA.

Where the cause of action is not the same as a former action (*County of Wentworth* v. *Hamilton Radial Electric R. Co.*, 28 D.L.R. 110, 31 O.L.R. 659, 33 D.L.R. 439, 35 O.L.R. 434, 54 Can. S.C.R. 178) and the same question was not in issue and was not raised or decided, there can be no application of the doctrine of estoppel or *res adjudicata*.

Statement.

APPEAL from a judgment of Sutherland, J., in an action to recover balance alleged to be due under a covenant contained in an agreement, as the consideration for certain privileges granted to an electric railway company. Affirmed.

The judgment appealed from is as follows:—

The plaintiff corporation alleges that, under an agreement between it and the defendant company, dated the 19th June, 1905, the latter covenanted and agreed with the plaintiff corporation "to perform, observe, and comply with all the agreements, obligations, terms, and conditions" in a certain by-law of the plaintiff corporation, being by-law No. 516, passed on the 10th June, 1905.

Under para. 24 of the said by-law, the defendant company agreed to pay to the plaintiff corporation an annual money con-

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sideration for the privileges granted. In a former action between the plaintiff corporation as plaintiff and the Hamilton Radial Electric Railway Company and the Corporation of the City of Hamilton as defendants, the question in dispute was, whether, in consequence of the Corporation of the City of Hamilton having annexed territory of the county, including part of a road therein over which the privilege of running cars had been granted to the defendant company by the said by-law, the agreement between the plaintiff corporation and the defendant company still remained in force in respect to the portion of the road so annexed, and the county corporation was still entitled to the whole annual payment for the year 1914, as if such annexation had not taken place.

It was held therein that the agreement was still in force and the plaintiff corporation entitled to the said annual payment.

In this action the plaintiff corporation is claiming the annual payment of $460 for the years 1915, 1916, and 1917, amounting in all to $1,380, less cash received $214.70, balance $1,165.30.

The decision in the former case is found in the report of *County of Wentworth* v. *Hamilton Radial Electric R.W. Co. and City of Hamilton* (1916), 54 S.C.R. 178, 33 D.L.R. 439, and the general facts relating to this case are there fully set out.

The plaintiff corporation in this action alleges that its right to collect was definitely determined by the Supreme Court of Canada in the action referred to.

The defendant company contends that there has been a change of circumstances of such a character as to render the said judgment no longer applicable, and which prevents the plaintiff corporation from properly raising the plea of *res adjudicata*.

It is said that in August, 1913, the defendant company tore up the tracks on Main street, between what is known as "the Delta" and Sherman avenue, and since that date, the defendant company says, it has not operated cars on that line, that is to say, that its line now runs between Bartonville and the Delta and stops at the latter point. The defendant company says that along the remaining portion it has extended its lines, and that the only use it makes of the said lines over that portion of railway is to run its cars in for storage purposes at night.

It was contended that, while in the former action the de-

fendant company was desirous of still maintaining its franchise over that portion of the roadway included in the territory which had been annexed to the City of Hamilton, now it is no longer claiming a franchise or running rights over it, and that in consequence there is nothing due the county corporation in respect of that portion of the roadway in question. The defendant company contends also that, under paras. 14 and 22 of the by-law, it has, if not directly, at all events inferentially, the right to withdraw from any portion of the roadway and abandon it, and that the only remedy open to the county corporation under such circumstances is to cancel the defendant company's franchise over such portion of roadway.

It was pointed out on behalf of the plaintiff corporation that the same condition of affairs existed at the time the writ was issued in the former action. The plaintiff corporation is not desiring, on account of any default on the part of the defendant company, to put an end to the contract or repeal the by-law. The defendant company cannot compel the plaintiff corporation to do so. The plaintiff corporation is simply relying upon its right, under the contract, to collect from the defendant company the moneys agreed to be paid.

I am of opinion that all defences raised in this action were open to and were raised by the defendants in the former action, and that the matter is *res adjudicata*.

The plaintiff corporation will therefore have judgment as claimed with costs.

D. L. McCarthy, K.C., and *A. H. Gibson*, for the appellant company, said that the question for decision was, whether the obligation of the company was to pay mileage on the whole line as originally constructed, or only on that part of the line which was actually operated by it. They argued that the latter was the true construction of the agreement between the parties, and that the learned trial Judge erred in holding that the question was *res adjudicata* by reason of the decision in *County of Wentworth* v. *Hamilton Radial Electric R.W. Co. and City of Hamilton* (1914-16), 31 O.L.R. 659, 35 O.L.R. 434, 28 D.L.R. 110, 54 S.C.R. 178, 33 D.L.R. 439. The payment into Court was not an estoppel. They referred to Halsbury's Laws of England, vol. 13, p. 355, para. 494; *Smith* v. *Merchants Bank of Canada* (1917), 13 O.W.N.

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31; *Swanson* v. *McArthur* (1915), 21 D.L.R. 580; *Re Ontario Sugar Co.* (1910), 22 O.L.R. 621; *Pedlar* v. *Road Block Gold Mines of India Limited*, [1905] 2 Ch. 427; *Davis* v. *Hedges* (1871), L.R. 6 Q.B. 687; *Rigge* v. *Burbidge* (1846), 15 M. & W. 598.

J. L. Counsell, for the respondent corporation, argued that the judgment of the trial Judge could be supported, not only on the ground taken by him that the matters in question were *res adjudicatæ*, but also on other valid grounds. The by-law under which the road was constructed, the provisions of which the appellant company was bound to observe, provided for the continuous operation of the whole line, and the obligation of the appellant company was to pay mileage on the whole. Breach of this obligation would make the appellant company liable in damages. Reference was made to Hukm Chand on Res Judicata, p. 115.

McCarthy, in reply.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant company from the judgment, dated the 18th July, 1917, which was directed to be entered by Sutherland, J., after the trial of the action before him, sitting without a jury, at Hamilton, on the previous 21st day of May.

The action is brought to recover the amount of the annual instalments which the respondent alleges are due to it under the terms of an agreement between the parties dated the 19th June, 1905, the instalments sued for being those payable on the 1st day of January in the years 1915, 1916, and 1917.

By a by-law of the council of the respondent corporation, passed on the 10th day of June, 1905, the right, under certain conditions and subject to certain terms mentioned in the by-law, to construct, maintain, and operate a single track electric railway on the Main street road from Sherman avenue to the Delta and on the King street road from the Delta easterly through the unincorporated village of Bartonville to the Saltfleet townline, was granted to the appellant; and, by the agreement, the appellant covenanted with the respondent that the appellant would "perform, observe, and comply with all the agreements, obligations, terms, and conditions" contained in the by-law and on its part to be performed, observed, and complied with.

The compensation which the respondent was to receive for the grant of the rights and privileges which it granted is provided for by para. 24 of the by-law, which reads as follows:—

"For the privileges hereby granted the company shall pay to the Corporation of the County of Wentworth yearly at the commencement of each year, at the rate of $50 per mile, or *pro ratâ* for portion of a mile, per year, for the first three years, and after the expiration of the first three years at the rate of $100 per mile, or *pro ratâ* for portion of a mile, per year, for the next five years, and at the rate of $200 per mile per year thereafter for every mile, or *pro ratâ* for portion of a mile, of railway operated on the said county roads under this by-law. First payment to be made on the first day of January, 1907."

The whole railway was constructed and operated until August, 1913, when the appellant tore up its tracks from the Delta westerly to Sherman avenue, and it has not since had any line between those points, but has continued to operate the remainder of its railway.

The Hamilton Street Railway Company has built a double-track railway between the Delta and Sherman avenue, and the cars of the appellant, under some arrangement with that company, pass over its lines for the purpose of going to the street railway company's barns to be stored in them.

The appellant has paid into Court the amount to which the respondent is entitled for that part of the railway which is still in existence and operated by it; and the contest is as to the obligation of the appellant to pay for the whole distance covered by the grant made to it by the by-law.

In my opinion, the contention of the appellant, as far as it depends on the meaning of para. 24 of the by-law, is well-founded.

What the appellant obligated itself to pay was the agreed rate for every mile, or *pro ratâ* for a portion of a mile, of railway operated on the county roads under the by-law. The respondent's contention would require that para. 24 should be read as providing for the payment for every mile or portion of a mile of the railway which the by-law gave authority to operate.

It is clear, I think, that according to the terms of the agreement the appellant is liable to pay the mileage rate only for the railway which it actually operates.

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It was however contended, and the learned trial Judge has held, that the appellant is estopped by the judgment in a former action between the parties from contesting its liability to pay for the whole mileage of the railway as it was constructed. The former case is reported: *County of Wentworth* v. *Hamilton Radial Electric R.W. Co. and City of Hamilton*, 31 O.L.R. 659, 35 O.L.R. 434, 28 D.L.R. 110, 54 S.C.R. 178, 33 D.L.R. 439.

In that action the respondent claimed for the year 1914 and some preceding years, and recovered for the year 1914. The appellant might, no doubt, have set up in that action that it was liable only for the mileage between the Delta and the Saltfleet town-line, but it did not do so.

The controversy there was as to whether the appellant or the Corporation of the City of Hamilton was entitled to be paid for the mileage in what had become since the by-law was passed a part of that city, and the appellant did not contest its liability to pay for the whole mileage, but paid into Court the amount of the instalment payable in 1914, calculated on that basis.

In my opinion, no case is made for the application of the doctrine of estoppel or of *res adjudicata*.

The cause of action is not the same as that in the former action, and therefore the question is not *res adjudicata*.

If in the former action the question now raised had been in issue and had been determined, it could not have been again raised in this action, but it was not in issue and was not raised or decided. As was said by Willes, J., in *Howlett* v. *Tarte* (1861), 10 C.B.N.S. 813, 827:—

"It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action."

In the same case, Byles, J., referring to the common law rule that a defendant could plead only one plea, said (p. 828) that "to extend the rule to the case of an allegation not upon the record would increase the hardship tenfold. Suppose an action of covenant: the defendant had two defences,—performance and release; he could not plead both: he elected to plead performance.

Suppose that plea found against him. He could not in a subsequent action plead *non est factum*. But, what authority is there for saying that he could not plead the release?"

In that case the first action was for the recovery of rent under an agreement for a lease, and to it the defendant pleaded as to part of the claim payment into Court, and as to the remainder a breach of the plaintiff's agreement to erect a dwelling-house on the premises; but, being under terms to plead issuably, the plaintiff treated the pleas as null and void and signed judgment against the defendant and so recovered the rent which he claimed.

The second action was for subsequent rent, and to it the defendant pleaded that after the making of the agreement a new agreement was entered into, in substitution for it, by which the defendant became tenant for one year and thereafter from year to year so long as the plaintiff and he "should respectively please," and that he subsequently terminated the tenancy by notice to quit and delivered up possession in pursuance of the notice, and that no rent became due thereafter. The plaintiff replied estoppel by the judgment in the first action, but it was held that there was no estoppel.

In *Humphries* v. *Humphries*, [1910] 1 K.B. 796, [1910] 2 K.B. 531, the facts were, that the plaintiff had brought an action for arrears of rent due under an agreement for a lease, and the defendant had relied on the defence that no agreement had been concluded, but did not raise any defence under sec. 4 of the Statute of Frauds, and judgment was given for the plaintiff. Further arrears of rent having accrued, the plaintiff brought a second action, in which the defendant raised the defence that there was no memorandum in writing of the agreement for the lease sufficient to satisfy the requirements of sec. 4 of the Statute of Frauds; but it was held that, not having raised that defence in the former action, he was precluded from raising it in the second action.

That case is, I think, distinguishable from the case at bar. The ground of the decision was, that there had been an adjudication in the first action; that there was an agreement for a lease binding on the defendant; and that it was not open to the defendant to controvert the fact so found; and that it made no difference in the application of the doctrine of estoppel that she

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had failed to set up the defence that she sought to avail herself of in the second action.

The *Humphries* case was followed in *Cooke* v. *Rickman*, [1911] 2 K.B. 1125. There the first action was for rent due under an agreement, and judgment was signed under Order XIV. for part of the sum claimed, which the defendant admitted that she owed. The second action was between the same parties, for further rent under the same agreement. The defendant raised the defence that there was no consideration for the agreement; and that, as it was held, she was estopped from doing.

In that case the ground of the decision was that, consideration being essential to make a binding agreement, the defendant's admission of the agreement by the payment into Court was not only an admission of the making of the agreement, but also an admission that it was founded on consideration.

The former action between the parties to this action was for the recovery of the instalment payable in 1914 and in previous years. The admission of the agreement made in the former action doubtless precludes the setting up in any subsequent action that the agreement was invalid or not binding on the appellant, even though there might be a good ground for impeaching it which was not set up in the former action; and, if the appellant had in it set up the contention which is now set up, and judgment had gone against it, that contention could not now be raised. That was not done, and the question was not passed upon in the former action. The cause of action which the respondent is now asserting is a different cause of action from that in the former action; and, nothing that the appellant is setting up in this action having been set up or passed upon by the Court in that action, there is nothing to estop or preclude the appellant from now setting it up.

It was, however, contended by counsel for the respondent that, even if the respondent has no right to recover upon the covenant of the appellant as applied to para. 24 of the by-law, the respondent is entitled to recover an equal sum as damages for the breach of the appellant's covenant to operate the railway on the Main street road from Sherman avenue to the Delta and on King street from the Delta easterly through the unincorporated village of Bartonville to the Saltfleet town-line.

If there is to be found in the by-law any provision the effect of which is to obligate the appellant to do this, I am of opinion that the contention is well-founded, for in that case there has been a breach of the appellant's covenant, and the damages which the respondent has sustained are the loss of the yearly payment in respect of the abandoned part of the railway which the respondent would have been entitled to receive if the railway had been operated between the termini mentioned in the by-law.

Although there is in the by-law, in terms, no provision that the whole railway shall be operated, the by-law does provide that the railway between the termini mentioned in the by-law shall be constructed and operated before the 15th November, 1905 (para. 9), and it also provides (para. 13):—

"The said company shall place and continue on said railway within the township of Barton, and from the township of Barton to the terminus of said railway in the city of Hamilton, cars with all the modern improvements for the convenience, safety and comfort of passengers, including lighting and heating, and equal in every respect to the class of cars in ordinary use in the city of Hamilton by the Hamilton Street Railway Company, and shall run at least one car each way every half hour between 6.30 a.m. and 11.30 p.m. of every day, except Sunday, to and from the terminus of said railway in the city of Hamilton and Bartonville, and also on Sundays sufficient cars to accommodate church-going traffic from 10 a.m. to 1.15 p.m., and from 6.30 p.m. to 9 p.m."

"Terminus," as used in this paragraph, means, of course, the terminus for which the by-law provides, and not any point which the appellant may choose to make the terminus of its railway.

These provisions are, in substance and effect, provisions for the continuous operation of the whole railway, and the appellant by its covenant became bound so to operate it.

I would, for these reasons, affirm the judgment of my brother Sutherland, and dismiss the appeal with costs; and give leave to the respondent to amend, by alleging as an alternative claim the cause of action in respect of which, as I have said, the respondent is entitled to recover.

Appeal dismissed.

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VÉZINA v. LAFORTUNE.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 5, 1918.

JUDGMENT (§ I—3)—SALE OF LAND—IMMORAL—SALE NOT FORMALLY SET ASIDE—POSSESSION ANIMO DOMINI—SEIZED BY SHERIFF FOR DEBT OF VENDOR—ART. 699 C.C.P.

An action to recover the balance of the purchase price of property having been successfully defended on the ground that the transaction was immoral and void, but the sale not having been formally set aside, the purchaser being in fact in possession *animo domini*, a seizure by the sheriff under a judgment against the vendor will be set aside as in contravention of art. 699 of the Code of Civil Procedure.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, 25 Que. K.B. 544, reversing the judgment of the Superior Court, District of Quebec, 48 Que. S.C. 254, and dismissing the action with costs. Reversed.

Alleyn Taschereau, K.C., for appellant; *Langlais*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting)—The facts out of which the case arose are few and undisputed. The appeal turns upon the construction to be given art. 699 C.P.Q.

The respondent, being the judgment creditor of one Adèle de-Senneville, caused a writ of execution to be issued addressed to the sheriff of Quebec, under which the latter took in execution and sold to him, the respondent, the immovable property, the title to which is now in question. After the sale, the appellant brought this action to set aside the sheriff's title on the ground that at the time it was taken in execution and sold the immovable seized had become the property of the plaintiff under a good and valid title. The material allegation of the appellant's declaration, or statement of claim, is in these words:—

> La susdite propriété ainsi décrite et vendue est le propriété de la demanderesse qui en est la propriétaire par acte dûment enrégistré et en a toujours été en possession légale depuis le 7 juillet, 1910.

The Chief Justice of the Court of King's Bench says that the appellant only incidentally invokes her right of possession. I have carefully read the pleadings and found no reference either near or remote to any title to the property beyond that set out in the paragraph above quoted.

It is well to make it clear at the outset that in an action of this kind, *en nullité de décret*, the plaintiff must prove either that she was the owner of the property or that she was in possession of it at the time of the seizure *animo domini*. The trial judge finds

specifically, "que la vente du 7 juillet 1910 (*i.e.*, the title relied on by the plaintiff) était nulle et n'a pu conférer aucun titre à la demanderesse," and that finding, concurred in by the Court of King's Bench, is not appealed from. To succeed here therefore it is necessary for the appellant to establish that she was in possession *animo domini*. The fundamental error in the judgment of the trial judge, if I may say so with all respect, lies in the assumption that, in the circumstances of this case, it was for the respondent to prove that the appellant was not at the time of the seizure of the property in possession *animo domini*.

This is not the case of an opposition to the seizure made before the sale by the person in possession. Here the property was seized and sold as that of the person who must be deemed for the purposes of this appeal, in view of the concurrent findings below, to be the rightful owner and adjudged to the respondent. The sheriff's title conveys all the rights of the judgment debtor upon the immovable sold. Articles 760 (8), 778, 779 and 780 C.P.Q.

The only ground upon which the appellant could rely was her possession *animo domini*. (See interesting discussion as to this by Bugnet, note to Pothier, vol. 10, No. 526.) How can the appellant be heard to say that she was in possession *animo domini* when, in a suit brought by her vendor to recover the purchase price, she, the appellant, actually had it declared that the sale she now relies upon was a nullity, that it conveyed no title to her and that she therefore could not be called upon to pay the consideration or purchase price. One feels that it must be superfluous to quote authorities in support of the very elementary proposition that possession *animo domini*, which is what the Code requires, means what it says, a possession which is indicative of ownership. As Baudry-Lacantinerie says: Prescription No. 212:—

> La possession est un fait qui ne peut pas d'abord établir un droit mais qui indique la qualité de propriétaire,

and again, par. 214:

> Il y a deux éléments dans la possession; un élément matériel, le fait de l'occupation, *corpus*, et un élément intentionnel, la volonté d'avoir la chose à titre de propriétaire ou d'agir à titre de maître, de titulaire d'un droit sur la chose, *animus rem sibi habendi, animus domini*. Le concours de ces deux éléments est nécessaire pour l'acquisition de la possession.

It appears to me difficult to conceive how a vendee can successfully resist a claim for the purchase price of a piece of property on

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the ground that the sale was without consideration, as the title never passed, and then succeed in retaining the possession of the same property against its legal owner on the ground that the same vendee is in possession with the *animus rem sibi habendi*, or as owner. Mere detention, of course, is not sufficient; there must be a seizin or investiture of the property sufficient to enable the freehold to pass.

Much might be said of the character of the appellant's possession which, at best, is merely constructive. But the Chief Justice below has so fully and conclusively disposed of the appellant's claim that I am content to refer to his reasons for judgment.

I would dismiss this appeal with costs.

Davies, J.

DAVIES, J.:—I would allow this appeal with costs, and would restore the judgment of the trial judge.

Idington, J.

IDINGTON, J.:—I think this appeal should be allowed and the judgment of the trial judge be restored with costs throughout.

Duff, J.

DUFF, J.:—I would allow this appeal with costs.

Anglin, J.

ANGLIN, J.:—The plaintiff, Vézina, attacks a seizure of real property in the City of Quebec made in May, 1914, at the instance of the respondent, Lafortune, as a judgment creditor of one deSenneville, and his title thereto as purchaser from the sheriff at the sale under such seizure.

DeSenneville, formerly the owner of the property, purported to convey it in 1910 to Vézina for $10,000. Vézina successfully defended an action brought by deSenneville in 1913 to recover $1,620, the balance then unpaid of the purchase money, the Superior Court holding that the transaction was immoral and therefore void. The sale was not formally set aside, however, that relief not having been asked and no offer to repay the $8,380 which she had received on account of the purchase money having been made by deSenneville; and Vézina retained possession of the property. That mutual restitution might have been decreed, had it been sought seems reasonably clear. French law, in that respect differing from English law, now regards that relief as the logical and legitimate consequence of a finding of nullity. Sirey, 90, 2, 97 (cited by Carroll, J.); *Lapointe* v. *Messier*, 17 D.L.R. 347, 49 Can. S.C.R. 271; *Prévost* v. *Bédard*, 24 D.L.R. 153, 51 Can. S.C.R. 149.

Whether the respondent, as an execution creditor of deSenne-

ville, can set up the illegality of the transaction between deSenneville and Vézina and the consequent absence of title in the latter by way of defence to her action to set aside the seizure of the property, which deSenneville had purported to convey to her and of which she held possession, is a question that I find it unnecessary to determine. If deSenneville could have recovered the property only upon the terms of making restitution to Vézina of what she had paid on account of the purchase price, it is difficult to understand how the execution creditor of the former can have a higher right than his debtor, whose interest it is that is exigible to satisfy his demand, or how a sale made under his execution could vest higher rights in the purchaser.

L'adjudicataire (sur saisie immobilière) ne transmet à l'adjudicataire d'autres droits à la propriété que ceux appartenant au saisi. Bugnet's Pothier, vol. 10, p. 243, note (I).

But the main contention of the appellant is that, however defective her title, she was, in fact, in possession of the property *animo domini*, that deSenneville neither was nor was reputed to be, and that the seizure under a judgment against deSenneville was, therefore, in contravention of art. 699 C.P.Q.

The seizure of immovables can only be made against the judgment debtor, and he must be, or be reputed to be, in possession of the same *animo domini*.

For the respondent, it is contended that Vézina's possession after she had defeated deSenneville's action continued under her deed and was merely that of a tenant of deSenneville so long as any part of the purchase money remained unpaid. The deed is in the record. I find no provision in it constituting the purchaser a tenant. On the contrary, it expressly provides:—

Pour la dite acquéreure en jouir, faire et disposer en pleine et entière propriété avec possession immédiate.

Moreover, having successfully repudiated the obligation to make any further payment under this deed because of its nullity, Vézina's possession thereafter could scarcely be regarded as held under such a provision as the respondent suggests, if the deed in fact contained it.

That Vézina held possession *à titre de propriètaire* and not *à titre prècaire* seems to me indubitable. She did not hold as tenant or otherwise under or for deSenneville or for any person other than herself. She held it with the intention of asserting ownership. She may have been aware of the invalidity of her title, but that

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knowledge would not affect the legal character of her possession. That possession would nevertheless be held *animo domini*. Fuzier-Herman, Rep. Vbo. Possession, No. 6; Baudry-Lacantinerie, de la prescription, Nos. 264-5. The distinction made by Pothier between *possession civile* and *possession naturelle*, on which Carroll, J., relies, would seem to be inapplicable under the Napoleonic Code. Baudry-Lacantinerie, de la prescription, Nos. 204-5, and likewise under the Quebec Code, 9 Mignault, 358, 367.

The seizure and sale having been made *super non possidente*, I am, with great respect, of the opinion that they were invalid and that the title acquired by the respondent from the sheriff was, therefore, null. *Dufresne* v. *Dixon*, 16 Can. S.C.R. 596. The appellant, as the person who was, or was reputed to be, in possession *animo domini*, is entitled to have it so declared and to have the sale set aside.

The appeal should be allowed with costs in this court, and in the Court of King's Bench, and the judgment of the trial judge should be restored. *Appeal allowed.*

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EX. C.

POISSON v. THE KING.

Exchequer Court of Canada, Audette, J. March 25, 1918.

PUBLIC IMPROVEMENTS (§ IV—65)—EXPROPRIATION—RIPARIAN RIGHTS—FLOODING—DAM—PUBLIC WORK—NEGLIGENCE.

Where there has been no expropriation by the Crown of any easement to flood the land of a riparian owner, the injury or damage suffered by the latter from flooding, as a result of the construction of a dam by the Crown, is not actionable under the provisions of the Expropriation Act. Nor is it actionable under secs. 19 or 20 of the Exchequer Court Act; the land being situate over 50 miles from the dam cannot be regarded as "on a public work" and no evidence being adduced that the injury resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Statement.

PETITION OF RIGHT to recover damages for flooding suppliant's land.

M. L. Duplessis, for suppliant; *Auguste Désilets*, for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $4,999 for the flooding of his land and injury to his mill and loss of business.

In 1909, the Government of Canada started works at the foot of Lake Temiscamingue, which were completed in April, 1912. These works consisted in building two dams—one on the Quebec side and one on the Ontario side, of the lake, with the object of

making a reservoir of the lake in order to control the debit of the waters and regulate thereby the water power at the Chaudiere Falls, Ottawa. The dam, it must be well borne in mind, was not built with the object and did not have the effect of raising the level of the lake to any new height; but only and especially to retain such waters, for a longer period, on a high known level in the past.

The effect of such dam, in the result, was not to raise the waters to any new high level, but to maintain a high level for a much longer period. The damage or injury suffered by the riparian owners would therefore be one of degree as compared with the past. That is, if the waters in the past attained a given maximum height, it only maintained that state of things for hours, and perhaps two or three days, while at present a high level, without being the maximum of the past, is maintained for months.

Under deed of March 6, 1908, Jean Baptiste Poisson, the suppliant, and Joseph Poisson, both merchants of Gentilly, carrying on business under the name and firm of "Poisson & Poisson," acquired the land in question herein with the second-hand saw mill thereon erected, and its appurtenances, including also, with covenant, a timber license, etc.

Subsequently thereto on November 9, 1909, Joseph Poisson, after the dissolution of the above-mentioned partnership, as mentioned in the deed, assigned and transferred to the suppliant all his rights in the property in question. Nothing is said in that deed of the transfer of the timber limits, in respect of which there is not a tittle of evidence and which was not brought to my attention at the trial—a matter which may have no direct effect in the present case, but which might have had in the adjustment of accounts at the time of the dissolution of partnership.

Joseph Poisson was not heard as a witness. Jean Baptiste Poisson, the suppliant, states the mill was bought with the object of establishing Joseph Poisson's sons, who worked the mill for some time. The suppliant says the sons were to pay for the mill out of the revenues derived from the operation of the same; but they had so many repairs to attend to that they never paid him anything, and Joseph Poisson asked the suppliant to purchase the mill, thereby relieving Joseph Poisson of any liability in respect of the same, which he did, as appears from the deed of November 9, 1909.

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A book of account was filed at trial to shew the revenues of the mill, when operated by the two Poisson boys; but that book has proved unreliable, and the least said about it perhaps the better. In it is found one of the elements of exaggeration which is found in almost all expropriation cases, and cases of compensation. And, in the present case, that element may be coupled with the further exaggeration in respect of the capacity of the mill as stated by the suppliant—the topography of the land adjoining Simard St., the line of flooding shewn on plan ex. No. 4, and finally the allegation in paras. 9 and 10 and following, of the petition of right, where it is alleged that since March, 1913, the mill, its accessories and the lands are of no more use and have lost four-fifths of the value—yet the mill was rented to Parent and operated by him in 1915. In respect of this plan No. 4 it may be said, at once, so as to avoid misconception, that it is unreliable, as the different lines of flooding were not ascertained *de visu* or in any satisfactory manner. From observation on the premises, witness Cross says lines "E,' "F," should be at "X," "Z." Were even these lines of flooding accurate, the witness Barrette could not establish whether the lines on his plan ex. No. 4 would be in respect of the period before or after the construction of the dam.

Having said so much as a prelude, let us consider the construction of the building of the mill. Apart from the machinery, its construction was of the cheapest. The building, except on the land side, rested on posts, and some of the witnesses even said they were not braced. A mill on such foundation did not assert permanency of construction. It should have been on a proper foundation. These posts standing without protection were greatly affected by the frost, and as a result the building was continually out of plumb, hence calling for so many repairs, as claimed by Joseph Poisson's sons, and as said by some of the witnesses, it could hardly be called a permanent building. Frost had more to do with undermining the solidity of the mill than any erosion mentioned in the evidence. Witness Verhelst said it was difficult to maintain a mill upon such foundation. It had the appearance of being affected by frost—it was sloping upon one side or another, involving considerable repairs every spring. The posts under the mill were upset or taken away by the beating of the logs. The suppliant has suffered injury to this property from the operation

and maintenance of the dam. While he might assert a reasonable claim he could not expect the Crown to step in at this juncture and help him out of an unsuccessful undertaking—the unremunerative operation of this mill, which like so many others in that locality had to be closed down.

The waters of Lake Temiscamingue have not been raised by the dam. The dam has maintained a level reached by the lake before, but maintained this high level for a longer period than formerly. A level of 588 could be maintained all the time by using the stop logs.

The present space at the dam through which the water runs out of the lake is larger than before the erection of the dam. The dam is never completely closed, and there is a 45-foot opening down to the bottom, which is kept open all the time.

Dealing with the question of the level of the waters of the lake, taking the sea as datum, 585 was a very ordinary high level obtaining on the lake before the construction of the dam. Here follows the ascertained levels prevailing from 1906 to 1914, inclusively, viz:—

1906 ..... 1st July 583
1907 ..... June 587
1908 ..... June 589
That is 47 consecutive days above 585
1909 ..... End of May—highest 5 days 592
And above 585 for 45 days from 15th May to the end of June.
1910 ..... On the 10th May, highest 585
Duration at that elevation,—20 days. Did not go any higher that year.
1911 ..... On 5th May, highest, for one day 590
Above 585 for 35 days from beginning of May to beginning of June.
1912 ..... Last days of May, for 5 or 6 days 587
Above 585 for 35 days from middle of May to end of June.
Dam completed in April, 1912, and put in operation from that time.
1913 ..... Highest on 1st May 589
Duration above 585 for 95 days, from the end of April to the end of July, and, moreover, for 40 additional days in the Autumn, November and December.
1914 ..... Highest from 12th to 15th June 586
The dam broke on the 14th June, and the repairs were completed in January, 1915.

Most of the damages claimed to have been suffered by the suppliant have been done by the logs, held within the boom in front of the mill, beating against the land and the unprotected posts of the mill. The flimsy construction of the mill was also in

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no small degree the cause of some of the injury. Good size posts run into the ground and properly braced would perhaps have stood the knocking of the logs. The frost had also a deal to do with the keeping of the building plumb.

The engineer heard on behalf of the Crown has suggested, in his testimony, a very rational remedy for stopping any further damage, a remedy which is most practical and has the advantage of ecomony.

There can be no doubt that the mill was exposed to similar damages before the dam, but in a lesser degree, during a shorter period; but a deal of havoc might have been done to the property if a strong wind, combined with waves, had been beating in the direction of the property.

Small cribwork at the southern and western sides of the mill would stop all damages. The loose rock bank of the size and dimensions mentioned by Mr. Coutlee would also have the same effect. It would stop erosion, the waves would break upon the stone and the turbulation of the water would not reach the ground or soil.

The amount offered by the Crown would obviously, under the testimony of witnesses Coutlee and Cross, cover the necessary expenditure for such work. Would it cover the damage to the land, for the deprivation for a long period of a certain area of land which, but for the dam, the suppliant would have had the possession and enjoyment and also for the damage to the two piers?

Witness Parent rented the mill in 1915 for one year and operated it. He says it was in a bad state when he took it. The shingle machine was outside, between the two buildings, unfit to be used. The mill was off level, not plumb. He added from 10 to 12 posts under the mill and braced them. The roof was leaking over the planers, etc.

The prospect of such small saw-mills at Ville Marie is not very bright—a number of them, according to the evidence, have already gone under.

The suppliant has made a claim for loss of business in 1913 and 1914, but has not supported it by any satisfactory evidence. Indeed, both from his books and the evidence of record in respect of the general operations of small mills in the neighbourhood at the time, coupled with what we know of the operation of this mill

by the suppliant himself for a short period, it would appear that the mill was closed down to avoid further financial complications. However, there is not a tittle of evidence on record upon which a compensation for such element of damages could be substantiated or reckoned upon and the *onus* of such evidence was upon the suppliant.

The Crown, by its plea, has not set up any legal objection to the claim; but, if I have no jurisdiction to hear the claim, and if it is not well founded in law, I cannot but dismiss it. The Crown, by its plea, admits the suppliant has suffered damages, and rightly so.

As between subject and subject there can be no doubt that a right of action would exist in a case like the present one, but the law is different as between the subject and the Crown.

The Crown, in the present case, has not expropriated: Expropriation Act, R.S.C., 1906, c. 143, s. 2 (*f*), s. 3, the easement to flood the suppliant's land, therefore the court has no jurisdiction to entertain the claim under the Expropriation Act.

This case is in its very essence in tort, and apart from special statutory authority, no such action will lie against the Crown. The case does not come under s. 19 of the Exchequer Court Act. Can it be said that it comes within the ambit of s. 20 of that Act?

If the suppliant seeks to rest his case under sub-s. (*b*) of s. 20—to which the attention of counsel at bar was called by me at the trial—I must answer that contention by the decision of the Supreme Court of Canada in *Piggott* v. *The King*, 32 D.L.R. 461, 53 Can. S.C.R. 626, where His Lordship the Chief Justice says:—

> Paragraphs (*a*) and (*b*) of s. 20 are dealing with questions of compensation, not of damages.
>
> Compensation is the indemnity which the statute provides to the owner of lands which are compulsorily taken in, or injuriously affected by, the exercise of statutory powers.

Therefore, it obviously follows that the present case does not come under sub-s. (*a*) and (*b*) of s. 20.

Does the case come under sub-s. (*c*) of s. 20, repeatedly passed upon by this court and the Supreme Court of Canada, before its amendment in 1917, by 7-8 Geo. V., c. 23?

To bring this case within the provisions of sub-s. (*c*) of s. 20, before the last mentioned amendment, the injury to property must be: 1. On a public work. 2. There must be some negligence of an

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officer or servant of the Crown while acting within the scope of his duties or employment; and (3) the injury must be the result of such negligence.

The suppliant's property is situate a good deal over 50 miles from the dam, which undoubtedly, under s. 108 of the B.N.A. Act and the third schedule thereof, is the property of Canada.

Under the circumstances and under the decisions in *MacDonald* v. *The King*, 10 Can. Ex. 394; *Hamburg American Packet Co.* v. *The King*, 7 Can. Ex. 150, 175, 33 Can. S.C.R. 252; *Paul* v. *The King*, 38 Can. S.C.R. 126; *Olmstead* v. *The King*, 30 D.L.R. 345, 53 Can. S.C.R. 450; and *Piggott* v. *The King* (*supra*), it is impossible to find that the suppliant's lands, so situate at over 50 miles from the dam, are on the *public work*.

Were even this question of *on a public work* answered in favour of the suppliant, there would still be wanting, missing from the case, the evidence that an officer or servant of the Crown, while acting within the scope of his duties and employment, had been guilty of such negligence that would have caused the damages complained of. There is not a tittle of evidence in this respect in this case.

In the result it must be found, following the decisions in *Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Paul* v. *The King supra; Hamburg American Packet Co.* v. *The King, supra; MacDonald* v. *The King, supra;* and especially *Olmstead* v. *The King, supra*, that the injury complained of did not happen on a public work, and moreover, that it did not result from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment. The action will not lie.

There will be judgment dismissing the petition of right and declaring that the suppliant is not entitled to the relief sought by the same. *Action dismissed.*

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CONRAD v. HALIFAX LUMBER Co.

Nova Scotia Supreme Court, Harris, C.J., Drysdale, J., Ritchie, E.J., and Chisholm, J. April 15, 1918.

INCOMPETENT PERSONS (§ II—10)—DEED—INSANE PERSON—SETTING ASIDE.

1. A deed of land will not be set aside on the grounds that the grantor was insane, unless it is proved that he was insane, to the knowledge of the grantee, at the time the negotiations were being carried on and the deed executed.

2. NEW TRIAL (§ IV—31)—NEW EVIDENCE.
A new trial will not be ordered where the new evidence proposed to be adduced might have been produced at the former trial.

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CONRAD v. HALIFAX LUMBER CO.

Statement.

APPEAL from the judgment of Longley, J., in an action brought by plaintiff on behalf of herself and other heirs-at-law of Richard Myrer, deceased, refusing to set aside a deed of land made by the deceased which was attacked on the ground, among others, that when the said deed was made and executed and for some time previously the deceased was *non compos mentis* and incapable of understanding business transactions.

F. L. Davison, for appellants; *J. McG. Stewart*, for respondent.

The judgment of the court was delivered by

Harris, C.J.

HARRIS, C.J.:—I think this appeal should be dismissed with costs. The action, as originally brought, was to set aside a deed made on March 29, 1895, by one Richard Myrer or Myra to the Hon. A. R. Dickie, on the ground that the grantor was insane at the time he made the deed.

The timber lands which were the subject of the conveyance were taken possession of by the grantee and he carried on lumbering operations on the lands for years before he sold them, and Richard Myra, during this period, lived in the vicinity, and there is no evidence that any question was ever raised by him as to the validity of the deed. He lived for 15 years after the deed was given, and so far as the evidence goes the deed was not questioned until some time after his death. In the meantime the property had been transferred by Mr. Dickie and had passed by successive conveyances through several parties.

The contention is that Myra was insane at times, but with lucid intervals. If I had to make a finding upon the question I would say that there is little or no evidence of his insanity. There is evidence of members of his family as to his eccentricity, bad temper, and drinking habits, but it is largely as to periods years before or years after the date of the deed. He did not live with his wife and family and had nothing to do with them for a long period of time before and after the date of the execution of the deed in question. There is evidence that he had brain fever on one occasion, and some one was allowed to testify that some doctor had said that he would likely become a lunatic before he died, but that is the nearest approach to medical testimony. The doctor's name is not even given, and the whole evidence on the

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question of insanity is most unsatisfactory. He was the owner and master of a vessel for some years, and later carried on a grocery business in Lunenburg county, and was never declared a lunatic, deprived of his liberty, or had a guardian appointed. He went about and carried on his business the same as if his sanity had never been questioned by anyone.

There is very little, if any, evidence as to his mental condition at or about the time of the execution of the conveyance in question. What little evidence there is as to this period tends, I think, to show his sanity rather than insanity. Assuming, however, that he was insane at times, with lucid intervals, the action must still fail because the law seems well settled that it must be shewn that he was insane at the time of the execution of the deed, and that his insanity was known to the grantee. The evidence is uncontradicted that the grantee, or his agent who carried on the negotiations for the purchase and procured the deed for him, knew nothing of his being insane—if he was insane—and had no reason to suspect and did not suspect anything of the kind, and that is necessary for plaintiff's success. *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B.D. 599.

There was a question raised by counsel for the appellant that a certified copy of the deed in question was improperly admitted in evidence by the trial judge, and it was urged that defendants were bound to produce the original deed. The original deed was not in their possession, and I think the certified copy was properly admitted, it having been proved that the notice of intention to produce it was duly served as required by the statute.

The only other ground argued was that the deed was ambiguous so far as the description was concerned, and counsel asked for leave to put in further evidence to enable him to get a declaration as to what land was really embraced in the deed.

So far as I can see, there is no ambiguity in the description. An examination of the printed case shows that counsel on the trial asked for and was granted leave to amend his statement of claim by adding a claim for a declaration as to what lands passed under and by virtue of the deed. This amendment was asked for and granted after the plaintiffs had closed their case and the defendants had called and examined a number of witnesses and the trial judge permitted plaintiffs to call witnesses on this branch of the case,

and he did call a number of witnesses, and evidence was taken on behalf of defendants to meet the new issues.

It was stated by counsel for plaintiffs during the trial that a witness named Blackie was an old man, and, although subpœnaed, was unable to attend, and counsel for defendants offered to admit the affidavit of this witness, but no affidavit was ever produced, and other evidence put in by defendants seems to shew that Blackie's evidence could not have been of any help to the plaintiffs. The trial judge seems to have given plaintiffs the greatest latitude in calling and recalling witnesses in their efforts to support this claim. Counsel for plaintiffs on the argument of the appeal asks to have the case retried as to the amended claim on the ground that he has further evidence to produce on that branch of the case, but he has produced no affidavits to show that he did not know of these new witnesses at the time of the trial, nor why they were not then called. There is an entire absence of the usual grounds for such an indulgence as is now asked for.

In *Young* v. *Kershaw* (1899), 16 T.L.R. 52, at 53, Smith, L.J., said:—

> It seems to me that the authorities shew that a new trial may be ordered where the new evidence proposed to be adduced could not have been obtained by any reasonable diligence before the trial.

Collins, L.J., said (p. 54):—

> It was of the highest importance that all the evidence which could be got together at the trial should be the only evidence admitted . . . In exceptional cases the court had granted a new trial on the ground that new evidence had been discovered since the trial. But that had been fenced around with limitations. The party must shew that the fact that he had not brought it forward before was not owing to any remissness on his part.

There is nothing to shew that by due diligence the evidence might not have been produced at the former trial. We are not even told who the witnesses are, nor what they can prove. What counsel seems to ask for is that he may have a new trial and permission to go out and try and find something or someone to testify to something which may possibly help his case. It is, I think, too clear for argument that such an indulgence cannot and ought not to be granted.

The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed

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Ex. C.

THIBAULT v. THE KING.

Exchequer Court of Canada, Audette, J. March 25, 1918.

CARRIERS (§ II—35)—RAILWAYS—INJURY TO BRAKEMAN—ACCIDENT—NEGLIGENCE.

The death of a brakeman while riding on a box car in the discharge of his duties on the Intercolonial Railway, occasioned by the overturning of the car when it suddenly jumped the track, the roadbed and the car being in perfect condition and the train travelling at a moderate speed, must be regarded as an accident of an unforeseen event and is not attributable to the "negligence of any officer or servant of the Crown . . in or about the construction, maintenance or operation of the Intercolonial Railway," within the meaning of sec. 20 of the Exchequer Court Act.

Statement. PETITION OF RIGHT to recover for the death of a brakeman while in the discharge of his duties on the Intercolonial Railway.

E. Lapointe, K.C., and *A. Stein*, for suppliant.

Léo Bérubé, for respondent.

Audette, J. AUDETTE, J.;—The suppliant, by her petition of right, seeks to recover the sum of $22,000 as damages arising out of her husband's death, resulting from an accident while in the discharge of his duties as brakeman on the Intercolonial Railway, a public work of Canada.

On August 25, 1916, Horace Levesque was working, as brakeman, on a train travelling on the spur or branch line, between Tobin Junction and the Trois Pistoles Pulp & Lumber Co.'s mills, a part of the Intercolonial Railway. They took up 17 empty cars from Tobin Station to the mills, and they had 15 loaded cars to take from the mills to Tobin. Arrived at the mills, they first took 8 loaded cars down to Tobin Station, and on that first trip passed the place of the accident, at a speed of 10 or 11 miles an hour. They returned to the mills and took down to Tobin the remaining 7 loaded cars, and on their way down the conductor was on the top of the last box car with Levesque, who was sitting on the walking board at the end of the last car, when suddenly that car jumped and left the track, uncoupled and rolled down an embankment, about 40 ft. below the track. Levesque was then severely injured and died on September 3, following, as a result of the accident which happened at between 5.30 to 5.45 p.m. on August 26.

While this train travelled at 10 or 11 miles on the previous trip with 8 cars, at the place of the accident, she only travelled at between 6 or 7 miles with 7 cars, at the time of the accident.

The track, at the *locus in quo*, winds around a hill, and the train at the time of the accident was travelling through a parabolic curve, that is, after leaving a 16-degree curve, ran into an 8-degree curve, both ends curving in the same direction.

Without entering into unnecessary details it can be stated that in the result the suppliant's evidence established beyond doubt that the roadbed at the place of the accident was in especially good condition. The track lay in a rock cut, with rock foundation,—the ties were new, having been placed there the preceding summer or autumn, and were clamped or braced with iron at every other tie—the roadbed had been attended to during the summer, and, as put by witness Rioux, the place where the accident took place was as good as on the main track. The rails were in perfect order. Then, after an endeavour had been made to prove that steel framed cars were hard to curve, it was established, beyond peradventure, by the suppliant's evidence, that the box-car which jumped the tracks was a Delaware & Hudson car, and that such cars were very good and perfect. And, moreover, the evidence establishes that this very car was examined after the accident and it was found to be "first class," the wheels and the track "perfect." It further appears from the evidence that certain steel frame cars built at New Glasgow in March, 1917, the year following the accident, have proved defective and had been repaired; but that the Delaware & Hudson cars were perfect, and further, that steel frame cars, used for coal, had been in use on the Intercolonial Railway for over 10 years and had given entire satisfaction.

With respect to the rate of speed, the witnesses say, at the time of the accident, the train was travelling at 6 to 7, or 6 to 8 miles, and on the previous trip, over the same ground, on the same day, at a speed of 10 to 11 miles—and finally they concur in saying that the speed was not excessive and was not the cause of the accident.

The suppliant to succeed in the present instance must bring the facts of her case within the ambit of sub-secs. (*c*) and (*f*) of s. 20 of the Exchequer Court Act, as amended by 9-10 Edw. VII. c. 19. (The Act. 7-8 Geo. V. c. 23 (1917), not being in force at the time of the accident.) In other words, the claim must arise

> out of the death . . . of Levesque caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance, or operation of the Intercolonial Railway or the Prince Edward Island Railway.

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The suppliant's evidence has amply convinced me that the roadbed was in perfect condition, the ties were new and clamped at every other tie, the rate of speed was moderate and far from excessive, and that the box-car which jumped the track was in perfect order. Some of the witnesses have suggested the accident might have been the result of a bolt falling on the track, and which could have caused the accident, but this is only conjecture and surmise. It might also have been the result of a latent defect somewhere and not capable of detection by any ordinary means of examination open to the railway officials.

The *onus* of establishing negligence is upon the suppliant and she has failed to do so. The accident remains unexplained. The case is not within the statute and the action fails. *Colpitts* v. *The Queen*, 6 Can. Ex. 254; *Dubé* v. *The Queen*, 13 Can. Ex. 147.

What happened was fortuitous and unexpected. *Thompson* v. *Ashington Coal Co.*, 3 B.W.C.C. (O.S.) 21. The event was unforeseen and unintended, or was "an unlooked for mishap or an untoward event which was not expected or designed." *Fenton* v. *Thorley Co.*, [1903] A.C. 443; *Higgins* v. *Campbell*, [1904] 1 K.B. 328. It was a personal injury by accident. In *Briscoe* v. *Metropolitan St. R. Co.*, 120 Southwestern Rep. 1162, at 1165, an accident is defined as

> such an unavoidable casualty as occurs without anybody being to blame for it; that is, without anybody being guilty of negligence in doing or permitting to be done, or in omitting to do the particular things that caused such casualty.

The accident in this case was an unforeseen event which was not the result of any negligence or misconduct of an officer or servant of the Crown, and while the court cannot grant any relief in such a case as the present, it is to some extent comforting to realize the widow and children are receiving insurance moneys to the amount of $3,000 and that they have a home free of the mortgage of $600 paid out of such insurance moneys.

The suppliant is not entitled to the relief sought by her petition of right and there will be judgment in favour of the Crown.

Action dismissed.

REX v. COYNE.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. October 18, 1917.

1. MAGISTRATE (§ I—5)—JURISDICTION—TERMS OF APPOINTMENT.
Although sitting within his territorial jurisdiction a magistrate cannot try an offence which is alleged to have been committed beyond his territorial jurisdiction, except where there is a statutory extension of his power in that respect; sec. 577 of the Criminal Code has not been made applicable to offences under Alberta statutes.
R. v. *Coyne* (No. 1) 28 Can. Cr. Cas 428, affirmed]

2. MAGISTRATE (§ I—5)—DOMINION COMMISSIONERS OF POLICE—FEDERAL LAWS.
A Commissioner of Police appointed by the Governor-in-Council under R.S.C. 1906, ch. 92, has no jurisdiction to make a conviction under a provincial law; his jurisdiction is restricted to the matters set forth in the federal Act and coming within the legislative jurisdiction of the Parliament of Canada.
[*R.* v. *Coyne* (No. 1), 28 Can. Cr. Cas 428, affirmed.]

Statement.

APPEAL by the prosecutor from the judgment of Scott, J. setting aside a summary conviction for lack of territorial jurisdiction in the magistrate. (*R.* v. *Coyne* (No. 1), 28 Can. Cr. Cas 428). The appeal was dismissed.

F. D. Byers, for the prosecutor, appellant.

G. E. Winkler, for defendant, respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—The defendant was convicted under The Sale of Shares Act, ch. 8, of 1916 (Alberta), for selling shares of a company without having first obtained a certificate authorizing him to do so from the Board of Public Utility Commissioners.

The conviction was made by Mr. Primrose who purported to act in his capacities of Police Magistrate (Edmonton) and Commissioner of Police.

The offence was charged as having been committed at or near Wetaskiwin, a city some forty miles from Edmonton.

The question we are called upon to decide is whether Mr. Primrose had jurisdiction over an accused in respect of an offence not committed within the City of Edmonton, in view of the terms of his appointment and of the terms of the Act which provides for summary conviction before a Police Magistrate or two Justices of the Peace (sec. 15).

The words of Mr. Primrose's appointment are: "To be Police Magistrate in and for the City of Edmonton in the Province of Alberta (a city having a population of not less than 25,000, according to the last census taken under the authority of an Act of the Parliament of Canada)."

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Since the conviction under consideration, Mr. Primrose has been given the additional appointment of "a Police Magistrate in and for the Province of Alberta."

The Act respecting Police Magistrates and Justices of the Peace (ch. 13 of 1906 with the amendments) provides: (S. 1, s.-s. 1) that the Lieutenant-Governor-in-Council may appoint one or more Police Magistrates for the Province and may define the territorial limits of their separate and respective jurisdictions; (S. 1, s.-s. 2), that every police magistrate appointed under the provisions of this Act shall have and exercise within the limits of his territorial jurisdiction all the powers and authority now or hereafter vested in two justices of the peace sitting and acting together under any law in force in Alberta.

It requires no authority for the proposition that a magistrate may not sit and adjudicate upon any case in a locality beyond the limits of the territory within which he has jurisdiction. But the question is whether sitting within his territorial jurisdiction he can try an offence which is alleged to have been committed beyond his territorial jurisdiction. Apart from statutory provision it seems clear that he has no jurisdiction in such a case. That this was the common law rule seems quite clear from the following cases and the various authorities referred to therein: *Regina* v. *Malott*, 1 B.C.R. Part 2 p. 207, and, in error, p. 212; *The Queen* v. *Ponton*, 2 Can. Cr. Cas. 192; *The King* v. *Lynn* (No. 2), 19 Can. Cr. Cas. 129, 4 Sask. L.R. 324.

This rule has been encroached upon by numerous statutory provisions, *e.g.*, those relating to change of venue and by section 577 of the Criminal Code authorizing every Court of criminal jurisdiction to try any offence within its general jurisdiction wherever committed within the Province if the accused is found or apprehended or is in custody within the territorial jurisdiction of the court. But this provision *proprio vigore* applies only to offences which are criminal by virtue of Dominion legislation and it has not been made applicable to provincial crimes and there seems to be no corresponding provision in our local legislation. The powers of a commissioner of police are by the statute defining the powers of such an officer expressly confined to "the carrying out of the criminal laws and other laws of Canada only."

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It seems clear then that Mr. Primrose had no jurisdiction over the accused in respect of the offence with which he was charged.

This is an appeal from the decision of Scott, J. who came to the the same conclusion. The appeal should therefore be dismissed, with costs. *Appeal dismissed.*

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CURRIE v. HARRIS LITHOGRAPHING Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 26, 1917.

1. STATUTES (§ I—25)—EXTRA PROVINCIAL CORPORATIONS ACT—CONSTRUCTION—INVALID IN PART.

The provisions of the Extra Provincial Corporations Act R.S.O. 1914 c. 179, except the latter part of sec. 16 (1) are *intra vires* in so far as they apply to a company incorporated under the Dominion Companies Act, R.S.C. 1906, c. 79, for carrying on business in Ontario, and with its chief place of business in Ontario, such company is precluded from carrying out its objects and undertakings in Ontario until it becomes licensed; it is subject to the penalties prescribed in the Act for carrying on business, and is prohibited from holding lands for the purposes of its business without being licensed under the Act.

That part of sec. 16 which provides that so long as a company remains unlicensed it shall not be capable of maintaining any action or other proceeding in any court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of sec. 7 is *ultra vires*.

[*John Deere Plow Co. Ltd.* v. *Wharton*, [1915] A.C. 330, 18 D.L.R. 353 (annotated), distinguished.]

2. STATUTES (§ II A—95)—MORTMAIN ACTS OF PROVINCE—DOMINION COMPANY BOUND TO OBEY—MEANING OF THE WORDS "HIS MAJESTY" IN PROVINCIAL ACT.

A Dominion company is subject to and bound to obey the statutes of the Province as to mortmain. The words "of a statute for the time being in force" contained in sec. 3 of the Mortmain and Charitable Uses Act R.S.O., c. 103, apply only to a statute of the Province, and the words "His Majesty," where they first occur in the same section, mean His Majesty acting by the Lieutenant-Governor of the Province, and where they occur the second time, mean His Majesty in right of the Province. The Act is an Act of general application.

Statement.

APPEALS by the plaintiffs, Currie and the Attorney-General for Ontario, from the judgment of MASTEN, J., 40 O.L.R. 290, in so far as adverse to the appellants; and appeal by the defendant company from the same judgment in so far as adverse to the company; the Attorney-General for Canada supported the latter appeal.

Argument.

Wallace Nesbitt, K.C., and *T. H. Barton*, for the Attorney-General for Ontario, referred to the following cases which were cited by MASTEN, J., in the Court below: *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330; *Davidson* v. *Great West Saddlery Co.* (1917), 27 Man. R. 576, 35 D.L.R. 526; *Harmer* v. *Macdonald Co. Limited* (1917), 33 D.L.R. 363. He argued that

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the *John Deere Plow Company* case, on which the defendant company relied, was distinguishable from the case at bar, discussing the cases above mentioned, and also the following: *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1916] 1 A.C. 598, 602, 26 D.L.R. 293; *In re Incorporation of Companies in Canada* (1913), 48 S.C.R. 331, 15 D.L.R. 332; *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437, 442; *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96; *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1883), 9 App. Cas. 157; *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario*, [1897] A.C. 231; *City of Montreal* v. *Montreal Street Railway*, [1912] A.C. 333, 1 D.L.R. 681. The *John Deere Plow Company* case, on which so much reliance was placed by the respondents in the main appeal, was decided by the Privy Council on a British Columbia statute, and on facts peculiar to itself, and in no way affects the validity of the Ontario statute which is here in question. If it is a revenue Act, it is within sec. 92 of the British North America Act, and the Province has a right to enforce its provisions by penalties: *Union Colliery Co. of British Columbia* v. *Bryden*, [1899] A.C. 580. Reference was also made to *Canadian Pacific R.W. Co.* v. *Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405; *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A.C. 73; *In re Incorporation of Companies in Canada*, *supra*, 48 S.C.R. 331, at p. 336; *per* DAVIES, J., at p. 357; *per* IDINGTON, J., at pp. 374, 382, 383, 388, 391; *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566, 26 D.L.R. 273; *Attorney-General for Canada* v. *Attorney-General for Alberta*, [1916] 1 A.C. 588, 595, 26 D.L.R. 288, 291, where reference is made to *Russell* v. *The Queen* (1882), 7 App. Cas. 829.

C. E. H. Freeman, for the plaintiff Currie, stated that he was in the same interest as the Attorney-General for Ontario, and adopted the argument of counsel for the Attorney-General. He referred to *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653, cited in the *Bonanza* case, *supra*, and referred to frequently in Mitchell's work on Canadian Commercial Corporations; also to the judgment of CAMERON, J.A., in the *Davidson* case, *supra*, 35 D.L.R. at pp. 541-551; and to a paper by Victor E. Mitchell on Canadian Companies' Incorporation and the doctrine of *ultra vires*.

F. W. Wegenast, for the defendant company, argued that the statute in question was not a mere taxing Act, but was in reality a change and innovation in the recognised law of companies. On the question of the right of the company to hold land in Ontario, he referred to the Companies Act, R.S.C. 1906, ch. 79, sec. 29. [MEREDITH, C.J.O., thought that the powers given by that section were facultative only. If they went beyond that, they were *ultra vires* of the Dominion.] The language of sec. 29 is clear and gives complete power as well as the faculty or capacity to hold lands. The Province has not in terms purported to deny or challenge our right to hold lands. If it should attempt to do so, its action would be *ultra vires*. The learned Judge in the Court below held that the company was precluded from acquiring lands by virtue of the Mortmain and Charitable Uses Act, but that Act is not applicable in the present case. As to the main question in this case, the general principle on which the powers of the Dominion depend is stated in *Att'y-Gen'l for Canada* v. *Att'y-Gen'l for Alberta*, 26 D.L.R. 288, [1916] 1 A.C. 588, at 597. Reference was also made to *Dobie* v. *Temporalities Board* (1882), 7 App. Cas. 136, and to the *John Deere Plow Company* case, 18 D.L.R. at 361, where it is laid down that the question "is in reality whether the Province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion." He also referred to *Madden* v. *Nelson and Fort Sheppard R.W. Co.*, [1899] A.C. 626; the judgment of PERDUE, J.A., in the *Davidson* case, *supra*, 27 Man. R. at p. 600 *et seq.* The Province is practically seeking to outlaw the defendant company for not paying its taxes. This is beyond its powers. It is an attempt to regulate matters of trade and commerce, which are not within its jurisdiction. He referred to the *John Deere Plow Company* case, *supra*, [1915] A.C. at pp. 339, 340, 341, 344.

Christopher C. Robinson, for the Attorney-General for Canada, said that the main points in the case were: (1) whether the statute in question was really a taxing Act; (2) whether the Province had power to suspend the operations of the company until the tax was paid; (3) whether or not the *John Deere Plow Company* case is distinguishable from the case at bar. In considering the first

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point, regard should be had to the principle stated by Lord Watson in the *Union Colliery* case, [1899] A.C. at p. 587, where he says that in determining whether or not a particular enactment comes within the competency of the provincial Legislature, its "whole pith and substance" must be looked at. Examination of the Act will shew that many of its provisions are quite inconsistent with the view that it can properly be called a revenue Act, as, for example, secs. 5, 6, 7, 8, 9, 10, 11, 12, 14, 19, 21. The *John Deere Plow Company* case has, in principle, decided that this is not a taxing Act, within the powers of the Province. Even assuming that the Act is *intra vires*, it was submitted that the powers of the company could not be suspended in this manner and subject to the penalties imposed by the Act, and in this connection reference was made to the *John Deere Plow Company* case, [1915] A.C. at pp. 340, 341, and it was argued that the decision in that case did not turn on sec. 18 of the British Columbia Act, but on the Act as a whole. Reliance was placed on the decision in the *Bonanza* case, which shews that such a company as this has the capacity and the right to go into Ontario in order to prosecute its business. As to the decision in the Court below that the defendant company was prohibited from acquiring and holding lands by the Mortmain Act, he argued that that Act was not of general application, and did not apply to this case, nor had the Province the power to enforce such a prohibition as is attempted by this Act, which is not "in pith and substance" mortmain legislation at all, but company legislation, which unwarrantably interferes with the status and capacity of the defendant company.

Nesbitt, in reply, referred to *Valin* v. *Langlois* (1879), 5 App. Cas. 115, *per* Lord Selborne, at pp. 118, 120, 121; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, at p. 132. The Province has plenary powers of regulation in any matter which is within its legislative authority. This Act is not prohibitive but regulative. He also referred to the *Dobie* case, 7 App. Cas. at pp. 146, 148, 149, and to the *Colonial Building Association* case, 9 App. Cas. at p. 166.

Meredith, C.J.O.

MEREDITH, C.J.O.:—The Attorney-General for Ontario and the plaintiff Currie appeal from the judgment of Masten, J., dated the 13th August, 1917, in so far as it is adverse

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to them; and the defendant company appeals from the judgment in so far as it is adverse to the company; and the Attorney-General for Canada supports the latter appeal.

The appellant company was incorporated by letters patent issued under the authority of the Companies Act, R.S.C. 1906, ch. 79, for trading purposes, and it is now carrying on its business in Ontario from its chief place of business in Toronto—that being the chief place of its business designated in the letters patent. For the purposes of its business, the company has occupied and is occupying land in Toronto owned by Samuel Harris, one of its directors, under a lease to the company from him.

Section 29 of the Companies Act provides that "the company may acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking of the company;" and sec. 30 of the Interpretation Act, R.S.C. 1906, ch. 1, provides that:—

"In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall,—

"(*a*) vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, 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,

"(*b*) vest in a majority of the members of the corporation the power to bind the others by their acts; and,

"(*c*) exempt individual members of the corporation from personal liability for its debts or obligations or acts, if they do not violate the provisions of the Act incorporating them.

"2. No corporation shall be deemed to be authorised to carry on the business of banking unless such power is expressly conferred upon it by the Act creating such corporation."

A special case has been stated by the parties, and from it I have made the foregoing statement of the material facts. According to the special case, the questions for the opinion of the Court are:—

"1st. Whether the provisions of the Extra-Provincial Corporations Act (R.S.O. 1914, ch. 179), or any of them, in so far as they

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purport to apply to the defendant company, are valid and *intra vires* of the Legislature of the Province of Ontario.

"2nd. Whether the defendant company is precluded from carrying out its objects and undertakings in the Province of Ontario unless and until it shall have been licensed under the said Act.

"3rd. Whether the defendant company is subject to the penalties prescribed by the said Extra-Provincial Corporations Act for carrying on business without being licensed.

"4th. Whether the defendant company is incapacitated or prohibited, by reason of not being licensed as required by the said Act, from acquiring and holding lands for the purpose of its business in the Province of Ontario."

By the judgment *á quo*, the first three questions are answered in the negative and the fourth in the affirmative.

The appeals raise two very important questions: (1) as to the constitutionality of the Extra-Provincial Corporations Act, R.S.O. 1914, ch. 179, as amended by 4 Geo. V. ch. 21, sec. 38, in so far as it assumes to affect companies incorporated by or under the authority of the Parliament of Canada; and (2) as to the right of a trading company, where authorised by the Parliament of Canada to hold land in a Province for the carrying on of its undertaking, to do so without a license in mortmain of the Crown in right of the Province whose laws prohibit the holding of land without such a license.

The provisions of the Extra-Provincial Corporations Act relevant to the inquiry are the following:—

Section 4, which provides that "corporations created by or under the authority of an Act of the Dominion of Canada, and authorised to carry on business in Ontario," shall be required to take out a license under the Act.

Section 5, which provides that such a corporation upon incorporation "shall, upon complying with the provisions of this Act and the regulations, receive a license to carry on its business and exercise its powers in Ontario."

Section 7, which provides that no such corporation "shall carry on within Ontario any of its business unless and until a license under this Act so to do has been granted to it, and unless such license is in force."

Section 9, which provides by its second sub-section that "no

limitations or conditions shall be included in any such license which would limit the rights of a corporation coming within class 7 or class 8" (in which class the companies whose rights are in question are included), "to carry on in Ontario all such parts of its business and to exercise in Ontario all such parts of its powers as by its Act or charter of incorporation it may be authorised to carry on and exercise therein."

Section 10, which authorises the Lieutenant-Governor in Council to make regulations respecting:—

"(*a*) the evidence required, upon the application for a license, as to the creation of the corporation, its powers and objects and its existence as a valid and subsisting corporation;

"(*b*) the appointment and continuance by the corporation of a person or company as its representative in Ontario on whom service of process, notices or other proceedings may be made, and the powers to be conferred on such representative;

"(*c*) the forms of licenses, powers of attorney, applications, notices, statements, returns and other documents relating to applications and other proceedings under this Act."

Section 10 also authorises (sub-sec. 2) the Lieutenant-Governor in Council to "make orders as to particular cases where the general regulations may not be applicable or where they would cause unnecessary inconvenience or delay."

Section 11, which provides that an applicant for a license shall establish to the satisfaction of the Minister charged with the administration of the Act, or some person authorised by him to report thereon, that the provisions of the Act and of the regulations have been complied with.

Section 12, which authorises a corporation licensed under the Act, subject to the limitations and conditions of the license and of its own charter, Act of incorporation or other instrument creating it, to acquire, hold, mortgage, alienate and otherwise dispose of land in Ontario to the same extent and for the same purposes as if it had been incorporated under the Ontario Companies Act with power to carry on the business and exercise the powers embraced in the license.

Section 14, by which annual returns are required to be made to the Minister, containing a statement under oath and according to a form approved of by the Lieutenant-Governor in Council,

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containing information similar to that required by sec. 135 of the Ontario Companies Act, or so much of it or such additional information as may be required by the form, and which provides that the Minister may at any time require the corporation to furnish further and other information.

Section 15, which authorises the Lieutenant-Governor in Council to revoke or suspend a license for default in observing and complying with the limitations and conditions of the license or the provisions of sec. 14, or the regulations as to the appointment and continuance of a representative in Ontario.

Section 16, which provides a penalty for carrying on any part of its business in Ontario contrary to the provisions of sec. 7; and that so long as a company is unlicensed it shall not be capable of maintaining any action or proceeding in any Court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of sec. 7.

Sections 17 and 18, which authorise the remission of penalties, and provide that no proceedings for the recovery of them shall be taken without the consent of the Attorney-General, or after six months from the time when they were incurred.

Section 19, which provides that "there shall be paid to His Majesty for the public uses of Ontario for every license under this Act, such fees as may be prescribed by the Lieutenant-Governor in Council."

Section 20, which provides for the fees to be paid upon transmitting the statement required by sec. 14.

Certain extra-provincial corporations are not required to be licensed (sec. 3); and (sec. 2 (*a*)) "Extra-Provincial Corporation" is declared to mean a corporation created otherwise than by or under the authority of an Act of the Legislature of Ontario; and by sec. 4 secs. 7, 9, and 16 are made applicable to "corporations not coming within any of the classes 1 to 8" and therefore to foreign corporations.

The first Extra-Provincial Corporations Act was 63 Vict. ch. 24, which was substantially the same as R.S.O. 1914, ch. 179, except that it did not include sub-sec. 2 of sec. 9 of the Revised Statute, which was first enacted by 1 Edw. VII. ch. 19, sec. 3, or

sec. 19, which was first enacted by 3 Edw. VII. ch. 7, sec. 53—that section amended sec. 18 of the first Act, by which the amount of the fees was prescribed.

By the schedule of fees now in force, which was prescribed by the Lieutenant-Governor in Council on the 2nd December, 1909, the fees for licenses to "Dominion corporations" are $25 if the company's capital is $100,000 or less, and $50 if it exceeds $100,000, and the fee for a license in mortmain is $100, and the fees in the case of other extra-provincial corporations are stated to depend largely on the amount of capital used in Ontario, calculated on the table of fees for the incorporation of domestic companies.

I have referred to all the important provisions of the Extra-Provincial Corporations Act, not because the validity of all of them is directly in question, but in order that they may be looked at for the purpose of determining what is the true nature and character of the Act.

The view of my brother Masten was that it had been settled by the case of *John Deere Plow Co. Limited* v. *Wharton*, [1915] A.C. 330, 18 D.L.R. 353, that "the power to regulate trade and commerce at all events entitled the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable;" that sec. 7, sub-secs. 1 and 2, and the definition of class 8—"Corporations created by or under the authority of an Act of the Dominion of Canada, and authorised to carry on business in Ontario"—"gives the key-note of the Act; 'its pith and substance,' and its purpose as applied to the defendant company, is to preclude it from the exercise of some of its powers and to deprive it of its status in the Province of Ontario *unless and until* it files certain documents, pays certain fees, and takes out a license."

If this be a correct view as to what the "pith and substance" of the Act is, I would agree with my learned brother; but is it the correct view?

That, notwithstanding that the Dominion has conferred on a company of its creation rights and powers, the company is subject to, and bound to obey, the laws of the Province with regard to taxation for provincial purposes, as to its contracts made within the Province and as to the holding and tenure of land, is equally well-settled, and the exercise by the Province of its authority to

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pass such laws necessarily limits or restricts the powers granted to it by the Dominion.

I shall deal later on with the question of the character and scope of laws which such a company is subject to and is bound to obey.

The question in the *John Deere Plow Company* case was as to the validity of Part VI. of the Companies Act (R.S.B.C. 1911, ch. 39), and what was decided was that:—

1. The power of legislation with reference to the incorporation of companies with other than provincial objects belongs exclusively to the Parliament of Canada.

2. The matter is not one "coming within the classes of subjects" "assigned exclusively to the Legislatures of the Provinces" within the meaning of the initial words of sec. 91 of the British North America Act, but is to be regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order, and good government of Canada."

3. Head 2 of sec. 91, which confers exclusive power on the Dominion Parliament to make laws respecting trade, enables that Parliament to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion shall be exercisable, and what limitations are to be placed on those powers.

4. That secs. 5, 10, 12, 29, 30, and 32 of the Companies Act (Canada) and sec. 30 of the Interpretation Act (Canada) are *intra vires* the Parliament of Canada.

5. That, inasmuch as the provisions of the British Columbia Act which were in question would compel the appellant company to obtain a provincial license of the kind about which the controversy had arisen, or to be registered in the Province, as a condition of exercising its power or of suing in its Courts, they were inoperative for those purposes.

Rules for the interpretation of secs. 91 and 92 were laid down, and qualifications of the general statements upon which the conclusions numbered 1 to 5 were based were made as follows:—

1. That the expression as to "civil rights," notwithstanding the generality of the words, must be regarded as excluding cases expressly dealt with in sec. 91 or sec. 92.

2. That, even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less

subject to provincial laws of general application enacted under the powers conferred by sec. 92; that, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the Province as to mortmain or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies; and that such a company is subject to the powers of the Province relating to "property and civil rights" under sec. 92 for the regulation of contracts generally.

3. That it might be competent for a Provincial Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the Province to register for certain limited purposes, such as the furnishing of information, and that it might also be competent to enact that any company which had not an office and assets within the Province should, under a statute of general application regulating procedure, give security for costs.

It is to be noticed that all that was decided was, that it was not competent for the Legislature to enact the provisions of the British Columbia Act which were in question "in their present form," and that the key to the decision is what is stated on p. 343, viz., that, in the opinion of the Judicial Committee, those provisions were not of the character mentioned in the above para. 3, but were "directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada dealing with a matter which was not entrusted under sec. 92 to the Provincial Legislature."

What was meant by the expression "provincial laws of general application," as applied to the exercise by a Provincial Legislature, was probably such legislation as was in question in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, which imposed taxation on every bank carrying on the business of banking in the Province, every insurance company accepting risks and transacting the business of insurance in the Province, every incorporated company carrying on any labour, trade, or business in the Province, every incorporated loan company making loans in the Province, every incorporated navigation company running a regular line of steamers, steamboats, or other vessels in the waters of the Province,

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every telegraph company working a telegraph line or a part of a telegraph line in the Province, every telephone company working a telephone line in the Province, and railway companies and tramway companies working a railway or part of a railway or a tramway in the Province; as applied to contracts, such legislation as was in question in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, which provided that certain conditions should be deemed as against the insurers to be part of every policy of fire insurance thereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein, subject to a limited right given to the insurer to vary these conditions; and as applied to holding land that a Dominion company is only enabled to acquire and hold land in any Province consistently with the laws of that Province relating to the acquisition and tenure of land: *Colonial Building and Investment Association* v. *Attorney-General of Quebec*, 9 App. Cas. 157.

What I understand was meant by Viscount Haldane, by whom the judgment of the Judicial Committee in the *John Deere Plow Company* case was delivered, by the expression "provincial laws of general application," was such laws as I have just mentioned; and the view of the Judicial Committee was that it was not competent for a Provincial Legislature to single out Dominion corporations and subject them to laws which were not applicable to all corporations.

I do not think that it was intended by the observations made as to the powers which might be exercised by a Provincial Legislature in respect of Dominion corporations to give an exhaustive definition of those powers; what was intended was, I think, to give illustrations for the purpose of indicating the kind of powers that Viscount Haldane had in view as being properly exercisable by a Provincial Legislature; and indeed it was expressly stated by Viscount Haldane (p. 343) that the Committee did not attempt to define *à priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by provincial laws of general application enacted under the powers conferred by sec. 92.

In order to ascertain the scope and effect of the decision in the *John Deere Plow Company* case, it is necessary to see what the facts and circumstances of it were.

The material facts and circumstances were, that the effect of

Part VI. of the Provincial Act (R.S.B.C. 1911, ch. 39) was *inter alia* to require that every company incorporated otherwise than under the laws of the Province should be licensed or registered under the provincial law, and that until it should be so licensed or registered it should not be capable of carrying on business in the Province or of maintaining proceedings in the Provincial Courts in respect of any contract made within the Province; that the company had applied for a license, but its application was refused by the registrar, on the ground that there was another company of the same name upon the register, in which case sec. 18 of the Act, as amended by sec. 6 of ch. 3 of the Acts of 1912, prohibited the granting of a license.

It is important to observe that the opinion of the Judicial Committee that this legislation was *ultra vires* is confined to declaring that "it was not within the power of the Provincial Legislature to enact these provisions in *their present form*" (the italics are mine): p. 343.

It is important also to observe that the British Columbia Act assumed to deny the right to a license if the name of the company applying for it was that of another company upon the register, and that the controversy between the company and the British Columbia authorities began with the refusal of the registrar to issue a license for which it was applying unless a change were made in the company's corporate name—undoubtedly an interference with the status of the company.

There was much discussion upon the argument before us as to whether the presence of this provision was not what led the Judicial Committee to its conclusion that the provisions of the Act in their present form were *ultra vires*.

Some support for an affirmative answer to that question may be found in what was said by Viscount Haldane at p. 341. He there speaks of the provisions of the British Columbia Act "relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen."

Reading this language in connection with what I have said as to how the controversy began, and with the form in which the opinion of the Judicial Committee as to the invalidity of the legislation was expressed, there is at least some ground for thinking

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that the question I have mentioned should be answered in the affirmative.

Attention should also be directed to the important difference as to this matter between the Ontario Act and the British Columbia Act.

By the former not only is such a condition as that imposed by the latter to the issue of a license not imposed, but it is expressly provided that "no limitations or conditions shall be included in any such license which would limit the rights of a corporation coming within class 7 or class 8, to carry on in Ontario all such parts of its business and to exercise in Ontario all such parts of its powers as by its Act or charter of incorporation it may be authorised to carry on and exercise therein:" sec. 9 (2).

I venture to doubt whether, if the British Columbia Act had contained such a provision as this, and there had been absent from it the provision as to withholding the license if there was on the register a company having the same name as the company applying, the conclusion would have been reached that the Act was in substance and in effect an Act affecting the status of Dominion companies and restricting them from exercising in the Province the rights which, as it was held, had been conferred on them by the Parliament of Canada.

Just as the wide and comprehensive expression "property and civil rights" may, and in some cases must, be cut down, so the wide and comprehensive expression "the regulation of trade and commerce" is not to be interpreted in a literal sense. That was pointed out in *Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, 344, as it had before been pointed out in *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, 586, and it was recognised in the *John Deere Plow Company* case at pp. 340, 341.

See also *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, 113.

A different rule apparently applies where a subject such as "banking" is among those enumerated in sec. 91; for, as was held in *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31, 10 Times L.R. 47, the exclusive authority conferred on the Parliament of Canada by sec. 91 (15) to make laws as to banking and the incorporation of banks was not confined to the mere constitution of corporate banks with the privilege of carrying on the business of bankers, but was extended to other matters, and comprehended "banking,"

which was wide enough to embrace every transaction coming within the legitimate business of a banker; and that the lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction; and it was accordingly also held that a section of the Bank Act, 46 Vict. ch. 120, which authorised banks to acquire and hold warehouse receipts or bills of lading as security, and provided what the effect of them should be, was *intra vires* of the Parliament of Canada, although these provisions were at variance with provincial legislation dealing with the subject of warehouse receipts and bills of lading.

The decision in the *John Deere Plow Company* case was based upon the proposition that the authority of the Parliament of Canada to make laws as to the incorporation of companies other than those whose objects were provincial, and to confer upon companies created under the authority of those laws the powers which the Companies Act of Canada and sec. 30 of the Interpretation Act conferred upon them, was derived from the authority of Parliament to pass laws for the peace, order, and good government of Canada and laws for the regulation of trade.

It follows from this that, unless the provisions of the Ontario Act in question lie outside this domain of the Parliament of Canada, or come within the classes of cases in which, according to the *John Deere Plow Company* case, Provincial Legislatures may legislate with regard to Dominion companies, it must be held that it was not competent for the Legislature of Ontario to enact those provisions.

Before entering upon the inquiry necessary to determine these questions, I desire to say that, in my opinion, it is not competent for this Court or for any Court to inquire as to the good faith of a Provincial Legislature in enacting its laws or to find that it has acted in bad faith. Within the limits of its constitutional authority, the Legislature of a Province is a sovereign Legislature, having, within those limits, the like power and authority as that possessed by the Imperial Parliament. The duty of a Court called upon to determine questions as to the constitutionality of an enactment of a Provincial Legislature is to determine whether, upon the true construction of the enactment, it is one which, under the British North America Act, it was competent for the Legislature to pass, and beyond that the Court cannot go.

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I do not mean to suggest that in such a case as the one now under consideration the Court may not look beyond the form in which the enactment is expressed, and if from the nature of its provisions it is found not to be what it assumes to be, but is in its "pith and substance" something different, and so different that it encroaches upon the domain of legislation assigned exclusively to the Parliament of Canada, it is not the duty of the Court to pronounce against its validity.

I adopt what was said by a late Chief Justice of Canada (Strong) in *Severn* v. *The Queen* (1878), 2 S.C.R. 70, 103, as to the general principle to be applied in determining questions as to the validity of provincial enactments. That principle was thus stated by him:—

"It is, I consider, our duty to make every possible presumption in favour of such legislative Acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it; and in doing this, we are to bear in mind 'that it does not belong to Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it.'"

I desire also to express my entire concurrence with what was said by Duff, J., in the *Companies* case, 48 S.C.R. 331, at p. 423, as to the impossibility of holding that a Court has power to effect the nullification of a provincial statute because of the motives with which the legislation was enacted; supported, as his statement is, by what was said by Lord Hobhouse in delivering the judgment of the Judicial Committee in *Bank of Toronto* v. *Lambe*, 12 App. Cas. at pp. 586, 587, and by what was said by the Committee in previous and subsequent cases.

I come now to the question as to what is the "pith and substance" of the Act the validity of which is impugned. Is it what on its face it purports to be, or does it impose upon Dominion companies restrictions which the Legislature could not lawfully impose?

The constitutional right, in order to the raising of a revenue for provincial purposes, to impose direct taxation on Dominion companies doing business in the Province is unquestionable, and

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was not questioned at the bar. That it has the like right, in the exercise of the powers conferred by sec. 92 (9), to require, in order to the raising of a revenue for provincial purposes, such companies to be licensed, is also, I think, not open to serious question, in view of the decision of the Judicial Committee in *Brewers and Maltsters' Association* v. *Attorney-General for Ontario*, [1897] A.C. 231, and of what was said by Viscount Haldane in the *John Deere Plow Company* case at p. 343. Having authority to require such a company to be licensed, a Provincial Legislature has also, in my opinion, the power to require that the license shall be obtained as a condition precedent to the exercise by such companies of the right to carry on their business in the Province. That, I think, is established by the case of *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (*supra*).

The question in that case was as to the validity of a provincial enactment (R.S.O. 1887, ch. 194, sec. 51 (2)), the effect of which was to require brewers, distillers, and other persons duly licensed by the Government of Canada to manufacture fermented, spirituous, or other liquors, to first obtain a license to sell by wholesale, under the Act, the liquor so manufactured by them, when sold for consumption within the Province. It was argued by the appellants, the Brewers and Maltsters' Association of Ontario, that, inasmuch as, as the fact was, the Parliament of Canada had always regulated by statute the trade of manufacturing and wholesale vending of spirituous and fermented liquors, had laid considerable duties on them, created a rigorous system of inspection, supervision, management, and control of the business, and had provided for the issue of licenses to the manufacturers and vendors of these commodities, authorising them on certain conditions to make and sell, the Dominion Parliament had occupied the whole field of legislation on the subject, and that it was an interference with the powers of the Dominion, derived from its exclusive jurisdiction over the regulation of trade and commerce, the public debt, and the raising of money by any mode of taxation, for the Province to step in and add to the conditions already prescribed, by enacting that a provincial license should also be necessary.

This argument did not prevail, and the validity of the enactment was upheld as authorised under sec. 92 (2) or sec. 92 (9) or both of them.

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The Dominion Act then in force was the Inland Revenue Act, R.S.C. 1886, ch. 34, and the licenses for which provision was made were "licenses to carry on the trade or business"—the case was therefore one in which the Parliament of Canada had regulated the trade and prescribed the conditions in which it might be carried on throughout the Dominion.

The question whether the provisions of secs. 10, 11, 12, 14, and 15 are *ultra vires* is, if I am right thus far, a question of minor importance.

In sec. 15, which authorises the revocation or suspension of a license, "default in complying with the limitations and conditions of the license" is mentioned as one of the causes for which a license may be revoked or suspended.

Those words were appropriate enough as the Act originally stood; but, since the amendment made by 1 Edw. VII. ch. 19, sec. 3, which is now sec. 9 (2), already quoted, the words have no meaning, and would no doubt have been eliminated but for an oversight of the draftsman of the amendment.

The provisions of these five sections appear to me to come within the class of provisions which in the *John Deere Plow Company* case it was held that it was competent to a Provincial Legislature to enact; and I cannot see that they are unreasonable or that they impose an unnecessary burden on the companies to which they apply.

That part of sec. 16 which relates to the penalty is, if I am right in my conclusions as to the extent of the powers of a Provincial Legislature, undoubtedly *intra vires*, as the power of imposing penalties is conferred by sec. 92 (15) of the British North America Act.

In its present form the latter part of the section is objectionable, and, I think, *ultra vires*. It is also unnecessary if a Dominion company may not carry on its business in the Province unless licensed, because a contract entered into by it when unlicensed would not be enforceable.

I have thus far dealt with the case on the assumption that the provisions of the enactment in question are "provincial laws of general application" within the meaning of that expression as used in the *John Deere Plow Company* case; and the question whether they are such laws remains to be considered.

The provisions of the Ontario Companies Act must, I think, be taken into consideration for the purpose of ascertaining whether Dominion companies are singled out for taxation to which provincial companies are not subjected, and whether the requirements of secs. 10, 11, 12, 14, and 15 are imposed upon Dominion companies and not on provincial companies. The question is not, I think, whether the enactment in question, standing by itself, is open to objection for these reasons, but whether the company law of the Province, viewed as a whole, is so open.

Nor is it, in my opinion, essential that the form in which the taxation is imposed should be identical in all cases. The important question is, does the provincial legislation discriminate in that respect against Dominion corporations?

In my view, that question must be answered in the negative. The tax imposed in the case of Dominion companies is imposed in the form of a license fee, the maximum fee being $50 and the minimum $25. In the case of provincially incorporated companies the tax is imposed in the form of a fee for the grant of the letters patent which confer the right to carry on the company's business; and the fees vary according to the amount of the capital stock of the company, from a minimum fee of $100 to a maximum fee where the capital exceeds $100,000, of $385, with an additional $2.50 for every $10,000 or fractional part thereof in excess of $1,000,000.

The result of this is, that the tax imposed on Dominion companies is less than that imposed on provincially incorporated companies. It is quite true that a Dominion company has paid fees to the Dominion authorities upon obtaining its charter; but that is not, I think, a factor to be taken into account in ascertaining whether the provincial tax bears more heavily on Dominion companies than on provincially incorporated companies.

Provisions similar to those of sec. 14 are applied to companies incorporated under the Ontario Companies Act (secs. 135, 137).

The provisions of secs. 10, 11, 12, and 15 may be supported, I think, as ancillary to the powers of taxation and licensing and proper for the purpose of making effective use of those powers.

It is settled by decided cases that provincial legislation with reference to a subject assigned exclusively to the Provincial Legislatures is not invalid because it may or even must interfere

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with matters as to which the Parliament of Canada has exclusive legislative authority, such as the raising of a revenue for Dominion purposes, or with the carrying on of trades in the Province licensed by the Dominion, or indirectly with business operations beyond the Province: *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348; *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A.C. 73, 79, 80.

Each of the powers which it was determined by the Judicial Committee in the *John Deere Plow Company* case, and in the cases referred to in that case, a Provincial Legislature may exercise in regard to companies with other than provincial objects created by Dominion authority, in a sense restricts the exercise by them of powers conferred upon them by that authority; the power to require them to be licensed does so, so also do the powers to subject them to provincial taxation, to the laws of mortmain, and to the regulation of the form their contracts must take. All of these provincial powers are powers conferred either by sec. 92 (2), by sec. 92 (9), or by sec. 92 (13).

Looking at the Act in question as a whole, in my opinion it is not in its "pith and substance" an Act designed to restrict Dominion companies in the exercise of the powers conferred upon them by Dominion authority, but an Act lawfully passed for purposes as to which the Legislature by which it was enacted had authority to legislate. I except, however, the last part of sec. 16, for the reasons I have already mentioned.

I would, for these reasons, allow the appeal on this branch of the case and substitute for the declaration and judgment of my brother Masten a declaration and judgment in accordance with the opinion I have expressed, and my answers to the questions of the special case are:—

To the first, Yes, except the last part of sec. 16; and to the second and third, Yes.

There remains to be considered the question whether the defendant company is incapacitated or prohibited, by reason of not being licensed as required by the Act in question, from holding the lands leased to it by Harris.

It is, as I have already pointed out, settled law that a Dominion company is subject to and bound to obey the statutes of the Province as to mortmain, or, as put by Sir Montague E. Smith in

Colonial Building and Investment Association v. *Attorney-General of Quebec*, 9 App. Cas. 157, 166, the capacity given to such a company by its incorporation "only enables it to acquire and hold land in any Province consistently with the laws of that Province relating to the acquisition and tenure of land."

It was argued that this did not apply to a trading corporation; but there is, in my opinion, no foundation for that contention. It was said in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, 117:—

"Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province having exclusive legislative power over 'property and civil rights in the Province') that it could hold land in that Province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the Provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

There is nothing in this to suggest any such distinction as is contended for; what was said is applied to corporations whose powers include that of purchasing and holding land, as well as to those where that is the sole power possessed by them.

In the *John Deere Plow Company* case the Judicial Committee was dealing with the case of a trading company, and, if it had been thought that any such distinction existed, that would have been said, but it was not.

If a company incorporated for the sole purpose of purchasing and holding land throughout the Dominion is so subject to the mortmain laws of the Provinces that it could do no business in any part of it by reason of all the Provinces having passed mortmain Acts, *à fortiori* where the purchase and holding of land is only incidental to the purposes for which the company is incorporated, its right to purchase and hold land in any Province is subject to the laws of mortmain in that Province. See also *Chaudière Gold Mining Co. of Boston* v. *Desbarats* (1873), L.R. 5 P.C. 277,

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in which it was argued that the Quebec laws of mortmain were not applicable to trading companies because their lands were not withdrawn from commerce and were alienable, and it was answered by the Judicial Committee (p. 296) that "the withdrawal of lands from commerce was only one, and not the main, reason of the law of mortmain."

The Mortmain Act of this Province is R.S.O. 1914, ch. 103, and by its third section it is provided that:—

"Land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a license from His Majesty, or of a statute for the time being in force, and if any land is so assured, otherwise than as aforesaid, the land shall be forfeited to His Majesty from the date of the assurance, and His Majesty may enter on and hold the land accordingly."

And, by sec. 4, the Lieutenant-Governor in Council is authorised to "grant to any person or corporation a license to assure land in mortmain in perpetuity or otherwise," and to "grant to any corporation a license to acquire land in mortmain, and to hold such land in perpetuity or otherwise."

It was argued that, the defendant company having been empowered by a statute of the Parliament of Canada to acquire and hold land, the land assured to it by Harris was so assured under the authority "of a statute for the time being in force," within the meaning of sec. 3.

The words "of a statute for the time being in force," in my opinion, apply only to a statute of the Province, and the words "His Majesty," where they first occur in sec. 3, mean His Majesty acting by the Lieutenant-Governor of the Province, and, where they occur the second time, mean His Majesty in right of the Province.

To give to the words "of a statute for the time being in force" any other meaning than I would give to them would be to interpret them as surrendering to the Parliament of Canada the provincial authority to license in mortmain, which by the 4th section is conferred upon the Lieutenant-Governor in Council in all cases in which Parliament should deem it proper to confer upon a corporation of its creation the right to acquire and hold lands in the Province, and that that was what was intended is highly improbable.

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Unless there is something in the context to the contrary, in my opinion, where in a provincial statute such a reference is made to a statute as is made in sec. 3, "statute" means a statute of the Legislature which is speaking.

It was also contended that the Mortmain Act is not a law of general application; because, as was contended, a corporation created by the authority of the Legislature of Ontario may acquire and hold land without the license of the Crown. That, I think, is a misconception. A corporation which is authorised by a provincial enactment to acquire and hold land has, by the Act or charter which confers that authority, the license of the Crown; and, if the Act or charter does not confer that authority, the corporation cannot acquire or hold land unless licensed to do so in the mode provided by the Mortmain Act. The Act appears to me, therefore, to be clearly an Act of general application.

I would, therefore, affirm the judgment of my brother Masten on this branch of the case and dismiss the appeal from it with costs, and allow the appeals on the other branch of the case with costs throughout.

Before parting with the case, it is not, I think, unfitting that I should make some general observations as to the question of the incorporation of companies and as to the way in which, in my judgment, the consideration of questions as to the extent of the legislative authority of the Parliament of Canada and of the Legislatures of the Provinces should be approached.

It is, I think, to be regretted that at the outset it was not determined that the authority of the Parliament of Canada to incorporate companies was limited to creating them and endowing them with capacity to exercise such powers as it might be deemed proper that they should possess, but leaving to each Province the power of determining how far, if at all, those powers should be exercised within its limits.

Such a construction of the British North America Act would have accorded with the basic principle upon which the union of the Provinces was founded, to which I shall afterwards refer, and would, at least, have had the merit of preventing such questions as arose in the *Insurance* case, the *Companies* case, and the *John Deere Plow Company* case, from arising; and, if it had been adopted, the exact boundary-line between Dominion and Provincial powers

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with respect to the incorporation of companies would not have been, as it now is, undefined and uncertain.

The language used by Sir Montague E. Smith in *Colonial Building and Investment Association* v. *Attorney-General*, 9 App. Cas. at p. 166, appears to me to indicate that the view I have suggested as the proper one, was his view, for he said:—

"What the Act of incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a definite area, viz., throughout the Dominion."

But for the decision in the *John Deere Plow Company* case, I should have thought that such a construction might well have been adopted. I do not see why it might not well have been held that the expression "incorporation of companies" in sec. 92 (11) extended only to the creation of the corporate body and endowing it with the capacity it was to have, leaving the powers it was to exercise to be given to it under the authority conferred by one or other of the heads enumerated in the section, e.g., the wide fields of property and civil rights, the administration of justice, and matters of a merely local or private character.

Such a construction would, of course, have left to the Parliament of Canada authority to legislate for the incorporation of companies with other than provincial objects, using the words "incorporation of companies" in the sense which I have just mentioned, but leaving it to the Province to endow the company with such powers as it should deem proper that it should possess.

It is of the gravest importance to the people of Canada that the British North America Act, which was but putting into legislative form the agreement that had been come to between the Provinces which had agreed to unite as one Dominion, as to the terms of their union, should be interpreted in accordance with the principle upon which that union was formed.

The union was brought about after violent political controversies between the political parties of the then Province of Canada had gone so far as to render the formation and maintenance of a stable government practically impossible. These controversies had their origin in what was thought by one party to be the

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unwarrantable interference by the Legislature of Canada, through the representatives in it of one Province, with the domestic and local affairs of the other, and the impossibility, owing to the same cause, of effecting changes in the domestic laws which the representatives of one Province desired should be made. The existence of that state of matters resulted finally in the leaders of the two political parties contriving to bring about such a change in the constitution of the country as would remove these and other anomalies, and leave each Province to manage its domestic affairs as it might deem best.

Accordingly it was resolved that the legislative union between Upper Canada and Lower Canada should be dissolved, and a new Dominion be brought into existence, comprising at the first, as well as these two Provinces, the Provinces of Nova Scotia and New Brunswick, and ultimately, it was hoped, comprising all the British Dominions north of the United States of America, with a constitution that would leave each Province supreme in all domestic and local matters, and give to the Parliament of the Dominion control of all matters of a national character or importance—matters in which all the Provinces had the same interest, although they might differ as to the means by which that interest should be best subserved.

The British North America Act was the result, and it safely may be asserted that its basic principle was intended to be that each Province should be autonomous and "master of its own house."

This principle, I venture to think, has not always been applied to the determination of questions that have arisen under the Act, partly, perhaps, because it has been thought that, having regard to the language used in the Act with regard to the question under consideration, it could not be applied, and sometimes because the principle was not kept clearly in view.

I have little doubt that, if the authors of the compact which led to the union of the Provinces had anticipated that such results would follow as have in some cases followed from their work, they would have taken care to express what they meant in such language as would have rendered it impossible that the conclusions which were reached would have been come to.

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Hodgins, J.A.

MACLAREN and MAGEE, JJ.A., agreed with the Chief Justice.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice, but on one point I am not sure that I can go as far as he does. Sub-section 2 of sec. 9, R.S.O. 1914, ch. 179, provides that no limitations or conditions shall be included in the license which would limit the exercise of the corporate rights authorised by the charter. But this sub-section deals only with the effect of the license when granted and the restrictions which it contains. Section 7 of the same Act makes the obtaining of a license a condition which must be fulfilled before a corporation can carry on its business in Ontario; while secs. 5 and 11 confine the right to such license to those corporations which comply with the Act and the regulations.

It does not seem to me that the sub-section at all meets the difficulty that if compliance with certain regulations, unwarranted by law, is a condition precedent, then the operations of a corporation will be effectually blocked, notwithstanding that the license, when obtained, will be found to be free from any stipulation containing the obnoxious provision.

The Lieutenant-Governor in Council, under sec. 10, has power to make regulations respecting certain matters, none of which, either in themselves or as enacted in exhibit 3, appear to go beyond what the *John Deere Plow Company* case indicates as a proper use of the provincial powers.

I do not think an Act is open to objection from a constitutional point of view because the powers conferred by it are wide enough to enable acts to be done which may be *ultra vires* of the enacting authority. Such powers will always be read as intended to be used in a legitimate way, and it is only when the act which it is contemplated will be done is in itself *ultra vires*, that the power to do it will be held to that extent to be equally objectionable.

In the memorandum, exhibit 10, regarding licenses in mortmain, para. 3 is practically the same as that held to be beyond provincial powers in the *John Deere Plow Company* case. No question appears to be asked regarding this; but, if it is a provincial regulation which has to be complied with before a license is granted, it is of doubtful validity, notwithstanding the language of the cases which were relied on before us.

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Ferguson, J.A.

I would answer the questions as proposed by my Lord the Chief Justice.

FERGUSON, J.A.:—The facts are so fully set out and the authorities so exhaustively discussed in the judgment of Mr. Justice Masten, appealed from, and in the opinion of my Lord the Chief Justice, which I have had the privilege of reading, that I shall content myself with stating my conclusions and indicating the grounds thereof.

1. I consider that the Extra-Provincial Corporations Act, as originally enacted, was passed on the assumption that it was within the legislative capacity of the Province to assert and exercise control over all extra-provincial corporations, and to declare what companies should do business in Ontario, and under what conditions, and by license to regulate the exercise in Ontario of the corporate powers of such companies.

2. That, in respect of the companies incorporated under the Companies Act of the Dominion, several amendments have been enacted with the object of making the Act conform to the trend of judicial opinion discussed and expressed in the authorities referred to in the argument, and in doing so to limit the control of the Province to requiring these companies to pay taxes and to conform to the general laws of the Province in respect to the administration of justice and property and civil rights.

3. That, because, notwithstanding these amendments, it is, in my opinion, still within the power of the Lieutenant-Governor in Council, acting within the scope of the authority conferred upon him by the Act as amended, to require, among other things, an application for a license supported by a petition setting forth the facts and evidence required by exhibit 10 (regulations), particularly the facts required by the third paragraph thereof, which reads as follows—"That the corporate name of the corporation is not on any public ground objectionable, and that it is not that of any known company, incorporated or unincorporated, or of any partnership or individual doing business in Ontario, or a name under which any known business is being carried on in Ontario, or so nearly resembling the same as to deceive"—and because, by sec. 11, it is required that the applicant shall establish to the satisfaction of the Minister that the provisions of the Act and the

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regulations have been complied with, power is still conferred upon the Minister to refuse a license to a Dominion corporation otherwise entitled to it, if, for instance, its name, in the opinion of the Minister, conflicts with that of any other already incorporated or licensed to do business within the Province.

Such regulation and the granting of power to pass and enforce such regulation, whether exercised or not, are, in my opinion, contrary to the opinion of the Privy Council in the case of *John Deere Plow Co. Limited* v. *Wharton*, [1915] A.C. 330, 18 D.L.R. 353; consequently, the Act as framed is in this respect *ultra vires*. I do not agree with Mr. Justice Masten in his view that the purpose and effect of the Act has not, as to companies in classes 7 and 8, been changed by amendment (1 Edw. VII. ch. 19, sec. 3), but am of the opinion that the amendments are not wide enough to cover the regulations.

4. That, because the Province, in the exercise of its control over property and civil rights, prohibits all corporations, including its domestic companies, from holding real estate, unless expressly authorised in manner provided by the Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103, the defendant company must obtain such license before exercising that power.

Appeals of the plaintiffs allowed as to three questions with costs and dismissed as to one with costs.

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EX. C.

Exchequer Court of Canada, Audette, J. March 20, 1916.

EXPROPRIATION (§ III C—135)—COMPENSATION—FARM—TIMBER LAND—VALUATION.

The basis of compensation for the expropriation of farm or timber lands by the Crown for training camp purposes is the market value of the property as a whole at the time of expropriation, as shown by the prices other farms had brought when acquired for similar purposes.

Statement.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

G. G. Stuart, K.C., and *E. Gelly*, for plaintiff.

L. Cannon, K.C., for defendant.

Audette, J.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands belonging to the defendant were taken and expropriated

* Affirmed on appeal to Supreme Court of Canada, December 11, 1916.

by the Crown, under the provisions of the Expropriation Act, for the purposes of the Valcartier Training Camp, a public work of Canada, by depositing on September 15, 1913, a plan and description of such lands in the office of the registrar of deeds for the County or Registration Division of Quebec.

While this property was expropriated in September, 1913, the defendant was allowed to remain in full possession up to September 15, 1914, when he was required to give up possession, under short notice. He had his full crop in 1913, but suffered some damage to the 1914 crop. He lived a couple of months off the farm in 1914, but came back and remained in possession of the buildings, but not of the farm, until November 1, 1915, when he definitely left his house and went to reside somewhere else.

The defendant's title is admitted.

The lands so expropriated are in severality described in the information and are composed of three lots: lot No. 28, of 137 arpents, 53 perches and 174 ft., and lot 69a, of 32.097 arpents; these two lots form what is hereafter called the farm. There is also taken lot 36, of 85 arpents, which is a bush lot. The total area of the lands taken is admitted by both parties at 255 arpents.

The Crown by the information offers the sum of $2,150, and the defendant, by his plea, claims the sum of $13,695.

On September 9th, 1913, a few days before the expropriation, the defendant gave an option upon his property at the sum of $2,150.—upon which option the Crown, through Captain McBain, paid the sum of $50. But the option was thereafter allowed to lapse.

An official from the Department of Militia and Defence was sent by the Deputy Minister to endeavour to effect a settlement with the defendant, and some time around the month of July, 1915, he offered the defendant the sum of $8,000 in full settlement. Nothing came of it.

Shortly before this official came to the defendant, one Mynot, in the employ of the Government at Valcartier, but subsequently dismissed for cause, as appears in the evidence, prepared ex. N, and asked the defendant to sign it. The defendant, in his evidence, says that while he was quite willing to settle for $11,756, the amount mentioned in that document, he refused to sign it, because he had some doubt it was wrong and that Mynot wanted

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to catch him. Be all that as it may, nothing came out of this option and these offers.

On behalf of the defendant, witness Hayes valued the three lots at $9,600, adding that $8,000 would be a fair price. Witness Vallee values lots 29 and 69a at $8,424; witness Corrigan values the three lots at $8,800.

On behalf of the Crown, witness Capt. A. McBain values the whole property at $2,150, as of September, 1913, and witness Col. W. McBain places a valuation of $2,200 to $2,400 upon the whole farm and the wood lot. This witness also filed as ex. No. 3, a list of 31 properties bought by him, for the camp, in the actual neighbourhood of the property, at an average price per arpent of $16.57 to $17.

One cannot lose sight of these sales, as there certainly could not be a better illustration of the market value of these farms at the time of the expropriation than the prices actually paid to such a number of proprietors, not pressed to sell, but selling at a price arrived at of their own free will. These prices afford the best test and the safest starting point in the present enquiry into the market value of the present property. *Dodge* v. *The King*, 38 Can. S.C.R. 149; *Fitzpatrick* v. *Town of Liskeard*, 13 O.W.R. 806; and *Falconer* v. *The Queen*, 2 Can. Ex. 82.

The character of the evidence adduced by the defence is worth a passing notice. Indeed, this evidence is adduced upon a wrong basis, upon a wrong principle. To arrive at the valuation, the witnesses segregated the acreage and allowed so much for such area and so much for another area and then valued the buildings, in 1915, on the basis of what it would cost to build them. A farm or property of this kind is valued as a whole. The valuation of the wood lot is also upon a wrong principle, as mentioned in the case of *The King* v. *Patrick King*, 17 Can. Ex. *See also The King* v. *Kendall*, 8 D.L.R. 900, 14 Can. Ex. 71, confirmed on appeal to the Supreme Court of Canada; *The King* v. *New Brunswick R. Co.*, 14 Can. Ex. 491.

The defendant suffered some damages occasioned by the expropriation; but the statement prepared by him fixing these damages at $668.56, is out of proportion and is grossly extravagant. Some of these items are shocking and preposterous and are better left without comment. However, while the amount claimed

is extravagant and not justifiable, the defendant is entitled to some damages. He was allowed to remain upon the property after the expropriation and he certainly derived some material benefit therefrom, and for that reason it is now quite difficult to determine, out of his claim for damages, what is referable to the benevolence of the Crown, by thus allowing him to remain in possession, and what may well constitute a legal right to compensation.

The option given by the defendant for the sum of $2,150 and which was allowed to lapse, was perhaps given at the time for the purpose of effecting an immediate settlement without litigation, and it cannot now be claimed as binding. Yet, while declining to limit the compensation to that amount, it must be relied upon, to a certain extent, as a sufficient ground for not adopting the extravagant estimates made by the defendant's witnesses and by his plea.

Taking all the circumstances of this case into consideration and without overlooking that a just and fair amount should be allowed for damages, I have come to the conclusion to fix the amount of the compensation herein at the liberal and high amount of $5,000, inclusive of the 10 per cent. allowance for the compulsory taking, thus allowing the defendant more than double the amount of the option given by him in September, 1913.

Therefore, there will be judgment as follows, viz.:—(1) The lands expropriated herein are declared vested in the Crown from September 15, 1913. (2) The compensation for the land taken and for all damages resulting from the expropriation is hereby fixed at the sum of $5,000, with interest thereon from September 15, 1914, to the date hereof. (3) The defendant is entitled to recover from and be paid by the plaintiff, the said sum of $5,000, with interest as above mentioned, upon giving to the Crown a good and sufficient title free from all mortgages and encumbrances whatsoever upon the said property. (4) The defendant is also entitled to the costs of the action. *Judgment accordingly.*

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SIMSON v. YOUNG.

Supreme Court of Canada, Fitzpatrick, C.J., and Idington, Anglin, and Brodeur, JJ. March 25, 1918.

1. VENDOR AND PURCHASER (§ I E—28)—VENDOR OUT OF COUNTRY—BROKER HELD OUT AS AGENT—TENDER TO—REQUEST BY BROKER FOR DELAY—EVIDENCE OF AGREEMENT TO EXTEND TIME—INTENTION TO RESCIND.

Where the vendor of land is out of the country and there is no place mentioned in the agreement of sale at which the deferred payments are to be made, the purchaser is justified in tendering the purchase money to the agent who listed the property and who has been held out as the vendor's agent.

An assent by the purchaser to the request of such agent to wait for some time before making payment in order that the transfer may be received from the vendor is not an agreement to extend the time nor evidence of an intention not to rescind, although time is stated to be of the essence of the agreement.

2. SPECIFIC PERFORMANCE (§ I E—33)—VENDOR'S AGENT GIVING WRONG ADDRESS IN AGREEMENT FOR SALE—LETTER TO ADDRESS GIVEN—VENDOR'S FAILURE TO RECTIFY—EFFECT.

A letter by the purchasers to the vendor, giving notice of intention to rescind the contract if completion should be delayed beyond a named reasonable time, having been made impracticable by the act of the vendor's agent in stating a wrong address in the agreement, and the vendor's neglect to rectify the error, prevents such vendor from insisting on this condition of the right of rescission.

The failure of the vendor to prepare and tender, within a reasonable time, the transfer which was to have been prepared disentitles such vendor to ask for specific performance of the agreement.

[*Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599, and *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, referred to.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta, 33 D.L.R. 220, 10 A.L.R. 310, reversing the judgment on the trial in favour of the plaintiff. Reversed.

Geo. H. Ross, K.C., and *Barron*, for appellants.

J. A. Ritchie, and *A. B. Mackay*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The respondent is a married woman resident in Ireland; she had a brother, one Robertson, who, prior to the occurrence leading up to this action, was for some time in Calgary, engaged in the office of Messrs. Wilkinson & Boyes, real estate agents in that city. Probably through this brother of hers, though I do not think the fact appeared from the record, Mrs. Young contracted for the purchase of the city lots in question in this suit; at any rate, he listed them for resale with Messrs. Wilkinson & Boyes. It was, of course, a speculative purchase.

Wilkinson approached the appellants who were then carrying on business as building contractors in Calgary and eventually effected a sale which was carried out by the agreement of March 8, 1913. The appellants paid the $1,550 on the execution of the

agreement to Wilkinson who applied it in payment of the balance of the purchase money still due to Mrs. Young's vendors. Robertson had by that time returned to England.

On or shortly before March 1, 1914, the date for completion of the purchase, the appellant, Simson, went to Wilkinson and offered to give him a cheque for the balance of the purchase money if he had the transfer there. Wilkinson replied that he had not got the transfer but would have to write to Ireland; he said he would make out a transfer and send it along, it would be back in 5 or 6 weeks. Simson returned in 6 weeks but Wilkinson said he had had no reply. Simson subsequently continued his inquiries of Wilkinson but always with the same result.

On or about December 3, 1914, Simson went with his solicitor to see Wilkinson and made a tender of the balance of the purchase money but Wilkinson was still without the transfer. Thereupon, on the 7th of the same month the appellant's solicitors wrote a letter to the respondent, which is ex. 3, formally repudiating the agreement and on January 15, 1915, the present action was begun. On February 15, 1915, the respondent's solicitor tendered a transfer of the property.

The judgment of the Appellate Court proceeds on the ground that the appellants were bound to communicate with the respondent personally before attempting to rescind. I do not think this can be supported; where a payment has to be made there is a distinction between the obligation in case the party to whom it is to be made is out of the country; thus in Viner's Abridgment Tender, G. 4, we read:—

> If the obligee, etc., be out of the realm of England, the obligee, etc., is not bound to seek him or to go out of the realm unto him; and because the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition. Co. Litt. f. 210 b.

See also *Hale* v. *Patton*, 60 N.Y. 233 at 236, and *Dockham* v. *Smith*, 113 Mass. 320.

The rule of the civil law is, where, as in this case, the sale is of a definite ascertained thing on credit and the place of payment is not agreed upon by the contract, then the payment must be made at the place where the subject matter was at the time the contract was entered into. Arts. 1152 C.C. and 1533 C.C.

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The vendor being out of the Dominion was, I think, bound to appoint someone to whom payment could be made.

That does not, however, dispose of the matter. The purchasers clearly waived the condition for completion of the purchase on the date originally fixed. They were, as they themselves say, willing to complete at any time up to December 1, 1914; if they then came to the conclusion that the matter had been allowed to stand over long enough they were allowed to give notice of this to the vendor and name such reasonable time within which the purchase must be completed or, failing that, the contract be at an end. Yet immediately, that is on December 7, they gave notice to put an end to the contract. This I do not think they could do. If they had given a notice fixing such a date for completion as would allow of communication with the vendor in the meantime, then, if they had obtained no satisfaction by the appointed time, they would have been justified in withdrawing from the agreement; but they could not, after allowing the matter to remain open till December, suddenly demand immediate completion and on failure to obtain it put an end to the contract; this, of course, more especially under the circumstances when to their knowledge the vendor was residing in a distant country.

In the case of *Taylor* v. *Brown*, 2 Beav. 180, 48 E.R. 1149, Lord Langdale, M.R., said:—

> The question which has been discussed in this case is, whether the defendant remains under any obligation to perform the agreement. He says he does not, and that he has ceased to be under any obligation from the 13th of July, 1836. Now, as I have before stated, where the contract, and the circumstances are such that time is not in this court considered to be of the essence of the contract—in such case, if any unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court; and where the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, this court has very frequently supported that proceeding; and bills having been afterwards filed for the specific performance of the contract, this court has dismissed them with costs.

The appellants not having attempted to give any notice, it is unnecessary to decide to whom notice could have been given under the circumstances. It is, however, to be noted that the whole transaction, so far as the appellants were concerned, was conducted on behalf of the vendor through Wilkinson. The

vendor's brother, admittedly her agent, was in his office, listed the property for sale with him on his return to England and left him with instructions for carrying out the sale. Wilkinson received the first payment on account of the purchase money and applied it in payment of the purchase money due to Mrs. Young's vendors, completed her title and sent the certificate of title to Robertson, who, he supposes, turned it over to the respondent; he prepared the transfer to the appellants and sent it for Mrs. Young's execution. When the respondent did at last think of taking any steps in the matter, it was to Wilkinson & Boyes that her husband wrote on September 12 "to know why the appellants had not paid the balance of the purchase money." She had the reply which Mr. Wilkinson wrote to her husband stating that he had prepared and sent the transfer for her execution; that the money had been tendered to him when originally due and was available upon surrender of the transfer. It was not until February 15, 1915, that the tender of the transfer was made. The respondent at no time gave to the appellants or evidently to Mr. Wilkinson himself the slightest intimation that he was not authorized to act on her behalf in the matter. I do not think it can be doubted that he was so authorized and I do not think the respondent could under such circumstances be heard in any court to repudiate his authority.

Certainly the position would have been very different if the appellants had given to Mr. Wilkinson notice calling for the completion of the purchase at a date within a reasonable time. They, however, gave no such notice either to the respondent or any one else on her behalf.

It is not without some regret that I arrive at these conclusions, because I think that the respondent was much to blame for the delay. She had had the agreement for a year and it provides that the transfer is to be prepared by the vendor. She is therefore not entitled to say, as she does in her affidavit, that Mr. Wilkinson's letter was the first intimation she had received of any transfer requiring execution by her. Moreover, it is common knowledge that a conveyance of some sort by a vendor is required on every sale of lands, more so in the United Kingdom than in this country. That she was really aware of this fact is shewn by her previous statement in the affidavit that "shortly before the balance of the

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purchase money became payable under the said agreement, my husband wrote to my brother to remind him of the fact and to arrange that the sale should be completed."

Though, as she says, repeated letters to her brother met with no response, the time for completion was allowed to go by and nothing was done until September 12, when her husband wrote to Mr. Wilkinson "to know why the appellants had not paid the balance of the purchase money." Though Mr. Wilkinson's letter was received in October, 1914, it was not until February 15 following that the transfer was tendered; within 2 weeks of a complete year from the date when it should have been ready.

The appellants under the circumstances could, I do not doubt, have claimed damages for the delay. Damages can be recovered by a purchaser from his vendor for delay in completing the purchase occasioned by the vendor not having used reasonable diligence to perform his contract. *Jones* v. *Gardiner*, [1902] 1 Ch. 191. The appellants, however, have treated the contract as at an end and I do not see therefore how they can recover anything.

The appeal should, I think, be allowed to the extent that the appellants are not liable to pay interest on the balance of the purchase money; but otherwise the judgment should be confirmed. There should be no costs of the appeal.

Idington, J.

IDINGTON, J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court for Alberta, directing, under the circumstances I am about to set forth, specific performance of an agreement to purchase some land in Calgary.

The respondent, who lived in Ireland, having an agreement for purchase of said land listed it for resale with one Wilkinson carrying on in Calgary the business of a real estate agent.

He sold it on her behalf to appellant for $3,150 of which $1,550 was paid him in cash and the balance with interest at 8% was to be paid a year later.

The agreement was reduced to writing dated March 8, 1913, and executed in duplicate by appellants and said Wilkinson, who signed his own name, writing thereunder the words "for Eileen Young."

He does not say whether or not he sent the duplicate copy he signed to respondent, or any one for her. He does say that the other two copies were sent to respondent in Dublin to have her

execute them and that they were returned executed: "and one was handed to Mr. Simson and one was sent to Dublin to Mrs. Young."

Simson, the appellant, denies ever seeing such second copy and the trial judge seems sceptical of Wilkinson's recollection of the facts relative thereto. I agree with him in that regard without doubting in the slightest the integrity of Mr. Wilkinson who seems to have given his evidence fairly.

The execution or non-execution of such second agreement is not of the slightest consequence in my view, but the attendant circumstances are of some value.

The respondent was described in the first writing as of Belfast, Ireland, but how in the second we know not.

If she saw herself so described and it was not according to the fact, how did she come to sign such a misleading document?

And if "one was sent to Dublin to Mrs. Young" how could she imagine, or her husband imagine, that a transfer was not required?

The document is not a long one and has plainly written therein that she was to have a transfer prepared.

Passing these curious incidents the appellant Simson went with the money to meet the second and last payment, to Wilkinson's office, either on March 1, 1914, when it was due, or the day before, and offered to pay him same.

He replied that he had not the transfer and preferred Simson to keep the money till it arrived, and assured him there would be no interest running upon the money in the meantime.

He mentioned to Simson that he had sent a transfer for execution. Indeed Simson seems to think he mentioned doing this twice, but Wilkinson only speaks of sending it once, about 2 weeks before the money was due.

He further says that that was sent to Robertson, a brother of respondent, who had, whilst in Calgary, been her agent in listing the land with him (Wilkinson) and was the medium of the communication through whom the terms of sale had been settled by a cabling of messages that passed in the first few days of March, 1913, before Wilkinson signed the agreement.

Robertson seemed indifferent for some reason or other that remains unexplained.

Appellants were remarkably persistent and patient in waiting for the transfer and jogging Wilkinson's memory.

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On October 13, 1913, Wilkinson wrote the husband of respondent at Dublin, Ireland, explaining what had transpired as above stated and urging a return of transfer duly executed.

Respondent tells in her affidavit that the letter was received on October 28, 1914. One would have supposed that it should, under the circumstances, have occurred to respondent or her husband to go to a solicitor or notary in Dublin and get him to draw up a transfer, get it executed and return forthwith to Calgary or at all events to acknowledge the receipt of the letter and explained or given excuse for the delay. Nothing of the kind happened.

After 12 days wasted in some useless and fruitless inquiries as to Robertson (which ended nowhere that we are told of) it occurred to respondent's husband to write solicitors in London to act on her behalf with a view to the completion of the sale. And they, on January 13, 1915, sent her a duplicate transfer which she actually executed before a notary public on the next day.

When or how that was sent to America is not explained but evidently, if Wilkinson is correct, in March or April following he had a letter from respondent. Nor is there any explanation of why it took from November 7 till January 13 for London solicitors to prepare a transfer for which less than an hour's labour is needed.

Meantime, appellants' wonderful stock of patience had become exhausted and they consulted a solicitor in the beginning of December, 1914, who seems to have advised and brought about a tendering of the money to Wilkinson who could do nothing. He says, speaking of things at that stage, "I am quite well satisfied that if the title was there they would have paid."

The solicitors prepared and, on December 7, 1914, on behalf of appellants, mailed a letter to respondent repudiating the contract on account of her failure to deliver title, although appellants had repeatedly tendered the money and demanded the same. They, by same letter, demanded a return of the money already paid and of the taxes which they, the appellants, had paid as the agreement bound them.

Copies of that were mailed to respondent and to Wilkinson but brought no response. Wilkinson got his but evidently, by reason of the respondent's treatment of his appeals to her husband and brother, could do nothing.

Respondent's copy had been addressed to Belfast which,

according to the agreement, was quite proper and was returned as uncalled for.

The appellants, after 6 weeks' wait, instituted an action on January 15, 1915, for recovery of the moneys paid and so demanded to be returned.

The service of that on respondent on February 1, 1915, seems to have prompted some response.

The defence to the declaration consists of a denial of its allegations and an averment of willingness and readiness at all times to fulfil the contract, followed by a counterclaim asking for specific performance of the agreement.

This the court below, has, as stated above, granted.

The question raised thereby is whether or not a remedy which cannot be got by a suitor seeking relief, to use the oft-quoted language of Lord Alvanley, M.R., "unless he has shewn himself ready, desirous, prompt and eager" is open to one conducting her business in the manner of respondent.

I cannot think so. And when we examine the agreement and consider the duties cast thereby in express terms upon respondent to observe same, there is no excuse which is presented that should avail her in seeking to enforce such a remedy.

The agreement specifically provides that the "transfer shall be prepared by the vendor at the expense of the purchaser."

The appellants were entitled to have that ready for delivery in Calgary (and not in Ireland) to them upon payment of the balance of the purchase money.

The case does not permit of giving effect to the side issues raised, as excuses for the gross failure on respondent's part.

The defence alleging readiness is unfounded in fact.

The suggestion that appellants knew they were contracting with a vendee in Ireland loses all its force when the fact that Wilkinson (her local agent) seemed to be so held out by the vendee as possessing the power to receive about half of the purchase money and apply it in the way he did which was far beyond the usual power of a mere real estate broker.

The presumption was that he would be continued and be duly authorized, or armed, when the time came, with an effective transfer, ready to complete the sale when the time came.

Be all that as it may, I have no doubt the vendee, under such

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circumstances, is not bound to go either to Ireland or China to present the payment and demand the transfer in any case. I confess I have been unable to find any decisions expressly dealing with such a situation and am not surprised at the absence of an illustration on the part of any suitor.

The general principles of law governing the respective duties and rights of debtor and creditor do not indicate such contention as maintainable in any ordinary case, much less in a case dependent upon the application of the principles governing cases of specific performance.

Again, the express language of the agreement provides as follows:—

> Time is to be considered as the essence of this agreement, and unless the payments are punctually made at all times and in the manner above mentioned, these presents shall be null and void and of no effect, and all moneys paid thereon shall be absolutely forfeited to the vendor, and the vendor shall be at liberty to peaceably re-enter upon and resell the said land, together with all the buildings thereon, without notice to the purchasers, and purchasers covenant not to remove any buildings whatsoever that may be erected on said land.

I construe this clause as making time the essence of the agreement.

The subsequent part of the clause after the word "agreement" probably was intended for another sentence, but however that may be it in no way impairs the force of the express language declaring that "time is to be considered the essence of this agreement."

It is further to be observed that there was only one payment to be made and that the transfer was to be ready to deliver contemporaneously with that payment and impliedly thus bound the vendor to observe the necessity of being ready, otherwise the vendee could not safely pay.

In that view the decisions of the court above in the case of *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599, and *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, seem to put an end to the contentions set up herein by first depriving the party in default, in a time of the essence agreement, of any right to specific performance and in the next place by giving the right to the purchaser to recover the moneys paid on account of the purchase.

The suggestion that appellants, by listening to the appeal of the agent of the respondent to await return of the transfer sent for

execution, waived this provision or any right under the agreement, does not seem to me entitled to any very serious consideration.

They did nothing and said nothing and merely acted the part of unusually fair minded men desirous of avoiding litigation or appearance of sharp practice or attempting to evade their obligations. All they did or submitted to was conditional and limited to the time needed to get a reply to the letter which they were assured had gone forward with a transfer to be filled up and executed.

See the decision of Jessel, M.R., in *Barclay* v. *Messenger*, 22 W.R. 522; 43 L.J. Ch. 449, holding that an express enlargement of the time was not, unless fulfilled, a waiver.

The case sometimes does arise where the vendee or vendor, as the case might be, has entered into a more or less complicated arrangement for carrying out the completion of a sale and very properly have been held estopped thereby from breaking off abruptly the due execution of the mutual arrangement and falling back upon time being of the essence unless they gave due notice of such intention.

Then they would be required to fix a term or specify that within a reasonable time they would do thus and so as the agreement entitled them.

The peculiarly amusing feature of this case is the argument in respondent's factum which disclaims Wilkinson as an agent of respondent and then falls back upon what happened between appellants and this man on the street or off the street when destitute of any sort of authority to represent the respondent.

How can she avail herself of anything passing between strangers? I am not at all sure, though coming from the respondent in support of her claim it is absurd, but that the facts, if fully investigated, would have borne out the suggestion that Wilkinson had no standing as representative of anybody. Assuredly, appellants assumed they were dealing with one respondent had held out as her agent.

Then, alternatively, I am of the opinion that even if there is no effect to be given the clause as to time being the essence of the agreement, yet on general principles by the failure of the vendor to prepare and tender within a reasonable time the transfer she was to have prepared she had lost her right to specific performance, especially under the conditions of a speculative market such as had developed in Calgary.

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She seemed to have had no regard for others, or consideration for the situation, however cruel it might have been, in which her conduct for nearly a year might have placed the vendees.

It is no answer to say that in this instance as things turned out it might not have made much difference to appellants. Not even they can perhaps yet guess whether or not, had the respondent's transfer been got on March 1, 1914, the result would have been better for them or otherwise.

The question is whether or not a vendor, situate as respondent was, is entitled by law to treat vendees, situate as these appellants were, in relation to the bargain in question, as she has done and still claim specific performance.

I submit with some confidence she is not, even if time had not been of the essence of the contract, but much more so when she insisted on having so rigourous a term imposed upon the vendees under circumstances which could only relate to one payment when her transfer was to be ready for delivery.

I have treated the case thus far as relative to the validity of the judgment for specific performance. I think not only is that the true test of the right to appeal, and succeed in such an appeal, but also incidentally a good test of the appellant's right to treat the contract as rescinded, as they did in repudiating it and bringing this action.

If the situation created by respondent's conduct is such a breach of the contract as to disentitle her to specific performance thereof, then, if not before, she becomes clearly liable at common law for the breach of the contract in failing to have the transfer ready for delivery at the time named and to repay the money paid her or paid on faith of her contract, as to meet the tax bills, for example.

She has no answer to such a claim unless in equity of which the right of specific performance is the test.

Thus, I submit, rescission with all its incidents is in the net result of the operation of law and equity but the counterpart, as it were, to the claim for specific performance.

Such, I submit, is the net result of the latest development of the law as exemplified in the cases I have cited above.

The counsel for respondent claimed that the mistake in the agreement in describing the respondent as of Belfast which evi-

dently misled appellants in addressing the notice of renunciation to her there, could have been rectified by an inspection of the transfer to her of the land in question in the registry office. And he seems to have tendered a certificate of title to prove this, but it does not appear in the printed case and I am assured by the officer in charge of the exhibits that no such document is on file.

In my view of the law governing the rights of the parties to the agreement, the result cannot be affected by the mistake, but if anything could be expected to flow from the possibility of the registry being inspected, proof should have been given of the fact.

I think the appeal should be allowed with costs and the judgment of the learned trial judge be restored.

Anglin, J.

ANGLIN, J.:—The plaintiffs sue for the rescission of a contract to purchase some building lots in Calgary because of the vendor's default in making ready to complete the contract on the date fixed by it and for many months thereafter. The defendant resists that action and counterclaims for specific performance, alleging in excuse of her own default that the plaintiffs did not appraise her of their readiness to carry out their purchase and pay the balance of their purchase money.

The trial judge granted rescission, holding that the plaintiffs had done all that could reasonably be expected of them and that the defendant was clearly and inexcusably in default. The Appellate Division reversed this judgment on the ground that the plaintiffs had failed to make reasonable efforts to inform the defendant of their readiness to complete, that her duty to convey would have arisen only when they had done so, and that she had always been ready, eager and willing to carry out her contract.

I would add to the statement of the material facts given in the opinion of Stuart, J., 33 D.L.R. 220, 10 A.L.R. 310, merely that the agreement provided that the transfer or conveyance should be prepared by the vendor at the expense of the purchasers and should be delivered to the latter "immediately" upon payment of the second and final instalment of their purchase money. If not overlooked, these two features of the contract would seem not to have been given the weight to which they are entitled in the Appellate Division.

Moreover, between March 1, 1914, the date fixed by the contract for closing the sale, and January 15, 1915, when this

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action was begun, there had been a most material change in the desirability of the property and in the position of the plaintiffs. They were a firm of builders and required the land for use, at first as a stone cutting yard, and eventually as a site for an apartment block which they proposed to erect. After March, 1914, building ceased in Calgary and the plaintiffs had no further use for the land. They dissolved partnership shortly afterwards. War began in August, 1914. At the date of the trial (April, 1916) one of the former partners had enlisted for service overseas and the other was residing in Scotland. It is obvious that to compel the plaintiffs now to take and pay for the property would entail upon them substantial hardship, although probably not such as would in itself have afforded a defence to an action for specific performance (Fry, on Spec. Perf., 5th ed., pars. 418-9, 426-7; 27 Hals., Nos. 61 and 65) had the defendant been entirely free from fault—had she done everything that could reasonably be expected of her towards carrying out her contractual obligation and enabling the plaintiff to fulfil theirs. Yet the hardship, such as it is, is a circumstance that may be taken into account in so far as the granting or withholding of specific performance may be in the discretion of the court. *Harris* v. *Robinson*, 21 Can. S.C.R. 390; *Colcock* v. *Butler*, 1 De saussure 307, at pp. 313-4; Fry, at p. 19.

Notwithstanding that the provision of the contract that "time shall be of the essence of this agreement" is followed by a statement of the consequences of default by the purchasers, I am not disposed to accept the view that it should, therefore, be held to apply only to the purchasers' obligation. I prefer to give to the words "of this agreement" their literal and natural meaning covering the contractual undertakings of both parties, and to assume that the silence of the contract as to the consequences of default by the vendor merely indicates an intention that they should be such as the law imposes. *Foster* v. *Anderson*, 16 O.L.R. 565-70; 42 Can. S.C.R. 251; *Seaton* v. *Mapp*, 2 Coll. 556, 564.

It is contended, however, that the plaintiffs by their visits to and enquiries of Wilkinson, notwithstanding his lack of authority to represent the defendant, manifested an intention not to rescind because of her unreadiness to complete punctually on March 1, 1914, with the result that the contract should be treated as if the condition as to time being of its essence were eliminated from

it. *Kilmer* v. *B.C. Orchard Lands*, 10 D.L.R. 172, [1913] A.C. 319, as explained in *Steedman* v. *Drinkle*, 25 D.L.R. 420, [1916] 1 A.C. 275, at pp. 279-80. The case at bar differs from the *Kilmer* case, however, in that there was in that case a definite extension of time by agreement—a new contract as to the time of performance (*Goss* v. *Lord Nugent*, 5 B. & Ad. 58, at 64-5; *Earl Darnley* v. *London, Chatham & Dover Rly.*, L.R. 2 H.L. 43, at 60, discussed in Ewart on Waiver Distributed, at pages 133-6; see, however, *Morrell* v. *Studd and Millington*, [1913] 2 Ch. 648, in which the stipulation making time of the essence was held not to apply. Here there was no alteration by express contract of the time fixed for performance, and under the circumstances, I think a parol agreement for an extension should not be implied from the conduct of the parties, as it was in the *Morrell* case.

But it is said there was an election by the purchasers not to rescind their contract for the vendor's default but to continue it in force and that the right to take advantage of the stipulation as to time being of the essence having been thus relinquished, that term was in effect eliminated. Whether there could be such an election binding upon the purchasers without communication of it to the vendor; *Scarf* v. *Jardine*, 7 App. Cas. 345, at 360-1; see discussion by Mr. Ewart in his Treatise on Waiver Distributed, at pp. 88 *et seq.*, whether the letter from Wilkinson to the vendor's husband of October 13 should be regarded as such a communication; whether there was not a mere waiting or a suspension by the purchasers, when they found themselves unable to make a tender for their purchase money and were probably in uncertainty as to their legal position, of an exercise of their rights. *Clough* v. *London & North Western R.*, L.R. 7 Ex. 26, at 34; *Moel* v. *Weir*, [1910] 2 K.B. 844, 855, but unequivocal conduct evidencing an election to treat the contract as unaffected by the vendor's default, are interesting questions upon which I find it unnecessary to express a definite opinion in this case. While strongly inclined to think that an election was not to insist upon the right to terminate the contract for the vendor's default is not sufficiently established, I shall proceed on the assumption that it is.

As Stuart, J., has well said:

> The whole dispute has arisen on account of a considerable delay on the part of the defendant in furnishing to the purchasers the title as agreed at the time agreed.

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The chief issue is as to where responsibility for that delay should rest.

Upon the facts in evidence I entertain no doubt whatever that the failure to carry out the contract on the date fixed and for many months thereafter is entirely attributable to the neglect of the defendant, resident abroad, to provide for the fulfilment of her obligation to be in readiness to convey at the date fixed for closing by either coming herself to Calgary or nominating a representative there clothed with the necessary authority to receive the purchase money and to deliver a transfer, and furnished with the means of carrying out his mandate and notifying the purchasers of such appointment, and in having allowed the mistake of an agent, whose acts she adopted, in misstating her address in the agreement of sale (Belfast instead of Dublin) to remain unrectified. Indeed, in the peculiar circumstances of this case, had the vendor's address been correctly given, I gravely doubt that it would have been incumbent on the plaintiffs to seek her out and notify her that they were prepared to make payment before she would be required to put herself in readiness to deliver to them the transfer to which they would be entitled "immediately" upon payment.

With respect, I fail to find in the record evidence warranting the view expressed in the Appellate Division and said to be "the turning point of the case" that, when the plaintiffs "really wanted to find her (the defendant) they were quite able to do so." On December 7, 1914, they mailed a letter addressed to her at Belfast, Ireland—the address given in the contract; and there is nothing to shew that in doing so they did not act in perfect good faith. How their solicitors learned in January, 1915, that her correct address was Dublin does not appear. It may be surmised that they discovered it by examining the transfer to her registered in the Land Titles Office. The fact that they did so scarcely warrants the assumption that the plaintiffs themselves could readily have ascertained the correct address months before, or that they were remiss in having failed to do so. I rather agree with the trial judge that the purchasers "acted in good faith" and tried to "locate . . . the vendor and failed."

Moreover, the defendant was apprised by Wilkinson's letter of October 13, 1914, received by her on the 28th, that the purchasers had "tendered money against documents" to him on or

prior to March 1. (Incidentally it may be remarked that this shews the understanding of the man who prepared the agreement of the purchasers' conception of their rights and their attitude.) Yet no tender of a transfer was made to them until February 15, 1915—a month after this action was begun, a fortnight after the service of the statement of claim on the defendant, and eleven and a half months after the date fixed by the agreement for completion. Nor was there any communication before February 15, 1915, to the purchasers of their vendor's intention to carry out her contract. The delay from October 28 to February 15 was, under the circumstances, in my opinion, unreasonable, making every proper allowance for difficulties of communication.

The obligation of the purchasers to pay and that of the vendor to deliver a transfer were to be performed at the same time. They were dependent undertakings. The circumstances of the vendor's residence abroad as well as the form of the contract make it clear that the consideration moving each party was performance by the other and not a mere promise. The purchasers looked to obtaining the actual transfer of the land on payment and not merely a remedy more or less adequate against their vendor. A vendor seeking to enforce liability upon the purchasers' obligation under such a contract must shew punctual performance or an offer to perform his own undertaking although it be not certain that he was obliged to do the first act. 1 Wm's. Saunders (1871 ed.) 566. In addition to cases there cited reference may be had to *Large* v. *Cheshire*, 1 Vent. 147, and *Marsden* v. *Moore*, 4 H. & N. 500. Especially is this so where the remedy sought is specific performance. The plaintiff must shew that he was "ready and prompt" as well as "desirous and eager." *Millward* v. *Earl Thanet*, 5 Ves. 720 *n.*; *Mills* v. *Haywood*, 6 Ch. D. 196, at 202; *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171, at 174; Fry, 5th ed., 457.

Even if, upon a construction of the contract most favourable to her, the vendor, had she been present in Calgary personally or by agent, might have been entitled to defer having the transfer prepared until actual payment or tender of the balance of the purchase money, and, by delivering it on the same or the following day or even within a day or two thereafter, might have met the requirement that delivery of it should be made "immediately" upon payment, the agreement certainly did not contemplate that

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the purchasers should, after paying their purchase money, be obliged to wait for their transfer until it could be obtained from Ireland remaining for a month or longer without title and with a right of action against a "foreigner" as their only security.

In my opinion the place of performance of this contract, no other being stipulated in it, was at Calgary. The ordinary rule of English law that a promisor is bound to seek his promisee, if ever applicable to a case where there are mutual obligations to be fulfilled concurrently, only governs

where no place of performance is specified either expressly or by implication from the nature and terms of the contract and the surrounding circumstances —7 Hals. 857-8.

Here all these circumstances as well as the nature and the terms of the contract furnish unmistakable indicia that the intention of the parties was that performance should take place at Calgary. The contract was entered into there. *Weyand* v. *Park Terrace Co.*, 202 N.Y. 231; 25 Am. & Eng. Ann. Cas. 1010. In making it the vendor acted through an agent resident there. It concerned land there. The transfer was to be delivered immediately upon payment of the balance of the purchase money. Title would pass to the purchasers only on the registration of the transfer in the Registry Office there. (6 Edw. VII. c. 24, s. 41.) Stuart, J., who spoke for the Appellate Division, seemed inclined to the opinion that the purchasers were entitled to have the actual delivery of the transfer and payment of their purchase money take place contemporaneously in the Registry Office itself, citing Hogg on Ownership and Incumbrance of Registered Land, at page 187. In view of the provisions of the Land Titles Act already adverted to, not a little may be said for that view (see Williams on Vendor and Purchaser (2nd ed.) 1186)—but it is unnecessary to determine the point in the present case.

Yet, although of the opinion that

the purchasers were not bound to go to Ireland and pay her (the vendor) the money there (and that) the Land Titles Office at Calgary was the only place where they could safely part with their money,

that judge thought they were

bound to communicate with her and notify her that they were ready and that if she did not produce title within a reasonable time the agreement would be repudiated.

In the first place the presence of the vendor in person or by authorized agent at Calgary being necessary for the fulfilment of the

purchasers' duty to pay or tender their purchase money (if to do so should be regarded as a condition of the vendor's obligation to put herself in readiness to transfer the land), its performance would be excused by her absence. Comyn's Digest, "Condition," L. 5. The giving notice of intention to resind if completion should be delayed beyond a named reasonable time having likewise been made impracticable by the act of the vendor's agent in stating a wrong address in the agreement (the only information the purchasers had) and her subsequent neglect to rectify that error, she cannot insist on that condition of the right of rescission, ordinarily applicable where time is not of the essence originally or has ceased to be so. A notice addressed to her at Belfast would in fact have been futile, as is proved by the return of letters sent to that address. Although the purchasers did not know that it would have been so, the vendor cannot complain because they did not attempt to give her a notice there. *Lex neminem cogit ad vana seu inutilia.* The giving of notice of intention to rescind having been thus rendered unnecessary through the fault of the vendor, the purchasers were not bound to wait indefinitely for her to fulfil her contract.

Having regard to all the circumstances, the nature of the contract, its terms, the failure of the vendor to put herself in readiness to carry out her obligation, the fact that time was originally of the essence and probably remained so, and if not, that notice of intention to rescind unless the contract should be completed within reasonable time could not be given owing to fault ascribable to the vendor that her delay both before and after she became aware of the purchasers' readiness to complete was gross and inexcusable, and that if obliged to take and pay for the property now the purchasers would be subjected to great hardship—I am, with respect, of the opinion that this is not a case for specific performance and that the right to rescission has been established. No doubt the granting of rescission does not ensue as of course because the relief of specific performance is denied, *Gough* v. *Bench*, 6 O.R. 699. The circumstances sometimes make it proper to leave the parties to their common law remedies. But if, as seems probable, time continued to be of the essence of the contract, the plaintiff's right to rescission is unquestionable. If, on the other hand, time ceased to be of the essence of the contract, having regard to the circum-

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stances, I think the purchasers are entitled to be placed in the same position as if they had duly given notice of intention to rescind should the vendor fail to deliver a transfer within a named reasonable time. Since they have paid a substantial sum on account of purchase money, recovery of which they would otherwise be obliged to seek by way of damages, and are themselves free from blame, equity and an application of the maxim *ut sit finis litium*, alike require that rescission and the return of the money paid on account of the purchase price and for taxes should be decreed.

The circumstances, however, are not such as warrant a judgment for damages beyond the return of the money paid with interest. Indeed, with rescission the plaintiffs are probably better off than they would have been had the defendant carried out her contract.

The judgment of the learned trial judge should be restored and the appellants should have their costs in this court and in the Appellate Division.

Brodeur, J.

BRODEUR, J.:—The appellants should succeed. They have done all in their power to carry out the agreement in question and to complete the sale. On the other hand, the respondent was too late to claim specific performance, since the purchaser had then rescinded the contract.

For reasons given by my brother Idington, I would allow the appeal with costs of this court and of the Appellate Division and I would restore the judgment of the trial judge.

Appeal allowed.

B.C.

C. A.

ROYAL BANK v. GOLD.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher, McPhillips and Eberts, JJ.A. May 17, 1918.

BILLS AND NOTES (§ IV B—159)—STAY OF ACTION AGAINST PRINCIPAL DEBTOR —EFFECT AS TO ENDORSER—WAR RELIEF ACT (B.C.)

A bank may recover against an endorser of a promissory note, notwithstanding that the action is stayed as against the principal debtor by the War Relief Act. The deposit of certificates of title with the bank as additional security at the time the advance was made, although an unenforceable hypothecation, does not relieve the surety from liability.

Statement.

APPEAL by defendant from the judgment of Clement, J. Affirmed.

The judgment appealed from is as follows:—

At the trial I resolved in favour of the plaintiff bank all ques-

tions but the one as to the alleged illegality of the transaction, of which the note sued on was, as is alleged, merely one feature; and as to the effect of such illegality upon the right of the plaintiff bank to recover upon the note.

I must find, on the evidence, that the moneys advanced were advanced upon the security, in part, of lands, in contravention of s. 76, 2 (*c*), of the Bank Act. In the absence of any evidence from Mr. Dobson or Mr. Seamen to contradict Mr. Gold's evidence as to the arrangements made for the advance, I must accept Mr. Gold's evidence that, as part of the very transaction in question certain certificates of title were lodged with the plaintiff bank as security for the advance.

On this state of facts, I must confess that my first inclination was to apply the principle of the recent well-known moneylenders' cases in England. *Victorian Daylesford Syndicate* v. *Dott*, [1905] 2 Ch. 624, approved of in *Bonnard* v. *Dott*, [1906] 1 Ch. 740, and in *Whiteman* v. *Sadler*, [1910] A.C. 514. See also *Northwestern Construction Co.* v. *Young* (1908), 13 B.C.R. 297. In other words, I inclined to the view that the transaction was so illegal that the plaintiff bank could get no aid from a court of justice as to any part of the transaction. But upon careful consideration of *National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299, I have come to the conclusion that I cannot distinguish it from the case at bar. The statutory prohibition was as distinct in that case as in this; but their Lordships held that it amounted to a declaration as to what was *ultra vires* rather than to a declaration of illegality in the more culpable sense. The collocation of the clauses, first a declaration of the bank's powers, followed by a declaration of disabilities—amongst these latter the prohibition in question—was relied on by their Lordships; and the same argument, in even stronger shape, is open upon the collocation of the clauses of s. 76 of the Bank Act.

I must, therefore, hold that the advance in the case at bar created a valid debt and that the promissory note sued on, given as one security for repayment of that debt, cannot be impugned upon the ground taken.

There will be judgment for the plaintiff bank with costs, including the costs of the trial, except that there will be no costs to the plaintiff bank of the proceedings at the trial on the 1st instant,

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and the defendant should have his costs of those proceedings to be set off against the costs awarded to the plaintiff bank.

E. M. N. Woods, for appellant; *Sir Charles Hibbert Tupper*, K.C., for respondent.

MACDONALD, C.J.A.:—On the question as to whether the security was illegal or not I agree with the judgment of Clement, J. The judgment of the Judicial Committee of the Privy Council in *National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299, is, in my opinion, conclusive of this issue.

The action was before trial stayed so far as defendants Edward Gold and Emma Gold are concerned by operation of the War Relief Act, 1916. The defendant Evans only appeals. His counsel contended that because the respondent cannot proceed with the action as against the Golds, the principal debtors, it cannot proceed against him, as surety. I cannot agree with that contention. The principal debtors are not necessarily parties to an action against the surety. The respondent might have released the principal debtors altogether, saving its rights against the surety and then proceeded only against the surety.

The stay effected by the War Relief Act has not changed the contract nor made it impossible of performance. It has merely postponed the date of its enforcement against the principal debtors.

The case is, I think, analogous to those cases of which *Ex parte Jacobs*, L.R. 10 Ch. 211, 44 L.J.Bk. 34, is an example.

While the question was raised that the taking of an illegal security by the respondent would disentitle it to enforce payment of the debt against the surety, there is nothing in evidence to shew that the appellant endorsed the note either on an express contract with it, or on an implied contract or condition that valid securities should be taken by respondent for appellant's protection. If appellant knew about the security which Gold intended to offer, namely, real estate, he is not entitled to complain, as it is presumed that he knew the general law of the land, and hence knew that such a security could not legally be taken by the respondent. The right of the appellant to a transfer of the security in question should he pay the note is not in question here, and I, therefore, dismiss it from consideration.

The question which has given me some anxiety is that which relates to the notice of dishonour. Some months before the mak-

ing of the promissory note in question, appellants' address was at 125 Hastings St. W., in the City of Vancouver. The notary addressed the notice to him at that address without ascertaining the fact that long prior to the date of the mailing of the notice it had been changed to 77 Hastings St. E., in said city. In these circumstances, it was incumbent on the respondent to prove the due receipt, by appellant, of the notice. A clerk in the post office at Vancouver was called who explained the system in vogue there with reference to changes of address. From this evidence it appears that the letter-carriers were supplied with books in which they were required to note changes of address. The book of the carrier who delivered at 125 Hastings St. W. was produced, and shewed entries of a change in appellant's address from there to 412 Dominion Building, and again from that address to 77 Hastings St. E., which was appellant's address at the date of the mailing of the notice of dishonour. The practice of the post office was, as I infer from this evidence, to deliver letters after such entries at the new address. The evidence is not very satisfactory. The letter-carrier whose book was produced and who delivered letters during the period in question was overseas, and his evidence was not available. Though the evidence is not very satisfactory, I think there was sufficient to submit to a jury. At least sufficient to make it incumbent on appellant to deny the receipt of the notice, which he has not done. He was examined for discovery, and gave very unsatisfactory answers, not amounting to a denial, and at the trial offered no evidence at all to rebut the inference which might be drawn from that of the postal clerk. In *MacDougall* v. *Wordsworth*, 8 U.C.C.P. 400, the notary was in doubt as to whether he had given the notice of dishonour or not. The jury found for defendants, and on motion for a new trial, Draper, C.J., delivering the judgment of the court said, p. 403:—

> It certainly would have been more satisfactory if the defendant, having now the opportunity, had denied the receipt of any notice. Still that fact is not asserted against him in the plaintiff's affidavit, in which case it would have been incumbent on him to meet it.

The judge exercising the functions of a jury found the fact of the receipt of the notice of dishonour by appellant in respondent's favour, and I cannot say that he drew an unwarranted inference from the evidence, coupled with the defendant's failure to deny the receipt of the notice.

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It is true that s. 103 of the Bills of Exchange Act makes a notice mailed to the address given in the instrument a sufficient notice. But that section does not affect the law as it stood in respect of proving notice of dishonour or the receipt of dishonour by any other way. The sender's channels of proof of service otherwise are not impeded by the section.

I would dismiss the appeal.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal, although with some hesitation as to the notice of dishonour.

Proof of notice is not very satisfactory and I doubt if I would have accepted it had I been trying the case in the first instance, however, I will not go so far as to say the trial judge could not reasonably draw the inference he did from the circumstances especially as the appellant has never specifically denied receipt either in examination on discovery or at the trial.

I have carefully considered the defence raised as to the War Relief Act and all the cases cited and the two subsequently handed in by Mr. Woods and have come to the conclusion that the Act has no application to the surety here.

McPhillips, J.A

MCPHILLIPS, J.A.:—The defendant Evans appeals from the judgment of Clement, J. The action was upon a promissory note of which the bank, the respondent, was the holder in due course, the appellant being one of the endorsers thereon to the bank. The defence was that the circumstances attendant upon the transaction were impeachable, contravening s. 76 (2) (*c*) of the Bank Act, c. 29 R.S.C. (1906). The advance or discount of the promissory note, being a lending upon the security of lands, and that the transaction was illegal, with the further defences that the appellant was discharged from all liability because of the non-protest of the promissory note, the failure to give notice of dishonour, and that the action was not maintainable as the maker of the promissory note being entitled to the benefit of the War Relief Act (c. 74 B.C., 1916) the appellant, a surety, could not be sued or judgment go against him. In my opinion, all of these defences fail notwithstanding and with deference to the very able argument of counsel for the appellant. In the first place, and with great respect to the trial judge, I do not think that it was established that the transaction was one of lending upon the security of lands.

However, should I be wrong in this, I entirely agree with the trial judge, that if it be so looked at, that the transaction was not an illegal one. At most, all that can be said is that it was an *ultra vires* transaction and the hypothecation of the certificates of title is not an enforceable hypothecation, this, though, not relieving the appellant from liability. Lord Cairns had to consider legislation of a similar nature to that of s. 76 of the Bank Act (Canada) in *National Bank of Australasia* v. *Cherry* (1870), L.R. 3 P.C. 299, at pp. 307, 308:—

> It appears, therefore, to their Lordships that there are considerations of public policy involved in this clause, but it is also true to say, that those considerations of public policy look to and deal with the management of the bank, and have for their object the limitation of the powers and authorities of the bank.
>
> That being so, and without for the present turning to the facts of this particular case, it would seem to have been the object of the legislature in this clause, not to make void the contracts for such advances as between the bank and their customers, in the same way that in former times contracts open to the objections of the usury laws were made void, but rather to make it something *ultra vires* the bank to take upon the occasion of contracts for those advances, securities of the kind mentioned in this section. And this construction of the section would harmonize with what was very properly, as their Lordships think, admitted at the bar on behalf of the respondents—that upon a transaction of the kind described in this bill, the contract for the loan of money would be perfectly valid, and the question would be confined to a question as to whether the bank had the power to take the security which it took for the advance.
>
> I may add, that although the words of the proviso which I have read in the latter part of the section would appear somewhat stronger in their negative form than in the affirmative part of the clause, yet, in the opinion of their Lordships, the affirmative part of the clause and the negative part are meant to be correlative and co-extensive, and the negative part of the clause is intended to express nothing more than this, that it should not be lawful for the bank to take landed or mercantile security for advances, except under the conditions mentioned in the affirmative part of the clause.

Also see *McHugh* v. *Union Bank of Canada*, 10 D.L.R. 562, [1913] A.C. 299; and *Merchants Bank* v. *Bush*, 38 D.L.R. 499 (reversed by Canada Supreme Court). Upon the facts, it is clear that there was a proper protest of the promissory note and due notice of dishonour, s. 11 of the Bills of Exchange Act (c. 119, R.S. Canada, 1906) reads as follows:—

> 11. A protest of any bill or note within Canada, and any copy thereof as copied by the notary or justice of the peace, shall, in any action be *primâ facie* evidence of presentation and dishonour, and also of service of notice of such presentation and dishonour as stated in such protest or copy.

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The notarial protest was adduced in evidence, it constitutes *primâ facie* proof and was in no way rebutted—I have not the slightest doubt that the appellant received notice of the dishonour, and it would be unconscionable upon the facts of the present case to give effect to any such defence (see Maclaren on Bills, Notes and Cheques, 5th ed. (1916), at pp. 36, 37, 294, 295, 296, 297, 298, 299; *Cosgrove* v. *Boyle* (1881), 6 Can. S.C.R. 165, Gwynne, J., at pp. 178, 179, 180; and *Merchants Bank of Halifax* v. *McNutt* (1883), 11 Can. S.C.R. 126).

Then, with respect to the contention advanced that the appellant being a surety (although as to this and as affecting the bank, the evidence is not satisfactory, in fact inconclusive) and the maker for whom he is surety not being capable of being proceeded against by the surety, in case he, the surety, pays the debt, that, therefore, the action is not maintainable against him or should be stayed, is, withall deference, idle argument. The situation is not, one of the bank's creation. Further, it is in no way a defence, at most all that can be said is that the surety is prevented from bringing or proceeding with any such action until the end of the war.

I would dismiss the appeal.

After the foregoing reasons for judgment were written reference has been made by counsel for the appellant to the case of *Merchants Bank of Canada* v. *Eliot*, a decision of McCardie, J., of the King's Bench Division, England, reported in [1918], 1 W.W.R. 698. After consideration of that case, and especially *Rouquette* v. *Overmann* (1875), L.R. 10 Q.B. 525, cited therein, I am still further confirmed in my opinion (see McCardie, J., at p. 701).

Martin, J.A.
Eberts, J.A.

MARTIN and EBERTS, JJ.A., agreed in dismissing appeal.

Appeal dismissed.

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Ex. C.

Exchequer Court of Canada, Audette, J. November 10, 1916.

NEGLIGENCE (§ I B—5)—PUBLIC WORK—RAILWAYS—CONTRACTOR—SAND DEPOSITS—EXPROPRIATION.

Damages suffered by a landowner from sand deposits in the course of construction of a Crown railway are only recoverable as against the contractors; the injury not having resulted from any expropriation of land is not actionable against the Crown under the Expropriation Act, and having happened 10 acres away from the railway, was not "on a public work" within the meaning of sec. 20 of the Exchequer Court Act, and therefore not actionable against the Crown under the latter statute.

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PETITION OF RIGHT to recover damages for an injury to land.

E. Belleau, K.C., for suppliant; *E. Gelly*, for respondent.

AUDETTE, J.:—The suppliant brought his petition of right to recover the sum of $300 for alleged damages suffered to his farm from sand, earth and coal which, through the Crown's employees, were dumped into a creek passing in a culvert under the right of way of the National Transcontinental Railway, and which were carried on to part of his farm under cultivation about ten acres from the railway.

The damages in question are claimed to have been suffered during the years 1911-12, 1912-13, and 1914-15.

The National Transcontinental Railway was in the course of construction, and in the hands of the contractors up to the date at which the Crown began to operate the same on November 23rd, 1914.

The question to be decided, under the circumstances of the case, is whether these damages were caused by the contractors or by the Crown.

It is conceded at bar by the suppliant's counsel that the damages suffered during the construction of the railway are only recoverable as against the contractors, following the decision in the case of *Marcotte* v. *Davies*, 41 Que. S.C. 444.

It is established by the evidence that some of the sand so carried upon the suppliant's property came, for a certain portion, as ascertained from indications upon the premises, from a large sandhill upon the suppliant's property. The toe of that hill abuts on the creek and the steep slopes thereof are practically denuded of vegetation.

The piece of land in question was, before the construction of the railway, flooded in the spring and in freshets.

The farm in question was purchased by the suppliant in 1910 for the sum of $600 and comprises one and one-half arpents in front by 28 arpents in depth, and the suppliant contends that upon that farm only one and one-half by four and a half arpents were under cultivation, the balance being rocky and wooded. The damages claimed are in respect of the part under cultivation.

Mostly all the evidence adduced on behalf of the suppliant establishes damages suffered before the operation of the railway

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by the Crown in November, 1914, and for which the Crown is obviously not liable. The only evidence extant upon which the existence of damages subsequent to November, 1914, would be the evidence of the suppliant himself given in a general way, without specifying anything, when he says that "the same thing occurred in 1915"; and he adds at the end of his evidence that in 1915 "he did not touch his land"—meaning, I assume, he did not remove any sand that might have been carried thereon.

Witness Zephiron Laflamme, a section-man, also testified that in 1915 some sand slid from this embankment near the culvert in question; but that he did not then go upon the suppliant's land, at the point marked "A" on the plan, to ascertain if any damages were suffered. However, he adds, this sandslide was not of enough importance to necessitate any repairs.

On behalf of the Crown witness Lefebvre says, that in October, 1915, he was sent to ascertain if the suppliant were suffering any damages from the operation of the railway. He then paid a visit to the *locus in quo*, and starting from the culvert he noticed near the same an erosion of about 10 yards; but cannot say when it took place. He travelled from the culvert to the next place marked "A" on the plan and ascertained there was grass growing nearly everywhere at that place, excepting, however, at certain spots where it appeared to him some earth had been taken away, but he did not know under what circumstances and on what occasion. There was then, according to him, no damages.

In view of the fact that the overwhelming weight of the evidence adduced by the suppliant was directed to damages suffered before November 23rd, 1914, when the Crown took possession, I find that there is not enough evidence on the record upon which I could find that there was any damage suffered from causes originating since November, 1914, and that if any appreciable damages were suffered since then it cannot be distinguished from the result of those suffered before that date.

Having thus primarily disposed of the facts of the case, there remains the question of law standing in the way of the suppliant and which did not attract or invite the argument of counsel at bar.

This case is in its very essence an action in tort and such an

action does not lie against the Crown, excepting under special statutory authority.

The case does not involve any expropriation of land and the injurious affection flowing therefrom, and does not come under the Expropriation Act. The suppliant, to succeed, must bring his case within the ambit of either sub-sec. (*c*) or sub-sec. (*f*) of s. 20 of the Exchequer Court Act.

Under sub-sec. (*c*) the injury to property must be : first, on a public work; secondly, occasioned by an officer or servant of the Crown acting within the scope of his duties and employment; and thirdly, the injury must result from such negligence.

Following the decisions in *Chamberlin* v. *The King*, 42 Can. S.C.R. 350; *Paul* v. *The King*, 38 Can. S.C.R. 126; *Olmstead* v. *The King*, 30 D.L.R. 345, 53 Can. S.C.R. 450; and *Piggott* v. *The King*, 32 D.L.R. 461, 53 Can. S.C.R. 626, I must arrive at the conclusion that as the damages suffered were so suffered ten acres (as stated by witnesses) away from the public work the National Transcontinental Railway, he cannot recover. The injury to property was not "on the public work." Absurd as this conclusion might appear, the jurisprudence has now been clearly established and settled upon that point.

There is some oral evidence by one witness that that part of the railway in question herein was operated by the I.C.R., but more than verbal evidence by one witness would be required to arrive at the conclusion that that part of the Transcontinental is now operated and forms part of the Intercolonial Railway. And were it operated as part of the Intercolonial Railway it would be still doubtful as to whether or not 10 acres from the public work would bring the case within the provisions of sub-sec. (*f*) of s. 20 of the Exchequer Court Act, and within the words "upon, in or about" of said section.

Under the circumstances the suppliant is not entitled to any portion of the relief sought by the petition of right herein.

Action dismissed.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, Simmons and Hyndman, JJ. June 26, 1918.

DIVORCE AND SEPARATION (§ II—5)—IMPERIAL DIVORCE AND MATRIMONIAL CAUSES ACT—INTRODUCED INTO NORTHWEST TERRITORIES—CONTINUED IN ALBERTA—JURISDICTION OF ALBERTA SUPREME COURT.

The law of England relating to divorce and other matrimonial causes, enacted by the Divorce and Matrimonial Causes Act, 1857, was introduced into and given force in that part of the Northwest Territories now comprised in the Province of Alberta by (1886) 49 Viet. c. 25, s. 3, (Dom.), R.S.C. 1886, c. 50, s. 11.

This enactment, continued in Alberta by the Alberta Act, 1905, c. 3 (Dom.) and by the Alberta Supreme Court Act, 1907 (Alta.) c. 3, s. 5, established a substantive law of divorce in Alberta, which the Alberta Supreme Court has full jurisdiction to enforce.

[*Watts* v. *Watts*, [1908] A.C. 573, *Walker* v. *Walker*, 39 D.L.R. 731, followed].

Statement. APPLICATION by defendant to dismiss an action for divorce in the Supreme Court of Alberta for want of jurisdiction to maintain it. Dismissed, Harvey, C.J., dissenting.

Short, K.C., and *H. C. Macdonald*, for plaintiff; *McLaughlin*, for defendant; *Frank Ford*, K.C., for Attorney-General.

Harvey, C.J. HARVEY, C.J. dissenting:—The argument in this case on behalf of the plaintiff was: (1) The law of England respecting the right to divorce is in force in Alberta; and (2) the Supreme Court of Alberta has jurisdiction to enforce it. An exactly similar case, as applied to British Columbia, arose about 10 years ago and was carried to the Judicial Committee of the Privy Council, *Watts* v. *Watts*, [1908] A.C. 573. Lord Collins, in giving the reasons for judgment, states, at p. 576:—

> The only question raised in the present appeal is whether the Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that colony, and in respect of the matrimonial offences alleged to have been committed therein.

He gives no independent reasons of the Committee but concludes by saying:—

> In the opinion of their Lordships, the reasons given in the judgments of Gray and Crease, JJ., in *S*—— v. *S*—— (1877), 1 B.C.R., pt. 1, p. 25, together with the recent critical survey of the ultimate situation by Martin, J., in *Sheppard* v. *Sheppard* (1908), 13 B.C.R. 486, place the question beyond discussion.

If the facts with respect to Alberta were parallel to those relating to British Columbia that decision would be conclusive of this application. But they differ in most material respects.

The provisions introducing the law of England, except as to date, appear to me to be substantially the same, but the provisions

establishing the court's jurisdiction seem to me to differ materially and the ultimate situation referred to in the judgment as pointed out by Martin, J., has no parallel whatever with us. It is pointed out by Martin, J., that for 30 years the jurisdiction had been exercised, parliament which had authority to change the law tacitly assenting, and the legislature which controlled the jurisdiction, not merely tacitly, but actively approving of the exercise of jurisdiction. He also points out the seriousness of the consequences of declaring that the jurisdiction had been erroneously exercised in disrupting family relations and "bastardising innocent offspring" and concludes as follows:—

> The circumstances, in my opinion, present the strongest possible ground in the public interest for refusing, unless absolutely compelled to do so, to disturb this jurisdiction and bring about a social and domestic calamity in our midst, p. 527.

We approach the problem, however, from the other end and, therefore, require to consider only the strict legal effect of the legislation establishing our court.

The court is established by c. 3 of the statutes of Alberta, of 1907.

Without dealing with the different sections in detail it seems clear that unless by s. 22 the court is not given any greater or other jurisdiction than was exercised in England on July 15, 1870, by (1) The Court of Chancery, (2) the Court of Queen's Bench, (3) the Court of Common Pleas at Westminster, (4) the Court of Exchequer, (5) the Court of Probate, (6) the Court of Assize of Oyer and Terminer and General Gaol Delivery (s. 9). These courts were all the superior courts of England on the date specified, except the Court for Divorce and Matrimonial Causes, which was established by 20-21 Vict. c. 85, in the same year that the Court of Probate was established. S. 22, however, confers on the court all the jurisdiction which theretofore was vested in or capable of being exercised by the Supreme Court of the Northwest Territories.

It is necessary, therefore, to consider the extent of the jurisdiction of the last mentioned court. That court was established in 1886. The section, as it appears in the Consolidated Statutes, c. 50, R.S.C. (1886) numbered 48, is in substantially the terms of the original statute. It is as follows:—

> The court shall, within the Territories, and for the administration of the laws for the time being in force within the Territories, possess all such powers

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and authorities as by the law of England are incident to a superior Court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a court of record and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the fifteenth day of July, one thousand eight hundred and seventy, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law, or by the Court of Chancery, or by the Court of Probate in England—and shall hold pleas in all and all manner of actions, causes and suits as well criminal as civil, real, personal, and mixed—and shall proceed in such actions, causes and suits by such process and course as are provided by law, and as tend with justice and despatch to determine the same—and shall hear and determine all issues of law, and shall also hear and (with or without a jury as provided by law) determine all issues of fact joined in any such action, cause or suit, and give judgment thereon and award execution thereof in as full and as ample a manner as might at the said date be done in Her Majesty's Court of Queen's Bench, Common Bench, or in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer, or by the Court of Chancery or the Court of Probate in England.

The section is a somewhat difficult one to construe. Nowhere is the word jurisdiction used but, after full consideration, the conclusion I have reached is that the jurisdiction actually conferred on the court by the section is the jurisdiction exercised on July 15, 1870, by the Court of Queen's Bench, the Court of Common Bench, the Court of Exchequer (in part), the Court of Chancery and the Court of Probate, in other words, nothing more than is conferred on the present court by the Act of 1907 otherwise than by s. 22.

The first portion of s. 48 appears to me to have reference to the incidental powers inherent in any Superior Court and not to have regard to its substantive jurisdiction. Then, when we come to the substantive powers, we find them defined by reference to the courts in England other than the Court for Divorce and Matrimonial Causes. I am quite at a loss to understand why the name of that court was omitted in both the places where the various courts are specified if it was intended that the court should have its jurisdiction. It is true the section provides that the court "shall hold pleas in all and all manner of actions," but it shall only do so in "as full and ample a manner" as any of the courts specified could do. In my opinion the word "manner" does not refer merely to form but also to substance. The qualifying words "full and ample" seem to indicate that. But neither in form nor in substance could any of the courts specified exercise the jurisdiction of the Court for Divorce and Matrimonial Causes, for

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by the statute creating it, all the jurisdiction theretofore exercised in matters matrimonial were vested in that court to the exclusion of all other courts.

I am of opinion, therefore, that no jurisdiction in matters of divorce was ever conferred on this court.

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Whatever may have been said about a jurisdiction existing in some court, where a right exists to be enforced, at times when the jurisdiction of courts was established by their own exercise of it, appears to me to have no application to modern courts established by statute with distinctly defined jurisdiction.

Having come to this conclusion as to the jurisdiction of the court, it is, of course, unnecessary to consider whether the right of divorce under the English statute exists here. It may be noted, however, that the statute, in form at least, does not give the right to divorce but merely the right to file a petition in the court for a divorce. The fact that the law of England was introduced by the same statute which established the only court in the Territories upon which it did not confer the jurisdiction to grant a divorce, might have some bearing upon the question whether the law of England respecting divorce was "applicable" to the Territories. Gray, J., in his judgment in *S*—— v. *S*——, *supra*, (approved by the Privy Council in *Watts* v. *Watts*, [1908] A.C. 573), says at p. 35, "not inapplicable here" means workable here and by local machinery as well as not unsuitable to the circumstances of the country.

It is, perhaps, worth keeping in mind in a consideration of the intention of the statute, both as to the jurisdiction of the court, and the introduction of the law of England, that when the statute was passed Confederation had existed for nearly 20 years, during which time no general law, or right of divorce, existed and that the right existed only in the smaller provinces, which had it prior to Confederation and it would seem unlikely that parliament, while refraining from passing any law which would give the right of divorce to the populous and well-settled Provinces of Ontario and Quebec, should intend to confer it upon the new and comparatively unsettled Territories.

For the reasons I have given, I have reached the conclusion that the present action cannot be sustained, and that the application to dismiss the petition should be granted.

STUART, J.:—The fact that for 30 years or more, no one has

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attempted to assert, either in the Supreme Court of the Northwest Territories, or in the Supreme Court of any province carved out of those Territories, the proposition that a law of divorce existed in the Territories and in the provinces, can, as I apprehend the matter, have no bearing upon the question which is presented to us in this case. It will, probably, not be found to be the first instance in which a vague but very general opinion as to the state of the law upon a certain subject has, for a long time, deterred possible litigants from incurring the risk and expense of putting the matter to the test of a long series of appeals in the courts. Neither do I think that the action of the Parliament of Canada in entertaining petitions from residents of the Territories and provvinces for private acts of divorce, in granting the prayers of those petitions, and in passing the statute asked for, can, in any way, be treated as a legislative interpretation of the meaning of its own statute of 1886 introducing the law of England as it stood on July 15, 1870, as the basis and starting point of the law of the Territories. The passing of a private Act of Parliament settling the civil rights of two related parties cannot be taken as a declaration that no ordinary law and no court existed by and in which those rights could be ascertained and declared.

For the purpose of deciding the matter before us, I can see no advantage in going so far back in history as 1670 to ascertain the state of English law upon the subject of divorce. At that date, whatever the law was, I have no doubt that memories of the times of Henry VIII. still lingered; and if the law then existing, whatever it was, became at that time the law of Rupert's Land it was probably little regarded by Hudson Bay traders. The decision in *Sinclair* v. *Mulligan*, 3 Man. L.R. 481, may be correct, but, if correct, there is, in my opinion, much room for doubt as to its applicability in a region 800 miles away from the Red River settlement.

I see no advantage, either, in restating the effect of the well-known statutes of the Parliament of the United Kingdom, by which the Parliament of Canada became endowed with authority to enact laws for the peace, order and good government of the Northwest Territories. By the authority of those statutes the latter parliament in 1886 by statute, 49 Vict. c. 25, s. 3, enacted that:—

Subject to the provisions of the next preceding section the laws of England relating to civil and criminal matters as the same existed on July 15, 1870, shall be in force in the Territories in so far as the same are applicable to the Territories and in so far as the same have not been or may not hereafter be repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor-in-Council.

The preceding s. 2 referred to in the first line of the above enactment contains nothing which can affect the question involved.

At the date mentioned in the section the Divorce and Matrimonial Causes Act of 1857, as amended, was in force in England.

In 1867, the Legislative Council of British Columbia enacted as follows:—

From and after the passing of this ordinance the civil and criminal laws of England as the same existed on the 19th November, 1858, and as far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia.

In *S*—— v. *S*——, 1 B.C.R., Part 1, p. 25, the Supreme Court of British Columbia decided that, by virtue of this last recited enactment, The Divorce and Matrimonial Causes Act of 1857, as amended, and so far as it established a substantive law of divorce, as distinguished from the establishment of a court with jurisdiction to enforce it, was in force in British Columbia.

In *Sheppard* v. *Sheppard*, 13 B.C.R. 486, Martin, J., gave a decision to the same effect.

In *Watts* v. *Watts*, [1908] A.C. 573, the Judicial Committee of the Privy Council confirmed these decisions and specifically approved of the reasons given by Gray and Crease, JJ., in the first case and by Martin, J., in the second.

It is impossible, in my opinion, to discern any distinction between the local conditions in the North-west Territories and those in British Columbia, or between the terms of s. 3 of the Act of 1886 and those of the Ordinance of British Columbia of 1867.

Unless, therefore, there can be found something in some other part of the statute, 49 Vict. c. 25, which should be held to modify the meaning and cut down the very general terms of s. 3, it follows that we are bound to hold that that section introduced into the Territories the substantive law relating to divorce which is to be found in the Act of 1857 as amended.

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There is only one suggestion of this kind made. It is suggested that the words of s. 14 relating to the powers of the Supreme Court of the Territories which was established by the intervening ss. 4 to 13, inclusive, of the Act are such as impliedly, because they certainly do not expressly, to limit the meaning of the words used in s. 3.

S. 14 reads as follows:—

> The court shall within the Territories, and for the administration of the laws for the time being in force within the Territories, possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the fifteenth day of July, one thousand eight hundred and seventy, used, exercised and enjoyed by any of Her Majesty's superior courts of common law or by the Court of Chancery or by the Court of Probate in England and may and shall hold pleas in all and all manner of actions, causes and suits, as well criminal as civil, real, personal and mixed and may and shall proceed in such actions, causes and suits by such process and course as are provided by law and as shall tend with justice and despatch to determine the same and may and shall hear and determine the same and may and shall hear and determine all issues of law and may and shall also hear and (with or without a jury as provided by law) determine all issues of fact that may be joined in any such action, cause or suit, and judgment thereon give and execution thereof award, in as full and ample a manner as might, at the said date, be done in Her Majesty's Court of Queen's Bench, Common Bench or in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods) by the Court of Exchequer or by the Court of Chancery or the Court of Probate in England.

It is suggested that the omission to refer in this section to the Court for Divorce and Matrimonial Causes, which was established in England by the Act of 1857 in the same year as the Court of Probate was established and which alone had jurisdiction to administer the law of divorce in England, indicates the absence of any intention on the part of parliament, in enacting s. 3, to introduce into the Territories the substantive law of divorce.

I am unable, however, to assent to this proposition, or even to agree, that supposing it to be correct, it can be properly treated as necessarily leading to a narrower interpretation of the words of s. 3. The question is not what parliament meant or intended to say but what parliament meant or intended *by what it said*. We may well be convinced to a moral certainty, reasoning from our general knowledge of public affairs, that parliament never really intended to enact a certain thing but, if the language it has used, interpreted

according to the well-recognised canons of interpretation, expresses such an intention, it is the expressed intention and not the believed intention that must govern.

It cannot be said in any case, I think, that parliament had in mind each provision of the whole body of law which by this enactment it introduced, or in other words, that it went over the whole field of law and decided that each item was good. The fact that it left the introduction of any specific rule of law to be decided according to its applicability indicates clearly that parliament definitely refrained from so enormous a task.

My opinion is that this is not a case in which we are entitled to limit the meaning of the words of a section of a statute by reference to other sections, although, in some cases, of course, something of that kind must be done.

In *Colquhoun* v. *Brooks*, 14 App. Cas. 493, at 506, Lord Herschell said:—

> It is beyond dispute, too, that we are entitled and indeed bound, when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act.

But, as pointed out by Collins, M.R., in *Garbutt* v. *Durham Joint Committee*, [1904] 2 K.B. 514, 521-2, this rule should only be applied "where the provision of the enacting section is not in itself absolutely clear." It cannot possibly be said that the words of s. 3 are not "absolutely clear." Jessel, M.R., in *Bentley* v. *Rotherham and Kimberworth Loc. Bd. of Health*, 4 Ch. D. 588, at 592, referring to the use of the context as an aid to interpretation said:—

> But then, as has been said very often, you must have a context even more plain, or at least as plain—it comes to the same thing—as the words to be controlled.

So far are we from this, that the fact is that s. 14 is really the obscure section. As we shall see, it is the words of that section that are lacking in clearness and precision so that it will be found, I think, to be more in consonance with the rule above expressed to use s. 3, a very plain section, in interpreting s. 14, rather than to use s. 14—a section by no means plain—to interpret or explain s. 3.

(In the consolidation of 1886, s. 3 appears as s. 11, and s. 14, with one slight amendment, as s. 48, and it is as s. 11 and s. 48 that I shall hereafter refer to them.)

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I do not think, therefore, that we are entitled to use any doubt which may arise from the words of s. 48 as to the true extent and scope of the jurisdiction conferred upon the Supreme Court of the North-west Territories as a reason for limiting the simple, plain meaning of s. 11.

Of course the absence in a certain territory of a court with jurisdiction to enforce a law might be thought to be a reason for saying that the law was not "applicable" to that territory but it seems to me that the enactment of law, at least in these modern times, logically, comes first and it is presumed that a court exists or will be created with jurisdiction to enforce it. In the early history of English law, no doubt the courts to a large extent came first, and the law grew up and developed out of the judgments of the courts. But even there, whatever may have been the actual fact, the theory always was that the court was not legislating but was applying a pre-existing law.

Upon this point, of course, I cannot logically say that, because for the reasons I shall presently give, I think the court created did, in fact, possess jurisdiction, the suggestion as to inapplicability must be put aside because one of the reasons which I shall give for the existence of the jurisdiction is precisely this, that the particular law was applicable and was introduced by s. 11.

I think, throughout the whole matter, the reasoning should proceed from s. 11 to s. 48, and not from s. 48 to s. 11.

In my view, the question of applicability of a law is to be decided from a consideration of the general conditions of settlement and society, and that it was not intended by parliament that the existence or non-existence of a court with the requisite jurisdiction should be considered as affecting the matter one way or the other.

It is well, perhaps, to remember, that laws do not, in strictness, exist for mere territorial areas but rather for the inhabitants of those areas. And the rule laid down in such cases, *Campbell* v. *Hall*, 1 Cowp. 204, 98 E.R. 1045, and *Att'y-Gen'l* v. *Stewart*, 2 Mer. 144, 35 E.R. 895, is that when English settlers come to inhabit an unsettled or barbarous country they take with them the laws of England so far as suitable to the settlement, that is, to the people so settling and the state of their society; and s. 11 is merely a statutory enactment of this rule.

Is it to be said that, before there can be any law in the new country at all, a court must be erected to enforce it, or that for contracts made or crimes committed in the interval between settlement and the erection of a court, there is no law to govern? I think not; because the Courts of England would undoubtedly have jurisdiction over such subjects. Something of this kind seems to have existed in *Reg.* v. *Jameson*, 60 J.P. 662, although the law there applied was the Foreign Enlistment Act, 1870, a very general Act. The infringement of the Act took place in British Bechuanaland and the accused was tried in London. The same principle, however, would, I think, apply even to a common law crime.

It may be said that this begs the question because there was at least a court somewhere which could enforce the law while the Act of 1857 applies only to persons domiciled in England. The matter is from this point of view discussed, however, very fully in *S*—— v. *S*——, 1 B.C.R. pt. 1, p. 25, where the court rejected the suggestion that the parties ought to seek their remedy in England.

A case which, perhaps, comes nearer to the point is *Adv.-Gen. of Bengal* v. *Ranee Sur. Dossee*, 2 Moore P.C. (N.S.) 22, 15 E.R. 811, where the question was whether the English law of *félo de se* and the forfeiture of goods and chartels extended to a native Hindoo who committed suicide in Calcutta. The head-note states that the rule was laid down that

> Where Englishmen establish themselves in an uninhabited, or barbarous country, they carry with them not only the laws, but the sovereignty of their own state.

But the essential point is that both Sir Barnes Peacock, then Chief Justice of the Supreme Court of Bengal, and Lord Kingsdown, delivering the judgment of the Judicial Committee on appeal referred to the question of the non-existence of a court. The former said, p. 39:—

> If a law had existed by which the goods and chattels of a *felo de se* were forfeited to the Crown the appointment of coroners might have provided means for putting the law into force *even though it might previously have lain dormant for want of the necessary machinery.*

And Lord Kingsdown, after deciding that the law in question did not, in any case, apply to Hindoos went on to say, p. 64:—

> It would not necessarily follow that, therefore, it never existed as regards Europeans. That question would depend upon this, whether, when the

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original settlers under the protection of their own Sovereign, were governed by their own laws, those laws included the one now under consideration; whether an offence of this description was an offence against the King's peace for which he was entitled to claim forfeiture; whether the factory could, for this purpose, be considered as within his jurisdiction. In that case it might be that the subsequent appointment of coroners by the Act of 33 Geo. III. *would render effectual a right previously existing but for the recovery of which no adequate remedy had been previously provided.*

It is true that we have here merely suggestions, but the passages certainly do indicate that, in the opinion of these jurists, a law may well exist and be in force under the general rule as to the introduction of English law before there is in existence any court competent to award an adequate remedy.

There is, moreover, another circumstance which, it appears to me, has some bearing upon the question. Two years after the enactment of s. 11 of the North-west Territories Act, of 1886, the Parliament of Canada passed the statute, 51 Vict. c. 33, in relation to the Province of Manitoba. The reasons for that enactment are explained in the judgments of the Court of Appeal of Manitoba in *Walker* v. *Walker*, 39 D.L.R. 731, and I need not here repeat them. But it will be observed that substantially the same language was there used by the Parliament of Canada in introducing the English law as of 1870 into Manitoba, as was used in s. 11 of the statute now being considered, with a variation merely due to the fact that, in the Manitoba case, parliament was limited in its jurisdiction by the B.N.A. Act while, in the other case, it was not. In Manitoba, the provincial legislature had erected a Superior Court with the jurisdiction of "any English Court of civil jurisdiction." The Federal Parliament in the case of Manitoba was not dealing with the question of erecting a court at all. In the case of the Territories it was simultaneously erecting a court and giving it jurisdiction. Yet it used substantially the same language indifferently in the two cases. For this reason, I think, it ought to be tolerably clear that the jurisdiction given by s. 48 to the court ought not to be considered at all in seeking the proper interpretation of s. 11.

If I may say so with respect, I think the reasoning of the decision in *Walker* v. *Walker*, *supra*, is irrefutable in view of the decision in *Watts* v. *Watts*, and that to some extent, at least, it can be applied in the case before us in this province.

Of course the situations in the three cases are distinct in some

respect, each from the other. The legislation in British Columbia, which was to be interpreted, took place while that province was a separate colony of Great Britain, not yet joined to the Dominion and by force of the order-in-council admitting the colony as a province all existing laws were continued until altered by competent authority. The legislation to be interpreted in Manitoba took place after the creation of that province as a province under the federal system. The legislation to be interpreted in the present case, except that contained in our present Supreme Court Act, took place while the Territories occupied the same relation to the Parliament of Canada as British Columbia, prior to 1871, occupied with relation to the Parliament of Great Britain. But I can see no reason for making a distinction as to the real situation. There is not in this case, and in neither *Walker* v. *Walker*, nor *Watts* v. *Watts*, was there, any serious question of the constitutional competency of the various enactments. The reasoning in *Walker* v. *Walker* seems to me to be entirely sound upon the question of the competency of a provincial legislature, under the B.N.A. Act, to erect a court with jurisdiction to administer and enforce a law upon the subject of divorce, if such a law has been enacted by competent authority, viz., by the Parliament of Canada. The distinction between the enactment of a general law and the creation of a court with jurisdiction to enforce that law is clearly observed in ss. 91 and 92 of the B.N.A. Act. There seems, clearly, no reason whatever for making any distinction between a law dealing with the civil contract of marriage and with the grounds entitling a party to a judicial decree dissolving that civil contract and a law dealing with Bills of Exchange or Trade and Commerce, or railroads or banking, or any of the subjects specially enumerated in s. 91. Parliament, with respect to all of these, has, as a rule, confined itself to the enactment of a general law leaving the enforcement of that law to courts established by provincial legislatures under the authority of s. 92. Only very few exceptions can be found. Even the bankruptcy legislation of the federal parliament of 1869-1880 was left to provincial courts to be administered. Courts of Criminal Appeal and Criminal Courts for speedy trials are possible exceptions, though, even with regard to the latter, concurrent provincial legislation has taken place. The Exchequer Court Act is no doubt another exception.

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It is, I rather imagine, because of some tradition in our thoughts remaining from the days of ecclesiastical courts—days when the sacramental and religious aspect of marriage was more generally insisted upon, even in secular law than it is now, that we are inclined to shrink from the plain consequence which must follow from the general rule that the federal legislature is supposed to enact general laws upon all subjects enumerated in s. 91 and the provincial legislatures to establish courts of civil jurisdiction to enforce them. The federal legislature may possibly be entitled to erect a special court to administer its special law but, so far, it has seldom done so.

Legislation by the federal parliament, under the powers given it to *pass laws* with respect to marriage and divorce has hitherto been confined, so far as Canada generally is concerned, to the enactment of private Acts dissolving a particular marriage and granting a particular divorce. It might, it seems to me, be a fair question for consideration whether these private Acts come within the meaning of words giving power to "*pass laws.*" These Acts present rather the features of the ancient "Themistes," a sort of divine decree in individual cases rather than of a general rule to be continually obeyed and observed by the community. See Maine, Ancient Law, pp. 3-5 *et seq*, and the dissenting judgment of Lord Shaw in *Rex* v. *Halliday*, [1917] A.C. 260. But of course it is now too late, even if it would have been possible, which no doubt it was not, to question the validity of these private Acts. I just make the preceding observations in passing in order to emphasise the distinctions between private Acts of divorce and general laws upon the subject and to lead to the further observation that when general laws as to divorce existed undoubtedly in four of the provinces it was by no means so strange as it might at first appear that parliament, while continuing to pass private, individual, divorce Acts for individual persons who were able to pursue a petition for that purpose, should have introduced a general law upon the subject into an additional province and into the Territories. It is noticeable that in all the divorce Acts which have been passed the recital alleges that the husband "is now domiciled in *Canada*"—not in any specific province and it would therefore appear that domicile in a province, having admittedly a divorce law and a divorce court, would be considered

by parliament as no bar—as of course legally it could not be—to the granting of the petition and that, therefore, the existence of the concurrent remedy by suit in court or by private Act is not an unusual situation.

Passing one's memory back to the days before 1907, when the Supreme Court of the Northwest Territories was abolished in the two provinces concurrently and separate provincial courts established, one can well recall how startling a proposition it would then have appeared if a petition for divorce had been brought in that court. But *Watt* v. *Watt*, *supra*, had not then been decided, a fact of some importance in another connection.

For these reasons I think that the substantive law of the Act of English 1857 was introduced into the Territories by virtue of s. 11 of the Northwest Territories Act, 1886.

Proceeding now to the second question, viz., has this court jurisdiction to entertain the present suit and to administer a law which, having been in force in the Territories, was continued by the Alberta Act establishing this province as the law of this province until altered by competent authority? I am bound to say that, owing to the special wording of the material statutes to be interpreted, the matter seems to me to be by no means so clear as it was in *Watt* v. *Watt* and in *Walker* v. *Walker*, *supra*.

But nevertheless after the best consideration I can give the matter, I have been led to the conclusion that this court has jurisdiction to administer the law of divorce.

By the Act of the legislature of Alberta creating this court, c. 3, of 1907, in s. 22, it was enacted that

> The court shall have, generally, all the jurisdiction, powers and authority which, prior to the coming into force of this Act, was by any law . . . vested in or capable of being exercised by the Supreme Court of the North-west Territories.

This carried forward and made applicable to this court the provisions of s. 48 of the North-west Territories Act. In the revision of 1886 the word "may" was eliminated where it occurs in the original s. 14 but otherwise there had been no change.

Then also by a specific section (9) it was declared that the court should possess the jurisdiction which on July 15, 1870, was vested in and capable of being exercised in England by (1) the High Court of Chancery, (2) the Court of Queen's Bench, (3) the Court of Common Pleas at Westminster, (4) the Court of Ex-

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chequer, (5) the Court of Probate, (6) the Courts of Assize and of Oyer and Terminer and General Gaol Delivery.

Perhaps it is worth while stating, for the sake of emphasis, even with some tautology, what seems to me to be the evitable effect of the whole legislation which I have recited. By that legislation the Supreme Court of the North-west Territories was in very truth Her Majesty's ancient Common Law Court of Queen's Bench for the North-west Territories and for Her Majesty's subjects dwelling therein, it was Her Majesty's ancient common law Court of Common Pleas or Common Bench for the North-west Territories and for Her Majesty's subjects dwelling therein, it was Her Majesty's ancient common law Court of Exchequer for the North-west Territories and for Her Majesty's subjects dwelling therein (except with respect to the Crown in the right of the Dominion in regard to which a special Federal Court of Exchequer had been established) and it was Her Majesty's ancient High Court of Chancery for the North-west Territories and for Her Majesty's subjects dwelling therein. So also now this court is in very truth, as I conceive it, His Majesty's ancient common law Court of King's Bench, his ancient common law Court of Common Pleas, his ancient common law Court of Exchequer and also his ancient High Court of Chancery for the Province of Alberta and for His Majesty's subjects dwelling there.

Now, it appeals to me very strongly as a serious consideration, indeed, that it would be a very strange thing if, with a law in force giving one of His Majesty's subjects a certain legal right or remedy, it could be said that that right could not be vindicated and the remedy given in any of His Majesty's courts. These courts are the courts of the King and the King through their operation is the guardian of the law. In Magna Charta itself it is promised that "to none will we sell, to none will we deny or delay right or justice."

From this point of view it is, I think, futile to say that in England a special court was erected to give effect to the right to divorce because it was certainly merely because a special court was there erected with special jurisdiction to administer the substantive law enacted in the Act of 1857 that the King's courts of general jurisdiction did not and could not administer it. Once it is admitted (and in view of the decision in *Watt* v. *Watt* it cannot be

denied) that the body of substantive law contained in the Act of 1857 can be extracted and segregated from the rather complicated provisions as to the machinery of enforcement with which it was involved it becomes, I think, apparent that if no special court is erected to administer that law then the law falls within the jurisdiction of those ancient courts whose immemorial duty and function it was to administer the laws of the realm and in which the King was bound to implement the promise of Magna Charta. If those courts in 1870 had no jurisdiction to enforce the new divorce law it was merely because a special court had been created for the purpose.

This principle was so fully recognised that the rule was that if a defendant, sued in one of the King's superior courts of general jurisdiction, desired to dispute the jurisdiction, he was not allowed to put in a mere denial of that jurisdiction but unless he could and did name the court which had jurisdiction upon which there might be a triable issue, his plea was treated as bad.

In *Mostyn* v. *Fabrigas*, 1 Cowp. 161, at 172, 98 E.R. 1021, at 1028, Lord Mansfield said:—

> In every plea to the jurisdiction, you must state another jurisdiction; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this court, you must shew the jurisdiction of the court of Wales; and in every case to repel the jurisdiction of the King's court, you must shew a more proper and more sufficient jurisdiction; for if there is no other mode of trial, that alone will give the King's court a jurisdiction.

In *Earl of Derby* v. *Duke of Athol*, 1 Ves. Sr. 202, 27 E.R. 982, Hardwicke, L.C., said:—

> The rule is insisted on that whoever pleads to the jurisdiction of one of the King's superior courts of general jurisdiction must shew what other court has jurisdiction. I am of that opinion. . . . The reason of this is, that in suing for his right, a person is not to be sent everywhere to look for a jurisdiction, but must be told what other court has jurisdiction. . . . I cannot put this (which is a superior court of general jurisdiction in whose favour the presumption will be, that nothing shall be intended to be out of its jurisdiction which is not shewn and alleged to be so) upon a level with an inferior court of a limited local jurisdiction.

In *Nabob of Arcot* v. *The East India Co.*, 3 Bro. C.C. 292, at 301-2, 29 E.R. 544, at 549, Thurlow, L.C., said:—

> It is stated to be a plea to the jurisdiction of the court but it differs from a plea to the jurisdiction in all the particulars by which those pleas have been described; because (as it has been truly observed) it is impossible to plead to the jurisdiction of any particular court without giving a remedy to the party in some other court. Now, this plea says expressly that *the party has no*

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remedy in any court of municipal jurisdiction whatever (the italics are Lord Thurlow's). I take it therefore to be a plea in bar; as if it had been said *ex tali facto actio non oritur*, as if it had been gratuitous or honorary or of that species of contract upon which an action does not arise . . . The plea therefore as I take it is a plea in bar not a plea to the jurisdiction of a particular court but of all courts; and a plea to the jurisdiction of all courts I take to be absurd and repugnant in terms . . . it amounts to no more than saying that from the matter of the action itself *ex tali facto non oritur actio*.

In *Rex* v. *Johnson*, 6 East 583, 102 E.R. 1412, Lord Ellenborough quoted these opinions with approval and although it is true that he quotes the words of Lord Hardwicke in *Bishop of Sodor and Man* v. *The Earl of Derby*, 2 Ves. sen. 337, 357, where the latter declared that his decision in *Derby* v. *Athol* was not to be understood as *an affirmance of general jurisdiction* over the title to the Isle of Man, the matter there in question, yet I do not see that this detracts from the weight of these opinions on the general question that where there is a law to be enforced the King's courts are *primâ facie* the authority to enforce it.

These cases are also quoted and approved in *Mayor of London* v. *Cox*, 2 E. & I. App. 239, by Willes, J., and he there quotes the words of the court in *Jennings* v. *Hankyn*, Carth. 11, saying: "For this court (King's Bench) is not, like one of a limited jurisdiction holding plea of a cause arising without, for in such case all is void, as *coram non judice* but it is of an universal jurisdiction and superintendency."

I am not overlooking the circumstance that in all of these cases a question of territorial areas was involved rather than a question of subject matter. But it is significant, it seems to me, that in the passage in 9 Hals., p. 12, where these cases are cited, although the statement of the law is quite general there is no case cited where there was a plea to the jurisdiction merely on the ground of subject matter aside from any territorial question.

In 9 Hals., at p. 16, it is said:—

> The jurisdiction of each particular court is that which the King has delegated to it and *this delegation has been complete* for the King has distributed *his whole power of judicature* to divers courts of justice,

and for this is cited 4 Co. Inst. 70, as follows:—

> The King hath committed all his power judicial some in one court and some in another so as if any would render himself to the judgment of the King in such case where the King hath committed all his power judicial to others such a render should be to no effect (Y.B. 8 H. 4, fo. 19). The King doth judge by his judges (the King having distributed his power judicial to several courts) and the King hath wholly left matters of judicature according to his laws to his judges (Y.B. 8 H. 6, fo. 20).

We might compare in this connection the wording of s. 6 of the Divorce and Matrimonial Causes Act of 1857 by which it was enacted that the jurisdiction of the spiritual courts in certain actions should "belong to and be vested *in Her Majesty*" and that "such jurisdiction together with the jurisdiction conferred by this Act" should "be exercised in the name of Her Majesty in a court of record to be called, etc."

I apprehend that the principle of the passage quoted from Coke applied in the Territories and applies in this province, also in favour of His Majesty's subject resident therein, and that His Majesty was and is just as much present *in theory* in the Supreme Court of the Territories and this Supreme Court administering justice and enforcing the law for such subjects as he was in the Court of King's Bench at Westminster.

It seems to me that there might easily be found instances of the creation by statute of a right and of a right of action to enforce that right, both unknown before, without any particular court being specified wherein that right could be pursued. An example of this occurs, I think, in the case of Lord Campbell's Act, 3 & 4 Vict. c. 42, s. 2, by which an absolutely new right of action was created. It was called in the Act an action of trespass on the case, but there was nothing said as to what court should have jurisdiction, it being understood as of course that the courts which dealt with the actions of trespass on the case should also deal with this newly-created species. The matter, however, appears in a stronger light if we look as c. 48 of the Ordinances of the North-west Territories, s. 2, where the principle of Lord Campbell's Act is re-enacted by words merely saying that the personal representative of the deceased may bring an action and the wrong-doer shall be liable to an action for damages. Had there been in 1870 no Lord Campbell's Act in England and had this ordinance been new in the Territories could it be argued that the Supreme Court of the North-west Territories would have had no jurisdiction to entertain the action merely because no English court in 1870 had any such jurisdiction? I think not.

The Act of 1857, in its enactment of substantive law, declared that, in certain circumstances, a husband or a wife should be entitled to a judicial decree rescinding, or annulling, or dissolving the contract theretofore existing between them. The Court of

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Chancery had before this exercised the power of declaring civil contracts rescinded on certain grounds, just as common law courts had entertained actions of trespass on the case upon certain grounds. Why in the one case more than in the other could a new ground of relief not be given without any necessity for establishing a special court for the purpose? The civil contract of marriage is no doubt *sui generis* inasmuch as it is indissoluble by act of the parties. But I can see no reason why this should make any difference in principle. The Court of Chancery did dissolve or rescind civil contracts for certain reasons. A statute is passed saying that a certain special type of civil contract may be dissolved by judicial decree for certain reasons. It seems to me that there can be no reason why the right to dissolution of the contract thus given should not be asserted and vindicated in one of the King's ancient courts, by analogy no doubt preferably in the Court of Chancery, just as the new action for trespass on the case created by Lord Campbell's Act could fall to the common law courts which dealt with that type of action.

This is, after all, merely an application of the well-known maxim *ubi jus, ibi remedium;* or, as it was put by Lord Kenyon, C.J., in *Birkley* v. *Presgrave*, 1 East 220, at 226, 102 E.R. 86, at 88. "If the law confer a right it will also confer a remedy. When once the existence of the right is established the court will adapt a suitable remedy except under particular circumstances where there are nolegal grounds to proceed upon;" and by Le Blanc, J., in the same case, who referred to "the common principle of justice that where the law gives a right it also gives a remedy." Usually, no doubt, this principle has been applied where there has been a continuously existing right and some person has *infringed* that right. Here, in one sense, the situation is different because the right to a decree of divorce is not something that a third person can infringe upon. But, looking more deeply, the situation is that a husband and a wife have a continuously existing right to certain conduct by the other. The common law did not give a remedy for the infringement of that right as against the guilty spouse though it did as against the third party, the accomplice and paramour. But a statute, the Act of 1857, did give to the injured spouse a legal right to a remedy as against the guilty spouse. The matter was new in principle

and so the words of Ashhurst, J., in *Pasley* v. *Freeman*, 3 T.R. 51, at p. 63, apply, "Where cases are new in their principle there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance." Legislative interposition took place and it became a case, not so much of *ubi jus, ibi remedium*, as of *ubi jus et remedium, ibi item curia*." If the doctrine "*ubi jus, ibi remedium*" is sound then, *a fortiori*, for all the subjects of the King in this province with its superior court of the King, there must be such a rule as *ubi remedium, ibi curia*.

The foregoing views are based upon the assumption that the jurisdiction of this court and that of the Supreme Court of the North-west Territories is and was confined definitely by the words of s. 9 of the Supreme Court Act and s. 48 of the North-west Territories Act to the jurisdiction possessed in 1870 by the English courts specified in those Acts, and that there is nothing in either Act which can be treated as bestowing a wider jurisdiction. Even so, for the reasons I have given, I think the courts there mentioned had jurisdiction to enforce all laws, to protect all rights and award all remedies, jurisdiction in regard to which had not been specifically assigned to special courts created for special purposes and that, as there has been no special court created in this province to apply the remedies and protect the substantive right given by the law introduced in 1886 and taken from the Act of 1857, therefore, in the one superior court of the King established in the Territories and in this province, a person had and has a right to seek those remedies and ask for the granting of a decree to sustain his or her rights.

But the assumption mentioned is, in my opinion, not warranted by the words of the statutes, at least not by the words of s. 48 of the Act of 1886, although it may be by the words of s. 9 of the Supreme Court Act of Alberta exclusive of those which introduce s. 48 of the Act of 1886. The latter section declares that

> the court shall, within the Territories and for the administration of the laws for the time being in force within the Territories, possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction.

In my opinion, this language should receive a broad and liberal construction and should be held to mean that the court is to have power to enforce all the laws for the time being in force in the Territories. Certainly, that was obviously what the court was

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erected for and there was no other court to enforce them. It is true that the expression "incident to" has a wider and also a narrower meaning and that by giving it the latter, the clause would come to mean that the court was to have all the "incidental" powers of a superior court. But giving the words "incident to" the former or wider meaning, which is "pertaining to," and which I think in construing such a statute is the proper one to adopt, because the narrower meaning is thus included within it and the rule of broad and liberal interpretation is thus followed, the clause comes to mean that the court should have power to enforce the laws for the time being in force. The lesser incidents, rights and privileges necessary to a court of record are mentioned in the following phrases and I think these are sufficient to cover mere incidental powers, if they needed to be specially mentioned.

Then it is to be observed that the section never uses the word "jurisdiction" at all. If it was intended to restrict the jurisdiction given to the exact compass of that possessed by the various enumerated courts taken together it was quite easy to do so as was done in s. 9 of the Supreme Court Act of the provincial legislature.

Passing now to the words:—

> And shall hold pleas in all and all manner of actions, causes and suits as well criminal as civil, real, personal and mixed . . . and shall hear and determine all issues of law and shall also hear and (with or without a jury as provided by law) determine all issues of fact joined in any such action, cause or suit . . . in as full and ample a manner as might at the said date be done, etc.,

there are some things to be specially marked in regard thereto. In the first place, the new court is, in fact, directed to hold plea "in *all* and *all manner of* actions, causes and suits." I cannot see why the full meaning of these words should be whittled down because words follow expressive, not of exceptions to or limitations of, the full subject matter thus defined but expressive merely, as the words state, of the *manner* in which this is to be done.

It is undeniable that no one of the enumerated courts nor all of them together could hold pleas in England "in all and all manner of actions" because certain actions had been there assigned to certain other specified courts. The very argument which I am now combatting rests upon this fact. It is, therefore, really in substance suggested that the words now in question ought to be interpreted as if they read thus—"in all *such* actions, causes and

suits . . . as the specified courts or any of them could hold plea in." But this is just exactly what the section does *not* say. It says that the new court shall hold pleas "*in all and all manner of actions.*" In my opinion, therefore, the words "in as full and ample a manner as could be done" really and properly mean "in as full and ample a manner as (the specified courts) could hold pleas in the matters over which they respectively had jurisdiction." The words deal with the fullness and the amplitude of the manner of holding all pleas and of giving judgment and awarding execution thereon, not with the numerical extent of the pleas which are to be held and dealt with. In construing a statute plain and simple English words must be taken in the ordinary every day meaning unless there is some necessity or reason shewn for attaching special meaning to them. The words "in as full and ample a manner," need I repeat, just refer to "manner," a word whose meaning is well known and I see no reason at all for reading them otherwise. It is, therefore, quite futile, in my opinion, so far as the question before us is concerned, to attempt to make any application of the rule "*expressio unius, exclusio alterius*" because the *manner* in which the Divorce Court in England held pleas was really a matter of indifference. It would add nothing.

For these reasons, also, I think, that the Supreme Court of the North-west Territories was given power and jurisdiction to enforce all laws existing in the Territories and to hear and give judgment in all actions, suits and causes within the Territories, that therefore it was given power to enforce the substantive law of the Act of 1857 which had by s. 11 been introduced and that this court has consequently the same authority and jurisdiction.

Lastly, turning to the special words of our Supreme Court Act, I think it may be admitted that, if, before it was enacted, there had been any final judicial decisions placing a narrower meaning upon the words of s. 48 of the Act of 1886, it ought in such case to be held that the legislature had adopted such narrower interpretation when it practically incorporated that section into its own Act. But there was no such decision ever made and the matter is still at large.

S. 9 does specifically refer to the jurisdiction of certain enumerated courts and there is no doubt that if there were nothing else to be considered, neither s. 48 of the Act of 1886, nor the words

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of s. 9 (2), the jurisdiction to deal with a petition for divorce might possibly be considered as having been withheld; although even then the reasons I have first advanced would still hold on the ground that the King's courts had in 1870 jurisdiction to give all relief to which the law gave a right where no special court had been created for the purpose of giving a special kind of relief.

S. 9 (2), however, says:—

> The jurisdiction aforesaid shall include the jurisdiction which at the commencement of this Act was vested in or capable of being exercised by all or any one or more of the judges of the said courts respectively sitting in court or chambers or elsewhere when acting as judges or a judge in pursuance of any statute, law or custom; and all powers given to any such court or to any judges or judge by any statute; and also all ministerial powers, duties and authorities incident to any and every part of the jurisdiction so conferred.

Inasmuch, as "at the commencement of this Act" the courts referred to had ceased to exist, I think the phrase quoted should be disregarded as quite insensible and as an obvious slip or error. See Beal, Cardinal Rules of Interpretation, 2nd ed., pp. 70 and 324. Of course the Master of the Rolls still existed in 1907 and to that extent the words are not insensible. Perhaps it is finikin to suggest that the Master of the Rolls could in 1907 have granted a decree of divorce if he had been requested to sit in the Probate Division under s. 44 of the Judicature Act, 1873. But I pass that by. Treating the peculiar phrase referred to as eliminated, the subsection will refer, I should think, to the judges of the enumerated courts as they stood when abolished in 1873 or possibly as they stood on July 15, 1870, if there be any distinction. If it were not for some expressions used by Gray and Crease, JJ., in *S*—— v. *S*——, 1 B.C.R., pt. 1 p. 25, I do not know that I should consider it pertinent or helpful to refer to powers given to judges as persons and as distinct from the courts in which they sit. But there are undoubtedly expressions used there which make the suggestion that the powers and jurisdiction of judges as persons and as distinct from the court in which they sit are matters which are relevant and worthy of consideration. Certain judges of the courts enumerated in s. 9 were undoubtedly given by the Act of 1857 power to grant decrees of divorce. It is true that these powers were only given to be exercised *sub modo*, viz., while they were sitting as judges of the Divorce Court, which perhaps ought not to be considered as within the meaning of the word "elsewhere" in

sub-s. 2. But for myself I am not prepared to reject finally as untenable the suggestion that sub-s. 2 can be read as giving to this court the jurisdiction of certain judges of the enumerated courts to sit as a court to hear divorce petitions and to give judgment thereon. In view, however, of the other reasons I have given for my conclusion, I do not propose to pursue this suggestion any further.

I do not think it necessary to deal at any length with other expressions in our Supreme Court Act such as those to be found in ss. 16, 18, 20 and 21. The words of the provincial legislature to be found in s. 16 cannot be treated as in any way a legislative interpretation of s. 11 of the North-west Territories Act. A provincial legislature would have no right to interpret in any case an Act of the federal parliament dealing with a matter over which the province has no legislative jurisdiction. And whatever may have been the reason for the enactment of the sections I refer to—a reason I rather fancy to be found in a copying of certain Ontario legislation where the situation was really widely different—I do not think that an obvious misapprehension of the true state of the law ought to be given any very serious weight in interpreting the meaning of ss. 11 and 48 of the Act of 1886 which were carried forward into this province by competent authority. In any case, the authority of the Court of Probate was admittedly given by the general sections and yet we find s. 21 giving this jurisdiction specially. I think that, therefore, very little, if any, assistance can be derived from a consideration of these special sections. Greater caution and misapprehension of the real situation under existing or prior statutes will, I think, be found largely, though no doubt not entirely, to account for their appearance in the Supreme Court Act.

I am, therefore, of opinion that the application of the defendant to dismiss the action for lack of jurisdiction in this court to maintain it ought to be dismissed but in the circumstances without costs.

Beck, J.

BECK, J.:—*Watts* v. *Watts*, [1908] A.C. 573, in which the Judicial Committee of the Privy Council held that the Supreme Court of British Columbia has jurisdiction to grant a decree of divorce between persons domiciled in that province, it seems to me, leaves it not open to this court to hold otherwise than that

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the substantive law relating to divorce and other matrimonial causes enacted by the Divorce and Matrimonial Causes Act, 1857 (20-21 Vict. c. 85), which came into force in England on January 11, 1858, formed part of the law of England applicable to the territory now comprised in this Province of Alberta, introduced by statutory enactment introducing the law of England, so far as applicable, as it stood on July 15, 1870, notwithstanding that the Imperial Act coupled the enactment of the substantive law with an enactment that relief was to be obtained by petition to a special court constituted by the same Act.

Their Lordships gave no independent reasons for their decision, contenting themselves with saying that—

> In the opinion of their Lordships, the reasons given in the judgments of Gray and Crease, JJ., in *S*—— v. *S*—— (1877), 1 B.C.R., pt. 1, p. 25, together with the recent critical survey of the ultimate situation by Martin, J., in *Sheppard* v. *Sheppard* (1908), 13 B.C.R. 486, place the question (of the application of the Divorce and Matrimonial Causes Act, 1857, and the jurisdiction of the Supreme Court of British Columbia to apply it) beyond discussion.

Accepting then the proposition that the substantive law relating to divorce, embodied in the English Act of 1857, forms part of the body of law introduced into and now in force in this province the question remains whether the Supreme Court of this province has jurisdiction to apply it as cases arise.

The words in which, and the conditions under which, jurisdiction was conferred upon our court naturally differ from those relating to the Supreme Court of British Columbia as well as from those relating to the Court of King's Bench of the Province of Manitoba, in which latter province the Court of Appeal has quite recently also decided (*Walker* v. *Walker*, 39 D.L.R. 731) that the English Act of 1857 is in force in that province, as being part of the body of English law existing on July 15, 1870, introduced by local statute, and that the Court of King's Bench has jurisdiction to apply it.

Our Supreme Court Act (c. 3 of 1907) confers upon this court jurisdiction, to put it briefly, as follows: (1) The jurisdiction theretofore exercised by the Supreme Court of the North-west Territories. (2) The jurisdiction which on July 15, 1870, "was vested in and capable of being exercised in England" by the Courts of Chancery, Queen's Bench, Common Pleas, Exchequer, Probate, Assize and Oyer and Terminer and Gaol Delivery.

The Act then proceeds to enact that:

for the purpose of removing doubt and ambiguity but not so as to restrict the generality of the foregoing, it is declared and enacted that the court shall have the like jurisdiction and powers as by the laws of England were, on the 15th day of July, 1870, possessed and exercised by the Court of Chancery in England in respect of the matters hereinafter enumerated or referred to; that is to say:

Then follows among a list of ten (largely added to by subsequent sections) the following: (1) "The administration of justice in all cases in which there exists no adequate remedy at law."

It is a matter of certain knowledge—not of mere guess—that, as in a hundred other cases, the provisions just mentioned were copies from the corresponding statutory provisions of the Province of Ontario, formerly Upper Canada. Substantially the same list of specific items of jurisdiction, in practically identical words, appears in the Act respecting the Court of Chancery in the Con. Stat. of Upper Canada (1859), c. 12. The earlier statutes are not available but are noted as below: s. 26 (10) reads as follows:—

10. And generally, the like jurisdiction and power as the Court of Chancery in England possessed on the 10th day of June, 1857, as a court of equity to administer justice in all cases in which there exists no adequate remedy at law, 7 W. IV. c. 2, s. 2; 16 Vict. c. 159, s. 21; 13-14 Vict. c. 56, s. 4; 20 Vict. c. 56, s. 1; 12 Vict., c. 64, s. 8.

These provisions were carried forward in substantially the same form; see R.S.O. (1877) c. 40; R.S.O. (1887) c. 44.

If we can suppose the Parliament of England introducing divorce, or any consequence or remedy (other than damages) for matrimonial misconduct, and concurrently abolishing the ecclesiastical courts, can there be a doubt that the English Court of Chancery would have had jurisdiction to decree the consequences or remedy on the ground that the common law courts, though capable of giving damages for the offence, were without the necessary machinery or methods of procedure to enable them to give the "adequate remedy" which the new legislation had provided? Yes, this, it appears to me, is substantially the position of the present question in this jurisdiction.

Divorce, as a remedy for certain matrimonial offences, being in force in this jurisdiction, the Supreme Court of this province as the legatee of the jurisdiction of the English Court of Chancery to grant relief where no adequate remedy existed at law, has, in my opinion, jurisdiction to decree this remedy.

It is urged, however, that by the mention of all the superior

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courts of common law and equity and by the omission of mention of the Court of Divorce and Matrimonial Causes (1857, 20-21 Vict. c. 85, s. 6) the intention of the legislature was clearly indicated that the Supreme Court should not have jurisdiction in any case in respect of divorces *a vincula matrimonia*, or divorces *a mensa et thoro*, or judicial separation or in suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage or other causes, suits or matters matrimonial (see s. 5). Except, of course, where any of these subjects are specifically mentioned in the clauses giving jurisdiction.

In 1894 the Dominion parliament, legislating not for the Dominion but for the North-west Territories, passed the following provisions: (57-58 Vict. c. 17, s. 20)—

For the removal of doubts it is hereby declared that subject to the provisions of the North-west Territories Act the legislative assembly has and shall have power to confer on Territorial courts jurisdiction in matters of alimony.

This was accordingly done, C. O. (1898), c. 29, s. 1; Supreme Court Act (Alberta), s. 16.

The Dominion parliament, it therefore appears, expressly left in doubt the question of the effect of its own legislation in establishing the Supreme Court of the North-west Territories and conferring jurisdiction upon it and in introducing the laws of England.

The Supreme Court Act (Alberta) s. 18, enacts:—

The court shall have jurisdiction to entertain an action for criminal conversation. The law applicable to such actions shall be as the same was in England prior to the abolition of such action in England and the practice shall be the same as in other actions in the Court, so far as is applicable.

S. 59 of the English Act of 1857 expressly enacts that—"After this Act shall have come into operation no action shall be maintainable in England for criminal conversation."

The enactment whereby the legislature of the province expressly conferred jurisdiction upon the court in *crim. con.* and in addition concurrently re-established the former law of England in that respect, it seems to me, furnishes an argument neither one way nor the other regarding the question before us.

The English Act of 1857 had expressly abolished that kind of action. The right to bring such actions consequently formed no part of the body of the law in England introduced into the Territories as of July 15, 1870, nor consequently did the conferring upon the court of the jurisdiction of the English Courts of Common Law and Equity introduce that class of action.

Again, the Territorial legislature evidently assumed that the Supreme Court of the Territories had jurisdiction to pronounce nullity of marriage; for by statutory rule introduced by c. 10 of 1901, s. 3, it was enacted that—

(Statutory) Rule 99 of the said rules be amended by adding thereto the following words:—

Provided that no final judgment of nullity of marriage shall be entered (whether or not there is default of appearance or defence) until the court or judge is satisfied by evidence of the truth and sufficiency of the facts on which the claim for such judgment is founded.

Acting upon this view, my brother Hyndman has recently held in a case of *Cox* v. *Cox* not yet reported, (40 D.L.R. 195), correctly, in my opinion, that the court has jurisdiction to pronounce nullity of marriage.

Apart from constitutional questions arising upon the B.N.A. Act, jurisdiction would exist only on the ground that certain facts, by law, gave a right to a declaration of nullity and, the Supreme Court of the Territories being a superior court exercising all the powers of the English courts of common law and equity, it necessarily followed that there existed in that court jurisdiction to give a remedy.

I think that by refraining from conferring upon the court the jurisdiction of the Court for Divorce and Matrimonial Causes the intention, first of the Dominion parliament, then of the legislative assembly of the Territories and then of the legislative assembly of the province, was not to restrict the presumably almost universal jurisdiction of a Superior Court of Law and Equity over "property and civil rights." Had the Dominion parliament passed a law relating to divorce, without constituting a special court to deal with such cases, and without indicating what existing provincial courts might exercise jurisdiction, can there be a doubt that the Supreme Court of this province would have the necessary jurisdiction? We have more than once been called upon to decide whether some particular law of England existing on July 15, 1870, is in force in this province. The extent of the legislative powers of the province and of the Dominion respectively with regard to a variety of subjects has been a matter of much debate during forty years, and it was only gradually during that period that the principles of interpretation of the B.N.A. Act have, mainly of course by the decisions of the Judicial Committee of the

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Privy Council, become sufficiently defined to enable any one to come to an unhesitating opinion upon such a question as was raised in *Watts* v. *Watts*, [1908] A.C. 573.

It must be remembered that by the B.N.A. Act the Dominion parliament is given exclusive jurisdiction not only in respect of divorce but also in respect of marriage (excluding the solemnization of marriage). Nullity of marriage is, therefore, I think, equally with divorce, subject to the right of the Dominion parliament to deal exclusively with regard to it.

By the year 1901, as I have already pointed out, the legislative assembly of the Territories had apparently become convinced that there was in force in the Territories a law, derived not from Dominion legislation but, therefore, necessarily derived from English law, whereby under certain states of fact a marriage was null and, that being so, that the Supreme Court of the province had jurisdiction so to declare. Now, after admittedly a general impression to the contrary effect and then an uncertainty of opinion, it is found that the Judicial Committee of the Privy Council has so decided that the English law of divorce must be held to be in force in this province. That being so, I am unable to accept any other view than that it was always intended that the Supreme Court of the province should have jurisdiction to apply and to give every appropriate remedy based upon any law which might ultimately be found to be in force within the province.

In my opinion, for the reasons which I have indicated, the motion to dismiss the petition in the present case ought to be dismissed on the ground that this court has jurisdiction to entertain an action for divorce. Counsel have agreed that no objection would be made on the ground that the proceedings ought to have been commenced by statement of claim instead of petition. In my opinion the ordinary procedure, commencing by statement of claim, is the proper procedure, but the irregularity in this respect is of no importance and has been waived.

Circumstances make a call upon me to add some further observations.

In *Watt* v. *Watt*, 13 B.C.R. 281, at p. 282, counsel for the Attorney-General of British Columbia on argument said that in that province jurisdiction in divorce had been exercised for 30 years

by every judge who had sat upon the bench, with the exception of two, namely, Davie, C.J., and McCreight, J., who declined to exercise the jurisdiction from religious motives.

In *Sheppard* v. *Sheppard*, 13 B.C.R. 486, at p. 493, Martin, J., refers to this statement of counsel in the earlier case and says that the two judges mentioned were "converts to the Roman Catholic religion" and attributes the fact of their not exercising jurisdiction in divorce cases to "their very proper conscientious scruples."

Now, as is well and generally known, I am a Catholic, and, though I know of no reason why it is of consequence, a convert—of more than thirty years ago; and for nearly the whole of that period I have lived within what is now the jurisdiction of this court practising my profession until my appointment to the bench of this court, where, in the ordinary course of things, I may be expected to remain for some years to come.

Observations of various persons occasioned by the raising of the question of the jurisdiction in divorce of the courts of the Provinces of Manitoba, Saskatchewan and Alberta as well as the remarks to which I have already alluded, have made it clear to me that the opinion commonly prevails that, being a Catholic, I cannot with a good conscience take part in any divorce proceedings arising in this court. I do not know what foundation in fact there is for the suggestion that Davie, C.J., and McCreight, J., felt that they could not conscientiously do so; either there is a mistake in attributing that view to them or they had not sufficiently considered the question to lead them to the view which is well recognised by Catholic theologians. At all events, I cannot permit it to be supposed that in the event of my acting as judge in a divorce case I shall be acting in any way with a bad or uneasy conscience. I accept absolutely without hesitation the doctrines of the Catholic Church with regard to faith and morals. I accept and fully recognise the obligations of conscience imposed upon me by the canon law of the Catholic Church. Yet, sitting as a judge in a court established by the authority of the State to administer the laws of the State, my duty is to find the true facts and to declare the civil law applicable to those facts. I am in no way, for instance, in a divorce case, responsible for the law of the State, which, in contradiction to the law of Church, declares that after a decree of divorce, *a vincula matrimoni* in the case of a valid marriage between Christians *ratum et sconummatum*, the parties may

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lawfully remarry nor for the act of either of the parties, if they see fit to avail themselves of that permission. So clear is the principle involved that a Catholic husband or wife may, with a good conscience, apply for a decree of divorce or judicial separation where the proper foundation of facts exist, and where such a decree is necessary either to effectuate in the eyes of the civil law a decision of an ecclesiastical court or to secure the applicant's rights in respect of the custody of the children, or in respect of property, or for other sufficient reason, both parties remaining, of course, subject in conscience to obligation, notwithstanding the permission of the civil law, of not marrying again during the lives of both of them, if the marriage was one which was valid and binding by the canon law. The addition of this condition clause is of importance; for, as every one knows, by the canon law there exist impediments in certain cases which absolutely nullify the marriage and, by the civil law similar, though not so far reaching, impediments also exist; and consequently, the civil law fully recognises both in principle and in practice the difference between divorce *a vinculo matrimoni* and a declaration of nullity of marriage. Not only is the distinction very commonly confused in the popular mind but a particular case may fall within one class by the canon law and into another in view of the civil law.

The foregoing remarks, I have become convinced, are necessary in order that there may be no justification for misunderstanding the attitude of myself as a judge and of my fellow-Catholics generally, with regard to "divorce cases" which may come before this court as in the future they doubtless will from time to time.

In my opinion, the defendant's motion to dismiss the petition ought to be dismissed without costs.

Simmons, J.

SIMMONS, J.:—The determination of the question of jurisdiction of this court in divorce lies within the interpretation of ss. 11 and 48 of the North-west Territories Act, c. 50, R.S.C.

S. 11 introduced the laws of England of July 15, 1870, applicable to the Territories and is sufficient and ample in terms to include the laws of England in regard to divorce. *Watts* v. *Watts*, [1908] A.C. 573.

The controversy really arises in regard to s. 48. The first five lines ending with "jurisdiction" in the middle of the fifth line is quite consistent with the hypothesis that there was no intention

in s. 48 to limit the jurisdiction of the court in any degree. The omission of mention of the Court of Divorce and Matrimonial Causes raises the question of whether a limitation is implied, for clearly no limitation is expressly declared in the remainder of the section. If the omission can be reconciled with the express terms of the unqualified jurisdiction set out in the opening sentence of the section then no difficulty arises. In my opinion there is a very satisfactory explanation for the omission. The federal parliament was conferring upon these Territories a wide measure of self-government, having in contemplation the formation of a province or provinces in the future, which provinces would take their place with the provinces existing in the Dominion under the B.N.A. Act. Some of the older provinces, *e.g.*, Nova Scotia and New Brunswick, brought with them when they entered the Confederation the jurisdiction of their courts in regard to divorce, and have retained and exercised the same. Legislation subsequent to Confederation in regard to divorce was assigned exclusively to the federal parliament by s. 91 (26) of the B.N.A. Act.

Aside from granting divorces by private Acts the federal parliament did not interfere by way of general legislation in regard to this subject matter, although the right under the B.N.A. Act to create a court or courts of divorce is not questioned. In 1877 the Courts of British Columbia asserted and exercised jurisdiction in divorce which jurisdiction was upheld in *Watts* v. *Watts*, *supra*.

In the same province the Parliament of Canada continued to grant petitions for divorce by way of private Acts. See c. 82, statutes of Canada (1892) being an Act for the Relief of James Wright, of the Town of Donald, in the Province of British Columbia. C. 85 of 20 & 21 Vict. sets out in the preamble

> Whereas it is expedient to amend the law relating to divorce and to constitute a court with exclusive jurisdiction in matters matrimonial in England, etc.

S. 10 provided that all petitions either for the dissolution or for a sentence of nullity of marriage *shall be heard and determined by three or more* judges of the said court. Subsequent legislation in the Imperial parliament upon the subject did not affect the principle of the exclusive jurisdiction vested in this court.

If the Supreme Court of the North-west Territories had re-

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ceived jurisdiction in terms commensurate in regard to the exclusive jurisdiction vested in the Court for Divorce and Matrimonial Causes in England, it would be consistent with the theory that the Parliament of Canada did not intend to interfere in the matter while the North-west Territories Act remained in force, and that it was the intention of parliament to vest exclusive jurisdiction in the court just as had been done in England.

If, on the other hand, the Parliament of Canada intended to give the Territorial Court jurisdiction over the subject matter without prejudice to the right of the petitioner to apply for relief to parliament by way of private Act then I am of the opinion that the Court for Divorce and Matrimonial Causes would not be included in the last part of the section.

The latter interpretation reconciles the first part of the section assigning to the court "all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction," and the succeeding part of the section enumerating the courts in England. This view is consistent with the subsequent action of the federal parliament in granting divorce in the Province of British Columbia while the courts of that province were granting the same relief by way of petition to the courts, and would result in placing the Territories upon the same basis as the Province of British Columbia.

The Alberta Act, c. 77, of 1905, creating the province out of a part of the North-west Territories continued the laws then in force as well as the courts and provided that the legislature of the province might abolish the Supreme Court of the North-west Territories for all purposes affecting or extending to the province *as well as the jurisdiction of the said court.*

This specific preservation with the right of abolition implied the power to retain the court as well as the jurisdiction, as was indeed done.

In 1907, however, the provincial legislature abolished the court but preserved the jurisdiction of the former court in the newly-constituted Supreme Court of the province, c. 3 of 1907 of Alberta, ss. 9 and 22. Not only was the power given to the province in the Alberta Act constituting the province by implication to confer upon the provincial court all the jurisdiction of the Territorial Court, but the legislative power to confer such jurisdiction would fall

within s. 92 (14) of the B.N.A. Act, which assigned to the province the constitution, maintenance and organisation of provincial courts.

Until the federal parliament legislated in order to separate divorce from that division of the law over which the federal parliament exercised exclusive legislative jurisdiction the provincial court would have jurisdiction in divorce quite as logically as in regard to the laws governing bills of exchange, banking, interest and other subjects enumerated in s. 91 of the B.N.A. Act. Once conceded that the laws of England were introduced, there is a presumption in favour of jurisdiction in a superior court, *Watts* v. *Watts, supra,* and it will require specific and unambiguous language to rebut the presumption.

I am of the opinion therefore that the court has jurisdiction to entertain the petition.

Hyndman, J.

HYNDMAN, J.:—The petitioner seeks a dissolution of the marriage between himself and his wife, the respondent, on the ground of infidelity.

The matter came before Walsh, J., by way of motion by the respondent to quash the petition on the ground of want of jurisdiction in the court to entertain it; but instead of hearing the application the learned judge referred it to this court, it being the first occasion upon which the right to grant a divorce has been raised.

At the argument, a good deal was said with reference to the history of this part of Canada whilst under the rule of the Hudson Bay Co. and up to the date of Confederation. To my mind, what transpired during that period affecting the administration of law or the jurisdiction of the courts, whilst very interesting from an historical standpoint, has no material bearing on the point at issue.

It seems to me unnecessary to go behind the Imperial statutes known as Rupert's Land Act, 30-32 Vict. c. 105 (1868), and Statutes of Canada after Rupert's Land and the North-west Territories became part of the Dominion by virtue of the (Imperial) Rupert's Land Act.

S. 5 of that Act reads:—

> And thereupon it shall be lawful for the Parliament of Canada from the date aforesaid, to make, ordain and establish within the lands and territories so admitted as aforesaid, all such laws, courts and offices as may be necessary for the peace, order and good government of Her Majesty's subjects and

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others therein. Provided that until otherwise enacted by the said Parliament of Canada, all the powers, authorities, and jurisdiction of Rupert's Land, and the several officers thereof, and of all magistrates and justices now acting within the said limits shall continue in full force and effect therein.

In consequence, the Parliament of Canada took steps to organise the newly-acquired territory and as a very first essential it had to be declared what laws were to obtain therein and courts had to be established for the administration of such laws.

On June 22, 1869 (32-33 Vict. c. 3), parliament passed an Act for the temporary government of Rupert's Land and the North-west Territories in union with Canada, which continued all the laws hitherto in force so far as the same were consistent with the B.N.A. Act, 1867. In 1871 an Act was passed (34 Vict. c. 16) making further provision for the Government of the North-west Territories and provides for the appointment of a Lieutenant-Governor and conferring upon him certain powers.

S. 4 of the Act continues in force the laws theretofore existing.

On June 2, 1886, parliament passed another Act (49 Vict. c. 25) entitled an Act further to amend the law respecting the North-west Territories, which is the really important statute in regard to this question.

S. 11 reads:

Subject to the provisions of this Act the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, in the year of our Lord 1870, shall be in force in the Territories in so far as the same are applicable to the Territories and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or effected, by any Act of Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor-in-Council or of the legislative assembly.

S. 41 constitutes a Supreme Court of Record of Original and Appellate Jurisdiction.

S. 48 reads:—

The court shall within the Territories *and for the administration of the laws for the time being in force* within the Territories, possess all such powers and authorities as by the law of England are *incident to a superior court* of *civil* and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a court of record and all other rights, incidents and privileges as fully, to all intents and purpose, as the same were on the 15th day of July, 1870, used, exercised and enjoyed by any of Her Majesty's superior courts of common law, or by the Court of Chancery, or by the Court of Probate in England; and shall hold pleas in all and all manner of actions, causes, and suits as well criminal as civil, real, personal and mixed; and shall proceed in such actions, causes, and suits by such process and course

as are provided by law, and as shall tend with justice and dispatch to determine the same, and may and shall hear all issues of law and may and shall also hear and (with or without a jury, as provided by law) determine all issues of fact joined in any such action, cause, or suit, and give judgment thereon and award execution thereof, in as full and as ample a manner as might at the said date be done in Her Majesty's Court of Queen's Bench or Common Bench, or in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer, or by the Court of Chancery or the Court of Probate in England.

In 1905, the Parliament of Canada (by the Alberta Act, 4-5 Edw. VII. c. 3), established and provided for the government of the province of Alberta.

S. 16 of the Act enacts:—

All laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor, and all courts of civil and criminal jurisdiction, and all commissions, powers, authorities, and functions and all officers and functionaries, judicial, administrative and ministerial, existing immediately before the coming into force of this Act in the territory hereby established as the Province of Alberta, and shall continue in the said province as if this Act and the *Saskatchewan Act* had not been passed; subject, nevertheless, except with respect to such as are enacted by, or existing under Acts of Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered by the Parliament of Canada or by the legislature of the said province according to the authority of the parliament or of the said legislature:

Provided that all powers, authorities and functions which, under any law, order or regulation, were, before the coming into force of this Act, vested in or exercisable by any public officer or functionary of the North-west Territories shall be vested in and exercisable in and for the said province by like public officers and functionaries of the said province, when appointed by competent authority.

In 1907, the legislature of Alberta constituted the Supreme Court of Alberta, and s. 5 thereof enacts:—

The court shall consist of a Chief Justice who shall be styled "The Chief Justice of Alberta" and eight puisne judges who shall be called and be the justices of the court . . . and the Chief Justice of and justices of the court shall have, use and exercise, and enjoy all the powers, rights, incidents, privileges and immunities of a judge of the superior court of record, *and all other powers*, rights, incidents, privileges and immunities as amply and as fully, to all intents and purposes, as the same were, on and prior to the 15th day of July, 1870, used, exercised, and enjoyed by any of the judges of any of Her late Majesty's superior courts of law, or equity, or by the judges of Her late Majesty's Court of Exchequer as a court of revenue, or by the judges of the Court of Probate in England as well as by the judges of any of Her late Majesty's courts created by commissions of Assize, of Oyer and Terminer, and of Gaol Delivery or any of such commissions.

S. 9 sets forth the jurisdiction of the court as follows: which is equally as extensive as the former N.W.T. court.

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The principal points for determination are: (1) Is the law of divorce as it was in England on the 15th day of July, 1870, applicable and in force in this province, and (2) if so, has the Supreme Court the jurisdiction to entertain actions or petitions for divorce?

The question of applicability in my opinion is disposed of by the decision in *Watts* v. *Watts*, [1908] A.C. 573, where it was held in the Privy Council that the Divorce and Matrimonial Causes Act (1857), was in force in the Province of British Columbia.

The conditions in British Columbia were not fundamentally different from those existing in this part of Canada at the time of the introduction of the English civil laws there and here. It is surely quite as proper that citizens of Alberta should be entitled to divorce as those in British Columbia, or any other part of Canada.

It was decided in *Watts* v. *Watts* (*supra*) that the proclamation of Sir James Douglas imported the law of divorce into the Province of British Columbia, the words of the proclamation being as follows:—

> The civil and criminal laws of England, as the same existed at the date of the said proclamation, and so far as they are not from local circumstances inapplicable to the colony of British Columbia are, and will remain, in full force, etc.

I fail to appreciate any substantial distinction between the wording of the proclamation and that of s. 11 of the North-west Territories Act, 1886, set forth.

If the law of divorce was introduced into the Territories by the N.W.T. Act, then such law was continued in the province by virtue of the Alberta Act.

The only possible argument against the proposition that we have the law here is because, in mentioning the various English courts the Divorce Court was omitted; and that, therefore, it was not the intention of parliament that this part of the law should be introduced, and that in any event the Supreme Court has not the jurisdiction to administer it even if the law is in force.

The case of *Watt* v. *Watt* (*supra*) establishes without question that the law of divorce was part of the Civil Law of England in 1870.

When the Parliament of Canada enacted that the laws of England, of 1870, relative to civil and criminal matters were in force in the North-west Territories why should it be sought to

exclude the law of divorce, in the absence of a clear and unmistakable intention on the part of the legislature to do so? The Dominion Parliament has exclusive jurisdiction to legislate in regard to the subject and it would have been a simple matter to insert words expressly excepting this law.

The law itself, in my opinion, must be distinguished from and not confused with the court, and the administration of law.

The language of s. 48 of the Act of 1886 is to my mind very wide and comprehensive and cannot be said to in any way limit its jurisdiction to that of the courts enumerated therein. It reads in part:—

> The Court shall, within the Territories, *and for the administration of the laws for the time being in force therein possess all such powers and authorities as by the laws of England are incident to a superior court of civil and criminal jurisdiction*, etc.

The expression is not, "shall administer such laws only," as the English courts administered but "*such laws as are in force*" in the Territories—which by virtue of s. 11 embrace all the law of England as it stood on the 15th July, 1870.

In my opinion the clauses naming the English courts were not intended to "define" and "limit" the powers and jurisdiction of the court, but were rather directory or as a guide to the newly-created court. The whole body and not a part of the civil and criminal law of England was imported into the Territories and it seems difficult to understand why, because a special court which administered a part of that law is not mentioned, such law was not intended to be included, and that a superior court should be held unable to give effect to so important branch of the civil Law. To say that our court may exercise its rights and privileges in "*as full and ample a manner*" and "*as fully as*" those named surely does not restrict its powers, but, I think, must be regarded merely as illustrative of what the court or judge may do.

New laws are continually being passed in this province which did not exist in England. It is not necessary to mention a court each time such a law is enacted but a superior court will, and I should think is bound to, assert jurisdiction so that the law may become effective.

In *Spooner* v. *Juddow*, 6 Moo. P.C. 257, at 273, 13 E.R. 682, at 688, Lord Langdale says:—

> The defence to the want of jurisdiction of the Supreme Court could not be

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put in issue under the plea of "not guilty." The defendants ought to have pleaded the want of jurisdiction specially. The Supreme Court at Bombay being the court of highest jurisdiction, and having a general jurisdiction within the town of Bombay, could not be ousted of that jurisdiction, over any matter of complaint instituted therein, except by a plea to the jurisdiction, shewing positively and affirmatively what court, other than the Supreme Court, had jurisdiction over such matter of complaint.

In *Derby* v. *Athol* (1748-49), 1 Ves. sen. 202, 27 E.R. 982, it was laid down, that in a plea to the jurisdiction it must be shewn what other court has jurisdiction. A plea to the jurisdiction of a general court must shew where the jurisdiction vests, as well as negatively that it is not there; the reason of this is that, in suing for his rights, a person must not be sent everywhere to look for a jurisdiction, but must be told what other court has jurisdiction. There is a presumption that nothing shall be intended to be out of the jurisdiction of a superior court which is not shewn and alleged to be so, differing from an inferior court within whose jurisdiction nothing is intended to be, which is not alleged to be so.

Parliament having introduced all the civil law of England as it stood on July 15, 1870, into the Territories and which was contained and carried into the province and being of the opinion that the civil law included the law of divorce, I have come to the conclusion that the Supreme Court, being a superior court of record, notwithstanding the absence of any reference to the divorce court in the sections conferring jurisdiction has the necessary jurisdiction to entertain the petition in question, and I would, therefore, dismiss the application without costs.

Judgment accordingly.

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New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown and Grimmer, J.J. June 21, 1918.

MECHANICS' LIENS (§ V—32)—SEVERAL DIFFERENT HOUSES—WORK DONE ON ALL—CONSOLIDATION OF LIENS—VALIDITY.

The provisions of the Mechanics' Lien Act of New Brunswick (C.S.N.B. 1903, c. 147) although allowing any number of lien holders to be joined in one suit do not enable a lien holder to consolidate liens against several different buildings. Each individual building must bear the burden of its own construction.

Statement.

APPEAL from the Westmorland County Court, the Judge of the Kings County Court presiding, to set aside a judgment for the plaintiff in an action under the Mechanics' Lien Act, c. 147,

C.S.N.B. 1903. Appeal allowed with costs, and lien registered ordered to be cancelled.

A. J. Leger, for defendants; *F. P. Murphy, contra.*

McKEOWN, C.J., K.B.D.:—This is an appeal from a decision and judgment rendered by Jonah, Judge of the King's County Court, in the matter of a claim under the Mechanics' Lien Act, by which the respondent is seeking to enforce a lien on two buildings belonging to the appellant, upon which the respondent claims to have done 29 1-3 days' work as a carpenter.

The matter arose in the Westmorland County Court, and in consequence of illness, the late Borden, J., designated the Judge of the King's County Court to try the case. The lien was filed in the registry office of the County of Westmorland on August 31, 1917, and on September 19 the late Borden, J., directed that the matter be heard at his chambers in the City Building at Moncton with a view of determining whether the plaintiff was entitled to the lien claimed, and if so, that all necessary accounts would be taken for the purpose of enforcing the same. A notice disputing the plaintiff's right to such lien was filed and served upon the claimant, in which various defences are put forward, and the same were duly considered by the Judge of the King's County Court, so acting, in the manner aforesaid, with the result that he found there was due the claimant thereunder the sum of $80.05. A large number of objections were taken, dealing with both the procedure and the merits of the plaintiff's claim, and the same were disposed of by the County Court Judge. Some of them had to do with the facts of the case, which, being passed upon by the court below, will not be disturbed here. It seems that the plaintiff O'Brien worked as a carpenter upon two separate houses owned by the appellant Fraser, which houses were being constructed under a contract entered into between the owner Fraser and one Gallagher, a builder. It was argued before the County Court Judge that O'Brien was a co-contractor with Gallagher, but the judge declined to accept that view, and this is one of the questions of fact disposed of by him in the court below. The buildings so erected, and upon which claimant's work was done, were situate one on Birch St., and one on Union St., in the city of Moncton. There is no doubt that such buildings are wholly separate and in different parts of the city. In his claim filed in the registry office,

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the plaintiff describes the lands upon which he seeks to maintain his lien, and the amounts claimed as due him on each respective building.

It will be observed that plaintiff claims the sum of $171, to have been due him for work done upon the first lot, which is called the Birch St. lot; and the sum of $21.75 for work done upon the building situate on the Union St. lot. After deducting credits of $113 from the total, he claims $80.05, being a general balance for which both houses, in his view, are liable. It is clear that he might have applied a portion of the $113 received by him to the indebtedness due him for work done on the building on Union St., which would have wiped out that amount of respondent's indebtedness to him, and left the said balance as operative solely upon the Birch St. property. He has not taken this course and claims to be within his rights in attaching both properties. And the main question for decision is whether the statute, which gives the right to the lien, justifies the claimant in the course which he has taken. Apparently, the money is honestly due to the claimant, but it is clear that as he is pursuing statutory remedy, he must bring himself within the sections of the Act upon which he relies.

In a considered judgment, the Judge of the County Court has sustained the plaintiff's view. He remarks:—

That the contract, although covering the work on two disconnected houses, does state a definite price for each house and is thus divisible, and that both houses and lots are the property of one owner, Fraser. And thus there are no separate interests to be considered, thus differing in both respects from the case of *Barr & Anderson* v. *Percy & Co.*, 7 D.L.R. 831, cited by Mr. Leger, or *Ontario Lime Assn.* v. *Grimwood*, 22 O.L.R. 17, where these points are fully discussed by Middleton, J.

And the judge further says:—

Even if it were true that the payments being allocated to the work on the second or Union Street house would shew that nothing was due thereon, that would only entitle the owner to have the lien discharged as to that property, and the onus is upon him to shew such a state of facts, which he has not done. *Brown* v. *Allen*, 13 D.L.R. 350, not only shews, but the evidence distinctly shews, that if all the payments made by the owner to plaintiff were appropriated to the Birch St. house, there would still be a balance due him, and as to the second or Union St. house, it was admitted that plaintiff was unpaid for his work done upon the cement forms, so that he is under these facts entitled to maintain the lien against both properties.

With due respect to the views of the court below, I am unable to come to this conclusion. Referring to ss. 4 and 5 of the Mechanics' Lien Act, c. 147, C.S.N.B. (1903), it seems to me they can

bear no other construction than that each individual building must bear the burden of its own construction. They read as follows:—

4. Unless he signs an express agreement to the contrary, every mechanic, machinist, builder, laborer, contractor or other person doing work upon or furnishing materials to be used in the construction, alteration or repair of any building or erection, or erecting, furnishing or placing machinery of any kind, in, upon or in connection with any building, erection or mine, shall, by virtue of being so employed or furnishing, have a lien for the price of the work, machinery or materials upon the building, erection or mine and the lands occupied thereby or connected therewith.

5. The lien shall attach upon the estate and interest of the owner, as defined by this chapter, in the building, erection or mine upon or in respect of which the work is done or the materials or machinery placed or furnished, and the land occupied thereby or connected therewith.

The case relied upon by the County Court Judge had to do with circumstances very different from those now before us. I can understand how a judge before whom a claim in the nature of a lien upon buildings is made, which claim is founded upon materials supplied, in which it was impossible to distinguish how much and what materials had gone into each individual building, might be inclined to give the statute a broad construction in order to prevent the material-man from losing his claim. That seems to have been the course taken by Middleton, J., in the case relied upon by the County Court Judge. The head-note says:—

Where one owner enters into an entire contract for the supply of material to be used in several buildings, the material-man can ask to have his lien, . . . follow the form of the contract and that it be for an entire sum upon all the buildings.

So far as I have been able to see, this is the only Canadian case which has proceeded upon such a principle, and the judge is careful to distinguish this case from that of *Dunn* v. *McCallum* (1907), 14 O.L.R. 249, cited below, in which certain lumber was supplied to a contractor who had on hand several contracts with different persons for the erection of distinct buildings. The lumber so purchased went into these buildings, but no one could say how much went into any particular one, nor was there any way by which the payments made by the contractor to the material-men generally, upon accounts, could be applied. Under these circumstances, Middleton, J., goes on to say, the plaintiff failed because he could only have a lien upon the lands of the owner upon shewing that material for which he had not been paid had gone into that particular building. I think the law is correctly stated in Wallace's Mechanics' Lien Laws in Canada (1913), where at p. 17 he says:—

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The lien extends only to the property upon or in respect of which the work is performed or the materials furnished to be used, and the lands occupied thereby or enjoyed therewith, and this being so it follows that though the work is done under one contract and for the same owner, no lien is created upon the property for work done or materials furnished upon another distinct property. *Currier* v. *Friedrick* (1875), 22 Gr. 243; *Dunn* v. *McCallum*, 14 O.L.R. 249; *Barr & Anderson* v. *Percy & Co.*, 7 D.L.R. 831; *Oldfield* v. *Barbour* (1888), 12 P.R. (Ont.) 544; *Larkins* v. *Blakeman*, 42 Conn. 292; *Rice* v. *Nantasket Co.* (1885), 140 Mass. 256; but a joint lien may be had upon a number of structures built or repaired under a single contract and thus connected in construction and ownership. In reality they are to be considered as one building or structure. Thus, semi-detached houses, or houses erected in a row would be treated as one building (*Ontario Lime Assn.* v. *Grimwood*, 22 O.L.R. 17; *Crapper* v. *Gillespie*, 11 W.L.R. 310; *Windfall Nat. Gas Co.* v. *Roe* (1908), 42 Ind. App. 278.

I do not think that there was any onus upon the owner to shew that there was nothing due upon either of the houses in question. I think the whole burden of the procedure and the course adopted must rest with the claimant who institutes the process. The case of *Brown* v. *Allen*, 13 D.L.R. 350, mentioned, in that regard, by the County Court Judge had to do with a lien claimed by a sub-contractor for labour done under an entire contract to put in the plumbing and heating in a certain building, his claim for materials under the contract being disallowed, and a question arose as to what balance was due the original contractor. It is not necessary as to either of these Ontario cases, that an opinion should be expressed by this court, but it can readily be seen that, in both cases, the circumstances are very different from the matter in dispute here. Certainly no case has been cited to us in which it has been held that where a definite labour account has been kept against each building, the workman is entitled to lump the two accounts together and claim against both buildings for his total. I do not think that is the proper construction of the statute, and being of that opinion, it is unnecessary to give consideration to any other point. I think this appeal should be allowed with costs and that the lien registered should be cancelled.

Grimmer, J.

GRIMMER, J.:—(After setting out the facts.)

On the argument of the appeal the claim seems to have narrowed itself down to practically two grounds, one being that there should have been two liens filed, and the other that the certificate of appointment made by the Judge of the Westmorland County Court was bad.

The claim had its origin in an agreement made the 30th day of March, 1916, between the defendants Fraser and Gallagher, whereby Gallagher in consideration of the sum of $900 undertook to supply and perform all the labour necessary to complete two houses for the defendant Fraser, so far as the carpenter work, including forms for concrete walls, is concerned, $450 to be paid for each house, according to the terms of the agreement. These houses were situate on separate and distinct lots in different portions of the city of Moncton. The plaintiff claimed and gave evidence to support the same that he was hired by the defendant Gallagher as a carpenter to work on these houses; that he performed work and labour according to the statement filed amounting to $193.05, and that he had received on account of his labour the sum of $110, leaving a balance due him of $83.05, as stated.

The defendants gave evidence whereby it was sought to be established that the plaintiff and the defendant Gallagher were in partnership, under the contract, though the plaintiff's name was not mentioned therein, and that consequently the defendant Gallagher and the owner Fraser were neither of them liable and the lien could not be maintained. The judge hearing the case had the witnesses before him, had the opportunity to judge as to their behaviour and demeanour on the stand, and found upon the facts proved that the partnership claim did not exist, and with that finding I am not disposed to interfere.

The case then narrows itself down to the second point stated, viz., that there should have been two liens, and that the learned judge was wrong in maintaining the lien as filed.

By s. 4 of the Mechanics' Lien Act before referred to (see judgment of McKeown, C.J.).

Treating this claim from the abstract standpoint of work performed by a labourer from day to day at a stated wage, for instance, as claimed, at 30 cents per hour, the question arises whether the plaintiff can file one lien to cover the work done at different times upon different buildings upon different lots of land, thereby making it as it were a consolidated claim, and maintain the lien.

There is no doubt that under the Lien Act any number of lien holders may be joined in one suit, but I am unable to find therein any provision for consolidating actions against the defendant where the lien holders have a claim against one or more properties.

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Grimmer, J.

Neither do I interpret the Act as contemplating that it will allow a man's property to be encumbered, even for a short time, with an alleged claim for which it might not be legally chargeable, and I am of the opinion that s. 4 of the Act as quoted means that each lot of land shall be liable for lien only in respect of the amount with which it is properly chargeable. S. 25 provides for the discharge of liens and for the cancellation thereof, under which it would seem that it was at least contemplated that an owner should be in a position or might place himself in a position at any moment to remove the encumbrance by paying the amount actually due and chargeable under the Act against the property. This he would not be able to do if the plaintiff were permitted to consolidate liens against several parcels of land. I am therefore of the opinion that no such lien as is claimed in this case has been created by the Act, and therefore it follows that the claim as filed is a nullity and must be set aside. Being of this opinion it is unnecessary to decide other questions raised on the argument, but I am strongly of the opinion that under s. 45 of the Lien Act a certificate should have been given by the Judge of the County Court determining the questions raised under the notice disputing the lien, before he proceeded to determine the matter finally. This, however, does not appear to have been required by any of the parties to the suit, and it is therefore not necessary to make a formal finding upon this ground.

In view of the opinion which I have expressed, it follows that the appeal must be allowed, and the finding of the Judge of the County Court of Kings designated to hear this cause must be set aside with costs.

Cases referred to: *Barr & Anderson* v. *Percy & Company*, 7 D.L.R. 831; *Boucher* v. *Belle-Isle*, 14 D.L.R. 146, 41 N.B.R. 509.

Appeal allowed.

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WALLBRIDGE v. STEENSON, AND WASECA SCHOOL DISTRICT BOARD OF TRUSTEES.

Saskatchewan King's Bench, Dist. of Battleford, Macdonald, J. June 26, 1918.

1. SCHOOLS (§ IV—70)—SCHOOL TAXES—PERSON ASSESSED NOT OWNER OR OCCUPANT—NOTICE NOT SENT TO OWNER—ASSESSMENT VOID.

An assessment for school taxes in the name of one who has no interest in the land and is not the occupant thereof, and failure to send any notice of assessment whatever to the owner of the property renders the assessment void.

[*The King* v. *Town of Grand Falls*, 13 D.L.R. 266; *Riesbech* v. *Creighton*, 12 D.L.R. 363, followed.]

2. TAXES (§ III F—146)—CONFIRMATION OF SALE FOR—APPLICATION—ALL PARTIES APPEARING TO HAVE INTEREST TO BE SERVED—LAND TITLES OFFICE RECORDS—ORDER NOT MADE IN ACCORDANCE WITH STATUTORY PROHIBITION—INVALIDITY OF.

Section 2 of c. 49, R.S.S. 1909 provides that no application for an order for confirmation shall be heard until all persons appearing by the records of the proper Land Titles Office to have any interest in the said land *have received notice* of such application; an order made in the face of this statutory prohibition is made without jurisdiction and is void.

The questions involved, not having been determined in a *regular* procedure, the doctrine of *res judicata* has no application.

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Statement.

ACTION to set aside a sale, transfer and confirmatory order, to cancel the certificate of title issued, and to restore the certificate of title of the prior registered owner, of land sold and transferred for non-payment of school taxes. Judgment for plaintiff.

W. W. Livingstone, K.C., for plaintiff; *G. A. Cruise*, for defendant School District; *R. Robinson*, for defendant Steenson.

Macdonald, J.

MACDONALD, J.:—From April 20, 1907, until February 8, 1917, the plaintiff was the registered owner of the south-west quarter of section 25, township 47, range 25, west of the 3rd meridian in the Province of Saskatchewan, under certificate of title numbered M 222. On December 13, 1909, there was formed the rural municipality of Wilton No. 472, and the said land was, and still is, included therein. The plaintiff resides in the city of Toronto, and never resided on said land, nor did any one, claiming under her, except during the year 1911, when the land in question was held by the defendant William J. Steenson under lease from the plaintiff. In all the other years in question, the land was unoccupied. The plaintiff was from year to year assessed in respect of said land by said rural municipality, and regularly paid her taxes to the municipality.

The said land is also included in Waseca School District No. 1953. When said school district was formed does not appear in evidence. The plaintiff was never assessed by the school district in respect of the said land, and, of course, never received any notice of assessment from such school district, but the school district in the years 1912, 1913 and 1914 assessed said land to William Steenson. The said William Steenson did not pay the school taxes for said years on said land, and, on July 15, 1915, the land was sold for arrears of taxes and purchased by the defendant, William J. Steenson, for $55.50, the amount of taxes in arrears against the land. The plaintiff had no knowledge whatever that

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there were taxes in arrears against said land, nor had she any actual notice of such sale.

The sale was advertised in two issues of the "Saskatchewan Gazette," those of June 30, and July 15, 1915, and in four issues of 'The Lashburn Comet," those of June 10, June 17, June 24, and July 1, 1915. The land not having been redeemed, the school district issued a transfer to the defendant Steenson, which transfer is dated October 5, 1916.

The defendant Steenson caused to be issued an originating summons for confirmation of such transfer. The abstract of title to said lands shewed the plaintiff to be the registered owner thereof, and her address to be "Toronto," and said summons embodied an order for service on the plaintiff by prepaid registered mail addressed: "Jane A. Wallbridge, Toronto, Ont." None of the parties appeared to the summons, and, on proof of the mailing by prepaid registered mail, pursuant to the directions contained in the summons, and of such non-appearance, the local master of the Supreme Court at Battleford made an order confirming the transfer. The transfer and order were thereupon registered, the certificate of title in the name of the plaintiff cancelled, as to said quarter section, and a new certificate of title freed from incumbrances issued in the name of the defendant Steenson, such certificate being dated February 8, 1917.

The evidence shews that the summons so directed by registered mail to the plaintiff at Toronto never reached her, having been lost in the post office at Toronto.

The law firm of Aylesworth, Wright, Moss & Thompson, Toronto, were the solicitors of the plaintiff, and the first intimation the plaintiff received of the existence of any school taxes against said land, or of the said sale, or confirmation, was through a letter dated April 28, 1917, from the secretary-treasurer of the rural municipality of Wilton to said firm, advising them that he was informed that the land had been sold for arrears of taxes.

It may be noted that under the School Assessment Act, c. 25 of the statutes of 1915, which came into force on January 1, 1916, and repealed c. 101 of R.S.S., 1909—the duty of collecting school taxes on the land in question devolved on the secretary-treasurer of the rural municipality of Wilton, and in 1916 the plaintiff was assessed for school taxes in respect of said land and paid such

taxes. The notices sent her by such secretary-treasurer did not, however, indicate to her that there were any arrears, nor that the land had been sold for such arrears, as the secretary-treasurer of the defendant school district did not notify the secretary-treasurer of the rural municipality of the fact.

After some fruitless negotiations, the plaintiff commenced this action against the Board of Trustees of Waseca School District, and W. J. Steenson, the purchaser at the tax sale, to set aside said sale transfer and confirmatory order, to cancel the certificate of title in the name of the defendant Steenson, and to restore the certificate of title in the name of the plaintiff.

That the assessment of the plaintiff's land in the name of William Steenson, who had no interest therein, and was not the occupant thereof, and the consequent failure to send any notice of assessment whatever to the plaintiff, rendered the assessment void, seems to me beyond question. *The King* v. *Town of Grand Falls*, 13 D.L.R. 266; *Riesbech* v. *Creighton*, 12 D.L.R. 363.

It is argued, however, that, inasmuch as the transfer in question was confirmed by the local master of the Supreme Court and the confirmatory order not appealed from, the question is *res judicata*.

The Act respecting the Confirmation of Sales of Land for Taxes (c. 49, R.S.S.), makes no provision for an appeal from an order confirming a transfer. An appeal is the creature of statute, and does not lie unless given by statute; therefore, there could be no appeal from the order in question.

Nor do I think that the doctrine of *res judicata* has application here. The law on the subject is thus summed up in 12 Encyc. of the Laws of England, 2nd ed., at p. 690:—

> When questions of fact or law have been directly and finally determined between parties in a proper and regular proceeding in a competent court, such questions may not be reopened as between these parties, and their privies, etc.

The questions involved here were not in my opinion determined in a *regular* procedure by the local master. S. 2 of said c. 49 provides that no application for an order for confirmation shall be heard until all persons appearing by the records of the proper Land Titles Office to have any interest in the said land *have received notice* of such application unless such notice is dispensed with by the judge.

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The records of the Land Titles Office shewed the plaintiff to be the registered owner of the land; notice of the application was not dispensed with, nor was it ever received by her. It is true that notice was forwarded as directed by the local master, but, as above stated, it was never received, and if that fact were known to the local master, he could not have made the order in question. The order having, in fact, been made in the face of the statutory prohibition, it was, in my opinion, made without jurisdiction and is void.

The order confirming being void, it follows that s. 77 of the School Assessment Act (c. 101 of the R.S.S. 1909), affords no answer to the plaintiff's claim.

Then it is argued that, inasmuch as the defendant Steenson obtained a certificate of title to the land, his title cannot be impeached, and reliance is placed on s. 169 of the Land Titles Act. Said section reads as follows:—

> 169. Every certificate of title and duplicate certificate granted under this A t shall except:
>
> (*a*) In case of fraud wherein the owner has participated or colluded; and
>
> (*b*) As against any person claiming under a prior certificate of title granted under this Act in respect of the same land; and
>
> (*c*) So far as regards any portion of the land by wrong description of boundaries or parcels included in such certificate of title so long as the same remains in force and uncancelled under this Act;
>
> be conclusive evidence in all courts as against his Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same for the estate or interest therein specified subject to the exceptions and reservations implied under the provisions of this Act.

In this case, however, the plaintiff does claim under a prior certificate of title granted under the Act in respect of the same land, and so comes within the exception of sub-s. (*b*).

Moreover, indefeasibility of title is by the Act secured only to those who obtain title relying on the register. *Reeves* v. *Konschur*, 2 S.L.R. 125, *per* Lamont, J.

In this case defendant Steenson did not so obtain title. I am, therefore, of opinion that there is no bar to plaintiff's right to recover.

There will, therefore, be judgment declaring the sale, transfer and order confirming same void, a direction to the Registrar of Land Titles to cancel the existing certificate of title in the name of the defendant Steenson, and to restore to the register the said certificate of title numbered M 222, in so far as it covers the said land, in the same condition as it stood in on February 8, 1917,

except that caveat No. R 2470, made by Gottlieb M. Kneller *et al.* and registered on October 24, 1914, shall be noted thereon as the caveators were not made parties to the action.

The plaintiff will have her costs of action.

Judgment for plaintiff.

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Re LAND REGISTRY ACT; Re GRANBY CONSOL. MINING & SMELTING CO.

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British Columbia Supreme Court, Macdonald, J. June 17, 1918.

LAND TITLES (§ I—10)—LIS PENDENS—CLOUD ON TITLE—REGISTRAR OF TITLES—DISCRETION—REFUSAL TO REGISTER TILL CLOUD REMOVED.

A certificate of *lis pendens* registered against lands, in an action in which the Crown grant of such land is attacked, creates a cloud upon the title to such land; the registrar of titles properly exercises the judicial discretion conferred on him by the Land Registry Act, R.S.B.C. (1911), c. 127, s. 116A (as amended by 4 Geo. V. (1914), c. 43, s. 66), in refusing to issue an indefeasible title until such cloud is removed.

[*Re Land Registry Act and Shaw*, 24 D.L.R. 429, followed.]

APPLICATION for an order directing registration of an indefeasible title. Refused. Statement.

Mayers, for company; Registrar in person; *H. B. Robertson*, for E. & N.R. Co.

MACDONALD, J.:—The Granby Consolidated Mining and Smelting Co. Limited, being dissatisfied with the refusal of the registrar-general to register certain conveyances affecting s. 2 and e. 60 acres, s. 3, r. 7, Cranbrook District, B.C., applies by way of petition for an order directing such registration. The refusal is based upon the fact that certificates of *lis pendens* have been registered on behalf of the E. & N. R. Co. and Bing Kee, in actions in which the Crown grant of such land is attacked. The root of title under which the Granby Consolidated Co. seeks to become a registered owner in thus questioned, and the registrar claims that such a cloud has been thus created upon the title that he is justified in his refusal to register conveyances which would vest an indefeasible title in the applicant. Macdonald, J.

If I were to comply with the petition I would, under s. 116 (A) of the Land Registry Act, R.S.B.C. (1911), c. 127 (as amended by 4 Geo. V. (1914), c. 43, s. 66), be required to declare that it has been proved, to my satisfaction, upon investigation, "that the title of the person to whom a certificate of title is directed to issue is a good, safe-holding and marketable title," *i.e.*, "a title which at all

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times and under all circumstances may be forced on an unwilling purchaser"—Dart, 7th ed., vol. 1, p. 92. The like necessity existed on the part of the registrar. He contends that he properly exercised his discretion under s. 14 of the Act, which declares that, if he is not satisfied that such a title exists, he may "in his discretion" refuse the registration. It is submitted that such discretion was improperly exercised, and that, notwithstanding such *lis pendens*, registration should be effected.

There is no doubt that if the certificates of *lis pendens* had been registered "since the date of the application for registration" of the conveyances, then the certificates of indefeasible title would under s. 22 (*g*) of the Act be subject to such *lis pendens*. They were, however, registered prior to the application for registration, and so the position thus created has to be considered.

It was argued on behalf of the applicant that the certificates of indefeasible title, if issued, would be subject to the *lis pendens*, and that the word "interests" in such a certificate included a *lis pendens*. I do not think this ground is tenable. While s. 71 of the Land Registry Act provides that "any person who shall have commenced an action in respect of any land may register a *lis pendens* against the same as a *charge*," still I do not consider this provision as to registration of a *lis pendens* means that it is to have the same effect and constitute a "charge," as interpreted by s. 72 of the Act. It merely provides a mode of registration. The certificate of *lis pendens* does not create an estate or interest, but is simply a notice that some estate or interest is claimed by the party bringing the action: see *Robinson* v. *Holmes*, 17 D.L.R. 372, at 375; also Armour on Titles, 3rd ed., p. 193:—

> A certificate of *lis pendens* is a mere allegation of fact, *i.e.*, that an action is pending, and the registration is designed to give notice to persons dealing with the land that some interest therein is called in question.

The case of *Pearson* v. *O'Brien*, 4 D.L.R. 413, was cited in support of the contention that the word "interests" mentioned in a certificate of title under the Manitoba Real Property Act included interests that are merely claimed as well as those established or admitted; Perdue, J. (now C.J.), certainly so held, but such conclusion, in this respect, was not essential for the determination of the point at issue. Further, the Manitoba Act provides for the filing of a *lis pendens* "in lieu of or after filing a caveat" either before or after the issuance of a certificate of title.

There is no section in our Act indicating this similarity between a caveat and a certificate of *lis pendens*. The procedure (as to caveats) is the same between the provinces in prohibiting the transfer or other dealing with land—unless the instrument sought to be registered is "expressed to be subject to the claim of the caveator." There is no corresponding provision as to a *lis pendens*. If the registrar were only "registering" instruments then there would be no difficulty, but he is examining and passing titles, and it would seem an anomaly to grant a certificate of indefeasible title where the Crown grant, forming the very basis of title, was attacked. It was proposed that even if the word "interests" did not include a certificate of *lis pendens*, an order might be made retaining such certificate of indefeasible title in the registry office, "to be held on behalf of all persons interested in the land," but unless such certificate be considered a "charge" there is no provision in the Act supporting such procedure. This conclusion is supported by the fact that it was deemed necessary in 1917 to pass legislation authorising the issuance of an "interim certificate of title" in certain events. The applicant, in my opinion, is thus forced to rely upon the contention that the certificates of *lis pendens* should have been ignored by the registrar in passing the title, on the ground that they do not create a cloud upon the title. This means, that the registrar having failed to do so, I should now determine that the actions in which such certificates of *lis pendens* were issued are so ill-founded that they will not succeed, and thus that I can, with safety and confidence, pay no attention to the *lis pendens*. In view of the fact that the interests involved are very important, this course should not be pursued, if any doubt existed on the point. If it were eventually decided that the plaintiffs in the actions were entitled to succeed, a very anomalous position would be created.

In the first place, it would be contrary to authorities in Canada, not to consider a *lis pendens* as a cloud upon a title. See Martin, J., in *Townend* v. *Graham* (1899), 6 B.C.R. 539, at 541:—

> It is now settled that such a *lis pendens* is a cloud on a title which a purchaser is entitled to have removed.

The question considered in that case was whether the purchaser was justified in refusing to make payments under an agreement for sale before the cloud created by a *lis pendens* had been removed,

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and the judgment clearly decides that the title thus affected could not be "forced" upon the purchaser. *Bobier* v. *Ont. Investment Assen.* (1888), 16 O.R. 259, to the same effect, is referred to with approval.

Even if, generally speaking, a certificate of *lis pendens* creates a cloud upon the title and gives notice of the plaintiff's claim, it is contended that it would not excuse a purchaser from completing his contract.

During the argument I referred to *Bull* v. *Hutchens* (1863), 32 Beav. 615, 55 E.R. 242, as giving support to this proposition, but in Armour on Titles, 3rd ed., 195, after mentioning this case, *Bobier* v. *Ont. Invest. Assen.*, *supra*, is referred to as follows:—

> In a recent case it was held that the vendor was bound to remove certificates of *lis pendens* in order to make a clear registered title.

In *Bull* v. *Hutchens*, *supra*, the head-note on this point is as follows:—

> A registered *lis pendens* does not create a charge or lien on the property nor does it excuse a purchaser from completing his contract. It merely puts him upon an inquiry on the validity of the plaintiff's claim.

In this contradictory state of the law of conveyancing, a number of authorities have been cited upon the question of what is a safe-holding and marketable title, and also as to the necessity of considering and deciding the validity of the plaintiff's claim in the actions in which such certificates of *lis pendens* were registered. In my view of the matter, I do not consider it necessary to discuss this position at length. The registrar in passing a title is, I think, in an analogous, if not stronger, position than a solicitor acting for a purchaser. While he is required to facilitate the transaction of business, and the registration of documents towards that end, still, when an indefeasible title is sought to be obtained, he should not ignore the rights and claims of parties brought to his notice. He should not be called upon, where an action has been brought, apparently in good faith, to determine, in advance, the result, nor do I think I should take a similar course. If the certificate of indefeasible title were issued, it would, under s. 22 of the Act, be good against the whole world, subject only to the exceptions referred to in said section, and these would not include any rights sought to be preserved by a plaintiff under a *lis pendens*, registered prior to the application, under which such a certificate of indefeasible title was issued.

In my opinion, the registrar properly exercised the judicial discretion which is referred to in *Re Land Registry Act and Shaw* (1915), 24 D.L.R. 429, 22 B.C.R. 116. His duties in the investigation of titles of various kinds are there outlined, and I do not think he has violated any of the principles referred to in that case.

I might add that, without any application being made for the cancellation of the *lis pendens*, the plaintiffs in the actions should speed the trial, on the same basis as they would be required to do where an injunction had been granted in their favour. See Blake, V.C., in *Finnegan* v. *Keenan* (1878), 7 P.R. (Ont.) 385, at 386:—

> I have always understood that where a party to a suit obtains an injunction he must proceed with the greatest possible expedition, and, a *lis pendens*, being in effect an injunction, the same rule applies to the present case.

See further, *Preston* v. *Tubbin* (1684), 1 Vern. 286, 23 E.R. 474:—

> Where a man is to be affected with a *lis pendens* there ought to be a close and continued prosecution.

In the view I have taken of the matter, I have not deemed it necessary to deal with the application of the Esquimalt & Nanaimo Railway Co. for an order prohibiting any registration in connection with the land, or the issuance of a caveat.

The application of the Granby Consolidated Mining & Smelting Co. Ltd. is refused, and in the meantime, pending the trial and final determination of the actions, the registrar should, by necessary extensions, provide that the applicant is not prejudiced by the delay in obtaining registration of the conveyances.

Application refused.

BRENNER v. CONSUMERS METAL Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 26, 1917.

1. CONTRACTS (§ IV B—330)—TEMPORARY EMBARGO—WITHIN CONTEMPLATION OF PARTIES—EMBARGO CONTINUING—REPUDIATION OF CONTRACT—REASONABLE TIME.

   If it is within the contemplation of the parties to a contract at the time the contract is entered into that an existing embargo of the railway company is of a temporary character and may be raised at any time, the vendor is not justified in repudiating the contract on the ground of impossibility of delivery until a reasonable time has elapsed; what is a reasonable time is a question of fact in view of the contemplated duration of the contract and circumstances of the case.

2. DAMAGES (§ III P—342)—CONTRACT—REPUDIATION—REASONABLE TIME —MEASURE.

   The measure of damages for breach of a contract to deliver goods, by repudiating the contract before a reasonable time has elapsed, on the ground of impossibility of delivery is the difference between the contract price and the market price at the place of delivery at the time the breach occurred.

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BRENNER v. CONSUMERS METAL CO.

Statement.

APPEAL by the plaintiffs from the judgment of DENTON, Jun. Co. C.J., dismissing an action brought in the County Court of the County of York, after trial without a jury.

By the action the plaintiffs sought to recover damages for the non-delivery of four car-loads of shrapnel turnings, in breach of an alleged contract for the sale by the defendant company, which carried on business in Montreal, to the plaintiffs, who carried on business in Toronto, of five car-loads of that commodity.

H. H. Shaver, for appellants; *Gideon Grant*, for defendant company, respondent.

The judgment of the Court was read by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment of the County Court of the County of York, dated the 26th October, 1917, which was directed to be entered by His Honour Judge Denton, after the trial of the action before him, sitting without a jury, on that day.

The action is brought to recover damages for the non-delivery of four car-loads of shrapnel turnings, in breach of an alleged contract for the sale by the respondent, which carries on business at Montreal, to the appellants, who carry on business at Toronto, of five car-loads of that commodity.

According to the statement of claim, the contract was formed by a letter of the 8th February, 1917, from the respondent to the appellants, in which the respondent said—"We have five car-loads of shrapnel turnings which will be loaded in the course of the next two weeks. We can accept your order on these cars at $10.00 per gross ton Montreal"—and the following order from the appellants to the respondent:—

"Toronto, Feb. 9, 1917.

"No. 1650.

"We have purchased from the Consumers Metal Company of Montreal, Quebec, the following:—

"Five car-loads shell steel turnings (this order is for shipment to the United States) $10.00 G.T. Montreal on railroads taking G.T.R. rates to Cincinnati. Terms thirty days draft. Shipment to be made as follows: During the next two weeks load this material in open car equipment and consign same to H. Brenner & Company, Cincinnati, Ohio, routing Erie delivery.

"H. Brenner & Company."

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What is set out in the statement of claim as the order is not the whole order, but that is perhaps of no importance. It is clear, I think, that this letter and order do not constitute a contract.

Apart from the question whether the letter of the respondent was an offer which the appellants might have accepted, which I doubt, the parties were not *ad idem*, because the order of the appellants embodied terms other than and different from those of the respondent's offer, and therefore there was no contract entered into. Apparently seeing this difficulty confronting him, the appellants' counsel attempted at the trial to prove a verbal acceptance of the terms proposed in the order of the 9th February; but, according to the view of the learned trial Judge, which counsel for the appellants failed to satisfy us was erroneous, that was not proved.

At the trial a mass of correspondence between the parties was adduced in evidence. Among the letters is one from the appellants to the respondent of the 9th February, 1917, which accompanied the order of that date. In that letter the request is made to "sign copy of order and return" it to the appellants, and the respondent is informed that the order is only for American delivery, and is asked, if not able to ship to the United States within the specified time, to return the order to the appellants.

The order was not returned, nor was the copy of it signed by the respondent and sent to the appellants.

On the 13th February, 1917, the appellants sent the following telegram to the respondent:—

"Wire quick to-day whether or not you are shipping material per our order and letter ninth instant."

To which the respondent replied, also by telegram, on the same day:—

"Will ship turnings, cars scarce and will depend on railroad."

This telegram was followed by a letter of the same date, in which the telegram is quoted, and the respondent says:—

"You understand the railroad conditions here are such that we are uncertain whether cars can be secured for loading for export, but we will let you have the cars as fast as we can load same;" and to this the appellants assented.

A firm contract for the sale of the five cars of turnings, deliveries to be made as quickly as cars could be secured for the ship-

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ment of them from Montreal, consigned as the order provides for, was, in my opinion, then concluded.

One car-load only was shipped, and there is no doubt, upon the evidence, that the reason why the remaining four car-loads were not shipped was that it was impossible to ship them from Montreal to the United States, as the contract required should be done. The evidence is clear as to this, and it is also satisfactorily shewn that the respondent made honest efforts to get the railway companies to accept shipments in accordance with the terms of the contract, but was unable to induce them to do so.

So far did the respondent go, in endeavouring to ship the turnings, that it endeavoured to get the railway companies to accept shipments in box cars instead of open cars, or "gondolas," and telegraphed to the appellants asking if they would consent to the shipment being made in that way, but no answer was sent to the inquiry.

It is unnecessary to go through the correspondence, which consisted mainly of requests on the part of the appellants for delivery and explanations by the respondent of the difficulties it met with in getting the railway companies to accept shipments. In April the appellants made demands for the immediate shipment of the undelivered turnings, and notified the respondent that they would buy the turnings elsewhere if delivery were not made, and finally notified the respondent, on the 18th April, that they had bought in four car-loads of turnings which they were applying on the contract, and that they were charging the respondent with the difference between the contract price and the price they had paid.

It appears to me that at this time the respondent was not in default, for the car-shortage then still existed; and, but for the letters of the respondent of the 16th and 20th April, denying any obligation to make further deliveries, I should have thought that the action was brought prematurely.

The learned trial Judge was of opinion that it was an implied term of the contract that unless the necessary shipping facilities should be available within a reasonable time the obligation of the respondent to deliver should be at an end.

That view is supported by *De Oleaga* v. *West Cumberland Iron and Steel Co.* (1879), 4 Q.B.D. 472. In that case the contract was for the sale of Sommorostro ore, and the deliveries were to be

made in monthly instalments, provided that the plaintiffs should be able to procure tonnage at a specified rate, and it was held that the delivery clause was simply to regulate the mode of performance by monthly instalments, subject, however, to interruptions contingent on the rate of freight, and that so long as freight ranged above the limit the seller was entitled to withhold delivery, but the quantity undelivered remained in force; that the delivery was merely suspended until the freights came down; and that but for another stipulation in the contract the seller would in that event have been entitled and bound to resume the monthly deliveries, and if he failed to do so the buyer would have been entitled to buy in against him and sue for the difference between the contract price and the then market price.

It was also held that some limit must necessarily be put for the deliveries withheld, and that that limit was a reasonable time having regard to the contemplated duration of the contract, etc.; and that what was a reasonable time was to be determined as a question of fact in view of the contemplated duration of the contract, the means which the seller had to make up arrears, and possibly other circumstances.

I am unable, however, to agree that a reasonable time had elapsed when the respondent repudiated liability to make further deliveries. It was doubtless in the contemplation of the parties when the contract was entered into that the shortage of cars which then existed would be of a more or less temporary character, and that deliveries would be made when that temporary difficulty in the way of making shipments came to an end. As late as the 19th March, the respondent recognised its obligation to deliver as still subsisting, and the correspondence shews that the respondent expected that the embargo of the railway companies would be raised at any moment.

I do not think that, having regard to all the circumstances, a reasonable time had elapsed when the respondent repudiated liability to make further deliveries.

I have spoken of the car-shortage as being due to an embargo by the railway companies. That term is not, perhaps, strictly accurate, but it is commonly used to signify the condition which exists when railway companies refuse to receive shipments on their lines or for certain points on them or on to connecting rail-

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ways. There is some confusion in the evidence, owing to some of the witnesses using the term "embargo" in that sense and others using it in reference to an embargo established by the Government.

Upon the whole, I am of opinion that the respondent is liable for the damages, if any, which resulted from its breach of the contract, and that the measure of these damages is the difference between the contract price and the market price of the turnings at the time the breach occurred, and at Montreal, the place of delivery.

That the market price at the place of delivery governs, if there is a market price there, is well settled: Halsbury's Laws of England, vol. 25, para. 472 (note (*i*)); *Wemple* v. *Stewart* (1856), 22 Barb. (N.Y.) 154, 159; *Grand Tower Co.* v. *Phillips* (1874), 90 U.S. (23 Wallace) 471, 479; *Cahen* v. *Platt* (1877), 69 N.Y. 348, 351; *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, 315, 316.

The appellants gave no evidence as to the market price at Montreal, but claimed to recover on the basis of the market price at Toronto. There was no evidence as to the market price at Montreal at the time the breach of the contract occurred, but it was shewn that the market price there was lower than the market price at Toronto, and that it ranged from $8 to $11 per ton, the difference being due, no doubt, to the fact that the railway embargo existed at Montreal but did not exist at Toronto.

I am, for these reasons, of opinion that the appellants failed to prove that they sustained any damages by reason of the respondent's breach of its contract, and that they are entitled to nominal damages only: *Valpy* v. *Oakley* (1851), 16 Q.B. 941; *Griffiths* v. *Perry* (1859), 1 E. & E. 680; *Erie County Natural Gas and Fuel Co.* v. *Carroll*, [1911] A.C. 105, 117, 118; Benjamin on Sale, 5th ed., p. 989.

I would, for these reasons, allow the appeal and reverse the judgment *á quo*, and substitute for it judgment for the appellants for $1, and would give to the appellants their costs throughout on the Division Court scale, with the right to the respondent to set off the difference between the costs on that scale and on the County Court scale, and to recover from the appellants the excess, less the costs to which they are entitled.

Appeal allowed.

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Ex. C.

Exchequer Court of Canada, Audette, J. November 6, 1917.

EXPROPRIATION—(§ III—158)—COMPENSATION—TITLE—COMMUNITY PROPERTY—WILL—AGREEMENT OF SALE—MORTGAGE—PRESCRIPTION.

In an expropriation of land by the Crown for training camp purposes, *held*, that land acquired by a testator during his married life being community property could only be disposed of by him to the extent of his interest therein, and those claiming under the will were entitled to compensation therefor to no greater extent; that the testator's wife having died intestate, half of the community went to her children, who were entitled to compensation accordingly. A purchaser of such land, who has resold it to the Crown, is only entitled to compensation according to the terms of the agreement of sale, but not to damages for the compulsory taking; nor will compensation be allowed for mortgages or hypothecs which have become prescribed. The amount recovered being greater than the amount offered, interest was allowed from the date of expropriation.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown. Statement.

W. Amyot, for plaintiff; *A. Fitzpatrick*, K.C., for defendants.

AUDETTE, J.:— This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands belonging to the defendants were taken and expropriated, under the provisions of the Expropriation Act, R.S.C. (1906), c. 143, for the purposes of a public work of Canada, namely, the "Valcartier Training Camp," by depositing plans and descriptions of such lands, on September 15, 1913, and on August 31, 1914, in the office of the Registrar of Deeds for the County or Registration Division of Quebec. Audette, J.

The lands so expropriated are composed of the western half of lot No. 67, of lot No. 65, lot No. 64 and lot No. 35, with farm buildings erected on lot No. 67.

The Crown, by the information, offers the sum of $2,600.

The defendants, who severed in their defence, claim the sum of $10,000 for the immovables so expropriated, while some of them claim, in addition thereto, the further sum of $1,500 for damages resulting from the expropriation.

Dealing first with the question of title, it appears that one Thomas Berry, the father of the defendants Berry, was in his lifetime the owner in his name of lots 67, 65 and 35. He married without marriage contract, and during his married life lot No. 64 was acquired and fell in the community.

It is further in evidence that, at the time Thomas Berry, the father, made his will, his wife was *non compos mentis*, and that she

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died demented, being unable to testate, and the family notary further testified that it is not to his knowledge she ever made a will.

On September 4, 1904, Thomas Berry, the father, by his will, bequeathed and devised to his son, James Berry, all his movable and immovable properties, and constituted him his universal legatee.

On November 21, 1909, the said James Berry, by his will of that date, bequeathed and devised to his brother, Thomas Berry, all his movable and immovable properties and constituted him his universal legatee. The said James Berry has since departed this life.

On May 6, 1913, the said Thomas Berry (the son) sold (ex. "C") to his brother-in-law, Adam Aikens, the lands described in the deed of sale as the two half-lots 65 and 67, lot No. 64 and lot No. 35, for the sum of $1,700, to be paid by instalments, in the manner mentioned in the said deed of sale.

From the above mentioned chain of title it will therefore appear that Thomas Berry, the father, could only fully dispose of lots 65, 67 and 35, together with the half only of lot 64. The other half of 64 having fallen into the community and becoming the property of his wife. When he bequeathed and devised his properties to his son James he could only dispose of half of lot 64, and in like manner James, by his will, in favour of his brother Thomas, could dispose of no more under the title acquired from his brother's will.

The mother having died intestate, the half of lot 64 became the property of her children, Thomas, John, Margaret and Elizabeth Miriam—each being the owner of one-eighth of lot No. 64.

However, under the deed of sale of May 6, 1913, it must be found that Thomas Berry, the son, conveyed to Adam Aikens, all the rights he had in the lands in question, making, therefore, Adam Aikens the owner of lots 65, 67 and 35, as well as one-half of 64, together with the eighth which came to Thomas Berry, the son, from his mother.

Then John, Margaret and Elizabeth Miriam Berry were each the owner of one-eighth of lot 64 at the date of the expropriation, and are entitled to the compensation therefor, while Adam Aikens is entitled to compensation for the balance.

Now, on September 10, 1913, assuming the full ownership of

the four lots, Adam Aikens entered into an agreement with the plaintiff's representative (ex. No. 3) whereby he sold this property for $2,600, when $50 were paid him on account and in part payment of the price of such sale. This agreement was entered into between Aikens and Capt. Arthur E. McBain, who was duly authorised by his brother, Col. W. McBain, the latter being in full charge on behalf of the Crown of the expropriation for the Valcartier Camp. The sale had to be completed by January 15, 1914, and as it was not, the agreement lapsed and the $50 were forfeited in favour of Adam Aikens.

Then, on September 17, 1914, Aikens having gone to Col. William McBain, they both entered into the agreement of that date, whereby Aikens agreed to sell his farm for $3,050, he receiving the sum of $100 on account, "the balance of $2,950 to "be paid over as soon as deeds are executed," and the purchaser was to have immediate possession.

The original of the latter agreement, having been used before the Public Accounts Committee of the House of Commons, could not be found, but both parties thereto spoke to the agreement when a copy was produced. Aikens admitted entering into the agreement, signing the same and receiving $100 on account, but he said he understood he was to be paid the balance at once; and Col. William McBain states the balance was to be paid upon Aikens giving good title—the latter construction of the agreement being the only reasonable one. Now it appears clearly from what has already been said with respect to the question of title that Aikens could not give good title for all the lots, and the notary charged with the preparation of the deed, as appears from the evidence, so reported to Col. William McBain.

I, therefore, find that the compensation to which defendant Aikens is entitled for the property in question is, on the basis of the sum of $3,050 as agreed upon by him. But from that sum should be deducted the sum of $100 already paid to him on account, and which he never returned, but retained, together with the further sum of $458.62, representing the value of the $\frac{3}{8}$ of lot No. 64 reckoned under the basis of $3,050 for the whole farm, that is to say, $3,050, from which should be deducted $100, and the further sum of $458.62 = $558.62, leaving the sum of $2,491.38.

While I find that defendant Aikens is bound by his agreement,

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it is obvious that the other defendants are at large and are not affected by that sale, beyond conveying implicitly that if Aikens accepted that amount for the farm, he being the one most interested, it would give a very good idea of the value of the same.

However, the defendants have adduced evidence in respect of the value of the farm as a whole, and as to lot 64 in particular. That evidence has practically remained uncontroverted, the Crown, relying on the agreement (ex. No. 4), did not adduce any evidence on the question of value.

I will, therefore, assess the value of each eighth of lot 64, under the basis of $20 an acre, as established by the evidence adduced, making the sum of $675 as representing the three-eighths coming to the defendants John, Margaret, and Elizabeth Miriam Berry—the defendant Thomas Berry (the son) having disposed of his eighth of lot 64 by the deed to Aikens of May 6, 1913. In the result John Berry will receive $225, Margaret $225, Elizabeth Miriam, $225 = $675.

As the defendants recover more than the amount offered by the information, they will be entitled to interest from the date of the expropriation.

Dealing with the question of damages, I find that the defendants Aikens, Elizabeth Miriam Berry, and Thomas Berry make a claim for $1,500 as set out in their plea. I have already found that Thomas Berry had not, at the time of the expropriation, any interest in the lands in question, he having conveyed all such interest therein to defendant Aikens in May, 1913. We must, therefore, ascertain what damages Aikens and his wife can have suffered.

This property was expropriated in September, 1913, but Aikens and his wife remained in possession of the lands at the sufferance of the Crown. They were still in possession in September, 1914, when Aikens entered into the agreement of the 17th of that month —and it would appear from the evidence that he and his wife did not abandon the possession until some time in January, 1915, although by the agreement of September 17, 1914, he was to give immediate possession. If Aikens and his wife suffered damage, the evidence does not disclose any tangible loss. It is true Aikens and his family had to leave and vacate the house, some time in the autumn of 1914, during artillery practice, and that it had to be

done perhaps at very trying times; but they were in possession by sufferance—and what is referable to the grace and bounty of the Crown cannot be construed as an acknowledgment of a right of action for damages, if any were suffered. Especially is this true when damages, including those to crop and for stolen goods, appear to have already been paid by the Crown to the defendant Aikens. I fail to see how, under the evidence, I could with any degree of exactness name any amount. But in view of the fact that I cannot allow Aikens any amount for compulsory taking when I have accepted as a basis of compensation the amount he was willing to sell for in September, 1914, I will, by way of damages—although he remained in occupation up to January, 1915—allow interest from the date of the expropriation to this day, this interest to cover the damages to his mill and all trouble or damage not already compensated, resulting from the expropriation. This accrued interest will amount to slightly over $500.

The two mortgages or hypothecs, mentioned in paragraphs 6, 7 and 8 of the information, in favour of Hall & Lloyd, are declared prescribed, and the heirs at law or next of kin of the said parties are not therefore entitled to recover in respect of the same.

Coming to the question of costs, I find that the defendants, who were represented by the same solicitors and counsel, severed their defence into two sets of pleadings. Each part of the plea with respect to the claim made for the lands taken is absolutely identical: but one set of pleading claims, in addition thereto, the damages above referred to. Under the circumstances of the case I feel unable to allow full costs on each issue, but I will treat the two defences as one and will allow the defendants costs against the Crown, which I will fix at the sum of $275—the amount to cover all witness fees, disbursements, etc.

Therefore there will be judgment as follows, to wit:—(1) The lands expropriated herein are declared vested in the Crown as of September 15, 1913. (2) The compensation for the lands taken and for all damages resulting from the expropriation is hereby fixed at the total sum of $3,266.38, the said compensation being composed of the aggregate sums of $2,591.38 and $675 as above mentioned, with interest from the date of the expropriation. (3) The defendant, Adam Aikens, is entitled to be paid the said sum of

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$3,050, after deducting therefrom the sum of $100, already paid on account; and the further sum of $458.62 = $558.62, leaving the net sum of $2,491.38, with interest thereon from September 15, 1913. The said defendants, John Berry, Margaret Berry, and Elizabeth Miriam Berry, are also entitled to be paid the total sum of $675 in the proportion of $225 each, with interest thereon as above mentioned. All of the said defendants being thus entitled to be paid the sums above mentioned in full satisfaction for the lands so taken and for all damages whatsoever resulting from the said expropriation, and upon giving to the Crown a good and satisfactory title free from all mortgages, hypothecs and encumbrances whatsoever upon the said property, including the release or discharge of the *bailleur de fonds* claim mentioned in the deed of May 6, 1913 (ex. C). (4) The mortgage creditors, Hall and Lloyd, or their heirs and assigns or next of kin, as mentioned in the information herein, are not entitled to recover in respect of the mortgages or hupothecs therein mentioned. (5) The defendants who appeared at trial and filed written pleadings are entitled to their costs in the manner above set forth, which said costs are hereby fixed and allowed at the total sum of $275.

Judgment accordingly.

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Nova Scotia Supreme Court, Longley and Drysdale, J.J., Ritchie, E.J., and Chisholm, J. April 27, 1918.

NEGLIGENCE (§ II—70)—HILL—LOADED VEHICLE—STREET CAR TRACK—RIGHT OF WAY OVER—DAMAGES.

The driver of a loaded vehicle climbing a steep hill has no special right of way over a street car track and must use reasonable care in crossing. Blindly crossing the track without looking to see whether a tram car is approaching or not is negligence which disentitles him to damages for injuries sustained.

Statement.

APPEAL from the judgment of Harris, C.J., in favour of plaintiff for the sum of $300 and costs, in an action claiming damages for the loss of plaintiff's horse which received injuries resulting in its death, having been run into by one of the defendant company's tram cars by reason of the alleged negligence of the defendant company, its servants and agents in not keeping a good lookout and the wrongful, defective and negligent manner in which the tram car was operated, driving the same at a reckless and excessive rate of

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speed, failing to apply the brakes in proper time or to ring the gong or give other warning of the approach of the car. The horse was so injured that it had to be shot.

L. A. Lovett, K.C., for appellant; *T. R. Robertson*, K.C., for respondent.

RITCHIE, E.J.:—The plaintiff company's loaded cart, drawn by a horse, was proceeding up East Young St., in the City of Halifax, and the driver of the cart attempted to cross the defendant company's track on Barrington St., which runs at right angles with East Young St. The horse was struck by the tram car, and, in consequence of injuries received, had to be shot.

The action is to recover the value of the horse, charging negligence on the part of the defendant company. The trial judge decided in favour of the plaintiff company, and an appeal is asserted. The three usual questions are presented, namely, negligence, contributory negligence, and that, notwithstanding contributory negligence if any, the plaintiff could, by the exercise of ordinary care, have avoided the accident.

There is a finding that the defendant company was guilty of negligence.

I approach the finding with respect, but, after the most careful consideration, I am of opinion that there was no negligence on the part of the defendant company. The tram car was coming to the crossing at a slow rate of speed, the gong was sounding, but the driver of the cart deliberately drove on the track in front of the car. As I will endeavour to shew later on, the motorman did all that could reasonably be done to avoid the accident. I am of opinion that the driver of the cart was guilty of gross contributory negligence. I speak, of course with respect, but I think it is clear that the trial judge went wrong with his law on the point.

Several propositions in the judgment are laid down as law, which, in my opinion, are not sound. I quote one of them:—

> I have discussed the question on the assumption that the driver of the team saw the car when 10 ft. from the track, and when the car was 80 ft. away, and that he decided to go on trusting to the car to stop. It may be that he did not think the matter out in this way. His attitude seems to have been that he did not have to look when he was driving a team pulling a heavy load up the hill. It may be that he did not see the car, until it was much nearer than the 80 ft., but negligence, unless it produces the accident, cannot affect the question. If the motorman of the car saw the horse proceeding to cross the track when 80 ft. away, and, under such circumstances as made it

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the duty of the motorman to stop, and he did not stop, it would be his negligence which caused the accident, and not the negligence of the other party, even if he blindly crossed the track unaware that a car was in the vicinity.

The attitude of the driver is correctly stated in the judgment. I quote from his direct examination:—

Q. I suppose you were going up the hill in the usual way? A. Yes, I was cutting it south and then north. I was cutting it south again when I saw the car, when I broke the corner of Hill's store. I kept on going and the car kept on. I saw that it was going too fast for me and I hauled more to the south. That would be south-west. The horse was just about in the track when the car hit him.

And on cross-examination:—

Q. You came up on this track, north to south, to get to the top of the hill? A. Yes. Q. Where were you when you first saw the car? A. I was just about Hill's corner. Q. How near the rail was the horse at the time? A. He was pretty near breaking the track. Q. You were still between your wheels? A. Yes. Q. When you got to where you could look back from Hill's corner your horse was nearly on the track? A. Yes. Q. Mr. Evans has placed a mark on the plan shewing the position of the horse about three feet from the rail when he first saw it? A. Yes. Q. You could look back from Hill's corner and see north? A. Yes, I could see Hill's foundry. Q. At that time where was the front of the tram car; about how far north of the centre line of Young St? A. It was just about breaking the points. Q. By the points you mean the switch from the north to the south bound track? A. Yes. Q. The front of the car was about going over the points when your horse was within three feet of the track? A. Yes. Q. What caused you to see the car then? A. I happened to look up the street. Q. That is the first time you looked? A. Yes. Q. You did not look until the horse was practically on the track? A. Yes. Q. You have taken the position that you do not have to look? A. No, not when I am pulling up heavy loads. Q. You do not have to look to see whether tram cars are coming when you are pulling up a heavy load; you have so stated your position? A. Yes. Q. In other words, it is not your business to look to the right or to the left? A. I said I did not make a practice. Q. In this particular instance you did not look and you only happened to look when the horse was nearly on the track? A. Yes. Q. The horse did not get any further on the track? A. No. Q. It just got its fore foot over one of the tracks—its right fore foot? A. Yes. Q. The shoe must have cought in the flange of the rail? A. No. Q. Do you know of anything else that would pull it off? A. I don't know unless it was the fender. Q. There is no conceivable thing that could pull the shoe off unless it caught in the flange of the rail? A. No. Q. Naturally, when the horse fell it fell to the south? A. Yes.

The judge, apparently, did not disapprove of the attitude of the driver, and attached great weight to the fact that the horse was drawing a load up hill; his conclusion is that under such circumstances the team had the right to go over the crossing, the driver being justified in assuming that the car would stop; in other words, that the team has the absolute right of way.

The judge says:—

The question is whether the driver was justified in assuming that the car would stop and allow him to pass over the tracks with his loaded team.

This question the judge answers as follows:—

I think it would be highly improper for the car to continue on its course, when it could be stopped so easily, and compel the loaded team to stop on this hill to let the car go by; I think the driver of the team was justified in assuming that the motorman would see his team and would stop his car and allow him to get over the track and that he was not guilty of negligence in continuing on after he observed the car.

But it was far easier to stop the team than to stop the tram car. I quote from the evidence of William Holland:—

Q. Where were you when coming up the hill? A. I was behind the team with a block. I carry that in case anything happens. Q. If the driver calls to you you block the team? A. Yes. Q. You can do that in an instant? A. Yes.

The judge, as I have said, seems to attach great weight to the loaded team and the hill. I am unable to follow his reasoning in that regard. One cannot walk up the Halifax hills without knowing that it is the practice to block the wheel to rest the horse and give him his wind. If it comes to a question of convenience (I do not say that it does) surely it is better for the horse and the two men to be delayed rather than a tram car filled with people. Is a man justified in "blindly" crossing the tram car line in the city of Halifax? I think not. He is bound to use ordinary care. But the position taken by the driver of the cart in this case was that, knowing the car was coming, he had the right to drive in front of it, and this position is sustained by the judgment appealed from. I think he had no such right, and that the course he adopted was a needless and reckless course and the efficient cause of the accident.

According to the evidence of the driver, he was not on the lookout; he was going along blindly, but he "happened to look up the street," and this was at a time when the horse "was nearly on the track." He could have stopped his horse pulled him back, and avoided the accident, but as he says, "I kept on going and the car kept on going." I am unable to conceive a more conclusive case of contributory negligence. The theory set up in the judgment appealed from that the car was bound to stop, and the driver of the cart was not so bound is, I venture to think, unsound.

The trial judge says:—

I think it would have been highly improper for the car to continue on its course when it could be stopped so easily and compel the loaded team to stop on this hill and let the car go by.

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If this is the test, why not look at the other side of the question, because the cart, as I have said, could have been stopped far more easily than the car; it is uncontradicted that it could have been done in an instant. The driver of the cart certainly had no right of way on the track which was paramount to the right of the defendant company to operate their cars on it. S. 4 of c. 107 of the Acts of the province for the year 1895 provides that the defendant company's cars

> shall have a right to the tracks as against any person, carriage, vehicle or incumbrance put, driven or being thereon, and no person shall obstruct the said tracks, or obstruct or prevent the cars from running or progressing thereon, or remain or keep any vehicle on said tracks in the way of any cars if there shall be an opportunity to turn off of the same.

The driver in this case had three alternatives, namely, to turn off, to stop, or to go on and be struck by the car; he adopted the last alternative. It would be easy to multiply authorities on the question of contributory negligence as it is disclosed by the evidence in this case, but I only refer to *Danger* v. *London Street R. Co.*, 30 O.R. 493; *Davey* v. *London and South Western R. Co*, 11 Q.B.D. 213, on appeal in 12 Q.B.D. 70.

Duff, J., in *Brenner* v. *Toronto Railway Co.*, 40 Can. S.C.R. 540, at pp. 555, 556.

The remaining question is, could the defendant company by the exericse of ordinary care, notwithstanding, and after such contributory negligence, have avoided the accident? I am of opinion that this question must be answered in the negative. There was very little time after the motorman saw the horse. At this juncture there were just two things to do, namely, put on the brakes and the reverse if necessary. Both these things were done promptly; there was no delay. The rail at the particular point was wet and the car skidded. But for this, no doubt, the car would have been stopped in a shorter time.

It is suggested that sand should have been used, but the evidence is absolutely uncontradicted that there was only sufficient time to release the brakes and put on the reverse and that what was done was the best thing to do under the circumstances and that it was all that could be done under the circumstances. The conclusions of fact which I have indicated are fully supported by the evidence of Maskell and Deveau. Maskell was an experienced motorman. Deveau was a new hand. The practice is for new

men to have an experienced man with them for 3 days and Deveau was on his third day. It is suggested that the accident was due to the inexperience of Deveau; the only evidence in support of this suggestion is that of Evans, a passenger, who says:—"All at once the motorman fumbled with the handles and the man who was over him grabbed it and he hit the horse."

It is not suggested by Evans that any time was lost. There is no suggestion that any of the witnesses were intentionally untruthful. Maskell was certainly in a far better position than Evans to say as to whether the accident was in any way attributable to the action of Deveau. I quote from his evidence:—

Q. If you had been at the controller instead of Deveau could you have done any better? A. I don't think I possibly could. Possibly it was done quicker by the two of us being there. Q. You say that it was possibly done quicker by reason of the two of you being there? You mean that the car was stopped quicker than if Deveau had been there alone? A. I guess that two would do it quicker; when a man puts on the reverse he has to let the brake off. If a man was alone he would have to drop either the power or the reverse. I put my hand underneath his and handled the reverse. Q. Could you have done anything different from what was done under the circumstances? A. No. Q. Could the things that were done have been done quicker if you had been there alone? A. No, they could not have been done as quickly.

In my opinion the appeal should be allowed and the action dismissed with costs.

LONGLEY, J.:—I agree. Longley, J.

DRYSDALE, J.:—I agree Drysdale, J.

CHISHOLM, J., (dissenting):—In this case, I am not persuaded that the findings of fact of the trial judge should be set aside. In the course of his judgment he says:— Chisholm, J.

It would therefore, appear that the motorman and the driver of the team saw each other at about the same time, but I think the head of the horse must have been probably 10 ft. from the track and not within 3 ft. as the driver stated . . . The question is whether the driver was justified in assuming that the car would stop and allow him to pass over the tracks with his loaded team. . . . There is, in my opinion, no question as to which should give way.

Even if the plaintiff's driver were guilty of contr butory negligence—which the trial judge does not find—there is a finding that, if the car were under proper control, the accident could have been avoided. There is evidence to support that finding, and the finding in my opinion concludes the matter.

In the *Toronto Railway Co.* v. *Gosnell* (1895), 24 Can. S.C R. 582, it was held that persons crossing railway tracks are entitled to assume that the cars running over them will be driven moder-

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ately and prudently, and if an accident happens through a car going at an excessive rate of speed, the street railway company will be responsible.

In the present case, the plaintiff's driver assumed that the tram car would stop as soon as the motorman saw the team, and allow the team to pass; and the trial judge finds that this could have been done had the car been under proper control.

Either the driver or motorman could have avoided the accident by stopping and allowing the other to pass. It was urged by Mr. Lovett that the defendant company's Act of Incorporation and the rules referred to therein (Acts of 1895, c. 107, ss. 3 and 5, rules 7 and 8) gave it a right of way superior to that of the plaintiff; but I am not as yet prepared to accede to that contention. The law seems to be settled otherwise in courts of high authority in the United States.

In Booth on Street Railways, 2nd ed., s. 304, I find the law stated as follows:—

> As already stated, as a general rule, especially between street crossings, cars have a right of way superior to that of other vehicles and pedestrians, this preferential right to be exercised in a reasonable and prudent manner. But this rule does not apply to the crossing of tracks at street intersections. There the car has a right to cross and must cross the street; and vehicles and foot passengers have a right to cross and must cross the railway track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and in such a careful manner as not unreasonably to abridge or interfere with the right of the other.

And in Nellis on Street Railways, 2nd ed., vol. 2, s. 388, I find the following statement:—

> A street car has no paramount right of way over other vehicles and pedestrians at the intersections of streets where the car tracks cross other streets than the one they run along. The preference or right of way accorded to street cars upon city streets, especially between street crossings, and in respect to vehicles passing in the same or opposite directions to the cars, within the space embraced within their tracks, does not apply at street crossings, and their rights to the use of the streets at crossings are precisely the same as those of pedestrians and other vehicles crossing their tracks there. Neither has a superior right to the other. The car has a right to cross and must cross the street; and a vehicle or pedestrian has the right to cross and must cross the railroad track. The right of each must be exercised with due regard to the right of the other, in a reasonable and careful manner, and so as not unreasonably to abridge or interfere with the rights of the other.

In the *N.J. Electric R. Co.* v. *Miller*, 59 N.J.L.R. 423, at p. 425, it is stated that the rule of law is:—

> that the driver would have the right of way, if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he

should reach the point of crossing in time to safely go upon the tracks in advance of the approaching car, the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach him.

See also *Knox* v. *North Jersey St. R. Co.*, 70 N.J.L. 348; *Bresky* v. *Third Avenue R. Co.*, 16 (N.Y.) App. Div. 83.; *O'Neil* v. *Dry Dock &c. Co.*, 129 N.Y. 125; *Buhrens* v. *Dry Dock &c. Co.*, 53 Hun. 571.

I think the appeal should be dismissed with costs.

Appeal allowed.

TOWN OF MACLEOD v. CAMPBELL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. June 27, 1918.

TAXES (§ III D—135)—TOWNS ACT (ALTA.)—ASSESSMENT OF LAND—STATUTORY REQUIREMENTS—DISREGARD OF—INVALIDITY.

Sec. 267(1) of the Towns Act (1911-12, c. 2, Alta.) provides that, "Land shall be assessed at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor." The assessor has power to assess only in accordance with the terms of the statute. When he wilfully disregards these the assessment is illegal and invalid and taxes based on such assessment cannot be recovered.

Subsection 3, of the above section, that "If the value at which any land has been assessed appears to be more or less than the actual cash value, the amount of the assessment shall nevertheless not be varied on appeal if the value at which the said land is assessed bears a fair and just relation to the value at which other land in the immediate vicinity thereof is assessed, provided, however, that in no case shall an obviously excessive assessment be maintained," means nothing more than that slight increases over the cash value of property shall not be considered as a ground for altering the assessment, if the other property in the immediate neighbourhood is assessed in the same proportion to its real value.

Statement.

APPEAL by plaintiff from a judgment of Ives, J., in an action for taxes. Affirmed.

J. W. McDonald, for appellant; *E. V. Robertson*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an action for taxes in respect of nine different parcels of land for the year 1917, amounting in all to $675.18. It was tried before Ives, J., who gave judgment in favour of the defendant.

At the opening of the case, counsel for the defendant, while not admitting liability, offered to transfer to the town in satisfaction for the taxes some of the lands on which the taxes are claimed which were assessed at $950. This offer was promptly refused. The plaintiff then called the assessor and tax collector to prove the roll and the amount of the taxes. The defendant then called three witnesses with a knowledge of real estate values

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in the town, who gave evidence as to the value of the lands in question. No evidence was given by the plaintiff on this point. The assessed value does not appear from the appeal book, but the assessment roll was produced in court and the plaintiff's counsel has in his factum tabulated the various lots with the assessed values and the values given by the witnesses. From this, it appears that the assessed value varies from 100% to 500% of the real values, and that, while the total assessed value is $13,500, the total value, according to the highest valuation of the witnesses in each case, is $6,250. The taxes for the year, with the penalties, thus appear to be almost exactly 5% of the assessed valu and almost 11% of the highest value witnesses will place on the property.

This excessive rate of taxation no doubt had its practical effect in causing the defendant to endeavour to resist the plaintiff's claim, but I agree with the plaintiff's counsel that it can have no bearing on the legal rights of the parties.

It is contended on behalf of the plaintiff that there is nothing involved except the amount of the assessment, and that inasmuch as that is a matter which can be dealt with by the Court of Revision it cannot be raised here. Indeed, it is stated that the defendant did give notice of appeal from the assessment, but did not pursue the appeal as far as she could have done. If the premise were right I would be disposed to agree with the conclusion, but I am by no means satisfied that there is not something involved besides the amount of the assessment.

In *Toronto Railway* v. *Toronto*, [1904] A.C. 809, the plaintiff had appealed from an assessment of property which it claimed to be exempt even to the Court of Appeal for Ontario, and had failed, but the Judicial Committee held that the assessment was invalid and that the plaintiff was not estopped by the fact of the appeal.

The Act in that case gave the Court of Appeal on assessments the power to try all complaints in regard to persons wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum. The complaint was that the property for which it was assessed was exempt, which, apparently, does not differ much from saying that the railway was wrongfully placed upon the roll for the purpose of that assessment, but it is stated in the judgment at p. 815:—

It appears to their Lordships that the jurisdiction of the Court of Revision and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable.

This seems to suggest that the Court of Revision is for the purpose of dealing only with questions of fact including opinions as to value and that its decision on questions of law would not be conclusive. If this were the case where there was a right of appeal to the highest court of the Province, it would seem even more reasonable when the appeals are dealt with simply by a body of laymen with a right of appeal only to the District Court Judge and no further.

There is a multitude of cases in which a court has dealt with legal questions respecting assessments regardless of the right of appeal to the Court of Revision and discussed the principles involved. Some of the more recent of such cases in our own court are *Rur. Mun. of Bow Valley* v. *McLean*, 26 D.L.R. 716; *Town of Coleman* v. *Head Syndicate*, 11 A.L.R. 314; *Clive School District* v. *Northern Crown Bank*, 34 D.L.R. 16, 12 A.L.R. 344, and *Hagman* v. *Merchants Bank*, [1918] 2 W.W.R. 377. Other decisions to which reference may be made are *Hickson* v. *Wilson* (1897), 2 Terr. L.R., 426; *Bradshaw* v. *Riverdale S. D.* (1894), 3 Terr. L.R., 276; *Re Assessment of Joseph Gillies*, 42 N.S.R. 44; and *Re Town of Grand Falls*, 13 D.L.R. 266.

S. 267 (1) of the Towns Act provides that

> Land shall be assessed at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor

and by sub-sec. 3 that

> If the value at which any land has been assessed appears to be more or less than the actual cash value, the amount of the assessment shall nevertheless not be varied on appeal if the value at which the said land is assessed bears a fair and just relation to the value at which other land in the immediate vicinity thereof is assessed; provided, however, that in no case shall an obviously excessive assessment be maintained.

When the assessor was being examined by the plaintiff's counsel he was asked: "Did you assess these lands at their actual cash value as they would be taken in satisfaction of a just debt by a solvent debtor?" and replied, "It is hard for me to say so. I don't think anybody could say as to that." The counsel then very discreetly closed his examination, but in cross-examination the matter was reopened and we find the following dialogue:—

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Q. You are familiar with the provisions of s. 267 of the Towns Act in regard to your duty in assessing land at its actual cash value? A. Yes. Q. As it would be appraised in payment of a just debt from a solvent debtor, as required by s. 267 of the Towns Act? You are familiar with the provisions of that section? A. It is a very amusing thing to me. Q. I know, but it is not a very amusing thing to the poor taxpayer. Now, did you have that before you as a guide w' en you arrived at your assessment? A. No, sir. Q. You did not accept that as the principle upon which you should assess these lots? A. You couldn't accept it at the present day under these circumstances. Q. And as a result you did not do it? A. We have to fall back on another clause which says whether it is assessed high or low.

The provision last referred to is the third sub-section above quoted. As I pointed out in *Town of Castor* v. *Fenton*, 33 D.L.R. 719, 11 A.L.R. 320, at 326, this provision, in my opinion, has done much harm in the manner in which it has been acted on in establishing dishonest assessments upon which the public are asked to place confidence and on the faith of which loans are obtained which, in some cases no doubt, could not be obtained otherwise, because they exceed the percentage of borrowing power authorized by the statute upon a valuation according to the true value of the property. It is clear, I think, that that provision, which is, of course, only for guiding purposes upon appeals from assessments, means nothing more than that slight increases over the cash value of property shall not be considered as a ground for altering the assessment if the other property in the immediate neighbourhood is assessed in the same proportion to its real value. It could not mean otherwise, for if it did property in one neighbourhood might be assessed at its cash value and in another at 25% over its cash value and in another at 50% over, which would be entirely inequitable, and yet any person appealing in either of the two latter localities could have no redress.

The absolute disregard of the basic principle laid down by the statute for fixing the values, which the assessor apparently considered a joke, resulting, as the evidence shews, in this case, in property being assessed in some cases at its actual value and in others at five times its actual value, makes the matter much more than a question of too high or too low an assessment, and goes to the legality of the assessment.

The assessor has power to assess only in accordance with the terms of the statute. When he wilfully disregards these, which are not merely directory, and I do not think anyone would suggest that this is merely directory, he accomplishes nothing but an

illegal and invalid assessment which will not support any legal claim for taxes.

The case of *Canadian Oil Fields Co.* v. *Village of Oil Springs* (1907), 13 O.L.R. 405, is in principle much such a case as the one at bar. In that case, in fixing the value of assessable property, the value of some non-assessable property was added to the actual value of the assessable property and the total value was given as the assessable value of the assessable property. As far as the assessment roll was concerned, it was only a question of the property being assessed too high and only by the evidence of the assessor showing how he fixed the value could the illegality be disclosed. The court, however, held that the assessment was invalid and could not be enforced. Mulock, C.J., at p. 410, says:—

> In addition to contending that it is assessable, the defendants point to the assessment roll and say that the plaintiffs complain merely of over-assessment and are merely seeking a reduction of the amount assessed against their buildings and contend that the only machinery competent to deal with such complaint is that provided by the Assessment Act. I am unable to accede to that view. The method attacked seems to me a transparent attempt to evade the fair meaning of the Act. The question is not one of more or less regarding assessable value, but whether the provisions of the Act can be defeated by the assessable value of property exempt from taxation being added to that of property liable to taxation in the assessment roll. The assessment of the exempted property was wholly illegal; that item of unassessable property is as clearly distinguishable from the assessable as if we were dealing with two separate properties, one assessable and the other not, and it was not for the assessor in the exercise of his judgment to assess it for taxation at any amount whatever. The illegality being beyond question established, the court has jurisdiction to deal with it.

Teetzel, J., concurred with Mulock, C.J., and Anglin, J., gave reasons for the same conclusion.

The illegality in this case is established as in that by the evidence of the assessor as to his disregard of the provisions of the Act, and this court has, therefore, I think, jurisdiction to deal with it.

The assessment being illegal, the taxes cannot be recovered, and the plaintiff must fail in its action.

I would, therefore, dismiss the appeal with costs.

Stuart, J.
Beck, J.

STUART and BECK, JJ., concurred with HARVEY, C.J.

Hyndman, J.

HYNDMAN, J. (dissenting):—This is an appeal from Ives, J., who dismissed the plaintiff's action for $675.18, being the amount of taxes against several lots in the town of Macleod owned by the defendant for the year 1917.

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The defendant's principal objections were that (*a*) the amount of such assessment was not the "fair cash value of the land but greatly in excess thereof," and that (*b*) they were not assessed at their "actual cash value" as they would be appraised in payment of a just debt from a solvent debtor.

It is admitted that the lands were legally liable to assessment by the plaintiff municipality, but it is contended that, inasmuch as the assessor did not follow the directions prescribed by the Town Act, and on the contrary admittedly appraised the lots at a figure which was more than their fair actual or cash value that, therefore, the assessment was illegal and the defendant relieved from the obligation to pay the taxes imposed and sued for.

The trial judge found as a fact that the assessment was grossly excessive, and I think he was correct in this conclusion.

Notwithstanding this, however, I am of opinion that the objection of illegality in the assessment is not tenable.

As mentioned, there is no doubt about the plaintiff's right to assess the land, and no question is raised as to the formalities followed by the town's officers.

The usual assessment notice was sent to the defendant, who, under s. 274 of the Town Act, appealed to the Court of Revision on the ground of excessive valuation, which came on for hearing and the appeal was dismissed. Defendant did not take her appeal further to the District Court Judge as she might have done and, in due course, the assessment roll was finally passed and certified by the assessor.

The plaintiff's next step was to bring this action, which the defendant resists on the ground that the assessment on her lands is illegal because of the facts above referred to, viz., excessive appraisement.

By s. 274 of the Town Act it is enacted as follows:—

> If any person thinks that he or any other person has been assessed "too low" or "too high" or that his name or the name of any other person has been wrongly inserted in or omitted from the roll or that any person who should be assessed as a public school supporter has been assessed as a separate school supporter or *vice versa* he may within the time limited as aforesaid give notice in writing to the assessor that he appeals to the council to correct the said error and in such notice he shall give an address where notices may be served upon him.

From the decision of the Court of Revision an appeal may be taken to the District Court Judge (see ss. 292 and 293 of the Act),

and the decision and judgment of the judge shall be final and conclusive in every case adjudicated upon.

The point was raised that because the assessor did in fact (as admitted by him in evidence) assess the lands at an amount greater than what he believed to be their fair actual value, that, therefore, it was an illegal assessment and touches the jurisdiction of the whole matter. In other words, the assessment having been made in an illegal manner, is bad and should be treated as never having been made.

In my view, this is not the case. The legislature, undoubtedly, intended to direct in what way lands should be assessed and provided that the fair actual value should be the amount of such assessment. But they also provided a scheme or machinery for insuring that this intention or direction should be observed and carried out and the ratepayers protected against the unfair or erroneous conduct or breach of duty on the part of the assessor or Court of Revision. Hence, they enacted by what method the assessment should be finally arrived at and settled.

S. 74 provides that in a case where a person has been assessed "too high" or "too low" appeal may be taken in a certain manner.

I think it should be inferred that the legislature had in view just such a state of facts as in this case, where the assessor failed to do his duty and appraised the land at more than what even he himself believed to be the fair cash value. It seems to me that the rectification of such a mistake or improper action is one of the chief objects for which the Court of Revision and the District Court Judge are given power at all in the matter. The same objections exactly could have been raised before the tribunals mentioned, which are set up in the defence to this action, and, as the defendant failed to take advantage of her remedies under the Town Act, I think it must be held that it is at least too late to do so now.

If so, the serious result would likely happen that the financial position of many towns and cities in Alberta would be thrown into confusion, for it is common knowledge that the same objection as here could be raised in multitudes of cases. Without such a procedure as laid down in the Act there would be no finality in the matter, and it would be impossible to fix the rate of taxation with any certainty. No matter what we may now think of the real estate epidemic which existed, and which is very largely responsible

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for the obviously excessive assessments during the last few years, still the fact remains that money was borrowed from the public on the basis of those assessments, and which with interest must be repaid yearly, and if each individual assessment can be attacked in this manner, the ability to meet these payments would be much impaired. I think the object of the legislation was primarily to provide a method for compiling an assessment roll which when complete would be final and binding.

S. 285 of the Act enacts:—

> The roll as finally passed by the council and certified by the assessor as so passed shall be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll or any defect, error or misstatement in the notice required by s. 276 of this Act or any omission to deliver or to transmit such notice.

The Court of Revision and District Court Judge had full power to do everything necessary to remedy the owner's grievance.

In *Hislop* v. *City of Stratford*, 34 D.L.R. 31, Meredith, C.J.C.P., at p. 37, says:—

> But these first mentioned matters are things over which the Courts of Revision of assessments, provided for in the Assessment Act, now have complete control, with full power to make all such changes, and give all such relief, as the nature of the case may require, if any; and so they are not the proper subject of an action in this court, as they might be if the facts were one in which there was no power in the municipality to tax; or one with which the Courts of Revision have not power to deal properly.

In *City of Halifax* v. *Farquahar*, 33 N.S.R. 209, in an action to recover the amount claimed to be due for rates and taxes, the defendant pleaded, amongst other things, that, at the time of the assessment, the defendant was not the owner of more than a one-fourth interest in the ship assessed—it was held that the defendant having received notice of the assessment, if he was dissatisfied at any time, should have brought the matter before the assessment Appeal Court, established for that purpose, and having failed to do so that the assessment was conclusive and could not be attacked in an action to recover the rate.

It was argued in that case that unless the statute provides, either expressly or by necessary implication, that the Appeal Court is the only remedy, defendant cannot be prevented from setting up this defence. Townshend, J., who delivered the judgment of the court, said in part:—

> The city charter provides the machinery, and affords ample opportunity for party aggrieved by his assessment to have it rectified. A Court of Appeal

sits to hear all such complaints, of which due notice is always given and was given to defendant, of which he did not choose to avail himself, and, not having done so, the assessment is conclusive, and cannot be attacked in an action to recover the rate.

The case at bar seems to me to be exactly similar in principle. I, therefore, would allow the appeal with costs, and enter judgment for the plaintiff for the amount of its claim and costs.

Appeal dismissed.

Hyndman, J.

QUINLAN & ROBERTSON v. TOWN OF ST. JOHN.

Quebec Superior Court, Archibald, A.C.J. April 13, 1918.

MUNICIPAL CORPORATIONS (§ II D—142)—CONTRACTS—APPARENT EXERCISE OF POWERS—NEGLECT OF STATUTORY DUTY—ULTRA VIRES—BREACH—DAMAGES.

If a municipal corporation, apparently in the due exercise of its powers, enters into a contract, but by reason of the non-fulfilment of some statutory duty imposed on it in connection therewith, such contract is declared to be *ultra vires*, the corporation is liable in damages for breach of such duty.

A municipal corporation having made a contract imposing an obligation on such corporation must provide sufficient means to fulfil such obligation.

[See annotation, 36 D.L.R. 107.]

Statement.

ACTION against municipal corporations for breach of contract to build a bridge. Judgment for plaintiff.

Archibald, A.C.J.

ARCHIBALD, A.C.J.:—The two defendants constitute separate municipalities, one on each side of the Richelieu river and opposite each other. At the request of the defendants, a statute was passed in 1910, 1 Geo. V. c. 65, authorising these two municipalities to construct a bridge across the river Richelieu from any point in the City of St. Jean to the opposite point in Iberville. The said statute prescribed in detail the manner in which the councils of the said two municipalities should proceed to accomplish the construction of the said bridge.

The statute in question, after reciting in the preamble that the said two municipalities had requested authority to build the bridge in question, and stating that it was necessary to grant certain additional powers to enable the said municipalities to perform the said work, it then proceeded in the first section to authorise St. Jean and Iberville to build and maintain a free iron bridge with all necessary approaches, piers, works and structures from the eastern end of St. James Street in the town of St. Jean to the western end

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of Market St. in the town of Iberville, and in the second section, for the purpose of building of said bridge, the councils of the towns of St. Jean and Iberville are vested with all the necessary powers for passing by-laws for loans by the issue of bonds or otherwise, following in each case the procedure established by the general or special laws governing each of the said towns, and s. 5 provided the manner in which the building and control of the bridge should be accomplished, indicating that the councils of the said two municipalities should appoint a board consisting of members of the council of each municipality. The said two councils acted in accordance with the provisions of the said Act and by resolution dated March 18, 1913, gave the contract for the construction of the bridge to the plaintiffs in this case, accepting their tender to do the said work for the sum of $197,150 and thereafter, a contract was passed before M. Deland, notary, between the said councils and the plaintiff for the construction of the said bridge, for the sum above mentioned. The contract provided for the immediate commencement of the work and for its termination by May 1, 1914, and stipulated a penalty of $50 per day for tardy delivery, and also a deposit of $19,715, as security for the good faith of the plaintiff and for the faithful performance of the work.

The plaintiff immediately commenced preparations for the performance of the contract and made considerable disbursements in connection with such work.

In April, 1913, one Bachand, a taxpayer of the town of St. Jean took a proceeding for the purpose of annulling the resolution of the defendants according the contract for the building of the said bridge to the plaintiff, and for the cancellation of the contract actually passed, and accompanied said action with an interim injuction which stopped the plaintiff from further proceeding in the construction of the bridge.

Judgment was rendered on June 14, 1913, maintaining the interim injunction and ordering the plaintiff to cease work under the contract and ordering defendants to cease paying any money in execution of the contract.

On February 2, 1914, final judgment was rendered upon said action annulling the resolution of March 18, 1913, and also setting aside the contract with the plaintiff and declaring the injunction perpetual.

This judgment was inscribed in the Court of Review by the defendants but said inscription was desisted from in October, 1914.

The grounds upon which the resolution and the contract in question appeared to have been set aside were:—

1. That the council had accepted a tender $22,150 higher than another which had been submitted to the councils, without having given any reason for accepting the higher tender;

2. That by the statute authorising the construction of the bridge, the defendants were only authorised to borrow the sum of $25,000, and that the contract accepted given by defendants for the sum of $197,150, even allowing that the subsidies granted by the federal and provincial governments would amount to $128,000, left a considerable balance for the completion of the work unprovided for, and that in consequence there would remain about $44,000 which the defendants had not provided. That not having been authorised by any special statute to contract a loan with respect to the said sum of $44,000 it ought to have obtained authorisation in virtue of the powers contained in its charter by the vote of the electors which it had not done.

That defendants had entered into a contract three years earlier with Lemoine & Son for the construction of the bridge, which contract was only set aside by the resolution according the contract to Quinlan & Robertson, and that without the consent of said Lemoine & Son.

Then the court proceeded to annul the resolution and the contract in question. That judgment is now *chose jugée*. By the 14th allegation of the declaration, plaintiff alleges as follows:—

Les défenderesses n'avaient en conséquence aucun droit de passer la résoluti n et le contrat plus haut mentionnés, lesquelles procédures étaient illégales et nulles et n'ont été ainsi passées que par suite de la faute et la négligence grossière des dites défenderesses qui ont refusé et négligé de remplir les conditions voulues par la loi, et qu'elles n'avaient pas le pouvoir de passer la dite résolution et de signer le dit contrat, tel que mentionné plus en détail dans le jugement auquel la demanderesse réfère.

And by par. 15, the plaintiff continues:—

Par suite de la faute et de la négligence grossière des défenderesses, la demanderesse a dû faire des déboursés pour la somme de $70,949.95.

Plaintiff proceeds to distribute this sum in different categories, $2,971.52 for costs incurred by the plaintiff as *mis-en-cause* in the actions above referred to; $491.43 for other expenses connected with the said actions; $4,168.62 for expenses made in connection

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with the work of the said contract, wages paid, materials employed, works done; $1,482.64 for interest upon the deposit made as required by the contract to secure the faithful performance of the work; $52,500 for loss of profits which plaintiff would have gained upon the work. Plaintiff prays judgment for that sum.

The defendants by their factum, on p. 6, summarise their grounds of defence as follows:—

1. Proposition: Prescription de la poursuite en autant que la défenderesse, la ville de St. Jean y est concernée (there is a provision in the charter of the town of St. Jean requiring all actions of damages to be brought within three months);

2. Proposition: Acquiescement par les dits Quinlan & Robertson au dit contrat, ces derniers l'ayant accepté á leurs rique et péril;

3. Proposition: Renoncement par les dits Quinlan & Robertson au dit contrat alors que la question de sa légalité était pendante devant les tribunaux;

4. Proposition: Le jugement du 2 février, 1914, qui a déclaré le dit contrat illégal et nul et ultra vires des pouvoirs des dits conseils municipaux, ne peut donner ouverture à aucune poursuite en dommages contre les corporations défenderesses;

5. Proposition: Moyens de défense résultant de la force majeure;

The answer to the first proposition, namely, the prescription of 3 months seems to be obvious. The work in question could not be done in virtue of the charter of the defendant, the town of St. Jean. In fact, this statute declares it outside the powers conferred by the charter of said town, and indeed it was manifestly so. Therefore, it is obvious that the provisions of the charter with regard to the prescription of actions of damages against the town would not apply to the present case. Moreover, the town of St. Jean was contesting the judgment which had cancelled the contract up to a period less than three months from the commencement of the action. Nothing more need be said upon that question of prescription.

The second point, namely, that the plaintiffs knew of all the circumstances connected with the contract and were supposed to know whether these circumstances would allow the defendants to contract validly with them, the plaintiffs, as a question of law, and that, therefore, they accepted any risk there might be in reference to the validity of the contract which they received. The proof of that position results from the proved presence of the engineer Janin, representing the plaintiff at the meeting at which the resolution in question was passed. There is no proof that any

doubt was ever cast upon the authority of the defendants to pass the resolution in question or to execute the contract in question, or that there was any voluntary acceptance of a risk on the part of plaintiffs with regard to the said contract.

Some little confusion seems to exist with regard to what is meant by the expression *ultra vires*. It is treated as if it meant the same thing as "illegal."

Now that is not the case; the defendants corporations were specially authorised by the statute 1 Geo. V. c. 65, to do precisely what they did and by the procedure which they adopted, therefore, the contract which they gave to the plaintiff was not *ultra vires*, because they had authority to pass that contract, but by the ordinary law a corporation which undertakes an obligation must provide the means by which that obligation can be met. They had also authority to provide those means.

The allegation which the plaintiff makes against them, in substance, is this: You were negligent and in fault, because having made the contract you did not provide means sufficient to accomplish your obligation. Therefore, your obligations are "illegal," and that is what was decided by the court.

The plaintiffs, although present by their representative at the meeting at which the contract was discussed and was awarded to them, had no means of knowing whether defendants had by the use of their inherent powers provided the means necessary to pay the amount or not. There was nothing to indicate to them this proceeding at which they were present was illegal, and, therefore, they cannot be said to have acquiesced in a position which, so far as they knew, had not arisen.

Now the third point raised by the defendant is this, subsequently to the contestation of the validity of the councils of the defendants' resolution and contract, the plaintiff received back from the defendants the sum of money deposited by them for the security of the performance of the contract and therefore by that act renounced the contract.

Obviously that effect would not follow as a matter of course from the act in question. The contract had been, at the date when the deposit was received back, annulled by a judgment of the court and that judgment had been inscribed in review by the defendants and was still standing undecided before that court.

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It appears that although the inscription in the Court of Review had not been withdrawn until late in October, 1913, that nevertheless long before that defendants had practically abandoned the inscription and acquiesced in the judgment and had negotiated with and indeed given a contract to other persons for the performance of the same work, so that at the date when the deposit was received back the defendants had committed a breach of their contract by contracting for the same work with other persons.

Under those circumstances, it is manifest that the reception back of the deposit did not constitute any renunciation to any claim for damages which the plaintiff might decide to make.

It might possibly be different if the question was an effort on the part of plaintiff to compel the specific performance of the contract. That plea of the defendant will accordingly be set aside.

I pass over, for the moment, the 4th proposition and take the 5th one. "Means of defence resulting from *force majeure*." This is founded upon the proposition that the defendants had to obey the judgment of the court, that they were perfectly willing to carry out the contract, but that they were forced by judicial authority to do otherwise and that, therefore, they are not responsible. This is wholly a misapprehension of the circumstances of the case.

It is true that they were forced by judgment of the court but this judgment was based upon the ground that they had neglected to do certain acts within which would have rendered their contract with the plaintiff legal. The ground of plaintiffs' damages is that they neglected to do those acts, whereby the plaintiffs suffered loss.

Manifestly the plaintiffs' ground for action, if it otherwise existed, is not affected by the compelling force of the judgment in question.

The real defence of the defendants is contained in par. 4:—

Le jugem nt de 2 février, 1914, qui a déclaré le dit contrat illégal et nul et ultra vires des pouvoirs des dits conseils municipaux, ne peut donner ouverture à aucune poursuite en dommages contre les corporations défenderesses.

The defendants have cited numerous authorities which at first sight sustain the proposition just above cited, nor do I quarrel with those authorities.

If those appointed by law to manage the affairs of a corporation do some act which that corporation has absolutely no right to do and that act is carried into execution by means of a contract with

third persons, the corporation cannot be held towards those third persons for the costs and expenses which they incurred in carrying out such contract. Thus, for example, if without the statute 1 Geo. V. c. 65, the defendant, the town of St. Jean, had contracted with the plaintiff to build the bridge in question and had afterwards violated its contract and refused to pay plaintiff, they could not have been sued either for payment of their work or for damages, and this upon the theory that the acts of a corporation outside of its powers are wholly null and non-existent, they cease to be the acts of the corporation and become the acts of those who are mismanaging its business. But where a corporation has authority to do a certain act and contracts with a third person for the performance of that act that is to say where the act is *intra vires* of the corporation. But when the corporation neglects to do some act which it has power to do and ought to have done in connection with the said contract, whereby that contract becomes illegal, then the rule is different.

Were it otherwise, corporations would never be responsible in damages for they never would have power to commit any wrong. But the books are full of decisions in which corporations have been condemned to pay damages.

I find in the Cyclopedia of Law and Procedure, vol. 10, p. 1096, under the heading, "Corporate Powers and Doctrine of Ultra Vires":—

Judicial decisions abound in general statements of doctrine to the effect that corporations possess only such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted.

A corporation (said a great jurist in a great case), being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.

With regard to incidental powers, the authorities referred to in the Cyclopedia speak of the provisions of money to carry out the object of the corporation.

On p. 1097, the Cyclopedia proceeds:—

Every corporation has, by necessary implication, the power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law or by its charter.

On p. 1104, under the heading, "Rights of Creditors where Debts are created in excess of Statutory Limit":—

By the American law, where there is a statute imposing limit upon corporations in respect of the amount of debts which they can incur, a creditor who does not know that the limit has been exceeded, and who has no reason-

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able ground to believe that such is the fact, may enforce the obligation of the contract against the corporation.

On p. 435 of Brice on Ultra Vires, 3rd ed., the author remarks:—

If a tort is caused by proceedings or acts which on the face of them are manifestly outside the powers of a corporation, and unconnected with its proper business, enterprise, or scope, then plainly the corporation cannot be liable. Such a tort can be in fact and in law the wrong act only of the parties causing it. But suppose there is not this clear want of connection between the tort and the corporate enterprise, what is the position?

An agent has no implied authority to commit, and cannot on such ground alone bind his principal, a corporation, by committing an *ultra vires* tort. What a corporation cannot do, its agent cannot, under ordinary circumstances, and in the case of contracts, do so as to bind it. From this it necessarily follows that there can be no authority to an agent, implied or otherwise, to enter into contracts or to institute proceedings in the nature of contracts, which would be *ultra vires* of the corporation; and that the corporation cannot in any way be rendered amenable for such proceedings, or for matters incidental to, or torts committed by one of their servants in the course thereof.

On p. 437, at No. 183, the author states:—

If a corporation in, what appears to be, the due prosecution of its enterprise or the due exercise of its powers, engages in or directs proceedings which necessarily cause an *ultra vires* tort, it is liable therefor.

Then on p. 438, No. 183A:—

If a corporation engages in proceedings apparently in the due prosecution of its enterprise or the due exercise of its powers and a duty, common law or statutory, is imposed on it by reason of such proceeding, then, although it should turn out that such proceedings are *ultra vires*, the corporation will be liable in tort for any breach of such duty.

The principle involved in this proposition is very reasonable and seems established by decision. Assuming its correctness, a fair measure of protection is provided for persons dealing with corporations, and who often enough would be utterly unable to gauge exactly the powers and capacities of such bodies. Without some such principle railway companies and like might engage in transactions of great moment and causing damage to many, and when it suited them, repudiate all liability.

Brice cites an American case of *Bissell* v. *Michigan Southern R. Co.*:—

Where two railway companies, chartered respectively by the States of Michigan and Indiana, with power to each to build and operate a railroad within its own State, had united in the business of transporting passengers over a third road in the State of Illinois beyond the limits authorised by the charter of each of such corporations, they were jointly liable to a passenger for injuries resulting from the negligence of their employees.

This case will be found in 22 N.Y.R. 258.

This doctrine is fully confirmed by the decisions of our own courts in numerous cases, some of which will be found cited in the factum produced by the plaintiff in this case, and the authorities produced by defendants are in no sense contradictory. In fact,

it may be stated generally that there is no case in our law reports which denies the doctrine in question.

It may be then said that the defence of the defendants fails and the only question now remaining is to determine the amount of damages which the plaintiff has proved.

The items of damages claimed by the plaintiffs are set down in their exhibit No. 4, the first of these is in law expenses, $2,971.52. These expenses were incurred by the plaintiffs who were made *mis-en-cause* in the suit of Bachand to obtain injunction and cancel the resolution of the defendants and their contract in favour of plaintiffs. Plaintiffs, being summoned as *mis-en-cause*, pleaded without necessity and without success. This sum, therefore, of $2,971.52 cannot be allowed.

Item 2 is sundry expenses, $491.43. The evidence made in the case justifies this item to the extent only of $158.13. Item 3 is materials, including steel piers, $1,949.02. By a statement filed by the plaintiff, this item is reduced to the sum of $16,998.41 and I find the proof establishes that item satisfactorily up to that amount. Item 4, wages, $1,019.60, has been proved up to the sum of $907.10. Item 5, engineering charges, $1,200, by the statement in question, has been reduced by plaintiff to the sum of $1,000, and I find that the proof establishes it up to that amount. Item 6, interest on deposit at legal rate of 5%, $1,482.14 with a credit of $644.26 for bank interest, reducing that item to $818.38, is manifestly well founded. Item 7, amount of security deposited $19,715, is manifestly to be stricken out as the plaintiff has already received that amount. Item 8, of $25,500, for profits which the plaintiff would have made upon the contract; the plaintiff contends that he has proved that he would have made at least $34,500, but he is content to reduce the claim to $25,000 which represents a profit of a little more than 12%. With regard to this item, I would remark that the amount of profit which a contractor can make upon any particular contract is subject to so many conditions and contingencies that the proof concerning it cannot produce anything like legal certainty, but it does appear of record that contractors are willing to accept contracts based on costs and 10%, and the plaintiff himself admits that he has accepted contracts upon that basis, and indeed that contract is a very ordinary one. But he says when he assumes responsibility for the contract he ought to

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be entitled to a higher rate of profit. Doubtless that is the case and it is the case because unforeseen difficulties and contingencies may reduce his profits much below that percentage, or may take it away altogether, but here the contract was not executed and that responsibility did not come into question.

I think, therefore, that the most reliable basis upon which I can go is to give the plaintiff 10% upon the amount of his contract, which is $19,150; upon that item then, I will award plaintiff $19,715, making altogether the sum of $24,297.02 in which amount the defendants will be condemned.

Judgment accordingly.

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Ex. C.

THE KING v. PATRICK KING.*

Exchequer Court of Canada, Audette, J. March 20, 1916.

DAMAGES (§ III L 2—240)—EXPROPRIATION FOR TRAINING CAMP—COMPENSATION—FARM—TIMBER LAND—VALUATION—DAMAGES—OFFSET—USE AND OCCUPATION.

The basis of compensation for the expropriation of farm or timber lands by the Crown for training camp purposes is the market value of the property as a whole, at the date of expropriation, as shewn by the prices other farms had brought in the neighbourhood when acquired for similar purposes, the benefits derived by the owner from the use and occupation of the land after the expropriation to go as an offset against his claim for damages.

Statement.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

G. G. Stuart, K.C., for plaintiff; *L. S. St. Laurent*, K.C., for defendant.

Audette, J.

AUDETTE, J.:—This is an information, exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands and real property, described in the amended information and belonging to the defendant, were taken and expropriated by the Crown under the provisions of the Expropriation Act, for the purposes of the Valcartier Training Camp, a public work of Canada, by depositing on September 15, 1913, a plan and description of the same, in the office of the registrar of deeds for the county or the registration division where the same are situated.

While the property was expropriated in September, 1913, the defendant was allowed to remain in possession after that date for a long period of time, as will be hereafter mentioned.

The defendant's title is admitted.

*Affirmed on appeal to Supreme Court of Canada, December 11, 1916.

It is also admitted and agreed upon by both parties, that lot No. 20, the farm lot, contains 89½ arpents, out of which 20,000 sq. ft. must be deducted, as having been sold to third parties before the expropriation; and that lot No. 22, the bush lot, contains 146 2-5 arpents.

The Crown, by the information, offers the sum of $2,600 for lot No. 20, and the sum of $1,300 for lot No. 22. The defendant claims $5,000 for lot No. 22 and $5,000 for lot No. 20, although expressing his willingness to accept $4,900 for the same, as intimated on previous occasions, together with the sum of $140 for alleged damages suffered in disposing of his stock, making in all the sum of $10,140.

While the expropriation took place on September 15, 1913, the defendant was allowed to remain in possession of his property for quite a while after that date. He and his family had the use of the residence and buildings on lot No. 20 up to May, 1915, and resided there until that time. The Crown took possession of lot 20 some time about August 9, 1914. The defendant had his crop of 1913, and the use of his farm up to August 9, 1914. On September 15, 1914, he was paid the sum of $425 "in full settlement for all claims and damages of any and every nature whatsoever on lot 20," as appears by the receipt for this sum of $425, filed as ex. No. 3.

On behalf of the defence, witness Giroux, assuming lot No. 20 contained 94 arpents, valued it at $25 an arpent = $2,350; the dwelling house, $967.60; extension kitchen, $67.20; the barn, $1,077.12; 3 lean-to's, $75; dairy, $25 = $4,561.92; and he added thereto $338.08 to make up the amount of $4,900 for which he had obtained an option from the defendant. And he adds: "that was the value in August, 1914." He says, to arrive at the intrinsic value of a property it has to be valued in detail. He further testifies that the value of the farm (lot No. 20), without any question of expropriation, is the sum of $3,000 to $3,500.

Witness Vallee values only lot 22, which is a bush lot, with about 8 arpents under cultivation, at $5,325. To arrive at this figure, he proceeds by first estimating the quantity of commercial timber, pulp and cordwood upon the lot. He reckons there are 90 arpents with 882 cords of standing pulpwood, upon which he could realize $2.50 a cord, 20 pieces of commercial timber at $2 a

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piece, 120 standing cords of fuel at 75 cents profit upon each. Then he says, there are 38 arpents of swamp upon the lot, and an old barn which he valued at $50, and 8 arpents of good land under cultivation, which he valued at $100 an arpent. He values the swamp at $5 an arpent, and the balance which is not cleared at $20 an arpent, adding that by working out the lot he would make $3,000 and retain the land. On cross-examination he stated he does not know of any farm at Valcartier which was ever sold at $100 an arpent. He bought the right to cut on 8 or 10 lots, some of 80 others of 100 arpents, for $500 each. In 1903 he bought a wood lot for $400.

Witness Jules Croteau, a civil engineer, who did not shew much qualification to value a bush lot, proceeded upon the same basis as the previous witness to arrive at the value of that lot 22 at $5,332, as the intrinsic value. He states that he valued the lot upon the consideration that by working it he could realize the profits he mentioned. He further says a purchaser could advantageously purchase at $3,500 to $4,000. He estimates also the number of flooded acres upon this lot.

Witness Murphy examined lot No. 22 in March, 1916, and estimates there are 1,000 cords of pulpwood standing on it, and 120 cords of cordwood, and values the pulpwood at $2.75 a cord, and the cordwood at $1 standing; but this witness did not put any valuation upon lot No. 22 as a whole. He valued lot 20, under the quantity survey method, as follows:—4 acres of swamp at $5, $20; 12 acres of bush land at $15, $180; and upon which are 3 cords of pulpwood per acre, at $2, $72; 1 cord of wood per acre, $12; 53 acres of land at $30, $1,590; 4 acres of land at $75, $300; 8 acres of land at $75, $600; 2 acres of land at $75, $150; 6 acres of land at $100, $600; building, $1,190; making the total of $4,714.

The buildings he valued as follows:—Dwelling house, $500; dairy, $10; pig pens, $20; machine and other sheds, $60; barn and stable, $600 = $1,190.

The valuation of $4,714 was made in November, 1915, in company with witness Maher.

Witness Maher valued lot 20 at $4,714, and agrees with the details given by the previous witness. He values the bush lot, No. 22, at $5,765, and states there are almost 8 acres of cleared

land upon it, and about 38 acres of swamp. He estimates there are about 882 cords of wood upon the lot, 20 large commercial trees, etc., and says he does not know—or does not remember—of any sale of wood lots, at Valcartier, previous to 1913, or of any farm selling at $75 or $100 an arpent, but that he bases his valuation on what he thinks he could get out of this lot, which he visited once in September, 1915. He further adds that this lot *en bloc* is worth to a farmer from $3,500 to $4,000.

Patrick King, the defendant, says he has under cultivation about 75 arpents on lot No. 20, and 8 or 10 on lot No. 22. He sowed oats in 1914, but was settled with by the Crown for all damages in respect thereto. On lot No. 22, upon which he reckons there are between 38 to 40 arpents of swamp, he estimates there are 1,000 cords of pulpwood. Carrying on the practice his father had before him, he was cutting some wood every year on lot No. 22. In 1914-1915 he cut 6 cords of pulpwood, the cordwood for the use of his home, 75 saw logs and about 7 pine logs. He has been working at the Power House since April 1, 1914. He further claims the damages mentioned in the defence.

On behalf of the Crown, Colonel McBain values lot No. 22 in 1913 at not over $1,200 and says there are about 60 arpents of swamp on that lot; and if the wooded part was cleared there would remain but sandy land. He further values lot No. 20, as of September, 1913, at the sum of $2,600, which, he said, is the outside figure, and adds, if that farm had been advertised in 1913, for one month, it could not sell for anything over that amount. This witness purchased 31 farms, at Valcartier, as appears by ex. No. 4, at an average price of $16.57 to $17 per arpent.

Witness John Jack values lot No. 22, as of September, 1913, at the sum of $1,700, which, he says, is an extraordinarily big price. He examined and went over the bush lot for one day and a half, and estimates there are between 60 to 70 arpents of swamp, and from 8 to 10 arpents of good land on it. On ex. C he indicated what he thought was swamp, as distinguished from the balance of the lot. He says a man can walk with difficulty over the swamp, but that he would lose a horse if he took it there. He had a stick, at the time of his inspection of the lot, which he ran down for a couple of feet.

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Leslie H. Coombes accompanied the previous witness when visiting lot No. 22, and says they went over it 3 times, and he made a sketch of the swamp, which is now produced as ex. No. 5, estimating there are 62 arpents of swamp on this lot.

Capt. Arthur McBain says lot No. 20, with buildings, in September, 1913, could not be sold for $2,000. He further says he purchased cordwood delivered at the camp for $2.65 and $2.75 a cord.

Now, the defendant's farm of about 89 arpents, in round figures, after making the above-mentioned deduction, would appear to be one of the fairly good farms at Valcartier, such as they are, that is, of sandy soil. The dwelling-house is old, but the barn and stable were built only about 6 years ago, and are in very good condition. About 75 acres are under cultivation, with about 12 acres of bush land and 4 acres of swamp.

Most of the evidence offered on behalf of the defendant in respect of lot No. 20 has been on a wrong basis. Indeed, the witnesses proceeded by segregating the acreage of the farm and placing a certain value upon different sections, running the price of some acreage as high as $75 and $100 an acre, a price unknown to the witnesses as having ever been paid at Valcartier. Then, after valuing the land at $25 an arpent, witness Giroux testified to the intrinsic value of each building, as of August, 1914, nearly a year after the expropriation, when, he says, prices were all spoiled. *Tout etait alors gate.* These valuations are more with respect to the intrinsic value than of the market value of the property. Although it is true, however, that after arriving at these very high figures, some of the defendant's witnesses added that, to the farmer, it was worth a lesser sum arrived at on a market value basis, and witness Giroux, without any question of expropriation, said the farm would be worth $3,000 to $3,500; but that was in 1914, when the camp had inflated the values. Others spoke in that stress, but the valuation is either made as of 1914 or 1915.

With respect to lot No. 22, the bush lot, the evidence of the defence is again arrived at on a wrong basis—upon a wrong principle. As was said in *The King* v. *Woodlock*, 32 D.L.R. 664 15 Can. Ex. 429, and *The King* v. *McLaughlin*, 26 D.L.R. 373, 15 Can. Ex. 417, it is useless to juggle with figures and to estimate the quantity of sticks of wood upon the lot, estimate the number

of cords of pulpwood, cordwood, the value of 19 or 20 sticks of commercial timber, and having done so, estimate the profits which can be realized out of that lot with the object of arriving at the market value according to such profits and to the additional value of the soil. In other words, it would mean that a lumber merchant buying timber limits under these conditions would have to pay his vendor an amount representing the value of the land together with all the foreseen profits he could realize out of the timber upon the limit. In the result leaving to the purchaser all the labour and giving the vendor all the prospective profits to be taken out of the limits. Stating the proposition is solving it, because no sane business man would purchase, or could afford to purchase, under such circumstances.

What is sought in the present case is the market value of this farm as a whole, as it stood at the date of the expropriation—the compensation to be ascertained, not upon the bare market value, but on a liberal basis. We have as a determining element to be guided by, a large number of sales of farms in the neighbourhood acquired under private agreements and sales for camp purposes at prices which by comparison go to make the defendant's claim excessive. The prices paid by Col. McBain (as shown by ex. No. 4), as of the date of the expropriation, are $16.57 to $17 per acre, and they afford the best test and the safest starting point for the present enquiry into the market value of the present farm. *Dodge* v. *The King*, 38 Can. S.C.R. 149; *Fitzpatrick* v. *Town of New Liskeard*, 13 O.W.R. 806.

For the farm and the buildings thereon erected I will allow $30 an arpent, which is indeed a high price for farms in that locality, making for the 89 acres in round figures (20,000 sq. ft. having to be deducted from the acreage, as above set forth), the sum of $2,670, to which should be added the sum of $600 in round figures, in view of the barn and stable only recently built, and the fact that lots had been sold on the waterfront and others could be sold, and further to cover the cost of moving and all expenses incidental thereto, making the total sum of $3,270, an amount coming within the range of the valuation of witness Giroux, heard on behalf of the defendant.

The valuation of the wood lot should also be arrived at as a whole and with the consideration of the sales above mentioned. *The King* v. *Kendall*, 8 D.L.R. 900, 14 Can. Ex. 71, confirmed on

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appeal to Supreme Court. *The King* v. *New Brunswick R. Co.*, 14 Can. Ex. 491. A deal of evidence has been adduced in respect of the value of this bush lot, and while it would seem that a bush lot of 146 arpents, with between 38 to 70 arpents of swamp and 8 to 10 acres of good land at Valcartier in September, 1913, must be of good value to the owner, it cannot be worth anything like the amount claimed. I will allow for the same the sum of $1,700, which is characterized by the Crown's witness himself, who made that valuation, as a very extraordinarily high price.

The claim for damages, as mentioned in the plea, small as it is, seems to be the result of an afterthought, as would appear by the reference to ex. No. 3, which is the receipt given in September, 1914, for the sum of $425 in full settlement for all claims and damages of any and every nature whatsoever. The defendant remained in occupation of the farm up to August 9, 1914, and resided on the farm, with the use of all the buildings, up to May, 1915. He further cut pulpwood, cordwood and commercial timber upon this property after the date of the expropriation. If all he has thus received from the benevolence of the Crown is not a waiver to such a claim for damages, and if he is not asked to account therefor, it can obviously be set up to offset any such claim for damages.

The compensation will be assessed as follows, viz.:—for lot 20, the farm, $3,270; for lot 22, the wood lot, $1,700 = $4,970, to which should be added 10% for compulsory taking, $497 = $5,467.

Therefore, there will be judgment as follows, viz.:—1. The lands expropriated herein are declared vested in the Crown as of September 15, 1913. 2. The compensation for the land and real property so expropriated, with all damages arising out of or resulting from the expropriation, are hereby fixed at the said sum of $5,467, with interest thereon at the rate of 5% per annum from August 9, 1914 (when the Crown took possession of the farm) to the date hereof. 3. The defendant is entitled to recover and be paid from the plaintiff the sum of $5,467, with interest as above mentioned, upon giving to the Crown a good and sufficient title free from all incumbrances whatsoever, the whole in full satisfaction for the land taken and all damages resulting from the said expropriation. 4. The defendant is also entitled to the costs of the action. *Judgment accordingly.*

REX v. HARRISON.

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Saskatchewan Supreme Court, Haultain, C.J., Lamont, Elwood and McKay, JJ. November 24, 1917.

CRIMINAL LAW (§ II B—40)—ELECTING SPEEDY TRIAL—DISTRICT OTHER THAN THAT OF THE OFFENCE—CR. CODE SS. 577, 825.

An accused person committed for trial, and who on arraignment before a District Judge under the Speedy Trials Part of the Criminal Code has elected to take jury trial, may be permitted to re-elect to be tried without a jury by the District Judge's Criminal Court holding speedy trials in the district in which the goal is situated to which he was committed and is in custody, although that is a different judicial district from that in which the alleged offence was committed.

Statement.

THE following case has been stated for the opinion of the court:—

The accused is in custody in the Regina jail upon a charge of theft in respect of which he has been duly committed for trial. On July 11th, 1917, he appeared before His Honour Judge Hannon, Judge of the District Court of the Judicial District of Regina, and then elected to take jury trial, being remanded for trial at the next Supreme Court Sittings for the Judicial District of Swift Current in which district the alleged offence took place. On July 28th, 1917, the accused at his own request appeared before me, acting as Judge of the District Court of the Judicial District of Regina, upon the request of His Honour Judge Hannon, Judge of such court, and re-elected taking speedy trial and being duly remanded therefor.

On August 10th, 1917, the accused at his own request appeared before me with counsel and intimated a desire to plead guilty before me forthwith and requested that I should forthwith take such plea and try his case. In such request counsel for the Crown joined. I, however, refused to have the accused arraigned or to take such plea or try his case, holding that I had no jurisdiction to do so, and that, as the alleged offence took place in the Swift Current district, only the Judge of the District Court of that district could take such plea and try the case. I was thereupon requested by counsel for the Crown to state a case for the opinion of the Supreme Court of Saskatchewan *en banc*, and therefore do so, being of the opinion that the further question as to my right to take the re-election should also be reserved.

The questions submitted for the opinion of the court are:—

1. Did the fact that the accused was in custody in the Regina jail within the Judicial District of Regina give me, as Judge of the

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District Court of the Judicial District of Regina, jurisdiction to take the re-election of the accused or should such re-election be taken only by the Judge of the District Court in which the alleged offence arose.

2. Had I any jurisdiction to take the plea of guilty of the accused and thereupon try him.

C. E. D. WOOD,
Judge of the District Court of the
Judicial District of Weyburn.

Dated at Regina, Saskatchewan,
August 16, 1917.

H. E. Sampson, K.C., for the Crown.

The judgment of the court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—I think that the learned judge did not misconceive his jurisdiction when he took the re-election of the accused. He was the Judge of the Judicial District of Regina and the accused was in gaol within his jurisdiction. There does not seem to me any reason for interpreting the provisions with regard to election as requiring the election to be taken before the judge within whose jurisdiction the offence was committed and before whom, under ordinary circumstances, the accused would be tried. As Mr. Justice Anglin says in *The King* v. *McDougall*, 8 Can. Cr. Cas. 234, at p. 237:—

"The election precedes arraignment and is required to give jurisdiction to the judge to try the accused. It is no part of the trial."

In the case of *The King* v. *Tereault*, 17 Can. Cr. Cas. 259, this court held that the place of election for speedy trial is the district to the gaol of which the accused has legally been committed on the preliminary enquiry.

On this point see also the judgment of this court in *The King* v. *Lynn*, 19 Can. Cr. Cas. 129.

For these reasons the first part of question No. 1 must be answered in the affirmative.

The provisions of sections 577 and 825, as amended, of the Criminal Code, in my opinion gave the learned judge jurisdiction to try the accused. He had elected to be tried by a judge and consented to be tried by the judge in question, being in custody within the jurisdiction of the court and being charged with an

offence committed within the province and within the jurisdiction of the court to try. The accused consented to be tried by the judge by intimating a desire to plead guilty before him and requesting that he should forthwith take such plea and try the case.

I think, therefore, that the second question must be answered in the affirmative. *Answers accordingly.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, and Simmons, JJ. June 17, 1918.

DISCOVERY AND INSPECTION (§ I—1)—DOCUMENT WITHIN MEANING OF RR. 364 and 366—LEDGER—PERSON MAKING DISCOVERY MUST SPECIFY PAGES.

A ledger or other book of account containing accounts relating to transactions between the parties to an action and also other accounts between one of the parties and many other individuals not connected with the issues is not a "document" within the meaning of rr. 364 and 366 relating to orders for discovery and the affidavit thereon. The person making the affidavit must specify either by existing page numbers or by identification marks placed thereon specially for the purpose the particular pages wherein entries can be found relevant to the matters in issue.

Statement.

APPEAL by the defendant from an order of Walsh, J., dismissing an appeal from an order of the Master at Edmonton by which the latter dismissed an application by the defendant for an order that the plaintiff's action be dismissed because of the failure of the plaintiff to comply with an order for production of documents. Reversed.

H. H. Hyndman, for plaintiff; *C. F. Newell*, K.C., for defendant.

The judgment of the court was delivered by

Stuart, J.

STUART, J.:—The action was begun in October, 1908. The plaintiff bank is claiming against the defendant as the endorser of a number of promissory notes signed by several different makers amounting in all to some $13,000 odd. The notes were made in the years from 1900 to 1902.

The defences pleaded by the defendant, in addition to general denials, consist of allegations of certain dealings between the plaintiff and other persons liable on the notes and of negligence and laches on the part of the plaintiff, which, it is alleged, had the effect of releasing the defendant from his liability.

In order to prove his allegations, the defendant naturally will rely principally upon the records and documents of the plaintiff bank itself. The matters of business connected with the notes

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in question were all transacted in the Rossland branch of the plaintiff bank, or of its legal predecessor.

The original order for production by the plaintiff was contained in an order on directions made on November 14, 1916. Between that date and July 3, 1917, several successive affidavits on production were filed by the plaintiff, all, except of course, the first, in consequence of special orders obtained by the defendant for the filing of a further and better affidavit.

It seems to be quite plain that the plaintiff made great efforts to comply with the various orders. Ultimately, the matter reached the position that the plaintiff had produced a large number of books of account, ledgers, etc., formerly in use in the Rossland office. In July, 1917, Ives, J., decided that the plaintiff had fully complied with the orders for production. In September the solicitors for the defendant endeavoured to make an inspection of these books of account in order to discover the items material to the issues in the case. It appears that they were unable to do so. Then, taking the position that the obligation lay upon the plaintiff to specify the particular pages and leaves of these books where any material entries were to be found, the defendant's solicitor, in October, made the motion to dismiss the action which has led to this appeal.

In giving his reasons for judgment, Walsh, J., said: "The order, *I suppose*, provides for the production of the books and their production is a compliance with the order."

From this it is evident that the learned judge did not have the order before him, but that he supposed that it existed. But, it now appears that the order was never actually drawn up at all, and that the parties acted merely upon the verbal order of the Master and upon the assumption that the order, if it had been drawn up, would have been in the usual form

What, then, would have been the proper form of the order? Naturally and properly it would follow the words of the rule giving the right to the order. R. 364 says:—

> A judge at any time may order any party to a cause or matter to discover by affidavit on the documents which are or have been in his possession or power relating to any matter in question in the said cause or matter or such of them as the judge shall deem proper.

Then r. 366 provides what the affidavit shall contain and it refers throughout to "documents" only and makes no mention

whatever of "books of account." Even sub-s. (4), which, in practice, is usually extended and amplified, requires the party to swear that he has not any other relevant "documents" in his possession. Usually, however, the affidavit, in making the negative assertion provided for, is very much extended in its wording so as to be as wide as possible, and hence we generally have, as we have in clause 4 of the affidavit in this case, the allegation that

> the plaintiff has not had and never had in its possession . . . any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy or extract from any such document or any other documents whatsoever relating to the matters in question in this action or any of them or *wherein any entry* has been made relative, etc., other than and except the documents set forth in the said first and second schedules hereto.

This follows substantially the form given in the Annual Practice, 1916, p. 1539. It will be noticed that in the affidavit an "account" is spoken of separately from a book of account.

It is apparent, therefore, that what a party is required to produce is any "*document*" relative to the issues. And the chief question is this: Is a ledger or other book of account admittedly containing accounts relating to transactions between the bank and many other individuals not connected with the issues in the case properly to be termed a "document" within the meaning of the rule, and the order based thereon?

It seems to me that this is not so. The whole book cannot be called "a document." Rather, it is a series of documents bound together for convenience. It is true that r. 369, dealing with the time and place where documents may be inspected, uses the words "or in the case of bankers' books or other books of account in constant use for the purpose of any trade or business," but the obvious sense is, "in the case of documents contained in bankers' books," etc. I do not think the rule can be read as declaring that a large banker's book of account is to be regarded by the producing party as a "document."

R. 364 provides that the opposite party may inspect and take copies of the "documents" produced. Surely it would n t be contended that he could take copies of pages in the ledgers referring to the bank's dealings with other customers not involved in the transactions at all.

Of course, there is the obvious query to be made as to a single page in a journal or day book upon which may be entered a large

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number of items dealing with quite distinct and mutually unrelated matters. It may be asked:—Then do you not consider the whole page a "document" notwithstanding these irrelevant entries? Using the word in the physical sense, I suppose the whole page would be the "document," but there is no doubt that the irrelevant items could be covered up and any dispute about them could perhaps only be resolved by a judge's inspection under r. 372 (2).

The subject-matter and substance of entries must be considered as well as mere physical form, and, while a page of a day book, with all items but the one relevant one covered over, should be considered the true document, on the other hand, a number of related pages all dealing with the same relevant subject-matter might be treated as one document or as a number of documents indifferently.

But when, admittedly, the books of accounts and ledgers in question have a large number of pages, and when, admittedly, very many of these have entries having no relation whatever to the parties involved or the subject matter of their dispute, I think it was improper for the plaintiff's agent merely to refer generally in his affidavit to these books. In my opinion, it was the duty of the deponent to specify, either by existing page numbers or by identification marks placed thereon specially for the purpose, the particular pages wherein entries could be found relevant to the matters in issue.

If it were allowable for the plaintiff to do what was done here, it would be equally allowable for any business man or company or a solicitor to say: "I produce all the books in my office. Come and look them over. I cannot say where there may be entries relevant to this case, but I have no doubts there are some to be found in my office. You are at liberty to begin your search"; or to say: "I produce ten letter copying books (of the old type); I have no doubt there are letters to be found scattered throughout these ten books which are relevant to the case, but I cannot give you the pages. Come and look for yourself."

I do not think such a course would be permissible, and I think this is practically what was done in this case.

In *Price* v. *Price*, 48 L.J. Ch. 215, the defendant swore:—

I am not able to say exhaustively that there may not be in my office or may not have been in the possession of Ebenezer Roberts, deceased, my late clerk,

documents relating to the matters in question in this suit which I have been unable to find.

Bacon, V.C., held that this was insufficient, though, of course, there was no direct offer to produce them all for inspection.

Of course most of the precedents which apparently come near the facts here existing are cases of refusal to produce, and when the party refusing has sworn there is nothing relating to the issue contained in a mass of documents in his possession. In the present case there is no refusal but a blanket consent and an invitation to examine extended to the other party. But the cases, even of refusal, do shew what degree of particularity in search is demanded.

In *Combe* v. *Corporation of London*, 62 E.R. 1048, 1 Y. & C.C.C. 631, Knight-Bruce, V.-C., made the inference, p. 1057, "that the examination of the books had not been precise and complete." This case is cited in Bray on Discovery, p. 220, as authority for the statement that "the number of the documents is no excuse for an imperfect examination of them, and the court will, if necessary, allow time to prepare a proper schedule."

In *Stuart* v. *Bute*, 11 Sim., 442, 59 E.R. 943:—

> The fifth interrogatory required the defendant to set forth a full, true and particular schedule or copy of all and every the entries or entry contained in any of the ledgers, day books, bankers' books, bill books and other accounts and books of accounts, by the fourth interrogatory mentioned or inquired after, which in any way related to the several particulars and matters, etc.

Shadwell, V.-C., said:—

> Then what is said in answer to the fifth interrogatory is a very different thing. The defendant first states that the books comprised in the schedule are very voluminous; which is a statement that has no reference to the contents; for it does not follow that, because the books are voluminous the entries are voluminous and therefore the statement that the books are voluminous is merely surplusage and merely put in to mislead.

He held the answer was not sufficient. This seems to be a fairly clear authority for the proposition that a party producing voluminous bank books must specify the entries contained therein which relate to the matter in question.

The case of *Christian* v. *Taylor*, 59 E.R. 928, 11 Sim. 401, where the defendants were executors of a deceased partner and they had stated that they had in their possession three hogsheads sealed up containing old papers consisting of invoices, orders for goods, etc., is distinguishable because apparently all the documents were relevant as being partnership documents and also the

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defendants were only representatives of the person who was a party to the transactions and were not parties thereto themselves.

In my opinion, the plaintiff is bound, in its affidavit, to state not only what books contain relevant entries (which it has done), but also to state where those entries, so admitted to exist therein, can be found by reference to already existing paging or to markings especially created for the purpose. In this way only can it refer to relevant documents in its possession. It is necessary to observe the distinction between producing for inspection after the relevant documents have been revealed and the production by affidavit, that is the discovery or revealing of what documents do exist in the party's possession. It is the latter, not the former, we are dealing with here.

It is not for us now to suggest what degree of particularity of search by the plaintiff would be acceptable as shewing that nothing more can be discovered or exists. That would be a matter which could be raised by cross-examination upon the new affidavit, which is allowable under our new r. 382, or perhaps in other ways later on.

Having secured such an affidavit as I have indicated, the defendant will, at least, be in a position to know what he may be confronted with on the trial, and to object or ask an adjournment on the ground of surprise if anything new is produced, as well as to produce in evidence himself whatever he may think is favourable to his case.

I think, therefore, with respect, that the appeal should be allowed with costs, the orders below set aside, and the plaintiff ordered to make a further and better affidavit meeting the requirements above set forth. The costs of the application below should, in the circumstances be costs in the cause. Owing to the doubt evidently existing as to the proper practice there should as yet be no order to dismiss. *Appeal allowed.*

QUE.

K. B.

THE KING v. BENJAMIN.

Quebec King's Bench, Crown Side, Hackett, J. October 4, 1917.

CRIMINAL LAW (§ II B—46)—CONFESSION—MUST BE VOLUNTARY—ONUS.

A confession in a criminal case must not be extracted by any sort of threat or promise, or by fear of any direct or implied promise. It must be entirely free and voluntary and the onus of establishing this rests on the prosecution.

QUESTION of the admissibility, in the evidence, of an admission made by the prisoner Benjamin, accused of murder.

Boivin, for the Crown; *Gaudet*, for the prisoner.

HACKETT, J.:—During the examination of the witness Choquette, an objection was raised by the counsel for the prisoner about certain admissions said to have been made by the prisoner while in custody, at the lock up at Farnham, to the witness Choquette.

It would appear that Choquette, who is a trader at Farnham, is also a justice of the peace, and he frequently goes to the court house for the purpose of trying cases which may be heard before him.

On the morning in question, the high constable of this district, Boisvert, had informed Choquette that he, Choquette, was to sit as one of the justices for the preliminary examination of the prisoner. The witness went down to the court house, and while there went to see the prisoner. As he was going into the cell, the high constable of the district said to him:

Try to make him tell where he put the shirt.

This was what was said to the witness as he was going down. The witness Choquette goes into where the prisoner is, gives him the ordinary salutation, and then asks him, at the request of the high constable, where he had put the shirt.

The law upon the question, governing this question, is this: A confession in order to be admissible must not be extracted by any sort of threat or promise or forcing, nor can it be extracted by any fear of any direct or implied promise, however slight, or by the exercise of improper influence, but it must be entirely free and voluntary, and the *onus* is upon the prosecution to establish that it is entirely free and voluntary. So that in the case of a confession made before a magistrate or any person, it must be shewn affirmatively that it was made by the prisoner without any promise, or threat or fear, or the exercise of any undue influence upon him. If a confession is not so made, it cannot be used in evidence against the prisoner.

The principle of the rule relating to the exclusion of a confession is to exclude all confessions which may have been procured by the prisoner being led to suppose that it would be better for him, and thus led to confess to the commission of an offence which in reality he never committed.

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The attention of the court was drawn, by the counsel representing the Crown, to the fact that there was a difference in relation to confessions and admission. The admission which is sought to be received from the prisoner in this case is an admission which forms a strong link in the chain of presumption against the prisoner. The witness Choquette was trying to ascertain from him that he was the owner of that shirt that was about to be produced. The witness Choquette stated that he told the prisoner that it would be better for him to admit if the shirt was his, that it would be easier for him, and he stated that he induced him to make an admission, if an admission was made.

Under these circumstances, and under the jurisprudence as laid down in the case of *The King* v. *White*, 15 Can. Cr. Cas. 30, which states, after going over the law, at great length, that the recent decisions in criminal cases shew an increasing exclusion of evidence which appears to be unfair or irregular.

The witness Choquette, as he states, has gone there, and asked this question at the direct or indirect request of the high constable and having made the promise or inducement which he made,and he being a justice of the peace at that time, this does, in my mind, constitute a ground upon which this cannot be admitted in evidence, and, therefore, I am obliged to state that this admission, which is by nature of a confession, cannot be received or entered in the record. *Judgment accordingly.*

N. S.
S. C.

McKAY v. McKAY.

Nova Scotia Supreme Court, Longley and Drysdale, JJ., Ritchie, E.J., and Mellish, J. April 27, 1918.

JUDGMENT (§ II D—178)—AGAINST ESTATE—CONDITIONS OF ADMINISTRATION BOND BROKEN—ASSIGNMENT OF BOND TO PLAINTIFF—DEFAULT JUDGMENT—LIQUIDATED DEMAND.

Where a judgment has been obtained for the amount of the plaintiff's claim against an estate, and the court of probate, being satisfied that the condition of the administration bond has been broken, has assigned the bond under the provisions of the Probate Act to the plaintiff who thereby became entitled to sue on the bond, and recover thereon as trustee for all parties interested, a default judgment may be entered for the judgment, debt, and interest, the statement of claim being for a liquidated demand under O. XXVII. r. 2. The sureties on such bond cannot compel the creditor to establish the claim over again against the estate.

Statement.

THE COURT was moved, pursuant to notice, for an order to set aside the plaintiff's judgment and the writ of execution issued thereon, with costs, and that defendants have 10 days in which

Statement.

to file and deliver a defence on the following grounds:—(1) Because the judgment being an action on a bond within 8 and 9 Wm. III. c. 11, which is in force in Nova Scotia, could only be entered after assessment of damages on said bond. (2) Because said judgment could not be entered in default of delivering a defence, and the indorsement on the writ was not within O. III., rule 5, to permit of a summary judgment.

J. J. Power, K.C., in support of motion; *Ernest Ackhurst*, *contra*.

The judgment of the court was delivered by

Mellish, J.

MELLISH, J.:—This is a motion to set aside a default judgment *ex debito justitiæ*. The statement of claim discloses the following facts: The plaintiff, Teresa McKay, is a married woman; the defendant, Emma McKay, is the widow and administratrix of the late Alexander McKay since May 21, 1915. This defendant and the other defendants, William J. Yetman and Elizabeth Yetman are parties to the administration bond given to the registrar of probate and dated May 21, 1915, whereby the defendants became bound that Emma McKay should, *inter alia*, administer the goods and effects of the deceased according to law. The plaintiff recovered judgment against the administratrix as such on September 20, 1917, in this court for $186.45. The Court of Probate, on October 10, 1917, being satisfied that the condition of the bond had been broken, assigned this bond under the provisions of the Probate Act to the plaintiff who thereby became entitled to sue on the bond in her own name as if it had originally been given to her and to recover thereon as trustee for all parties interested.

Plaintiff claims payment of the judgment, $186.45, debt, and interest from the date of the judgment.

The statement of claim is dated March 7, 1917, and, no defence having been forthcoming, a default judgment for the claim and costs was entered by the plaintiff on March 19, 1917.

The motion came on before Russell, J., in chambers and was by him referred to this court. On behalf of the defendants it is contended: (1) That judgment could only be entered after an assessment of damages. (2) That the indorsement of the writ is not within O. III., r. 5, so as to permit of a summary judgment.

The latter contention is not, I think, material. A default judgment can be entered even though the claim is not a matter of

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special indorsement, the advantage of which is that in such cases an application may be made for summary judgment under O. XIV. notwithstanding appearance.

The sole question I think is whether the statement of claim is for a "liquidated demand" under O. XXVII., r. 2.

The indorsement on the writ would indicate that the plaintiff was claiming the full amount of the bond, $2,000. But in such an indorsement, the precise ground of complaint or the precise remedy to be claimed is not essential. (O. III., r. 2; O. XX., r. 2.)

In regard to the authorities cited in support of the motion; at the outset it is to be recognised that under the English practice judgment cannot be entered for default of pleading where appearance has been entered un ess the writ has been specially indorsed notwithstanding the terms of O. XXVII., r. 2, because under O. XXX., which is not imperative under our rules, the plaintiff must apply for directions.

It is further to be observed that by O. XIII., r. 14, of the English rules, where a writ is indorsed for a claim on a bond within 8 & 9 Wm. III., c. 11. and default in appearance is made, no statement of claim shall be delivered and the plaintiff may at once suggest breaches and proceed under the statute. We have no such rule.

Having regard to the provisions of this rule, the court in the case of *Tuther* v. *Caralampi*, 21 Q.B.D. 414, held that O. XIV. as to summary judgment was inapplicable because the bond being one within the statute 8 & 9 Wm. IV., c. 11, the provisions of O. XIII., r. 14, shewed that the other provisions of the rules as to special indorsement were inapplicable and that the special procedure under the statute was saved by O. XIII., r. 14. There is no such saving provision in our rules; and in my opinion these rules are exhaustive and were intended to apply to all actions whether brought on bonds within the statute or otherwise.

There are also special provisions in the Ontario rules which, in my opinion, render the cases decided thereunder inapplicable.

Under the peculiar circumstances of this case, a judgment having been obtained for the amount of the plaintiff's claim against the estate and the administration bond being in effect in my view a guarantee by the obligors that the administrator should pay such claims at least when so established, I do not think the plain-

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tiff's demand can be said to be unliquidated, at least as against the defendant administratrix, and I do not think the sureties on such a bond are in any better position, nor could they, I think, compel the plaintiff creditor to establish his claim over again against the estate in this action.

I am not unmindful of the general rule that a surety is not bound by a judgment against the principal. I do not, however, think that such a rule is applicable to a case of suretyship such as that in question here, where one of the duties for the performance of which I think the bondsmen are sureties is that the administrator shall protect the estate and make all proper defences to any claims that may be made against it and pay them when established. (Probate Act, s. 58.)

Whether this is so or not, I think the demand is *primâ facie*, and purports to be, a liquidated one; it does not even require a "computation" to ascertain the precise amount, much less the intervention "of a jury or of a court of equity." *Murray* v. *Earl of Stair*, 2 B. & C. 82, 107 E.R. 313; *Gerrard* v. *Clowes*, [1892] 2 Q.B. 11, at 13.

The defendants having made default, and the sole question for consideration being whether the claim is for a liquidated demand, in my opinion, the defendants cannot succeed on either of the grounds upon which the motion is based.

The motion will be dismissed with costs to be taxed as counsel agreed, on the footing of its having been made in Chambers.

Motion dismissed.

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CAN.

Ex. C.

Exchequer Court of Canada, Quebec Admiralty District, Maclennan, Dep. L.J. in Adm. April 4, 1917.

COLLISION (§ I A—3) — FOG — RULE OF ROAD — SPEED — LOOK-OUT — NEGLIGENCE.

Where in a fog or thick weather a steamer proceeds at an excessive speed, without a sufficient look-out, and fails to keep out of the way of a schooner keeping properly within her course, she is in violation of arts. 16 and 20 of the Rules of the Road, and liable for a collision with the latter vessel.

Statement.

ACTION to recover damages resulting from a collision.

Hector McInnes, K.C., for plaintiffs; *A. Holden*, K.C., for defendants.

Maclennan, Dep. L.J. in adm.

MACLENNAN, Dep. L.J. in adm.:—This is an action *in personam* by the owners and crew of the fishing schoomer "Lucille M. Schnare"

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against the master, first officer and look-out of the steamship "Wartenfels" for damages from a collision between these vessels on June 18, 1916, resulting in the loss of the schooner and one member of the crew.

The schooner was bound from St. Lawrence, Newfoundland, on a fishing trip to the Grand Banks, having on board a crew of 19, stores, bait and fishing tackle and the personal effects of the crew, and was proceeding on a course S.E. by E.½E. magnetic, when at 7.50 p.m., during daylight, she was struck by the steamship "Wartenfels" on the port side ranging aft between the foremast and mainmast. The wind was a light westerly breeze on the schooner's starboard quarter with fog of varying density. The schooner had all her sails up except topsails and was proceeding at a speed of about 3 to 4 knots per hour and had a mechanical fog horn at the bow which was sounded in accordance with the regulations. The master of the schooner had been on deck all day attending to the navigation, and with him was a man who was steering and two men keeping look-out forward, one of the latter operating the fog horn, when they heard a steamer's whistle 4 or 5 points on the port bow. The master heard about 4 blasts of the whistle and by watching he saw the compass bearing did not appreciably change, and on the last blast the steamship "Wartenfels" came into sight through the fog at a distance of 200 or 300 yards off the port bow, according to the evidence of the master and the look-out Beck, who was operating the fog horn. The other look-out, Arthur Schnare, also saw the steamer at a distance which he estimates at 800 or 900 ft. Another member of the crew, Stedman Corkum, was in his berth below, heard two blasts from the steamer, came up and saw the steamer at a distance of twice its own length, which would be about 800 ft. The schooner kept her course and speed, as her master relied upon the steamer keeping out of the way. The schooner's length was 124 ft., drawing about 13 ft. aft and 6 or 7 ft. forward, and had on board about 30 tons ballast, besides stores and provisions. The stem of the steamer struck the port side of the schooner between the main hatch and mainmast and the schooner went down in 15 minutes.

The "Wartenfels" was a German captured steel ship owned by the Crown and in the service of the Admiralty, 396 ft. over all, with a gross tonnage of 4,511 tons, quadruple engines, single screw,

drawing 14 ft. forward and 18 ft. aft, had 3 officers, 5 engineers and a crew of 79 which had been shipped in Bombay. She was on a voyage from London, and, at the time of the collision, was on a course S. 70 W. and about 5 or 6 miles south of Cape Race. The full speed of the steamer was 11 knots, and from 4 p.m., to the time of the collision at 7.50 p.m., had proceeded at varying speed owing to the fog conditions. The navigation was attended to by the master, the first officer and the quartermaster, who was steering on the bridge, and by one look-out forward on the forecastle head. The master left the bridge to go to his room 6 minutes before the collision when she was going at half-speed, and when about to leave his room to return to the bridge he heard the fog horn of the schooner about 30 seconds before the collision. The first officer, who was on the bridge, heard the schooner's fog horn, saw the schooner at the same moment, and says that he at once gave the order "hard aport," and ordered the engines "full speed astern," and that the orders hard aport and full speed astern and the collision were simultaneous. The look-out did not hear the schooner's fog horn until the collision. The second officer, who was off duty, went from the fore part of the bridge deck into the bathroom, where he heard the schooner's fog horn, and in the space of a minute the collision occurred. The quartermaster was at the wheel steering; he says the fog was thick and he did not hear the fog horn. He was examined through an interpreter, and the following extracts from his evidence are relevant:—

Q. Did he get any orders from the first officer when the schooner was seen? A. Hard aport. Q. What time did the collision take place after he got that order "hard aport"? A. About a minute or two, as soon as the first officer gave the order "hard aport" he did it, and the vessels collided. Q. Could he see the schooner? A. No, sir, it was too thick. (And further on he testified as follows):—Q. Did he change his course just before the collision? A. S. 70 W. about 7 o'clock. Q. Did he change his helm just before the collision? A. No, sir. Q. Did he get an order to port his helm just before the collision? A. He was going on the same course. Q. Did not get any order to port the helm? A. The first officer gave him "hard aport," and after two minutes they touched the schooner. Q. What order did he get? A. The first officer gave him "hard aport" and the ship touched the other vessel. Q. What was the 2 minutes you were talking about? A. He did not say it, sir, as soon as he got the order "hard aport," he thinks it was 2 minutes before the collision. Q. After he got the order "hard aport" he thinks it was 2 minutes until the collision? A. Yes, sir. Q. Did he see the schooner? A. No, sir. Q. Any time at all? A. See nothing, sir.

The gunner of the steamer was on watch right aft, and he

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swears he heard a long blast from the schooner's fog horn when they struck. At the time of the collision the weather was fine and the sea smooth. The master of the schooner thought the steamer was going about 7 miles an hour from the foam that appeared on her bow. Corkum also saw the white foam, and the look-out, Arthur Schnare, says she had considerable foam on her bow rolled up.

The evidence on behalf of the steamer shews that she was proceeding at varying speed during the 3 or 4 hours preceding the collision, and I consider that a reasonable appreciation of all the evidence on this point shews that the steamer had a speed at the time of the collision of 6 knots an hour. There had been fog of varying density for some hours; some of the witnesses say that the fog was dense at the time of the collision. By art. 16 of the Rules of the Road the steamer was obliged to go at a moderate speed, having regard to the existing circumstances and conditions. The meaning of this rule has been very frequently considered by the courts, and I think it is absolutely settled by the Court of Appeal and by the House of Lords, that you ought not to go so fast in a fog that you cannot pull up within the distance that you can see, and if you are going in a fog at such speed that you cannot pull up in time if anything requires you to pull up you are going too fast. A steamer should be able to stop within the limit of observation, and, as a general rule, speed such that another vessel can not be avoided after being seen is excessive; *The Campania*, [1901] P. 289; *The Oceanic*, 9 Asp. M.C. 378; *The Counsellor*, [1913] P. 70; *The Umbria*, 166 U.S. 404.

Whatever number of knots per hour the steamer was making it was unable, after its first officer saw the schooner, to pull up and avoid the collision.

I, therefore, find that the steamer was going too fast, and not at the moderate speed required in a fog by article 16 of the Rules of the Road.

By articles 20 and 21 of the Rules of the Road the schooner had the right-of way and was bound to keep her course and speed, and the steamer was obliged to keep out of her way. The evidence shews that the schooner did keep her course and speed, no alteration whatever having been made from the time that the fog signal of the steamer was first heard until the collision. The steamer was

seen, according to the evidence of those on board the schooner, at a distance of 200 to 300 yds., and Capt. Schnare says a minute or a minute and a half before the collision. If the look-out on the steamer had been sufficient and vigilant the schooner would have been seen at the very time the steamer came in view of those on board the schooner. The first officer was the only person on the steamer, according to the evidence, who saw the schooner before the collision, and when he saw her he says he gave the order "hard aport." The quartermaster swore that one or two minutes elapsed between that order and the collision. At the trial, I had the advice and assistance of Capt. Reid as nautical assessor, and he advised me that if the helm of the steamer had been put hard aport one minute before the collision or when she was 200 yds. away, her bow would have gone to starboard and would easily have cleared the schooner. No explanation has been given why the order of the first officer "hard aport," one or two minutes before the collision, was not carried out, as if it had been promptly and properly executed the steamer would have gone astern of the schooner. The steamer was bound to keep out of the way of the schooner and the burden rests upon her to shew a sufficient reason for not doing so.

I, therefore, find that art. 20 of the Rules was violated.

The plaintiffs have submitted that the steamer's look-out was incompetent and insufficient. The look-out was Fakir Hoosein, a Lascar, who gave his evidence through an interpreter; he was forward on the forecastle head and, according to his evidence, heard the horn and saw the schooner for the first time at the moment of the collision. The master of the steamer had left the bridge for 6 minutes; just as he was returning the collision took place. During this interval the only man on the bridge was the first officer, who walked across it constantly, and from time to time pulled the whistle cord and looked at the compass. The position of look-out is one requiring great fidelity, attention and care and should not be entrusted to an incompetent person. The greatest vigilance is required in fog or thick weather and one look-out which may be sufficient on a clear day is not sufficient in thick weather or in a place where other vessels may be met. The collision occurred on the route of ships coming in and going out past Cape Race,

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and during the course of the afternoon the fog signal of several ships was heard both on the steamer and schooner. In addition it was a place where fishing vessels were liable to be met. I asked my assessor if, having regard to the fog conditions, one look-out on the forecastle was sufficient, and he advised me it was not, that there should also have been a look-out in the crow's nest, and in the absence of the master from the bridge he should have left someone there with the first officer, and that it is usual in a fog to have, in addition to the other look-outs, someone on each end of the bridge to look and listen. I am satisfied that the look-out on the bow could have seen the schooner and heard its fog horn before the collision if he had been competent and attentive to his duty.

Dr. Lushington, in *The George*, 9 Jurist 671, said:—

What is a proper look-out? Two things are necessary to constitute it: first, that, according to the state of the weather, the wind and the darkness at the time, there be a sufficient number of persons stationed for the purpose. Secondly, assuming that there is a sufficient number so stationed, that those persons kn w and perform their duty; for it does not follow, that, because persons are appointed to a duty, they, therefore, discharge it. Upon the present occasion, the question as to whether a good look-out was actually kept will turn upon the question, whether the "Nora Creina" ought to have been visible at a longer distance or not. If you are of opinion that the night was not so dark as to prevent persons seeing the "Nora Creina" in good time to prevent the accident, then there was not a good look-out. If, on the other hand, you shall be of opinion that it was so dark that it was impossible by any ordinary care and caution, to have discovered this vessel, so as to prevent the accident, then no one will be to blame.

In the case of *The Germania*, 21 L.T. 44, the Privy Council held that there ought to be two look-outs at the bow-sprit, and the Master of the Rolls, delivering the judgment for the Judicial Committee, said:—

Their Lordships are informed by the naval assessors who assist them that it is the usual practice in King's ships to have never less than two look-outs at the bow-sprit, and their lordships are not satisfied with the sufficiency of the reason alleged for having only one of these look-outs in the present case. The evidence of the chief officer is to this effect. The first report was from the look-out man, who reported ship right ahead, the officer of the watch saw something ahead, and ported the helm directly. He says that the time was about a minute from the time when he first saw her to the time when the collision took place.

Marsden's Collisions at Sea, 6th ed., p. 472:—

The look-out must be vigilant and sufficient according to the exigencies of the case. The denser the fog and the worse the weather the greater the cause for vigilance. A ship cannot be heard to say that a look-out was of no use because the weather was so thick that another ship could not be seen until

actually in collision. In *The Mellona*, 3 W. Rob. 7, Dr. Lushington said: It is no excuse to urge that from the intensity of the darkness no vigilance, however great, could have enabled "The Mellona" to have descried "The George" in time to avoid collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed.

In ordinary cases one or more hands should be specially stationed on the look-out by day as well as at night. They should not be engaged upon any other duty, and they should be stationed in the bows, or in that part of the ship from which other vessels can best be seen.

The great importance of a look-out is also referred to in the case of *The Batavier*, 9 Moo. P.C. 286, 14 E.R. 305. In the *Cape Breton and Richelieu & Ontario Navigation Co.*, 36 Can. S.C.R. 564, the offending ship was held liable for failure to maintain a proper look-out, and the decision of the Supreme Court in that case was subsequently confirmed in the Privy Council, [1907] A.C. 112. A vessel without a sufficient look-out has the burden cast upon her of proving that such fact did not contribute to the collision; *Magdalen Islands Steamship Co.* v. *The Ship Diana*, 11 Can. Ex. 40, 57. In *The Curran*, [1910] P. 184, the court found there had been a defective look-out on the part of one of the vessels because those on board failed to hear fog signals sounded by the other vessel.

I am, therefore, compelled to find that the evidence and circumstances of the case shew that there was a failure to keep proper look-out on the steamer which directly contributed to the collision.

I have asked my assessor to advise me, if after the steamer came into sight there were any circumstances which required the schooner, under art. 27 of the Rules of the Road, to depart from the rule requiring her to keep her course and speed, and he has advised me there were none and that it was imperative on the schooner to keep her course and speed, and that if she had changed her course she would have broken the rule. In my opinion, his advice on these points was proper and correct. A slight change in the helm of the steamer would have taken her out of the way and avoided the collision. The master of the schooner had a right to expect that the steamer would perform the necessary manœuvre, and he swears that "he thought the bow would sheer." I think he was justified in coming to that conclusion.

In the case of a collision between the "Turret Age," which held its course, and the "Lloyd S. Porter," which should have given way, the Privy Council observed, [1907] A.C. 498:—

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The "Turret Age" is encountered by a vessel which, if it is performing the manœuvres that it ought to perform, will keep clear of them. They proceed, and their lordships think that they had a right to proceed, upon the fair belief that the vessel which they saw was going to perform the proper manœuvres for the purpose of avoiding any difficulty or danger.

A case in which the facts were very similar to these in the present action was *The Nacoochee*, 137 U.S. 330, before the Supreme Court of the United States in 1900. In that case there was a moderate breeze and a thick fog, and a fishing schooner was under all plain sail making about 4 knots, when the steamer "Nacoochee" was suddenly sighted on the port side at a distance of 400 to 500 ft. The schooner kept its course and the steamer, which was making 6 to 7 knots, struck her on the port quarter. The court held that the schooner was not sailing too fast, that she was not in fault for keeping her course, and that the steamer was solely responsible for the collision.

I find that the master, first officer and look-out of the "Wartenfels" are to blame and that the collision was occasioned by their failure to observe arts. 16, 20 and 29 of the Rules of the Road.

There is no blame imputable to the master or the crew of the schooner.

The plaintiffs are entitled to judgment against the defendants, with costs, and there will be a reference to the registrar to assess the damages.

Judgment for plaintiffs.

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Alberta Supreme Court, Walsh, J. June 18, 1918.

NEGLIGENCE (§ I B—5)—SCHOOL BOARD LENDING DANGEROUS EQUIPMENT FOR EXAMINATION PURPOSES—INJURY—DAMAGES.

A school board which conducts a technical school for instruction in the manual arts, and allows its equipment to be used on an examination, although the examination is conducted by examiners appointed for that purpose by a board created by or under the direction of the Provincial Department of Education, is liable in damages for injuries to a student taking the examination, caused by dangerous equipment not being properly guarded so as to be reasonably safe for the purpose for which it is being used.

Statement.

ACTION for damages for injuries to a student caused by an unguarded saw, used for examination purposes.

J. F. Lymburn, for plaintiff; *H. H. Parlee*, K.C., for defendant.

Walsh, J.

WALSH, J.:—The plaintiff, a lad of 16, was a student at one of the high schools under the jurisdiction of the defendant, and

as such he became a candidate for examination in grade IX at the annual departmental examination held in June, 1917. One of the obligatory subjects for this examination under departmental regulation was manual arts. The defendant board at the time of and for some time prior to the holding of this examination conducted a technical school as a part of its educational system in premises owned and equipped by it. The plaintiff, as a high school student, and as a part of the course of studies prescribed by regulation of the department, attended at this school once a week for several months before the date of this examination and received instruction in the manual arts from instructors appointed for that purpose by the defendant. A part of the equipment of this school was a combination of a cross-cut saw and a rip-saw. Each of these is a circular saw set in the same table and operated by the same belting and shafting, though only one of them can be used at a time; when one of them is in use the other by some mechanical device being lowered out of the way below the top of the table. An adjustable guard or hood of wire mesh fastened to a steel rim forms the only protection to the operator while either saw is in motion. These saws during the greater part of the course that the plaintiff attended were used by the instructors alone and by them exclusively for demonstration purposes, but towards the end of the course the students were allowed to do some work with them. The plaintiff used the cross-cut saw twice under the directions of one of the instructors. It is a much easier and less dangerous saw to work with than the rip-saw. On two other occasions immediately before the examination the students present were permitted to use the rip saw, but the plaintiff was not present on either of these occasions, and as a result when the examinations began he had never used nor had he formed the slightest practical acquaintance with it. The examination in manual arts took place at this school, and one of the things required of the candidates according to the paper set for the examination was to saw out of a block of wood a piece 3 inches wide by 3 ft. long. The plaintiff was given a block with which to do this work. He put the end of it which was nearest his body in his right hand and with his left hand guided the other end of it against the rip saw, which was in motion, and ran the saw through the wood, keeping his left hand on the left hand edge of the block at a distance, I should say, of a little more

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than 1 inch from the saw until the saw had run itself through the block. Then, for some purpose, and in some manner which he cannot explain, he brought his left hand back towards his body, and in doing so it came in contact with the saw, which was quite unguarded. The result is that he has lost from that hand his little finger from the first joint, his third finger from the knuckle, and the end of his thumb, whilst his first and second fingers are to a certain extent stiff. His claim is against the board for the damages thus occasioned him.

In my opinion, the defendant, in supplying this equipment for use in this school in the shape in which it was, was guilty of negligence. Each of these saws is an exceedingly dangerous instrument, and the rip saw is particularly so. It is a large saw with formidable teeth, and it makes 3,000 revolutions in a minute. When in motion, it is sure and certain injury of a serious character to any part of the person of the operator which may come in contact with it. The guard provided for it, and which may or may not be used as the operator decides, constitutes his only protection, and it is upon the admission of the defendant's two instructors who should know more about it than any one else, worse than worthless, for they both say that it is much more dangerous to operate either saw with than without it. It appears that in mills and other industrial establishments in which saws of this character are used, it is usual to operate them without guards, but I think that no fair comparison can be made between such concerns and a school like this. In them, men of mature years, experienced in the handling of such machinery, are employed, while in this school, mere lads, with absolutely no training beyond that which they receive at the hands of their instructors, are, after months of theory in which the saws are handled exclusively by the instructors for demonstration purposes, expected to handle these dangerous articles either in an unguarded condition or under the false protection of a most inefficient guard. If the plaintiff's accident had happened at a time when the defendant board, through its officers or servants, was in charge of the saws, I should say that there could be no doubt of its liability to him for damages. The difficulty that I have is in determining whether or not, in the circumstances of this case, that liability must be borne by the defendant or placed elsewhere.

The examination in the course of which the plaintiff was injured was not conducted by the defendant, but by examiners appointed for that purpose by a board, created by or under the direction of the Provincial Department of Education. The defendant allowed its premises to be made use of for the examination, doubtless because it was the only place in the city equipped for the purpose, but the time for holding it, the setting and marking of the papers, and the conduct of the proceedings was entirely in the hands of this board of examiners without any right in the defendant board to interfere with it. The argument is advanced that because of this the defendant board cannot be held liable for the plaintiff's injuries. I am unable, however, to agree with this view. The plaintiff was a pupil at one of the schools under the defendant's jurisdiction, who was seeking promotion to a higher grade in the same school. The defendant allowed the board which was conducting the examination to make use of its technical school and its equipment for the purposes of this examination. The plaintiff was told by his instructors at this school that he would have to attend this examination. It was by a notice posted on the bulletin board at the high school which he was attending that he knew it would be held at the technical school, and when it would be held. The same notice gave information as to the supplies of wood that the instructor, presumably the defendant's instructor, was to have on hand for each student from which he must have known that each student would be called upon to do some work upon the machines with which the school was equipped. These supplies were in fact purchased by the headmaster of the technical school, though the cost of them was charged to the Department of Education. At the request of the Director of Technical Education for the Province the headmaster ordered two of the technical school instructors to be present at the school during the examination and take charge of the machines and see that they were all right, and both he and they were there during the examination and at the time of the accident. The instructors' conception of their duty was, in substance, that they were to see that the machinery was, and continued to be, during the progress of the examination, in good running order. In the light of these facts, it is abundantly clear that the defendant, when it allowed its premises to be made use of for the purposes of this examination,

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knew full well that the candidates would be required to use its equipment, and that it co-operated in the fullest manner possible with the examining board in such use of the same. That being so, I think that the defendant owed a duty to those candidates to use ordinary care to see that the dangerous equipment which these untrained boys were to handle, under the stress and strain and excitement of an examination, was reasonably fit and safe for that purpose, and in this it failed.

In *Heaven* v. *Pender*, 11 Q.B.D. 503, Brett, M.R., at p. 509, says:—

> Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Although the other members of the Court of Appeal did not concur with the Master of the Rolls in what Cotton, L.J., called "the larger principle which he entertains" referring, no doubt, to that embodied in the above-quoted language, they agreed with him in the result, namely, that the defendant, a dockowner, who supplied and put up a staging outside a ship in his dock under a contract with a ship owner, was liable in damages to the plaintiff, a workman in the employ of a painter who had contracted with the ship owner to paint his ship, for injuries suffered by him through the breaking of a rope which was unfit for use when supplied by the defendant. That may, I think, be properly called the classical case upon the question, and applying the principle of it to the facts of this case, I think the liability of the defendant is established. The defendant gave to the examining board the use of its equipment for the examination of its pupils and the portion of it with which I have to deal was not, in my opinion, safe for that purpose. I do not think that there was any obligation on the examining board or the candidates or any one else outside of the defendant's servants to test the machinery. I think that the examiners were quite justified in the circumstances in assuming that it was safe in every respect for the boys who were to use it. I also think that they were quite justified in assuming that this boy, when he undertook to operate that saw, had sufficient practical familiarity with it to enable him to do it

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in safety when his instructors, who should have known that he had absolutely none, stood mutely by and allowed him to undertake it. I think that the boy, if one of his immature years could be expected to give the matter anything that could properly be called consideration, would probably conclude that, as he was there for the purpose of undergoing this examination, he must submit himself to the test, no matter what the conditions were, and he would very naturally assume that those whose pupil he was, and whose equipment he was to use, would not allow him to handle it unless they were quite satisfied that he could safely do so. I must hold the defendant liable.

The hospital bill is $10 and the doctor's bill is $150. I award the plaintiff in addition to these, special damages, $1,000 as general damages, making $1,160 for which he will have judgment. This money will be paid into Court and, when paid in, $10 of it will be paid out to the Royal Alexandra Hospital and $150 to Dr. J. P. Johnson for distribution amongst the medical men entitled to it. The balance of $1,000 will remain in court, subject to further order herein, and failing such further order, will be paid out to the plaintiff with the accrued interest thereon when he attains his majority on May 4, 1922. The defendant will pay the plaintiff's costs taxable under column 3 of the schedule.

Judgment for plaintiff.

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Exchequer Court of Canada, Audette, J. March 17, 1917.

NEGLIGENCE (§ II C—95)—PUBLIC WORK—RAILWAY—COLLISION—STALLED AUTOMOBILE.

The collision of a train with an automobile stalled on a level crossing of the Intercolonial Railway, occasioned by the delay of the engine driver to apply his brakes the moment he became aware of the presence of the motor upon the track, is an accident "on a public work" and caused by the "negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway," within the meaning of s. 20 of the Exchequer Court Act.

Statement.

PETITION OF RIGHT to recover damages for the destruction of suppliant's automobile by a train of the Intercolonial Railway.

C. D. White, K.C., and *A. Galipeault*, K.C., for suppliant; *Alleyn Taschereau*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover the sum of $1,590 as representing alleged damages to his

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automobile and effects in an accident on a level crossing of the Intercolonial Railway, near Old Lake Road Station, in the Province of Quebec.

The accident happened under the following circumstances. The suppliant and his friend, W. J. Bigelow, between 8 and 9 o'clock in the morning of September 30, 1915, were returning by automobile to their home in St. Johnsbury, Vermont, from a fishing excursion to the Scott Fish and Game Club. They left Riviere du Loup that morning for Levis, and having found they had gone too far east, they retraced their way by a cross-road to get on the main road at another point, and came to the crossing in question some little distance from Old Lake Road Station, on the Intercolonial Railway, a few miles only from Riviere du Loup. The highway intersecting the railway crossing at the *locus in quo* runs diagonally, but the way across the rails is directly at right angles.

On approaching the crossing they were travelling upon an ordinary country road, with grass on the sides, and the road was slightly lower than the railway track; but they could see both ways for quite a distance. They looked up and down the railway and there was no sign of any approaching train. When they came close to the rails they saw a hand-car on the other side of the track, about eight feet from the rail, and it occupied about three-quarters of the travelled part of the road. On coming still closer a man stood up on their left hand side, threw up his hands, signalling to stop. He "occupied the broad portion of the road between the hand-car and the margin of the road." The suppliant applied his emergency brake, with the result that he suddenly stopped and stalled his car squarely on the track, the front wheels of the car just reaching the south rail, the car itself covering more than the track, the hind wheels being north of the north rail.

Seeing there was space, on the grass, to pass by the hand-car to the left, the suppliant's companion got off the car to crank. He had never cranked a car before this trip, and it is always more difficult to crank a car after it has been stalled. He tried three or four times, and, failing to succeed, the suppliant sprang out of the car to do it,—they did not feel too secure in this position on the centre of the track,—and as the suppliant stepped to the ground a train whistled. The suppliant says he thinks it was then at the whistling post, about a quarter of a mile away. All then started

to push the car, but as there was no one in front to steer, the motor sheered and the left wheel of the car, which was near the edge, left the planking and became stopped by the rail. Then it became difficult to move the car—the train was coming and they got away near the fence.

When the train was about half way between the whistling post and the crossing, witness Bigelow stepped out about ten feet from the fence and signalled the engineer of the train to stop. So also did witness Giles.

The whistling post in question is 1,386 feet from the crossing. Between the Old Lake Road Station and the crossing in question there is a slight curve, and witness Bigelow says he saw the train pass that station, then for a short time lost sight of it, and before it came to the whistling post it was again in sight. By reference to plan exhibit "B," filed by the Crown, it will be seen that from the crossing one can see to about 1,600 feet in the direction from which the train was coming,—the line of vision being unobstructed, as specifically shewn upon the plan, and sworn to by the suppliant after actual measurement.

The train was coming at a good speed when it struck the car and practically destroyed it, and some of the baggage in it was also damaged.

This was a passenger train of eight cars, engine and tender, and when it stopped, after the accident, the rear coach was right across the highway.

Now, this is clearly an action sounding in tort and such an action, apart from the statute, will not lie against the Crown. Therefore, the suppliant to succeed must bring his case within the ambit of sub-secs. (*c*) or (*f*) of s. 20 of the Exchequer Court Act.

The accident happened on a public work, the Intercolonial Railway being by statute declared to be a public work of Canada. The only point to be decided is, whether or not the injury to the suppliant's property was caused by the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway.

It must be found, as established by the evidence, that the automobile at the time of the accident was in good working order, and that had it not been for the signal to stop, the suppliant would

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not have stopped his car right across a railway track, and that the machine did not stop of itself, as attested by the suppliant and his companion.

Warren, an employee of the Crown, who was around at the time of the accident and who might have thrown some light upon the facts, was not heard as a witness. Giles swears he did not give the signal in question, but his memory is not very reliable, especially when he states, of the suppliant and his companion, that one was sitting in the front seat and the other at the back of the automobile. On this point he was contradicted by two witnesses. Then when he says that one person was still sitting inside the automobile, at the back, when they were pushing it, he is contradicted by three witnesses. Taking into consideration these salient facts, and the general nervous and peculiar demeanour of the old man Giles when giving his testimony, I have no hesitation in accepting in preference to his evidence that of both the suppliant and his companion.

Now Giles was a servant of the Crown acting within the scope of his duties and employment, and had it not been for him, the highway would not have been partly obstructed by the hand-car, and the suppliant's motor would not have been signalled to stop. But while Giles' negligence made the accident possible, was there any other negligence which determined the accident? Was the engineer in charge of the train guilty of any negligence?

Witness Bigelow says when the train was halfway between the whistling post and the crossing he stood about ten feet from the fence and signalled the engineer to stop the train. Witness Giles also swore that when the suppliant and his companion had got out of the motor, he made a sign to the engineer to stop when he was standing on the south-west side and that he so signalled the train from a place where the engineer could have seen him.

Tardif, the engine-driver, swears he did not see any one making signals to stop. However, the motor was in the centre of the track and his line of vision was unobstructed for 1,600 ft. The whistling post was 1,386 ft. from the crossing. He saw the whistling post, since he says he whistled when he passed it. Had he exercised reasonable care and diligence, since he could see the stalled motor 1,600 ft. before getting to it, had he looked ahead as he should have done, he would have seen the motor in full view; the line of vision being unobstructed for that distance, and could have avoided

the accident. He blew his whistle at the whistling post. Therefore his attention was thereby attracted to the fact that the crossing was quite close—he had knowledge of the conditions obtaining, and it was his duty to look for the crossing, as he had no excuse or justification for taking an unnecessary and improper chance where even human life could have been in jeopardy and peril. He knew of the crossing. Two persons signalled to him to stop, and he swears he did not see them. Did he or did he not see them? If he did not see them it is because he was not looking ahead, as he should have done. However, I would feel very much inclined to apprehend and believe that he took an improper chance, and did not see fit to apply his brakes the moment he became aware of the presence of the motor upon the track, and that delaying in doing so he only applied his emergency brakes when it was too late. *Canadian Pacific R. Co.* v. *Hinrich*, 48 Can. S.C.R. 557, 15 D.L.R. 472; *Long* v. *Toronto R. Co.*, 50 Can. S.C.R. 224, 250, 20 D.L.R. 369; *City of Calgary* v. *Harnovis*, 48 Can. S.C.R. 494, 15 D.L.R. 411.

He stated he stopped his train in one length and a half, and that he applied his emergency brakes about half-way between the whistling post and the crossing, perhaps a little closer to the crossing. Had this statement been accurate it would seem he should have stopped his train before getting to the crossing, since it was giving him a margin of about 690 feet. He further stated in his testimony that his train was going 3 miles an hour when he struck the motor, a statement which on its face is obviously wrong. A speed of 3 miles an hour is the ordinary step of a man. Had the train been going only 3 miles an hour when it struck the motor, it would have shoved it away and not sent it up in the sir, smashing everything. In making that statement was he actuated by the consideration of s. 34 of the Government Railway Act, with respect to the six-mile limit of speed at certain places? However, such a statement goes to the reliability of the evidence. The stoker on board the very same engine swore the train was going at 15 to 20 miles an hour at the time of the accident, and the suppliant puts it at from 40 to 50 miles. All this goes to shake the strict accuracy of the engine-driver's evidence, and would go much to militate in favour of the hpyothetical assumption, as above stated, that he really did take chances and neglected to apply his brakes when he

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did see the motor for the first time and applied his emergency brakes only when it was too late. And how could it be otherwise, when it is established beyond peradventure both by the plan and the testimony of the suppliant, after actual measurement, that the line of vision was unobstructed for over 1,600 ft., that he whistled at the whistling post, which indeed notified him, so to speak, of the crossing in question. Had he looked ahead, as a reasonable man should have done, as his duty called upon him to do, exercising due and reasonable care and diligence, he would have seen the stalled automobile, around which men were engaged pushing it, in time to stop his train well before reaching the crossing. The engine-driver neglected to apply his brakes until he was too near the place of the accident for him to do so in time. He only attempted to stop when in the agony of the accident, as is said in collisions at sea, and should have done so before, as he should have seen the stalled car and the men around it, before only about 300 to 400 ft. from the crossing,—had he attended to his duty by looking ahead and exercised due care and diligence. *Connell* v. *The Queen*, 5 Can. Ex. 74; *Harris* v. *The King*, 9 Can. Ex. 206.

The duty of the engine-driver, a breach of which would constitute ultimate negligence, arose when the danger was or should have been apparent. He should have looked ahead, and if he did not he became guilty of want of care and diligence, which amounted to the negligence causing the accident. And as said by Anglin, J., in *Brenner* v. *Toronto R. Co.*, 13 O.L.R. 423, a judgment most favourably commented upon by Lord Sumner in *B.C. Electric R. Co.* v. *Loach*, [1916] 1 A.C. 719 at 726, 23 D.L.R. 4 at 9.

> If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful but for some self-created incapacity, which rendered such efforts inefficacious, the negligence that produced such a state of disability, is not merely part of the inducing causes—a remote cause or a cause merely *sine qua non*—it is in very truth the efficient, the proximate, the decisive cause . . . of the mischief.

The ultimate negligence which was the cause of the accident in this case would therefore arise either in the engine-driver's incapacitating himself to stop his train in time by his want of looking ahead as he should have done, or in his want of care and diligence in delaying to apply his emergency brake in time to avoid the accident.

Coming to the question of quantum, one must not overlook

that the damaged automobile was a second-hand car bought by the barter of an old second-hand car and some cash.

It was a second-hand six-cylinder Mitchell car, model of 1913, which had been operated for 14,000 miles in July, 1913, when it was purchased by the suppliant for the barter of an old second-hand 4-cylinder model, same make, of 1911, and $750.

He had to disburse some money, as shewn in the evidence, to pick up the pieces of the machine after the accident and ship them to the United States by freight, because his machine was bonded for duty. He sold the scrap in the United States for $65. He also suffered some damages to a rifle, telescope and a few other things of minor value.

Under all the circumstances of the case I am of opinion that judgment should be entered for the suppliant, who is declared entitled to recover from the respondent the sum of $750 and costs.

Judgment for suppliant.

REX v. PETTIBONE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, J.J. June 19, 1918.

ABORTION (§ I—2)—SUPPLYING DRUGS—KNOWLEDGE OF ACCUSED—MAY BE CONVICTED OF ATTEMPT.

If there is sufficient evidence to justify a reasonable inference that an accused attempted to obtain noxious substances for the purpose of causing a miscarriage; that he believed he had obtained them, and that he tried to administer them, he may be properly convicted of an "attempt" under s. 72 of the Criminal Code. It is immaterial whether the substances obtained in fact contained noxious ingredients or not.

CASE reserved under the Criminal Code by Walsh, J. Statement.

E. V. Robertson, for Crown; *C. F. Harris*, for appellant.

The judgment of the Court was delivered by

STUART, J.:—The charge against the accused was that on or about December 15, 1916, he did, with intent to procure the miscarriage of a woman, to wit, one Agnes Florence Hewitt, attempt to administer to the said Agnes Florence Hewitt or cause to be taken by her, a drug or other noxious thing. Stuart, J.

A second charge of a similar attempt was also made, the date alleged being January 4, 1917.

The evidence for the Crown disclosed that the accused had had sexual intercourse with the woman and that she became pregnant. The woman testified to this and also stated that she had gone to

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the accused and told him of her condition, that accused asked if she would go to a doctor for something to get rid of the child, that she had refused, that he said he would go to a certain doctor whose name she could not remember and offer him $25 to give him medicine for her to take to get rid of the child, that subsequently about a week later he had come to see her and had handed her a box with a tablet in it and had told her to take it, but not to tell her father or any one because he could get into trouble for giving it to her, that she put the box in her trunk and did not take the tablet, that he had come to see her again in a few days and had asked if she had taken it and that she had told him that she had done so, and that he asked her if anything had happened and that she said, no, that he then said he would go to the doctor and get more medicine, that later on she had met him in a hotel at Macleod where he had again promised to get more medicine from the doctor, that later the same day he came to her and put a bottle with liquid in it in her bag saying that he had got the medicine to relieve her of the child and that the doctor had said it would surely work this time and that she took it away but never took any part of it.

It was owing, apparently, to the fact that the woman had never taken either the tablet or the liquid that the accused was charged merely with an attempt to commit the crime.

The chief difficulty in the way of the prosecution at the trial was apparently considered to be in the fact that no scientific analysis of either the tablet or the liquid had been obtained owing to circumstances not now material to relate.

The accused did not testify on his own behalf, though he did call two witnesses.

The trial judge in charging the jury spoke as follows:—

My instruction to you is this, that if you believe the Hewitt girl when she says that this man Pettibone gave her these things, and that he told her upon the occasion of doing so that they would produce a miscarriage, that the doctor had told him so, that he had got them from a doctor and paid him for it, it seems to me that there is some evidence there from which you can, at any rate, draw the inference that those things were drugs, or other noxious things, within the meaning of the section. I am telling you that now as a matter of law.

The following questions were reserved for the opinion of this court by the trial judge:—

1. Was there any or sufficient evidence that either of the substances which the complainant swore that the accused gave her was a drug or other noxious thing within the section of the Criminal Code under which the charge was laid to justify me in submitting the case to the jury?

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2. Was my direction to the jury upon this question wrong?

It seems to me that in charging the jury as he did and also in submitting the above questions for our consideration the learned judge possibly did not, for the time, appreciate fully the fact that the charges against the accused were charges of making attempts only and not of actually committing the offence. If the charges had been for the actual offence under s. 303, then undoubtedly it would have been necessary to prove that the substances referred to were in very fact noxious drugs within the meaning of the words used in that section.

But the charges were only of attempts. The argument of counsel for the accused before us seemed to be based upon the assumption that the exact character of the attempts charged consisted in the accused actually first securing really noxious drugs and then trying but failing to get the woman to take them. And this seems to have been what was in the trial judge's mind when he instructed the jury and when he reserved the case.

If there had been no other aspect in which what the accused was said to have done could be considered as an attempt I am bound to say that, being in such case forced to consider and answer the questions exactly as submitted, I would have very grave doubt whether there was sufficient evidence to justify the inference that the substances were in fact noxious. No doubt there was evidence to justify the inference that the accused thought and believed they were noxious, but when the evidence also shewed, as it clearly did, I think, that the accused knew nothing about it of his knowledge and had merely taken the doctor's word for it, it seems to me that it is a somewhat doubtful question whether a jury could, on such evidence, reasonably infer that the substances were in fact noxious.

But, even if we assume in the accused's favour, that there was not sufficient evidence to support a reasonable inference to that effect, and that the trial judge's direction was, therefore, erroneous, does it follow that we must quash the conviction? It seems to me that, at least as the case now stands, we ought not to do so. And for the following reasons: I think there was undoubtedly sufficient evidence to justify a reasonable inference that the accused *attempted to obtain* noxious substances from the physician, that he believed that he had got them and that he had tried to get the

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woman to take them. That, in my view, was quite sufficient to constitute an attempt and it was, therefore, quite immaterial upon a charge of an attempt on such grounds, whether the substances which he tried to get the woman to take in fact contained noxious ingredients or not.

S. 72 of the Code says:—

Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence and too remote to constitute an attempt to commit it, is a question of law.

Now, even if the doctor deceived the accused and gave him innocuous material, yet, if the accused really tried, as I think the jury could reasonably infer that he did, to get a noxious material, believed that he had got it, and tried to get the woman to take it, in my view there was much more than mere preparation, there was a real attempt to commit the offence, and the fact that, owing to the doctor's deceit, it was impossible for him to commit it, would not make any difference, as the section of the Code just quoted says.

The jury did infer that the accused did try to administer to the woman or cause her to take substances which they obviously did infer, owing to the direction given them, were, in fact, noxious. Is it not obvious that they would have made the lesser inference that he had merely attempted to get the noxious drugs and had tried to get the woman to take them, believing himself that they were noxious if the matter had been left to them in that form? It seems to me that they would undoubtedly have done so and that it cannot be said that any substantial wrong or miscarriage of justice occurred, although this point was not directly raised upon the argument. This being the situation, I do not think we ought now, even if we were of the opinion that the first question should be answered in the negative and the second one, therefore, in the affirmative, to quash the conviction.

Of course, it might no doubt, conceivably, be argued that, assuming that these questions were so answered, the case was improperly left to the jury, that we cannot assume that the jury would have brought in a verdict of guilty, if the basis upon which an

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inference of an attempt could clearly be reasonably arrived at, as I have suggested, had been fully explained to the jury in place of the basis (viz., that if the actual existence of noxious ingredients in the drugs) which was adopted at the trial, and that, therefore, a substantial wrong was done to the accused, in not placing the exact situation before them. But for myself I cannot see how the accused could possibly be prejudiced. The case was put to the jury in a manner much more favourable to him than it needed to be. In other words, they were apparently asked to find a fact against him which they did not need to find at all in order to convict. How he could have been prejudiced by their going the whole distance and finding that fact even if there was no evidence to support such a finding, it is somewhat difficult at present to see.

I, therefore, think we should make no order disturbing the conviction. *Appeal dismissed.*

COURTEAU v. THE KING.

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Exchequer Court of Canada. March 15, 1915.

CROWN (§ II—20)—INJURY—PRESCRIPTION—PUBLIC WORK — VESSEL ON LAUNCH-WAYS—NEGLIGENCE.

The prescription for filing a petition of right is interrupted by the deposit of the petition with the Secretary of State.

An injury to an employee of the Crown while taking a Crown vessel on launch-ways owned and operated by a company on lands leased from the Crown is not an injury happening "on a public work" within the meaning of s. 20 of the *Exchequer Court Act*, and therefore is not actionable against the Crown; the mere fact of a chain breaking is not *primâ facie* negligence of the Crown.

PETITION OF RIGHT to recover damages for personal injuries. Statement.

Bruno Marchand, for suppliant; *Alfred Désy*, for respondent.

AUDETTE, J.:—The suppliant brought his petition of right to recover a yearly rent of $312, or, in the alternative, the lump sum of $3,000, for alleged damages arising out of bodily injury suffered by him while in the employ of the Dominion government, on the shores of the St. Maurice River, in the Province of Quebec. Audette, J.

The accident happened on November 27, 1912, and the petition of right was filed in this court on February 12, 1914,—that is, more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, it appears from the documentary evidence that the petition of right was, under the pro-

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vision of s. 4 of the Petition of Right Act, R.S.C. 1906, c. 142, left with the Secretary of State on November 10, 1913 (see ex. 1). Following the numerous decisions upon this question in this court, it is found that such deposit with the Secretary of State interrupted prescription within the meaning of art. 2224 C.C. P.Q.

During the month of November, 1912, the Government District Engineer at Three Rivers instructed P. Hamel, the captain of the government steamboat the "Montmorency," to take his vessel ashore, in winter quarters, upon the launch-ways of the St. Maurice Lumber Co. These launch-ways belong to the St. Maurice Lumber Co. and have been erected by them upon lands leased from the government. Permission was obtained from the company to haul the vessel upon the launch-ways upon the condition that it should be done at the cost of the government and upon its (the latter) making all the necessary repairs for that purpose.

A cross-beam was placed at the head of the launch-ways and a pulley was fastened to this beam by means of a three-quarter inch chain. This chain snapped in the course of the work of hauling the vessel, and striking the suppliant on the arm, caused a fracture of the same. It would appear, under the evidence, that the size of the chain was sufficient and was of the usual strength for that class of work, and the resident engineer stated that all chains bought by the government were tested chains. There is no satisfactory evidence of defect or weakness in the chain or to establish what caused it to break; not is there anything to indicate that the officers or servants of the Crown had been negligent either in not providing a better or different chain or that they had any knowledge of any condition from which they could have known that it was otherwise than safe and fit for the purposes for which it was used. Indeed, the mere fact of a chain breaking is not *primâ facie* evidence of negligence. *Hanson* v. *Lancashire and Yorkshire R. Co.* (1872), 20 W.R. 297, and that same view is shared by Mr. Ruegg in the 8th ed. of his work on the Employers' Liability and Workmen's Compensation Act. *Haywood* v. *Hamilton Bridge Works Co.*, 7 O.W.N. 231.

There is no satisfactory evidence, apart from the mere breaking, that the chain was or appeared to be or was known to be weak or otherwise defective or insufficient or unfit for the purposes for which

it was used,—there is not that additional evidence of defect in condition or of any negligence by the Crown's officer or servant which would so far support the suppliant's contention of actionable negligence under the Act. There must have been a latent or hidden defect in the chain, which the accident itself, by exposing the inside of the metal, failed to disclose and which would still continue to baffle the scientist.

At the time of the accident the Crown's officer offered the suppliant to be taken to a hospital to be cared for by medical men. He refused and went to a bonesetter, with the result that the arm was not properly attended to. The doctor called and heard as a witness by the suppliant stated that the reduction of the wrist had been placed in a false position, and that if the limb had been properly treated it would not have been left in the position in which it was. Indeed, if one voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the results of the injury are aggravated by such unskilled or improper treatment, he is in any case only entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from the improper treatment to which he subjected himself. *Vinet* v. *The King*, 9 Can. Ex. 352.

Now, to succeed in an action for tort against the Crown, the suppliant must bring the facts of his case within the provision of s. 20 of the Exchequer Court Act, and that is, there must first be a public work; secondly, an officer or servant of the Crown whose duty it was to do a given thing; and thirdly, that officer or servant must have been guilty of a breach of such duty which would amount to a negligence from which the accident resulted.

In the present case the first requirement is wanting. That is, the St. Maurice Lumber Company's launch-ways, upon which the government vessel was being hauled, is not a public work, within meaning of any Act of the Parliament of Canada, or of any known decision of the courts. See case of *City of Quebec* v. *The Queen*, 3 Can. Ex. 164, and 24 Can. S.C.R. 420.

There will be judgment that the suppliant is not entitled to the relief sought by his petition of right. *Action dismissed.*

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HUTCHINSON v. SHEARER.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Hyndman, JJ. May 23, 1918.

AUTOMOBILES (§ III C—300)—SALESMAN—DISPLAYING CAR BY OPERATING IT—AFTER SALE ASSISTING PURCHASER TO LOCATE TROUBLE—"MECHANIC"—"CHAUFFEUR"—MOTOR VEHICLE ACT (ALTA.).

An automobile salesman who displays his car by operating it, and having effected a sale, assists the purchaser in locating some trouble, by going out with him and operating the car for a time, is not a "mechanic" within the meaning of the word as used in the definition of "chauffeur" in s. 2 (3) of the Motor Vehicle Act (Alta. stats. 1911-12, c. 6).

[See annotation 39 D.L.R. 4.]

Statement. APPEAL by defendant from the trial judgment in an action for damages for injuries to an automobile caused by a collision with another car, being driven by an automobile salesman. Affirmed.

H. H. Hyndman, for plaintiff; *H. H. Robertson*, for defendant.

The judgment of the Court was delivered by

Stuart, J. STUART, J.:—I think it is impossible to do otherwise than dismiss this appeal. The case is one about damages to two automobiles which had come into physical contact and had each been injured.

It may be a very difficult question to decide whether or not s. 33 of the Motor Vehicle Act (Alta. stats. 1911-12, c. 6) is intended to apply to such a case. I do not feel at all sure that the view that it does, which was apparently adopted by the trial judge, is the correct view. But it is clearly not necessary to decide the point in the present case. The trial judge, while possibly having taken an incorrect view on this question, certainly did also find as a fact that the defendant was really responsible for the accident quite aside from any question of the burden of proof. He said, "Indeed I think it was his (the defendant's) negligence which was the immediate cause of the accident." In my opinion there was, to say the least, ample evidence upon which the trial judge could reasonably come to this conclusion if he thought it right to do so. We cannot say upon reading the evidence that he was clearly wrong and the consequence is that upon the question of fact his finding cannot be disturbed.

There is no doubt that it is possible to take various mental attitudes in regard to what a reasonably careful automobile driver ought to do in such circumstances as were shewn to exist in this case. But my own strong impression, after a careful reading of the evidence, is, in any case, that the defendant was really the one to blame and that the trial judge was right. He admitted that he

noticed the "funny way" the plaintiff's car was acting and yet he kept driving exactly behind it. He saw that the car ahead was stopped when he was, as he said, 40 ft. behind it. Even assuming that the plaintiff was negligent in being where he was with a defective car, which I think was the case, it seems to me that, if the defendant had been reasonably careful, and the true measure of this must be estimated in the light of his admitted knowledge that the car ahead was acting strangely, he could have avoided the accident. The one independent witness who saw the accident happen and had himself driven automobiles told the defendant at the time that he was to blame.

The defendant contended strongly that McLean who was driving the plaintiff's automobile at the time was a chauffeur within the meaning of the Motor Vehicle Act and that, as he was admittedly unregistered and not licensed, he was operating the car illegally with the consequence that the owner could not recover.

S. 2 (3) of the Act says:—

"Chauffeur" means and includes any person operating a motor vehicle as mechanic, paid employee or for hire.

It is admitted that McLean was not operating the car "as a paid employee or for hire." The words "paid eemployee" mean apparently "paid employee of the person for whose benefit the operating is being done."

It was contended that McLean was a "mechanic" within the meaning of that word as used in the definition. As so often happens, the definition needs defining, the interpretation needs interpreting.

The facts are that the plaintiff had bought his car, a Chevrolet, in April, 1917, and had used it during the summer, that on the day in September when the accident happened something appeared to be wrong with it, that he went to the Chevrolet garage and got McLean who was a salesman for the Chevrolet company to get in and take the wheel. As I read the evidence McLean had actually sold the car to the plaintiff. He drove the car out on the street for the purpose of "attempting to locate the trouble."

The question is, was McLean a "mechanic" within the meaning of that word as used in the definition of a "chauffeur."

We must read the word "mechanic," which itself is given no definition in the Act, it its ordinary meaning and acceptation. Webster's dictionary gives the meaning:—

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One who practices any mechanic art; one skilled or employed in shaping and uniting materials as wood, metal, etc., into any kind of structure, machine or other object requiring the use of tools or instruments; an artisan; an artificer.

Murray's New Dictionary says:—

One who is employed in manual occupation, a handicraft man, or a skilled workman, especially one who is concerned with the making or use of machinery.

In my opinion, whatever the word may have been intended to cover, it cannot be said to cover a salesman of automobiles who displays his car by operating it and after having effected a sale assists the purchaser in locating some trouble, which has arisen, by going out with him and operating the car for a time, which is the present case. He was of course operating the car in a sense but not in my opinion "as a mechanic."

The appeal should be dismissed with costs.

Appeal dismissed.

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REX v. STACKHOUSE.

Nova Scotia Supreme Court, Russell, Longley, and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. December 3, 1917.

ESCAPE (§ I—5)—PROVING LEGALITY OF ARREST WITHOUT WARRANT.

On a charge of escaping from the custody of a police officer after an alleged arrest, the legality of the arrest must be shown.

Statement.

CROWN CASE reserved by George H. Fielding, Esquire, Stipendiary Magistrate in and for the City of Halifax, as follows:—

The accused Charles Stackhouse was convicted before me under Part 16 of the Criminal Code for escaping from custody at Halifax on November 11th, 1917, while under an arrest for common assault on his daughter. Section 190 is the section of the Code dealing with the offence.

The evidence disclosed that on November 11th, 1917, at Halifax, the prisoner's daughter complained to Police Officer McDonald that her father had assaulted her. The officer went to the residence of the accused, and finding him there in a room, told him that he was under arrest, or according to the daughter's version that he was sorry, but that he would have to arrest him, or according to defendant's version, "You will have to come with me." The officer did not lay hands on the prisoner to effect his arrest or come in manual contact with him. The accused told the officer to wait for a minute, that he wanted to

tie up a parcel, and leaving the room where they were in, he ran downstairs and into the street, when the officer followed him, and while still fleeing overtook him, and took him into custody, by then laying hands on him and arresting him. No evidence was given before me that the police officer believed on reasonably and probable grounds that the defendant was guilty of the assault, except an admission of the prisoner made before the alleged arrest to the constable that he shoved her. I convicted the defendant of the escape from custody in the room at his house, which was the offence relied on by the Crown. The officer had no warrant authorizing the arrest, nor did he see the assault complained of committed. On the prisoner's application, I reserved for the consideration of the Supreme Court of Nova Scotia *en banco*, sitting as a Court for Crown Cases Reserved, the following questions of law:—

(*a*) Was the policeman justified in arresting the prisoner under the circumstances without a warrant, as he did not see the assault committed?

(*b*) Was the prisoner as a matter of law arrested by the police officer, in the room at his house, so as to render his flight an escape from lawful custody?

(*c*) Was I justified in finding the arrest as legally proved to have been lawfully made in the absence of proof by the officer that he had reasonable and probable grounds for believing that Stackhouse was guilty of the offence of assault?

(*d*) If any of these questions should be answered in the negative, should the conviction stand?

The prisoner is so far as this case is concerned out on bail to appear for sentence December 13th, 1917.

Dated at Halifax this 20th day of November, A.D. 1917.

GEORGE H. FIELDING,
Stipendiary Magistrate in and for
the City of Halifax.

J. J. Power, K.C., for prisoner, referred to 32 Canada Law Journal, pages 499, 534 and cases therein cited, and Code secs. 32, 33, 34, 36, 190, 291, 646-647, 648, 652, 732, 733.

A. Cluney, K.C., for the Crown, *contra*.

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THE COURT at the conclusion of the argument delivered judgment answering the questions submitted as to the validity of the conviction in the negative and, as to the last one, ordered the conviction to be quashed.

Conviction quashed.

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ALBERTAN PUBLISHING Co. v. MUNNS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Hyndman, JJ. June 26, 1918.

LIBEL AND SLANDER (§ II A—10)—NEWSPAPER—SELLING INFLUENCE—WORDS TENDING TO BRING INTO CONTEMPT—DAMAGES.

To charge a newspaper with selling its influence to any political party and therefore binding itself in a manner to deceive the public, by publishing what may be contrary to the honest convictions of its management, tends to bring such newspaper into contempt with the public and result in damages and is therefore actionable.

[See annotation 4 D.L.R. 572.]

Statement. APPEAL from a judgment of Walsh, J., dismissing a motion to strike out a statement of claim on the ground that it disclosed no cause of action. Affirmed.

G. H. Ross, K.C., for plaintiff; *J. E. Varley*, for defendant.

The judgment of the court was delivered by

Hyndman, J. HYNDMAN, J.:—In my opinion this appeal ought to be dismissed. I think whether or not the words complained of were or were not spoken of the plaintiff company in respect of its business, and whether or not it tended to prejudice the plaintiff in its business, is one for the judge or jury to determine.

The words specially complained of "that the 'Albertan' had been bought," might be used in a sense which would not be actionable, but I think, under the circumstances, here, it is a matter which can only be determined by a trial. I think the words are capable of having such a reference, and might cause damage. If that is so there is no necessity for alleging special damage. In *Jones* v. *Jones*, [1916] 2 A.C. 481, at 500, Lord Sumner laid down certain rules within which the facts of this case fall. He says:—

> The law of defamation is founded on settled principles. Defamation, spoken or written, is always actionable if damage is proved, and, even if it is not, the law will infer the damage needed to found the action. . . . (4) When words are spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling. . . .

The business of a newspaper, in addition to publishing current events and being the medium of advertisement, consists of follow-

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ing the political questions of the day and giving to its readers honest opinions or criticism on public and state matters. To charge a newspaper with selling its influence to any political party or group and, therefore, binding itself, in a manner, to deceive the public and its readers by publishing what may be contrary to the honest opinions or convictions of the management, to my mind, tends to bring such a newspaper into contempt with the public and result in damage and ought to be actionable.

The point was also raised that the plaintiff being a corporation could not maintain such an action. The law is clear that a corporation or a company may sue for any words which affect its property or injure its trade or business. (See Odgers on Libel and Slander, 5th ed., p. 591.) Whether or not the plaintiff suffered any damage is for the judge or jury to determine.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

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KOMNICK SYSTEM SANDSTONE BRICK MACH. Co. v. B.C. PRESSED BRICK Co.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. May 14, 1918.

COMPANIES (§ VII C—375)—EXTRA PROVINCIAL COMPANY—NOT LICENSED IN PROVINCE—ACTION DECIDED AGAINST—SUBSEQUENT LICENSE—RESTORATION OF ACTION.

Under s. 168 of the Companies Act (R.S.B.C. 1911, c. 39) as re-enacted by the Companies Act Amendment Act, 1917 (7 & 8 Geo. V. c. 10), allowing a company, if it is licensed, to "maintain anew" an action which has been decided against it, on the ground that any transaction of the company was invalid because it was an extra-provincial company and was not licensed; the company is not obliged to bring an action *de novo* but is entitled to have the action reinstated at the stage at which it was when the judgment based on the statute was given.

[*John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, (annotated) referred to.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, 8 D.L.R. 859, 17 B.C.R. 454, maintaining the judgment of Clement, J., at the trial, by which the plaintiff's action was dismissed with costs.

H. J. Scott, K.C., for appellant; *Chrysler*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The appellants brought suit which after trial was, on March 22, 1911, dismissed upon the merits. An appeal from the judgment was dismissed not on the merits but on the ground that the transaction in respect of which the action was

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based was invalid by reason of the plaintiff not having been licensed pursuant to the Companies Act then in force.

The Companies Act Amendment Act 1917 (7 & 8 Geo. V., c. 10) repeals ss. 168 and 169 of the Companies Act (R.S.B.C. 1911, c. 39) and substitutes a provision therefor as s. 168. Subsection 3 of the said substituted section is as follows:—

> Where an action, suit or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act, and upon such terms as to costs as the court may order, maintain anew such action, suit or other proceeding as if no judgment had therein been rendered or entered.

The marginal note is "remedial provision."

The form of the legislation would seem rather unfortunate. The sub-section does not appear to be properly placed in the Companies Act for it cannot be read without reference to the Act by which it was passed. No doubt the intention is that any suit decided prior to the Act of 1917 can be maintained anew and presumably only suits so previously decided.

It is unnecessary to refer to the circumstances which led to the passing of this remedial provision, it is sufficient to say that they are such as to render it incumbent on the court to afford every possible relief that the terms made use of will admit in favour of those litigants for whose benefit it was passed and this in accordance with the intention of the legislature which cannot be doubted.

Now this was a motion to the Court of Appeal "for an order that the appeal herein, for which notice was given on the 17th day of June, 1911, be entered for rehearing as if no judgment had been rendered or entered herein."

The Court of Appeal dismissed the motion on the ground that it had no jurisdiction to make the order sought. That "to maintain anew in these circumstances means to bring and maintain, that is to say, an action *de novo*."

The question, therefore, is, whether the Court of Appeal is right in holding that the statute cannot be construed so as to enable the appellants to take up and continue their action at the point when the court decided that their action could not be maintained by reason of their not having been licensed as if such judgment had not been rendered.

I think the position is the same as if the appeal had not yet come on for hearing, and that I think is certainly in accordance with the intention of the Act.

It is not to be expected in such a special case that we can find any guidance in the rules or in authority. We have nothing but the obvious intention of the statute to assist in construing the terms made use of.

It would have been difficult to provide for every possible case, impossible perhaps to foresee a suit left in such a position as this. Now the Court of Appeal has said "that to maintain anew in these circumstances means to start the action all over again," and it is precisely in the words, "in these circumstances" that the error in the decision is to be found. Even if it be conceded that under some circumstances the words, "to maintain anew" might bear the meaning put upon them by the Court of Appeal. I do not think thay can or ought to be so interpreted in the actual circumstances.

I think the provision for maintaining "anew such action, suit or other proceeding as if no judgment had therein been rendered or entered" may very properly be held to mean that the Court of Appeal should hear the appeal as if its previous decision had never been rendered and I certainly think that this will be only giving effect to the intention of the legislature in enacting the measure of relief to those who suffered hardship through the mistaken view of the law then held.

DAVIES, J.:—My impression at the close of the argument in this case and of the motion to quash for want of jurisdiction was that the motion should be dismissed, the appeal allowed and the case remitted back to be heard on the merits, with costs on the motion and in the appeal. Further consideration has satisfied me that my impression was right.

On the question of our jurisdiction to hear the appeal, I am of the opinion that there was alike finality in the judgment appealed from and also that a substantial right on plaintiff's part to continue the present action was adversely determined upon.

On the merits, I am of the opinion that sub-sec. 3 of s. 2 of the Companies Act should not be construed as giving the unlicensed company whose action had been dismissed on that ground simply a right to begin another action after it had become licensed but a

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right to maintain or continue the dismissed action at and from the stage at which it was when dismissed. I construe the words "maintain anew," as used in that sub-section, as meaning "continue anew."

The result would be the same as if this court had, on appeal, reversed the judgment dismissing the action.

I would, therefore, refer the case back to the Supreme Court for hearing on the merits.

IDINGTON, J.:—There are two appeals; both and motions to quash each of them herein were argued together.

The respondent has moved to quash these appeals and relies upon the decision in *Saint John Lumber Co.* v. *Roy*, 29 D.L.R. 12, 53 Can. S.C.R. 310, wherein it was held that an order allowing the service of a writ out of the jurisdiction of the court could not become the subject of an appeal to this court.

Inasmuch as the only question there was of the forum before which the parties were held bound to appear and submit to its jurisdiction, and these appeals in the last analysis involve only the question of forum, the point seems well taken if that decision is to be held binding.

However, those who decided that case are agreed it does not govern and I am content; especially because in each case there was, in my opinion, a substantial right in controversy in the action involved in the appeal. I do not think there should be any costs of the motions.

The British Columbia Legislature has passed a rather drastic licensing Act relative to foreign corporations doing business in that province and thereby attempted to deprive those failing to comply therewith of all rights to contract or sue upon contract made there in the British Columbia courts. This legislation was held by the Judicial Committee of the Privy Council to be *ultra vires* the legislature. Meantime an action had been tried and on the merits dismissed by the learned trial judge who declined to rely upon the said statute. Upon appeal to the Court of Appeal that court relied upon the said statute and dismissed the appeal. To rectify the possible wrongs done a suitor in cases wherein effect had been given to the said *ultra vires* statute the legislature in 1917, by the Companies Act, c. 10, s. 2, repealed the said statute and re-enacted by s. 168 thereof new licensing provisions applicable to companies,

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and amongst other things in the said section sub-sec. 3 enacts as follows. (See Fitzpatrick, C.J.)

The neat point involved in each of these appeals is whether or not any suitor desiring to take advantage of the relief thus provided must do so by bringing a new action. The Court of Appeal has so held. It might be possible, following the refining and technical means of interpretation of the section which has been so adopted, to maintain that view. I prefer, instead of such critical way of approaching the interpretation and construction of such a statute, to have due regard to the rules laid down for construing an enactment by the Barons of the Exchequer in *Heydon's* case which rules can be found either in Maxwell on Statutes, or Hardcastle, 3 Coke 7 b. on Statutory Law, as follows:—

For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. (1) What was the common law before the making of the Act. (2) What was the mischief or defect for which the common law did not provide. (3) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth. (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtile inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.

I venture once more to quote these rules as the most cogent and concise argument in answer to the reasons in support of the appeal. I am clearly of the opinion that the appeal ought to be allowed with costs and the appellant permitted to renew or revive its motion for appeal before the Court of Appeal and have its case heard upon the merits.

Anglin, J.

ANGLIN, J.:—In *John Deere Plow Co. Ltd.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, the Judicial Committee of the Privy Council held that

Part VI. (sections 139-173) of the Companies Act of British Columbia (R.S.B.C. 1911, ch. 39), which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the province or maintaining proceedings in its courts, is . . . *ultra vires* the provincial legislature under the British North America Act, 1867.

In 1917 (c. 10) the legislature repealed ss. 168 and 169 of the Companies Act (R.S.B.C. 1911, c. 39; s. 123 of the Companies Act, 1897, c. 44) and substituted therefor the following:—

168 (1) No unlicensed or unregistered company shall be capable:—

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(a) of maintaining any action, suit or other proceedings in any court of the province in respect of any contract made in whole, or in part, within the province, in the course, of, or in connection with, its business; or,

(b) of acquiring or holding land, or any interest therein, in the province, or registering any title thereto under the Land Registry Act.

(2) Where an extra-provincial company has heretofore become licensed or registered under this, or any former Companies Act, or becomes licensed or registered under this Act, or a license or certificate of registration of any such company is suspended, revoked or cancelled, and is subsequently restored or reinstated, the provisions of the foregoing subsection and any prohibition having a like effect formerly in force, shall be read and construed as if no disability thereunder had ever attached to the company, notwithstanding that any such contract was made or proceeding in respect thereof instituted, or any land or interest therein acquired or held, before the first day of July, 1910.

(3) Where an action, suit or other proceeding has been dismissed or otherwise decided against an extra-provincial company on the ground that any act or transaction of such company was invalid or prohibited by reason of such company not having been licensed or registered pursuant to this or some former Act, the company may, if it is licensed or registered as required by this Act and upon such terms as to costs as the court may order, maintain anew such action, suit or other proceeding as if no judgment had therein been rendered or entered.

While the chief purpose of these amendments unquestionably was to meet the objections which had prevailed against the former legislation, there can be little room for doubt that sub-sec. 3 was designed to undo as far as possible whatever injustice had been sustained by extra-provincial corporations whose actions had been dismissed for non-compliance with the legislation which the Privy Council held to be invalid.

When these amendments were enacted the plaintiff company found itself in this position: This action brought by it in 1909, while still unlicensed, to recover the price of machinery furnished by it to the defendants had been dismissed at the trial in 1911 on the merits, the trial judge holding that the machinery did not fulfil the requirements of the contract under which it had been sold. On November 8, 1912, the Court of Appeal, by a majority of the judges, upheld the judgment dismissing the action, but on the ground that the plaintiff, as an unlicensed extra-provincial company, had been prohibited by the Companies Act of 1897 from making the contract sued upon and that its license, obtained in September, 1909, after the commencement of this action, did not entitle it under an amendment of 1910 (c. 7) further to maintain and prosecute it. Two of the four judges who constituted the

court expressed views favourable to the appellants on the merits, 8 D.L.R. 859, 17 B.C.R. 454.

Conceiving itself entitled to prosecute its action under the legislation of 1917 "as if no judgment had therein been rendered or entered," dismissing it on the ground that its contract sued upon was invalid or prohibited by reason of the company not having been licensed or registered under the Companies Act of 1897 (c. 44, s. 123), in order to meet the requirements of the War Relief Act (1916, c. 74) and the War Relief Amendment Act (1917, c. 74), the plaintiff company applied for and obtained from Gregory J., on October 30, 1917, an order declaratory of its right to proceed with the action, notwithstanding the provisions of those statutes.

It then applied to the Court of Appeal upon motion "for an order that the appeal herein, for which notice was given on June 17, 1911, be entered for hearing as if no judgment had been rendered or entered therein upon such terms as to costs as the court may order, and for such further order and directions as the court may deem fit."

This motion was dismissed on November 20, 1917, the court (Martin, Galliher and McPhillips, JJ.A.) holding that the statute of 1897 did not entitle the plaintiff to prosecute the action which had been dismissed in 1911-12, but enabled it to bring and maintain anew action for the same cause of action. "Maintain anew . . . means bring again." It is from this order that appeal No. 1 is now brought to this court.

Meantime the defendants had appealed from the order of Gregory, J. Adhering to the view that the action in which that order purported to be made had been finally dismissed in 1911-12 and was not resuscitated by the legislation of 1917, the Court of Appeal on January 22, 1918, allowed this appeal and set aside Gregory, J's., order. This judgment forms the subject of appeal No. 2.

The respondent moves to quash both appeals on the ground that the judgments appealed from are not "final judgments" within the meaning of para. (*e*) of s. 2 of the Supreme Court Act, as enacted by 3 & 4 Geo. V., c. 51, s. 1. The motions and the appeals were heard together.

Both the judgments of the Court of Appeal determined that the plaintiff's action was at an end and negatived the right to

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maintain or prosecute it further. In my opinion that right is "a substantive right in controversy in the action," which has been determined adversely to the plaintiff, within the definition of s. 2 (e) of the Supreme Court Act. I find it difficult to appreciate the argument that a judgment which holds that an action is at an end, with the result that it stands forever dismissed, is not a final judgment. Its finality seems to be so obvious that it scarcely brooks the aid of definition. The definition of "final judgment," now found in the Supreme Court Act, was required to bring within that term judgments, which, though finally dispositive of substantive rights in controversy therein, did not terminate the actions or judicial proceedings in which they were rendered. *St. John Lumber Co.* v. *Roy*, 29 D.L.R. 12, 53 Can. S.C.R. 310. It was not needed to meet the case of a judgment dismissing an action or declaring it to be finally disposed of and terminated.

It was also urged that the orders appealed from were discretionary and dealt with mere matters of procedure and were therefore not appealable. I cannot understand how an order denying a claim of statutory right on the ground that, properly construed, the statute does not confer it can be said to be in any case discretionary. Neither in my opinion is the matter disposed of by the orders one of procedure only. I regard it as one of substantive right—the right to maintain this action. The motions to quash, in my opinion, fail.

With deference, I am unable to agree in the constru tion placed by the Court of Appeal on s. 168 (3) of the British Columbia Companies Act as enacted in 1917. The word "maintain" is obviously equivocal. As Mr. Chrysler frankly admitted in the course of his able argument, it may mean either to bring or institute an action or proceeding or to continue or further prosecute an action or proceeding already commenced, It is, however, coupled in the statute with the word "anew," and, no doubt, not a little may be urged in support of the view that "maintain anew," if standing alone, would imply "commence or begin afresh." But this phrase may not be segregated from its context without doing violence to a fundamental canon of construction. Not only does the word "such," which precedes the words, "action, suit or other proceeding," clearly referring back as it does to the "action, suit or proceeding" mentioned at the commencement of the sub-section

indicate that it is the very action, suit or other proceeding which has been dismissed or otherwise adversely decided that the extra-provincial corporation is empowered to "maintain anew," but the concluding clause of the sentence, "as if no judgment had *therein* been rendered or entered," would appear to put the matter beyond doubt. It is the action which has been dismissed (*such* action)—the action *wherein* the judgment, based "on the ground that (the) act or transaction of (an extra-provincial) company was invalid or prohibited by reason of such company not having been licensed or registered . . . has been rendered or entered," that the company is authorised to maintain anew.

With great respect, I fear that the significance of the words of reference "such" and "therein" must have escaped the attention of the learned appellate judges. I cannot conceive of a legislature employing the terms of sub-sec. 3 to express the idea that a new action might be brought for the same cause of action as was involved in that which had been dismissed. The language used clearly points to a reinstatement or revivification of the dismissed action or proceeding "as if no judgment had therein been rendered or entered," *i.e.*, at the stage at which the dismissed action was when the judgment based upon the statute subsequently held *ultra vires* was pronounced. Not only are two well-known rules of construction—one, known as "The Golden Rule," that

> In interpreting all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument,

and the other that "remedial statutes should be construed liberally and so as to suppress the mischief and advance the remedy," thus given due effect, but the apparent purpose of the legislation of 1917—to place extra-provincial corporations, as far as possible, in the same plight and position as if, in litigation to which they were parties, judgments based on the statute held to be invalid had never been pronounced—is best attained. The costs of the litigation incurred up to the date of the judgment that should not have been rendered are not thrown away, as they would be if a new action should be brought. Moreover, if obliged to bring new actions, many plaintiffs, who had suffered dismissals based on the statute held to be invalid, would find their causes of action barred by statutes of limitations. It is most probable that the legislature

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had this in view and therefore authorised the prosecution of the very action so dismissed rather than the institution of new proceedings, in which the remedy which the legislature meant to afford might prove illusory. By empowering the court to deal with the costs—"upon such terms as to costs as the court may impose"—it has been made reasonably certain that no injustice to any party will ensue. While the use of the terms, "as if no judgment had therein been rendered or entered," might at first blush lead one to think that it was meant that in every case the action should stand for judgment before the trial court, although it had, as here, been there dismissed on the merits and not because of any lack of status of the plaintiff, further consideration of the sub-section as a whole I think warrants the view that the only judgment with which it was intended to interfere was a judgment based on the ground that the failure of the company to obtain license or registration was fatal to the validity of act or transaction forming the subject matter of the suit. It follows that the appellant company was right in applying to the Court of Appeal to reinstate this action in that court as it stood before it pronounced its judgment on November 5, 1912—the first judgment which based the dismissal of the action on the ground of the invalidity of the plaintiffs' contract by reason of its not having been licensed or registered.

Whether the Court of Appeal should hear further argument, whether it should allow any amendments, if sought, or the introduction of any further evidence are questions of practice and procedure which that court may more properly deal with. Pronouncing the order which, in our opinion, the Court of Appeal should have made, we merely direct that the action of the plaintiff company be reinstated in the Court of Appeal of British Columbia and be dealt with by that court as if its judgment of November 5, 1912, had *not* been rendered or entered—subject to such terms as to costs as it may see fit to direct or impose.

The appellant is entitled to its costs in this court, of the appeals and of the motions to quash and also to the costs of the appeal to the Court of Appeal from the order of Gregory, J.

Brodeur, J.

BRODEUR, J.:—I concur with my brother Anglin.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. January 11, 1918.

SALE (§III—57)—DELIVERY AT TIME OF SALE—BREACH OF WARRANTY—RIGHTS OF PARTIES—DAMAGES.

Where a valid sale is made of goods in existence and ready for delivery when the sale is made, the contract of sale not being severable, and the property in the goods passing to the purchaser at the time of the sale; the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term in the contract express or implied to that effect.

Where no time is mentioned a contract must be executed within a reasonable time.

Statement.

APPEAL by defendant from the judgment of a County Court Judge in an action to recover $640, the balance remaining unpaid of the price of a quantity of hay sold by the plaintiff to the defendant. Affirmed.

The judgment appealed from was as follows:—

The plaintiff is a farmer, now retired and living in the town of Arnprior, in the county of Renfrew. The village of Pakenham is about 6 miles distant from his farm, which he still owns. About the 7th November, 1916, he had a sale of his farm-stock and effects, except the hay-crop, and thereupon moved to Arnprior, leaving the farm unoccupied. The hay, aggregating 65 tons, had, during the latter part of October, been pressed into bales, and was stored in his barn on the farm, where it was at the time of the sale to the defendant. The defendant is a cattle-dealer; but, in the latter part of 1916, added to his ventures the hay-business as a sort of "side-line." The two parties met at Arnprior about the 20th December, 1916, when the defendant made an offer for the hay. A few days later, they met at Pakenham, when a bargain was struck, and the hay sold to the defendant at $10 per ton at the plaintiff's barn, the defendant to draw it away. A payment down of $10 was made as earnest-money, and a valid sale was effected. The contract was for an immediate sale, the plaintiff asking that the hay be taken out between Christmas and New Year's, and the defendant undertaking to remove it as soon as he could. It was to be paid for when taken away by the defendant. Nothing however remained to be done by the plaintiff as between him and the defendant, and the property in the hay thereupon vested in

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the latter, who, by the nature of the transaction, became entitled also to immediate possession: *Tarling* v. *Baxter* (1827), 6 B. & C. 360; *Acraman* v. *Morrice* (1849), 8 C.B. 499.

Sixty-five tons of pressed hay were thus sold, and up to this point, or rather so far as I have stated, the parties appear to be in agreement. They disagree, however, to some extent on the details of the description. The plaintiff's story is that, on being asked by the defendant if his hay was good, he replied that it was good timothy except 2 or 3 tons of clover-hay. The defendant also inquired if it was dry, and the answer was that it was pressed dry, except the last two loads, which had got wet by rain in moving to the barn after being pressed. The defendant says that the plaintiff represented the hay as "No. 1 good timothy" except about 3 tons of clover. The defendant had not seen the hay at the time of the bargain; and, although it was to be taken out "as soon as he could get at it," he did not take the trouble to look at it until about the 14th March, 1917 (nearly three months after the sale). On cross-examination, he said he was buying "good timothy hay." On or about the 14th March, he commenced drawing, and removed 46,346 pounds of hay. He says he knew "it was not good No. 1 timothy hay." A bale then broke; and, upon its being found musty in the centre, the defendant, to use his own expression, immediately "quit," and examined and set aside about 20 other bales left in the barn which had must on the outside. None of these were, however, opened. He then called up the plaintiff by telephone, and advised him that he had struck musty hay, and asked him to go out and look at it, and offered to cull it and take what was good out of it. The plaintiff replied that he could not go out, but took the position that the hay was the defendant's property, and that he (the plaintiff) had nothing to do with it. Thereupon the defendant wrote the plaintiff on the 14th March advising that he had stopped drawing, as there was *too much* of the hay musty. His opinion must have been formed at this time from the single broken bale, as he had then looked at no other except by surface observation. It may be noted here that the defendant did not pursue his inspection any further until a few days before the trial, when 6 or bales were opened and others turned over and examined from the outside, the total number of bales thus inspected aggregating probably 20. On the

14th March last, about 42 tons of hay remained in the barn, and are still there. The 23 tons 346 pounds previously taken out by the defendant were not objected to. They were accepted by the defendant and sold and shipped by him, on or about the 3rd May following, to D. A. Campbell, of Montreal, the contractor for the British Remount Commission. Evidence of this shipment is put in by the defendant in the Canadian Pacific Railway Company's freight-bills and the contractor's checking-list. The list accounts for 319 bales, aggregating 42,958 pounds of hay, or 3,388 pounds less than the quantity taken by the defendant on account of this purchase. This shipment was graded at Montreal as "No. 2 ordinary." There seems to be no standard weight of bales in pressing hay. According to the list, they ran from 90 to 185 lbs., the whole shipment averaging 135 lbs. per bale. That, according to the evidence, would be a fair average all round. Keeping that average in mind, it will be seen that the 42 tons of hay then and now remaining in the barn would include about 623 bales. Of these only 20 have been inspected. The inspection was made by the defendant and expert witnesses on his behalf in preparation for the trial, and for two purposes, viz.: (1) to ascertain the extent of must; and (2) to classify the hay according to a technical standard. The 20 bales were pronounced affected with must. As evidence of it, samples taken from *two* bales were produced in Court. It was not suggested in the evidence that the bales contained any substance other than timothy or clover-hay or a mixture of both. The main part of the evidence for the defence was directed towards establishing, through expert graders of hay who had recently examined the 42 tons of hay in the barn, that it was not up to the standard of "No. 1 timothy."

After hearing the evidence of the plaintiff and defendant, the only persons who were witnesses of the contract, and considering the circumstances, I have come to the conclusion that at the time of the bargain neither party had in his mind any technical classification with regard to this hay. The plaintiff insists that he agreed that the hay was "good timothy with 2 or 3 tons of clover." The defendant was a novice in the hay business. That he did not then know what "No. 1" grade meant is evident from his admission that he had been seeking information on that point ever since the month of March last. No doubt, he only became

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aware of it when his expert witnesses told him. At all events he accepted over 23 tons of this hay, which secured a grade of "No. 2 ordinary," without question, and by an alleged tender, made shortly after the hay was taken out and by payment into Court in this action, submits to pay for that quantity at the contract price.

It seems to me that the fair construction of the bargain was that it was a sale and purchase of 65 tons of pressed hay which consisted of good timothy except 2 or 3 tons of clover. No. 1 timothy, according to the experts, is the highest grading, and according to Mr. McGuire, who has had a wide experience, No. 1 hay is 100 per cent. pure timothy, green, well-cured, saved, and baled; and it was exceptional to get any of this grade in the crop of 1916. A contract for No. 1 hay, such as the defendant now suggests, would, therefore, have been practically an impossible undertaking for the plaintiff. Having found, as I think the weight of evidence warrants, that there was no condition of grading in the plaintiff's representation, the testimony of the expert witnesses for the defence does not offer much assistance in the disposal of this case. Neither party goes so far as to say that it was agreed that the timothy and clover were extracted and pressed into separate bales. I suppose a certain mixture of the two was inevitable all through; and, if the defendant wished to protect himself against this contingency, he could have done so at the time by imposing such a term in his bargain. His complaint was that there was too much clover mixed with the timothy, but he knew he was getting 2 or 3 tons of the former. The mixing of the two kinds was not guarded against, and was not, as I find, a breach of the plaintiff's contract.

Then, as to the bales rendered defective by heating and must: the plaintiff says that in making the bargain he informed the defendant that about 2 loads of the hay had got wet by rain. That is not admitted. The hay had been pressed about 2 months when it was sold. As the defendant did not look at it for nearly 3 months afterwards, there is no evidence of its condition, so far as must is concerned, at the time of the sale. Evidence was given, however, that must communicates by contact; and, in view of this fact, it may be a fair inference that during the 3 months' delay the extent of any defect due to

this cause would have been aggravated. The defendant has not enlightened me on this point. Referring to the 42 tons still left in the barn, he says in his evidence, after explaining that about 20 bales in all had been opened or looked over, "I can't say how much of the balance is musty or what the balance of the hay in the barn is worth." There is no counterclaim or claim for damages for breach of any representation made by the plaintiff. The foregoing is a somewhat detailed but plain statement of the facts, as I find them established by the evidence before me.

I am of the opinion that this case should be decided by the consideration which led to the judgment in the recent case of *Niagara Grain and Feed Co.* v. *Reno* (1916), 38 O.L.R. 159, 32 D.L.R. 576. The representations made by the plaintiff at the time of the sale were not in the nature of a warranty, but rather a condition; and for a breach thereof the defendant could reject within a reasonable time.

In the circumstances of this case, I know of no decided authority which permits the purchaser of a specific article to accept part and reject the balance. Mr. Stafford referred me to a quotation from Wyatt Paine's Law of Simple Contracts, 1914, p. 213, and also to an extract from Chitty on Contracts, 15th ed., p. 716, which declare the right of a purchaser to accept goods which are in accordance with the contract and reject the rest or to reject the whole. The examples in Chitty refer to a sale of books, and I should regard that as easily distinguishable from this case, as in the case of books there would be no difficulty in separating those up to standard.

In this action, the defendant has accepted and submits to pay for a third of the hay contracted for, which he admits that he knew at the time was not up to what he says was standard quality, but claims the right to throw back on the plaintiff's hands the balance of the hay, which, except as to the few bales he (the defendant) has since inspected, he is unable to say is or is not of inferior quality.

Apart from this, I think the defendant's right to reject must be exercised within a reasonable time. The *Niagara Grain Company* case seems to me clear authority for that. If the rejections were not made within a reasonable time, the time might be prolonged indefinitely; and, where the deal was in the nature of a cash transaction, such as occurred between the parties to this

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action, it would not be fair to the plaintiff to oblige him to take back the rejected hay at any time the defendant might decide to repent of his bargain. I find that the defendant did not exercise his right of rejection within a reasonable time. He offers no excuse for the delay, other than that he was busy with his cattle business; and, so far as this contract is concerned, that, in my opinion, is no excuse at all.

The result, in my judgment, is, that the position taken by the defendant is no defence to an action for the price of the hay, and that his only remedy is by an action for damages, or, which would have served the same purpose, a counterclaim in this action. The defendant having offered no evidence as to damage, it seems to me that my only course is to give effect to the plaintiff's claim and leave to the defendant such recourse as he may be advised he has against the plaintiff for breach of his contract. If it is necessary, and I have the power, that leave may be reserved to him. If, on review, it may be held that the defence in this action is well-laid, and that the defendant had the right to reject the 42 tons of hay left in the plaintiff's barn, then I find that before action the defendant made a sufficient tender (according to the contract price) to the plaintiff, before action, of $221.75, which would be full payment for 46,346 pounds of hay taken out and accepted by the defendant, which sum has been paid into Court.

There will therefore be judgment for the plaintiff for $640 and costs. The amount paid into Court by the defendant, viz., $221.75, will be paid out to the plaintiff and applied on account of the judgment.

R. J. McLaughlin, K.C., for appellant; *R. J. Slattery*, for respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—It is much to be regretted that this case was not wholly dealt with at the trial, for, if it had been, all the delay and expense caused by the contest over the question whether the hay in question was sold upon a "condition" or upon a warranty, could, and should, have been saved: whether a "condition" or a warranty, the substantial result would have been as six in the one case is to half a dozen in the other. If the hay in question were musty, and so of no value when sold, the plaintiff could not recover anything for it by reason of the warranty; a cross-action or counterclaim was not necessary to obtain a mere reduction in price; and, if anything

more were needed, a counterclaim should have been made: the whole matter should have been finally dealt with in the one action: there can be no reasonable excuse for making two actions out of it.

But the case was not so dealt with, and we have now to consider whether the hay was, as it is commonly, though inaccurately in this case, said, sold subject to a "condition" or only upon a warranty.

The learned trial Judge found as a fact that the property in the hay passed from the seller to the buyer at the time of the sale; but he afterwards treated the sale as one on a "condition," which was inconsistent, because, if sold on a condition—I speak, of course, always of a condition precedent—the property would not pass unless and until the condition was fulfilled. If the property passed, the case was one of a warranty, not one of a "condition:" and, if a warranty, the main ground of this appeal fails.

As the hay in question was in existence, pressed and in bales ready for sale and delivery, when the sale in question was made, any condition, in the true meaning of the word, was improbable; a warranty was very probable because of the impossibility, practically, of having an inspection of the quality of the hay, though the kind of hay might have been seen readily. Conditions are more usual in regard to sales of things not yet in existence; or things which are not present and cannot be seen.

In this case the question is really not one of conditional sale; but is really whether the goods delivered are the goods which were bought: that is, whether the hay in question is of the same kind which the defendant bought. As was said in one of the cases: a sale of pease is not carried out by a delivery of beans. It is not a question of "condition;" but is: whether the goods delivered are those which were bought. In some cases the real question is whether a condition has been performed: and in all cases it seems to be the fashion now to call the question one of a condition.

I am quite in accord with the learned trial Judge in his finding that the property in the hay passed to the buyer at the time of the sale.

The hay was, as I have said, in existence, pressed and in bales ready for sale, and all in the seller's barn. It was that hay and all of that hay that the parties intended should be bought and sold. It was capable of inspection as to the kind of hay, which could

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be readily seen without opening the bales: as to its quality, that was not practically possible: it might be damp inside, a dampness which might in time make it worthless: a dampness which might have generated must; as to quality, ordinary prudence required a warranty: as to the kind of hay, that was not so much needed: and, as to the kind of hay, no real question arises in this case, because the defendant accepted it in that respect, and complained only, and refused to take more only, because it was musty.

So, there can really be no doubt that what was sold was that hay, with a warranty as to quality: not so much of that hay as should prove to be of good quality. No one would sell on any such terms, which would require both parties to be present and contend as to what was and what was not of good quality; and leave it in doubt what was and what was not sold until each bale was opened, and after that if the parties could not agree upon what was and what was not good: see *London Electric Co.* v. *Eckert*, 40 O.L.R. 208. The convenience, indeed the need, of the thing is against any condition, is altogether in favour of the property in the goods passing with a warranty as to quality. In the first text-book that comes to my hand—Blackburn's Contract of Sale, 3rd ed., p. 541—the rule as to condition or warranty is thus stated: "Where the goods are ear-marked at the time of the contract, the stipulation as to quality is not a condition precedent . . . but a warranty merely, for the breach of which the buyer may obtain damages;" and, I may add, may obtain them by way of reduction of the price he is to pay for the goods.

That being so, the appeal fails; and the only question is: what disposition of the case should be made now: whether the trial should be reopened so that the whole matter may be dealt with, as it should have been, in the one case, or the defendant left to bring a new action upon the warranty. I am inclined to the former course, but some of my brothers prefer the latter; and, as no judgment can be pronounced without a reargument, according to the ordinary practice of this Divisional Court, on an equal division of the Judges in unappealable cases, and as really it means only some more expense, I agree to that disposition of the appeal rather than cause the unsatisfactory alternative.

Another point of importance was raised and much discussed upon this appeal, in regard to which I should add a few words,

although it does not arise if, as I think, the case is one of a warranty. That point was: whether, the defendant having accepted, and sold, a number of these bales of hay, he could then reject the rest because of breach of "condition." I should have thought not: that, in the circumstances of this case, he could then treat the undertaking of the seller as a warranty only.

The case of *Molling and Co.* v. *Dean and Son Limited*, 18 Times L.R. 217, was relied upon as being opposed to that view. The case is not fully reported; and the question here involved may not have been considered. The case was one in which it was found that the purchasers had the right of inspection, and of rejection of goods not made according to contract. On the subject of rejection of a part only, the learned Judge who delivered the judgment of a Divisional Court is reported to have said: "In a contract of the nature of the one in question, where every one of the articles had to be up to standard, the purchaser was entitled to keep some and reject others, and thereby reduce the damages to be paid by the vendor in respect of the breach of contract:" the Court treating, I suppose, the contract as severable.

The law of England and Ireland upon the subject is thus expressed in the Sale of Goods Act, 1893, sec. 11 (1.) (*c.*): "Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

It was not at any stage of this case contended that the property in the hay did not pass because it had not been weighed. Nor could it have been so well contended. There was no obligation on the seller to weigh the hay. Its weight was pretty well known by the number of bales, the average weight of which was known to the parties when the contract was made. There was no mention or thought of weighing when the purchaser took the bales which he carried away and sold.

The appeal is dismissed.

RIDDELL, J.:—The plaintiff, a farmer, in the fall of 1916 baled up his hay (65 tons) and stored it in his barn; having sold out the

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rest of his stuff on the farm, he went to reside in a neighbouring village, leaving the hay, pressed and baled, lying in his barn. The defendant made him an offer of $10 a ton for it, the defendant to draw it away; the offer was accepted and the defendant paid $10 on the bargain. This was a few days after the 20th December, 1916. The plaintiff suggested that the defendant should draw the hay away between Christmas and New Year's; the defendant agreed to draw it "as soon as possible;" and this was acceded to.

The learned trial Judge says "it was to be paid for when taken away by the defendant." I do not find that in the evidence. The defendant says:—

"Q. 256. Was there anything said that day" (i.e., the day of the acceptance of the defendant's offer) "as to when he was to be paid? A. There was nothing at all said."

The plaintiff is silent as to the time of payment. We must, therefore, I think, take it that no time for payment was mentioned.

Early in January, the plaintiff asked the defendant if he had started to take the hay away; he said he had not, and the plaintiff asked him to remove it, and send a cheque for $300 on account. The defendant replied that he would remove the hay soon, or as soon as he could, and would pay the whole amount then. Apparently the plaintiff demanded again, for the defendant says:—

"Q. 264. I think I saw him in Arnprior again, and he told me he wanted the money—I put him off. I said I had not the money to pay, but would give it to him when I drew the hay."

The defendant began to draw on the 14th March, and drew some 23 tons and some hundreds not "good No. 1 timothy hay," as he knew—then a bale broke, and was found to be musty in the centre: he thereupon examined some 20 more bales, musty on the outside, but did not open them. He "quit," and, calling up the plaintiff by telephone, told him that he had struck musty hay, offered to cull out the hay he thought would answer his contract, and pay for what he took. The plaintiff refused to come over and discuss the matter, taking the position that the hay was the defendant's.

The defendant then wrote the plaintiff on the 14th March: "Just a line to let you know I have stopped drawing your hay, as it is not in shape for me to handle, as there is too much of it musty,

so I will send you a cheque by next mail for the amount I have out." He drew no more, but left some 42 tons in the barn, about 600 bales or a little more—this still remains in the barn.

On the 19th March, the defendant sent to the plaintiff an account of the amount of hay drawn away by him, 46,346 lbs., and a statement shewing $221.72 still due, concluding by saying, "hope you will be satisfied." He also orally made an offer to pay this sum (no real tender was made), but the plaintiff refused to accept unless the price for the whole should be paid.

An action was brought in the County Court of the County of Lanark for $640, the balance of the price for 65 tons, less $10 paid; the defendant paid into Court the sum of $221.72, and defended for the balance; the learned County Court Judge gave judgment for $640, but reserved leave to the defendant to sue for damages for breach of contract—this was because there was no counterclaim pleaded in the present action, and no evidence had been given as to damage. The defendant now appeals.

The learned County Court Judge held that the property in the hay passed to the defendant on the bargain being made; this is the first finding upon which an attack is made.

I do not see how there can be the slightest doubt of this—the Privy Council, in the Canadian case of *Gilmour* v. *Supple*, 11 Moo. P.C. 551, 566, say: "By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that such was not the intention of the parties." The goods here were known, both by description and situs; and, unless there is more in the case, the result is clearly adverse to the defendant.

The defendant contends, however, that the hay was described to him as "No. 1 timothy," and that it was not "No. 1 timothy." What might be the result, had this contention been established by the evidence, we need not consider—the learned County Court Judge has found, on evidence amply justifying the finding, that "the bargain was that it was a sale and purchase of 65 tons of pressed hay which consisted of good timothy except 2 or 3 tons of clover"—"there was no condition of grading in the plaintiff's representation." Unless there was must present in the hay, it cannot, on the evidence, be successfully contended that the

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goods did not answer the description. As to the must, the only evidence we have of its presence was nearly three months after the contract—there is nothing to indicate its presence at the time of the contract. Indeed it may well be that the must was wholly absent at the time the defendant should have removed the hay.

Where no time is mentioned, the law implies that the contract is to be executed within a reasonable time—and the stipulation that the hay was to be removed "as soon as possible," or the like, means much the same—as soon as one reasonably can, having regard to all the circumstances: *Attwood* v. *Emery*, 1 C.B.N.S. 110; *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q.B.D. 670, especially pp. 676, 677; *Tennant* v. *Bell* (1846), 9 Q.B. 684; *Staunton* v. *Wood* (1851), 16 Q.B. 638; *Duncan* v. *Topham* (1849), 8 C.B. 225.

The property then passed on the making of the contract, and the authorities cited, which deal with another kind of case, have no application. The hay became the property of the defendant, and the plaintiff became entitled to the price of it. All question of the right to take part and reject part disappears.

On the evidence, I can find no case for diminution in the price, under the rule in *Gilmour* v. *Supple* and similar cases: but the learned County Court Judge has amply protected the defendant if he has such a case.

I would dismiss the appeal with costs.

Rose, J.

ROSE, J., agreed with RIDDELL, J.

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LENNOX, J. (dissenting):—The facts are not complicated, and the learned trial Judge has stated his reasons with singular clearness. I quite agree with him that if the plaintiff in selling the hay described it as "No. 1 good timothy," the expression was not used, and was not understood by the defendant, in a technical or scientific sense; nor as that term is used in the larger markets in grading hay.

The agreement was, that the plaintiff would sell and deliver to the defendant, at the plaintiff's barn, about 65 tons of hay at $10 a ton, to be paid for at this rate as it was taken away; that the defendant would accept delivery and take it away as soon as he could; and that all of the hay, with the exception of about 3 tons, was clean timothy, in good condition.

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The decision of this appeal turns upon the somewhat narrow and difficult point so frequently presented in deciding agreements of this character, namely: Did the property, by force of the bargain, immediately vest in the defendant, leaving him to the remedy of damages only for breach of contract if the hay turned out not to answer to the description, or did the hay remain the property of the plaintiff until it passed into the possession of the defendant, entitling him to refuse to accept, if all or some of it turned out not to be of the character described by the plaintiff?

It was a sale, rather it was an agreement for sale, by description; and, if the question were *res integra*, I would have no hesitation in saying that, the plaintiff undertaking to furnish about 65 tons of good, clean, marketable timothy hay, was bound to furnish about that quantity of the quality specified, and liable to damages, if damages were sustained and insisted upon, if he made default; that the defendant, having taken a part of the hay, in good faith and in the ordinary way of handling such goods, and disposed of it beyond recall, had the right to refuse acceptance of hay of another description; that, the plaintiff having refused to allow the balance to be culled, the defendant was justified in doing what he did; and that, in tendering and paying into Court for what he got at the agreed price, the defendant did all and possibly more than all he was bound to do. But, although, as said by Greene, C.J., in 1 R.I. 356, "The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society," yet as "this progress must be by analogy to what is already settled" (title-page of Corpus Juris), I have to keep in mind and weigh the accumulated, and not always reconcilable, decisions upon agreements with a warranty, sales upon condition, sales of specific goods, severable agreements, etc., so easy to talk about and so difficult to apply. Nevertheless each case must be decided upon its own facts. The facts in this case are hardly in dispute. A clear apprehension of the agreement is the first thing. The plaintiff said:—

"Mr. Noonan met me in Arnprior on the 20th December last, and asked me if I had my hay sold. I said 'no,' and he made me an offer of $10 a ton for it—for my hay in the barn—and he would draw it. I didn't accept his offer that day; I told him I would let him know in a few days whether I would accept his offer or not.

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So I went over to Pakenham on the train a few days after, and met Mr. Noonan there, and talked the matter over and I decided to accept his offer. He gave me $10 on the hay at that time, and I suggested that he draw the hay between Christmas and New Year's, or at the first good sleighing, and he says, 'I will draw it as soon as I can get it.' . . . He asked me if it was good hay. I told him it was good timothy hay with the exception of 2 or 3 tons, or probably more, of clover-hay. That was mentioned in Pakenham anyway. When we closed the deal in Pakenham, I told him it was clover-hay, and, if it did not suit him, he could feed it to his cattle." (According to the evidence on both sides, in this sentence he is referring only to the "2 or 3 tons.")

"Q. At the time in Arnprior was there anything else said about that hay? A. Not that I mind of, not until we closed the deal in Pakenham, just before train-time.

"Q. What was said, if anything, in Pakenham in the first conversation about quality—was there anything said? A. He asked me if the hay was dry. I said it was all pressed hay and it was dry with the exception of two loads. We were drawing it to the barn, it was raining a little while, and then it came on heavier, and we had to stop working. That was all that got wet. The last two loads, probably nearly two tons; it got a little rain moving it to the barn after being pressed."

This was not quite true, and the difference is important. It was raining while it was being baled; and rain on closely baled bundles, while they are carried for a few rods, and wet hay bound up into bundles, are not the same thing.

"Q. And you sold that hay in December to Noonan? A. 20th of December, I think was the date.

"Q. What kind of barn was it—does it leak? A. No.

"Q. Was it a good barn for hay? A. Yes.

"Q. What happened after you sold the hay to Noonan? Did he take the hay away? A. No, he did not. I said, 'You will commence after the New Year and draw the hay;' and he says: 'I will draw it just as soon as I can get at it.' I expected to have got my money for the hay then or in a very short time."

The plaintiff kept the hay under lock and key. The barn was some six miles from Arnprior, where the agreement was made. The defendant did not see the hay until he began to remove it.

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He could not judge of its character except as he removed it from the mow and loaded it. The plaintiff admitted that it would be "an awful job" even to count the bales left after the defendant had removed 23 tons. And even for the trial the plaintiff only examined a few bundles closely, and looked at what was visible. It was impossible to examine it closely, as it was piled in the mows. Nothing appears to have been said by either party, and nothing was done, after the beginning of January until the defendant began to draw the hay in March; and, although none of it was quite up to the description, the first 23 tons were marketable and fairly good. Then it was found to be musty. As to this the plaintiff says:—

"Q. Did he give you any reason why he did not remove it all? A. After he moved that portion of it that he took away, he called me up on the 'phone one night and said he had struck some musty hay and wanted me to come and see it. I told him I could not go to see it. I said the hay was not mine; I would take nothing to do with it; but I told him, if he had moved it in time, it was all right when I sold it to him."

The defendant offered to take what was good—and, debate it as you will, that is all he agreed to buy; but the plaintiff would not consent to this, insisted that he must take all, and refused even to look at it. The defendant tendered payment at the rate of $10 a ton for what was taken, as the Judge finds. This was refused, and he paid the money into Court.

That the hay was not of the class or character described, as well as being of a poor quality, and in bad condition, is not open to question. Nothing, as I said, turns on whether the hay was described as a "No. 1 timothy" or only as "good timothy." Timothy is the best hay in the market, and the experts agree that good timothy properly saved is "number 1." They are convertible terms. The hay did not deteriorate owing to any condition arising after the bargain. There is no suggestion that it did, and there is abundant and uncontradicted evidence that its condition in March was owing to its character when harvested, want of care in harvesting, and rain during the baling, and the internally wet bales being piled deep in the mow.

There can be no doubt about it being musty. The plaintiff's counsel found it advisable not to call some of the witnesses selected

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by the plaintiff to examine it, and after his own inspection of it appeared to have no great confidence in it himself. On cross-examination the plaintiff said:—

"Q. According to your judgment, was all the timothy hay that was in the barn, good hay? A. It looked good.

"Q. Can't you form any judgment about it? A. It was in good shape.

"Q. Was it good hay? A. It looked to be good hay—good colour.

"Q. That is as far as you can go? A. Yes."

It may be that other considerations might arise if the condition of the hay in March was owing to leakages or something of that kind subsequent to the agreement. I do not say or think that this would alter the situation; but, at all events, it was not owing to conditions subsequent, as the expert evidence shews, nor as shewn by the plaintiff's own evidence, already quoted, and these answers upon cross-examination:—

"Q. If the hay were in good condition on the 20th of December, and was in a dry barn, what would take place between the 20th of December and March that would injure it? A. I don't know.

"Q. Is there anything you know of that would take place to injure the hay? A. Nothing that I know of.

"Q. So it is a fair inference, then, that the hay was the same in March as when you sold it to him on December the 20th?

"(Counsel objects.)"

The evidence of the hay-packers—so materially different from the statement of the plaintiff to the defendant—perhaps explains the condition of the hay when they got down into the mow; and, if the plaintiff had accepted the defendant's very reasonable offer, they might have come to a lot of good hay in sorting it out; and the loss, if any loss there was, would not have fallen very heavily upon any one.

The parties agree in saying that no time was mentioned for payment, and in such case the plaintiff was entitled to payment for each load of hay as it was taken, if he was not, indeed, entitled to full payment before delivery of any of the hay. This was the plaintiff's right as a matter of law, and this whether the property in the hay had passed or not—in the absence of an actual agreement to the contrary such as credit terms or the like or an estab-

lished course of dealing from which a contrary intention should be inferred.

This is in accord with the English Sale of Goods Act, 1893, sec. 41 (1.) (*a.*): "Where the goods have been sold without any stipulation as to credit." And the same was the rule at common law: *Miles* v. *Gorton* (1834), 2 C. & M. 504, at p. 511, per Bayley, B. The statute is a crystallisation of the common law as to many of its provisions, and it is to be noted that the common law presumption that the property does not pass, where the goods are sold by description, until they are examined and accepted, is recognised by the statute, and the description is a condition: *Varley* v. *Whipp*, [1900] 1 Q.B. 513.

It may be that in many cases possession in itself, therefore, determines nothing as a matter of law, but is important and significant in determining the fact as to the intention of the parties. That the plaintiff did not exercise this right does not change the character of the contract, nor did anything happen that would amount to a waiver as to the hay remaining in the barn. Again, the somewhat loose agreement as to the time the hay was to be taken away presents no difficulty. A good deal of latitude was allowed to the defendant, but the plaintiff could protect himself by a notice; and he regarded the time taken as reasonable, for he made no complaint. The plaintiff was not quite frank when he asked the defendant, in January, if he had taken the hay. He knew he had not, for he knew the hay was locked in the barn, and that the key was in his pocket. He knew, too, that the weight had to be ascertained—that nothing had been said as to how this was to be done—and he would be presumed to know that the concurrence of both parties was necessary to effect this operation. When a party agrees to do an act as soon as he can or when he is able, it is for the plaintiff to establish ability as a matter of fact. The character of the evidence depends upon the circumstances: *Re Ross* (1881), 29 Gr. 385; *Sylvester* v. *Murray* (1895), 26 O.R. 599, 765; and, if the plaintiff was dissatisfied, of which there is no evidence, he was bound to give notice: *Daily* v. *Stevenson* (1839), 5 O.S. 737.

I recognise and concur in the view so frequently stated that it must be an extraordinary case in which an appellate Court will feel itself justified in reversing the findings of the trial Judge based

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upon the relative value of conflicting verbal testimony. In this case, as I have said, there is practical agreement as to the expressed terms of the bargain; and in this, as in all cases, it is right that I should form and express an opinion as to the proper inferences to be drawn from undisputed facts and the resulting consequences to the parties as a conclusion of law. I have not found it necessary, however, to draw any inferences in conflict with the findings of the trial Judge, so far as I know.

Considering this case, then, upon its own facts, without, for the moment, endeavouring to fit or shape them to the law as declared by other Judges, as applied to other facts, and for the moment leaving out of sight all the niceties, subtleties, and perplexities pertaining to sales of specific goods and the like, and whether it was or was not intended that the property in the subject of the agreement should pass by force of the agreement on the 20th December—for the intention of the parties is the determining factor upon this question—I am of opinion that the contract the defendant entered into and the only obligation he assumed (leaving out the question of a few tons of clover) was to accept, pay for, and take away such bales of hay, then stored in the plaintiff's barn, not exceeding in all about 65 tons, as upon loading and examination were found reasonably to answer the description given by the plaintiff, and understood by both parties as the basis and condition of the bargain. That there may yet be hay there of the character described by the plaintiff matters not, for the plaintiff repudiated the right of selection. Of course the subject of the agreement was identified—it was hay in the plaintiff's barn the parties were talking about—but the plaintiff, honestly or dishonestly, by his description of it, worded and limited the contract; and the bargain was for 3 tons of clover, and, except as to this, for good, clean, merchantable timothy, well garnered and properly baled, housed, and cared for. It was located and defined, and in this sense "specific," but to speak of it as "specific and ascertained" within the meaning of decided cases, in my opinion, which I express with unfeigned respect, would be to push the sometimes salutary principle upon which the Courts have determined the ownership of ascertained goods quite too far. How does this case differ in principle from a sale of bullocks or hogs or apples or potatoes? The dealer wants all he can get of a specified class and

quality. The farmer wants to sell all he has produced. They meet in a neighbouring market-town, and the farmer, describing what he professes to have, says, "I have so many or so much;" and they are in agreement as to a price per head, or per barrel, or per bag. He says, "I have 20 first class Durham steers fitted and ready for slaughter," or "50 well-fatted Tamworth pigs;" or "100 barrels of A1 sound handpicked greenings;" or "1,000 bags of first class, sound early Rose potatoes;" and the dealer says, "I will take the cattle or the hogs at so much per head," or "the apples at so much a barrel," or "the potatoes at so much a bag." Granted in each case that the goods are upon the seller's farm, and the parties are speaking of the same herd or the growth of the same orchard or the same potato-patch, it is specific in that sense if you like. Well, if it turns out that the farmer can produce only 10 Durhams or 30 Tamworths, and the rest are lean and runty and of another breed, or half the apples are windfalls, or half the potatoes offered are of an unknown or mixed variety, has the property passed in the runts or the windfalls or the mixture, as well as in what answered the description upon which the agreement was based, and must the dealer who has shipped a part upon the faith of the vendor's word, and before it was possible to detect the misrepresentation, innocent or otherwise, accept and pay for what was never spoken of and what he never would have bargained for, and whistle for damages? I can see no distinction in principle between the cases I have put and the case at Bar. This is in a way what occurred to me during the argument, but it is to no purpose if my argument is faulty, as it may be, and it is inconsequential if in conflict with the law as declared by relevant decisions binding upon this Court. I am of opinion, as an inference of fact based in the main upon the plaintiff's evidence and conduct in holding the key and looking for his money, amongst other things, that it was not intended that the property should pass by the making of the bargain. I am of opinion, too, that something remained to be done by the plaintiff, and that from the nature of the transaction there could be no change of property in the hay remaining in the barn until the defendant had an opportunity to test the goods by the description, or until both parties concurred in ascertaining the quantity, or had unequivocally assented to it. The existence of a warranty, if it could be said there was a warranty, is not incon-

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sistent with the existence of a condition as well. As pointed out in *Mody* v. *Gregson*, L.R. 4 Ex. 49, in addition to the condition that the goods shall answer to the description, there may be a warranty that they are merchantable etc.

If the vendor, in addition to describing the goods by their generic name, further describes them in terms calculated to enhance their value or affect the purchaser, or specifically describes their quality, this becomes an essential part of the contract—in other words, a condition: Pollock on Contracts, 8th ed., p. 562. In such case the purchaser is not compelled to accept goods not answering the description: *Chanter* v. *Hopkins*, 4 M. & W. 399, at p. 404; *Azémar* v. *Casella*, L.R. 2 C.P. 431.

Whether a particular affirmation as to the quality of a specific thing sold be only a warranty, or the sale be "conditional, and to be null if the affirmation is incorrect," is a question of fact to be determined by the circumstances of each case: Pollock, *op. cit.*, p. 514. And "a party is not bound to accept and pay for chattels, unless they are really such as the vendor professed to sell, and the vendee intended to buy:" *Hall* v. *Conder*, 2 C.B.N.S. 22, at p. 41, 109 R.R. 590.

"The parties may indicate an intention by their agreement, to make any condition, precedent to the vesting of the property, and if they do so their intention is fulfilled . . . And, as is said in Comyn's Digest, Condition (B. 13), 'if a personal thing be granted on a condition precedent, the property does not vest till the condition performed.' And so also in sales by sample no property will pass, until the vendee has compared the bulk with the sample and assented to the appropriation," etc.: Blackburn's Contract of Sale, Blackstone edition, pp. 142, 143 (star p. 196). And *â fortiori* must this be the rule when the sale is by description only.

There is no dearth of cases, the difficulty is to apply them properly. The decisions are not uniform, but I cannot find that the declared principles of decision are in conflict. This only emphasises that each case must be determined on its own facts.

Craig v. *Beardmore* (1904), 7 O.L.R. 674, is perhaps as strong a case as can be cited in favour of the plaintiff, but it in no way conflicts with the opinion I entertain as to the principle upon which this appeal should be determined. I heartily concur in the principle of that decision. The cases are clearly distinguish-

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able upon the facts. There was no dispute as to the bark which had not been drawn to the railway siding—that was to the good; the question was solely who should bear the loss of the tan bark burned at the siding. As to this bark there was nothing remaining to be done by the plaintiff except the loading of 164 cords, and this was prevented by the inability of the defendants to procure cars. The basis of the decision is self-evident upon the mere statement of the facts. There was no dispute as to the character or even the quality of the subject of sale. The tan bark was examined, measured and classified, by the defendants' agent before the agreement was signed or drawn up. They were dealing not only in reference to a defined or specific commodity, but the quantity as "measured in the bush," price per cord, and total price were final. All this appeared in the report sent in by the defendants' agent, and before the fire the plaintiff was credited in the defendants' books with 559.80 cords of bark at $6.25 per cord, total $3,497.66, and charged with $500 paid on account. Both the learned Chief Justice of this Court and Mr. Justice Street, in pronouncing the judgment of the Divisional Court, were careful to point out that the bark had been already measured, classified, and accepted by the defendants' agent at the time of the contract, and in the judgment on appeal it is pointed out that the vendors in *Logan* v. *LeMesurier* (1847), 6 Moo. P.C. 116, failed because the lumber was to be finally measured in Quebec, and the raft was lost before measurement or delivery at that place; and that there were *both* final measurement and actual delivery of the raft in *Gilmour* v. *Supple*, 11 Moo. P.C. 551, before the loss occurred. It is unnecessary, therefore, to refer further to the *Gilmour* case, except it be to point out the importance attached in all the cases to final and definite ascertainment of the quantity, and that in none of them was there any question as to the goods or any of the goods answering to the description.

On the other hand, the case most relied upon by Mr. McLaughlin, *Molling and Co.* v. *Dean and Son Limited*, 18 Times L.R. 217, appears to be directly in point—a contract by description and for severable goods at individual prices, as the case at the Bar is: and a case, too, like this, in which the buyer used the goods conforming to the contract, or at least saleable, but unlike this defendant, in that he did so knowingly and voluntarily. The plaintiffs, colour

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printers in Germany, agreed to supply the defendants with a number of books, some for sale in England and some in America, as the plaintiffs knew. They sent on to London 40,000 intended for re-shipment to America, and they were shipped by the defendants to New York without inspection; and were there rejected as not being of the *quality* agreed, and sent back to England. The books bore the imprint of the American publishers. The books were shipped by the plaintiffs in August, and arrived back in England in November, when the defendants gave notice of acceptance of 13,000 as saleable and rejection of the others. The defendants paid for what they kept, less expenses of shipment, customs duties, and loss of profits on resale. The plaintiffs sued for £738, the agreed price for 40,000 books. The Official Referee gave judgment in favour of the defendants. On appeal by the plaintiffs to the King's Bench Division, Lord Alverstone delivered the judgment of the Court. He held that the delay was not too great, and the place of inspection was in New York, and said: "It was argued that the defendants, having picked out and sold 13,000 books, could not reject the rest of the parcel. In a contract of the nature of the one in question, *where every one of the articles had to be up to standard*, the purchaser was entitled to keep some and reject others, and thereby reduce the damages to be paid by the vendor in respect of the breach of contract." This case fully bears out what Mr. McLaughlin was mainly seeking to impress: that the agreement here was severable; that, being by description, the defendant only bought and was only bound to take what answered (in character) to the description; that in the nature of the contract this was necessarily a matter to be subsequently ascertained; that until this was done it was not contemplated or intended by either party that the property in the goods would pass, and then only in such of the goods as answered the description; and that the ascertainment of character and actual quantity was practically impossible until the hay was taken from the mows to be loaded and taken away. The italics in the language quoted are mine. Assuming that the plaintiff acted honestly in describing the hay as he did—an assumption which should be made whenever possible—this argument is entirely in harmony with what I regard as the proper inferences of fact to be drawn from what was admittedly said and done, and the surrounding circumstances.

But there are many other equally cogent decisions: I can refer only to a few of them. *Heilbutt* v. *Hickson* (1872), L.R. 7 C.P. 438, 41 L.J.C.P. 228, was a contract for 30,000 pairs of boots intended for the French Army. They were sold by sample, and the boots were to be equal to the sample. The sample contained paper in the sole, but this was not known by the purchaser at the time of the contract, and could not be discovered without cutting the sample open. A quantity were delivered at Fenning's Wharf in London, and on cutting the soles of some of these open the method of manufacture was discovered, and the defendant, the vendor, agreed to take back such as had this defect. He thereupon delivered other parcels, making in all 12,825 pairs, and after inspection they were shipped to Lille and were there rejected by the French Government for the same cause. The plaintiff then repudiated the contract, and claimed to recover the money paid. The defendant was willing to take back those proved to contain paper. This could only be discovered by cutting them open. The jury found that the boots delivered and ready for delivery were not equal to the sample, and the defects could not be discovered on inspection without cutting the boots open. The defendant relied upon the inspection and acceptance; and claimed that the plaintiff was only entitled to damages as upon a warranty. Bovill, C.J., and Byles and Brett, JJ., held the plaintiff entitled to recover back what he paid and for loss of profits. Brett, J., said (pp. 456, 457): "The defect . . . was a secret defect, not discoverable by any reasonable exercise of care or skill on an inspection in London. By the necessary inefficacy of the inspection in London . . . the apparent inspection in London could be of no more practical effect than no inspection at all . . . a real inspection at Lille being . . . the first possible effective inspection, and no use of the goods having been made before the inspection at Lille, it seems to me that such inspection was, by the acts of the persons for whose acts the defendants were responsible, substituted for the first inspection stipulated for by the contract."

In *Azémar* v. *Casella*, L.R. 2 C.P. 431, 677, the goods were described as "Long-staple Salem" cotton, and were sold by sample. The sale was of specific ascertained goods per ship "Cheviot." The goods turned out to be not "Long-staple Salem," but an

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exceptionally fine grade of "Western Madras," and were rejected. The decision turned upon the fact that they were not the goods ordered. There was a provision for abatement of price in case of inferiority, and it was contended that the defendants must rely upon the warranty. If the goods had been of the class ordered, although inferior to the sample, this would have been so—the property would have passed—but, where they are not the goods bargained for, it is manifest that there can be no change of ownership as to these goods. Willes, J., said that the property had not passed, that it was not a mere difference in value to be compensated for under the allowance clause, but a difference in species, so that the contract was for one thing and the goods tendered another thing.

In Benjamin on Sale, 5th ed., p. 563, it is said that, except under special circumstances, "the rule is very general and uniform that the condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other to comply with his promise"—authorities referred to.

In *Nicholson* v. *Bradfield Union* (1866), L.R. 1 Q.B. 620, as here, part of the goods could not be returned. The defendants ordered 70 tons of Ruabon coals. The plaintiff delivered 15 tons of this, and next day 7 tons of another kind of coals, which he shot into the same pile. Before discovery, the defendants had consumed 6 tons taken from the bulk. Held, the defendants were not bound to pay for what remained.

In *Lucy* v. *Mouflet*, 5 H. & N. 229, the defendant used part of the cider and complained by letter. He went on and used more, in all about 20 gallons. He then repudiated the contract. The plaintiff did not answer the defendant's letter. The Court held that the omission to answer, under the circumstances, might be regarded as acquiescence in a further trial of the cider, and that the defendant could still exercise the right to reject.

In *Harnor* v. *Groves* (1855), 15 C.B. 667, the plaintiff bought and paid for 25 sacks of flour, and the decision was the other way. When he had used half a sack, he gave notice that the flour was not according to contract, but he used two more sacks and sold one. The Court held that he was precluded by his manner of dealing with the flour, after he knew of the defect, from repudiating his contract.

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Toulmin v. *Hedley* (1845), 2 Car. & K. 157, was the case of a sale of a specific cargo of guano on the ship "Sarah." Cresswell, J., directing the jury, said: "It is true that this was a contract for a specific cargo; but it had not been seen by the defendant; and I think, therefore, that, before accepting it, he was entitled to look at it, in order to see whether it corresponded with the terms of the warranty or not; and that, if it did not, he was entitled to reject it."

I have referred to the weighing or other ascertainment of the quantity. All that was to be done to pass the property to the defendant, in my opinion, was not done. I have not overlooked the distinction that must be kept in mind between "difference in character" and mere difference or inferiority in quality. In this case the hay rejected was different in character. The three specialised tons called "clover" were mixed clover and timothy, all the rest was to be timothy properly harvested and housed, etc., as I have said, and in good condition. The evidence is, that what was rejected was unquestionably not of this character, even aside from the question of must. Musty hay, in the sense of fodder, is not hay at all—nothing will eat it.

The appeal should be allowed and the action be dismissed with costs here and below. The money in Court should be applied towards payment of these costs, and the surplus, if any, paid to the plaintiff.

Appeal dismissed; LENNOX, J., *dissenting.*

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Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 11, 1918.

VENDOR AND PURCHASER (§ I D—20)—SALE OF LAND—PARTIES MISTAKEN AS TO QUANTITY—DEFICIENCY—IMPLIED WARRANTY—RESCISSION.

The words "containing 271 acres" following the description of land as a definite part of a defined section, both parties being innocently mistaken as to the acreage which is in fact much less, do not amount to an implied warranty as to the quantity of land sold; after completion of the purchase, rescission will not be granted for deficiency.

[*Franz* v. *Hansen*, 36 D.L.R. 349, reversed.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta, 36 D.L.R. 349, 12 A.L.R. 406, reversing the judgment on the trial in favour of the defendants.

Matheson, for appellants; *Chrysler*, K.C., for respondent.

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FITZPATRICK, C.J.:—The appellant by deed dated February 27, 1909, agreed to convey to the respondent his farm described as follows:—

All that part of s. three (3) township eight (8) range one (1) west of the fifth (5th) principal meridian, lying west of the river, said land containing two hundred and seventy-one (271) acres and being located in Alberta, Canada.

This description is in accordance with that in the appellant's certificate of title from the South Alberta Land Registration District, which adds, however, "as shewn on a plan of survey of the said township signed at Ottawa, August 24, 1898, by Edouard Deville, Surveyor-General of Dominion lands, and of record in the Department of the Interior."

A transfer dated November 15, 1910, as printed in the record, but which is undoubtedly an error for 1909, was made by the appellant to the respondent; and the latter has a certificate of title dated December 1, 1909.

Through an error in the survey the property is erroneously described as containing 271 acres when as a fact it has been subsequently ascertained to contain only 164.80 acres. It is admitted that there was an innocent mistake common to both parties.

Except that the deficiency is so remarkably large there is nothing to distinguish this case from any other in which the contract calls for a larger area than the property actually contains.

Nothing is more clearly established in the practice of conveyancing, and it is so laid down in all the books, as the rule that after completion of the conveyance the purchaser who has had the opportunity of raising objection to any least deficiency in the quantity agreed to be conveyed has no further remedy. The so-called exceptions to the rule include a representation made at the sale collateral to the contract for sale and amounting to a warranty of the truth of the fact stated.

I can find in this case no evidence whatever either of an intention on the part of either party that there should be any warranty or that such was given. The testimony carries the matter no further than the written document which is the very ordinary statement of quantity in the property agreed to be sold and which it is admitted the appellant had the best reason for believing was correct. If we were to hold that there was ground for decreeing compensation in this case, I do not know how it could be refused

in any case at all, as the established rule would be reversed and the conveyance with payment of the purchase money would cease to be a final settlement of the sale.

I agree further with Stuart, J., that no such claim as that on which the judgment appealed from is based ought to have been admitted upon the pleadings which raise an entirely different one. Even if the respondent were entitled to any relief, I do not think the judgment of the Appellate Division could stand. The agreement was for the sale of the farm at a named sum and this has been carried out. There can, I think, be no possible warrant for the court to substitute for the terms of the agreement a purchase price arrived at by a *pro ratâ* one on the acreage of the farm. This is no way to arrive at the damages sustained by the respondent.

The appeal should be allowed with costs.

Davies, J.

DAVIES, J.:—I concur with my brother Anglin, J., and I would allow this appeal with costs and restore the judgment of the trial judge.

Idington, J.

IDINGTON, J.:—This appeal presents a case which is remarkable, not only by reason of its peculiar facts, but also by reason of the very peculiar state of our law relevant thereto, being such as it is. The facts are undisputed. The inferences therefrom may vary.

According to the law as presented by appellant, we are asked to render a judgment which would produce not only a bare denial of justice, but a shocking injustice. The judgment appealed from, no doubt, if left standing, would execute substantial justice between the parties.

The real question is whether or not the law is such as appellant contends.

The appellants and respondent in 1909 lived in the State of Washington. The respondent had a farm there which he valued at $7,000, and the appellant, Hansen, agreed to buy at that price, pay $3,500 cash and transfer a piece of land in Alberta represented by him to contain 271 acres. The cash part of the price was paid and then the appellants and the respondent executed an agreement, dated February 27, 1909, made between the former parties of the first part and the latter as party of the second part whereby it was witnessed:

That the said party of the first part, in consideration of the covenants and agreements hereinafter made by the party of the second part, hereby covenants

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and agrees that he the said first party will deliver unto the second party hereto a warranty deed shewing a clear title to the following described property, to wit:

All that part of s. three (3) township eight (8) range one (1) west of the fifth (5th) principal meridian, lying west of the river, said land containing two hundred and seventy-one (271) acres, and being located in Alberta, Canada.

The instrument then proceeded to bind the party of the second part that he would "in consideration of the covenants of the said first party" deliver a warranty deed conveying to him the lands described free of encumbrance.

It is to be observed that there is nothing in this instrument relative to the cash part of the transaction or indeed in any way pretending to set forth the entire actual bargain between the parties. It relates only to part of that entire contract. It is not an ordinary contract of purchase and sale, yet may fall within the rules of law applicable thereto.

The conveyance from respondent provided for by this instrument was duly given and his land resold by appellant. All that the appellant Hansen gave to respondent in way of assumed compliance with his covenant, above quoted, was by a transfer in the usual form under the Alberta Land Titles Act, dated November 15, 1909, in which the lands professed to be thereby transferred were described as follows:—

That portion of s. three (3) in township eight (8) range one (1) west of the fifth meridian, which lies to the west of the Old Man River as shewn on a plan of survey of the said township signed at Ottawa 24th August, 1898, by Edouard Deville, Surveyor-General of Dominion Lands, and of record in the Department of the Interior, containing two hundred and seventy-one acres more or less.

Which is followed by a reservation as follows:—

Reserving unto His Majesty, His successors and assigns all gold and silver and unto the Calgary and Edmonton Land Company, Limited, their successors and assigns, all other minerals and the right to work the same.

It is to be again observed that this description bears a resemblance to yet is far from being identical with that in the covenant of February 27, 1909, above quoted.

Can it be held in law to have been identical therewith? That is one of the questions to be considered herein.

This transfer professed, on its face, to have been made in consideration of $3,500 and the receipt thereof, is therein ac nowledged. There were no covenants expressed therein of any kind.

The Land Titles Act implies only one on the part of the vendor and that is one for further assurance of a very limited nature which does not touch what is involved herein.

The expression in the description used in the covenant of February 27, 1909, was such as called for absolutely 271 acres, but is modified in the transfer to read 271 acres more or less.

Can the latter be said to be a fulfilment of the obligations in the former?

I pass the reservation of minerals, though a clear departure from the contract, because nothing is made of that herein, and confine my question to the rest of what appears.

That transfer was registered and a certificate of title issued, dated December 1, 1909, constituting respondent the owner of an estate in fee simple in lands which are described substantially the same as in the transfer containing two hundred and seventy-one acres more or less.

It turned out upon investigation some months later that within that part of section three thus described there were only 164 8-10 acres instead of the promised 271 acres.

The parties seem to have been friendly and it was for a long time assumed that their efforts at rectification made first by claims on the railway company which had sold the land to Hansen, and next upon the Dominion government, made through first one parliamentary representative and then through another, his successor, might bring relief. All that ended nowhere; but it accounts for the loss of time which had elapsed before resorting to the court on the 1st November, 1912.

Had the litigious spirit been predominant and suit entered immediately upon discovery and before respondent's Washington farm had been resold by Hansen, I think there can be little doubt but that rescission might have been had of the entire contracts between the parties.

It seems to be admitted that is now impossible. Hence authorities bearing upon that aspect of the case, of which a few are to be found, are almost useless for present purpose. The latest application of the law relevant thereto, at least up to the stage when a conveyance has been accepted, appears in *Lee* v. *Rayson*, [1917] 1 Ch. 613.

And the large number of decisions in specific performance cases,

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which have been cited to us, shewing that compensation has been many times insisted upon by the courts, seem still more remote from the business in hand.

In any such case as presented herein there would have been clearly either a refusal of specific performance or it would have been only granted with compensation.

In his evidence Hansen was asked and answered as follows:—

Mr. McDonald: You do admit that you told him your land had 271 acres in it?

A. I think I told Henry there was 271 acres, at least I told him that is what the deed called for.

Mr. Matheson: You thought at that time there were 271 acres? A. Yes, certainly, because I had the deed for it.

and from his examination for discovery there is the following evidence:—

13. Q. Did you ever mention to him the number of acres that were there? A. I told him that according to the deed it was 271 or 272 acres, I think. That is my recollection. Of course it was a long time ago.

14. Q. And at that time he had not had any opportunity of measuring the land or examining it? A. No.

15. Q. As a matter of fact how many acres are there in that piece? A. Well, that is pretty hard for me to say, you know, I never measured it. I bought the land and I got a title for it and of course I bought hundreds of acres of land and I have never measured a piece of land yet. I have always taken the title for it.

This had been relied upon as evidencing a collateral warranty enabling two of the judges in the Appellate Division to hold respondent entitled to relief though recognizing the general rule that after a contract of sale and purchase has been executed by the delivery of the conveyance there can be no relief got by a purchaser, by reason of any failure on the part of the vendor to give thereby what he had bargained to give, unless there has been actual fraud on his part or some covenant in the deed of conveyance upon which he can sue.

Beck, J., agreed in the result, but apparently on the ground that the general rule thus recognized was not, in the Alberta jurisdiction, where an agreement for the sale of land is not followed by a deed of grant, but by a transfer, which in his opinion is, in effect, only an order to the registrar to cancel the vendor's certificate of title, and to issue a new one in the purchaser's name, leaving, in his opinion, in full force and effect all the covenants of the agreement for sale.

There certainly is much to be said for this view if, as I understand, the system introduced by the Land Titles Act into Alberta, that it forbids covenants in the instrument of transfer, and that in itself it is of no value until recognized, and given vitality by the registrar's certificate, which in truth is what passes the title; and also if we have regard to the origin and development of the rule in question.

But unfortunately the doctrine it represents has not been confined to transactions relative to the sale of some interests in land.

It is set forth by that very able judge, the late James, L.J., in the case of *Leggott* v. *Barrett*, 15 Ch. D. 306, at foot of p. 309, as follows:—

> But I cannot help saying that I think it is very important, according to my view of the law of contracts, both at common law and in equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. . . . unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake.

This was said, not in a case relative to the sale of land, but where the only questions involved depended upon the terms of a dissolution of partnership, and how far the defendant was bound by the terms as expressed in the deed of dissolution, which had been preceded by an agreement in writing possibly capable of a wider import than in the said deed.

In the same case Brett, L.J., perhaps somewhat more concisely, said as follows:—

> I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document.

It might be argued that it was not necessary for the decision of that case to express any such opinions and hence these expressions should be held to be mere *obiter dicta*. Indeed, Brett, L.J., distinctly says he could see no difference at all between the preliminary contract and the deed.

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Be that as it may, the definition of the doctrine as expressed by James, L.J., has received acceptance by others on the Bench, and writers of text books.

Why, as it is thus expressed, there should be found ground for relief in the case of mistake which, I take it, means mutual mistake, and then only limited to the case of a possible alteration of the deed, must puzzle anyone but those conversant with the peculiarities which our judge-made law has so frequently developed.

And I may be permitted to remark that if we look for its parallel in the wider field of law applied to mercantile transactions we will not easily find its application to have been permitted there to frustrate the execution of justice.

We will find that the common sense of mankind engaged in these pursuits has so impressed the judicial mind therewith, that it has so developed the law, as generally to furnish implications that execute the purposes of the contracting parties and thereby escape the undesirable consequences of a rigid adherence to such a rule.

The rigid application of the doctrine has doubtless received a greater measure of success, if I might say so, in relation to contracts respecting land than in those relative to mercantile transactions. This has probably arisen because the former have been more generally conducted than the latter, through skilled men ready to apply that due diligence, which courts are apt to insist upon, in the way of procuring safeguarding covenants following careful examination of what is being bought or sold.

But what measure of diligence should be required of men dealing in wild lands? Must they have a survey made?

I am almost tempted to ask if when and where the reason for the rule ceases should it not then also cease to operate?

Passing all these suggestions and coming to the question of the observation of the rule as stated above, we find (in 1883) the case of *Palmer* v. *Johnson*, 12 Q.B.D. 32, decided by A. L. Smith, J., holding expressly that a purchaser, after conveyance and without any covenant therein upon which he could rely, might resort to a stipulation in the original contract providing for compensation in case of error, misstatement or omission being discovered in the particulars—otherwise meaning the terms of sale.

In this he professed to follow the law as laid down in *Bos* v. *Helsham*, L.R. 2 Ex. 72, and *Re Turner and Skelton*, 13 Ch.D. 130.

He discarded the decision by Malins, V.C. in the case of *Manson* v. *Thacker*, 7 Ch.D. 620, a short time previously and essentially of the same nature in its leading features. The reason assigned by him for so doing was that Malins, V.-C., had rested his decision upon the grounds that the purchaser should by the exercise of due diligence have observed the misstatement before conveyance executed.

This decision of A. L. Smith, J., was upheld in the Court of Appeal, 13 Q.B.D. 351. Of that Appellate Court, Brett, M.R., whose opinion expressive of the rule of law applicable to the case of an executory contract followed by an executed contract and the resultant consequences thereof, has been quoted above, was the first to give his opinion in support of the decision by A. L. Smith, J.

One might be tempted to suggest that the two opinions are irreconcilable; but Brett, M.R., speaking doubtless of the argument which had pressed that view, says, at p. 356, as follows:—

> Smith, J., in his judgment, from which this appeal is brought, points out all that was there meant. "All that was there held was," he says, "that where the parties enter into a preliminary contract which is afterwards to be carried out by a deed to be executed, there the complete contract is to be found in the deed, and that the court has no right whatever to look at the preliminary contract," but *Bos* v. *Helsham*, L.R. 2 Ex. 72, had decided that this particular contract for compensation was one which was not to be carried out by the deed of conveyance, and therefore it did not come within the principle of the law and was not merged in the deed.

With great respect for the memories of these judges I doubt if the explanation is quite satisfactory. It certainly did not occur to the astute mind of Jessel, M.R., in his more elaborate judgment in *Re Turner and Skelton*, 13 Ch.D. 130, or to that of Malins, V. C., in *Manson* v. *Thacker*, 7 Ch.D. 620, where each had to grapple with the same doctrine, though of course not with the identical expression of it.

Moreover, the opinion of James, L.J., expressly covered the law of contracts both at common law and in equity. By the latter, as lucidly shewn in the case of *Holroyd* v. *Marshall*, 10 H.L. Cas. 191, at p. 209, 11 E.R. 999, there is in a sense no need for a formal conveyance, as a valid contract for a present transfer passes at once the beneficial interest to the vendee.

The fair deduction from these cases is, I submit, a narrowing of the rule and limiting it to the mere effect of the conveyance of the legal estate which does not as a matter of course seem to have

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such elemental force in it as to extinguish anything in the contract of purchase but what is strictly limited to the passing of that common law legal estate.

And what of it when it fails to pass title to the substantial part of that which the parties believed they were contracting for? Does the doctrine only rest upon a mere play upon words, or was it developed from and does it rest upon the requirement of due diligence and subject to the limitations so implied.

However, if the distinction drawn by Brett, M.R., be sound, then it is very helpful in maintaining the judgment appealed from by reason of its limiting the operation of the rule simply to what may be a mere fractional part of the contract, leaving all else intact and inoperative.

As already pointed out, not only was there the verbal assurance of there being in fact two hundred and seventy-one acres offered which the appellant admits, but also there was an express contract under seal for a warranty deed of two hundred and seventy-one acres, which never has been given, indeed could not be effectively given in the Province of Alberta. The respondent, doubtless relying upon the assurance of appellant, Hansen, was induced to accept a certificate of title which professed to be for 271 acres "more or less" but in fact falls one hundred and six acres short of the two hundred and seventy-one acres promised.

True there was not a specific agreement for compensation, but there was a collateral agreement upon which, applying ordinary reason and common sense, the respondent was quite as much entitled to rely for his protection which would, upon being enforced, bring him the equivalent result in damages. And under the peculiar circumstances of the giving of the written contract, which did not profess to deal with the entire transaction between the parties, I think its nature and purport may well be looked to as shedding light upon the meaning and intention of the verbal assurance that there were 271 acres to be given.

I observe the attempt faintly made by Hansen to fall back upon what the deed, as he alleges, had expressed. A comparison of the dates and other facts leaves, as highly probable, the inference that at the time he spoke giving such assurance he had never seen what he calls the deed. If it was present at the bargaining I fail to see why the conveyancers drawing up the written covenant did

not incorporate the language used therein. Not only did he fail to catch the expression "more or less" therein, but also the entire wording of the description varies so much from either that in the so-called deed from the railway company to Hansen or the certificate of the registrar, that I am driven to the conclusion that neither was at hand.

The transfer from the railway company to Hansen is dated February 20, 1909; the affidavit of execution thereof is dated February 22, 1909; the affidavit of Kemmis as to value, doubtless for the registrar's use in fixing fees, is dated February 26, 1909; and the certificate of the registrar is dated March 1, 1909.

Having regard to the relative localities where these several acts were respectively done, and the dwelling place of the parties concerned herein, and place where the bargaining and execution of the covenant took place, it is extremely improbable that Hansen on February 27, or before, had had any opportunity of seeing, much less of speaking from, the deed as he suggests.

These facts and dates are important not only as a means of rendering more definite the terms of the verbal assurance he gave, but also as reflecting what purpose was intended in the giving of that assurance.

I have not the slightest doubt it was fully intended to persuade respondent to rely upon it, and that he did rely upon it and none the less so because it was followed or accompanied by a covenant emphatically consistent therewith.

Such being the facts, I am unable to distinguish between the force and effect thereof and what was in the case of *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215, given effect to, in the way of a warranty for good drainage given by an intended lessor to an intended lessee who was induced to take and took possession under a lease which had no covenant relative to drainage. That was an action for damages and so far as I can see could have been successfully answered if maintainable by just such arguments as appellants have presented here, relying upon the line of authority I have already dealt with.

Let us test the matter in another way, as exemplified in the case of *Piggott* v. *Stratton*, 1 DeG. F. & J. 33, 45 E.R. 271, when the representation of a vendor that he was bound by some lease from others not to build so as to obstruct a sea-view of those

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choosing to build on land he was selling, was held enforceable by injunction, though the same argument doubtless was used as herein, and as is implied in the doctrine in question, that the vendee should have protected himself by a covenant in the deed but had not. How is that decision consistent with the doctrine? It is only possible to make it so by assuming that the law never intended to deprive purchasers of the plain rights which a solemn representation carries with it even when mistakenly made in good faith.

The converse of this case, as it were, where there was no evidence of representation to be relied upon and nothing enabling the plaintiff to claim the benefit of restrictive covenants, came up in the case of *Renals* v. *Cowlishaw*, 9 Ch.D. 125, when Hall, V. C., dismissed the action and was upheld in doing so by the Court of Appeal, 11 Ch.D. 866.

The principles involved in that case come to be dealt with in the case of *Spicer* v. *Martin*, 14 App. Cas. 12, where, after conveyance, it was discovered that the purchaser might lose the benefits of restrictive covenants unless an injunction granted and it was granted accordingly and upheld on somewhat different grounds from mere misrepresentation.

The case of *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch.D. 392, at pages 402, 403, 413-15, 417, 434 and 456, shews how a defendant was, long after conveyance, in absence of fraud, and where rescission had become impossible, granted damages plaintiff was entitled to, arising out of the condition of the property at the time of conveyance not having been such as plaintiffs were entitled to have it. Yet there was no covenant in the conveyance to rely upon. Again, the case of *Clarke* v. *Ramuz*, [1891] 2 Q.B. 456, dependent upon the doctrine of equity, which I have already adverted to, of the vendee being the trustee of the purchaser from the time the contract of purchase had been formed, shews how, even after conveyance, the duty of such vendor to protect the property from deterioration has been enforced.

There had been in that case some earth in substantial quantities removed from the property after the making of the contract of sale, but before the conveyance, and the vendee was condemned to pay damages on discovery after the conveyance.

This case seems rather a decisive answer to the argument

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founded upon due diligence. Surely the vendee could have seen the earth in question had been taken without the knowledge of either vendee or vendor.

All these cases I refer to, not as strictly in point decisive of the question raised herein, but of how much care is to be taken in applying some expressions of opinion of very able judges which, if given effect to in the widest sense the language used might be capable of, would lead to doing an injustice which the courts have in these cases striven to avoid on one ground or another.

And the more I consider them the more I find it necessary to observe the terms of the covenant to give the respondent two hundred and seventy-one acres. It was not a mere symbol of numbers that appellant agreed to give, but of so many acres of ground.

It must not be overlooked that men, when dealing in wild lands, think of the acreage thereof and not of the illusory description a surveyor's blundering work had put upon paper.

I am quite aware that, in *Doe d. Meyrick* v. *Meyrick*, 2 C. & J. 222, and other cases, the rule has been laid down that, where in a deed there has been a general and specific description of the property, only that specifically described will pass. But I think we must ever observe, as was done in *Ringer* v. *Cann*, by Baron Parke and cited with approval by Wood, V. C., in *Jenner* v. *Jenner*, L.R. 1 Eq. 361, at 366, the object of the parties.

And the fact should not be overlooked that what is thus attempted to be put off upon the confiding purchaser as worth $3,500, to secure which to respondent was the object of the parties here, had almost immediately before been bought for $1,626 by the appellant Hansen.

This is not the case of only an immaterial or small fractional part of that bargained about being in question, but more nearly resembles that which was involved in the case of *Cole* v. *Pope*, 29 Can. S.C.R. 291, where, without actual fraud as here, the price had been paid and a conveyance got by a purchaser of what in truth as it turned out the vendor had no title to and the purchaser was held entitled to recover his purchase money.

The decision in the case of *Joliffe* v. *Baker*, 11 Q.B.D. 255, at 268, so much relied upon, is, if we examine closely the facts, possibly reconcilable with justice and common sense.

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The vendor in the opening letter of negotiations had stated in his description of the property, the quantity of land to be three acres, but the description in the contract of purchase, drawn up later and after the purchaser had come to inspect and presumably inspected the premises, alleged the property to "contain by estimation three acres or thereabouts." It turned out that there were only two acres, one rood and twelve perches. The price was £270. There were upon it a four-room cottage, a pig-sty, cow-pen, garden, and a capital meadow, which facts suggest that the shortage in mere acreage was probably in the eyes of the parties but a comparatively trifling part of the whole of that which was sold (although assessed at £50), and might well fall within the allowance therefor in the description.

There was nothing in that case upon which the plaintiff could by any possibility hand a claim of warranty beyond the not very uncommon one that the purchaser taking and paying for a thing which turns out to be a trifle less valuable than he had expected, and hence was driven to rely upon alleged fraud, which was quite untenable.

The court could not find anything in the conveyance upon which to found a warranty of quantity when that was expressly referred to as by estimation. I fail to see much resemblance between that case and this.

In closing his long judgment, Williams, J., refers to a number of cases of defect in the quantity including *Portman* v. *Mill*, 2 Russ. 570, 38 E.R. 449, and says he cannot extract a rule therefrom. Neither can I, yet I cannot escape feeling a suspicion derived from the tone of his closing remarks, that had he been confronted with such a case as the *Portman* case or that herein he might have found a remedy.

It is observable that it was only in the next year that A. L. Smith, J., who had concurred in the result, decided the *Palmer* v. *Johnson* case, 12 Q.B.D. 32, and I may add that the greater number of the other decisions I have referred to, and rely upon herein, were decided since the *Joliffe* case and shew clearly that there can be found a collateral warranty resting upon the representation made; and especially so when as herein that is equally consistent therewith followed by a covenant not yet fulfilled, instead of being followed, as in the *Joliffe* case, *supra*, by an agreement which by its

very terms so modified the representations as to render the representation worthless.

I need not enter upon the question of what a collateral warranty may or must consist of, for I agree, speaking generally, with what Walsh, J., has set forth in that regard, and the meaning thereof is illustrated by the cases I have cited.

Although holding with him that which he relies upon to be sufficient reason for dismissing the appeal, I am yet inclined to think that the covenant under seal was not extinguished by what transpired. The gist of the rule in question relative to an executory contract being extinguished by the executed contract, implies that it has been substantially executed and thus has carried out the purpose and attained the object of the contracting parties.

Can it be said to have been executed in this case unless we assume that the respondent's assent to the transactions relied upon as its execution was induced by the representation?

I am disposed to attach more importance to the indirect effect, not limiting it to the words "warranty deed" but the entire tenor of the written covenant, than Walsh, J., does, as shewing the purpose of the appellant in making the representation he did and of the respondent in accepting it.

Let us revert, in that connection, to a consideration of the doctrine of its extinction as respectively expressed by James and Brett, L.JJ., and some of the reasons for its existence.

Brett, L.J., distinctly puts it upon the ground of the superior nature of the later writing substituting the oral agreement, or deed substituting the prior writing.

If that expresses its meaning we have before us in this case a covenant under seal which is followed by a transfer which is not under seal and a certificate of title which is neither under seal nor given any force or vitality by virtue of any seal.

The superior document, if common law notions relative to the value of a seal are to prevail, is that covenant, under seal, which has never been fulfilled; if due effect is to be given to all the language used relevant to what was contracted for. And as the superior document has never been fulfilled may I suggest it has not been extinguished?

A reason for part of the operation of the rule laid down by

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those learned judges, which, however, is not given expression to by them, is that rule of law against the admission of oral evidence varying that which has been written. The real reason, I submit, for the rule in question is, that, in such transactions as the sale of real estate, the parties are presumed to have used due diligence and care and to have expressed in the later and final writing, what they mutually had agreed upon and hence it cannot be varied by oral evidence.

As governing what in the vast majority of cases happens in England or Ontario, the rule is a wise one and not lightly to be set aside, but as Mr. Justice Beck has suggested, is it under the circumstances in which parties find themselves in those jurisdictions in which the Torrens system of passing titles prevails, likely to be as useful or workable as elsewhere?

And when we find in the reports of the courts of our Western provinces the number of cases we do, when its observance may be suspected of having produced injustice, it becomes our duty not too hastily to extend its operation, but to scrutinize closely the facts in each case and see if in truth they permit the operation of the rule.

We have seen how by later development that which may be held to be a collateral part of the purchase contract is not supposed to be extinguished by only that relevant to the passing of the legal estate.

Does not all that bring us back to the original question of whether or not any such passing of title can be said to have taken place in pursuance of a covenant under seal, to convey by a method clearly impossible as contracted for, 271 acres of land when that which has been given neither in fact nor in form executes the purpose of the covenant?

I doubt it so much that I cannot see my way to allow an appeal by a judgment that would rest upon an affirmative answer to the query I put.

As already stated I hold the representation made, coupled with the covenant as illuminating the meaning and purpose thereof, such a warranty as relied upon below.

I have examined all the authorities cited and many more to ascertain whether or not it really is law as suggested that a man can misrepresent and mislead no matter how innocent of fraud,

and profit thereby at the expense of another who has had no fair opportunity to test the truth of the representation.

I submit there is no justification for imputing to the law such inevitable and unjust results as herein claimed for expressions, in terms too wide, of a doctrine that is supposed to be so well known and daily relied upon as that in question.

The appeal should be dismissed with costs.

DUFF, J.:—Appeal dismissed with costs. Duff, J.

ANGLIN, J.:—I am, with respect, of the opinion that this appeal should be allowed and the judgment of the trial judge restored. Anglin, J.

The plaintiff (respondent) very properly concedes that, owing to his delay in instituting this action, the absence of fraud and the impossibility of a *restitutio in integrum* he is not entitled to the equitable remedy of rescission. His alternative claim to recover damages he rests on (*a*) a warranty as to the quantity of land which he asserts is implied in the agreement for sale by the words in the description of the land to be transferred, "containing 271 acres," which follow its designation (in itself definite, unequivocal and complete) as that part of a defined section lying west of the river; and (*b*) an alleged collateral warranty consisting in a verbal representation that the parcel in fact contained 271 acres.

There can be no question as to the identity of the parcel with which the parties were dealing. The plaintiff got the land for which he bargained. Both he and the defendant were quite innocently mistaken as to the acreage, which was only 164.80 instead of 271. There is, therefore, neither a suggestion nor ground for a suggestion of fraud. The preliminary contract contains no provision for compensation for any deficiency in the quantity or quality of the estate. It may also be worth noting that before he took his transfer the plaintiff had learned that there was a very considerable deficiency in the quantity of the land, although he ascertained its precise extent only afterwards.

In the transfer itself, and in the certificate of title obtained by the plaintiff words of designation, the equivalent of those used in the preliminary agreement, are followed by the words, "containing two hundred and seventy-one acres more or less." The words "more or less" cannot cover a deficiency of 106.20 acres in a parcel supposed to contain 271 acres. *Portman* v. *Mill*, 2 Russ. 570, 38 E.R. 449. I do not, therefore, see any material difference

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between the description in the transfer and certificate and that in the preliminary agreement. Moreover, since the transfer was made in the form prescribed and customary in the Province of Alberta, it must be taken to be the form of conveyance for which the parties to the agreement intended to stipulate. I am, therefore, with respect, unable to assent to the view, which I understand, Beck, J., to express, that the doctrine of merger of the preliminary agreement in the conveyance is inapplicable to such a transfer.

I agree with Walsh, J., that (at all events in the absence of evidence as to the meaning according to the law of the State of Washington of the term "warranty deed" used in the agreement) the provision for such a deed cannot be taken to import a stipulation that the transfer to be given under the Alberta Land Titles Act should contain a warranty of the quantity of the land. If that should be its meaning, a serious obstacle would probably be presented by the acceptance, especially with knowledge of a deficiency, of a transfer without any such warranty.

But whether the transfer itself or the preliminary agreement is looked to, I am of the opinion that the words "containing two hundred and seventy-one acres" or "containing two hundred and seventy-one acres more or less" are merely a part of the description, probably to be regarded as *falsa demonstratio* (see cases collected in 10 Hals., p. 407, n. (*g*)), and not importing a covenant or warranty as to quantity which could found a demand either for compensation or for damages after the completion of the contract. *Penrose* v. *Knight*, Cass. Dig. (2 ed.) 776; *Follis* v. *Porter*, 11 Gr. 442; *Clayton* v. *Leech*, 41 Ch.D. 103. Dart on Vendors and Purchasers (1905 ed.), p. 812; Williams on Vendor & Purchaser (1911 ed.), pp. 6, 10, 11. In an action to enforce the contract while still executory a court of equity might of course entertain a claim for compensation as incidental to its jurisdiction to grant specific performance. The right to that relief would not rest upon breach of any warranty implied in a statement of quantity in the description, but would be based upon the equitable doctrine of mistake. After completion, however, unless a case can be made for rescission (*Debenham* v. *Sawbridge*, [1901] 2 Ch. 98, 109), the only remedy is by an action at law for damages. Neither innocent mistake nor innocent misrepresentation will support such an

action. It must either be in tort for deceit or upon contract for breach of warranty. *Joliffe* v. *Baker*, 11 Q.B.D. 255, at 267-9. Moral fraud, the essential of deceit, is entirely absent. The transfer does not contain any contract of warranty. Lord Moulton, in *Heilbut* v. *Buckleton*, [1913] A.C. 30, at 47, states the nature of such a contract and indicates the difficulty of establishing it when not expressed. There is no covenant in the transfer which gives a remedy. As Stuart, J., has said, we have been referred to no case where it has been decided that in a conveyance a statement of the number of acres contained in the parcel following the description of it amounts to a warranty. That appears to have been rather assumed in *Joliffe* v. *Baker*, *supra* (in other aspects a strong authority for the defendant), in the latter part of the judgment of Watkins Williams, J., (pp. 273-4) But that judge held that the terms of the description, regarded as a warranty, were literally true and that there had been no breach. That case is clearly not authority for the proposition that a mere statement of quantity in a description of land imports a warranty.

The claim based upon an alleged verbal warranty is in a position even more unsatisfactory. The only representation as to quantity of which there is any evidence amounted, in my opinion, to nothing more than a statement by the defendant that his own deed called for 271 acres—as in fact it did. Whether a vendor's representation on a sale imports a warranty is always a question of intention. The existence of that intention must be established. It is a matter of fact to be determined upon "the totality of the evidence." *Heilbut* v. *Buckleton*, *supra*. I am unable to discover in the record any evidence which would justify a finding that the defendant intended to make, or that the plaintiff understood him to make, a contract of warranty. On the contrary, the reference by the defendant, when speaking to the plaintiff of the quantity of land, to the description in his deed would to me rather seem to exclude the idea that any such undertaking was contemplated. Moreover, I doubt whether the statement of claim can be regarded as alleging a collateral warranty. If not, it would be unsafe for an appellate court to base a judgment on the existence of an intention which was not put in issue, which the defendant had not a fair opportunity of meeting, and upon which we are deprived of the advantage of a finding by the trial judge. *Appeal allowed.*

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DONER v. WESTERN CANADA FLOUR MILLS Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 26, 1917.

CONTRACTS (§ IV—351)—FAILURE TO MEET PAYMENTS WHEN DUE—SMALL BALANCE DUE—SET OFF—FAILURE TO DRAW—DEFAULT—DELIVERY BY INSTALMENTS—ORDER OR REQUEST BEFORE OBLIGATION TO SHIP—SEPARATE CONTRACT AS TO EACH INSTALMENT—REMEDIES OF PARTIES.

In an action brought by the surviving partner and the administrator of the estate of a deceased partner, for damages for non-delivery of the balance of goods ordered, under an agreement in writing whereby certain dealers in flour were to deliver to a firm of bakers 5,000 bags of flour: 2,000 bags of one kind, 2,000 bags of another kind and 1,000 bags of a third kind, at a specified price per barrel for each kind; to be taken in an approximately equal monthly quantity of 410 bags per month; payments to be made in accordance with the vendors' usual terms, the purchasers' account to be kept in such condition as to warrant the usual line of credit being extended, *failure to meet payments when due* to give the vendor the privilege of shipping and making sight draft with bill of lading attached or refusing to make further shipments. The evidence shewed the usual terms to be the acceptance of the buyer's drafts at 30 and 45 days, with a discount for cash. The fact that a small sum was owing by the purchasers for which they had a set off and for which amount the sellers had not drawn at the time an order was given, is not a default on the part of the purchasers within the meaning of the agreement which justifies the sellers in refusing to make further deliveries.

The contract being for different quantities, at different prices, of three different kinds of flour, there must be an order or request from the buyers for what they required, before the obligation to ship arose. The contract, being for delivery by instalments and for payment for each instalment separately, is to be treated as a separate contract for each instalment; the purchasers are entitled to damages for non-delivery of an instalment for which an order had been duly given, but are not entitled to call for delivery, in a subsequent month, of any instalment in respect of which no order to ship was given in due time.

Statement.

APPEAL by plaintiff from a judgment of Rose, J., in an action for damages for non-delivery of 3,460 bags of flour in accordance with an agreement made with the defendant company.

By the agreement, 5,000 bags of flour were to be delivered by the defendant company between the date of the agreement and the 30th September, 1916. William Reynolds, the active partner in the firm, died on the 14th August, 1916. The action was brought by Doner, the administrator of the estate of William Reynolds, and John Reynolds, the surviving partner.

The judgment appealed from was as follows:—

Up to the time of his death, on the 14th August, 1916, William Reynolds and his son, the plaintiff John Reynolds, carried on business as bakers and millers at Stayner, under the firm name of William Reynolds & Son. William Reynolds apparently had the active management of the business. The plaintiff Doner is the administrator of his estate.

William Reynolds & Son and the defendant company entered into a contract in writing in the words following:—

"Oct. 12, 1915.

"Western Canada Flour Mills Company Limited.

"Kindly accept our order for the purchase of 5,000 bags of flour for delivery between Oct. 12, 1915, and Sept. 30, 1916, made up approximately:—

"2,000 bags of Purity flour.....	$5.30 per bbl.	Jute.
"1,000 " " Battle flour.....	4.70 " "	"
"2,000 " " Three Stars flour.....	4.90 " "	"

"F.O.B. Stayner.

"All of which is to be taken in an approximately equal monthly quantity of 410 bags per month (variations not to exceed 25%).

"Payments to be made in accordance with your usual terms, with the understanding that our account with you is kept in such condition as will warrant your credit department, in their judgment, extending usual line of credit. Failure to meet payments when due will give you the privilege of shipping and making sight draft with bill of lading attached or refusing to make further shipments. It is also understood that the flour purchased is for consumption in bakery only, and must not be sold to the trade.

"Subject to the above, this order will become a firm contract upon your acceptance being mailed to at the address given below.

"Submitted by:

"F. J. Layman, "Traveller.

"Wm. Reynolds & Son, "Buyer. "Stayner.

"We accept the above,

"Western Canada Flour Mills Company Limited.

"G. K. Matford, "Treasurer."

On the day of the date of the contract, the 12th October, 1915, William Reynolds & Son ordered 410 bags. These were shipped about the 19th October, and two drafts, each for half the price, payable one in 30 days and the other in 45 days, were accepted by the buyers. More than a month elapsed before the next order for 410 bags was given. When it was given, about the

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end of November or the beginning of December, one of the drafts accepted in October was overdue and unpaid, besides which the purchasers owed the defendant company the balance of an old account, and the defendant company delayed the shipment of the flour until that old balance was paid on the 16th December. The next order for 410 bags was given about the 17th January, 1916, for shipment on the 1st February, but shipment was postponed at the request of the buyers, who said that, owing to their inability to dispose of some of the product of their own mill, they had no place in which to store the flour. The car went forward from Goderich on the 18th February.

Throughout December, January, and February, the buyers were behind in their payments, and there were repeated demands from the defendant company for payment, and repeated explanations and promises, and some payments by the buyers. On the 28th February, an order was given for 410 bags for shipment on the 15th March. On the 8th March, the defendant company wrote that the shipment would be made on the 15th March, unless the buyers desired to alter the date. The buyers instructed the defendant company not to ship until further instructed. The defendant company wrote, on the 10th March, that it was placing the order on its files for the 4th April.

During March, the correspondence about the overdue payments continued, and the defendant company asked for and was furnished with a statement of the buyers' financial position, which the defendant company thought indicated "a very respectable surplus in business."

On the 4th April, the buyers wrote: "We have about 4,000 bags coming yet on our contract, and it is worth about $1.50 per bbl. more now than when we bought it. What will you allow us and cancel the contract and wind the matter up?" The defendant company answered: "In connection with the cancellation of the contract now running, would point out that we reserved the right under the contract form to cancel same at any time should the buyers' account become unsatisfactory as regards credit, so that in the event of cancellation there would be no question of an allowance on the balance still to be shipped."

A payment on account was made on the 10th April, but some further payments promised were not made, and on the 17th April the defendant company wrote: "You are owing for accep-

tances due March 24th and April 16th for the amounts of $573.25 each, and, as this represents the full value of the last shipment to you, we are not in a position to forward the order you have on file until this account is reduced."

Again, on the 25th April, the defendant company wrote: "We are anxious to get forward the order we have on file, but, as explained to you in a previous letter, we are not in a position to forward another car-load shipment with this large amount outstanding."

A payment of half the overdue amount was made on the 12th May, and a further payment on the 15th June, and the whole of the balance overdue was paid on the 29th June.

Nothing more was said about the 410 bags ordered in February; but, on the 11th July, the buyers wrote: "Please ship us on our contract as soon as possible" 110 bags. The defendant company answered: "In view of the manner in which you have handled your account in the past, we regret to have to advise you . . . that it will be impossible for us to ship you on any other terms than sight draft attached to bill of lading less our usual discount of 1% for cash." The buyers wrote: "You can ship the" 110 bags "in the way you suggested;" the flour was sent forward accordingly from Goderich, the defendant company writing: "We are invoicing this off your contract." The draft attached to the bill of lading was paid.

On the 28th July, the buyers wrote, "Please send us 100 bags . . . off our contract," and on the 9th August they wrote for another 100 bags "off our contract." In each case the defendant company did as requested, writing that the flour was shipped "off (the buyers') contract." Drafts were attached to the bills of lading and were paid.

On the 23rd August, nine days after the death of William Reynolds, the defendant company discovered that in making out the draft for the price of the 110 bags ordered on the 17th July, it had inadvertently deducted the freight charges from Goderich to Stayner, $18.33, although the company had, itself, paid the charges, in advance at Goderich, and the company wrote the buyers asking for a cheque for the amount. The letter was not answered, and the company wrote again on the 1st September and on the 18th September. The letter of the 18th September was

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returned with the following, dated the 22nd September, written at the foot: "As Mr. Wm. Reynolds is dead, we will have to refer you to the Bank of Toronto, Mr. W. B. Doner, manager, Stayner. Yours truly, Wm. Reynolds & Son, per Loran Jackman."

Before the last-mentioned day, and about the 6th September, Mr. Doner, who was manager at Stayner of the bank in which the buyers had their account, and who was then applying for, but had not yet received, letters of administration of the estate of William Reynolds, had an interview, at Toronto, with two officers of the defendant company. The accounts of what was said differ in some respects, but I think it is clear that the financial position of William Reynolds' estate was discussed, and that Mr. Doner was told that there were still 3,620 bags of flour to be delivered under the contract. No order to ship was given on that day, and I do not think that much importance attaches to the interview. On the 6th September, the defendant company wrote to Mr. Doner: "There is a balance of 410 bags of flour due this firm on their contract, which expires September 30th." Both the statement at the meeting and the statement in the letter as to the number of bags undelivered are inaccurate; the real number is 3,460.

On the 20th September, Mr. Doner wrote the defendant company as follows: "As administrator of the estate of William Reynolds, it is our intention to continue the mill and bakery, and we have decided to take delivery of the 3,620 bags of flour, being the balance of Mr. Reynolds' contract with you. Kindly ship this to us, with the bills of lading attached to your draft, and the same will be taken care of as per Mr. Reynolds' contract of October 12th, 1915. Yours truly, W. A. Doner, administrator William Reynolds' estate." The defendant company answered: "The matter has been taken up with our management, and we shall write you fully in this connection in a few days." Then on the 3rd October the company wrote: "As Mr. Reynolds did not take out the monthly quantities in accordance with the terms of the contract, the balances were automatically cancelled. Our past due account against William Reynolds & Son has not been paid, and we understand the business formerly in the name of Wm. Reynolds & Son is now in an insolvent state. Under these circumstances we do not see our way clear to make any further shipments."

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There is a later letter, dated the 31st October, giving other reasons for the defendant company's refusal, but it is written to the plaintiffs' solicitor "without prejudice," and I do not refer to it. Even if it may be referred to, it does not seem to be important.

The question in the case is, whether the refusal, on the 3rd October, to ship more flour is or is not justifiable.

The meaning of the contract does not seem to be doubtful. There is a sale and purchase of 5,000 bags of flour "to be taken in an approximately equal monthly quantity of 410 bags per month;" if the buyers' account is kept in such condition as will warrant the sellers, in their judgment, extending credit, the buyers are to have credit; failure to meet payments when due gives the sellers the option of shipping with sight drafts attached to the bills of lading or of refusing to ship at all. There was a failure on the part of the buyers to take 410 bags a month; but the sellers did not, and with a constantly rising market (see exhibit 9) would not have been expected to, complain; in fact, on at least one occasion, they were asked to postpone delivery of a shipment that had been ordered, and did postpone it. They did not treat the contract as terminated by the failure to take the flour as promptly as stipulated for, but treated it as still subsisting up to August, 1916.

I do not think that this failure to take the stipulated quantity each month excuses them from delivering the balance. It may have entitled them to an extended time for delivery of the balance; but that is not what they seek: *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1875), L.R. 10 Ex. 195.

There was an obvious failure on the part of the buyers to keep the account in satisfactory condition, and they lost the right to demand credit. There was also a "failure to meet payments when due," and the sellers acquired the right, at their option, to ship with sight drafts attached to the bills of lading or to refuse to ship at all. They exercised their option, and the last three shipments were with sight drafts attached to the bills of lading, and I do not think it is open to them, when further shipments are called for, to make a new election, and, because of the old defaults, to refuse to ship at all. But, after the last shipment, the mistake as to the $18.33 was discovered, payment was demanded, and was not made. I think this sum was "due" when it was demanded;

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and I think that, when the order for the 3,620 bags was received, it was open to the defendant company to say, as it did, that, as its past due account had not been paid, it would not make further shipments. It seems hard that, if there is no other obstacle in the plaintiffs' way, their rights under an important contract should be defeated by their failure to pay this trifling sum as soon as it was discovered that it was due, but I see no answer to the defendant company's contention in this regard, unless, as was argued by Mr. McCarthy, the default was waived. The waiver alleged is at the interview in September, and in the letter of the 6th September, stating that there was "a balance of 410 bags of flour" due to the buyers on their contract. Nothing that was sworn to as having been said at the meeting and nothing in the letter seems to me to amount to a waiver of the right of the defendant company to say that, because of the failure to meet the payment of $18.33 when due, it would refuse to make further shipments; and I think, therefore, that the plaintiffs' action fails and must be dismissed with costs.

Another point was made by the defendant company in its pleading, but not argued at the trial, viz., that, the contract being with the firm of William Reynolds & Son, which firm was dissolved by the death of William Reynolds, the plaintiffs had no right of action. Upon this point *McCraney* v. *McCool* (1890-91), 19 O.R. 470, 18 A.R. 217, is against the defendant company.

D. L. McCarthy, K.C., for appellants.

J. A. Paterson, K.C., for respondent company.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment dated the 15th June, 1917, which was directed to be entered by Rose, J., after the trial of the action before him, sitting without a jury at Toronto, on the previous 4th May, 1917.

The action is brought to recover damages for the non-delivery of a quantity of flour which the respondent company, which I shall afterwards refer to as "the sellers," contracted to deliver to the firm of William Reynolds & Son, carrying on business at Stayner, which consisted of William Reynolds, now deceased and his son, John, the appellant, and which I shall afterwards refer to as "the buyers." William Reynolds died on the 14th August, 1916, and the appellant William A. Doner is the administrator of his estate, and the action is brought by him and the son John.

The contract is dated the 12th October, 1915. [The learned

Chief Justice then set out the contract as quoted in the judgment of ROSE, J., *supra*.]

The appellants in their statement of claim allege that in part fulfilment of this contract the sellers delivered and the buyers accepted and paid for: 410 bags in October, 1915; 410 bags in December, 1915; 445 bags in February, 1916; 110 bags in July, 1916; and 200 bags in August, 1916; and that, before the 30th September, 1916, they were ready, able, and willing to accept and pay for the undelivered flour, and that they demanded delivery of it and offered to pay for it, but that the sellers refused to make delivery and repudiated the contract.

The sellers by their statement of defence allege that the buyers without any reason "failed to purchase the required instalments of flour to be taken out during the months of November, 1915, and January, March, April, May, June, August, and September, 1916; and, having openly repudiated and abandoned the purchase of the said monthly instalments . . . all the rights and interest therein of the said firm of William Reynolds & Son were forfeited and terminated."

The sellers also allege that, at the time of entering into the contract, "and at the time of delivery of the certain instalments of flour taken out," the buyers "failed to establish satisfactory credit, and the defendants thereupon, under the terms of the said agreement, withheld further shipments in respect thereof," and that the agreement was entered into upon the condition that it should be kept according to the strict terms of it, which the buyers failed to do.

The sellers also allege that the contract was made with the buyers "as a going concern and actively engaged in business as bakers and upon the credit of Williams Reynolds;" and that, upon his death and the consequent dissolution of the firm, the respondent was no longer bound to continue the delivery of the flour.

There are also other defences to which it is not necessary to refer.

The sellers also set up by way of counterclaim that the firm is indebted to them in the sum of $18.33 for flour supplied on the firm's order and not paid for, and the counterclaim is for the recovery from the firm of that sum.

It will be convenient to mention here the nature of this claim. It arose out of a mistake made by the sellers in deducting from the price of one of the shipments made to the buyers the freight charge

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from the sellers' mill to Stayner, which had been paid by them. The deduction was made on the mistaken assumption that the freight charges had not been paid, and would therefore have to be paid by the buyers.

That the sellers were entitled to be paid this sum of $18.33 is not disputed; but the appellants say that, as the sellers had not drawn upon the buyers for it, the sellers had no right, because of its not having been paid, to exercise the right of suspending deliveries or to refuse to make further deliveries under the contract. The appellants also allege that the firm had a claim against the sellers for $21 for overcharges on two of the shipments that were made, which they were entitled to set off against the $18.33.

There is, I think, no doubt that these overcharges were made, and that they were not justified, as Mr. Tilley contended they were, by a suggested custom of the trade to make an additional charge when flour is shipped in small lots.

The learned trial Judge was of opinion that this sum of $18.33 was due when payment of it was demanded; and that, it being due when the order for the flour that had not been delivered was received, it was open to the sellers to say, as they did, "that, as their past due account had not been paid," they would not make further shipments; and on that ground the action was dismissed.

It appears to have been overlooked at the trial that no such defence as has been given effect to is raised by the sellers in their pleadings, and that the fact that the $18.33 had not been paid is set up only by way of counterclaim and as ground for the recovery of that sum by way of counterclaim.

I think also that the appellants are right in their contention that, instead of there being anything due by the buyers, the sellers owed them the difference between $18.33 and the $21 which had been overcharged.

This fact was not brought to the attention of the learned trial Judge; and indeed, as I understood Mr. McCarthy, it escaped the attention of counsel for the appellants at the trial.

I am also of opinion that the appellants are right in their contention that, even if there had been no set-off against it, as the sellers had not drawn on the buyers for the $18.33, they were not in default as to it. By the terms of the contract, payments were to be made in accordance with the sellers' regular terms, and

these were the acceptance by the purchasers of the sellers' drafts payable in 30 and 45 days, with a discount of one per cent. if payment should be made in cash.

The view of the learned trial Judge as to the main defence was, that the effect of the contract was that failure by the buyers to meet payments gave "the sellers the option of shipping with sight drafts attached to the bills of lading or of refusing to ship at all;" that, although there had been default on the part of the buyers to meet their payments, the sellers "did not treat the contract as terminated by the failure to take the flour as promptly as stipulated for, but treated it as still subsisting up to August, 1916;" and that this failure to take the stipulated quantity each month did not excuse the sellers from delivering the balance, though it may have entitled them to an extended time for delivery of the balance, and he referred to *Tyers* v. *Rosedale and Ferry-hill Iron Co.*, L.R. 10 Ex. 195, as authority for this latter suggestion.

The learned trial Judge was also of opinion that, when the buyers failed to meet their payments when due, the sellers, having exercised their option to ship with sight drafts attached to the bills of lading, as the sellers, as he thought, did in respect of the last three shipments that were made, were not entitled, "when further shipments are called for, to make a new election, and, because of the old defaults, to refuse to ship at all."

According to the provisions of the contract, the whole 5,000 bags were to be "taken" between the 12th October, 1915, and the 30th September, 1916, which meant that approximately 416⅔ bags were to be taken in each month.

The practice was for the buyers to notify the sellers of their requirements, stating the quantity of each description of flour which the sellers required to be shipped.

The first order was for 410 bags to be shipped on the 18th October, 1915, and it was given on the 12th of that month, and the shipment was made on the 19th October.

The second order, which was for 410 bags to be shipped at once, was given on the 30th November, and the shipment was made on the 21st December.

The third order was for 410 bags to be shipped on the 1st February, and it was given on the 17th January, 1916, and the shipment was made on the 18th February.

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The fourth order was for 410 bags to be shipped on the 15th March, and it was given on the 28th February, but no shipment was made.

No further order was given until the 17th July, when an order was given for 110 bags to be shipped at once, and they were shipped on that day.

The next order was given on the 11th August for 100 bags to be shipped at once, and they were shipped on the following day.

No other order was given until the 19th October, when Mr. John Hood, a solicitor acting on behalf of the appellant Doner, as administrator of the estate of William Reynolds, and of his son, described as the surviving partner, made a demand on the respondent for "the shipment of the balance of flour due by you under contract with you dated October 12th, 1915;" and asked that a draft be attached to the shipment, which he said would be honoured at Stayner.

From the very first, the buyers failed to make prompt payment for the flour that was shipped to them, and their acceptances of drafts for the price were scarcely ever paid at maturity, or even where, as several times happened, the period of credit was extended, when the extended period had expired. A great part of the correspondence consists of complaints by the sellers with regard to this and explanations and excuses by the buyers for not having met their payments promptly.

When the sellers received the order to ship the 110 bags which were shipped on the 17th July, they were asked to draw on the buyers at 30 days for the price. This the sellers refused to do, and wrote (12th July) that, in view of the manner in which the buyers had "handled" their account in the past, they would not ship the flour on any other terms than sight drafts attached to bills of lading, with their usual discount of one per cent. for cash, and to these terms the buyers assented, and the last two shipments that were made were accompanied by sight drafts for the price of the flour.

The second shipment was delayed because the buyers were then in default in paying for the flour that had been delivered, and the third shipment was delayed at the request of the buyers.

The time of shipment of the fourth order was extended at the request of the buyers until the 4th April. On that day, the

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buyers wrote to the sellers, making an explanation as to their financial position, and saying:—

"We have about 4,000 bags coming yet on our contract, and it is worth about $1.50 per bbl. more now than when we bought it. What will you allow us and cancel the contract and wind the matter up?"

The sellers replied on the following day asking for payment of what was owing to them, and concluding their letter as follows:—

"In connection with the cancellation of the contract now remaining, would point out that we reserved the right under the contract form to cancel same at any time should the buyers' account become unsatisfactory as regards credit, so that in the event of cancellation there would be no question of an allowance on the balance still to be shipped."

On the 6th April, the buyers acknowledged receipt of that letter and made promises as to payment of their indebtedness, but made no reference to the suggestion that they had made as to the cancellation of the contract or to the reply of the sellers to the suggestion, and no reference is made in the subsequent correspondence to the subject, nor is anything said as to the flour that had been ordered and was to have been shipped on the 4th April. There was correspondence in April, May, and June, but it was all with reference to the buyers' indebtedness and their failure to pay promptly, and on the 11th July the order was given for the 110 bags to which I have already referred.

I have said that no order to ship was given after the last shipment was made until the letter of the 19th October was written by Mr. Hood. In saying this I have not overlooked the appellant Doner's letter of the 20th September. That letter was written by him as "administrator of Wm. Reynolds' estate," and says:

"As administrator of the estate of William Reynolds, it is our intention to continue the mill and bakery, and we have decided to take delivery of the 3,620 bags of flour, being the balance of Mr. Reynolds' contract with you. Kindly ship this to us, with the bills of lading attached to your draft, and the same will be taken care of as per Mr. Reynolds' contract of October 12th, 1915."

Doner, as adminstrator of the estate of William Reynolds,

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had no right to require the flour to be shipped to him, and the demand being made in terms by him in that capacity was not a demand by the buyers which entitled them to require delivery to be made. There is also a further difficulty in the way of treating it as a good shipping order. In no view were there 3,620 bags undelivered, though, if Doner had had the right to give the order and there had been any flour yet to be delivered under the contract, that difficulty would probably have been removed in consequence of the sellers having replied refusing to make any further shipments.

I come now to the consideration of the meaning and effect of the contract, and the respective rights and obligations of the contracting parties under it.

As has been seen, the contract was for different quantities at different prices of three descriptions of flour, and it would seem to follow from this that before the obligation of the sellers to ship arose there must be an order or request from the buyers for what they required. It can scarcely have been intended that the sellers should have had the option of sending the monthly quota made up of such quantities of each description of flour as they might choose, regardless of the buyers' requirements, especially as it was required primarily at least for use in the buyers' baking business. The wording of the contract supports this view, for it is, not that the flour is to be delivered in equal monthly quantities, but is to be taken—that is, by the buyers—in those quantities.

The course of dealing was in accordance with that view, for in no case was a shipment made until the buyers' order was received, and both parties treated the buyers' order as a necessary preliminary.

If, as I think, the buyers had a right to select the description of flour they wished to take in any month, the principle of the decisions in such cases as *Brown* v. *Great Eastern R.W. Co.* (1877), 2 Q.B.D. 406, 409, applies.

In that case the question was as to the liability of a passenger on a railway for failing or refusing to produce his ticket or to pay his fare from the station from which the train originally started. Mellor, J., speaking as to this liability, said: "Unless the company make a demand, the passenger cannot tender any sum, so as to excuse himself."

The contract, being for delivery by instalments and for payment for each instalment separately, is, in my opinion, to be treated as practically a separate contract as to each instalment; and "the contract, so far as it applies to any particular instalment of goods, is discharged where default has been made in the delivery or acceptance of the instalment; . . . Accordingly the seller cannot afterwards claim to deliver the instalment, nor can the buyer demand it:" Halsbury's Laws of England, vol. 25, para. 377.

This statement is qualified by the following: "The fact that the parties have silently omitted to enforce and to require the delivery of any instalment of the goods, or have by mutual consent forborne its delivery at the contract time, is relevant, but not conclusive, to shew a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered:" *ibid.*

The first of these propositions is supported by what was said by Blackburn, J., in *Simpson* v. *Crippin*, 42 L.J.Q.B. 28, 33. He there said that, although the seller could not rescind, it was "pretty clear, supposing that no damage had resulted, that the plaintiffs" (the buyers) "could not have required the defendants to deliver the remaining 342 tons in the next month; they lost the opportunity of getting the whole 500 tons and must be content with the quantity which they had got."

The contract in that case was for 6,000 to 8,000 tons, and the delivery was to be made by about equal monthly instalments.

The same view was expressed by Bramwell, B., in *Barningham* v. *Smith* (1874), 31 L.T.R. 540, 543, and by Bigham, J., in *Nederlandsche Cacaofabrik* v. *David Challen Limited* (1898), 14 Times L.R. 322, 323.

In *Reuter* v. *Sale* (1879), 4 C.P.D. 239, 246, Thesiger, L.J., referring to contracts by which delivery was to be made by instalments, spoke of them as cases "where each delivery . . . was really like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties might well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract."

It follows that, if this be a correct view of the law, the buyers in the case at bar lost their right to require delivery to be made of the instalments which they failed to order in due time, unless from

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the dealings between the parties it properly can be inferred that there was either an agreement to postpone these deliveries or a waiver by the sellers of their rights under the contract.

I find nothing in the course of the dealings to warrant the drawing of either of these inferences. On the contrary, a perusal of the correspondence leads me to a contrary conclusion. There were, no doubt, consents by the sellers to extensions of time for the delivery of two of the instalments that were delivered, but no consent to extend the time as to the other instalments, and nothing to indicate that at any time, save as to these two instalments, was there anything said by the sellers to indicate that they waived or intended to waive any of their rights under the contract.

I find nothing in the two cases cited for the qualifying proposition in Halsbury's Laws of England, vol. 25, para. 377, to which I have referred, which supports the first part of it. The two cases cited are *Higgin* v. *Pumpherston Oil Co.*, 20 R. (Ct. of Sess.) 532, and *Tyers* v. *Rosedale and Ferryhill Iron Co.*, L.R. 10 Ex. 195.

In the former of these cases the question was as to the effect of a somewhat similar contract, as to paraffin wax, to that in question in the case at bar, but differing from it in that the contract in that case contained a term, which is not found in the contract now under consideration, that "each delivery shall constitute a separate contract." There had been default in the delivery of parts of some of the instalments and of the whole of others. The action was by the buyer for the recovery of damages for the non-delivery of the undelivered wax, and it was dismissed, the Court being of opinion: (1) that, as the contract note declared that each delivery should constitute a separate contract, the buyer's remedy in the event of the sellers' refusal to deliver any monthly instalment must be by buying in against the sellers in the market; and (2) the conduct of the parties indicated a mutual abandonment of their claims in regard to the undelivered instalments.

The Lord President, stating his opinion, said (p. 535): "It is sufficiently plain that unless the parties agreed to a postponement of any monthly delivery or series of monthly deliveries, the one party could not enforce acceptance or the other party demand the delivery of the belated quantity."

In the Court below *Tyers* v. *Rosedale and Ferryhill Iron Co.* (*supra*) was cited by the pursuer, but the Sheriff-substitute distinguished it because in it there was a postponement at the express request of the buyer, and it was held, as the effect of the evidence, that the conduct of the parties indicated, not an intention to be free from the contract, but only to postpone deliveries to subsequent months.

I find nothing in either case which indicates that the view of the Court was, that "the fact that the parties have silently omitted to enforce and to require the delivery of any instalment" is "relevant, but not conclusive, to shew a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered."

Upon the whole, I am of opinion that, apart from the question of there having been no proper demand for the delivery of the undelivered flour, as to which I have already expressed my opinion, the buyers were not entitled to call for delivery in a subsequent month of any instalment or part of an instalment in respect of which no order to ship was given in due time.

There remains to be considered the question as to the flour for which the order of the 29th February, 1916, for 410 bags, was given. The buyers were entitled to delivery of them, and the onus is upon the sellers to shew that that right has been lost or waived by the buyers. I find nothing in the evidence or the correspondence which would justify that conclusion. The fact that the order had been given and that the flour had not been shipped seems to have been lost sight of by both parties, but that cannot affect the buyers' right to damages for non-delivery; and, in my opinion, the appellants are entitled to recover the difference between the contract prices and the market prices of the 410 bags which were ordered. The time for delivery of them having been by mutual consent extended until the 4th April, 1916, the date at which the damages are to be ascertained may, I think, be taken to be the 6th day of that month.

There is nothing in the evidence to shew what the market prices were on that day; and, unless the parties agree as to them, there must be a reference to assess the damages.

The result is, that I would allow the appeal, reverse the judgment of the learned trial Judge, and substitute for it judgment for

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the appellants for damages for the non-delivery of the 410 bags ordered on the 28th February, 1916, to be ascertained as I have stated.

As the appellants have failed in their main contention, I would leave both parties to bear their own costs of the litigation throughout.

Maclaren, J.A. Magee, J.A. Ferguson, J.A.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with the Chief Justice.

Hodgins, J.A.

HODGINS, J.A.:—I agree in the result of the judgment of my Lord the Chief Justice, but I desire to qualify my adhesion on two points which are, in my opinion, of much importance.

I think that under a contract such as the present one the duty of the seller is to tender, if he wishes to put the buyer in default. The flour was of three qualities, but the relative amounts were specified, and it was quite possible to have made up a shipment of 410 bags in the proportions mentioned and to have tendered it to the buyers. No doubt, the buyers would be expected to send an order, as they were using the flour and knew their requirements, but there is nothing sufficiently strong in the text of the contract to warrant the application of the principle in *Brown* v. *Great Eastern R.W. Co.*, 2 Q.B.D. 406.

With regard to the citation from Halsbury, vol. 25, para. 377, containing the qualification as to the effect of silence on both sides regarding any instalment of the goods, the rule there laid down, making such inaction relevant but not conclusive evidence of mutual agreement to rescind as to that instalment, strikes me, I confess, as the proper principle to be derived from the cases upon the subject of instalment deliveries.

The silence may be by mutual though tacit consent owing to conditions known to both parties, though not made the subject of any communication, such as the burning of a mill, the impossibility of getting ships or cars for transport, the weather, etc. Hence much more than the silence may be in evidence and may weigh the scale to one side or the other.

But in this case, for all that appears, there was no damage: no tender was made by the sellers, and no request by the buyers, and so the foundation for damages is missing. No case is made

indicating that further time for extended delivery was in contemplation of the parties. Hence these instalment deliveries, by reason of the fact that neither party put himself in a position to claim or force later delivery or damages, must be treated on the present record, as relinquished by both parties.

I agree in the allowance of the appeal and in the judgment proposed by my Lord the Chief Justice, both without costs.

Appeal allowed.

GAGNON v. THE KING.

Exchequer Court of Canada, Audette, J. November, 22, 1917.

MASTER AND SERVANT (§ V—340)—NEGLIGENCE—EMPLOYEES' RELIEF FUND —VALIDITY OF CONTRACT—ESTOPPEL.

The agreement of an employee of the Intercolonial Railway, as a condition to his employment, to become a member of the temporary employees' relief and insurance association, and under its constitution and by-laws to accept its benefits in lieu of all claims for personal injury, is perfectly valid and may be set up as a complete bar to his action against the Crown for injuries sustained in the course of employment; by accepting the benefits he will be estopped from setting up any claim inconsistent with the rules and regulations.

Statement.

PETITION OF RIGHT to recover damages for personal injuries to an employee of the Intercolonial Railway.

Armand Lavergne, for suppliant; *P. J. Jolicoeur*, for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, by his petition of right, seeks to recover damages in the sum of $10,521 for bodily injuries sustained by him and which he alleges resulted from defective machinery, and the incompetence of the foremen and employees of the Intercolonial Railway, a public work of Canada.

On December 17, 1916, some short time after one o'clock in the afternoon, the suppliant was engaged, with other labourers, in the railway yard of the I.C.R. at Chaudiere, P.Q., in the work of lifting a turn-table with the aid of a derrick—his work consisting in placing blocks underneath the table as it was being raised. While engaged in this work the hooks attached to the table, worked from the derrick, and suddenly slipped from under the table; the latter fell, pinning the suppliant's right arm between the blocks and the table. For the purposes of this case, it is found unnecessary to go any more into the details of the accident and the causes which occasioned it. The sole question involved in this case can be stated without reciting the details of fact which have given rise to the litigation. It will be sufficient to state that as a result of the accident herein the suppliant's right arm was amputated three

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inches below the elbow joint, about 8 to 10 inches of the arm being removed.

To this claim for damages the Crown, *inter alia*, sets up the plea that the suppliant being a member of the I.C.R. Employees' Relief and Insurance Association, it was relieved by the rules and regulations of that association and by the suppliant's agreement on becoming a member thereof, of all liability for the claim now made.

At the time the suppliant entered the employ of the I.C.R. he was given a booklet intituled "Intercolonial and Prince Edward Island Railways Employees' Relief and Insurance Association—Rules for the guidance of members of the *Temporary* Employees' Accident Fund."

Having been given this book, containing the rules of this insurance association, for the *temporary* employees of the I.C.R., he signed a document or agreement whereby he acknowledged having received the booklet in question, and consented himself to be bound by, as a condition to his employment, and to abide by the rules and regulations of the association.

Furthermore, the suppliant, at different dates subsequent to the accident, and in compliance with the rules and regulations of the insurance association, was paid and received a certain weekly sick allowance during a period of 26 weeks, for which he duly gave receipts.

The receipts for these "sick allowances" contain the following words:—

> As full of all claims against said association on account of injury to arm . . . in accordance with constitution, rules and regulations.

These last words cannot be read otherwise than as being a full confirmation of that part of the original contract of service.

The rules and regulations of the association contain the following provisions:—

> The object of the Temporary Employees' Accident Fund shall be to provide relief to its members while they are suffering from bodily injury, and in case of death by accident, to provide a sum of money for the benefit of the family or relatives of deceased members; all payments being made subject to the constitution, rules and regulations of the Intercolonial and Prince Edward Island Railways Employees' Relief and Insurance Association from time to time in force.
>
> Rule 3.—In consideration of the contribution of the Railway Department to the Association, the constitution, rules and regulations, and future amendments thereto, shall be subject to the approval of the chief superintendent and

the Railway Department shall be relieved of all claims for compensation for injury or death of any member.

Having said so much, it becomes unnecessary to express an opinion as to whether or not the suppliant's claim could have been sustained on the ground of negligence. The agreement entered into by the suppliant, whereby he became a member of the insurance society and consented to be bound by its rules, was a part of a contract of service which it was competent for him to enter into. And this contract is an answer and a bar to this action, for the restrictive rules are such as an insurance society might reasonably make for the protection of their funds, and the contract as a whole was to a large extent for the benefit of the suppliant and binding upon him. *Clement* v. *London South Western R. Co.*, [1894] 2 Q.B.D. 482.

Such contract of service is perfectly valid and is not against public policy, *Griffiths* v. *Earl of Dudley*, 9 Q.B.D. 357, and in the absence of any legislation to the contrary—as with respect to the Quebec Workmen's Compensation Act, 9 Edw. VII. c. 66, s. 19; art. 7339, R.S.Q. 1909, any arrangement made before or after the accident would seem perfectly valid. Sachet, Legislation sur les Accidents du travail. vol. 2, pp. 209 *et seq.*

The present case is in no way affected by the decision in the case of *Saindon* v. *The King*, 15 Can. Ex. 305, and *Miller* v. *Grand Trunk R. Co.*, [1906] A.C. 187, because in those two cases the question at issue was with respect to a *permanent* employee where the moneys and compensation due him, under the rules and regulations of the insurance company, were not taken from the funds toward which the government or the Crown were contributing. It is otherwise in the case of a *temporary* employee, and I regret to come to the conclusion, following the decision in *Conrod* v. *The King*, 49 Can. S.C.R. 577, that the suppliant's claim is absolutely barred by the condition of his engagement with the I.C.R.

Furthermore, the suppliant having accepted the weekly sick allowance and given the receipt therefor in the manner above mentioned, he

is estopped from setting up any claim inconsistent with those rules and regulations, and, therefore, precluded from maintaining this action. *Per* Sir Charles Fitzpatrick: *Re Conrod* v. *The King*, *supra*, pp. 581-582.

Therefore the suppliant is not entitled to the relief sought by his petition of right. *Action dismissed*

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STARK v. SOMERVILLE.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. January 11, 1918.

BROKERS (§ II—6)—AGREEMENT TO SELL—PROCEEDS APPLIED ON CUSTOMER'S ACCOUNT—PAYMENT BY CUSTOMER—STATUTE OF LIMITATIONS.

The business transactions between stockbrokers and one of their customers having been begun, and always carried on, under an agreement in writing whereby when stocks held by the brokers for the customer were sold the proceeds were to be applied on the customer's account and the customer was to pay interest at "such rate or rates as the" brokers "might notify" the customer of from "time to time," a sale of the customer's stocks and the application of the proceeds towards payment of his account as provided in the agreement, is a payment made by the customer, which saves the broker's claim out of the Statute of Limitations under which it otherwise would be barred.

[*Waters* v. *Tompkins*, 2 C.M. & R. 723, followed.]

Statement.

APPEAL by defendant from a judgment of Clute, J. in an action by stockbrokers to recover the balance due in respect of advances made by them for the purchase of stocks after crediting the proceeds of sales.

D. O. Cameron, for appellant; *Joshua Denovan*, for respondents.

The judgment of the Court was read by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The plaintiffs are stockbrokers, and the defendant was one of their customers; and their business transactions were begun and have been always carried on under and subject to an agreement in writing respecting them. Under it, when stocks held by the plaintiffs for the defendant were sold, the proceeds were to be applied on the defendant's account; and the defendant was to pay interest at "such rate or rates as the" plaintiffs "might notify" the defendant of, from "time to time."

The questions involved in this appeal are: (1) whether a sale of the defendant's stocks and the application of the proceeds towards payment of his account, as provided for in the agreement, saved the plaintiffs' claim out of the provisions of the Statute of Limitations, under which otherwise it would be barred: and (2) whether the provision in respect of interest, contained in the agreement, is applicable until transactions under it ceased.

As the payment was made in accordance with the terms of the agreement, it was a payment made by the defendant; and, as it was made on account of a greater debt, it was a part payment, which necessarily was an acknowledgment of the existence of the debt, from which it is proper to import a promise to pay it; and so the statute runs now from the date of the payment, not from the time when the cause of action on the debt first arose; and, therefore, is not barred.

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The law upon the subject is thus clearly stated by Parke, B., in delivering the judgment of the Court of Exchequer in the case of *Waters* v. *Tompkins*, 2 C.M. & R. 723, 726: "The meaning of *part payment* of the principal, is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it: and the reason why the effect of such a payment is not lessened by the Act is, that it is not a *mere* acknowledgment by *words*, but it is coupled with a fact:" see the Limitations Act, R.S.O. 1914, ch. 75, sec. 55 (2).*

On the other question it is said that the agreement as to interest does not apply *post diem:* but after what date? The case is not one of a debt payable at a fixed time, with interest in the meantime. The indefiniteness as to the rates of interest was caused by the fact that they really depended upon the rates which the plaintiffs had to pay for the money which they were obliged to borrow to carry on the defendant's purchases. It was said that they charged one-half of one per cent. more than they were obliged to pay; and that part of this profit was taken up in paying the expenses of carrying on their brokerage business.

The meaning of the agreement, and the intention of the parties, were that the defendant should pay such rates from time to time as long as the plaintiffs were "carrying" the defendant's purchases: and in that manner interest has been charged. After the account was closed, and the defendant had been converted into simply a debtor, to the plaintiffs, interest has been charged at 5 per cent. only. The defendant has no reasonable cause of complaint in this respect.

And, lastly, it was urged that there was a binding verbal agreement that the plaintiffs should charge no more for interest than one-half of one per cent. more than they had to pay. There are two answers to that contention: (1) that there is no evidence that anything more than that has been charged: and (2) that, if there had been, the written agreement must prevail.

We held, upon the argument of the appeal, that none of the transactions was proved to be illegal.

I would dismiss the appeal. *Appeal dismissed with costs.*

*Section 55 (1) requires that an acknowledgment or promise shall be in writing; but sub-sec. (2) provides that "nothing in this section shall alter, take away or lessen the effect of any payment of any principal or interest by any person."

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CITY OF VICTORIA v. MACKAY.

Supreme Court of Canada, Fitzpatrick, C.J., and Davies, Idington, Anglin and Brodeur, JJ. May 14, 1918.

STATUTES (§II A—104)—MUNICIPAL CLAUSES ACT (B.C.)—IMPERATIVE AND DIRECTORY CLAUSES—INTERPRETATION.

Sub-sec. 142 of s. 50 of the Municipal Clauses Act of British Columbia (32 B.C. Stat. 1906) which provides that "every by-law . . . *shall before coming into effect* be published in the "British Columbia Gazette," and in some newspaper published in the municipality," is imperative and not merely directory; publication is a necessary condition to the validity of the by-law.

[*City of Victoria* v. *Mackay*, 39 D.L.R. 450, reversed.]

Statement.

APPEAL from the judgment of the Court of Appeal for British Columbia, 39 D.L.R. 450, rendered upon a special case stated by arbitrators in expropriation proceedings between the appellant and the respondent. Reversed.

F. A. McDiarmid, for appellant; *H. H. MacLean*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—The city, for the purpose of a street improvement, passed a by-law on May 29, 1910, for the expropriation of certain land belonging to the respondent. All necessary proceedings were taken, except that the by-law was not published, nor registered, in the Land Registry Office in the district in which the land is situate, as provided for in s. 50 (142) of c. 32 of the statutes of B.C., 1906.

Three arbitrators were duly appointed to determine the compensation payable to the respondent, and having heard the evidence and counsel for both parties they made an award, subject to the opinion of the court, whether the city was liable to pay the compensation.

The city from motives of economy desires to abandon the intended scheme of improvement and has set up as a ground of non-liability to pay the compensation the fact that the by-law was never published as aforesaid.

The concluding sentence in sub-s. 142 of s. 50 is all that is material, and it reads:—

> Every by-law passed under the provisions of this sub-section shall, before coming into effect, be published in the "B. C. Gazette" and in some newspaper published in the municipality.

The contention on behalf of the appellant is that this means that the by-law shall not become effective until such publication has been had, in other words, that the statute must be read as if it had said:

No by-law passed under this sub-section shall come into effect until it has been published, etc.

I do not think this is a legitimate or even possible interpretation of the meaning of the words used. I think they necessarily contemplate the coming into effect of the by-law whether published or not and they only direct that before it does come into effect it shall be published. This seems to me the natural interpretation to put upon the words used, and not only reconciles the sub-section with s. 86, but is just what we should expect in view of the provisions of that section, which provides that "every by-law passed by the council of any municipality . . . shall be registered in the County Court . . . and such by-law shall take effect and come into force and be binding on all persons as from the date of such registration."

It would require clear words to override this absolute and general provision and we have not got them because it is perfectly possible to read sub-s. 142 as if after the words "before coming into effect" there were added "as by s. 86 hereinbefore provided."

There is no validity in the claim advanced by the appellant that the upholding of the award would be a hardship to the local property improvement owners, which the quashing of it certainly would be to the respondent. The expropriation was made by the representatives of the former and must be considered as if it were their own act. Moreover, it is a salutary rule in the courts that private individuals ought to be protected from oppression at the hands of corporations with whom they have to contend on such unequal terms. A corporation is vested with the extreme power of expropriating private property only in the necessary interests of the public, and it certainly would be oppressive if it could take all necessary proceedings so far as the owner dispossessed is concerned and then avoid payment of the compensation by pleading its own neglect to observe procedure directed by the statute the due observance of which can hardly be a matter that individual owners are under obligation to ascertain or even to have knowledge of. *Nowell* v. *Worcester*, 9 Ex. 457, 156 E.R. 195; Maxwell on Statutes, 5th ed., p. 599, says: When nullification "would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim

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and object of the enactment, such an intention is not to be attributed to the legislature."

DAVIES, J.:—This was a special case stated by arbitrators for the decision of the court and the question was whether, under the special facts as stated by them, they had power to make an award of compensation for lands of the respondent alleged to have been expropriated by the city under a by-law passed by the council for a proposed widening of a public street.

The decision of the trial judge, Murphy, J., was that the arbitrators had such power—that the city was liable to pay the compensation awarded.

On appeal, the court was equally divided and the judgment of the trial judge accordingly stood.

I think this appeal must be allowed and that the question submitted should be answered that the arbitrators had no power to make an award of compensation because the by-law authorizing the widening of the street and the necessary expropriations therefor had never been published.

The determination of the question submitted depends upon the construction of s. 50 (142) of the Municipal Clauses Act, 1906, empowering municipal councils from time to time to make, alter and repeal by-laws on a number of specified subjects. The question is whether s. 50 (142) was merely directory in its provisions as to publication of a by-law, or was mandatory. I have no hesitation in reaching the latter conclusion and in holding that publication is essential to make a by-law under that sub-section valid. The latter part of the section provides:—

> Every by-law passed under the provisions of this sub-section shall, before coming into effect, be published in the "British Columbia Gazette" and in some newspaper published in the municipality, or if no newspaper is published in the municipality, then in a newspaper circulating in the municipality, and a certified copy thereof shall be filed in the Land Registry Office of the district in which the land affected by the by-laws is situate.

I cannot think of language which would more clearly carry out the evident intention of the legislature than that used. It provides that "before coming into effect" every by-law passed under the provisions of the sub-section should be published in the way and manner provided. Publication was made a condition precedent to the by-law coming into effect.

S. 5 provided (*inter alia*) for the establishing, opening and

widening of roads, streets, squares, etc., and for expropriating, taking, or using any real property in any way necessary or convenient for any of the specified purposes without the consent of the owners.

It was not the owners alone who were interested in the exercise of the powers granted to the corporations in this section. The great body of the municipal ratepayers who had to pay the moneys necessary to carry out the improvements mentioned were interested, and it was no doubt to bring to their notice before it became valid any by-law passed by the municipal council under the sub-section that the language was used providing that "before coming into effect" the by-law should be published as provided.

For us in this court to say that any by-law passed under this sub-section was valid before and without publication, where the legislature has said that "before coming into effect" it must be published, seems to me to amount to legislation on our part and not simply construction of legislation enacted by the proper authority.

I would allow the appeal with costs.

Idington, J.

IDINGTON, J.:—The question raised by this appeal turns upon the meaning or want of meaning to be found in s. 50 (142) of the Municipal Clauses Act of British Columbia, passed in 1906.

Said s. 50, which evidently was intended to define with great particularity the subjects respecting which a municipal council might make by-laws and the limitations of power it might so exercise, reads as follows:—

50. In every municipality the council may, from time to time, make, alter and repeal by-laws for any of the following purposes or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:—

There follow this introductory enactment one hundred and ninety sub-sections, of which sub-s. 142 is as follows:—

(142) For establishing, opening, making, preserving, improving, repairing, widening, altering, diverting or stopping up roads, streets, squares, alleys, lanes, bridges, or other public communications within the boundaries of the municipality or the jurisdiction of the council, and for entering upon, expropriating, breaking up, taking or using any real property in any way necessary or convenient for the said purposes without the consent of the owners of the real property, subject to the restrictions contained in ss. 251 and 252 of this Act. Every by-law passed under the provisions of this sub-section shall, before coming into effect, be published in the "British Columbia Gazette" and in some newspaper published in the municipality, or if no newspaper is

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published in the municipality, then in a newspaper circulating in the municipality, and a certified copy thereof shall be filed in the Land Registry Office of the district in which the land affected by the by-law is situate.

It has been held below that the last sentence of this sub-section was merely directory and hence null. Those so holding do not use this language, but I respectfully submit that is the effect of the decision, if allowed to stand. In short the imperative words therein, "shall before coming into effect," are given no effect to.

The sentence in which these words occur was an amendment to the Municipal Act in 1903. If intended to be entirely directory it should never have contained these words. As a purely directory enactment, having nothing in the way of sanction to secure its observance, once these words are deleted, it would stand as a unique piece of legislation.

In argument, I pressed counsel for respondent to suggest any possible purpose the legislature could have had in view in such an enactment if the argument that these words were not to be given any operative force should stand good. I am yet without any explanation or suggestion of anything the legislature could have had in view if the words in question were not to be given any effect.

I think the plain ordinary meaning of the language used requires us to say that the by-law, so called, now in question, which has been acted upon, never was effective as a by-law and never should have been acted upon or given any appearance of vitality.

It seems idle to disregard the scope and purpose of s. 50 expressly designed to define the exact limitations and conditions to be observed in exercising effectively the by-law making power, and rely upon s. 86 of the Act appearing among others under the caption "Passage and Authentication of By-laws" which deals with filing of by-laws in the County Court and incidentally uses the words, "shall take effect and come into force and be binding on all persons as from the date of such registration, etc.," and treat these words because now in same statute as predominant over any others therein. Surely it was quite competent for the legislature to impose any terms it chose to declare as preliminary to any by-law becoming effective. And if s. 86 at first blush is misleading and puzzling when we find the restriction in s. 50 (142) was enacted as an amendment thereto, long after s. 86 had stood as law with the

words just quoted, we must doubtless conclude the amendment was designed to restrict all else, including, if necessary, this older s. 86 in its operation so far as related to by-laws of the class named in sub-s. 142.

To test that reasoning further and see if this language used in s. 86 can be applied in the way suggested, instead of presupposing any by-law it refers to as an already effective and valid by-law, let us follow the subject under the caption of "Quashing By-laws," as found in s. 89 *et seq.*, and see where it would land us.

We find that so-called by-laws registered in the County Court may possibly have been null and void and liable therefore to be quashed.

The reading of s. 86 in the imperative and wide sense urged upon us by counsel for respondent as absolutely effective, would render it impossible to quash any by-law no matter how absurdly beyond the competence of the council, once it got registered in the County Court.

The mere statement of such a proposition shews how untenable it is.

The language used in s. 86, relied upon herein for respondent, evidently does not and never was intended to mean that whatever form of by-law is filed in the County Court it is effective.

Publicity, and the furnishing of an accessible record, fixing the starting point of time when, but not before, any by-law might become effective, would seem to have been the purpose of enacting s. 86, requiring registration in the County Court of all by-laws which had passed through certain named formalities.

Whatever the object to be accomplished thereby, or however clumsy and inapt the language used, matters little for our present consideration.

It seems very clear that the amendment of s. 142 by adding the provision now therein for publication and registration of any of the by-laws of the class named therein in the Land Registry Office, was intended to fit the law to the reasonable needs of those concerned in their dealings with real estate, affected by such by-laws, and render it quite safe for them to rely upon the real estate record alone.

The absurdity of requiring such persons to watch the County Court Office instead of the usual record in the Land Registry Office

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was put an end to by the amendment and doubtless was so intended.

With great respect I submit it was not merely directory but imperative in its terms, and constituted a much needed condition precedent to the operation of any by-law of the class in question.

And if regard had been paid by respondent to its terms she need not have appointed an arbitrator and brought all the trouble that has followed the doing so upon herself.

The appellant has done no wrong to anyone by refraining from proceeding to the publication and registration and thereby abandoning its project when found improvident.

The clerk of the municipality may have erred in sending the notice he did, but five years' lapse of time should have suggested it was a mere error.

The legislature also may have erred in letting such a curiosity as s. 86 presents stand in its present shape.

I submit, however, none of these things present any reasonable ground for our punishing other owners of real estate by depriving them of the protection of a beneficent amendment to the law.

That amendment never having been observed the question submitted by the arbitrators should be answered in the negative.

I therefore think the appeal should be allowed with costs throughout.

Anglin, J.

ANGLIN, J.:—At the threshold of this appeal we are confronted with the contention that this proceeding should not be entertained because the validity of the submission and of the appointment of the arbitrators and their authority, which they have seen fit to make the subject of "a special case for the opinion of the court," declaring their award to be conditional upon their right to make it being upheld, is not a "question of law arising in the course of the reference" within the meaning of s. 22 of the Arbitration Act, R.S.B.C., 1911, c. 11. I rather incline to the view that it is not. From the fact, however, that there is no allusion whatever to this objection in the judgment delivered in the provincial courts or in the factums filed here, I infer that it was not raised below. Counsel for the respondent took it in this court only after he had fully presented his argument on the merits, and had some reason to think the court was not in his favour. Since the result of deciding that the objection to the status of the "special case"

should prevail might be that the condition which the arbitrators have attached to their award would alone be held bad and the award itself in favour of the respondent, shorn of that condition, absolute, it will probably be better, under the circumstances, to deal with the question submitted on the assumption that it is properly before the court. That question is whether the publication and the filing in the Land Registry Office of by-laws of the special class within it, which s. 50 (142) of the Municipal Clauses Act, 1906, c. 32, prescribes shall take place "before (their) coming into effect," are thereby made conditions of their efficacy, or whether this is merely a directory provision, non-compliance with which does not render such by-laws invalid or prevent their being in force.

The by-law was passed in May, 1911. Notice of expropriation was given in June. The respondent promptly presented her claim for compensation, which was rejected; and the council named an arbitrator. No further action was taken until 1916, when the respondent also named an arbitrator, and a third arbitrator was named either by the two, as stated by the appellant, or by a Judge of the Supreme Court, as averred by the respondent. The city's representatives appear to have taken part in these proceedings without protest. When the arbitrators first met, however, the city took exception to their jurisdiction on the ground of the invalidity of the expropriation by-law. The arbitrators nevertheless proceeded and published a conditional award in March, 1917.

If sub-s. 142 stood alone I agree with the Chief Justice of the Court of Appeal that "its construction would be simple enough. It might very well be read as making publication a condition precedent to the coming into force of the by-law." Indeed, I think it would admit of no other construction. Is there anything in the history of the legislation which tends either to confirm this as the proper construction of the clause added in 1904 to sub-s. 142 (formerly sub-s. 127) of s. 50 or to render it improbable that such a construction was intended? Is there anything in the context of the statute which clearly requires that a different construction be placed upon that clause?

The question is one of intention. The history of the legislation—the provision of the Revised Statute of 1897 (c. 144, s. 83) prescribing that every by-law passed by any council "shall come

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into effect and be binding on all persons after publication of the same in the 'British Columbia Gazette' and in some one or more of the newspapers selected by the council and circulating in the municipality"; the substitution in 1902 (2 Edw. VII., c. 52, s. 22) for such publication of registration in the office of the County Court with like consequences; and the revival in 1904 (3 & 4 Edw. VII., c. 42, s. 9) in the terms in which it is couched of the requirements as to publication, apparently because greater publicity than registration in the office of the County Court would afford was found to be necessary or desirable in the case of the by-laws specially dealt with in sub-s. 127 of s. 50 of the Municipal Clauses Act (R.S.B.C., 1897, c. 144)—in my opinion, makes it reasonably obvious that the legislature meant to impose such publication and filing in the Land Registry Office as conditions of the validity and efficacy of such by-laws.

No doubt the provision of s. 86 of the Municipal Clauses Act, 1906, applicable to all by-laws—that they shall be registered in the office of the County Court, and "shall take effect and come into force and be binding on all persons from the date of such registration"—presents a difficulty of construction. I think that difficulty is to be met, however, and the intention of the legislature carried out rather by treating s. 50 (142) as creating a condition (as its language imports) which the legislature assumed would have been already complied with, in the case of by-laws to which it relates, before s. 86, which occupies a later position in the statute, would be acted upon, than by straining the language of sub-s. 142 in order to make of it not the imposition of a condition, but a mere direction as to the time at which publication and filing in the Land Registry Office should take place, *i.e.*, before registration in the office of the County Court, treating that as the time of "the coming into effect" of by-laws within sub-s. 142. No other provision of the statute is referred to as presenting any difficulty. I find nothing therefore in the context which requires or justifies a refusal to give to sub-s. 142 the effect that its terms indicate was intended.

This case appears to be distinguishable from *Nowell* v. *Mayor of Worcester*, 9 Ex. 457, 156 E.R. 195, and *Montreal Street R. Co.* v. *Normandin*, 33 D.L.R. 195, [1917] A.C. 170, much relied upon by the respondent. In the *Nowell* case a statute was held directory

chiefly because, as put by Pollock, C.B., "no means are given them (the contractors with the municipality) of ascertaining the fact" whether the prescribed duty had or had not been fulfilled.

"How are the plaintiffs who contracted to do work for the corporation," asks Baron Parke, "to get information as to whether a report has been made by their surveyor?"

Here the failure to publish and to file in the Land Registry Office could easily have been ascertained by any person. In the *Normandin* case, *supra*, general inconvenience would have resulted from holding the neglect of the prescribed duty fatal and the main object of the legislature would not have been thereby promoted. Here, so far as appears, the respondent alone will be adversely affected by holding the by-law to be invalid and the main object of the legislature, which was to secure further publicity, might be frustrated were the provision in question to be treated as merely directory. The section does not designate an official to discharge the duty imposed and no sanction is provided to ensure its fulfilment.

Moreover, the statute with which we are dealing empowers taxation as well as an exercise of eminent domain. On both grounds a strict compliance with the terms in which it authorizes the exercise of the rights conferred may properly be exacted.

I am further of the opinion that no conduct of the municipal council or of its officials can have the effect of rendering binding steps taken under a by-law subject to an unfulfilled condition such as that imposed by the amendment of 1904, or can estop or preclude the municipal corporation from setting up the consequent invalidity of the by-law in any proceeding in which it is sought to enforce it or to compel its being carried out. It would be quite too dangerous to permit conditions imposed by statute to be thus evaded. To-day it is the municipal corporation which urges that non-compliance with the terms of its statutory authority renders its by-law ineffective: to-morrow a taxpayer or a landowner may have occasion to press a like objection. In either case the construction of sub-s. 142 and the effect of the omission to carry out its requirements must be the same.

I say nothing as to any possible right of action that any person injuriously affected by an attempt made by the municipal corporation or any of its officers to carry out or act upon such an invalid by-law may have.

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Anglin, J.

Counsel for the respondent further contended that, assuming the invalidity of the by-law, the arbitration proceedings and the award of compensation to his client might nevertheless be supported under s. 251 of the Municipal Clauses Act of 1906, c. 32. But that section deals with the making and ascertainment of compensation for lands taken or injuriously affected "by the corporation *in the exercise of any of its powers*." The power to take or injuriously affect land for, *inter alia*, the widening of a highway is conferred by s. 50 (142) of the same Act, and the means thereby prescribed for the exercise of that power is the enactment of a by-law according to the terms, and subject to the conditions which it and other sections of the statute impose. That is the power which the council ineffectually sought to exercise. If it possessed any other it did not attempt to use it. A valid and effectual exercise of a power to take or injuriously affect land is the foundation upon which proceedings under s. 251 must rest. Without that foundation such proceedings are unauthorized and ineffectual.

I am, for these reasons, with respect, of the opinion that this appeal should be allowed.

Brodeur, J.

BRODEUR, J. (dissenting):—I concur with His Lordship the Chief Justice.

Appeal allowed.

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Ex. C.

GULF PULP & PAPER Co. v. THE KING.

Exchequer Court of Canada, Audette, J. June 26, 1917.

CONTRACTS (§ III C—260)—HIRE OF HORSES—MILITARY OFFICER—LIABILITY OF CROWN.

A contract for the hire of horses entered into by an officer of the Crown's military forces acting under the authority of the commanding officer is binding upon the Crown.

Statement.

PETITION of right to recover for the loss of horses hired by a military officer.

A. Fitzpatrick, K.C., for suppliant; *G. F. Gibsone*, K.C., for respondent.

Audette, J.

AUDETTE, J.:—The suppliants, by their petition of right, seek to recover the sum of $850 for the hire of a team of horses, damages, and for the loss of the horses.

In the month of August, 1914, after the declaration of war by

Germany, Sergeant-Major Moisan, of the 7th Field Ambulance, came to the suppliants' office and hired a heavy team of horses which was delivered at the Drill Hall to said Sergeant-Major at 8 o'clock, on the evening of August 21, 1914, by witness Paquet, who received from the Sergeant-Major the receipt for the same.

After making delivery of the team, witness Paquet helped the Sergeant-Major to at once hitch the horses on an ambulance waggon to go down to Beaumont, to the Martiniere Battery, where Capt. Delage, who was in charge, was stationed. The Captain saw the horses several times, and he says they were the best horses they had.

Without entering into full details, it will perhaps be sufficient to say that when the rent for the hiring of these horses was sought, they could not be found and they seem to have disappeared.

The name and description of these horses, as well as the name of their owners, are not on an official list, which was long after, prepared, as best it could be done, because Major Lagueux said, although he repeatedly asked for information with respect to the horses from Major Wright, who had been in command of a section of the 7th Division at Levis before him, he never could get an answer.

Some horses, to the knowledge of Major Lagueux, were omitted from the official list. This list is more or less reliable.

However, I must find that this team of horses was actually delivered, on behalf of the suppliants, to Sergeant-Major Moisan, who on that same evening had them hitched to a military ambulance waggon. The horses were actually delivered and accepted, as attested by the receipt. Sergeant-Major Moisan went to the front either in August or September, 1914, and is now in France.

The evidence further disclosed that the commanding officer, in presence of Capt. Delage, authorized Sergeant-Major Moisan to procure the necessary horses for the use of the 7th Ambulance Division.

War at that time had been declared. Sergeant-Major Moisan was in active service, acting under the authority of his commanding officer. It is therefore obvious that it must be taken he had then the proper authority to hire these horses, and, moreover, that the Crown, through him, took delivery of the same.

If, as is contended, these horses were afterward converted to

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the use of someone else, the suppliants herein have nothing to do with it. After delivery it was not the suppliants' duty to see that the horses were not stolen. They were delivered to the Crown.

If the Crown did not get much benefit out of the horses, it is not the suppliants' fault. *The Queen* v. *Henderson*, 28 Can. S.C.R. 433. The horses had been hired in the regular manner, no other provision having been made for procuring them. They have been delivered and used by the Crown, and therefore the Crown must be taken to have ratified what in this respect its officers and agents had done. *Henderson* v. *The Queen*, 6 Can. Ex. 48.

The Crown has paid no rent to the suppliants and the horses have apparently been lost—they are therefore entitled to recover for the breach of the contract under the decision of the case of the *Windsor & Annapolis R. Co.* v. *The Queen*, 11 App. Cas. 607.

I am not satisfied with the evidence respecting damages, but I think the suppliant should get the value of these two horses, which I hereby fix at the sum of $450. In lieu of their rent and damages, there will be interest upon this sum from August 21, 1914, the date of the delivery of the team to the Crown. *Johnson* v. *The Queen*, 8 Can. Ex. 360; *Henderson* v. *The Queen*, 6 Can. Ex. 39, 28 Can. S.C.R. 425; *Wood* v. *The Queen*, 7 Can. S.C.R. 634, 639; and *Hall* v. *The Queen*, 3 Can. Ex. 373.

Therefore, judgment will be entered declaring that the suppliants are entitled to recover from the respondent the sum of $450, with interest thereon at 5 per cent. per annum, from August 21, 1914, and costs. *Judgment for suppliant.*

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TAYLOR v. DAVIES.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 26, 1917.

1. TRUSTS (§ I D—22)—MORTGAGEE—APPOINTMENT AS INSPECTOR—CONSTRUCTIVE TRUSTEE—STATUTE OF LIMITATIONS—ASSIGNMENTS AND PREFERENCES ACT.

A mortgagee of land which formed part of an estate which had been assigned for the benefit of creditors is not by virtue of the Assignments and Preferences Act R.S.O. 1897, c. 147, nor of the terms of the resolution of the creditors appointing him one of the inspectors of the estate—with power in conjunction with the assignee, to realise upon the estate to the best advantage—constituted an express trustee nor is he under the same liability as an express trustee in respect of the equity of redemption conveyed to him by the assignee; at most he is a constructive trustee; the Statute of Limitations applies to a constructive trust and may be invoked by a constructive trustee in answer to a claim for recovery of the property

upon which the trust is in equity impressed, if there has been no concealed fraud which could not have been discovered by the exercise of reasonable diligence.

[*Segsworth* v. *Anderson* (1894-5) 21 A.R. (Ont.) 242, 24 Can. S.C.R. 699, distinguished; Dictum of Moss C.J.O., in *Re Canada Woollen Mills Limited* (1905), 9 O.L.R. 367, 368, disapproved.

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2. ASSIGNMENTS FOR CREDITORS (§VIII A—65)—SPECIFIED VALUE ON SECURITY—NOT REQUIRED TO BE FILED WITH CLAIM—STATEMENT BY CREDITOR THAT HE PUTS STATED VALUE ON CLAIM SUFFICIENT—AGREEMENT AS TO VALUE BETWEEN CREDITOR AND ASSIGNEE—WAIVER BY ASSIGNEE TO HAVE SPECIFIED VALUE PUT ON SECURITY—MORTGAGEE APPOINTED INSPECTOR—INTENTION OF CREDITORS—ASSIGNMENTS AND PREFERENCES ACT.

Under the Assignments and Preferences Act (R.S.O. 1897, c. 147, s. 20 (4)) the creditor is not required to put a specified value on the security in the claim which he files with the assignee; this may be done by a separate document; the delivery to the assignee of a simple statement that he puts a stated value on his security is sufficient compliance with the section. If a secured creditor and the assignee meet and arrive at an agreement as to the value of the security held by the creditor, and the assignee does not desire to be given an opportunity of taking over the security in the formal manner for which s. 20 (4) provides, he may waive his right to have a specified value put on the security by the creditor and consent to the retention of it at the value which he and the creditor have agreed that it was at all events when the assignee does this under the authority of the creditors.

It being known to the assignee and to the creditors that a mortgagee is a secured creditor, they must be taken in appointing him an inspector to have intended that he should act as inspector only in respect of matters outside of those in which he had duties to perform under s. 20 (4).

Statement.

APPEALS by the defendants from the judgment of LENNOX, J., 39 O.L.R. 205.

I. F. Hellmuth, K.C., and *M. H. Ludwig*, K.C., for the appellants the executors of Robert Davies.

R. H. Parmenter, for the appellant Clarkson.

Wallace Nesbitt, K.C., and *Christopher C. Robinson*, for the plaintiff, respondent.

Meredith,C.J.O.

MEREDITH, C.J.O.:—These appeals are by the defendants from the judgment dated the 7th May, 1917, which was directed to be entered by Lennox, J., after the trial of the action before him sitting without a jury at Toronto on the 26th, 27th, and 28th days of May, 1915, the 8th, 9th, 10th, 11th, and 12th days of November, 1915, and the 20th and 21st days of November, 1916; and the reasons for judgment are reported 39 O.L.R. 205.

The judgment of the learned trial Judge is based upon the proposition that the testator, Robert Davies, was an express trustee, or, at all events, owing to his fiduciary position as one of the inspectors of the estate of the assignors, under and subject to the same obligations, liabilities, and disabilities as an express

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trustee; and, if this proposition cannot be supported, the main ground upon which the judgment proceeded disappears.

In my opinion, Davies was neither an express trustee nor did he stand in the same position as an express trustee, but, if a trustee at all as to the matters in question, a constructive trustee.

It was contended on behalf of the respondent that Davies, by reason of his position as inspector, was an express trustee; but, if he were not, he was constituted such a trustee by the creditors at the meeting of the 5th July, 1901, at which the inspectors were appointed.

The action of the creditors at that meeting is evidenced by the following resolution:—

"On motion of J. A. Worrell, K.C., it was resolved that Messrs. E. W. J. Owens, David Smith, Robert Davies, Frank Denton, K.C., J. A. Worrell, K.C., and Carrington Smith, be appointed inspectors of the estate, with power, in conjunction with the assignee, to realise upon the assets to the best advantage."

Dealing first with the latter of the two contentions I have mentioned, it is important to observe that the only authority over the assignee which the Assignments and Preferences Act then in force, R.S.O. 1897, ch. 147, conferred, was that conferred by sec. 17, which provided that it should be the duty of the assignee, among other things, to "convene a meeting of the creditors for the appointment of inspectors and the giving of directions with reference to the disposal of the estate;" and that provision was made by sec. 18 (2) that if a sufficient number of creditors do not attend the meeting, "or fail to give directions with reference to the disposal of the estate, the Judge of the County Court may give all necessary directions in that behalf."

I doubt whether what the creditors did, as evidenced by the resolution, was to give "directions with reference to the disposal of the estate," within the meaning of sec. 17; but, assuming that it was, the effect of the resolution was not to vest the estate in the inspectors or to confer upon them any power to sell it, or any part of it, either alone or in conjunction with the assignee. The estate and the power to dispose of it were vested in the assignee, who was entitled and bound to dispose of it as directed by the creditors, or, failing any direction by them, as the Judge of the County Court should direct. The creditors had no power

or authority to create a new trust or to appoint additional trustees to act in conjunction with the assignee.

The utmost that, in my opinion, the resolution did was to constitute the inspectors agents of the creditors to assist the assignee in the realisation by him of the assets; and, *quoad* that duty, subject to what I shall afterwards say as to the position of Davies, the relation of the inspectors to the creditors was of a fiduciary character.

In support of the first of the contentions I have mentioned, that Davies was, by reason of his position as an inspector, an express trustee or under the same liability as an express trustee in respect of the transactions which the respondent impeaches, reliance was placed upon what was said by the Chief Justice of Ontario (Moss) in *In re Canada Woollen Mills Limited* (1905), 9 O.L.R. 367, 368. Referring to an inspector appointed under the Winding-up Act, the Chief Justice spoke of him as "in the position of a trustee for sale." That observation was not necessary for the decision of the question before the Court. The fact that an inspector occupied a fiduciary position in the liquidation proceedings which disabled him from becoming the purchaser of the assets of the company that was being wound up was sufficient for the disposal of the appeal adversely to the inspector, who was the appellant; and, in addition to this, there was no contract binding on the liquidator. It will be seen from the report of the case that Osler, J.A., the only other member of the Court who gave reasons for judgment, rested his judgment on these two grounds, and said nothing as to an inspector being in the position of a trustee for sale.

No authority was referred to by the Chief Justice in support of his *dictum;* and it was not, I think, a correct statement as to the position of an inspector. He doubtless occupies a fiduciary position, and is subject to disabilities as to becoming a purchaser of the estate, but is not, in my opinion, a trustee unless or until he, in violation of his duty, acquires trust property, when he becomes a trustee of it, but only a constructive trustee.

I have been unable, after diligent search and examination of very many cases and the text-books dealing with the subject of trusts, to find any case which supports the proposition that an inspector of an estate in liquidation is in the position of a trustee for sale.

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In *Segsworth* v. *Anderson* (1895), 24 S.C.R. 699, 700, all that was determined was, that the defendant Lee, being an inspector, could not obtain an advantage to himself from his position.

In the Court below, *Segsworth* v. *Anderson* (1894), 21 A.R. 242, 244, Hagarty, C.J.O., spoke of the inspector as "occupying a fiduciary position towards the creditors," and similar language was used by Burton, J.A. (p. 246), and by Osler, J.A. (pp. 246, 247), and the same view was taken by MacMahon, J., in *In re Canada Woollen Mills Co. Limited* (1904), 8 O.L.R. 581, and nowhere was an inspector spoken of as being "in the position of a trustee for sale."

As was said by Bowen, L.J., in *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, 396: "There has been some variety and inconsistency both in the language used about constructive trusts and in the line of demarcation that has been drawn between the cases of express and constructive trusts;" and the same view was expressed by Kay, L.J., at p. 401.

Among the many definitions of an express trust and of a constructive trust, that by Bowen, L.J., in *Soar* v. *Ashwell* (*supra*), p. 396, may be referred to. He there says:—

"An express trust can only arise between the *cestui que trust* and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour the Court construes as involving him in the duties and responsibilities of a trustee, although but for such conduct and behaviour he would be a stranger to the trust. A constructive trust is therefore, as has been said, 'a trust to be made out by circumstances.'"

In Hill on Trustees, p. 144, it is said:—

"Wherever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest, without necessarily violating some established principle of equity, the Court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who, in equity, are entitled to the beneficial enjoyment."

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In Lewin on Trusts, 12th ed., p. 201, it is said:—

"A constructive trust is raised by a Court of Equity wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee."

In Underhill on Trusts, 7th ed., pp. 7, 8, the definition of express and constructive trusts is as follows:—

"Trusts are created either intentionally by the act of the settlor (in which case they are called express trusts) or by implication of a Court of Equity where the legal title to property is in one person, and the equitable right to the beneficial enjoyment of it is in another, in which case they are called constructive trusts."

The definition of a constructive trust given in Godefroi on Trusts, 4th ed., p. 162, is—

"A constructive trust, apart from resulting trusts, may be defined as one which is not expressed in any instrument, but is imposed upon a person by a Court of Equity upon the ground of public policy . . . so as to prevent him from holding, for his own benefit, an advantage which he has gained by reason of some fiduciary relation subsisting between him and others, and for whose benefit only it is his duty to act."

There are, no doubt, cases in which a constructive trustee has, for the purpose of the application of the Statute of Limitations, been held to stand in the same position as an express trustee.

These cases are classified by Bowen, L.J., in *Soar* v. *Ashwell*, [1893] 2 Q.B. at pp. 396, 397, as follows: (1) cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust; (2) cases where a stranger participates in the fraud of a trustee; (3) cases where a person has received trust property and dealt with it in a manner inconsistent with the trust; and the Lord Justice spoke of a fourth class as to which, in his opinion, the cases were conflicting and which he did not define.

The solicitor whose acts were in question in *Soar* v. *Ashwell*, was treated as an express trustee upon the principle established by decided cases binding on the Court that "a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of

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which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence: . . . and this confidence or trust imposes on him the liability of an express or direct trustee" (p. 397).

The facts of that case were, that Ashwell was solicitor for trustees under a will, and in that capacity had invested the trust fund on mortgage security. The mortgage was paid off, and Ashwell received the money, one half of which he properly applied, and the other half he never accounted for. The case was therefore one in which a person occupying a fiduciary position had been in that capacity intrusted with the money of the trust, which brought the case clearly within the principle which was applied by the Court.

In *Burdick* v. *Garrick* (1870), L.R. 5 Ch. 233, the same principle was applied. The testator, who was then living in the United States of America, executed a power of attorney, appointing his brother David Garrick and his solicitor jointly and severally his attorneys to lease and manage his real estates in England; to receive the rents, to sell, and receive the purchase-money for the same; to call in and collect all sums of money and goods due or belonging to him; and to apply and dispose of all moneys which should from time to time come to their hands after paying the costs and expenses sustained by them to keep down interest on mortgages or other debts, to pay mortgages and other debts, to purchase land, and to procure the same to be conveyed to, or in trust for, the testator, his heirs, executors, administrators, and assigns, or to such uses as the attorneys should deem most beneficial to him, and to invest the residue of the moneys in the securities therein mentioned, either in the name of the testator, or in the name or names of any other person or persons in trust for him.

The suit was brought against David Garrick and Monckton for an account of their dealings and transactions under the power of attorney, and the Statute of Limitations was pleaded in bar of the plaintiff's claim.

Stating his opinion, the Lord Chancellor (Hatherley) adopted the rule laid down by Lord Cottenham in *Foley* v. *Hill* (1848), 2 H.L.C. 28, 35, and added:—

"In the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see. That being so, the Statute of Limitations appears to me to have no application to the case" (p. 240).

The view of Giffard, L.J., at p. 243, was that "there was, in the plainest possible terms, a direct trust created between these gentlemen and Mr. Garrick;" and that, "where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it."

In *North American Land and Timber Co.* v. *Watkins*, [1904] 1 Ch. 242, the same principle was applied by Kekewich, J., and it was held that, as the money in question had been remitted by the plaintiff to the defendant as their agent for investment in a specified manner, the defendant was an express trustee of the money, and that the Statute of Limitations was not a bar to the action, which was for an account.

The authority given by Bowen, L.J., for his statement as to the second class is *Barnes* v. *Addy* (1874), L.R. 9 Ch. 244. In that case the Lord Chancellor (Selborne), stating his reasons for judgment, pp. 251,252, said that the responsibility which attaches to an express trustee "may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust

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property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

It may not be amiss to quote what was said by James, L.J., in the same case, pp. 255, 256:—

"I have long thought, and more than once expressed my opinion from this seat, that this Court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think it is for the good of *cestuis que trust*, or for the good of the world, that these cases should be extended."

An earlier case of the same kind is *Rolfe* v. *Gregory* (1865), 4 DeG. J. & S. 576, in which a trustee of a promissory note delivered it to the defendant, who had knowledge of the trust upon which the note was held, in part satisfaction of his indebtedness to him. The transaction was held to be a fraudulent abstraction of the trust property by the trustee and a fraudulent receipt and appropriation of it by the defendant, and it was held that the beneficiaries had the same rights and remedies as they would be entitled to against an express trustee who had fraudulently committed a breach of trust.

Lee v. *Sankey* (1872), L.R. 15 Eq. 204, referred to by Bowen, L.J., as the authority for his statement of the third class, was the case of a firm of solicitors employed by the trustees of a will to receive the proceeds of the testator's real estate which had been taken by a railway company, and who had received the proceeds and properly applied part of them, but had paid over the remainder to one of the trustees without the receipt or authority of the other.

Bacon, V.-C., before whom the case was heard, said that, the money having been placed in the defendants' hands by the two trustees, they could only be discharged of it by the joint receipt or by the joint authority of the two persons who had so intrusted the defendants: p. 210. Further on in his judgment, p. 211, he said:—

"It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to *cestuis que trust* in respect of trust moneys coming to his hands merely

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in his character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing. And upon this latter principle I think the liability of the defendants is established."

What were referred to on the argument as the Directors' cases, such as *Flitcroft's Case* (1882), 21 Ch.D. 519, *In re Sharpe*, [1892] 1 Ch. 154, and *In re Lands Allotment Co.*, [1894] 1 Ch. 616, were decided on the same ground upon which the appellants in *Soar* v. *Ashwell* were held liable. Although directors are not,as Lindley, L.J., said in the last of these cases, [1894] 1 Ch. at p. 631, properly speaking trustees, they have always been treated as trustees of money which comes to their hands or is actually under their control.

In *Flitcroft's Case*, Bacon, V.-C., was of opinion that directors were trustees for the shareholders "of the money that may be collected by subscriptions, and of all the property that may be acquired; they have the direction and management of that property, and at the same time they have incurred direct obligation to the persons who have so intrusted them with their money" (p. 525). And he likens the case to that of a man going abroad saying to another: "You take charge, possession, and management of all my property and account to me for it when I come back."

In *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437, two questions were raised: (1) whether, in the circumstances of the case, the right of the plaintiff to recover the land was, as the defendant contended, barred by the Statute of Limitations; and (2) whether the right of the plaintiff to recover the rents that had been received by the defendant since the plaintiff became entitled to the land was barred by the Statute of Limitations, and both questions were decided adversely to the defendant.

The defendant had, during the lifetime of Ann Duncan, the owner under whom the plaintiffs claimed, acted as her agent, collected the rents and managed the property in the name of "the executors of Lawrence Buchan," under the will of whom Ann Duncan derived title, and a separate account of the rents

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received was kept in that name. After the death of Ann Duncan, who died intestate as to real estate, the defendant continued to receive the rents, and the receipts for them were given by him as for "the executors of Lawrence Buchan." These rents were placed specifically to an account with a banker, ear-marked and separate from the defendant's own, though under his control, and it was proved that the defendant had stated to several persons that he was acting as agent and receiver for the heir, whoever he might be.

It was held that the defendant had never been in receipt of the rents and profits of the land except as agent of the owner of it, and that the right of the owner to recover it was not barred by the Statute of Limitations; and as to the rents received after the death of Ann Duncan, that, having been received and held for the benefit of whoever might be her heir, and having been placed in a separate account with the defendant's banker and ear-marked, the defendant held them in trust, and that the Statute of Limitations was not a bar to the action for an account.

It was also held that the declarations, oral and in writing, of the defendant, were sufficient to establish against him by his own admission a fiduciary character, and it was pointed out that for the constitution of such a trust no express words are necessary; that anything which may satisfy a Court of Equity that the money was received in a fiduciary character is enough; and that it is not requisite that any acknowledgment of such a trust should be made to the *cestui que trust* or his agent, but that to whomsoever it is made it is evidence against the trustee. The case was, therefore, one of an express trust.

In *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co.*, [1912] A.C. 555, it was held that the Statute of Limitations did not bar the claim of the respondents, who had erected and maintained a special wire for the use of the appellants in and about their railway, for an account of the profits made by the appellants from the sending of unauthorised messages over the special wire.

The ground of the decision was, that when and so often as the appellants used the special wire for the transmission of unprivileged messages an obligation arose in the nature of a trust on their part, and it became their duty to keep an account of the profits accruing from the use of such wire and to set them aside

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as money belonging to the respondents; and that to such a duty, created as it was by the terms of the agreement between the parties, the Statute of Limitations could have no application; and that the appellants were liable as trustees.

This case came, therefore, within the class of cases to which *Soar* v. *Ashwell* belongs, being one in which the appellants had received in a fiduciary character moneys which belonged to the respondents, and of which it was their duty to have kept an account.

Applying, then, the law as laid down in these cases, what was the position of Davies? He was not, in my opinion, an express trustee, or, as coming within any of the classes mentioned by Lord Justice Bowen, under the same liability as an express trustee. Assuming that he was an inspector when the conveyance of the equity of redemption was made to him, there was no intention, on the part of any of the parties to the transaction which led to the making of the conveyance, that he should be a trustee of the land conveyed; and, if the taking of the conveyance was in effect taking possession of the trust property, he did not take possession in his capacity of fiduciary agent of the creditors, nor was he intrusted with it in that capacity. He took possession of it in his own right and as owner of it; and if, owing to his fiduciary position as inspector, he could not, in the circumstances, hold it except subject to the trusts of the assignment, his position was that of a constructive trustee by reason of the equitable rule which did not permit him, in those circumstances, to hold the property for himself discharged of the trust.

That the Statute of Limitations applies to a constructive trust and may be invoked by a constructive trustee in answer to a claim for the recovery of the property upon which the trust is in equity impressed, is beyond doubt. It is unnecessary to refer in detail to the authorities which support that proposition, but it will suffice to refer to Halsbury's Laws of England, vol. 19, para. 274; *Petre* v. *Petre* (1853), 1 Drew. 371, 393; and to quote what was said by Lord Justice Bowen in *Soar* v. *Ashwell*, [1893] 2 Q.B. at p. 395. He there says:—

"That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been clearly and long established."

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The case with which he was dealing was one relating to personal estate, to which, in the then state of the law, no Statute of Limitations applied, where the relief sought was relief which only the Court of Equity could give.

The Limitations Act, 10 Edw. VII. ch. 34, now consolidated as R.S.O. 1914, ch. 75, applies not only to what before the Judicature Act were actions at law, but also to what were then suits in equity; for, by sec. 2 (*a*), "action" includes "any civil proceeding."

Section 5 prescribes ten years as the time within which an action to recover any land must be brought, and the ten years are to be reckoned from the time at which the right to bring the action first accrued to some person through whom the person bringing the action claims, or, if the right did not accrue to any person through whom he claims, at which the right to bring the action first accrued to the person bringing it.

If this were all, the respondent's right to bring this action was barred before the action was begun. That it is an action to recover land, within the meaning of sec. 5, does not, I think, admit of doubt; and the right to bring it first accrued immediately after the making of the conveyance which is impeached.

The Act, however, contains a provision as to cases of concealed fraud (sec. 32); that section provides that, in cases of concealed fraud, the right of any person to bring an action for the recovery of land of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud was or with reasonable diligence might have been first known or discovered.

The question as to the meaning of the section of the Imperial Act corresponding to sec. 32 has been considered in several English cases. In *Petre* v. *Petre* (*supra*), it was dealt with, 1 Drew. at pp. 397 and 398, and the Vice-Chancellor (Kindersley) said:—

"Then, does this case come within the 26th section? Firstly, what is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold."

In *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210, 214, Lord Herschell said:—

"It is not enough, therefore, to prove a concealed fraud; the person bringing the suit must shew that he or some person through whom he claims has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought."

And Lord Watson said (p. 221):—

"The onus is, therefore, upon the appellant to allege and prove that the frauds of which he complains were of such a nature, or were perpetrated in such circumstances, that neither he nor his predecessors entitled for the time being could have come to the knowledge of them, by the exercise of reasonable diligence, during . . ."

In *Willis* v. *Earl Howe*, [1893] 2 Ch. 545, 551, Kay, L.J., said:—

"To bring a case within that section, four circumstances must concur: (1.) There must have been a fraud. (2.) That fraud must have deprived the claimant or his predecessors in title of the estate. (3.) Such fraud must have been concealed. (4.) The concealment further must have been such that it could not with reasonable diligence have been discovered sooner than it was in fact discovered, and, of course, such discovery must have been within twelve years before the commencement of the action."

And in the same case Lindley, L.J., p. 550, quoted with approval the language of Lord Herschell and Lord Watson in *Lawrance* v. *Norreys*.

In *In re McCallum*, [1901] 1 Ch. 143, the wife of General McCallum, to whom he had voluntarily conveyed the land in question by deed, voluntarily conveyed it to her daughter. The wife retained both deeds in her possession, and the daughter was ignorant of the existence of them. The wife deposited both deeds with a solicitor, with a memorandum stating that at her death they were to be given to her daughter, provided she should not then be the wife of X., as should that be the case she (the mother) never intended to benefit either of them.

The case went off on other grounds, but the Court held that the intentional concealment by the mother from her daughter that she had given her the house with the intention that the deed

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of conveyance should not become known to her except in certain events was a concealed fraud within the meaning of sec. 26.

Vaughan Williams, L.J., however, said (p. 164) that he was not "sure that the fact that she" (the mother) "did not disclose to her daughter the conveyance which she had executed would constitute 'concealed fraud,' if she honestly supposed that the conveyance was of no effect."

I am unable to see that in the case at bar any fraud, in the sense that that word is used in sec. 32, was committed by Davies. I adopt the view of Vice-Chancellor Kindersley in *Petre* v. *Petre*, that the section means designed fraud, and I do not think that Davies is chargeable with that kind of fraud. He, upon the assumption upon which I am now dealing with the case, was in the circumstances guilty of a breach of his duty in becoming the purchaser of the estate. That may have been a breach of trust, but not, I think, a fraudulent breach. I have no doubt that, believing, as he no doubt did, that he had divested himself of the fiduciary position in which he stood to the creditors, he thought that he stood in relation to the transaction into which he entered in the position of a stranger, owing no fiduciary duty to any one. But, assuming that his conduct in the transaction was fraudulent within the meaning of sec. 32, there is, in my opinion, nothing to warrant the conclusion that the fraud was concealed. The conveyance was promptly registered; the inspectors knew and approved of its being made; one of the inspectors, Mr. Owens, was the agent of the respondent; and it is not, I think, unreasonable to assume that what was done was communicated by him to her or to her husband, to whom she intrusted all her business affairs; and at a meeting of the creditors, though it may have been informally called, what was proposed to be done was communicated to them, and its being done was sanctioned. How, in the face of all this, there can be said to have been any concealment of the transaction, I am unable to understand. If, however, this conclusion is not warranted, the respondent has failed to satisfy the onus which rested upon her of establishing that the fraud, if fraud it was, could not have been discovered by the exercise of reasonable diligence on her part. Her case is that Davies was disqualified from becoming a purchaser of the property; that disqualification, if it existed, arose from his occupying

the position of an inspector of the estate. It is impossible for me to believe that the respondent did not know that Davies had been appointed an inspector; but, if she did not know that, the fact could at any time have been readily ascertained, as also could the fact that he had obtained the conveyance from the assignee. She knew that Davies was in possession of the property and dealing with it as if he were the owner of it, making large and expensive improvements that no mortgagee in possession would be justified in making. According to her case, she believed the property to be worth $1,000,000, and yet from the first to the last she took no trouble to ascertain what was being done by the assignee with the property that had been intrusted to him, or to ascertain in what capacity or why Davies was in possession of it. The respondent accepted a dividend of 2½ cents on the dollar on her claim of $6,000, and no further dividend was declared. If the property then had the value which the respondent now says it had, or even one quarter of it, there was enough to have paid every creditor, secured and unsecured, the full amount of his claim; and it is incomprehensible to me that any one believing the property to have had such a value would have accepted the small dividend that was paid without making any inquiry as to how it was that so little was being realised from so valuable a property; and yet, if the husband is to be believed, he never made any inquiry as to what was being done with the valuable property which had been intrusted to the assignee. This leads me irresistibly to the conclusion that no one entertained any such extravagant views as to the value of the property as it is now said it possessed, and that every one concurred in the view that the estate was hopelessly insolvent, and that, so far from there being anything left for the assignors, the creditors would receive only about one-fiftieth of the amount of their unsecured claims; and it is difficult to escape from the conclusion that it was not until after Davies had succeeded in obtaining and maintaining an award fixing at a very large sum the compensation which a railway company was to pay to him for an insignificant part of the property, that the respondent's husband came to the conclusion that it was unjust that Davies should enjoy the very large profit that his acquisition of the property will yield to him, and decided to set about endeavouring to "pick a hole" in the transaction

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by which he had acquired it, and thereby to divert to the respondent the whole, or a part at least, of the realised and prospective profits which otherwise would go to Davies.

The respondent does not, in my opinion, bring herself within the provisions of sec. 32; and, if it were necessary to draw from the facts proved the inference that the respondent was not ignorant of the nature of the transaction by which Davies obtained a release of the equity of redemption, I should not hesitate to draw it. The learned trial Judge has accepted the testimony of the husband of the respondent that he was ignorant of the fact that Davies had obtained a conveyance of the equity of redemption and was in possession of the property as the owner of it. This testimony has been accepted notwithstanding the circumstances to which I have referred, which, as I have said, lead irresistibly to the opposite conclusion. Not only has this testimony been accepted, though opposed to the inference that I think should be drawn from the undisputed facts, but it has been accepted in preference to the testimony of a reputable solicitor. Besides this, the learned trial Judge has ignored or disregarded the fact that the testimony was given by a man who was endeavouring by means of it to put into the pockets of himself and his wife many thousands of dollars, and that it was easy for a man influenced by such a motive to meet by a simple negative anything that would tell against the claim he was putting forward, or even to persuade himself that what he was saying was the truth.

Making every allowance for his supposed want of business ability, as found by the learned trial Judge, the existence of which, having regard to his testimony and the fact that he was for the three and a half years preceding the assignment the financial manager of the business of Taylor Brothers, I should have doubted, and for the weight to be attached to the fact that credit has been given to his testimony, in my opinion this Court is not merely justified but bound, in the circumstances of this case, to reverse the finding that the witness always believed that Davies was in possession as mortgagee.

Where, as in this case, the testimony of a witness deeply interested in the result of the litigation is opposed to the only inference that reasonably can be drawn from undisputed facts,

and there is no corroboration of his testimony, but it is contradicted by an independent witness, no Court is, in my opinion, justified in accepting the testimony as true; and, if a trial Judge accepts it, there is no rule of law which ought to, or in my opinion does, forbid the setting aside of his finding by an appellate Court.

If I may adopt the picturesque language of the late Mr. Justice Gwynne in the *London Election Case* (1874), 24 U.C.C.P. 434, 472, I can as readily believe it possible for Taylor to have been immersed in the lake and to be taken out dry, as to believe that he thought that Davies was in possession as mortgagee, or that he did not know that, in some way, as the result of proceedings under the assignment, he had become the owner of the property that had been mortgaged to him.

As in that case that learned Judge said he must do, I must yield to the only natural, rational, and irresistible inference which the facts established do, in my judgment, warrant: p. 472.

In that case the question was, whether corrupt acts committed by the agents of a candidate were committed with his knowledge and consent, and it was held that the circumstantial evidence was sufficient to establish it, notwithstanding the candidate's denial on oath.

The remarks of Hagarty, C.J., at p. 484, are so apposite to this case, as I view it, that I quote them. They were these:—

"If such an extraordinary chain of circumstances be insufficient to fasten knowledge upon the respondent, we must lay it down as our view of the law that knowledge must never, and can never be inferred, except on direct affirmative proof.

"No human tribunals are infallible. They can only judge by what they find after full consideration to be the natural and reasonable result, according to all experience, of the facts before them—what has been called the known and experienced connection subsisting between collateral facts or circumstances satisfactorily proved, and the fact in controversy."

In support of what I have just said I would point out that the statements in the testimony of Taylor as to his belief as to how Davies came to be in possession of the property, and as to his reason for his inaction, are unsatisfactory and contradictory.

Asked on his examination in chief (p. 25), "Did you know how Davies was in possession?" his answer was, "I did not." And

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to the further question, "What was your idea about it?" his answer was, "I thought he was in under the mortgage."

Again, asked on cross-examination (p. 42), "And you never made any inquiry to know what had become of your estate and sought no information about it?" his answer was, "I thought it was lost." And to the further question, "What?" his answer was: "I thought the way they got hold of it, the way they were handling this thing, it was all lost."

Again, asked on cross-examination (pp. 109, 110), "How soon was it do you say that—just to fix the time more accurately, if you can, than you did this morning—you came to the conclusion the whole thing was lost and gone?" his answer was, "When Robert Davies got hold of it, I thought it was gone." Again, asked (p. 110), "The moment he got hold of it you thought it was gone?" his answer was, "Yes."

So again, asked (p. 110), "So that from the moment he went into possession, you found him in possession, you thought it was gone?" his answer was, "Yes."

On his re-examination he was asked (p. 116): "You said to my learned friend Mr. Tilley, once you found Davies had got possession you thought the property was gone?" to which he replied, "Yes." And to the further question, "Why did you say that?" his answer was: "Well, I didn't think that Robert would like to give it up when he got hold of a good thing."

There was another very significant statement made by the witness, which was brought out almost accidentally. According to this statement, the respondent and a man named Thompson formed a partnership in September or October, 1901, for operating the paper-mill on the property mortgaged to Mr. Worrell; and Davies, learning this, came to the witness some time in the spring of 1902 and asked him to dissolve the partnership, and said that if he would do so he (Davies) would "fix up" the lower paper-mill and rent it to the witness for a nominal price as long as he liked. A paper-mill on the land mortgaged to Davies had been partly burnt down about a year before the date of the assignment, and it was that mill that Davies proposed to "fix up" and let to the witness.

It is difficult to see how this circumstance can be reconciled

with the statement of the witness that he thought that Davies was in possession under his mortgage.

I would also refer to the following facts as supporting my conclusion that at the time of the assignment the assignors, Taylor Brothers, were hopelessly insolvent, and that every one concerned, Taylor Brothers, the assignee, the inspectors, and the creditors, recognised that such was their financial condition.

The property in question was subject to the mortgage to Davies, upon which there remained due upwards of $100,000, and nothing beyond $1,460, which was paid on the 30th June, 1896, had been paid on account of either principal or interest from the time the mortgage was made on the 25th November, 1895.

The property mortgaged to Mr. Worrell for upwards of $120,000 was taken over by him under the Act at $35,000. It consisted of 350 acres of land, upon which there was a paper-mill.

The Donlands property, consisting of 659 acres, was incumbered by a mortgage, on which there remained due $35,000, and was sold by the mortgagee, and no surplus remained after satisfying the mortgage.

Various other properties owned by Taylor Brothers were mortgaged, and in all cases the properties fell into the hands of the mortgagees by foreclosure, or were sold by them, and nothing realised beyond the amounts of the mortgages upon them.

The unsecured debts amounted to upwards of $228,636.74 besides preferred claims for wages amounting to $4,193.83.

The credit of the firm was so exhausted and its property so incumbered that it was unable to borrow $4,000 to pay the wages of its workmen, and its inability to borrow that sum was what led to the making of the assignment.

It is a significant fact, I think, that Mr. Worrell, who was interested for his *cestuis que trust* in getting out of the property assigned as much as possible to meet the unsecured part of his claim, concurred, as it is fair to assume his *cestuis que trust* also did, in the arrangement which was made with Davies; and it is difficult to understand how it was that he and they did so, if any one entertained the idea that the property in question had then any such value as it is now said that it had.

That the witness at the time of the assignment entertained such extravagant views as to the value of the lands owned by

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Taylor Brothers as he now says they had, it is impossible for me to believe, in view of the facts I have just mentioned.

According to his testimony, as I have already mentioned, the property mortgaged to Davies was worth $1,000,000, the property mortgaged to Worrell $250,000, Donlands $66,900, and the other properties far more than they were mortgaged for. It is inconceivable that he or any one else could have believed that the property mortgaged to Worrell was worth $250,000, and the best evidence that he did not so believe came from his own mouth when he testified that in 1909 he bought for or in the name of his wife, for $14,010, 114 acres of it, certainly not the worst part of the 350 acres, and that the price paid was a fair one.

This illustration demonstrates, I think, the utter recklessness of Taylor in giving his evidence, and yet the oath of such a witness as he has proved himself to be, that he believed that Davies was in possession as mortgagee, has been accepted as proof of that fact, and that too in the face of the oral evidence and the circumstances to which I have referred negativing the existence of any such belief on his part.

Attention should also be called to the fact that after Mr. Denton had brought the assignment to Clarkson, Denton and Clarkson had an interview with John F. Taylor, one of the firm of Taylor Brothers, at which Clarkson asked Taylor "what his wishes were, if he was looking to making any offer of settlement and resuming business," and that Taylor replied, "No, he was not" (p. 522).

Taylor's answer appears to me quite inconsistent with the view that he believed that there would be anything left for the assignors after their debts were paid, and to point strongly to the conclusion that, in his opinion at all events, his firm was hopelessly insolvent.

It was, however, argued that the effect of sec. 47 (2) of the Limitations Act is to exclude from the operation of the Act the excepted claims mentioned in it in the case of all trusts, including a constructive trust, but I am not of that opinion.

Section 47 was first enacted by the Trustee Act, 1891, 54 Vict. ch. 19, sec. 13, and is the same as sec. 8 of the Imperial Act 51 & 52 Vict. ch. 59. The object of the enactment was to extend and not to lessen the protection afforded to trustees by the existing

law; and, with that object in view, the period of limitation is cut down to six years save in the excepted cases mentioned in the earlier part of sub-sec. 2, and in these excepted cases the existing provisions as to limitation of actions are left as they were.

Section 5 of the Act bars the right of action, in the case of a constructive trust, at the expiration of ten years after the time at which the right accrued, except in the case of concealed fraud, with which sec. 32 deals.

I am, for these reasons, of opinion that the Statute of Limitations is a bar to the action of the respondent.

There was a further ground urged by the appellants, which they contended, and I am of opinion, is fatal to the respondent.

The contention is, that Davies did not at any time, though an inspector, occupy a fiduciary position towards the assignee or the creditors as to the property in question; and that, with regard to the proof of his claim, the valuation of his security, and the proceedings consequent upon the filing of his claim, he was entitled to deal and act as he might have done if he had not been an inspector.

The original Assignments and Preferences Act, 48 Vict. ch. 26, was designed to provide for the equitable distribution of the property of insolvent debtors as far as it was within the authority of the Provincial Legislature so to provide, and it was modelled on the Insolvent Act, 1875, from which many of its provisions are taken. Section 18 (4) (sec. 20 (4) of R.S.O. 1897, ch. 147) was taken from sec. 84; and it is significant that, while that section required that the secured creditor "shall specify the nature and amount of such security . . . in his claim, and shall therein, on his oath, put a specified value thereon," the requirement of sec. 18 (4) was not that he should in his claim put a specified value on his security, or that he should do that on his oath, but merely that "he shall put a specified value" on the security.

The Act made no provision as to what was to happen if the creditor failed to put a specified value on his security; but, by a subsequent amendment, 59 Vict. ch. 31, sec. 3, provision was made for meeting such a case, and that section is substantially the same as sub-sec. 6 of sec. 20 of R.S.O. 1897, ch. 147.

By this amendment it was provided that if the creditor failed to value his security a County Court Judge might, on the applica-

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tion of the assignee or any person interested in the debtor's estate, order that, "unless a specified value shall be placed on such security and notified in writing to the assignee within a time to be limited by the order, such claimant shall, in respect of the claim, or the part thereof for which the security is held, in case the security is held for part only of the claim, be wholly barred of any right to share in the proceeds of such estate;" and that, in the event of failure to comply with the order, the claim, or part of it, should be wholly barred as against the estate, "but without prejudice to the liability of the debtor therefor."

It will be observed that the order which the Judge is empowered to make is to require the creditor to put a specified value on his security, not to require him to do this upon oath.

It may often be difficult, and sometimes impossible, for a creditor to pledge his oath as to the value of his security; and what was really aimed at by the Act was to prevent a creditor, by valuing his security too low, from obtaining an undue share of the proceeds of the estate in the hands of the assignee; and this it was sought to accomplish by requiring him, not to swear to the value of the security, but to "put a specified value" on it, and by giving the assignee the option of taking the security at an advance of 10 per cent. on the specified value he had put upon it.

The machinery provided by sec. 3 of 59 Vict. ch. 31 for barring the claimant of any right to share in the proceeds of the debtor's estate, if he fails to do what in effect is giving an option to the assignee to take an assignment of the security at an advance of 10 per cent. on the specified value the creditor puts upon it, supports the view I have expressed.

My conclusion, based on these considerations, is, that the creditor is not required to put the specified value on the security on oath, and that it is not incumbent on him to put this specified value on the security in the claim which he files with the assignee, but that that may be done by a separate document or even subsequently, and that the delivery to the assignee of a simple statement that he puts a stated value on his security would be a sufficient compliance with the requirement of sec. 20 (4) in that regard.

If this be the correct view of the effect of the section, I see no reason why what took place with regard to the security, followed by the release of the equity of redemption, was not, in substance

and reality, if not in form, a consent to the retention by Davies of his security at $45,000, within the meaning of the sub-section.

It was argued that Davies never put a specified value on his security: that what he did was merely to acquiesce in the valuation made by the assignee; and that the transaction must be treated, not as something done under sec. 20 (4), but as a purchase by Davies of the equity of redemption.

I am unable to agree with that contention; the purpose of the assignee in his dealings with Davies, and of Davies himself, was to arrive at the amount for which Davies was to be entitled to rank on the estate. The assignee was doubtless familiar with the provisions of the Act as to secured creditors. He had himself formed the opinion that the value of the mortgaged property was only $35,000; he had procured a valuation to be made, and the value placed on it by the valuators was $45,000. There was no thought of the assignee taking over the security at that price, much less of taking it over at an advance of ten per cent. In these circumstances, it would have been but an idle form for Davies to put a specified value on his security—that is, to do that formally and in writing.

I cannot doubt that if the assignee and a secured creditor meet and arrive at an agreement as to the value of the security held by the creditor, and the assignee does not desire to be given an opportunity of taking over the security in the formal manner for which sec. 20 (4) provides, he may waive his right to have a specified value put by the creditor on his security, and may consent to the retention of it at the value which he and the creditor have agreed that it has, at all events where the assignee does this under the authority of the creditors. With the effect of the consent to the retention by the creditor of his security and his right to require from the assignee a release of the equity of redemption I shall afterwards deal.

It is manifest, I think, that what was done, including the giving of the release of the equity of redemption, was understood by every one concerned as being done under sec. 20 (4).

The letter from Mr. Worrell to the assignee of the 30th April, 1902 (exhibit 57), though relied on by the respondent as evidencing the contrary of this, supports the view I have just expressed, for it shews that Mr. Worrell understood that what was being done

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was being done under sec. 20 (4), and it was because of this that he criticised the form of the conveyance—the ground of his criticism being that it might lead to difficulties because the form of it might appear to be inconsistent with the real transaction of which it formed part.

The conveyance (exhibit 9) to Mr. Worrell, who was also a secured creditor, is in the form which that gentleman thought should be adopted for the conveyance to Davies, and it is probable that the reason it was not adopted for that conveyance was, that there had been no formal putting of a specified value on his security by Davies.

Davies' letter to Clarkson of the 24th April, 1902, is, I think, strong, if not conclusive, evidence that the parties were acting under sec. 20 (4). It reads:—

"Toronto, 24th April, 1902.

"E. R. C. Clarkson, Esq.,

"Assignee of Estate of Taylor Brothers,

"Toronto.

"Pursuant to the arrangement made with you, I beg to notify you that, in consideration of your having given me a quit-claim of the property comprised in the Don Valley Brick Works, I have agreed to waive my right to rank on the above estate for $45,000 of the claim of $100,000 proved by me in respect of the mortgage I hold from Taylor Brothers. The sum of $45,000 is the valuation which has been made of the said property.

"I also agree to accept a quit-claim in respect of the nine houses on the Don Mills road, in full of my claim on a mortgage covering said property, and will not prove any claim in respect thereto.

"Yours truly,

"Robt. Davies."

Confirmation of this view is also found in the fact that a meeting of creditors was called for the 18th June, 1902, for, amongst other things, dealing with the claims of Davies and the Taylor estate (*i.e.*, the claim of Mr. Worrell), and that that meeting was held, and that at it what the assignee had decided to do was authorised to be done, and in the fact that in the dividend-sheet it appeared that Davies' claim was proved for the balance of it after deducting $45,000 as the value of his security.

I am not dealing now with the regularity of the meeting, but

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I refer to it only as throwing light upon what the parties engaged in the transaction intended to do and thought they were doing.

It is manifest that all parties to the transaction thought that where the assignee did not elect to take over the security the secured creditor was entitled to retain it and to a release of the equity of redemption from the assignee.

That a strict compliance with the procedure prescribed by the Act as to the claims of secured creditors is not essential to establish assent to the retention of his security by a creditor is, I think, settled by *Bell* v. *Ross* (1885), 11 A.R. 458. That was a case under the provision of the Insolvent Act, 1875, corresponding with sec. 20 (4), and it was held that a formal resolution of the assignee allowing the creditor to retain the property was not necessary, and that his assent was inferred from what had taken place.

It is, however, contended that, being an inspector, Davies was disqualified from entering into the arrangement that was come to between him and the assignee, even if the transaction is to be treated as having been a carrying out of the provisions of sec. 20 (4); that, because of Davies' position as inspector, the assignee could not deal with him even for the purposes of the sub-section.

I have already stated my conclusion as to the real nature of the transaction, and I am unable to agree with the, to me, startling proposition involved in the second of these contentions; and, in the absence of authority binding on this Court, I decline to give effect to it.

Davies was not only an inspector, but he was also a secured creditor, and was therefore under a statutory obligation, if he sought to prove against the estate in the hands of the assignee, to put a specified value on his security; and, as I have said, in effect to give to the assignee the option of taking over the security at an advance of 10 per cent. over that specified value, with the right, if that option were not exercised, to retain his security at the value he had put upon it and prove against the estate for the balance of his claim.

If the contention of the respondent's counsel were to prevail, it would be practically impossible for a secured creditor, who holds security and is appointed an inspector, to prove his claim.

With respect to his claim and his rights under sec. 20 (4),

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Davies was, in my opinion, entitled to deal with the assignee and the creditors just as freely and untrammelled as if he had not been an inspector; and, in respect of it and of the proceedings under sec. 20 (4), in my opinion he occupied no fiduciary position towards the assignee or the creditors, and any fiduciary position he occupied by reason of his appointment was, to use the language of Maclennan, J.A., in *Morrison* v. *Watts* (1892), 19 A.R. 622, 632, *quoad* his claim and proceedings under sec. 20 (4), "in abeyance."

In that case the assignee had, with the sanction of the inspectors, purchased the estate, and it was pointed out by that learned Judge that the defendant's difficulty was, that the inspectors of the estate had no power to bind the creditors by negotiating with him for a sale to him of the estate, and he added:—

"If they had, I should have thought that the moment they opened negotiations with him for that purpose, he was thereby put at arm's length, and that his trusteeship was, to that extent, put aside, and became in abeyance."

It is not necessary for the purposes of this case to go as far as the learned Judge intimated that he would have gone. The case which he cited in support of his proposition was *Boswell* v. *Coaks* (1883), 23 Ch.D. 302. The principle of that case, even if the application of it cannot be pushed as far as Maclennan, J.A., would have extended it, appears to me to be applicable to the case at bar, and the reasoning of Fry, J., at p. 310, particularly so.

In that case it was sought to set aside a sale that had been made in an administration action to the defendant Coaks, who was the solicitor for the defendants in the action. The solicitor had obtained leave to bid, and the conduct of the sale was given to the solicitors for the plaintiff, they undertaking not to communicate any particulars to Coaks and to carry out the sale wholly independently of him, and the sale was subsequently confirmed by the Court in due course.

It was sought to set aside the sale, on the ground that Coaks stood in a fiduciary position towards the creditors, and that he had concealed from the Court certain material facts within his knowledge as to certain matters which it was his duty to disclose.

Stating his reasons for judgment, Fry, J., said (pp. 309, 310):—

"The equity suggested is that, though the leave to bid was given, Mr. Coaks still remained in a fiduciary position towards the estate. It is said that the effect of leave to bid is, not to place a person who was in a fiduciary position at what is commonly called arm's length, and to put an end to that fiduciary position; but that it only varies the right of the *cestui que trust* to this extent, that whereas before the leave to bid he could at his mere election have set aside the transaction, after the leave to bid is granted he is no longer at liberty to set it aside at his mere election, but is bound to prove that there was some non-disclosure of a material fact which the person permitted to bid was obliged to disclose. In other words, it is said that Mr. Coaks, having obtained his leave to bid, was still under his original obligation to disclose everything which it was material to the vendor to know, and that if that disclosure was not made the sale could be set aside; and that the effect of the leave to bid was to limit the right to set it aside to that particular contingency. In my judgment nothing could be more inconvenient than such a rule, or more at variance with the general principles of the Court. The Court strives anxiously to prevent a person from being placed in a position in which his interest shall pull him one way and his duty shall pull him the other: and that is the very reason why persons standing in a position in which they have duties towards others are not allowed to maintain an interest of their own adverse to that duty. It is here said that Mr. Coaks, notwithstanding his liberty to bid, was bound to disclose everything which it would be material to the vendor to know. What would be the result of such a rule? It would amount to this: that Mr. Coaks, having leave to bid, as he subsequently did, £40,000, would have been bound to disclose his own willingness, if such were the case, to give £41,000 or £42,000; and that he would have been bound to admit that if he were pressed a little harder more money would be forthcoming. It appears to me to be obvious that no transaction of bargain and sale could be reasonably conducted on any such principle as that, and if that were the meaning of giving leave to bid . . . no such leave to bid ever ought to be given."

This was accepted as a correct statement of the law when the case came before the House of Lords, *Coaks* v. *Boswell* (1886), 11 App. Cas. 232, 242.

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In support of the contention that an inspector cannot exercise the rights he possesses or perform the duties he owes under sec. 20 (4), *Tennant* v. *Trenchard* (1869), L.R. 4 Ch. 537, 544, was cited, but that case is clearly distinguishable. What was said in it is that a trustee in whom an estate is vested upon trust, who is also a mortgagee of the estate, cannot, while he remains a trustee, exercise the right he would otherwise possess of foreclosing the equity of redemption. In the first place, no estate is vested in an inspector; and, in the second place, in the case of a mortgagee, he is asking a Court of Equity to exercise its powers to foreclose, and the Court refuses to aid him to accomplish that, and for the reason stated by the Lord Chancellor (Hatherley); while in the case of a secured creditor, who is also an inspector, his rights do not depend upon what a Court of Equity may or may not do, but are statutory.

Davies, with his statutory right and duty in regard to the proof of his claim and to what was to be done under sec. 20 (4), stood in at least as good a position as did Coaks in *Boswell* v. *Coaks;* and, in my opinion, as to those matters occupied no fiduciary position towards the assignee or the creditor or any one else.

I incline strongly to the opinion that, having regard to the fact that it was known to the assignee and to the creditors that Davies was a secured creditor and that Worrell was also a secured creditor, and knowing, as they must be taken, I think, to have known, what the statute required to be done in respect of secured claims, in naming them as inspectors, the creditors must have intended that they (Davies and Worrell) should respectively act as inspectors only in respect of matters outside of those in which they had duties under sec. 20 (4) to perform. If it were otherwise, they must have intended to render it practically impossible for Davies or Worrell to perform those duties, and for the provision of the Act as to secured claims to be worked out, unless indeed they resigned their inspectorships; and, if the latter course were to be rendered necessary, it was almost a farce to appoint, seeing that action upon secured claims must be taken promptly.

The inference might, I think, well be drawn that as business men, knowing what a secured claim was and the duties of the creditor and the assignee in respect of it, the creditors did not

intend by their action to hamper them in the performance of those duties, but to leave them, as far as the secured creditor was concerned, to be performed by him without being fettered in any way by imposing upon him duties of a fiduciary character in respect of them.

There remains to be considered, on this branch of the case, the question of the effect of the assignee determining not to take over the security. It was contended by counsel for the appellants that the effect is that the secured creditor is entitled to retain the property upon which the security is held, discharged of the equity of redemption of the assignee or any other person who otherwise would be entitled to redeem, and in support of that contention *Bell* v. *Ross* (*supra*) was relied on.

It was answered by counsel for the respondent that that case has no application to a provision such as that which sec. 20 (4) contains; that the provision of the Insolvent Act, 1875, which was under consideration there, differs widely from sec. 20 (4), which does not contain the words the use of which led to the conclusion that was reached in that case.

It is true that the wording of the section differs, the principal difference being that sec. 84 of the Insolvent Act, 1875, provided that:—

"The assignee, under the authority of the creditors, may either consent to the right to rank for such liability, or to the retention of the property or effects constituting such security or on which it attaches by the creditor, at such specified value, or he may require from such creditor . . . an assignment and delivery of such security, property or effects, at an advance of ten per centum upon such specified value, to be paid to him out of the estate so soon as he has realised such security, in which he shall be bound to the exercise of ordinary diligence; and in either of such cases the difference between the value at which the liability or security is retained or assumed and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid."

While sec. 20 (4) provided that:—

"Every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the debtor, or on the estate of a third

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party for whom such debtor is only secondarily liable, he shall put a specified value thereon, and the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the assignee has realised such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate."

There is another difference between the two enactments which it may be well to mention. Section 84 did not, at all events in terms, require, as did sec. 20 (4), that every creditor should in his proof of claim state whether he holds any security for his claim or any part thereof, and sec. 84 required that a creditor holding security from the insolvent or from his estate, or if there were more than one insolvent liable as partners, and the creditor held security from or the liability of one of them as security for a debt of the firm, to specify the nature and amount of such security or liability in his claim; while sec. 20 (4) required the security to be valued if it was on the estate of the debtor, or on the estate of a third party for whom the debtor was only secondarily liable.

The question then is: Are these differences such that the reasoning on which the Court in *Bell* v. *Ross* based its decision, is not applicable to a case arising under sec. 20 (4)?

The section is certainly not happily worded, and this makes it difficult to ascertain with absolute certainty what it means; but, if it had not the meaning which counsel for the appellants ascribes to it, it is difficult to see how the provisions of it could be worked out in practice.

The creditor is to put a specified value on the security he holds. What does that mean? What is his security? In one sense, no doubt, it was in this case the mortgage, but in another sense, and that in which, in my opinion, it is used, it means the property on which the debt is secured. What is it that the assignee gets if he elects to require "an assignment of the security?" Clearly it is not the mortgage, carrying with it the covenant of

the mortgagors to pay the mortgage debt. It must, therefore, I think, be the property discharged of the incumbrance upon it.

The amount which the assignee is to pay to the creditor is to be paid out of the "estate as soon as the assignee has realised such security;" language which points plainly, I think, to realisation by sale of the mortgaged property, for that is all that the assignee has from which to realise.

If this be the correct view, when the Act speaks of the security being retained, must not a similar meaning be given to the word "security," i.e., "the property which is held as security" discharged of the right to redeem? I think that that is the meaning that must be given to it, for, as Burton, J.A., pointed out in *Bell* v. *Ross*, at pp. 462, 463, there is no distinction made between the thing retained and the thing transferred.

It appears to me that, in framing what is now sec. 20 (4), the intention was to adopt, in what was thought to be more compendious language, and language that was more fitted to the change that was being made as to the nature of the security which was to be valued, the provisions of sec. 84 of the Insolvent Act, 1875; and, in my opinion, the principle of the decision in *Bell* v. *Ross* is applicable to a case arising under sec. 20 (4).

There remains to be considered the question whether what was done was done "under the authority of the creditors," within the meaning of sec. 20 (4).

It may be that the reasoning in the American cases cited would warrant the conclusion that direct action by the creditors is not necessary, and that it is sufficient if they took no contrary action, but it is not necessary to go that far; that no formal action or resolution is necessary is, I think, shewn by *Bell* v. *Ross*, but it is sufficient if it appears that what was done was done with the assent or concurrence of the creditors. The inspectors certainly authorised what was done to be done; at the meeting of the creditors to which I have already referred, it was authorised, and every creditor received his dividend on the basis of a dividend-sheet which disclosed the fact that Davies had been allowed to retain his security, and a copy of the dividend-sheet must have been sent to every creditor, and every creditor was entitled to object to any claim mentioned in it, and failing objection the dividends were to be paid (sec. 29); and, so

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far as the evidence discloses, no creditor ever objected to what was done until the objection was raised in argument in this case.

In referring to the meeting of creditors, I do not overlook the fact that the notice of it was not published in the Ontario Gazette; although that was not done, the notice was sent to every creditor, and that is sufficient for the purpose of my reference to the action taken at the meeting.

Under all the circumstances, the proper inference is, that the assignee's assent to the retention by Davies of his security was given under the authority of the creditors, within the meaning of sec. 20 (4).

For all these reasons, I would allow the appeal with costs, reverse the judgment of my brother Lennox, and substitute for it judgment dismissing the action with costs.

Since the foregoing was written, counsel for the respondent have referred us to *Moody* v. *Cox and Hatt*, [1917] 2 Ch. 71, but that case has no application to the case at bar, in the view I have taken as to the position of Davies with respect to his claim and the proof of it.

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MACLAREN, J.A., agreed in the result.

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HODGINS, J.A.:—The facts, although discussed at length in the trial judgment, are not at all complex. Robert Davies was mortgagee, to the extent of $73,000 and interest, of 140 acres in the Don valley, about 40 acres of which was used as a brick-yard, and on the remainder stood a burned paper-mill. The firm of Taylor Brothers, which owned the whole property and operated the brick-yard, assigned to E. R. C. Clarkson, one of the appellants, on the 14th June, 1901. The assignee, a few days afterwards, leased the brick-yard to Davies for one month. The lease was intended to keep the brick-yard going until the creditors should give directions as to its disposal. At the first meeting of creditors on the 5th July, 1901, Davies and some others were appointed inspectors, "with power in conjunction with the assignee to realise upon the assets to the best advantage." Davies attended one meeting, on the 5th July, 1901, was absent on the 9th July, and resigned as inspector on the 3rd September, 1901, by letter to the assignee, owing to negotiations looking to his

retaining his security and ranking upon the estate for less than his full claim. In fact as early as the 31st July, 1901, his solicitors told the assignee that he desired to retire as inspector, and suggested that no more formal resignation was necessary. Mr. Noel Marshall took his place, though never elected by the creditors, and attended the meetings of the 30th September, 1901, and the 25th October, 1901. On the 10th February, 1902, a deed to Davies was prepared, but it was not until the 22nd April, 1902, that a resolution of the inspectors, Davies being present, was passed, authorising the ranking of Davies on the estate for his claim, less $45,000, the valuation of the brick-yard and plant, and the giving of a release of the equity of redemption to him. To this Davies agreed formally, by letter dated the 24th April, 1902. Mr. Worrell, also an inspector, suggested, after the meeting, that the creditors should be asked to confirm this transaction; and, on the 18th June, 1902, a meeting, called to "consider the settlement and ranking of secured claims and such other business as may come before the meeting," was held, at which some creditors attended. This meeting was not advertised in the Ontario Gazette, as required by the statute then in force, but those present assented to the ranking and the giving of the equity of redemption to Davies.

The release of the equity of redemption itself was not delivered to Davies until the 15th September, 1902. In the meantime, Davies, apparently under the belief, shared by the assignee and those of the inspectors who were called as witnesses, that in order to save his mortgage money he would be obliged to take over the property, had made somewhat extensive improvements in the plant and continued the manufacture of brick. The month covered by the lease to him had expired, but it is not clear just what bargain was made regarding his occupation of the brick-yard and property, if, indeed, anything was actually arranged. Had the creditors on the 18th June, 1902, decided to sell the property subject to the mortgage, or to redeem Davies, it is most probable that he would have been entitled to remove these improvements as tenant's fixtures. No claim is made to set aside the lease. If he held under it or any other tenancy, there would naturally be a merger when the equity of redemption was vested in Davies. The improvements in question were made openly,

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were admittedly seen by the respondent and her husband, as well as were the operations carried on for making brick, and no claim against Davies or protest to him or to the assignee, nor even any inquiry, was made until this action was begun on the 21st July, 1914. Davies signed as inspector a deed of other property belonging to the estate in or about June or July, 1902.

It appears that, when the James Bay Railway Company, now the Canadian Northern Railway Company, expropriated their right of way through the brick-yard property, a claim for compensation was made by Davies, resulting in a large award, totalling $238,583, being given to him on the 14th May, 1912. The brick-yard property consists of a very valuable combination of shale, brick-clay, and sand. It was worked successfully by the methods adopted by Davies, but its natural advantages were open and visible when the assignment was made; and, if the respondent's husband is to be believed, it was worth an enormous sum. He puts it at a million dollars, while other brick-makers now estimate it as being worth then $500,000. No such value was ever attributed to it by the assignee, the inspectors, or the valuators employed by the assignee, and the actions of the respondent and her husband are entirely inconsistent with the belief he now professes to have held.

It is unfortunate that when this litigation was begun Davies was bedridden or suffering from a serious illness, one so severe that he never learned of the pendency of this action, and died without opportunity to give his evidence. The judgment is naturally largely the outcome of inferences drawn by the learned trial Judge from the circumstances as testified to by others, and from the written evidence. In view of the length of time that has been allowed to elapse since the impeached transaction took place, i.e., since 1902, the absence of Davies' testimony is greatly to be regretted. The only bit of evidence coming from him, and which might explain his exact attitude, was rejected at the trial, and I think wrongly. For, as it was contended that his letter of resignation did not represent his actual position, and was merely formal, and that he was guilty of want of candour, his statements at that time in regard to these matters are as relevant evidence as was the letter itself or his signature to the deed to Worrell in June, 1902, of the property already alluded to.

The judgment does not err on the side of giving him the benefit of any doubt, but it deals from its own point of view so exhaustively with the matters proved at the trial that it is unnecessary to elaborate them here.

I need not repeat the observations made by my Lord the Chief Justice in his judgment with regard to the position of inspectors under R.S.O. 1897, ch. 147, coupled with the resolution of creditors in this case. I agree with him in thinking that the inspectors were not trustees for sale. I think, however, that, under the statute and resolution, they stood to the creditors in the position of agents to represent their interests during the period of realisation of the assets by the assignee. Neither the statute nor the resolution had the effect of vesting any estate in them; but the latter was, in my view, a giving of directions with reference to the disposal of the estate, within the meaning of sec. 17, R.S.O. 1897, ch. 147.

The result is, that the creditors put in the hands of the inspectors whatever powers they might have exercised under the statute with regard to the realisation of the assets. "With power in conjunction with the assignee to realise upon the assets to the best advantage" imports delegation, and it renders the inspectors' consent equivalent to that of the creditors in the disposition of the assets by the assignee.

It is this view that makes it difficult to hold that Davies ever effectually terminated the fiduciary relationship accepted by him when he entered on the duties of inspector; nor can it, I think, fairly be said that what occurred in relation to his claim is equivalent to a valuation of his security under the statute, with the results flowing therefrom.

The original resolution of the inspectors is not exactly clear. It may be construed as directing sale by auction in all cases, but as relieving the assignee from getting valuations of the brick-yard and the 350 acres mortgaged to Mr. Worrell, or, in another view, as indicating that these were to be sold subject to the mortgages upon them after valuations had been procured. There was a reason why a valuation on these two properties was deemed unnecessary, for among the inspectors were the manager of Taylor Brothers and of John F. Taylor, Robert Davies himself, and Mr. Worrell, the trustee for the Taylor sisters; the two latter being also mortgagees of these properties.

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But in either case the inspectors owed the same duty to the creditors whether the sale intended was a public or a private one, and that duty was quite inconsistent with the right to purchase any part of the assets, or, what I think is equivalent, to require any property held as security pursuant to the statutory provisions as to the valuation of securities. I have, after reading the evidence in the light of very able arguments, no doubt that Davies realised his position, resigned, by letter to the assignee in September, 1901, his inspectorship, and refrained from acting as inspector until after the property was ready to be conveyed to him. But the position he occupied, based upon the statute and upon the resolution, required for its termination a definite notice to the creditors that he no longer was content to represent them. "His fault is," to quote Viscount Haldane's language in *Nocton* v. *Lord Ashburton*, [1914] A.C. 932, at p. 954, "that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known." The creditors had vested him with power which he was to exercise on their behalf; the assignee does not represent the creditors in such a matter as the appointment or payment of inspectors (secs. 17, 33); and so there is no reason why the assignee would accept the resignation of one or of all of the inspectors. If he could, then any control exercised by the creditors could be defeated by the retirement of all the inspectors or impaired by the retirement of any one or them, if that office might be relinquished without the creditors being aware of the fact.

It was argued before us that the creditors must consent to the withdrawal of an inspector, and that, unless they did so, he was compelled to continue in that position. This is too narrow an interpretation of the course open to any one in a fiduciary position which he occupies as a consequence of the formal action of others. There is always available as a last resort an application to the Court, as was pointed out in *Boswell* v. *Coaks*, 23 Ch.D. 302. But the difficulty of disentanglement is no answer to the position that the termination of the relationship must be clear and definite; and in this case it could have been accomplished, in my judgment, by the communication of Davies' decision to a meeting of creditors properly called to accept it and to appoint another in his place. Reliance was placed upon the assent manifested at the meeting

of creditors on the 18th June, 1902. It was said that the provisions as to advertising in the Ontario Gazette were directory only, and non-compliance with them did not nullify the meeting.

But it is not the validity of the meeting that is in issue: it is the validity of the discharge of Davies from his fiduciary position. If it had been proved that the meeting was called in the way the statute directed, the matter would have been reduced to a question of full disclosure. But, as the evidence falls short of shewing that all the creditors were in fact notified by letter, and is on that point of the vaguest description, the absence of the Gazette publication leaves the matter in such doubt as to amount to no proof at all of acquiescence except by those actually present. Indeed, Clarkson's evidence is merely that "if" notices were sent out he would take the list as it then appeared in his creditors' sheet (p. 555). The form of notice was afterwards produced, but nothing further as to its mailing by registered letter was offered.

The appellants placed much stress upon the statutory provisions regarding the valuation of securities, and contended that Davies, having an independent right, with the assent of the assignee and creditors, to retain his security, was, by virtue of those provisions, absolved as to it from his fiduciary position in regard to creditors.

Apart from the obvious difficulty in the way, in that Davies did not bring the statutory procedure into play by valuing his security in his claim, the right to retain the security depends upon the authority of the creditors (sec. 20, sub-sec. (4)), and their consent is not proved. This way of dealing with secured creditors is a method of realising on the estate, because, if the security is valued and retained, it is nevertheless disposed of for a consideration, i.e., either a reduced ranking or an abandonment of any claim on the estate, and this is exactly the way in which it is treated in the deed to Davies.

The inspectors, therefore, had, by virtue of the resolution, a voice in the transaction, if it is to be treated as having the effect given to it by the statute; so that it does not advance the matter very much.

Upon the general question, Davies had, as mortgagee, an interest personal to himself. But, if he voluntarily accepted a position which brought that personal interest into conflict with

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the duty he had assumed, then what would otherwise be his right must be subordinated to the performance of his duty. This is the result of the observations of Lord Hatherley, L.C., in *Tennant* v. *Trenchard*, L.R. 4 Ch. 537, 544, which seem to me to express very clearly principles laid down in many cases cited to us. The only suggested difference between those cases and this lies in the fact that a secured creditor is required to deal in a certain definite way with his security, thereby giving certain options under the statute to the creditors—not, in reality, to the assignee. The fact that he is compelled to put his security at the disposal of the assignee, but is left to fix its value himself, seems to me only to change the character of his personal interest, not to eliminate it. His action directly affects the interests of the creditors, and gives them certain rights, but dependent upon the way in which he exercises his discretion. If at the same time he owes them a duty which does or may conflict with the free exercise of that discretion, then, I think, disability arises, and he is bound to subordinate his personal interest to that duty, or to terminate the relationship. It is a difficult and delicate position; but, as I read the cases, that makes no difference in the result. His remedies and his rights are changed by the statutory provisions, but they do not get rid of the conflict which, in all the cases upon the subject, compels the Courts to hold that he can only exercise those remedies and rights subject to the paramount duty which he owes to those affected by them so long as the fiduciary relationship subsists.

The issue on this branch of the case is, whether the compulsory requirements of the statute override the general principle I have stated. I think the element of discretion, which is permitted to be exercised in complying with the statutory provision, determines this question adversely to the contention that Davies was enabled to deal with his own interest freed from his fiduciary duty. The situation was one of his own choosing, and, after all, could at any time have been terminated, not by abandoning the personal right, but by relinquishing the fiduciary position.

But, apart from that question, I am unable to agree that negotiations resulting in an arrangement for a conveyance of the equity of redemption, on terms which permit ranking for an amount arrived at by crediting an agreed sum upon the claim, where the person so acquiring the estate holds a fiduciary position to the

creditors, can be treated as exactly equivalent to the statutory procedure.

Having arrived at the conclusion that, with every intention of putting himself in a position to purchase the brick-yard property, Davies did not effectually do so, and remained subject to the liabilities flowing from his position as inspector, I am relieved from the necessity of considering what disclosure would have been required from him if his resignation had been entirely operative. If I had to decide that question, I should have found it difficult to accept the learned trial Judge's view of his obligation. What Davies did, and what the resources of the property were, appear to have been known to all concerned, and what he learned was no more than an obvious truth, namely, that, with excellent material, local demand, and capital, business ability will turn an unsuccessful business into a profitable one.

I am in agreement with the judgment of my Lord the Chief Justice as to the effect of the transaction, as carried out, on the status of Davies. I think he was a constructive trustee only, and I need not recapitulate the reasons given in the judgment to which I have just alluded. Davies acquired the property with no idea that it was to remain trust property, or that he was wrongfully converting it to his own use. So far as he saw, he became absolute owner of it, and intended so to be. The right of every one to object to his acquisition arose on his taking possession under his new title. Till then he had been lessee of the estate, the tenant of the assignee, or held some relation justifying his continued occupation, and from the time that, as purchaser, he went into possession, there was open, visible, and continuous possession in him, by virtue of his registered title, adverse to all other claimants.

It must not be forgotten that for many years, indeed from 1902 to 1914, the respondent and her husband saw before their eyes, not only the extensive improvements made by Davies, but the actual excavation of shale and the cutting down of the hillside, formed of brick-clay and sand; a fact of peculiar interest to a man who had for a long period operated this very brick-yard. Such a radical physical change in the property makes it difficult to understand his apathy or his professed inability to comprehend what it meant. Added to this is the offer, made late in 1901, of the

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reconstruction of the burnt paper-mill and its lease to him, and the formation of an opposition brick-yard in the same valley. This latter proposition was based upon the idea that the Davies property was not the only spot in which this unique combination of material existed.

I think our present Statute of Limitations can be successfully pleaded by the representatives of Davies, and in that respect I also concur in the judgment of my Lord the Chief Justice.

It was not argued before us that, if the respondent were successful in setting aside the release of the equity of redemption, the result would be to leave Davies in possession as tenant under the lease made to him by Clarkson before he was appointed inspector, or as tenant at will after its expiry if that was Davies' position during the negotiations. If the conveyance stood, the lease or tenancy merged in it; but, up to the time of the release, Davies' title to occupy and carry on the manufacture of bricks for his own benefit was this lease or that relation which resulted by law from the circumstances which took place after its expiry. No clear evidence exists on this point. The judgment treats Davies as if he had been mortgagee in possession.

I would allow the appeals of both appellants and dismiss the action with costs.

Magee, J.A. MAGEE, J.A., agreed with HODGINS, J.A.

Ferguson, J.A. FERGUSON, J.A.:—I have had the opportunity of perusing the opinion of my Lord the Chief Justice, with which in the result I agree, and I should have contented myself with simply agreeing in that opinion, but for the fact that the grounds of action alleged are such that the parties to the transaction are entitled to our opinion on the merits, and the result is not only of importance to the parties, but to the public, in dealing with insolvent estates under an Act of the Legislature of the Province of Ontario.

The plaintiff's grievance in this case is not founded on the incapacity of the assignee, Mr. Clarkson, nor on his intentional fraud or neglect nor on the intended fraud or neglect or incapacity of the co-inspectors of the defendant Davies, but is founded on the incapacity or inability of Clarkson to sell and of Davies to become a purchaser from Mr. Clarkson, even with the approval

and consent of Davies' co-inspectors and of part of the creditors, for the following alleged reasons:—

1. That at the time of the purchase Davies was an express trustee, and unable to purchase from himself.

2. That at the time of the purchase he stood in a fiduciary relationship to the plaintiff and all other persons beneficially entitled under the deed of assignment to Clarkson.

3. That the nature of the relationship was such that Davies could not purchase from the assignee, the inspectors, and some of the creditors.

4. That, if not entirely disqualified from acquiring for his own benefit, he could not acquire the property unless he disclosed not only that he was acquiring, but all information which he had or should have had which would aid the assignee, the inspectors, and the creditors, in coming to a conclusion as to the value of the property, and that the onus was upon Davies of proving affirmatively that he did disclose such information, and that he has not only failed to satisfy the Court that he made full and fair disclosure, but that it appears from the evidence that he had information which he did not disclose.

To arrive at a conclusion on these contentions, it is of importance to consider carefully just what Davies' relationship was in reference to the property, to the plaintiff, and to the other parties beneficially entitled under the trust deed.

At the date of the voluntary assignment by the partnership firm of Taylor Brothers to Clarkson, Davies was a mortgagee of the property. An assignment made for the general benefit of creditors, pursuant to R.S.O. 1897, ch. 147, and dated the 14th day of June, 1901, vested in Clarkson the property of the insolvent firm of Taylor Brothers upon the following trusts (subject to prior mortgages, including Davies' mortgage for $100,000):—

1. To sell and convey and convert the same into money etc.

2. To apply all moneys received etc.: (a) in payment of costs incidental to the preparation and execution of the assignment; (b) in payment of advances, liabilities, and outgoes of the assignee; (c) in payment of remuneration of the assignee; (d) to pay the creditors; (e) to pay the balance, if any, to the debtors.

The deed of assignment contains an irrevocable power of attorney from the debtors to Clarkson "to do all other acts,

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matters, and things necessary to enable the assignee to carry into effect the true intent and meaning of the assignment."

Section 17 of the Act requires the assignee to convene a meeting of the creditors "for the appointment of inspectors and the giving of directions with reference to the disposal of the estate."

Section 18, sub-sec. 2, provides that, in case the creditors fail to give directions with reference to the disposal of the estate, the Judge of the County Court may give all necessary directions in that behalf.

At the first meeting of the creditors, held on the 5th day of July, 1901, the following resolution was passed:—

"On motion of J. A. Worrell, K.C., it was resolved that Messrs. E. W. J. Owens, David Smith, Robert Davies, Frank Denton, K.C., J. A. Worrell, K.C., and Carrington Smith be appointed inspectors of the estate, with power in conjunction with the assignee to realise upon the assets to the best advantage" (see exhibit 7).

Immediately following that meeting, and on the same day, the inspectors held a meeting, at which Mr. Davies attended, so that there is no question about his having accepted whatever duties and obligations that resolution imposed upon him, and the question arises: did Davies, by accepting office under the foregoing resolution of the creditors, assume towards the plaintiff the position of a trustee or a fiduciary position, and in either case a position from which he could not retire without notice to the plaintiff and without her consent? The plaintiff alleges that she had no notice or knowledge of the meeting at which Davies was appointed; no knowledge of his appointment or of his subsequent resignation. Had the resolution been confined to the appointment of inspectors, we should have been able, by reference to the statute, to have learned what duties and obligations Davies assumed in accepting that office, but the resolution passed by the creditors purports to add something to the duties of that office, that is, that the inspectors shall have "power in conjunction with the assignee to realise upon the assets to the best advantage." There is nothing in this statute which vests the property in the inspectors, and empowers them to dispose thereof, or even to advise in reference thereto, excepting in fixing the remuneration

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of the assignee (see secs. 31, 32, and 33); and I do not find anything in the Act other than what may be inferred from secs. 17 and 18 that gave the creditors the right to control the disposition of the estate. While I, therefore, doubt the right of the creditors to delegate their power to give directions, and consequently doubt that the resolution, in so far as it purports to delegate that authority, bound Davies to act or empowered him to act for the creditors, not party thereto, so as to prevent Davies from withdrawing from the relationship, duties, or obligations voluntarily assumed without the knowledge and consent of these creditors, who were not parties to the resolution, yet I do not propose to rest my opinion on such an interpretation of the statute and resolution, but to assume for the purpose of my opinion that a majority of the creditors present at the meeting had, under sec. 20 of the Act, power to bind those not present, and that Davies, in accepting the office of inspector, accepted it with the powers added by the words of the resolution so as to impose upon him, in favour of the plaintiff, who was not present, as well as in favour of the creditors who were present, the limitations and fetters that attach to the establishment of the fiduciary or confidential relationship of adviser to Clarkson.

For the reasons stated in his opinion, I agree with the conclusion of my Lord the Chief Justice that the resolution did not place the inspectors so appointed in the position of express trustees; I am also of opinion that the resolution at most created between the inspectors and the creditors a fiduciary relationship, the duties and obligations of which are defined by the words of the resolution and the Act, and in this regard it is necessary to keep in mind the great difference between the Insolvent Act of 1875, 38 Vict. ch. 16, secs. 35, 36 (Canada), and amendments, 39 Vict. ch. 30 and 40 Vict. ch. 41, and the Act under which these inspectors were appointed, R.S.O. 1897, ch. 147, secs. 17 and 18, from a perusal of which it will be seen that there are no such duties and disabilities imposed by the Act of 1897 as were imposed by the Act of 1875, and it is necessary for us not to confound in our minds the relationship and disabilities established and imposed by one Act with those established under the other. To my mind, the difference is material, and must affect the application to be made of decisions under the former

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Act or under an Act of like import, such as the English Insolvency Act, or the Acts and procedure which were under consideration in the cases collected in White & Tudor's Equity Cases, 7th ed., p. 746, as part of the discussion of the principles followed in *Fox* v. *Mackreth* (1788), 2 Bro. C.C. 400. In arriving at a conclusion as to just what obligations and disabilities were intended by the Act of 1897 to be imposed upon the inspectors, it is worthy of notice that the Act, by secs. 31, 32, and 33, does impose certain duties and disabilities upon inspectors similar to those imposed by sec. 43 of the Insolvent Act of 1875.

Under the circumstances, I am of the opinion that any limitation, or, as put in *Allcard* v. *Skinner* (1887), 36 Ch.D. 145, 190, "the fetter" (if any) "placed upon the conscience" of Davies, was placed upon him, not by the statute, but by the words of the resolution, under which he voluntarily undertook to perform for the creditors certain duties, thus establishing, through contract with them, a confidential relationship with Clarkson, which confidence he was not entitled to abuse, and out of which confidential relationship he could not take a benefit without the knowledge and consent of those whose confidence he might take advantage of and abuse, given after a full and fair disclosure of all circumstances material to be known, in order that those who were to act upon his advice might form an opinion upon which to act. I do not agree with the contention of the respondent that the resolution placed a limitation or disability upon the right and power of the assignee and creditors to deal with the inspectors. They were free to do so if they chose. The fetter or limitation attaching to a fiduciary relationship is placed upon the person who receives or is in a position to receive and abuse confidence, rather than upon the person whose confidence may be abused. As pointed out in the case of *In re Coomber*, [1911] 1 Ch. 723, at pp. 728 and 730, there are degrees of fiduciary relationship; all fiduciary relationships do not place upon the person in the possession of confidence, the same limitation or burden; but, as pointed out by Lord Chancellor Brougham in *Hunter* v. *Atkins* (1834), 3 Myl. & K. 113, the Court is more watchfully awake and suspicious in some confidential transactions and in some confidential relationships than in others; that, when the fiduciary relationship in which the parties stand to each other is of a sort less

known and defined, the jealousy of the Court is diminished, and the conscience of the Court is more easily satisfied as to the righteousness of the transaction.

A perusal of many authorities satisfies me that, while it has been established that certain kinds and qualities of evidence are required to be given in certain kinds of fiduciary relationships—for instance, in a solicitor and client transaction, it is necessary to prove independent advice: *Liles* v. *Terry*, [1895] 2 Q.B. 679; yet that each case must be decided on its own facts, and that the Court is not bound by any hard and fast rule as to the quantity and nature of the evidence required, the jurisdiction of the Court to intervene and give relief being founded on the principle of correcting abuses of confidence; and the question is, is the Court satisfied that there has not been such an abuse?

The respondent's counsel referred to and relied upon *Tate* v. *Williamson*, L.R. 2 Ch. 55, as illustrating Davies' position, and the legal duties, obligations, and disabilities attaching thereto.

In that case, Tate, a young and inexperienced man who had lately attained his majority and come into possession of his estate, on being pressed for the payment of his college-debts, wrote to his great uncle for assistance and advice; the uncle deputed Williamson to see Tate on the subject. Williamson met Tate by appointment, and at the interview Tate refused to allow an attempt to compromise the debts, and said he would sell his interest in the estate, upon which Williamson offered him £7,000 for it. Tate next day accepted the offer. Before an agreement had been signed, Williamson obtained a valuation of Tate's half-interest in the property at £10,000. The sale was completed without this valuation having been communicated to Tate. It was held that Williamson stood in a fiduciary relationship to Tate, which made it his duty to communicate the valuation to Tate, and, as he had not done so, the transaction must be set aside. In that case it was urged that Williamson, when he made the offer to Tate, put an end to the fiduciary relationship existing between them, so that Tate was no longer entitled to rely upon Williamson's advice, he having assumed, to the knowledge of Tate, the rôle of purchaser. This contention was not given effect to, but I do not take that case as deciding that, if Williamson had expressly said to Tate at the time he made the offer, "Now, I will

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not advise you further in this transaction," he would not have been relieved from disclosing information or a valuation obtained *after* he had given that notice, or that, before that notice would have been effective, it would be necessary to notify Tate's uncle.

So, in the case at bar, I do not think it can be successfully argued that, after Davies had put himself at arm's length with Clarkson and his co-inspectors, who were the persons to be advised and assisted by him, and whose confidence he might take advantage of, he would be obliged to disclose to them any information he afterwards acquired. If Davies' resignation of the 3rd September, 1901, was in fact acted upon by Davies and the inspectors, and Davies had not, prior to that date, acquired any special knowledge or information in respect of the property, and he, Clarkson, and the other inspectors all honestly believed that the valuation put upon the property by himself, by Clarkson, by Stewart, and by Galley, represented, in the fall of 1901, the then selling value of the property, the plaintiff's action should on the facts fail, particularly so where the transaction was confirmed, ratified, and approved by the creditors at a meeting called on the 18th June, 1902, for that purpose, and at which all questions were to be settled by a majority voting under sec. 20 of the Act.

After careful study of the evidence with the finding of the learned trial Judge, I have arrived at the opinion that Davies' resignation of the 3rd September, 1901, was an honest and *bona fide* document; that it was received and acted upon by all parties; that Davies, if he ever had, prior to the delivery of the deed releasing the equity of redemption, any special information as to the value of the property, had not such information prior to the 3rd September, 1901; and that the valuations of Clarkson, Galley, and Stewart, on which Clarkson and the inspectors acted, and on which the creditors confirmed the transaction, represented accurately the then selling value of the property.

In arriving at these conclusions of fact, I am not unmindful of the authorities which require an appellate tribunal to be cautious in undertaking to differ from the trial Judge on a question of fact; but this case is peculiar in that the action proceeded to trial with all its preparations and preliminaries in the nature of pleadings and discovery, the hearing was commenced and continued for eight days, during which time oral testimony taking up 690

pages of a typewritten record was offered and heard, and during all of which time, and in the consideration of all of which evidence, not only the trial Judge, but all the parties to the action and their counsel and witnesses, were acting on the erroneous idea that the only written record of Davies' resignation was to be found in a letter dated the 3rd July, 1902—exhibit No. 56—and it was not until the case came on for argument before the trial Judge on the 20th November that an attempt was made to correct this erroneous impression by putting in evidence the documents found by Mr. Clarkson after the hearing had been concluded in May, and among which documents is the following correspondence:—

"Toronto, 31 July, 1901.

"E. R. C. Clarkson, Esqre., Assignee, Estate of Taylor Bros.,
"Toronto.

"Dear Sir: We are instructed by Mr. Robert Davies to advise you that he desires to retire from the position of inspector of above estate, to which he was appointed at the meeting of creditors.

"We presume it is not necessary to send a more formal resignation.

"Yours truly,
"Ritchie Ludwig & Ballantyne."

"Toronto, Sept. 3rd, 1901.

"E. R. C. Clarkson, Esq., Toronto.
"Dear Sir: "*Taylor Bros.*

"I beg to resign my position as inspector of the estate.

"Yours truly,
"Robert Davies."

"F. Denton, Esq., K.C., Toronto.
"Dear Sir: *Re Taylor.*

"Mr. Noel Marshall has asked that he be appointed an inspector of this estate in the place of Mr. Davies, who has resigned, and I would be obliged to know if his acting as such meets with your approval.

"It is proposed to hold a meeting next week.

"Yours truly,
"E. R. C. Clarkson."

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"Toronto, 10 September, 1901.

"E. R. C. Clarkson, Esq., 33 Scott Street, Toronto.

"Dear Sir:— *Taylor Estate.*

"Referring to your letter of the 6th of September in reference to the appointment of Mr. Noel Marshall as inspector of the estate in the place of Mr. Davies, whose resignation I understand is in your hands, I would prefer withholding any opinion on the subject until it is discussed at the meeting which you propose holding. I have no personal objection to Mr. Marshall, whose business capacity would, no doubt, render him a valuable adviser to the estate, but I am not sure it is necessary to increase the number of inspectors already acting.

"I note what you say in reference to continuing the running of the mill till Saturday. I shall take an early opportunity of seeing you for the purpose of arranging as to what the estate should pay for the use of the mill etc.

"I am, yours truly, "J. A. Worrell."

"Toronto, 24 April, 1902.

"E. R. C. Clarkson, Esq., Assignee of Estate of Taylor Bros., Toronto.

"Dear Sir: Pursuant to the arrangement made with you, I beg to notify you that, in consideration of your having given me a quit-claim deed of the property comprised in the Don Valley Brick Works, I have agreed to waive my right to rank on the above estate for $45,000 of the claim of $100,000 proved by me in respect of the mortgage which I hold from Taylor Brothers. The sum of $45,000 is the valuation which has been made of the said property.

"I also agree to accept a quit-claim deed in respect of the nine houses on the Don Mills road in full of my claim on a mortgage covering said property, and will not prove any claim in respect thereto.

"Yours truly,

"Robt. Davies."

Another noteworthy incident in connection with the evidence disclosed by this exhibit, is that, notwithstanding that it will be

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seen from the proceedings commencing on the 20th day of November that this exhibit was then put before the learned trial Judge, and an unsuccessful attempt was made to explain Mr. Clarkson's evidence in the light of the discovery of these letters and documents, yet the learned trial Judge entirely failed to appreciate the import and meaning of these letters or forgot their existence and formed his conclusions, prepared an opinion and handed it out to the parties, under the misapprehension that no such documents existed. See the report of the learned trial Judge's opinion, 39 O.L.R. 205, and his supplemental opinion at p. 241.

From a perusal of this supplemental opinion, it appears that the learned trial Judge, on discovering before the formal judgment was signed that he had made this mistake, recalled his opinion and approached the reconsideration thereof and the consideration of this exhibit, as he puts it, "with a view of determining whether or not it (exhibit 67) contains anything that would make it proper for me to alter or modify the conclusions I have already expressed."

With all due respect to the learned trial Judge, that does not seem to have been the question before him, or to be the way in which he should have approached the reconsideration of the facts of the case. The material in exhibit 67 should have been present in the mind of the learned trial Judge in reading the evidence and the other exhibits so as to enable him to form a proper conclusion thereon, and it is not just to the defendants to read the documents in exhibit 67 to see whether or not they should change an opinion already formed.

It seems to me that it must be considered a different task that one undertakes when, with an open mind, he approaches a question or the consideration of facts for the purpose of forming an opinion, from the task undertaken when, with a fixed and settled opinion, one approaches and reads evidence for the purpose of seeing whether or not an opinion already formed should be changed. I cannot help thinking that, when the trial Judge came to consider this supplementary evidence, his view was coloured and materially affected by the opinion he had already formed and expressed, and for these reasons his *opinion* is not entitled to the same weight that it would have been entitled to had this exhibit been present to his mind from the commencement.

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A reference to pp. 225 and 226 of the report of the original opinion of the learned trial Judge shews how he set at naught the testimony of Mr. Owens (p. 661 and following of the evidence) that, according to his recollection, Davies had, early in 1901, refused to act. The finding and production of this exhibit 67 not only corroborated Owens' recollection, but also is a striking corroboration of the opinion of Clarkson given in face of the production of the letter of the 3rd July, 1902, only. At the time this evidence was given, it seemed to be contrary to the fact as disclosed by exhibit 56; and I can, in that view, understand why the evidence was then lightly regarded; but I cannot help thinking that, had the trial Judge, when hearing and considering this evidence, known of exhibit 67, he would have accepted the evidence of Owens and Clarkson, and, having done so, he would have had no difficulty in arriving at the conclusion that Davies did not in fact act as inspector after September, 1901. For that reason, I quote from Clarkson's evidence (p. 549):—

"Q. Did Mr. Davies continue as an inspector throughout this matter? A. When it became apparent there might be a divergence of interests, I told him that he had to resign. I told Mr. Davies that he had to resign his position.

"Q. What did he do? A. He consented to do it.

"Q. Do you know when that was? A. I can't place the time for that. I have a letter of mine to Mr. Davies and his reply. Shall I refer to them?

"Q. Yes, you might refer to them now. We will put them in now. I believe these are copies you obtained (produced). A. Shall I read them?

"Q. Yes, read them and give the dates. A. Copy of letter from letter-book 59, p. 43, dated June 30th, 1902, in which I write to 'Robert Davies, Esquire, Toronto. Re Taylor Brothers. Kindly sign the enclosed memo. and return it to me and oblige.' To which he replied on July 3rd, 1902: 'E. R. C. Clarkson, Esquire. Re Taylor Estate. As requested in your favour of the 30th ultimo, I have duly signed and beg to return herewith my resignation as inspector of the above estate.' Exhibit 56: copy letter Clarkson to Davies, June 30th, '02. Letter Davies to Clarkson, July 3, '02, in reply.

"Q. Can you say when you had the verbal conversation with

him with reference to this correspondence you have just read, or with reference to this meeting of April, 1902? Can you fix the time at all? A. I can't—it is a long time ago. When that question was first considered by me—

"Mr. Nesbitt: Don't argue about it. If you cannot answer—

"Witness: I can't.

"Mr. Tilley: Q. Can you help us at all with regard to it? A. I can't go any further than to say I thought there might be a divergence of interests, and I told him he had to resign. It is an invariable custom.

"Mr. Nesbitt: Don't say that.

"Mr. Tilley: I think I can ask him that. It is a matter in respect of which he must have a practice.

"Q. Or had you any practice?

"His Lordship: Does it make any difference what the practice is?

"Mr. Tilley: Unless he can say he followed the usual practice.

"His Lordship: Does that help?

"Mr. Tilley: I want to throw the best light I can on an old transaction.

"His Lordship: I will not shut it out.

"Mr. Tilley: Q. Can you say whether you had any practice you followed:

"His Lordship: Did he follow the usual practice?

"Mr. Tilley: Q. Did you follow your usual practice?

"A. Yes. Never to allow an inspector to barter with an estate.

"Mr. Nesbitt: That doesn't help.

"His Lordship: He was just asked if he followed his usual practice.

"Mr. Nesbitt: That should be stricken out.

"Mr. Tilley: I think I can ask what the practice was.

"His Lordship: The latter part of the answer will be stricken out.

"Mr. Tilley: The answer is not very helpful unless I ask the practice. It cannot do any harm.

"Mr. Nesbitt: It may do harm.

"His Lordship: I do not think you should go that far.

"Mr. Tilley: I submit, my Lord, it cannot do any harm to

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put it on the record. If it is not evidence, your Lordship will pay no attention to it. We should have it in. Some other Court may think it is proper.

"His Lordship: Have what in?

"Mr. Tilley: As to whether he has, having regard to the number of occasions when these things come up, a practice with regard to it—what the practice is, and whether he followed it in this case.

"His Lordship: If he said he followed the usual practice, that would imply he had a practice.

"Mr. Tilley: Surely we ought to know what the practice is, whether it is to let the inspectors deal with it or not.

"Mr. Nesbitt: If Mr. Tilley wants it, I won't object, if Mr. Clarkson desires to make that statement and nothing more.

"His Lordship: You have got it already.

"Mr. Nesbitt: I don't think it is evidence, but if Mr. Clarkson desires to make the statement—

"Witness: It is the invariable rule not to permit an inspector to have any traffic with the assets of an estate—always has been."

And from Mr. Owens' evidence at p. 661:—

"His Lordship: Q. Tell us anything that occurred when you two inspectors were discussing the matter? A. Mr. Davies and I never discussed it as inspectors. As I understood, Mr. Davies resigned his inspectorship—

"His Lordship: We have the evidence of that.

"Mr. Nesbitt: He didn't know about it.

"Mr. Tilley: Q. Did you know about it? A. Well, what Mr. Davies told me.

"Q. When did he tell you? A. Just about the time. He came in and said he refused to act.

"Mr. Nesbitt: I object. This is all in writing, the resignation and everything else.

"Mr. Tilley: There may have been a verbal resignation.

"His Lordship: The letters shew there was not. You can turn up the correspondence.

"Mr. Tilley: I cannot dispute the letter, my Lord. That was at the end of June.

"His Lordship: He couldn't resign an office if he didn't hold it.

"Mr. Tilley: That may be true as a matter of law.

"His Lordship: There was a letter two or three days before asking him to resign.

"Mr. Tilley: That may be so as a matter of law.

"Mr. Nesbitt: That would be on in 1902.

"Q. Did you have any conversation with Mr. Davies in which he said anything to you as to whether he was an inspector or not?

"His Lordship: Wait, Mr. Owens.

"Mr. Nesbitt: I say that it is not evidence.

"His Lordship: I will not admit it.

"Mr. Tilley: Q. Can you fix the time when you had the conversation? A. No, I can't.

"His Lordship: I do not know why he should fix the time, when I have ruled he cannot give the conversation.

"Mr. Nesbitt: He can't remember.

"Mr. Tilley: I want to follow it up. If it is ruled out——

"His Lordship: He says he cannot fix the time.

"Mr. Tilley: Q. Can you fix the time approximately? Can you fix it by any event in the course of winding up this business? A. It was early after the assignment.

"His Lordship: You can go on with that if you like, but I will not in the end let you give the conversation.

"Mr. Tilley: I just want to protect myself. Your Lordship appreciates that.

"His Lordship: You can go on with that branch of it on the understanding that I will not allow you to go any further.

"Mr. Tilley: Q. Can you fix the month? A. No, I can't.

"Q. How long after the assignment? A. Your Lordship has ruled I may answer it?

"His Lordship: You may answer as to how long after, if you know.

"Witness: It would be within a few months. That's as near as I can come to it.

"Mr. Tilley: Q. That is as near as you can fix it? A. Yes.

"Mr. Tilley: Your Lordship rules I cannot ask what the conversation was?

"His Lordship: About his resigning—no."

The supplemental opinion of the trial Judge gave the resignation of the 3rd September some effect, but not the effect claimed for it by either of the parties to the litigation. In his original opinion he gave it none. There he says (39 O.L.R. at p. 226):—

"He (Davies) knew he ought not to act, but he did act and

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continued to act notwithstanding; and it is significant, and important to note, that, although Mr. Davies was not at all the meetings, he was generally, if not invariably, present and voting whenever anything was being done which personally affected him."

Couple with that the further statement, at p. 230:—

"I cannot believe that Mr. Davies continued to make outlays and work this property for a year without knowing the character of the business, the approximate saleable value of the property and business, and that he was obtaining it all at a sum far below its saleable value in open market."

In his supplemental opinion, after stating that, if Mr. Davies had clearly cut loose from his position after the 3rd September, 1901, he (the learned Judge) would have an entirely different question to deal with from the one he is dealing with, he says (p. 243):—

"He could not very well, at the same time, be an inspector and not an inspector, or for the purposes of the Worrell deed and not in the matter of purchasing and obtaining a part of the estate for himself. It seems to me that the attendance of Mr. Noel Marshall was for a temporary purpose only; and in the meantime Mr. Davies made all the arrangements for the deed, which, until Mr. Worrell intervened, were thought by himself, his solicitors, and Mr. Clarkson, to be effective without more, and then came back. He joined in the meeting of the 5th July, at which matters in his interest were determined upon, and, having completed the bargain for the purchase of the property in question on or before the 10th February, 1902, for a consideration not stated in the deed, he resumed his duties as an inspector and voted upon the amount he was to pay for it at the meeting of inspectors on the 22nd April thereafter.

"I cannot find ground for the argument that he is not recorded as an inspector attending this meeting."

Thereafter the learned trial Judge proceeds to discuss the meaning and effect of the minutes of the meeting of the 22nd April, and also the meaning and effect to be attached to Davies joining in the Worrell deed, and from these he concludes that Mr. Davies came back and acted and continued to act as an inspector, and never rid himself of the duties and obligations of his

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office. To adopt the latter finding, it seems to me necessary to set aside the evidence of Owens and Clarkson, and to conclude that Clarkson, fully alive to the proposition that, if not illegal, it was at least opposed to his established practice, for Davies, while acting as inspector, to negotiate and deal with him, his co-inspectors, and the creditors, not only allowed Davies to attend the meeting of the 22nd April as inspector, but allowed him to continue so to act until after the whole transaction was approved at the creditors' meeting of the 18th June, 1902; and then, for the purpose of making evidence, wrote for and obtained the resignation of the 3rd July, 1902.

I cannot accept such a view, which is based on inferences drawn from the fact that Davies is recorded as having attended the inspectors' meeting of the 22nd April, and executed the Worrell deed. The appellants' counsel urged upon us the view that, if we accept the minutes of the meeting of the 22nd April as shewing that Davies attended that meeting as inspector, the minutes are of themselves destructive of the learned Judge's finding that Davies resigned for the temporary purpose of making an arrangement for the acquiring of this property, because it was at that meeting that the proposed arrangement was approved of by the inspectors. Counsel urges the view that Davies was at that meeting *not* as inspector, but was there as a person entitled to deal with the assignee and the other inspectors for the property of the insolvent estate. This seems to me to be the reasonable and proper explanation of these minutes. Mr. Clarkson was himself experienced in these matters, and shews by his evidence that it was an established practice of his not to deal with an inspector in reference to an insolvent estate in his hands: there was no want of legal assistance; if there was anything to complain of, it was because there were too many lawyers on the board of inspectors. Mr. Worrell, Mr. Denton, and Mr. Owens were all lawyers. They, along with the assignee, are given a certificate of character by the learned trial Judge; and I think we should infer that they knew their business and attended to it faithfully, intelligently, and honestly, and did not improperly ask Davies to make a bid for part of the trust estate, rather than the contrary, and that no such finding should be made against them where it is founded on interpretation and construction of a record in the drawing and

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preparation of which the inspectors and Davies are not shewn to have taken any part.

That leaves to be dealt with the signing by Mr. Davies of the Worrell deed (exhibit 9). Though the minutes of the meeting of the 18th June are not before us to shew just who attended that meeting of creditors, or what deeds were approved or what took place there, I think it must be taken as a fact that both the Worrell and Davies deeds were approved of at that meeting, and executed subsequent to that date. The affidavit proving Davies' execution of the Worrell deed was made on the 23rd July, 1902. He would therefore appear to have signed this deed knowing that he had resigned not only in 1901, but after he signed the further document of the 3rd July, 1902 (exhibit 56).

The obtaining of this document is a circumstance hard to explain, and I am sorry Mr. Clarkson was not permitted to make any explanation he desired. I feel that I should have been assisted thereby. Counsel for the appellants suggested that, on Mr. Clarkson being asked to make, as a matter of title, a statutory declaration of Davies' resignation, he did not find Davies' resignation on his file, and, forgetting not the fact but the prior record, wrote for and obtained this new record of a fact, and that Mr. Worrell secured Davies' execution of his deed as a formality in order that the record of the title might appear to be complete. These may not be satisfying explanations, but are possible explanations. There may be others now forgotten, but at this late date we should, I think, endeavour to find in favour of regularity and legality instead of irregularity or wrong-doing, and also to endeavour to find that these experienced and competent professional gentlemen acted legally instead of illegally.

In discussing the attitude which the Court ought to adopt when investigating transactions after a long lapse of time, Lord Parker in *Vatcher* v. *Paull*, [1915] A.C. 372, at p. 382, approves of the position taken in *Re Postlethwaite* (1888), 60 L.T.R. 514, 520, by Lord Justice Bowen, who there says:—

"It seems to me that we ought to bring to the consideration of such a case this feeling, that if the correspondence and facts are capable of a reasonable explanation consistent with the validity of the transaction, one ought not to draw in the dark inferences which would really be guesses. So long as a reasonable explana-

tion is possible we ought not to draw inferences in favour of the invalidity of the transaction. The general presumption which the law makes is in favour of the good faith and validity of transactions, and not against them, and that presumption ought to acquire, and does acquire, weight from the length of time during which a transaction has subsisted. Having regard to the date of the transaction and the death of the parties, I think we should be acting on guesses, and not upon legal grounds, if we were to displace this transaction now. Having said that, I do not feel that it is the least necessary for me to embark in surmises as to what the exact explanation of this transaction is. I think it is consistent with the facts that there might have been some explanation if these gentlemen had been alive, the sincerity and good faith of which would have been as clear and transparent as noonday; but the misfortune caused by the length of time which has elapsed and the death of these gentlemen prevents the transaction being so lucid now as it otherwise would have been."

The wisdom of this rule is illustrated in the case at bar by the fact that, had it not been for the accidental finding of exhibit 67, the trial Judge and this Court would have been disposing of the rights of Davies, who was not able to defend himself or to instruct counsel, on the theory that Davies had never endeavoured to rid himself of his fiduciary relationship, but without doubt actually continued in his office of inspector under the resolution of the creditors down to and including the making and approving of the transaction now attacked.

The conclusion being reached that Davies resigned from his office on or before the 3rd September, 1901, it is necessary to consider whether or not there is any evidence from which it may be or ought to be inferred that he had, prior to that time, acquired any information that his co-inspectors, the assignee, or the creditors did not have, which would enable them to form an opinion as to the value to be put upon the property for the purposes of realisation. It is suggested, in the judgment appealed from, that it was the duty, not only of the assignee but of the inspectors, to make extensive inquiries on behalf of the creditors to satisfy themselves as to the value of this property and its potentialities, and that, had these investigations been made, these potentialities

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would have been discovered. I cannot accept that view or the learned trial Judge's finding that the incompetent management of William Taylor was the cause of Taylor Brothers' failure, and that investigation was bound to demonstrate the brick business as a profitable venture. I fail to see how it could be so demonstrated unless the business was carried on for the purpose of making a test. It is agreed that all parties knew of the brick-clay deposit; it was exposed to view, and had been worked for years; but, so far as anybody could judge from experience or the books, it could not be worked so as to be made commercially profitable, and I cannot think that these debtors, by making a voluntary assignment to Clarkson for the benefit of their creditors, for the purpose expressed in the deed, i.e., sale and conversion into money, imposed upon Clarkson or their creditors the duty of making any special test of the property for the purpose of acquiring any special knowledge as to its potentialities or commercial value. In the first place, the trust is for sale and realisation; in the next place, these creditors and the assignee are not put in funds to enable them to carry on the business for the purpose of making a test or otherwise; if they were bound to make the investigation, they were bound to make the necessary expenditures; so that, in my opinion, the inspectors as inspectors, the creditors as creditors, and Clarkson as assignee, were not bound to carry on the business for the purpose of making a test as to the commercial possibilities of the undertaking; but Davies, as mortgagee to the extent of $100,000, and, according to his own statement to Clarkson, if that is to be accepted as evidence, a mortgagee of the property for a great deal more than he thought it was worth, was under a necessity, if he wanted to save his mortgage moneys, of making a further investigation and expenditure; and the question is, did he, in protecting his security, acquire any special information before he resigned?

The evidence shews that he entered into possession almost immediately after the assignment on the 14th June, 1901, and that he retained the managers that Taylor had employed; and the plaintiff sought at the trial to shew, by the evidence of the assistant-manager, Burgess, that Davies, almost immediately after entering into possession, made large expenditures on the property in connection with improving his facilities for making bricks and

handling the same. The first recollection of this witness was that these expenditures had been made in 1901; it is on the inference drawn from these expenditures that the learned trial Judge comes to the conclusion that Davies must have known, before he got his deed, of the potential value of the property. The evidence of Burgess again illustrates the danger and care required in investigating and opening up an old transaction; for it will be seen from a perusal of his evidence that he was at first quite fixed in his opinion that these expenditures had been made before Davies got his deed, and apparently early in 1901; but, on the Court being adjourned, and he being given the opportunity of consulting some old personal records of his own, he found that, instead of being made in 1901, they were made in 1902 and 1903 and subsequently. His explanation and correction of his previous evidence will be found at p. 254 of the transcript of evidence, and seems to me to destroy the foundation of fact on which the learned trial Judge relies for his conclusion that Davies knew the potential value of this property before he resigned.

It must not be overlooked that Mr. Clarkson tells us that Mr. Davies assured him that he was quite disturbed at being obliged to take over this brick-yard; that he sought Clarkson's advice to know how to set about protecting himself and his security.

Mr. Clarkson claims to have been impressed with Mr. Davies' statements and attitude, and it seems to me that to adopt the finding of the trial Judge it would be necessary either to disbelieve Clarkson or to conclude that Davies was deliberately deceiving him.

While I regret to differ from the trial Judge on the proper inference of fact to be drawn from the evidence, I cannot avoid satisfaction in acquitting Clarkson and Davies of wrong-doing, and Worrell, Denton, and Owens of suggestions of carelessness and incompetency in looking after the business of their clients.

The conclusion having been reached that the plaintiff has not made out affirmatively that Davies had knowledge which he should have communicated, it becomes necessary to consider whether or not the defendants have satisfied the conscience of the Court as to the righteousness of the transaction, and in that connection to consider whether or not the Court should insist on the same satisfactory evidence now that it would have insisted upon had the transaction been attacked promptly.

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The fetter attached to the conscience of the person in the position of confidence is not, it seems to me, a rule of law fixing the rights of the parties, but is rather a rule of evidence to be kept in the mind of the Court in arriving at a conclusion of fact in order thereby to adjudicate on the rights of the parties, and, being a rule of evidence only, is not of the same force and effect in every fiduciary relationship and in all circumstances of confidence reposed and abused, but is to be applied by the Court to the evidence and circumstances in each case for the purpose of arriving at a conclusion as to whether or not the person charged has, under all the circumstances of that case, submitted to the Court evidence from which it is or should be reasonably satisfied of the righteousness of the transaction.

But it is also a rule of evidence that "lapse of time is a circumstance which ought to be taken into account and ought largely to influence our estimate of and the conclusions we come to upon the facts of the case:" *per* Lord Davey in *Watt* v. *Assets Co.*, [1905] A.C. 317, 334. The Earl of Halsbury, L.C., at p. 333 of the same report, points out "the impossibility . . . of disentangling what could have been very easily disentangled and ascertained if an earlier investigation had taken place;" and he says "that at this distance of time I shall make every intendment in favour of that having been honestly done which purported to be done . . . they (the complainants) have lain by upon their supposed rights all this time, during which time witnesses have died and the means of explanation have disappeared also to an extent which, to my mind, renders it impossible, or at all events extremely inexpedient as a matter of law and administration, to allow these things to be ripped up at this distance of time, when both the opportunities of explanation have gone by and when witnesses have passed away." See also *Re Postlethwaite*, *supra*.

The position and character of the parties to the transaction attacked is also a consideration to be kept in mind in arriving at a conclusion as to whether or not the Court is satisfied as to the righteousness of the transaction: *Hunter* v. *Atkins* (*supra*), 3 Myl. & K. at p. 133.

Therefore, it will not do to come to a conclusion unless we keep all these rules in mind when considering the facts and cir-

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cumstances of this case. If we do keep these rules in mind, and recall that this transaction took place in 1901 and 1902, and was not attacked until 1914, after Davies had become mentally incapable; that these debtors made the assignment to Clarkson voluntarily because they had been unable to make a financial success of their venture; that they did not ask an extension of time or endeavour to make a compromise, but abandoned the property to their creditors and remained quiet and satisfied for many years, knowing that their creditors had only received a dividend of about two cents on the dollar; that the plaintiff is the wife of the surviving partner of the firm of Taylor Brothers, and administrator and beneficiary under the will of another partner; that Davies and Taylor Brothers were brothers-in-law; that Worrell represented Mrs. Davies and the other female members of the Taylor family, and as trustee for them he was the largest creditor of the debtors; that Denton was the legal adviser of the head of the insolvent firm; that Owens was the solicitor for the firm; that Mr. Carrington Smith was the banker of the firm; that David Smith was not only a creditor but a brother-in-law of the Taylors; that Noel Marshall represented one of the largest unsecured creditors; that Clarkson was an honest, competent, and experienced assignee, fully alive to his duties and obligations not only as assignee but as attorney in fact for the debtors under powers of attorney contained in the trust deed (exhibit 50); that Clarkson valued the property at $35,000; that Stewart and Galley, two favourably known, experienced, and independent valuators, valued the property at $45,000; that Owens says he kept William Taylor informed of what was being done; that Owens' evidence in this respect is corroborated in many ways, but to my mind particularly by the declaration made by Taylor in September, 1902, before Owens, setting out what property was affected by the assignment, which declaration could only have been made to permit the registering of the assignment (exhibit 3), and thereby complete the registry office record of the Davies and Worrell titles; that the plaintiff, through her husband, as late as 1909, bought part of the adjoining property for $14,000, in the common belief that the brick-clay thereon was of the same character as that on the property in question (see William Taylor's evidence, pp. 89 to 94, the plaintiff's evidence, pp. 370, 371);

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that it was not until the company formed by the plaintiff and her husband had made extensive expenditures and tests that it was discovered that the deposit on the property in question was of unique character as being free from lime; that the property in question took on its special value by reason of not only the growth of the city of Toronto, but by reason of the demand for bricks following Toronto's great fire that occurred in 1904 (see exhibit 45), and by reason of the fact that the clay was of this unique character; that these facts were first demonstrated in the Davies-Canadian Northern arbitration; and that it was not until that award was affirmed in the Privy Council that the plaintiff, through her husband, began in 1914 to investigate in order to pick a hole in Davies' title; that, on a careful reading of Burgess's evidence, it is plain that Davies' large expenditures and extensions of operations on the property in question were not made prior to his resignation in 1901 but subsequent thereto; that, out of the total unsecured liabilities of the insolvent firm, amounting to $228,636.74, the inspectors and creditors they appeared for in the proceedings represented $159,613.51; that the notice of the 7th June, 1902, calling the meeting of creditors for the 18th June, was sent to all creditors; that a number of them appeared at the meeting of the 18th June and approved of the transaction now attacked; that all the creditors, including the plaintiff, received and accepted their dividend of about two cents on the dollar; that the plaintiff and her husband, at the time of Davies taking possession, and ever since, have resided side by side with Davies and his family in a residence overlooking the brick-yards, and could not help but see and know of Davies' possession and of the extensive operations there being carried on, and yet made no complaint or investigation into this transaction until after the affirmation of the Canadian Northern award in the Privy Council—I think that the proper conclusion is, that, no matter what potential value the property may have had at the time of the transaction, those potentialities were not known to Davies or to any of the other parties to the transaction, and that we should accept as honest and *bonâ fide* the representations made by Davies to Clarkson at the time as to his concern in reference to his money lent and his opinion of the value of his security.

In arriving at the conclusion that the defendants have thus

made out sufficient to satisfy any burden of proof put upon Davies by reason of his having at one time occupied a fiduciary relationship in reference to the property, I am not treating the lapse of time as being in itself a bar, but as being merely a circumstance which should be kept in mind in considering and drawing inferences from the other facts and circumstances of the case. It is for these reasons that I am of opinion that, if Davies did, by assuming the office of inspector under the peculiar wording of the resolution, enter into a confidential relationship with the plaintiff—which I doubt, because she was not a party to the resolution, and was not to be advised by him—he, by his resignation of the 3rd September, 1901, in the cirsumstances of the case, terminated that relationship; that Davies did not at that time possess any information in reference to the property not known to or which would aid the assignee and inspectors or creditors in arriving at a valuation; that $45,000 was the fair market value of the property; and that consequently the plaintiff's action fails on the merits.

That it may not be thought that I have overlooked and not considered the argument pressed by the respondent's counsel, that it mattered not what Davies did in the way of attempting to resign, he could not resign except on notice to each and every creditor, and unless his resignation was assented to, not by the majority of the creditors voting under sec. 20 of the Act, but by each and every creditor, I desire to say that such a proposition has caused me considerable thought and anxiety, and that I have read and considered the authorities mentioned in counsel's written memoranda, and many other authorities, including *Nugent* v. *Nugent*, [1908] 1 Ch. 546; *In re Canada Woollen Mills Limited*, 9 O.L.R. 367; *Ex p. Lacey*, 6 Ves. 625; but it seems to me that all these cases are different from the case at bar.

In the *Nugent* and *Canada Woollen Mills* cases, the receiver and the inspector were appointed by order of the Court, and were compelled to act until they were relieved by order of the Court; the *Lacey* and other cases referred to by counsel were express trustees or directors' cases, where the title or control of the property was vested in the trustees or directors.

In the case at bar, there was no title vested in Davies. He was not appointed by any superior authority; and it is not seriously contended that, if he had notified *all* the creditors and Clarkson,

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they could have held him in office against his will. Davies was not to advise these creditors; he was to advise for them; only a certain number of them appointed him; and the plaintiff herself said that she neither knew of his appointment nor of his resignation. If we were to carry the argument of the plaintiff's counsel to its logical conclusion, it would mean that, if Davies had failed to get the consent of a creditor of Taylor Brothers, who was only creditor to the extent of say $10, and that he had the unanimous consent of all the other creditors, yet that he remained in office and in a fiduciary relationship with and for the benefit of not only the creditor for $10 who had not assented, but with and for the benefit of all creditors, the debtors, and the assignee, who had assented. This seems to me to be doing away with the foundation for the rule of which the plaintiff seeks in this case to take the benefit. Confidence reposed and confidence abused. If confidence was not extended and received, it could not be abused: *Smith* v. *Kay* (1859), 7 H.L.C. 750.

Davies' position with reference to the creditors seems to me to have been essentially different to his position with reference to Clarkson and his co-inspectors—his relationship to the creditors being contractual rather than confidential—his relationship to the assignee and inspectors being on the other hand confidential rather than contractual; as to the assignee and inspectors, he got rid of his confidential position by notice of termination; as to the creditors, his breach of duty (if any) was in refusing to advise rather than in abusing his confidential position by continuing to advise when his interest might conflict with his duty.

Taking the view I do as to the facts, it is not necessary for me to deal with the question whether or not the plaintiff's right is barred by the Statute of Limitations, or the question raised as to whether or not the transaction attacked was a purchase by Davies or a valuation of his security under sec. 20 (4) of the Act, further than to say that I agree with the reasoning of my Lord the Chief Justice upon these questions; and, in connection with the latter, to refer to the judgment of the Earl of Halsbury, at p. 328 of the report of *Watt* v. *Assets Co.*, [1905] A.C. 317, as shewing how far the Court is bound by the form of the document, and how far it may go in considering the evidence outside of the document in

arriving at a conclusion as to the true nature and substance of the transaction.

Before parting with the case, I desire to point out that, though Taylor Brothers are not parties to the litigation, they are the parties most benefited by the judgment appealed from. This seems to me to be wrong. This is a class action, and the transaction should not, I think, be set aside further than is necessary for the relief of the class, but should be confined to such persons as have a common interest and a common grievance with the plaintiff, for that is the only class of persons she can without order represent. See Rule 75: *Duke of Bedford* v. *Ellis*, [1901] A.C. 1, 10; *Parkinson* v. *Wainwright* (1895), 72 L.T.R. 485; *Thompson* v. *Victoria Mutual Fire Insurance Co.* (1881), 29 Gr. 56, 63; *Johnston* v. *Consumers Gas Co. of Toronto*, [1898] A.C. 447, 452. How can it be said that the inspectors and the creditors that they represented, that the assignee and the debtors whom he represented both under the deed and under the powers of attorney, that the creditors who had notice and knowledge of Davies' resignation, that the creditors who attended the meeting of the 18th June, 1902, called to approve of the transaction and who did approve of it, that the debtors who were not parties and who had no right to be parties to the appointment of Davies to advise Clarkson, and who may have had a knowledge of the whole transaction and elected to abandon their rights, if any, are all in the same class and represented in this action by the plaintiff, who, in order to make out a cause of action not lost, destroyed, or barred by waiver, laches, delay, or the Statute of Limitations, alleges that Davies was an express trustee for her, and stood and continued to stand as to her in a fiduciary relationship; that he could not rid himself of such office and relationship without notice to her; and that she had no notice or knowledge that he had resigned his office or that he had received the conveyance attacked, or had entered into possession otherwise than as mortgagee?

Such is the form and effect of the declaration and judgment in the Court below. This appears to me to be an adjudication upon the rights and for the benefit of the parties not before the Court; and, if the plaintiff should be found to be entitled, that the judgment signed in the Court below should be amended and limited to protecting the rights of the plaintiff personally, and to afford-

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ing relief to such persons as establish that they are entitled to share in the benefit of the judgment, and should not be extended to opening up the transaction for all persons who were at one time beneficially entitled under the deed of trust, without inquiry as to what these rights were or how these rights have been affected or lost by notice, knowledge, waiver, laches, delay, statutory bar, or otherwise.

I would allow the appeal with costs, and dismiss the action with costs. *Appeal allowed.*

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Ex. C.

ATT'Y-GEN'L OF CANADA v. QUEBEC & SAGUENAY RAILWAY Co.

Exchequer Court of Canada, Cassels, J. January 24, 1917.

RAILWAYS (§VII—140)—ACQUISITION BY GOVERNMENT—6 & 7 GEO. V. c. 22—"SUBSIDIES"—"ACTUAL COST"—INTEREST AND CHARGES ON BONDS.

The court was required to fix the value of certain railways to be acquired by the Crown under the provisions of 6 & 7 Geo. V. c. 22. By s. 2 of such statute it was provided that the consideration to be paid for each of the said railways should be the value as determined by the Exchequer Court of Canada, "said value to be the actual cost of the said railways, less subsidies and less depreciation, but not to exceed $4,349,000, exclusive of outstanding bonded indebtedness, which is to be assumed by the government, but not to exceed in all $2,500,000."

Held, that the word "subsidies" in the above section did not relate only to those granted by the Dominion government but extended to any subsidies granted by the provincial government to the railways in question.

The court in finding the "actual cost" ought not to proceed as if the matter were an accounting between the directors of the railways and the shareholders. The duty of the court was to ascertain the value of the railways as between vendor and purchaser, and that value must be taken to be the actual cost of the railways less subsidies and less depreciation.

Interest on bonds issued by the company and moneys paid on the flotation of bonds during the period of construction of the railways could not be included in "actual cost" as the term was used in the statute.

Statement.

ACTION to determine the value of railways acquired by the Crown.

A. Bernier, K.C., *F. E. Meredith*, K.C., and *E. E. Fairweather*, for Crown.

P. F. Casgrain, and *Louis Coté*, for railways.

Cassels, J.

CASSELS, J.:—Since the conclusion of the hearing of these cases I have carefully perused the evidence and exhibits produced before me, and have also considered the questions to be determined. I think as the questions to be determined depend to such an extent upon the construction to be placed upon the statute as to the method by which the amounts payable are to be ascertained, and

as the differences are so large between the method of valuation claimed by the railway companies and the views I entertain, it may be better before any further evidence is taken, that an appeal, if such is proposed (assuming the right of appeal exists), should be taken to the Supreme Court, in order that I may be set right, if I have taken an erroneous view.

I may say that I have given the matter a great deal of thought, and I must express my thanks to the counsel for all parties for the great assistance they have afforded me.

The statute pursuant to which the matters came before the Exchequer Court of Canada is c. 22, 6-7 Geo. V., assented to on May 18, 1916. This statute provides that the Governor-in-council may authorize and empower the Minister of Railways and Canals to acquire, upon such terms and conditions as the Governor-in-council may approve, the railways described in the schedule hereto, together with such equipment, appurtenances and properties used in connection with such railways, as the Governor-in-council may deem necessary for the operation thereof.

There are three railways mentioned in the schedule:—(a) The line of railway commonly known as the Quebec, Montmorency & Charlevoix Railway, extending from St. Paul St., in the City of Quebec, to St. Joachim, a distance of about 43 1-5 miles;—(b) The Quebec & Saguenay Railway, extending from its junction with the Quebec, Montmorency & Charlevoix Railway at St. Joachim, in the County of Montmorency, to Nairn Falls, in the County of Charlevoix, a distance of about 62 8-10 miles; and (c) The Lotbinière & Megantic Railway, extending from Lyster, in the County of Megantic, to St. Jean Deschaillons, in the County of Lotbinière, a distance of about 30 miles.

S. 2 of 6-7 Geo. V. c. 22.—

2. The consideration to be paid for each of the said railways and for any equipment, appurtenances and properties that may be acquired as aforesaid shall be the value thereof as determined by the Exchequer Court of Canada; said value to be the *actual* cost of said railways, less subsidies and less depreciation, but not to exceed four million, three hundred and forty-nine thousand dollars, exclusive of outstanding bonded indebtedness which is to be assumed by the government, but not to exceed in all two million, five hundred thousand dollars.

It is agreed by counsel for the railways and for the Crown, that the maximum consideration of $4,394,000 and $2,500,000 is the maximum price to be paid for the three railways. Pursuant

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to the statute, an agreement was entered into between the Crown and the Saguenay Co., the Quebec Railway, Light and Power Co., the Lotbinière & Megantic Railway Co., and the Quebec Railway, Light, Heat and Power Co. The different railways are referred to throughout the agreement: 1, as "The Saguenay Company;" 2, "The Quebec Railway Company;" 3, "The Megantic Company;" and 4, "The Quebec Power Company."

The railway referred to as (a) in the schedule to the statute, and commonly known as the Quebec, Montmorency & Charlevoix Railway, is what is referred to as "The Quebec Railway Company," in the agreement in question. The name was changed by statute.

The agreement requires a separate valuation for each of these three lines of railway. By the agreement the Crown assumes bonds of $2,500,000 secured by a trust mortgage. These bonds and the trust mortgage securing the same in addition to being a charge on the Quebec Railway Co., are also a charge on other railways and properties not taken over by the Crown. By the terms of the agreement this bonded charge of $2,500,000, while it is assumed by the Crown, forms part of the purchase money payable by the Crown under the statute. If the value placed by the court on the Quebec Railway Co., known as the Quebec, Montmorency & Charlevoix Railway, exceeds the $2,500,000 only the excess over the $2,500,000 and the value so found is to be paid by the Crown, the $2,500,000 being treated practically as a payment on account. If, on the other hand, the value placed upon the Quebec, Montmorency & Charlevoix Railway is less than the $2,500,000, then the difference between the value as ascertained and the $2,500,000 is to be deducted from any sums that may be found due in respect of the other two railways.

The agreement refers to it in the following language:—

It is understood and agreed by and between all the parties hereto jointly and severally that in case the Exchequer Court of Canada fixes the value of the line of railway and other property set out in schedule "C" hereto at a sum less than $2,500,000, the difference between the sum so fixed and the sum of $2,500,000 shall be deducted from the aggregate amount of the purchase price to be paid for the lines of railway and other properties set out in schedules "B" and "D" hereto.

The intention of this agreement being that in no event shall His Majesty be liable to pay for the said three lines of railway and other properties a greater amount than the value thereof as fixed by the Exchequer Court, less

the sum of $2,500,000, the amount of the bonds to be assumed by His Majesty as aforesaid.

There are other provisions in the agreement in question which it is unnecessary for me to refer to at the present time. There are provisions protecting and guarding the Crown against any charges or incumbrances on the properties or any defect in regard to the titles to the right-of-way, etc.,—the intention of the agreement clearly being that His Majesty shall receive an absolute and clear title to all the properties in question.

On the opening of the case, I suggested that the duties of the Exchequer Court did not extend to an ascertainment of whether the various railways had good titles to the properties being transferred. These questions of title are questions provided for by the agreement, and it is a matter for the Crown attorneys and counsel to be satisfied upon. The view was assented to by the counsel for the railway companies, and for the Crown. The Court assumes that the railways are deeding the various properties with good title thereto, and the valuation is based on that supposition.

The method of procedure was one of considerable moment. I came to the conclusion that the only practical way of arriving at a result would be to adopt the method adopted in the arbitration in which I acted as counsel for the C.P.R. Co., in regard to what was known as the Onderdonk sections of the railway in British Columbia. The same course of procedure used to be adopted in the administration of estates in Ontario. The counsel, both for the railways and for the Crown, acquiesced in my view as to the course of procedure to be adopted. I therefore directed the railway companies to file and furnish to the Crown accounts showing in detail what they claimed to be the amount to which they were entitled under the agreement in question. I also directed that upon counsel for the Crown being furnished with these accounts they should investigate them, and such items as they were prepared to admit, should be admitted, and such items as they were not perpared to admit, would then become the subject of inquiry, and evidence could be adduced in respect thereof. I also directed that the Crown counsel should furnish to the counsel for the railways a statement of the amount which the Crown claimed should be set off for depreciation in respect of each of the three railways. Pursuant to these directions the railway companies

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by their counsel filed and served a complete and detailed account of their claim.

Competent experts were employed by the Crown to make a minute examination of the three lines of railway, and to furnish in detail what they considered the proper amount to be deducted for depreciation. A large amount of time was occupied by these gentlemen in making this inquiry. Subsequently the railway companies, by their counsel, accepted as correct the amounts as found by the experts of the Crown. The amounts of the depreciation to be offset against the value of the railways has therefore been settled. The figures I will deal with later.

Another question of considerable importance is in regard to the offset referred to in the statute as subsidies. Before me it was conceded by counsel for the Crown that the only subsidies in contemplation at the time of the statute were subsidies granted by the Dominion Government. This view is, in my judgment, untenable. I have to follow the statute. The statute says "less subsidies." There is nothing in the statute which would limit the meaning of the word "subsidies" to subsidies granted by the Dominion Government only. The word "subsidy" as defined in Webster's International Dictionary is as follows:—

> A grant of funds or property from a government as of the state or municipal corporation to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public,—a subvention.

The manifest object of the statute is that any grants furnished by the public towards the construction of the railways should be deducted. If, in point of fact, the statute, and the agreement based upon the statute does not carry out what the parties intended, the only course, in my judgment, open to the parties is to have the statute amended. I must take the statute as I find it, and, according to my view, subsidies include not merely Dominion but provincial as well. This construction is of importance as the Quebec subsidies amount to something in the neighbourhood of $440,000, which, according to the view I entertain, must be deducted from the value as ascertained. *Inglis* v. *Buttery*, 3 App. Cas. 552. In the *Dominion Iron & Steel Co.* v. *Dominion Coal Co.*, 43 N.S.R. 77, Judge Longley rejected evidence tendered as to the communings preceding the agreement, and this view was upheld in the Appellate Court in Nova Scotia, and

also in the Privy Council, [1909] A.C. 306. And in a late case, the *City of Toronto* v. *Consumers' Gas Co.*, 30 D.L.R. 590, [1916] 2 A.C. 618, decided by the Privy Council, Lord Shaw, in delivering the judgment of the Board, used the following language at p. 592:—

It is now expedient to see what are the powers relied upon by the appellants as entitling them to charge upon the gas company the cost necessarily incurred by them of lowering the pipes of that company. One ground is thus stated by the learned trial judge, whose opinion is that the corporation has the paramount duty of providing for the health of the citizens, with reference to the construction of sewers on their streets, and that the defendants have only the right to use the streets for their own benefit, subject to the paramount authority.

Certain decisions of courts in the United States reports in support of this doctrine of paramount right are quoted:—

Their Lordships are of opinion that there is no such doctrine of paramount right in the abstract, and that, unless legislative authority, affirming it, to the effect of displacing the rights acquired under statute as above described by the respondents, appears from the language of the statute-book, such displacement or withdrawal of rights is not sanctioned by law. In this, as in similar cases, the rights of all parties stand to be measured by the Acts of the legislature dealing therewith; it is not permissible to have any preferential interpretation or adjustment of rights flowing from statute; all parties are upon an equal footing in regard to such interpretation and adjustment; the question simply is—what do the Acts provide?

I come now to the consideration of the accounts as filed by the railways. I will deal first with that relating to the Montmorency division. The heading is as follows:—

"Statement shewing amounts expended yearly on capital account, Montmorency division, from the date of the organization, viz., July, 1899, to June 30, 1916."

The first item is dated July 1, 1898—"Road and Equipment, Real Estate and Buildings, etc. Montmorency division, $2,038,-149.40."

This starting point is assumed by the railways to have been the cost of construction up to that date. At the date in question, namely, July 1, 1898, according to Col. Wurtele, the road had been constructed as far as St. Anne's. The mileage of this road was about 21 miles, and it may be that they were running a mile or two beyond. Even if it were granted, that 22 miles instead of 21 miles of the railway had been constructed at that date, the cost would be in the neighbourhood of $92,500 a mile. Col. Wurtele puts it about $100,000. It seems a high figure. It is stated by counsel for the railway company that a certain portion of the right-of-way beyond St. Anne's had been procured. This

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may or may not be so. The proof before me is lacking on this point. Here there is a distinct difference between the views put forward by the counsel for the railway company and the counsel for the Crown. The counsel for the railway company contend that what the court has to do, is to find the cost as if it were an accounting between the directors of the railway and its shareholders; and that this amount being shewn by the books of the company as the amount expended at that date, should, therefore, be accepted as the cost. Numerous witnesses were called, gentlemen of good standing—accountants from Montreal—who gave evidence as to the custom in regard to the charging up of interest, etc., to capital account.

When I deal with the case of the Saguenay Railway, the absurdity of this contention put forward on the part of the railway company will be apparent. The directors of a company might have to pay 50% commission for obtaining a loan of $1,000,000. It would undoubtedly be quite right as between themselves and their shareholders to charge this 50% in their accounts. So also they might delay construction for a period of say 20 years, in the meanwhile paying interest on this bonded indebtedness. As between the directors and their shareholders, as a matter of bookkeeping, it may be quite reasonable to charge up every item of expenditure. But the case before me is of a different character. I am not dealing with the accounts as between the shareholders and their directors. What I have to ascertain is the value as between the vendor and the purchaser, and that value must be the *actual* cost of the railways, less subsidies and less depreciation.

The railway company contend that owing to the fact of the books kept by Mr. Beemer being destroyed, there is no other proof available. There is no suggestion that there was any intention of destroying these books with the view of preventing enquiry. Col. Wurtele's evidence is to the effect that he was the executor of Beemer, that it turned out that Beemer's estate was insolvent. He advised the heirs and next of kin to relinquish all claim to the estate. The books were retained by him for several years, and as he considered them of no value and they were occupying space required, he destroyed them. This may render it more difficult to arrive at the value. I suggested at the trial that it did not seem to me so impossible as counsel seemed to think.

Two or three times I pointed out to them that it would be easy to have competent valuators go over this line of railway from Quebec to Ste. Anne, and to value in detail the present railway. Of course it would not be by any means conclusive. The present values would probably be considerably higher than when the road was originally constructed. Under the agreement with the Crown, made pursuant to the statute, a good title has to be made to the right-of-way, and I would imagine that the title deeds conveying this right-of-way would shew the price paid.

By the trust deed which was executed on June 11, 1898, entered into after the passing of the statute, ch. 59, 58-59 Vict., dealing with the application of the proceeds of the stock and the bonds, it is provided that out of the proceeds of the bonds, the trustees shall pay off and redeem the present interim bonds, the whole as set forth in schedule "A" to the deed; and also to pay the floating debt detailed in schedule "B."

Now it is admitted that these two items of $500,000 referred to in schedule "A," and also the item of $794,869.58 floating liabilities, comprise part of this item of $2,038,149.40. Crown counsel in their statement were of opinion that these two items of $500,000 and $794,869.58 should be taken as the cost up to that date, namely, July 1, 1898. I do not agree with that contention. I fail to see how it can be assumed without further proof that the proceeds of these interim bonds, namely, $500,000, went into the construction of the railway. They may or may not. That is a question of proof. The bonds were held by the various parties, shewn on page 15, as schedule "A." They were held as collateral security by the various parties. What the nature of the debts due to these various parties is I would have thought susceptible of proof—at all events, before such an item can be allowed, further inquiry will be necessary, and so with regard to the liabilities. Unquestionably a considerable portion of them never went into the railway. Col. Wurtele states as follows:—

Q. A lot of these items on their face do not appear to be items that went into the construction of the road, how is that?—A. They may have gone into the operation of the road, we were operating the railway.

It would be impossible to accept Col. Wurtele's evidence as proving the fact that these two particular items went into the construction of the railway. Other evidence would be required

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before I would be willing to accept those two sums of $500,000 and $794,689.58 as having been expended in the construction of this 21 miles of railway.

I have to determine the value of the railways, the actual cost of them,—and construing the statute, as I think it must be construed, I would be unable, upon the evidence at present before me, to come to the conclusion that this item of two million odd dollars should be taken as being the actual cost of the railway to that date.

I do not think, as I have stated before, that I am concerned with the manner in which, as between the directors and their shareholders, the company kept their books. What I have to ascertain, as well as I can, is the meaning of the words "*actual* cost and value" is.

I pointed out during the progress of the trial the course which I thought might be followed.

I may call the attention of counsel to the fact, that in the trust deed, schedule "D," there is the estimate of cost of constructing certain extensions. The total is 11 miles, and the total estimate is $149,947, which would be under $14,000 a mile,—and while of course the main railway, previously built, may not have been built at that low figure, the contrast between the two figures, namely, $92,500 a mile and the $14,000 a mile, is striking.

There seems to be little controversy as to the expenditure after July 1, 1898. At present it is unnecessary for me to deal with the expenditure between that time and November, 1916. It can be taken up later on.

After careful examination, the Crown is willing to concede the main part of this expenditure. There are one or two items objected to, not of very much moment, and I think the evidence adduced has satisfied Crown counsel that these items should be allowed. However, it will be a matter for later consideration.

LOTBINIERE & MEGANTIC RAILWAY.

Dealing with the Megantic Railway, the amount involved in this railway is comparatively speaking not very large, but I think that further proof of a similar nature to that suggested in regard to the Montmorency Railway should be forthcoming. The only evidence given is that of Mr. Robbins, the manager of the railway, and it is a mere surmise. He may or may not be correct

when he states that it would probably cost about $11,000 a mile. I think, however, some evidence by outside witnesses qualified to speak should be forthcoming.

THE SAGUENAY RAILWAY.

Mr. Matthews, the manager of the railway, was called as a witness. He states that the construction of the Quebec & Saguenay Railway was started in April or May, 1911. Previous to that he believes exploration surveys had been made. He points out that the main construction on this road stopped some time about September, 1912, but certain small constructions were continued for quite a while. He also states that as a matter of fact, on what is known as the branch spur line, from Murray Bay Wharf to Nairn Falls, very considerable work was done in 1915. That branch is 7.6 miles in length, he thinks. He goes on further and explains that this spur line was constructed for the purpose of handling pulp from a pulp-mill situate at Nairn's Falls. Referring to the main construction, he states as follows:—

Q. You say that it was financial trouble that stopped you?—A. Financial trouble which stopped us. Q. How long has it been stopped—ever since?—A. Yes. Q. Since 1912?—A. September or October, 1912.

No further work was done, with the exception of repairing cribwork on the spur line, but on the main part of the line, from St. Joachim to Murray Bay, nothing has been done since October, 1912, and the work had to be stopped on account of the lack of money.

It is well to bear this fact in mind when we come to consider the claim made by and on behalf of the Saguenay Railway. There appears to have been two flotations of bonds, and to float these bonds a discount had to be allowed of $833,600. There were fees paid, according to the statement in connection with the listing of the bond issue amounting to $63,465.09. Counsel on behalf of the Crown objected to these items.

It would also appear that in making up their claim of $5,543,-260.89, there is an item charged of interest on the bond issue of $1,012,950. This item is also objected to by counsel for the Crown. I think the objection taken by Crown counsel is well founded. I am of opinion that this item of $1,012,950 interest, payable right up to 1917, is not a charge that can be allowed under the terms of the statute. The work of construction, as I have pointed out, with the exception of that small spur line, so to speak,

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from Murray Bay to Nairn Falls, stopped in October, 1912, and has never been gone on with, so far as the company is concerned. While, as I have stated before, as between the directors and shareholders it may be right to put in all items of cost, I do not think that as between the vendor and the purchaser, having regard to the wording of the statute, they are proper sums to be allowed. The statute, as I have pointed out, is precise and, to my mind, unambiguous.

The consideration to be paid is the value of the railways, the said value to be the *actual* cost of the said railways, less subsidies and less depreciation.

I cannot bring my mind to the conclusion that it was ever in contemplation that the actual cost should be what is represented on the books of the company as the outlay as between the directors and shareholders of the company. Some meaning must be given to the word "actual." The word "actual," according to Black's Law Dictionary, means "Real; substantial; existing presently in act; having a valid objective existence as opposed to that which is merely theoretical or possible."

"Actual cost" excludes interest on money "borrowed." *(Old Colony Railroad Co.*, 185 Mass. 160.

"Actual cost" means real cost as distinguished amongst other things from "estimated cost." *Lanesborough* v. *County Commissioners*, 6 Met. 329, or from market price which may include matters which do not enter into the real cost. *Alfonso* v. *United States*; 2 Story, C.C. 421; *United States* v. *26 Cases of Rubber Boots*, 1 Cliff. 580.

"The word 'cost' is of limited significance, much narrower than 'damages.'" *Massachusetts Central R.R.* v. *Boston & Clinton R.R.*, 121 Mass. 124.

In *Re Lexington & West Cambridge R.R.* v. *Fitzburg R.R.*, 9 Gray 226, the term "actual cost" of running trains was not held to include interest on cars and to mean money actually paid out.

Story, J., in construing a revenue Act in *United States* v. *Sixteen Packages of Goods*, 2 Mason Rep. 48, at 53, says:—

> It is apparent that the terms "actual cost," "real cost" and "prime cost," used in these sections are phrases of equivalent import, and mean the true and real price paid for the goods upon a genuine *bonâ fide* "purchase."

In *Re Mayor and Aldermen of Newton*, the Supreme Court of

Massachusetts (1897), 172 Mass. 5, construed the term "total actual cost of the operations" used by certain railroad commissioners in a report made under statute in that behalf. The railroad corporation claimed to be allowed the cost of a new station, new rails outside the area in question and other matters, representing an investment return upon the moneys expended. The court said:—

In construing the statute, regard is to be had to the nature of the subject matter, the various interests, public and private, which are to be affected.

The Court further said:—

If the railroad corporation is entitled to an investment return upon the portion of its road outside the commissioners' lines that was used in transporting the material, we do not see why it is not entitled to a like return upon that portion which was within the commissioners' lines, and also upon the capital invested in locomotives, cars, etc. But we think that by the words "actual cost" it was intended to exclude anything in the nature of a profit, or return upon the investment . . . The object of the provision was . . . to exclude in the accounting between them any profit, and everything except what fairly might be reckoned as a part of the real cost of the alterations; and it appears like a contradiction of terms to speak of an advance upon the actual cost as constituting a part of that cost. . . . Though in a sense the return on capital which one would have received for work done may be said to be a part of the cost, we do not think that in ordinary usage the term of "real cost," or "actual cost," includes a return upon the capital invested. After allowing all the actual expenses of doing the work, that seems to us more in the nature of profit than of cost.

In the case of *Richards* v. *Bussell*, 127 Pac. 198, the Supreme Court of Washington Territory, in construing a statute which used the words, "the actual cost of filling in, etc.," limited the term "actual cost" as follows: "The word 'cost' as used in this section manifestly means cost to the contractor aside from any profit to him."

Reference again may be had to the above case *Re Old Colony Railroad*, 185 Mass. 160, at 165.

Unless "actual cost" and "expense" are to be taken as equivalent in meaning to the expression, full compensation for any and all expenses in whatever form they may be sustained, which is a construction that in view of the language used and the general purpose of the Act for the abolition of grade crossings cannot be adopted, it must be held that these words have the limited definition given to them by the statute, and cannot be extended to include the claim of the petitioners.

In the case of *Lynch* v. *Union Trust*, 164 Fed. R. 161, at 167, the court said in construing a statute:

When Congress employed the expressions "actual value" and "clear value" it very evidently intended to convey the idea of definite or certain value—something in no sense speculative.

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The case of *National Telephone Co.* v. *Postmaster-General*, 29 T.L.R. 190, came before the Railway and Canals Commission in England—Lawrence, J., Mr. Gathorne-Hardy and Sir James Woodhouse constituting the tribunal which heard the case. There Lawrence, J., Mr. Gathorne-Hardy concurring, decided that the value of the plant of the National Telephone Co. taken over by the Postmaster-General was to be arrived at by taking the cost of construction, less depreciation, and that every expense which was necessary to construct the plant was an element to be considered, including in such expense (*inter alia*) reasonable cost of obtaining subscriptions, agreements which were in force at the date of the transfer, and also the cost of raising capital necessary to construct the plant. Sir James Woodhouse wrote a vigorous dissenting opinion in which he reached the same conclusion as the American courts in the cases I have collated above. He says at p. 196:—

> Those expenses, forming the actual cost of construction, having been ascertained, represented the value. That value had then to be expressed and paid in the current coin of the realm. How, or where, that current coin was obtained, or what was paid for obtaining it, had nothing in the world to do with the value of the thing which was the subject matter of the payment. If it were otherwise, the cost of construction, and equally, the value of the thing constructed, would differ according to the financial standing of the person who constructed. . . . It was, in fact, making the value of the thing constructed vary with and be dependent on the financial ability or credit of the constructor. . . . Again, the cost of raising capital was not the cost in the same sense that the vendor was saving anything to the buyer, because the buyer had to raise his capital when he came to pay for what he acquired. He would develop this a little. The company in this case said they incurred so much in raising the money to pay for what they constructed, and therefore the value must include that cost. Let him assume that another company instead of the Postmaster-General, was the purchaser of the undertaking, and that the purchase-price at cost included, say £500,000, as the amount paid by the vendor company for raising its capital to pay for the structure. The value of the thing constructed stood in the books of the purchasing company therefore with this £500,000 as part of it, for which there was, in fact, no actual asset corresponding to the item. Now the purchasing company must also raise its capital to pay the vendor company this price, and the cost of raising this money must, in turn, equally become to it an element in the value of the thing bought. Thus in the case of the second company, precisely the same asset would stand in its books enhanced in value by the amount it spent on raising its capital, and they had only to imagine a series of similar sales to perceive what an enormous value this same original asset would ultimately attain.

This point, again, could not be stated in better or more con-

vincing language than that used by the learned Judge in answering Mr. Gill's contention, at p. 244, when he said:—

The buyer has to raise "his capital also." According to that, you see, if the cost of raising the capital is an element of value in a plant, the second time the plant changes hands there have been two costs of raising capital, and so it would go on every time it changes hands. The plant would be increasing in value by reason of the cost of raising the capital necessary to purchase it. That, in his opinion, was the sound view, and the only logical conclusion from the premises underlying the company's contention. He had heard no argument and could find none which displaced it. It was the view taken by the only experienced men of business who gave evidence about it, viz., by Sir William Peat, the eminent accountant, and Sir George Gibb, who, they all knew as a railway lawyer and manager, had had a very large professional experience in valuations. He did not see his way to regard this item as one which they could rightly include in the value to be ascertained. If, however, he was wrong in his opinion, he had no objection to the amount of £247,189 which his colleagues allowed for it.

An appeal was taken from the decision of the Railway and Canal Commission in this case to the Court of Appeal, but it was settled between the parties before the appeal was called for hearing, and so we have not the advantage of a judgment of that court upon the question raised by the tribunal below.

In *Kirby & Stewart* v. *The King*, unreported, a case tried before me, I refused to allow the contractor interest which he had paid to the bank for moneys required for the purpose of the construction of the work. That case was appealed to the Supreme Court of Canada, and my ruling sustained. There is a difference between that case and the present in this respect; the claim there made was by the contractor, and he had been allowed the usual contractor's profits. The words of the reference, by the order-in-council in that case, were that he was to be allowed the "actual and reasonable cost."

To my mind, to allow these charges for obtaining money and the interest for a period of years might make the matter almost farcical. The railway might have laid dormant for a period of another 20 years, meanwhile the interest on the bonds would have to be paid, amounting to 2 or 3 more million dollars, all of which, assuming the company paid the interest, would be charged up in their books to the shareholders—and if the argument put forward is correct in that case the Crown when paying what is defined by the statute to be the *actual* cost of the railways, would be paying some 3 million dollars odd for interest for which no value is given in return.

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The views of the various accountants seem to vary. Some of them apparently were rather shocked at the length to which their evidence would lead, and came to the conclusion that the interest could only be a proper charge during a reasonable period of construction.

It will be easy when the case is concluded to arrive at the amount which, in my judgment, ought to be allowed. There will have to be deducted the allowance for depreciation, which has been settled. There will also have to be deducted the amounts received from the Dominion and provincial subsidies. These sums are not in dispute. There will also have to be deducted these items that I have just been referring to in connection with the Saguenay Railway, and any amounts that should be deducted from the Montmorency & Charlevoix Railway, and the Megantic Railway on a proper valuation being proved.

Judgment accordingly.

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BARRON v. KELLY.

Supreme Court of Canada, Fitzpatrick, C.J., Davies, Idington, Anglin and Brodeur, JJ. April 15, 1918.

VENDOR AND PURCHASER (§ I E—27)—SALE OF LAND—FRAUD—ELECTION TO RESCIND CONTRACT—SUBSEQUENT AFFIRMANCE—EFFECT OF—DAMAGES.

A purchaser of land under an agreement for sale who, upon discovering that statements by the land agent, which led him to make the purchase are untrue, writes, through his solicitor, a letter to the brokers, enclosing money on the purchase and stating that he was completing it rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, and stating also that he does not waive his right to insist on reparation for the deceit practiced upon him, and that he proposes to bring an action on account thereof; and who subsequently makes additional payments and offers to exchange the lots for others, elects not to rescind the contract. Discovery later of other false representations does not entitle him to rescission, but entitles him to damages for deceit.

[*Campbell* v. *Fleming*, 1 A & E 40, 110 E.R. 1122, and *Boulter* v. *Stocks*, 10 D.L.R. 316, 47 Can. S.C.R. 440, discussed; 37 D.L.R. 8, reversed.]

Statement

APPEAL from a decision of the Court of Appeal for British Columbia, 37 D.L.R. 8, 24 B.C.R. 283, affirming the judgment on the trial in favour of the defendants. Reversed.

G. H. Ross, K.C., and *Barron*, for appellant; *S. S. Taylor*, K.C., for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—The appellant in the year 1898 was resident in Dawson City, where he carried on "the clothing business, the jewellery and optician business, the pawn-

shop business, lending money too;" in fact, making money any way he could. His attention was first called to the townsite of New Hazelton by the usual flaming advertisements by which a land boom is started. Through the local agent in Dawson he eventually selected and purchased the lots in respect of which he now claims damages, on the ground that he was induced to purchase them by misrepresentation.

The record is a terribly voluminous one, but I have read through all the evidence. The purchase, I have no doubt, was a speculative one. It is true that the appellant says that, on account of his health, he was obliged to leave Dawson City and was looking for a place where he could set up business and make his home, but I do not think he ever regarded New Hazelton as other than the merest possibility of such. Perhaps if the town had grown up with the phenomenal rapidity of Dawson City, he might have moved there, as well as to Calgary, where he went some three or four years later, or to any other place.

Really the only substantial misrepresentation put forward in the statement alleged to have been made to him is that many lots in the townsite had already been sold when, as a matter of fact, they had not been. He has got hold of a nice expression of which he makes repeated use to the effect that he wanted to buy lots in a town and not a piece of prairie at all. This, however, does not accurately represent the facts, because all that he contracted to buy was land within the site of a projected town and he only thought that he had good reason to hope that a town was going to spring up on this site.

I agree with the trial judge that even on the plaintiff's evidence, which is all that was heard, there is no proof of any intentional misrepresentation made to him and further that any such misrepresentations, if made, were not the inducements which caused him to buy. But, in any event, this, in my opinion, is not a case in which a court of appeal would be justified in reversing the judgment of the trial judge unless upon some clear ground of error shewn. A mere opinion, formed as it must be without the advantages of hearing the evidence of the plaintiff and his witnesses ought not to prevail against the conclusion at which the trial judge has arrived without the least hesitation. It is purely a question of fact that is involved; no one could do more then form an opinion

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and no one can be in as good a position as the trial judge to draw a fair conclusion from the evidence given before him. The present appeal being from a decision of the provincial Court of Appeal confirming the judgment, its reversal in this court would be the more open to objection.

It is perhaps immaterial to point out that a judgment for the plaintiff in this case would involve a good reason for setting aside quite innumerable similar transactions. It seems only common knowledge that those entering on such speculations cannot expect the sober accuracy of expression to be looked for in ordinary and proper business dealings. Enterprises which are held out as promising great fortunes in brief time and with no trouble must always have their attendant risks and uncertainties. It is not for the courts to scrutinise such contracts closely with a view to trying to find a ground for affording relief to those who have lost their money recklessly embarking it in such wild speculation.

I would dismiss the appeal.

Davies, J.

DAVIES, J.:—After hearing the arguments of counsel, and reading the evidence to which they called our attention, I have reached the conclusion that this appeal should be allowed, and the case should be remitted back to the court to have the damages for deceit assessed. This conclusion is the same as that reached by the dissenting judge, McPhillips, J., in the Court of Appeal.

The action was one brought by the plaintiff-appellant, to rescind certain agreements made by him with the defendants (respondents) for the sale to him of certain lots of land and in the alternative for damages in respect of misrepresentations made by the defendants to the plaintiff which induced him to agree to purchase the lots.

The specific misrepresentations alleged were that certain lots in the business section of the townsite of New Hazelton, in which townsite the lots the plaintiff agreed to purchase were situated, were sold to residents of the town of Hazelton which nearl adjoined the townsite of New Hazelton and that certain blocks of lots in the same townsite were sold to Foley, Welsh & Stewart, well known as large railway contractors. That as a fact these representations were false and known to the vendors to be so and that they were inducing causes of the plaintiff's purchase.

The conclusions I have reached after the argument and reading

of the evidence called to our attention were that these representations were false to the knowledge of the plaintiff's agent who carried out the sale and were inducing causes of the plaintiff agreeing to purchase.

On this branch of the case I did not entertain any doubt. The only doubt which arose in my mind was whether or not the plaintiff, after learning of the fraud practised upon him, had deliberately elected not to rescind the contract but to claim damages for the deceit which had induced him to purchase.

I think the letter of plaintiff's legal adviser of March 6, 1914, and the payments of the purchase money made concurrently with that letter and afterwards conclusive evidence that the plaintiff with full knowledge of the gross fraud practised on him had elected to affirm the bargain and confine his claim to damages for the deceit.

But it is argued by the appellant's counsel that, though the plaintiff should be held to have had knowledge of the gross fraud practised upon him in the false representations made to him as to the sales of other lots, knowledge of the full extent of that fraud was not known to him, and was not discovered till afterwards. In other words, that while he ought to be held to have known when the letter was written and his election made not to rescind, that the representations as to the purchase by the residents of Old Hazelton of the lots they were represented to have purchased were false and fraudulent, he did not then know and did not discover till after the letter was written that the representations as to the purchase by the railway contractors, Foley, Welsh & Stewart, were also false and fraudulent.

His conclusion was that the discovery of the fact that Foley, Welsh & Stewart had not purchased when made by him entitled him to withdraw his previous election and to rescind.

I am not able, however, to accept this argument. The false representation as to the purchase made by Foley, Welsh & Stewart was only one of several incidents comprising the fraud, and it is not necessary, as Lord Denman says in *Campbell* v. *Fleming*, 1 Ad. & E. 40, 110 E.R. 1122, that "a party must know all the incidents of a fraud before he deprives himself of the right of rescinding." As Patteson, J., says at p. 42 of the report of that case:—

This (new discovery) can only be considered as strengthening the evidence

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of the original fraud and it cannot revive the right of repudiation which has once been waived.

It is obvious, I think, that whether a new discovery of false representations after the purchaser has elected to affirm the contract must be treated as a mere incident in the fraud or may be determined as justifying revival of the right of repudiation must depend upon the facts of each case and that it is impossible to lay down any definite rule which should govern every case. Much will depend upon whether the several misrepresentations were inter-related or connected. See *Ex parte Hale*, 55 L.T. 670. In the case of *Boulter* v. *Stocks*, 10 D.L.R. 316, 47 Can. S.C.R. 440, decided by this court some years ago, in which the case of *Campbell* v. *Fleming*, *supra*, was distinguished, it was held that an act which, under ordinary circumstances, would be held to amount to an affirmance of a contract to purchase a farm, did not under the circumstances of that case disentitle the plaintiff to rescission. The discovery that the acreage of the farm was very greatly less than the acreage represented by the seller when the contract was entered into was not related to or connected with certain other representations as to the farm being free from noxious weeds, and as to there being a certain number of apple trees in the orchard. After the representations as to the absence of noxious weeds had been made, and the purchaser knew of their falsity he nevertheless gave a lease of the orchard and thus affirmed his contract to purchase the farm. Afterwards, he discovered an enormous discrepancy between the acreage of the farm as represented to him when he purchased it and its actual acreage (some 46 acres), and sought on this ground to rescind the contract. The court held he was not estopped from doing so by his lease of the orchard and its affirmance of his contract to purchase. There was no interrelation or connection between the representations as to the noxious weeds and the orchard trees and the acreage of the farm and it by no means followed that knowledge of the falsity of the representations as to the noxious weeds and the orchard trees would necessarily have led the purchaser to a positive assurance that he had been the victim of a fraud and that the whole contract had been a deception.

Now, with respect to the appeal before us it does appear to me that there is a direct connection between the representation that some of the lots in the townsite had been sold to a number of

the inhabitants of Hazelton and other blocks of the land to Foley, Welsh & Stewart. It was the fact of the sales that was the controlling factor and I do not think it can be successfully argued that, after discovery, none of the lots represented as having been sold to the residents of Hazelton were so sold and the deliberate affirmance notwithstanding of his contract of purchase by Barron that he should be permitted, because he later discovered that another alleged purchaser of part of the townsite represented as having purchased blocks of land therein had not done so, can now enable him to repudiate his election to seek compensation by way of damages for deceit and instead obtain rescission of the contract.

That conclusion does not affect, of course, the plaintiff's right to recover damages for deceit, and I would, therefore, allow the appeal and remit the case to the court in British Columbia for the assessment of such damages as plaintiff may have sustained by reason of the deceit practised upon him, with costs in all the courts.

Idington, J.

IDINGTON, J.:—The appellant is the administratrix of the estate of her late husband, Joseph D. Barron, who in his lifetime claimed that he had been induced, by material misrepresentations, to buy from the respondent Kelly, town lots in a subdivision by him of a section containing 640 acres which he named Hazelton, and sought herein for the rescission of each of the contracts so induced, or alternatively, for damages.

There had long been established a Hudson Bay Co. trading post known as Hazelton, some few miles from this section.

The line of the Grand Trunk Pacific Railway did not touch Hazelton, but passed through said section.

As the work of construction of that railway developed, it seemed to tempt different sets of speculators to try and found new towns in the district. The respondent Kelly called his subdivision "New Hazelton."

Some of those interested in the said railway company made another subdivision a few miles further west and called it "South Hazelton." Another adjoining respondent's was projected by someone who called his the "Hammond Townsite of Hazelton."

These rival projects developed a struggle for the establishment on each site of the railway station to serve that district.

The respondent Kelly brought the claim on behalf of his subdivision before the Railway Commission, and won out. That

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Board directed, in December, 1911, that a station should be established on his said section 882.

The subdivision thereof shewed only two streets of 100 ft. in width. Both ran from east to west. One called 9th Avenue was near the centre of the section and hence likely to become the more important one. It was thus made clear that he, planning the townsite, expected one or both to be leading thoroughfares in the place.

Respondent Kelly had, at an early stage, entrusted the entire management of the selling of lots in New Hazelton thus planned (except some blocks to be presently referred to) to his co-respondents Clements & Heyward, real estate brokers in Vancouver.

Immediately the decision of the Board was published the firm of Harvey & McKinnon telegraphed from Hazlewood to Clements & Heyward to have a large number of the lots on said 9th Avenue reserved for them.

It is not now pretended in argument or evidence, that they had bought all the lots so reserved, or were supposed to have done so. Yet all the lots so reserved, and many more reserved for other agents elsewhere to sell, were marked on plans distributed for the information of prospective purchasers, by a pencil stroke intended to represent them as sold.

The firm of Foley Bros., Welsh & Stewart, prominent railway contractors, occupied three blocks of the subdivision whilst carrying on their work of railway construction. It is not explained upon what terms they so occupied them but no one seems to pretend that they had ever in fact purchased them, yet they were all marked off by the pencil stroke as sold.

These blocks were never given Clements & Heyward for sale and Heyward says he really did not know what the arrangement with Kelly was under which they were so occupied or why so marked off. One Firth, a general broker in Dawson, in the Yukon, applied to Clements & Heyward for information, and by their reply of February 5, 1912, was offered the agency in Dawson for selling lots in the subdivision. He responded on February 23, 1912, by telegraph, accepting the agency as follows:—

Letter fifth received. Agency accepted. Reserve Blocks Ninety, Ninety-one, Hundred two. Forward blue print, literature, full instructions, information business section.

They replied same day by letter which contained the following:

Reply to your wire of even date, we are mailing you a B-P of New Hazelton, sub-division 882, section two, with all the lots sold to date marked off. We are unable to reserve for you the blocks you name in your telegram, but you can look over the B-P and it will give you an idea what lots you can sell and upon receipt of your application we will immediately confirm same if not already sold.

The merchants and residents of "Old" Hazelton are grouping along 9th Ave. in such blocks as 93, 92, 91, 90, 89, 104, 102, 101, 100 and 99. The blocks 119, 120 and 121, are where the Foley, Welch & Stewart Company have their headquarters located. This will give you an idea of how the town is being formed. The station we fully expect will be erected on the south side of the railway, very close to the centre, somewhere near Templeton or Laurier Streets.

On the back of this letter there was written as follows:—

Blocks marked off with an X are B.C. Government Reserves and not on the market. Lots marked with a stroke thus/are sold. Blocks 119, 120 and 121 are held by the Foley, Welch and Stewart Company, Railway Contractors' headquarters.

The advertisement sent by them to Firth for distribution carried on these misrepresentations by such statements as the following:—

Nearly all the business men and residents of the old town of Hazelton and and vicinity are investing in the "KELLY" Townsite, and they are well pleased with the decision of the Commissioners. Read this telegram, which we assure you is genuine, and the number of lots since sold to them, who know what they are buying, proves its sincerity:

"Hazelton, B.C., Dec. 20, '11.

"Clements & Heyward,

"Vancouver, B.C.

"Old Hazelton people delighted Railway Commissioners' decision. Will wire long list of sales to-morrow. HARVEY & MCKINNON."

BIG LOCAL SALE.

During the past week practically every person in town has purchased lots in New Hazelton. Every day Harvey & McKinnon have wired sales to Vancouver. The business men have taken from one to six lots in what will be the business district, and they are now taking lots in other parts of the town for residential and speculation purposes.

The latter will be a strong feature here in the summer and many lots will be turned over at a good profit. The old town is very enthusiastic now that the Railway Commission has settled on the one town.

Armed with such authority and adequate means and methods of carrying out by fraudulent misrepresentation the sale of lots Firth, at that time I think innocent thereof, approached the deceased Barron, who then and for 12 years or more had carried on business in Dawson, made money and come to desire a less severe climate, and negotiated with him on the basis of the representations

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he had been thus instructed to contain the truth. He explained to deceased and other possible purchasers the several kinds of marks on the plans, and assured them that those marked with the stroke which stood for sold had already been sold. He succeeded in selling to him, by virtue thereof, and the respective isolations of Dawson and New Hazelton being such as to render investigation impossible if prompt action was to be taken.

The picture of so many actual sales and that so rapidly and especially to many of the people of Old Hazelton who alone of all men must know best the possibilities and probabilities of this newly-founded centre of trade and commerce, indicated that it was prompt action the situation demanded, or nothing.

The prompt result as designed and hoped for by means of said misrepresentations was got in the several agreements, now in question, alleged to have been thereby induced.

The facts were clearly proven by the books of the respondent Kelly that there had, when the deceased Barron made his first purchase, only been sold some 30 lots out of 155 represented in manner aforesaid as sold.

The judge, during the cross-examination of the first witness called for the defence, announced that he saw no use prolonging the trial, inasmuch as he had come to the conclusion that the deceased Barron was not induced by any of said misrepresentations to make the purchases he did, and dismissed the action accordingly.

The judge credited him with being honest in giving his evidence but presumed to find that "the inducements which led Mr. Barron to buy were the rosy inducements held out as to the future."

I am unable to accept such a theory. Not only is it expressly controverted by the sworn testimony of deceased but it is quite inconsistent with the ordinary judgment of men of business, such as deceased was, in venturing to buy that of which they know little or nothing. The rosy inducement of a real estate advertisement counts for little with them compared with alleged concrete facts as they were in this instance assured to have taken place.

Deceased had been in Dawson since 1898, without once getting out of the Yukon and was dependent, for aught one can see in the evidence, solely upon the general intelligence of men he met there, or newspapers, and upon the representations of the respondents. To assume that such a man would be so foolish as to discard the

express statements by respondents of what many other men, including those on the spot, thought of the future, and evidenced by their actual purchases, and rely solely upon the airy nothings put forward at the same time, in the publications of these same respondents, is not, I respectfully submit, a correct method of reasoning or one upon which to found a judicial judgment.

Perhaps the most potent factor governing the conduct of men in every walk of life, and especially in regard to subjects respecting which they know or can know but little, is their information of what other men, confronted with the like problems they have to solve, have done or are doing relative thereto. Even Firth, whose later conduct relative to the matters in question is not entirely commendable in some respects, discloses in his correspondence how highly improper he thought it would be to represent to possible purchasers lots as sold when they were not in fact sold, in his evidence testifies as follows:—

Q.—At that time Mr. Barron had a great deal of faith in the townsite? A.—Yes, we all had. Q.—And was enthusiastic about it, from the information he had and from the literature which you supplied him? A.—Yes. Q.—And from the sales which were apparently taking place there? A.—Oh, yes, I presume, everything. Q.—If a town is selling rapidly it is a great inducement to purchasers to invest? A.—It is, it has its influence, yes.

He certainly had the commonsense view of the influence and inducement of previous rapid sales. The callous indifference of respondent Heyward to the consequences of such an act as marking, on the maps which he put in Firth's hands to be used in procuring purchasers, blocks as sold when not a lot therein was sold, is well illustrated by his evidence given in examination for discovery as follows:—

Q.—That would be misleading to an intending purchaser, to find a block marked sold, when it was not sold? A.—That is up to them, I don't know how misleading it might be to somebody, but we never intended it to be misleading.

This attitude, of the man directly responsible for the wrong done by issuing such misrepresentations to catch possible purchasers, is not in my view improved by his swearing to the incredible statement that he did not intend it to be misleading. Why did he use such methods? He pretends in such explanation as given elsewhere in his examination that these markings were mere reservations which might possibly result in future sales. But his instructions quoted above, to Firth as a new agent when

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an entire stranger to the whole business, and to him, were unqualifiedly positive that the lots so marked were sold. It seems to me impossible to justify or excuse in law such conduct.

I see no reason to doubt the story of the deceased that he accepted, as true, the gross misrepresentations in question and that but therefor he would not have made a single one of the purchases in question.

The only difficulty in the case I have ever had during or since the argument herein, is whether or not the deceased should be held to have elected by the letter of Mr. Congdon to respondents Clements & Heyward, dated March 6, 1914, wherein he enclosed a post office order for $196 on account of purchase price of lots named and said:—

> I have further to advise you that although Mr. Barron is completing his purchase rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, he does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof.

They in reply of March 23, 1914, point out that he had evidently made a mistake by including all the lots named and assumed he only intended to pay on lot 11, block 144, due March 21, 1914, and add:—

> This is as per a/c mailed from here to Mr. Barron on Feb. 17th last.

They proceed to apply the money accordingly to the one lot so named and ask, "Is this correct?"

The account so referred to is not in the case. Nor do I find therein any reply to this letter.

The letter proceeds to reply to the charge of "fraudulent representations" by saying it had been answered by a letter to Mr. Firth of the 17th, and asking him and Mr. Barron to see that letter.

I think it is not possible in light of the construction thus put upon Mr. Congdon's letter to those to whom it was addressed to hold it as any election relative to the numerous other contracts in question herein.

So far as the exact expression of the letter goes it is to be observed that it uses the singular number both as to "purchase" and "purchase price" and hence cannot, in any view, by itself be taken as a definite election as to other contracts. And by reason of its ambiguous character when closely examined and illu-

minated by the respondent's reply, does not seem of as much value in way of election as at first blush I was disposed to attach to it; even as to any single lot.

Moreover, turning to respondents' pleadings I find the only claims made thereby in respect of waiver or election are as follows:

(23) The plaintiff has waived the said alleged misrepresentations and has elected to retain the said lots and each of them. Particulars of said waiver and election are as follows:—(*a*) He paid money on account of the purchase price after having knowledge of the alleged misrepresentations. (*b*) He offered the said lots for sale after knowledge of the alleged misrepresentations. (*c*) He applied to the defendants to exchange the said lots for others in the said New Hazelton Townsite after he had knowledge of the alleged misrepresentations.

The defendants therefore ask that this action be dismissed with costs.

Obviously, the pleader did not attach much importance to the Congdon letter, by itself, as containing any definite election, and I do not think we should invest it with an importance he failed to find in it. Of course, as a piece of such evidence as there may be supporting the pleading it is entitled to due weight. I cannot find that deceased ever had that knowledge, charged in the pleading, of the fraud practised upon him by the misrepresentations which I have referred to above, until after he had made his payment on account, by the remittance of $840 as third payment on lots 1, 2, 3, and 4, Block 97, New Hazelton, on March 31, 1914. That was the last payment he made. The times for payment extended over 4 years from the date of each purchase. Then and prior to that time of said remittance he had nothing more than a shrewd suspicion derived from newspaper intelligence as to the progress or rather want of progress in way of building on the lots which had been marked as sold, and a possible purchase from or offer by respondents to sell two or three of the numerous lots which had been marked as sold.

No prudent man would think of repudiating contracts as fraudulent, and launching into a sea of litigation, upon such slender basis as deceased had up to then been furnished with. The case of two or three lots sold since he bought might have been susceptible of many explanations when the facts were investigated which would dispel all suspicion of fraud and want of progress in way of building might also have had another explanation.

What deceased did was, in October, 1913, to draw Firth's

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attention to the fact that he was desirous of obtaining a site on 9th Ave. to build upon, and proposed exchanging therefor some of what he had bought from respondents.

Firth wrote on October 7, 1913, making them the suggestion, but got no reply. They pretended it never was received but there is reason to doubt the truth of such denial. But if true, then that proposal of exchange can hardly be counted in support of the pleading. There is nothing in the evidence of his complaining then of his suspicions.

On December 30 following he wrote the respondents Clements & Heyward again proposing an exchange and at the same time telling them as follows:—

> It was represented to me, and to others in Dawson through your agent and literature that 9th Avenue, from Laurier to Pugsley St. was all sold, but block 97; so I bought that and more.
>
> Had the truth been told me, I would not have bought a dollar's worth of property in New Hazelton. On October 7th I called on your agent and told him that I wanted to exchange some lots and to write to you.
>
> I am positive that he wrote. I have never heard anything from you since.
>
> Now, I do not want to get into litigation, I will try and settle it between ourselves.

These seem to be the proposals for exchange referred to in the above quoted pleadings.

I am unable to understand why such a proposal so framed as this and avowedly to avoid litigation should be held a definite election to retain what the deceased had been entrapped into buying.

Even then he had no more than suspicion to go upon. On March 3, 1914, Firth wrote them two letters, one dealing briefly with some other matters besides the Barron business, and at length in regard to that, in which he closes as follows:—

> Now I certainly would like to have you try and arrange some satisfactory deal with Mr. Barron, as he is determined that if this is not done he will commence suit to recover the money paid on the grounds of misrepresentation, and this, as you know, would stir up a lot of trouble and harm, and if it can be avoided within reason I certainly would advise it to be done.

The other letter marked "confidential" dealt at length with Barron's claim. He begins by intimating Barron was preparing a case against them and warning them against giving information to a party he named, and said was a confidential adviser of Barron. This is very suggestive of the confidence Firth had that Barron was

far from being possessed of any actual knowledge of the real facts. Later in the same letter he says:—

> Personally, I do not believe that Mr. Barron has any case at all, for I cannot bring myself to imagine that a firm of your standing would deliberately mark off any portion of a townsite map as being sold when such was not so.

In passing, I may remark what a commentary this expression furnishes of Firth's opinion, as a business man, of the worthless nature of the argument put forward that seeks to justify or excuse the fraudulent course of conduct pursued.

He urges a settlement. He ends by suggesting the reply should be of a duplex character. One sheet he wants to be confidential and the other so worded that, if necessary, it could be shewn to Mr. Barron.

He evidently was suspicious like Barron of what might be disclosed. He also was ignorant as he of the actual facts. He had not the callous courage of respondent Heyward who could answer as he did in evidence quoted above.

If Firth was ignorant and groping in the dark, even at that late date, how can we impute to Barron greater knowledge and say that the Congdon letter was written with that knowledge which would make it an effectual election? That was written only 3 days later. I see no reason to doubt the evidence of the deceased that it was not until he had, within a month thereafter, received a reply dated March 30, 1914, to an inquiry of his dated March 4, from the publisher of the Omineca "Herald," published at New Hazelton, telling that on 9th Ave., so far as he could learn, there had been no lots sold between Pugsley and Laurier Streets until recently, that he really became possessed of some actual reliable information of the magnitude of the misrepresentations conveyed by the respondents' plans, marking as sold the central properties so marked. Then he was told by Mr. Congdon that if he had known what was thus disclosed he should have advised against his sending the remittance above mentioned. He seems accordingly to have decided to pay nothing more.

In short, he seems, thereafter, to have awaited results. I can see nothing, therefore, in support of the grounds pleaded as defence set forth above. And the advertisement and its reason as explained by deceased is in itself not worth labouring with.

The respondents took no action to recover the next payment when due.

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In August, 1915, he left the Yukon and on his way out learned that none of the lots in the three blocks partly occupied by Foley Bros., Welsh & Stewart, as above mentioned, had been sold, though, as already stated, marked off on the plans as sold.

This action was started shortly afterwards. I think he has sufficiently answered the plea of having waived the right to rescission or (perhaps more correctly designated) of having made an election to abide by his purchases.

Indeed, it rested upon the respondents to prove knowledge on his part of the fraud when doing anything such as they charge as an election in order to entitle them to succeed in such defences as set up under that head. This they have failed to establish.

Mere delay or laches as has been often said short of falling within the Statute of Limitations is no bar to an action for rescission. It may be and often has been found so coupled with acts which have induced the vendor to change his position, or with circumstances which in themselves evidence knowledge and election, as to disentitle him seeking rescission to claim such relief.

It was in substance said in the judgment of the Judicial Committee of the Privy Council in the case of the *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221, and in like manner reaffirmed by the judgment of Lord Penzance in the case of *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, at p. 1230, that the contract having been induced by fraud and he defrauded, having the right to repudiate it when, if ever, it became a question in defence against the assertion of such a right, whether or not his refraining from doing so, had not waived his right or elected to abide by the contract, that the burden of proof of knowledge of the fraud and time of acquiring same rested upon the party setting up such a defence.

Lord Cairns who doubted the decision of the majority in the latter case did not dissent from such proposition but pointed out these things on the surface, as it were, which might be held to constitute knowledge at the outset or shortly after.

In like manner a shareholder in *Whitehouse's* case, L.R. 3 Eq. 790, having observed a discrepancy between the articles of association and the prospectus and withdrawn, yet paid thereafter a call, could not be held entitled on later discovering another discrepancy, to claim relief, because evidently the whole means of knowledge

lay in the documents which he had first relied on and must have read.

Again in this case the respondent Kelly counterclaimed for specific performance and was adjudged so entitled.

I am of the opinion that the courts below erred both in the refusal to rescind and in directing specific performance.

I cannot assent to the view of the law taken below, except by McPhillips, J., who held deceased was entitled to damages.

Derry v. *Peek*, 14 App. Cas. 337, had, I respectfully submit, when relied upon herein, been misapprehended. *Derry* v. *Peek* clarified the law of deceit and obliterated some judicial refinements. Fraud, however, still remains fraud. That decision neither changed the moral law nor enabled men who deliberately or recklessly committed a fraud to free themselves from the charge by swearing they did not intend to mislead, nor yet did it absolve from liability the honest and ignorant principal whose trust had been such as to enable him he trusted as his agent to succeed in bringing into their respective coffers the money of others.

If I could not see my way to granting rescission I should certainly hold the appellant entitled to damages.

I need not pursue that inquiry for the claim to damages is made only alternatively, and not cumulatively, as it was and maintained in the recent case of *Goldrei, Foucard & Son* v. *Sinclair*, [1918] 1 K.B. 180.

I think the appeal should be allowed with costs throughout, the contracts be rescinded and the money paid by deceased repaid with interest.

Anglin, J.

ANGLIN, J.:—A plaintiff claiming relief in respect of a contract on the ground that he was induced to enter into it by fraudulent misrepresentation, who has failed to convince either the trial judge or a majority of the judges of a provincial appellate court that he is entitled to judgment, can rarely hope to succeed on a further appeal to this court. The difficulty of demonstrating in such a case that there has been clear and manifest error in the findings of both the lower courts—the *sine qua non* of a reversal—is always very great and usually insuperable. Nevertheless, when convinced that such error has been demonstrated, our duty to reverse and to give the judgment which the provincial appellate court should have given is unquestionable. The right of appeal to this court

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is upon questions of fact as well as upon those of law. *Hood* v. *Eden*, 36 Can. S.C.R. 476.

In the present case, the evidence of the making of the representations that practically all the lots on 9th Ave. for half a mile had been sold to residents of Old Hazelton, and that lots on Pugsley St. for a like distance and the blocks 119, 120 and 121 had also been sold is so overwhelming, their misleading effect is so obvious and their materiality so clear that—I say it with all due respect—upon none of these points does there seem to be the slightest room for doubt. That there was actual dishonest intent is, I think, abundantly proved; that there was "what in the view of a Court of Equity amounts to fraud" (*Dimmock* v. *Hallett*, 2 Ch. App. 21, at p. 29), is beyond question. No good purpose would be served by detailing or discussing the proof. I would merely remark that if one were disposed to question the plaintiff's story, notwithstanding its corroboration in material particulars by other witnesses, Firth's letter of March 3, 1914, the materiality of which the trial judge appears to have been unable to appreciate, would remove all scepticism.

That the representations complained of, in fact, operated on the mind of the plaintiff as inducements would be a fair inference from their manifest materiality. His explicit testimony that but for them he would not have made the impugned purchases, credible in itself, is certainly not weakened by the trial judge's statement that he "would not suggest that Mr. Barron is not honestly telling his belief." I find nothing in the evidence to support the opinion that "he (Barron) would have bought just the same," and that he had "honestly argued himself into that idea (that he would not have purchased had he known the truth) years after the event." Indeed I am at a loss to account for this view of the judge, unless it should be ascribed to the influence upon his mind of his attitude towards actions such as this, expressed by himself to be that "of a doubting Thomas." Perhaps one should not be surprised, however. The judge also felt himself "inclined to think there was no intentional misrepresentation."

The two appellate judges who upheld the judgment dismissing the action appear to have given to the findings of the trial judge what I cannot but think was, under the circumstances, undue weight.

No doubt, in making his purchases, the plaintiff took into account other matters such as his idea as to the probable location of the railway station. But, having regard to the fact that, if the defendants' representations as to sales had been true, he would have been buying desirable building lots in a town of assured prosperity and immediate growth, whereas if false (as they were), his purchases would be practically on the prairie, their materiality is so palpable and their influence would ordinarily be so preponderating that it is almost impossible to conceive that they had not some effect as inducing causes. It is trite law that it is not necessary that other inducements should be wholly excluded. *Beckman* v. *Wallace*, 13 D.L.R. 540, 29 O.L.R. 96.

It is also elementary that a party misled by such misrepresentations as the evidence here establishes has, upon discovery of their falsehood, the choice of repudiating his contract—and (if *restitutio in integrum* be practicable) he may thereupon claim the equitable relief of rescission with reimbursement—or of affirming it and pursuing the common law remedy of damages in an action of deceit. The present plaintiff seeks rescission. He claims damages only alternatively, *i.e.*, if not entitled to rescission. His right to this alternative relief, although he should have lost his right to rescission is, in my opinion, incontestible.

The defendants assert that, with knowledge of the falsity of the misrepresentations on which he relies, the plaintiff definitely elected to affirm the contracts in question and to claim damages and is, therefore, disentitled to rescission. This feature of the case has occasioned me some trouble. The evidence of the alleged election to affirm consists in a letter written by the plaintiff's solicitor at Dawson to the defendants Clements & Heyward, on March 6, 1914, accompanied by a payment of $196 on account of moneys due under the contracts, and other acts about the same time—a further payment of $840 on account, a proposal to exchange the lots purchased for others on 9th Ave., and the publication of an advertisement asking offers for the lots. These other acts are less distinctly unequivocal than the letter, and if, owing to the circumstances under which it was written, it should be held not to afford conclusive evidence of a binding election not to seek rescission, they probably might be disregarded. In the letter it is stated that the plaintiff, "in completing his purchase rather than

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lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, . . . does not waive his right to insist on reparation for the deceit practised upon him, and proposes to bring an action on account thereof."

If the plaintiff, when this letter was written, had full knowledge of all the material facts entitling him to rescission, I regard it as conclusive evidence of an election on his part to forego rescission and to rely upon his remedy in damages for deceit. Whatever might be said had it been written by the plaintiff himself without professional advice, such a letter, written with full knowledge by a solicitor, imports affirmance of the contracts involving a deliberate choice between the two remedies which he must be taken to have known were open.

But the extent of the plaintiff's knowledge of the material facts is challenged. His story is that when his solicitor's letter was written, while he more than gravely suspected, he had no direct evidence that most of the lots on 9th Ave. had been unsold when he was induced to purchase. See 20 Hals., p. 749, n. (*b*); Bower on Misrepresentation, p. 269; and *Carrique* v. *Catts*, 20 D.L.R. 737, 32 O.L.R. 548, 559. The letter, however, is written, not on a basis of suspicion, but of actual knowledge, and I incline to think the plaintiff's rights may not unfairly be determined on the footing that, when he instructed the writing of it, he had such knowledge that the representation in regard to the sale of the 9th Ave. lots was false at the time it was made. *Whitehouse's* case, L.R. 3 Eq. 790. He swears, however, and his evidence is uncontradicted, that while he then believed it probable that the 9th Ave. lots had not been sold when he made his purchases, he was, at the date of the solicitor's letter, still under the impression that they had been subsequently sold. If that had been the fact of course the lots held by him would have been more desirable and of greater value, and his willingness to keep them and seek damages only may have resulted from his belief that it was so. According to his story, which seems not improbable and stands uncontradicted, he learned positively that many of the 9th Ave. lots still remained unsold only in the middle, or towards the end, of April, on receipt of Mr. C. H. Sawle's letter of March 30, 1914, written in answer to inquiry. This, however, was rather a fact which would influence

him in making his election, than a fact which would give rise to his right to make it. Ignorance of it would not suffice to render revocable an election otherwise binding. See Ewart on Waiver Distributed, pp. 72-76. The last payment made by the plaintiff was $840, on March 31, 1914. He says he made it because his solicitor had told him he would have a better chance to sue if he made prompt payments. He apparently had no suspicion throughout 1914 that blocks 119-121 had been unsold when he made his contracts of purchase. His letters of complaint and inquiry contain no reference to them. His testimony is that he first learned that these blocks had not been sold in August, 1915, when *en route* from Skagway to Vancouver returning from Dawson. This action was begun on October 7 following.

While the reading of the evidence left an impression on my mind that the plaintiff was much more affected in making his purchases by the alleged sales of the 9th Ave. lots to Old Hazelton people than by the misrepresentation as to the sale of blocks 119-121, yet I have found neither explicit testimony, nor anything to warrant the inference that his sworn testimony is untrue when he swears that, had he known that those blocks were not actually sold to, but were merely temporarily occupied by Foley, Welsh & Stewart, he "would have stopped there" and would not have bought in New Hazelton. In other words, there is nothing to justify a conclusion that his belief that blocks 119-121 were actually sold did not in itself influence his conduct in making the purchases as *an* inducing cause. Fraudulent misrepresentation in a matter *primâ facie* material and likely to operate as an inducement having been shewn by the plaintiff, the onus of satisfying the court that it did not in fact so operate is certainly cast upon the defendants. They have not discharged that burden. Had they done so in regard to the representation as to blocks Nos. 119-121, the present case would have been clearly distinguishable from *Boulter* v. *Stocks*, 10 D.L.R. 316, 47 Can. S.C.R. 440.

On the other hand, the appellant's case is put by his counsel, at the beginning of their factum, in this form:—

> The specific misrepresentation alleged is that the defendants represented that certain lots in the business section of the townsite of New Hazelton were sold, when in point of fact such lots were not sold, thereby inducing the plaintiff to purchase eight lots in the said townsite.

Viewed thus it was substantially a single misrepresentation of

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development in the business section that induced the appellant to purchase. If so, the reason which led him to believe that the representation as to the sale of the 9th Ave. lots had been untrue, and satisfied him that he had been the victim of false and fraudulent misrepresentations, as his solicitor's letter asserts, should have made him realise that the whole scheme was one of deception. His own letter of December 30, 1913, and his solicitor's letter of March 6, 1914, are susceptible of an interpretation indicating that he did so. If he did, the present case is brought within *Campbell* v. *Fleming*, 1 Ad. & E. 40, 110 E.R. 1122, distinguished by this court in *Boulter* v. *Stocks*, *supra*, and the misrepresentation in regard to blocks 119-121 should be regarded not as a distinct fraud, but merely as "a new incident in the fraud." "That," said Patteson, J., "can only be considered as strengthening the evidence of the original fraud; and it cannot revive the right of repudiation which has been once waived."

"There is no authority" says Lord Denman, "for saying that a party must know all the incidents of a fraud before he deprives himself of the right of rescinding."

[See, too, *Whitehouse's* case, L.R. 3 Eq. 790.]

I have found some difficulty, however, in distinguishing this case from *Boulter* v. *Stocks*, *supra*. The fact, had it been true, that three entire blocks had been purchased by such large railway contractors as Foley, Welsh & Stewart might well indicate to a man like Barron that large railway "shops" would probably be located permanently on them and would contribute materially to the rapid growth and prosperity of the new town. If so, it would almost seem that the misrepresentation as to that purchase might be deemed of a distinctive character, quite as much so as was that as to the acreage in *Boulter* v. *Stocks*. While I bow to the authority of that decision, I am not satisfied that, if a member of the court, I should have concurred in it. It appears to rest upon the view expressed by Davies, J., that (before the lease there relied upon as evidencing an election to affirm the contract had been executed) "the facts brought to the plaintiff's knowledge from time to time as he began cultivating the land in the spring, as to the dirty condition of the soil and the presence of large quantities of noxious weeds, would (not) of themselves be sufficient to satisfy the plaintiff that the sale of the farm to him was a fraud and a deception.

The evidence was of a character, no doubt, to raise grave and serious doubts in his mind as to whether he had not been deceived in the transaction, but nothing more;" and, as put by Duff, J.:—

He (the plaintiff) may have had his suspicions as to Boulter's entire honesty, but it is quite clear that the possibility of shortages in acreage had not then occurred to him and he had no suspicion that the whole transaction had been on Boulter's part the swindle that it ultimately proved to be. It would probably seem to him to be most unlikely that the misrepresentations as to the number of apple trees—so easy to expose—had been made deliberately and as to the prevalence of noxious weeds that is a matter respecting which he may well have thought some exaggeration was to be expected. I think the evidence is quite consistent with the view that his discoveries in regard to these matters did not bring home to his mind a conviction that a fraud had been practised upon him such as would entitle him to impeach the sale.

Here, on the contrary, the plaintiff in his own letter of December 30, 1913, after stating the representations made to him, says:—

Had the truth been told me I would not have bought a dollar's worth.

In Firth's confidential letter of March 3 to the defendants, Clements & Heyward, so much relied upon by the plaintiff for other purposes, it is stated:—

As intimated, Mr. Barron is positively preparing a case against you for misrepresentation on account of marking off all the 9th Avenue lots as being sold when in reality they were not.

The nature of the charge made is indicated in these words:—

Personally I do not believe that Mr. Barron has any case at all, for I cannot bring myself to imagine that a firm of your standing would deliberately mark off any portion of a townsite map as being sold when such was not so.

In the plaintiff's solicitor's letter of March 6, he speaks of "the false and fraudulent representations made to induce him to purchase" and of "the deceit practised upon him." That Barron then believed he had been the victim of a fraud is scarcely open to question. The case at bar, therefore, may probably be distinguished on this ground from *Boulter* v. *Stocks*, 10 D.L.R. 316, 47 Can. S.C.R. 440.

Having regard to all the circumstances I have, not without some hesitation, reached the conclusion that the defendants have sufficiently shewn an election by the plaintiff which is a bar to his exercising the right of rescission.

I have not taken the evidence of the witness Quinn into consideration at all. That, in my opinion, was the only proper course to follow since the trial judge saw fit to close the case before the cross-examination of that witness had been completed and, thereupon, delivered judgment dismissing the action.

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The appeal should be allowed with costs throughout and judgment should be entered for the plaintiff (by revivor) for recovery of damages, to be assessed in the Supreme Court of British Columbia upon a reference to the proper officer according to the usual practice of that court, for the deceit practised upon the original plaintiff in inducing him to purchase the properties described in the several agreements mentioned in the statement of claim.

Brodeur, J.

BRODEUR, J.:—This is an action for the rescission of a certain agreement for sale of lots of land in New Hazelton or, in the alternative, in damages for deceit.

New Hazelton is a new townsite which was subdivided during the construction of the Grand Trunk Pacific. It was expected that a railway station would be erected at that place and Robert Kelly, the respondent, bought a large tract of land which he subdivided into lots and offered for sale. Clements & Heyward, a firm of real estate agents in Vancouver, were instructed by Kelly to make the sale of those lots and they, in their turn, appointed different sub-agents in different towns of the West.

The sub-agent they appointed in Dawson City was a man named Firth and they sent him a map shewing the townsite and several lots were marked on this map with a stroke. It is claimed by the plaintiff, Barron, who asks for rescission, that it was represented to him that these lots so marked were sold and that he falsely bought the nearest ones on the strength of those misrepresentations.

On the other hand, the defendants (respondents) claim that it was not represented that those lots were sold simply but reserved for sale or selected by some intending purchaser.

The trial judge found that there was no intentional misrepresentation and his judgment has been affirmed by a majority in the Court of Appeal. This is an appeal from that decision. The main point in the case is whether or not there has been misrepresentation.

The appellant has proved, not only by himself but by some other witnesses, that the agent, Firth, has represented to him that the ots on 9th Ave. nearest to the station has been taken. That representation is confirmed by the written evidence which was presented in the case. Firth had received a map of the townsite from his principals, Clements & Heyward, and it was stated on

that map that the lots in question had been sold. Then, it is no wonder that the agent, in selling those lots to the plaintiff, would have represented that those lots had been actually disposed of.

It is in evidence, on the other hand, that, as a question of fact, they had not been sold. Proposals of sale might have been made but no actual agreement for sale had taken place. We all realise that such a representation might have induced the plaintiff to purchase some other lots in the neighbourhood when he saw that within a very short time so large a number of lots had been taken up by purchasers living in the neighbourhood, and consequently better posted as to the prospects of the place. The plaintiff was then living very far from there, could not very easily communicate with the place, and had no other information than what was conveyed to him by the respondent's representative.

It cannot be claimed that those representations were not of a fraudulent nature, because, why should the respondent state that those lots had been sold when, as a question of fact, they were still under their control? Why not represent the facts as they were, if they had simply reserved those lots for being sold by their agent at New Hazelton?

The only conclusion which I can reach is that there were misrepresentations and that those misrepresentations were fraudulent and induced the plaintiff to purchase the lots in question. There would be then no question as to the rescission, if the plaintiff, after being apprised of those misrepresentations, did not find it advisable to make some payments and to waive the right which he had for rescission.

By a letter which his counsel wrote to the respondent on March 6, 1914, he declared himself ready to complete his purchase, but did not waive his right to insist on reparation for the deceit practised upon him, and proposed to bring an action on account thereof. If it were not for such a letter, I would not hesitate to grant his action for rescission, but he should be all the same entitled to damages for deceit.

The judgment appealed from should be set aside; the appeal should be allowed and there should be judgment for the appellant for damages for deceit and an inquiry should be had to assess those damages. *Appeal allowed.*

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S. C.

ST. GEORGE MANSIONS Limited v. HETHERINGTON.

Ontario Supreme Court, Appellate Division, Mulock, C.J.Ex., Clute, Sutherland and Kelly, JJ. January 17, 1918.

LANDLORD AND TENANT (§ II—16)—DEMISE OF REAL PROPERTY—WARRANTY AS TO FITNESS FOR PURPOSE INTENDED.

In a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied. [*Davey* v. *Christoff*, 28 D.L.R. 447, not followed.]

Statement

APPEAL by plaintiff company from a judgment of a County Court Judge dismissing an action brought in that Court, and tried by him without a jury.

In the action the plaintiff company sought to recover $219.34 for rental of a suite of apartments leased to the defendant for twelve months. The defendant moved out of the suite, before the expiry of the twelve months, because he deemed it uninhabitable. He paid the rent up to the time he moved out. The plaintiff company's claim was for the portion of the rent appropriate to the period between the defendant's abandonment and the re-letting of the suite by the plaintiff company.

The County Court Judge found that the suite was let to the defendant partly furnished; that there was a breach of the implied warranty that the premises were habitable; and therefore dismissed the action.

J. A. Macintosh, for appellant company.

George Wilkie and *S. A. A. Campbell*, for respondent.

The judgment of the Court was read by

Clute, J.

CLUTE, J.:—Appeal from the Senior Judge of the County of York, who dismissed the action. The plaintiff now moves to set aside the judgment for the defendant and to render judgment for the plaintiff for $219.34. The amount is not in dispute.

The writ is endorsed for rental of apartment number 3 in the St. George Mansions, under lease dated the 16th September, 1915, between the plaintiff and the defendant, for the period extending from the 1st June, 1916, to the 23rd August, 1916. The lease is dated the 16th September, 1915, and is made for twelve months from the 1st October, 1915. The premises are described as "the suite of rooms or apartments designated on plans on file at the offices of the lessor as suite number 3, consisting of eight rooms, besides the private hall and bath-room, located on the ground storey, situated at the south-west corner of St. George and Harbord streets, in the city of Toronto, and commonly known and

described as the St. George Mansions, at a rental of $80 per month." This covers the description, and no chattels are referred to in the lease. The evidence shewed that there was upon the premises, and forming a part thereof, a refrigerator with a waste-pipe leading therefrom—the evidence did not shew whether securely or permanently attached or not. There were also certain window-blinds or curtains, but the premises did not purport to be furnished premises, nor were they in fact.

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The defendant occupied the premises from the date of the lease until the 31st May, 1916, and paid the rent therefor. In the affidavit in answer to the writ the defendant states that the "apartment was uninhabitable, and for that reason he moved out of said apartment."

The plaintiff entered and endeavoured to rent the premises, and did so rent them for the period subsequent to the 23rd August, and the rent claimed is for the intervening period between the abandonment by the defendant and the entry of the plaintiff.

The evidence established that the apartment was infested with cockroaches. They made their appearance and were observed a day or two after the defendant took possession. On the second day after possession they were found in great numbers climbing the wall, and many were killed by the defendant. The defendant made complaints from time to time, and the plaintiff promised to and did assist in the endeavour to exterminate them. The nuisance was much abated during the winter months, whether from the method adopted for their extermination or the cold weather does not very clearly appear. In the spring, however, they resumed their migrations, apparently coming from the adjoining premises, in large numbers. There is no doubt that the vermin became almost if not quite an intolerable nuisance to the premises, and were so at the time the defendant left. The defendant also complained a great deal, of noises from different causes, but principally from the occupants of the apartment above. There is some evidence, rather strong, to shew that the final cause of the defendant's leaving the premises was the disturbance suffered from the occupants of the apartment above; but the trial Judge has found, and there is evidence to support his finding, that the defendant left both on account of the nuisance of the cockroaches and of the noises complained of.

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The trial Judge found that the premises were partly furnished. I am unable to find evidence to support the finding of the trial Judge in that regard. It is true that the lessor covenants to supply the premises with necessary heat and hot and cold water at all reasonable times, by means of the pipes, radiators, and appliances now placed therein, and also to supply such janitor service as may be necessary for the proper care of the building, but not so as to include any care of the premises therein demised.

This does not, in my opinion, bring the case within the rule applied in *Davey* v. *Christoff*, 36 O.L.R. 123, 28 D.L.R. 447, following *Smith* v. *Marrable*, 11 M. & W. 5, and *Wilson* v. *Finch Hatton*, 2 Ex. D. 336, 344. The former was the case of the letting of a furnished house. The cases are fully collected and considered in *Davey* v. *Christoff*, where the rule was applied to the case of a furnished theatre.

In closing the judgment in that case, Meredith, C.J.O., expressed the desire that nothing should be said by the Court which would tend to unsettle the well-established rule of law that, in the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied.

This case does, in my opinion, fall within the rule. The facts are not such as to raise an implied warranty that the premises were habitable.

It is unnecessary to decide, had such an implication arisen, what would be the effect of the long-continued occupation by the tenant and payment of rent.

The judgment for the defendant should be set aside, and judgment entered for the plaintiff for $219.34.

The circumstances are exceptional. The defendant has suffered considerable loss from no fault upon his part, except the refusal to occupy the premises longer. While compelled to follow the rule in a case like the present, one cannot but feel that the plaintiff is not entirely free from fault. The condition of the premises one would think must have been known, and more effective means might have been used to make them habitable.

The plaintiff is entitled to the costs of the appeal, but no costs of the Court below.

Appeal allowed.

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Ex. C.

THE KING v. VANCOUVER LUMBER Co.

Exchequer Court of Canada, Cassels, J. May 27, 1914.

PUBLIC LANDS (§ I B—5)—DEADMAN'S ISLAND—LEASE—AUTHORITY OF MINISTER.

Deadman's Island, in the harbour of Vancouver, is the property of the Crown in the right of the Dominion of Canada. An order-in-council authorising the Minister of Militia and Defence to lease that island for a term of years does not carry with it the authority to vary its terms by providing for a right of perpetual renewal. In the absence of an order-in-council authorising such variation, the action of the Minister in doing so is null and of no effect.

Statement

ACTION to set aside a lease of Deadman's Island.

E. L. Newcombe, K.C., and *H. Cowan*, K.C., for plaintiff; *I. F. Hellmuth*, K.C., and *R. S. Lennie*, for defendant.

Cassels, J.

CASSELS, J.:—Deadman's Island, in the Harbour of Vancouver, is the property of the Crown, represented by the Dominion of Canada. At the time of the passage of the Confederation Act, it was owned by the Crown represented by the Imperial Government. Subsequent to Confederation it was transferred to the Dominion of Canada.

The facts relating to the title to this island are fully set out in the reports of the case of *Att'y-Gen'l of British Columbia* v. *Ludgate & Attorney-General of the Dominion of Canada*. The reasons for judgment in that case are to be found reported in 8 B.C.R. p. 242 (at trial), 11 B.C.R. 258 (Court of Appeal), and [1906] A.C. 552 (Privy Council).

An order-in-council was passed by Her Majesty's Privy Council of the Dominion of Canada, and was subsequently approved of by His Excellency the Governor-General of Canada. The order-in-council is as follows:—

276. Certified copy of a report of the Committee of the Privy Council approved by His Excellency the Governor-General on the 16th February, 1899.

On a memorandum, dated 10th February, 1899, from the Minister of Militia and Defence, recommending that authority be given him to lease Deadman's Island, situated in Coal Harbour, Burrard Inlet, British Columbia, to the Vancouver Lumber Company, of Vancouver City, British Columbia, for a term of twenty-five years, at an annual rental of five hundred dollars.

The Committee submit the same for Your Excellency's approval.

(Sgd.) RODOLPHE BOUDREAU,
(Seal). *Clerk of the Privy Council.*

Pursuant to this order-in-council, on February 14, 1899, a lease of this island, a copy of which is set out in the information

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and admitted by the defendant, was executed by the then Minister of Militia and Defence, Sir Frederick Borden, purporting to lease to the defendant company the island in question for a term of 25 years. It is open to question whether this lease is effective and whether it does not contain provisions in excess of the powers conferred by the order-in-council.

The plaintiff in the action before me does not raise any question attacking the validity of this lease. On April 14, 1900, the then Minister of Militia and Defence, Sir Frederick Borden, purported to vary the terms of the lease of February 14, 1899, in very important particulars. Among other changes one amendment would provide for a right of perpetual renewal to the lessee instead of a lease for 25 years, as authorized.

This information is filed to have it declared that the variation of the terms of the lease was unauthorized and that the document in question signed by Sir Frederick Borden is null and of no effect.

I am of the opinion that the contention of the Crown is well founded. It has been proved before me that no order-in-council was passed authorizing such a variation as that made by the subsequent document dated April 14, 1900. I expressed my view at the trial that the evidence of Mr. Macdonell taken on commission was almost wholly inadmissible and irrelevant, and that part of it reciting the statements of Sir Frederick Borden that an order-in-council had been passed authorizing the execution of this document was wholly inadmissible to prove such fact. Sir Frederick Borden was not called as a witness.

The plea of *res judicata* which I allowed the defendant to set up by amended defence in order not to deprive it of any defence if a higher court were to take a different view from that entertained by me, in my opinion hardly merits any consideration. It lacks every essential element of a valid defence of *res judicata*.

I think the plaintiff is entitled to judgment declaring that the document of April 14, 1900, varying the terms of the lease of February 14, 1899, is void and of no effect, and if the plaintiff so desires it should be delivered up and cancelled.

The defendant must pay the costs of the plaintiff in this action. *Judgment for plaintiff.**

*Affirmed on appeal to Supreme Court of Canada, December 4th, 1914.

McDONALD v. PEUCHEN.

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S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox, and Rose, JJ. January 21, 1918.

INDEMNITY (§ I—1)—ACTION FOR—JUDGMENT FOR FULL AMOUNT FOR WHICH INDEMNIFIED ALTHOUGH NO PART HAS BEEN PAID—CLAIM FOR NOT SUBJECT OF SPECIAL ENDORSEMENT.

In an action for indemnity, law and equity now being administered by the same court, a plaintiff may have judgment for the full amount against which he is indemnified, although he has paid no part of it and may never pay any part of it, in cases where the defendant is not concerned in the application of the money.

[*Liverpool Mortgage Ins. Co's* case,[1914] 2 Ch. 617; *British Union and National Ins. Co.* v. *Rawson*, [1916] 2 Ch. 476, referred to.]

Per RIDDELL and ROSE, JJ., a claim for an indemnity cannot be made the subject of a special endorsement, but where the whole merits of the case have been gone into, the trial should not be set aside and a new trial ordered, rule 183 being broad enough to enable the court to make all necessary amendments and to give judgment according to the rights and merits of the case.

Statement.

AN appeal by the defendant from the judgment of CLUTE, J., at the trial at Ottawa, in favour of the plaintiff, in an action upon a covenant for indemnity.

The plaintiff's claim, as endorsed upon the writ of summons, was for the sum of $4,182.34, being the amount due under a judgment for principal, interest, and costs, recovered by one Levesconte against the plaintiff for a balance of a commission on the sale of timber berths in the Province of Saskatchewan; the plaintiff alleging that the defendant had covenanted and agreed to indemnify and save harmless the plaintiff from any claim or demand by Levesconte for the commission; and claiming interest on the amount of the judgment.

J. R. Osborne, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Until this case was argued in this Court it seems to have been treated, by all concerned in it, as a simple case, depending mainly upon a single question of fact; and I am bound to say that it still seems to me to have been properly so treated, notwithstanding the length of the argument here and the number of new points raised here for the first time, and though some of them were first suggested by members of this Court.

The facts are not complicated: McDonald, the plaintiff in this action, owed Levesconte, a solicitor, $5,450; Peuchen, the defendant in this action, covenanted with McDonald that he would "indemnify and save harmless" McDonald from the Levesconte debt, except as to $1,450, part of it.

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The deed in which this covenant is contained does not fix the amount of the Levesconte debt, but it was ascertained, and settled with Levesconte, at $5,450, by Peuchen's solicitor, just before the deed was made, and was put in writing by the solicitor, over his own signature, as appears in exhibit 4 filed at the trial of this action.

McDonald paid to Levesconte the $1,450, but no more: and Levesconte thereupon sued McDonald for the rest of the debt, and, in that action, Levesconte recovered judgment against McDonald for the rest of the debt, $4,000, with interest upon that sum, $133.37, and costs of that action, $34.70; and that judgment stands in full force and effect against McDonald, who is ready to pay it, and from whom it can be recovered by execution.

Then this action was brought by McDonald against Peuchen to recover the amount of the judgment in the other action, with interest; the action being based upon Peuchen's indemnity covenant.

The single defence, set up in the proceedings in this action, to the claim made in it, is thus stated in Peuchen's own words, under oath: "I agreed that if any action was brought by Levesconte I would take over the defence and defend the said action in the name of Hector McDonald and would set up my claim against Levesconte as a defence to Levesconte's claim against McDonald;" but that "the said McDonald refused to allow me to defend the action or to accept an assignment of my claim against Levesconte and allowed judgment to go by default."

These words are contained in Peuchen's affidavit made under Rule 56, and which, under that Rule, must shew the nature of the defence, "with the facts and circumstances which he deems entitle him to defend the action;" and which also, with the writ of summons in the action, constitutes the whole record for trial of the action.

It will be observed that in all this solicitor-prepared and client-sworn statement of defence there is not a word of any agreement on the part of McDonald to do anything; but at the trial, though still very indefinite, Peuchen went further in this respect, stating his defence in these words:—

"Q. I would like to know what was said between you and Mr. McDonald on that occasion? A. He was agreeable to assist

me in this matter, and that is why that clause was put in the agreement.

"Q. Do you recall how he expressed his agreeableness? A. Except that he promised to do that, to allow me to be in a position to defend myself.

"Q. To defend yourself? A. Against the commission, I mean to say.

"Q. I suppose you mean defend yourself against the claim for commission? A. Yes.

"Q. And when was that understanding come to? A. We arranged the details prior to drawing out the agreement at the Chateau Laurier.

"Q. Where was the arrangement about your being given an opportunity to set up your claim? A. That was at the hotel prior to coming up to the office.

"Q. At the Chateau Laurier? A. Yes.

"Q. Upon which this agreement of the 9th of November was prepared? A. Yes."

Upon this single defence Peuchen failed at the trial, the learned trial Judge finding: (1) that no agreement, apart from that contained in the deed, was made; that that which took place beyond that amounted only to "an informal understanding," and so was not embodied in the deed which was afterwards made; and (2) that Peuchen was given all the opportunity which, under any circumstances, he could have been entitled to under this understanding, namely, an opportunity to come into the action of Levesconte against McDonald and raise there any question that the practice of the Court permitted; but found that he could get no relief in that action, and so was discharged out of it after having been brought into it by McDonald; so that in no sense was McDonald blameable.

I am quite in accord with the trial Judge in these respects, and desire only to add that another insuperable difficulty stood in the defendant's way: (3) he could succeed only, if at all, upon a reformation of the deed, for nothing like an independent collateral agreement based upon a good consideration was proved, and no claim for reformation was made. If it had been, doubtless the plaintiff would have been at the trial to testify in his own behalf, though that would hardly have been needful in view of the char-

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acter of the testimony given at the trial in his absence, as to any verbal understanding.

The only other point raised at the trial was, whether the plaintiff was entitled to interest upon the amount of the judgment against him in the other action: the trial Judge gave him such interest, very properly I think, because the plaintiff is liable for interest upon that judgment, and liable because the defendant has hitherto broken his covenant to save him harmless from the claim in that action.

And not only were these the only questions raised at any time, until now, in this action, but they are the only grounds of this appeal; the appellant is therefore not entitled to the benefit of any of the other points suggested or raised upon the argument of this appeal: but, if he were, he must fail in respect of all of them, and therefore I shall deal with all of them.

First, it was said that the plaintiff's claim was one which could not be the subject of a special endorsement on the writ; and that, as it was so treated, that irregularity renders the whole of the subsequent proceedings invalid: a contention that I should have thought could hardly have been seriously advanced. The answers to it are obvious: the claim, being for an amount ascertained and fixed in writing by the defendant himself, was one which, the plaintiff seeking payment to himself of that amount, was the subject of a special endorsement: and, if it were not, it was not only so treated by the plaintiff, but equally, if not more so, by the defendant, who, instead of objecting to the irregularity, filed his affidavit of defence and proceeded to trial upon a record comprising, as Rule 56 permits, the special endorsement and that affidavit only; how then is it possible for him now to urge even irregularity, not to speak of nullity? And, if there had been no other waiver of irregularity, or estoppel from setting it up, having gone to trial on the record as it is, substantially accurate in all material matters, and having taken his chances upon that trial, it does seem to me to be but a waste of words to urge any judicial tribunal to treat that trial as a nullity and give either party another chance upon a record setting up the same issues in a different form of pleading.

Second, it was urged that the plaintiff is not entitled to interest and to the costs of the other action. The question of interest I

have already dealt with; and as to such costs the plaintiff is entitled to them as between solicitor and client. According to the defendant's story, the plaintiff would have disregarded his "informal understanding" and have done the defendant a wrong if he had paid the $4,000 without being sued: an action was necessary in order that Peuchen might have the opportunity of setting up in it his claim against Levesconte's claim against McDonald. So Levesconte was put to his action for Peuchen's benefit: and in third party proceedings Peuchen was brought into that action and given that which he sought; but, having got it, he found it of no use to him, and so allowed those proceedings to be discharged. All that he might, and should, have seen from the beginning, for how could it ever have been thought that Peuchen's claim against Levesconte for damages for deceit could defeat an action by Levesconte against McDonald for money payable by the latter to the former for work done by the former for the latter at his request? This became very evident to Peuchen's solicitors when they abandoned the third party proceedings; and now they are driven to another untenable position; they say that McDonald should have taken an assignment of Peuchen's claim against Levesconte and have enforced it against Levesconte by way of counterclaim in Levesconte's action against him. But why should he? No one in evidence even suggests that he ever agreed to do so; and, having regard to the character of this claim, it is quite impossible to believe that he would have so agreed had he been pressed ever so much to do so; and the more so as the claim is not an assignable one: and so the contention in favour of it falls to the ground.

The nature of Peuchen's alleged claim against Levesconte seems to be one for damages for deceit, said to have arisen in this way: that Peuchen was buying property for the sale of which Levesconte and another were to have a commission, which was said to amount to $20,000; that Peuchen bought upon the agreement that he was to be allowed the amount of this commission, the amount of which was stated to be $20,000; that that agreement was carried out, and that he got the benefit of that commission just as provided for in the agreement; but that he afterwards discovered that Levesconte and his associate got an additional sum of $20,000 from his vendor; that, as he put it, the commission was $40,000, not $20,000, as he had been led to believe in making

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the agreement under which he was to have the benefit of the $20,000 only.

This transaction seems to have taken place in the year 1911: and so Peuchen, who now complains that McDonald, who had nothing whatever to do with the transaction, does not take an assignment of his claim in respect of it and prosecute it in his own name, has himself had the intervening years to prosecute the claim, but has done nothing whatever to enforce it. It also appears that Levesconte has large claims against Peuchen still outstanding; indeed from Peuchen's testimony at the trial of this action I gather that Peuchen was willing, somewhat recently, to settle all claims between them, "business and everything," on the basis of a payment by Peuchen to Levesconte of $6,500 or $6,000: Peuchen's testimony, as to that, is in these words:—

"Q. Didn't you offer Levesconte that day $6,500 in full settlement of his total claim for your business and everything? A. We discussed the matter. I went to get his bill, and I have not got his full bill to this day.

"Q. You did make him a bulk offer that day to close up your account with him? A. Yes, with the view of offsetting my claim against him.

"Q. If he had agreed to take $6,000 that day? A. I was trying to get his bills. I have not got anything in writing from him yet."

In all the facts and circumstances of the case, it does seem to me to require much assurance to contend that this stale claim of Peuchen against Levesconte and another, that other being in no way before the Court, should have been prosecuted in McDonald's name in Levesconte's action against McDonald, for a just debt, to which there was no defence: and to do so in the face of certain defeat because of the non-assignability of the claim.

Something was said about the want of proof of the amount of the plaintiff's claim, though no such point was made at the trial or in the notice of this appeal: I may, however, add that I do not see how the judgment in the other action could be proof against the defendant in this action: see *Ex p. Young* (1881), 17 Ch. D. 668; and *Walsh* v. *Webb* (1917), 38 O.L.R. 457, 34 D.L.R. 113; but what better proof could be desired of the amount of the claim than the proved fact that it was settled by the defendant, and that

it is shewn in evidence over the signature of the defendant's solicitor?

This brings me to the last point, which was never taken by any one at any time until suggested from the bench here: and the parties were, I think, right in never having raised it: it has force only if we confuse an action for indemnity with an action upon a guaranty.

In an action for indemnity, in these days when law and equity are administered in the one Court, a plaintiff may have judgment for the full amount against which he is indemnified, though he has yet paid no part of it, and may never pay any part of it, that is, in cases in which the defendant is not concerned in the application of the money: and that is this case: whether McDonald pays Levesconte or not does not affect Peuchen, McDonald alone is answerable to Levesconte for this debt: see *Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617, and *British Union and National Insurance Co.* v. *Rawson*, [1916] 2 Ch. 476.

I have no doubt the judgment at the trial was right, and so would dismiss this appeal.

Riddell, J.

RIDDELL, J.:—The parties hereto were bargaining concerning the purchase by the defendant from the plaintiff of certain limits in Saskatchewan.

It appeared that Levesconte, a Toronto solicitor, was claiming from the plaintiff a large commission, some $10,000. The plaintiff made a substantial reduction in his price in order to make a sale, but desired to be protected against the claim for commission. The defendant, being with Mr. Smellie, his solicitor, in Ottawa, called up Levesconte on the telephone, and it was arranged that Levesconte would accept $5,450 for the commission; the defendant was assured by Levesconte that the plaintiff would be satisfied to pay $1,450 of this. Then it was agreed by the parties hereto that the plaintiff should pay $1,450 and the defendant $4,000. But, when it came to drawing up the agreement, it would appear that there was a fear that Levesconte would not abide by his offer to accept $5,450, but insist upon more. Accordingly, the agreement provided that the defendant would indemnify the plaintiff against any claim by Levesconte in excess of $1,450. The clause (5) reads thus: "The said party of the second part" (the defendant) "shall

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indemnify and save harmless the said party of the first part" (the plaintiff) "and those for whom he is acting, from any claim that may be made by R. C. Levesconte for commission in respect of the negotiations of sale of said limits over and above $1,450."

The $1,450 seems to have been paid. Levesconte sued the present plaintiff for the remainder, $4,000, interest, etc. McDonald served a third party notice on Peuchen claiming an indemnity; Peuchen entered an appearance; McDonald let judgment go in favour of Levesconte; and the third party proceedings were set aside with costs. Peuchen opposed the third party proceedings, and asked for their dismissal, "on the one ground that when the judgment had been obtained in the action there was nothing further he could do to oppose that judgment."

This action was brought down for trial on what purported to be a specially endorsed writ and Peuchen's affidavit of merits. The trial took place before my brother Clute at the Ottawa sittings in October, when judgment was directed to be entered for the plaintiff for the sum of $4,182.34 and interest from the 24th July, 1917 (the day of the teste of the writ), with costs. Formal judgment has been settled for entry for $4,222.98 and costs. The defendant now appeals.

Much objection has been raised to the regularity of the proceedings; it has been pointed out, and truly, that a claim for an indemnity cannot be made the subject of a special endorsement. The so-called special endorsement reads thus:—

"The plaintiff's claim is for the sum of $4,182.34, being the amount due on a judgment for principal, interest, and costs, obtained by one R. C. Levesconte against the plaintiff for balance of commission on the sale of timber berths numbers 1114, 1115, and 1157 in the Province of Saskatchewan, from the said plaintiff, acting for himself and as trustee for the estates of C. G. Frith, deceased, and Kenneth McDonald, deceased, to the defendant. By agreements in writing signed by the said defendant, dated the 9th day. of November, 1915, and the 16th day of December, 1916, respectively, the said defendant covenanted and agreed to indemnify and save harmless the said plaintiff from any claim or demand by the said R. C. Levesconte for the said commission.

"The following are the particulars:—

"June 29th, 1917.	To judgment for said commission obtained by R. C. Levesconte against plaintiff on this date.....	$4,133.37
	To taxed costs.....	34.70
		$4,168.07
"July 24th, 1917.	To 25 days' interest to date, $4,168.07 at 5 per cent.....	14.27
		$4,182.34

"And the plaintiff will claim interest on the said sum of $4,182.34 to judgment, at 5 per cent., and any further costs the plaintiff may be put to by reason of the defendant's default."

It is obvious that the present action is an action for indemnity, and not on the Levesconte judgment, and that the proceedings have been very irregular. But the whole merits of the case have been gone into, and it would be an absurdity to set aside the trial and have a new trial in a new action or on pleadings if that result can be avoided. I think it can.

Rule 183 is very broad and gives us the power to make all necessary amendments to secure the advancement of justice and the giving of judgment according to the very right and merits of the case: see *Cropper* v. *Smith* (1884), 26 Ch. D. 700, at p. 710; *Williams* v. *Leonard* (1896), 17 P.R. 73 (C.A.), etc., etc.

We should amend the proceedings by causing formal pleadings to be put in, if insisted upon, and the case can then be dealt with.

At the time of the issue of the writ, the plaintiff had paid nothing; we are told (but that, of course, does not appear in evidence) that since the trial of this action he has paid $1,000.

The real ground for the defence and the appeal is an alleged agreement between the parties that in some way the defendant would be enabled to set up, against any claim by Levesconte, a claim which he had against Levesconte. As to this defence, I think the defendant has two difficulties, both impossible to get over.

1. The question of fact: I entirely agree with the learned trial Judge when he says: "I do not think that what took place prior to the drawing of the agreement, taking the defendant's own state-

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ment of the matter, which seemed to me to be given very fairly, amounted to such an agreement as precluded the payment of the $4,000 which was then agreed upon, until an arrangement had been made between the defendant and Mr. Levesconte. I think that it amounted to no more than this, that, so far as McDonald is concerned, if the defendant could intervene when a claim was made by Levesconte, he might do so, and the plaintiff did not object so far as he was concerned. I think that did not amount to an agreement; it only amounted to an informal understanding, which was not embodied in the subsequent agreement, and with respect to which the plaintiff did give to the defendant notice when he was served with a writ by Levesconte, affording the defendant an opportunity to come in and raise the question. He endeavoured to do so, but he found that the practice of the Court did not so permit. The plaintiff is not responsible for that. There is no obligation imposed upon the plaintiff to do that. So far as I can see, the plaintiff has not fallen short of what was the real understanding between the parties."

2. Moreover, the alleged agreement would have been inconsistent with the written agreement.

In no case can this defence succeed.

The form of the judgment next requires consideration.

At the hearing of the appeal, counsel for the respondent said that he could not contend that the judgment as entered should stand: that was, however, in deference to observations from the Bench, and the plaintiff should not be held to the admission if in fact the judgment is correct.

Contrary to the opinion I had at the hearing, I am now convinced that the judgment should stand—this conclusion is arrived at from a consideration of the English cases.

While it may not be easy to lay down the principle in logical terms, it would seem that if he who agrees to indemnify, insure, etc. (the precise form of the undertaking is immaterial), have an interest in the application of the money (e.g., if he be the owner of the equity of redemption subject to a mortgage or the like), he cannot be ordered to pay the amount to the person indemnified, insured, etc., but only to pay the creditor either directly or by paying into Court: *Boyd* v. *Robinson*, 20 O.R. 404; *Mewburn* v. *Mackelcan*, 19 A.R. 729; *In re Richardson*, [1911] 2 K.B. 705, at p. 713.

But, if he has no interest in having the money reach the creditor, judgment may be given against him that he pay the amount to the indemnified: *Carr* v. *Roberts* (1833), 5 B. & Ad. 78; *Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617; *In re Perkins*, [1898] 2 Ch. 182; *British Union and National Insurance Co.* v. *Rawson*, [1916] 2 Ch. 476.

As to the amount, the judgment in Levesconte v. McDonald is not absolutely binding, although the amount mentioned in such a judgment has generally—and especially where, as here, there is no charge of fraud—been accepted as the true amount indemnified against.

Counsel for the defendant expressly says that "it is not suggested that he (the plaintiff) did it wrongfully," although he says, "McDonald allowed a judgment to go by default against him for more than the actual commission which Mr. Levesconte was entitled to obtain from him." No evidence is given looking toward such a defence, and the amount is satisfactorily proved. Of course fraud in obtaining the judgment might have been proved, and if proved would be a good defence at least *pro tanto*: *Powell* v. *Boulton* (1846), 2 U.C.R. 487. Our cases in which the judgment is taken as the true amount go back very far: *Roberts* v. *Rees* (1858), 5 U.C. L.J. O.S. 41; *Joice* v. *Duffy* (1859), *ib.* 141.

If there be no objection on the part of the defendant herein, the sum of $4,133.37 may be taken as correct; if he objects, the true amount will be found by calculating the amount of $4,000 with interest from the day of the teste of the writ in the former action.

The costs given by the former judgment amount to $34.70. Where one is sued on a claim which some other should pay, he may or may not be entitled to charge that other with costs. The rule seems to be that, if the costs naturally follow from the contract, if they are to be taken as having been in the contemplation of the parties when the contract was entered into, they may be claimed against the indemnifier if the other act reasonably: *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79; *Baxendale* v. *London Chatham and Dover R. W. Co.* (1874), L.R. 10 Ex. 35, as explained in *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q.B. 413.

In the present case it is obvious from the defendant's own evidence that, when the contract was entered into, both parties

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expected that Levesconte would have to sue to get the $4,000; it was clearly contemplated that, when an action should be brought by Levesconte, the defendant herein should have notice so that he might make an effort to set up the claim he said he had against Levesconte. Had the plaintiff herein paid to Levesconte the $4,000 without suit, the defendant would have reason to complain, although he might not have had any legal redress. The plaintiff, when sued herein, did notify the defendant, and the defendant took no steps then to do anything with his alleged claim against Levesconte. I think that the plaintiff should have his costs in that action provided for here.

As to the amount of these costs, the plaintiff acted as a prudent man should in allowing the judgment to go by default, knowing that he had no defence; the costs which he had to pay or was rendered by the judgment liable to pay, the defendant should be ordered to provide for.

He does not claim his own costs of defending the action brought by Levesconte. The authorities above quoted shew that he would be entitled to them against the defendant and that as between solicitor and client: *Howard* v. *Lovegrove* (1870), L.R. 6 Ex. 43; *Clare* v. *Dobson*, [1911] 1 K.B. 35—but, as no claim is made for these, we need pay no attention to them.

If the defendant does not object to the amount, the appeal should be dismissed with costs; if he does, the amount should be fixed by the Registrar at the cost of the defendant, and judgment be entered for that sum with costs here and below.

Lennox, J.

LENNOX, J., agreed that the appeal should be dismissed.

Rose, J.

ROSE, J., agreed with RIDDELL, J.

Appeal dismissed with costs.

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THE KING v. CADY.

New Brunswick Supreme Court, Barry, J. June 10, 1918.

INTOXICATING LIQUORS (§ II A—35)—BEER LICENSE—APPLIES ONLY TO PREMISES DESCRIBED — HOLDER NOT A LICENSEE AS TO OTHER PREMISES.

A beer license issued under the Intoxicating Liquor Act (N.B. 1916, c. 20, s. 180) authorizes the holder to sell beer or non-intoxicating drinks only on the premises described in it.

The holder of such license has no right of appeal as a licensee against a conviction for permitting drunkenness on separate premises owned and occupied by him as a moving picture theatre.

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Statement.

The defendant was convicted on April 30, 1918, before George W. Kimball, a commissioner of the parish of Burton Civil Court, for having permitted drunkenness to take place on the premises of which he was the occupant, contrary to s. 24 of the Intoxicating Liquor Act, 1916. This is an appeal taken against the said conviction.

F. H. Peters, for defendant.

P. J. Hughes, for the prosecutor, *contra*.

Barry, J.

BARRY, J.:—The defendant was convicted on April 30 last before George W. Kimball, commissioner of the parish of Burton Civil Court, for permitting, on March 20 last, drunkenness on premises of which he was the occupant, situate at Minto, in the county of Sunbury, contrary to the provisions of s. 24 of the Intoxicating Liquor Act, 1916. For his said offence the defendant was adjudged to forfeit and pay the sum of $100 and $26.30 costs, and in default of immediate payment, to be imprisoned in the common gaol of the county of Sunbury for the space of 3 months.

An appeal against the said conviction has been brought before me by way of review, and I am asked to set aside the conviction on the grounds: (1) that there is no evidence to support the conviction; and (2) that although the defendant was the owner, he was not, at the time the alleged drunkenness took place, the occupier of the premises in question.

Counsel supporting the conviction raises the preliminary objection to the hearing of the appeal that inasmuch as the defendant is not a licensee within the meaning of the Intoxicating Liquor Act; as the conviction is not for an offence committed on or with respect to premises licensed under the Act; and as the defendant has not been sentenced to imprisonment, an appeal does not lie.

It is not contended by the defendant that the premises in respect of which the offence is alleged to have been committed, that is, the motion picture theatre, are premises which were licensed under the Act. It was determined in the recent case of *The King* v. *Doherty* (1918), 42 D.L.R., that an offender cannot be said to be sentenced to imprisonment where the imprisonment is imposed, not as the original sentence of the court, but simply as a means which the law provides for enforcement of the payment of a money penalty. The only question that remains before I can dispose

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of the appeal upon the merits therefore is, whether the defendant is a "licensee" so as to give him a right of appeal. If he is not a licensee, the appeal does not lie.

The defendant, it appears, conducts a poolroom and bowling alley, a beer shop and a motion picture house (the latter known locally as a theatre), at Minto. The poolroom and the picture house are from 40 to 50 feet apart, but the evidence does not disclose whether there is internal communication between them, or whether they are situate in the same building or under the one roof.

It is admitted by counsel on both sides that the defendant is the holder of a beer license under s. 180 of the Act, and that the premises described in it (form No. 37) are the beer shop and not the motion picture theatre. The evidence of the prosecution points conclusively to the picture house as the only premises on which the scenes of drunkenness were witnessed. It discloses that the two Crown witnesses were not in the beer shop at all, and, therefore, were not in a position to state what transpired there, although they say that they saw some of the drunken people, on leaving the theatre, pass into the beer shop.

All licensing laws with which I am acquainted—and I have examined those of every province of Canada—contain an express provision to the effect that every license for the sale of liquor shall be held to be a license only to the person therein named and for the premises therein described. And the form of beer license prescribed by our own legislature makes it clear that that is the intention of the Intoxicating Liquor Act. The license issues to a particular person and authorizes him to sell beer or non-intoxicating drinks only on the premises which are to be fully described in it. He cannot travel at large and sell beer wherever his fancy pleases.

No one but the defendant (and perhaps his servants and agents) is authorized to sell beer on the premises described in his license, and he himself cannot lawfully sell it on any other premises. His license may be said to be both personal and *in rem*. As to the beer shop he is a "licensee," but *quo ad* the motion picture theatre, he is not. It would indeed produce a singular result if every one who is licensed to sell beer were permitted to shield himself behind his license against any charge for violation of the Act that might be brought against him, and claim the right of appeal

which the law allows to licensees, although the offence of which he may have been convicted bore no relation whatever to, and had no connection with, the particular thing he was licensed to do. The license is not a sort of personal appendage that follows the person named in it around wherever he may go, and which he can invoke as a justification or excuse for any violation of the Act, committed anywhere. It is a protection to him only so long as he acts within its terms upon the premises described in it. Could the defendant, for instance, on being convicted under s. 6 of the Act, of publicly drinking, claim the right of appeal because he was a "licensee" under a beer license? Or would he, on being convicted of selling intoxicating liquor in Fredericton, be entitled to the appeal which the law gives to licensees under the Act, because he is a "licensee" licensed to sell beer at Minto? I think not.

This conviction is for permitting drunkenness on premises of which the accused was the occupant. That he was both owner and occupier of the hall in which, for 4 years, he has carried on the motion picture business, appears by his own evidence to be clear; although, it seems that occasionally he has let the hall for an hour or so on Saturday evenings for boxing and wrestling exhibitions. If the conviction were for permitting drunkenness in the beer shop, then the appeal would doubtless lie, because in respect of the beer shop he is clearly a licensee; but not so where the conviction is for permitting drunkenness in the picture house.

I am of the opinion that having regard to, and in connection with, the offence of which he has been convicted, the defendant is not a "licensee" within the meaning of the Intoxicating Liquor Act, so as to give him a standing here as an appellant, and that therefore there is no jurisdiction to hear this appeal on the merits. The appeal is therefore dismissed, with costs to be paid by the defendant (appellant) to the respondent, which costs I fix and allow at $15. *Appeal dismissed.*

WATSON v. TORONTO HARBOUR COMMISSIONERS.

Ontario Supreme Court, Lennox, J. February 2, 1918

EXPROPRIATION (§ I—4)—MUNICIPAL CORPORATIONS—OSTENSIBLY WITHIN MUNICIPAL ACTS—COMPREHENSIVE SCHEME OF IMPROVEMENT—MONEY EXPENDED FOR MANY YEARS—LACK OF FRAUD—SETTING ASIDE.

When a municipal council passes a by-law for the expropriation of land, ostensibly acting within the powers conferred by sec. 576 of the

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Municipal Act, 1903, purports to act in pursuance of a well thought out and comprehensive scheme for the acquisition of parks, pleasure grounds, boulevards, drives, gardens and places of recreation and enjoyment; when the propriety of the scheme has been generally approved, and has not been attacked by a single ratepayer as such, has been acted upon and money expended in pursuance of it for many years, and when each plot of land is essential to the harmonious development of the whole, such by-law will not be set aside at the instance of an owner of lots expropriated and included in the scheme who has been an active and zealous pioneer for the acquisition and construction of such improvements, especially when there is no evidence of fraud, dishonesty or trickery on the part of such council.

The erroneous introduction of unnecessary words cannot destroy a description otherwise clear.

Statement.

AN action for the recovery of possession of land.

Peter White, K.C., for plaintiff.

A. C. McMaster and *J. H. Fraser*, for the defendants.

Lennox, J.

LENNOX, J.:—This is an action of ejectment, brought to recover possession of two water-lots just east of the Humber river and south of the Lake Shore road, in the city of Toronto. The paper-title under which the plaintiff claims is not in dispute. The Municipal Council of the City of Toronto, on the 12th June, 1911, passed a by-law—No. 5755—expropriating these and other lands on the lake-front and south of the Lake Shore road "for park purposes." The by-law is also intituled: "A By-Law to acquire certain Lands on the Lake Shore, south of the Lake Shore Road, in the City of Toronto, for Park Purposes."

By by-law 5778, passed on the 6th July, 1911, the City Engineer and other officials, servants and agents, of the municipality are directed to enter upon and take and use this land for park, playground, and other purposes. The two lots are combined in one description, and the description evidently includes a narrow strip between the water's edge and the Lake Shore road. This seems to give a few feet greater depth at the north than was covered by the patents of the water-lots, but I am not aware that anything turns upon this. If, as I understand to be the case, the plaintiff owns this strip, it is expropriated; if he does not, the city corporation would probably, under an arbitration, pay for a little more land than it gets title to.

The Harbour Commissioners were incorporated in 1911, by 1 & 2 Geo. V. ch. 26 (D.) By an Ontario Act respecting the City of Toronto, 1 Geo. V. ch. 119, sec. 4, in the same year, the city

corporation was authorised to convey lands to the Commissioners; and, by a deed in fee simple, bearing date the 26th December, 1911, conveyed these and many other parcels of land along the water-front, and in the harbour, to the defendant corporation. The deed contains the usual statutory covenants; and, on the other hand, the Harbour Commissioners covenant, upon their part, not to sell, convey, lease, or mortgage, etc., the land conveyed without the approval and consent of the municipal council.

The Harbour Commission is composed of five members: three are appointed by the city council; one is the direct representative of the Dominion Government; and one is appointed by the Dominion Government on the nomination of the Board of Trade.

The first Board took office in August, 1911; the term of office is three years, and they can be reappointed. They serve without remuneration.

On the 11th November, 1912, the city council passed another by-law, No. 6269, expropriating other lands of the plaintiff to the north of the lands in question; and, the question of compensation under the two by-laws having been duly referred to and taken up by P. H. Drayton, Esquire, Official Arbitrator, it was arranged, with the concurrence of the counsel on both sides, to hear evidence and determine the question of compensation as to all the properties at the same time—Mr. Fairty being counsel for the Corporation of the City of Toronto, and the late Mr. James Bicknell, K.C., for the land-owner, the plaintiff in this action. This was on the 26th August, 1914.

From statements of counsel, I understand that, so far as the evidence upon the reference shews, it proceeded without any question being raised as to the sufficiency of the by-law, the location or description of the water-lots, the boundaries of the City of Toronto, or the regularity of the proceedings during Mr. Bicknell's lifetime, and until March or April, 1915.

The reference as to the land expropriated by the second by-law has been concluded, and no question arises as to it; it has not been concluded as to the water-lots, the subject of this action; and it is contended by counsel for the plaintiff that it cannot be further proceeded with; that by-law 5755 is inoperative and invalid; that the defendants are wrongfully in possession; and that

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neither this by-law, the proceedings taken under it, nor the payment hereinafter referred to, bars his right to recover possession.

The main questions for decision are:—

1. Was by-law 5755 passed in the *bonâ fide* exercises of powers conferred by sec. 576 (1) of the Consolidated Municipal Act, 1903, "For *entering upon, taking and using and acquiring* so much real property as may be required for the use of the corporation, for public parks, squares, boulevards, and drives in the municipality *and adjoining local municipalities*, without the consent of the owners of such real property, making due compensation," etc., or was it merely a colourable scheme or device adopted for the purpose of acquiring the land for and vesting it in the defendant corporation for harbour development and commercial and utilitarian purposes only, and with the object of determining the compensation to be paid therefor by a method not open to the Harbour Commission?

2. Was the by-law 5755 invalid or inoperative by reason of a defect in the Proclamation of the Lieutenant-Governor defining the extended area of the City of Toronto, made in 1903, and, if so, has this been remedied by the Ontario Act of 1916 (respecting the City of Toronto), 6 Geo. V. ch. 96, sec. 2?

3. If the defect existed in the Proclamation and has not been cured by the Act, is the plaintiff—having actual knowledge, as he had, of the alleged defect—estopped or precluded from objecting, by failure to give notice before entering upon the reference, or by express waiver after the reference was commenced, or by applying for and obtaining a payment on account of the total compensation to be awarded, or by any other act or circumstance?

As to the first question—the purpose of expropriation, involving as it does the question of good faith—the plaintiff does not mince matters. He distinctly charges that the action of the council in passing the by-law "was fraudulent and invalid, and all proceedings thereunder" (including of course the arbitration in which the plaintiff joined) are illegal and invalid; ". . . that the said lands were not expropriated by the said corporation for park, play-ground, or other municipal purposes, but, on the contrary, to enable the corporation to convey and transfer the same to the defendants in this action; and that the Municipal Corporation of the City of Toronto had no power to expropriate lands for such

Nothing, perhaps, was more strenuously attempted to shew that the object of the by-law was to anticipate the [illegible] of the Harbour Commission; in other words, that, this land being required for harbour improvement, and for this only, the object was simply to secure dishonestly the intervention of the Official Arbitrator in advance, and so avoid a reference to three arbitrators by a later direct expropriation by the Harbour Commission. It is enough to say, as to this, that there is no evidence whatever to support this contention. Not only was this purpose not discussed or mentioned, but, so far as could be ascertained, this aspect of the case was never thought of by anybody. This was made a prominent feature in the plaintiff's case.

I may as well here dispose of one or two other contentions urged by the plaintiff, as well.

It was argued that, before an expropriating by-law could be lawfully passed, there must be sufficient moneys to the credit of the parks appropriation fund or parks committee available for payment. I know of no condition or provision to that effect. The imposition of a separate rate for park purposes is only a method of civic administration or bookkeeping; the fund so collected is still the money of the city corporation; and the other revenues derived from general taxation are none the less available and liable for all legally incurred corporate obligations. The parks committee is only an adjunct of the city council, and not only has the city corporation been always ready and willing to make compensation to the plaintiff for his land when legally awarded, but as a matter of fact the plaintiff was actually paid $50,000 on account of his holdings before he was entitled to payment of a dollar.

It is argued, too, that a municipal council must not "look ahead," must wait until acquisition, development, and user as a park, can be practically simultaneous acts; must not do for the people what alert and capable business men are doing every day for themselves and their families; must drift and wait until men who look ahead, including the speculator and the subdivider and the person irreverently denominated "the land-grabber" have captured everything in sight; and, although there is nothing in law, there is a great deal in common practice or ordinary municipal methods, to give colour to the argument. The land in question

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was obtained by patents from the Crown for sums a[illegible] about $100; and, as early as the 24th January, 1907, wi[illegible] was no Harbour Commission movement thought of, t[illegible] corporation had offered to purchase this land at $10,852.50.

It was urged and dwelt upon, too, that in a contest between the city corporation and the plaintiff for a patent of one of these water-lots, in 1905, the Crown, exercising its discretion, decided in favour of the plaintiff; and so, impliedly, discountenanced public ownership or the user of this land for a park. Not at all, there was nothing left to implication. The Crown acted, and declared that it acted, on the well-established principle that, as a rule, the owner of the shore has a prior right over all other applicants for a patent for the adjoining water-lot; and so the incident only goes to establish these points, and none of them counting for the plaintiff, namely: that, if the council had looked ahead, they would have acquired the land on the shore, so manifestly essential to park development, long before 1905; would have had an irresistible claim to the patent, would have acquired it for $42; and that, at all events, as early as 1905, the municipal council had formulated, more or less definitely, a comprehensive scheme for the construction of parks, boulevards, drives, etc., embracing and extending over a wide area, and including the land in question.

I do not find it difficult to decide this question, and it is only fair to the plaintiff that I should frankly declare the way I approach the decision of the issue of fraud. I am of opinion that, when a municipal council ostensibly acts within the powers conferred by the Municipal Act, purports to act in pursuance of a well thought-out and comprehensive scheme for the acquisition of parks, pleasure-grounds, boulevards, drives, gardens, and places for recreation and enjoyment, encircling the whole municipal area, and, in this way, accessible and beneficial to the inhabitants of every section of the municipality, when the propriety of the scheme has not been called in question and in so far as appears has been generally approved, has not been attacked by a single ratepayer as such, has been acted upon, and money has been expended in pursuance of it for many years, and when each plot of land, including the plaintiff's, is essential to the harmonious development of the whole—to say nothing of the attitude of the plaintiff during all these years, which I will refer to specifically

later on—fraud is not a presumption of law or to be hastily inferred; there must be more than conjecture or possibility—the fraud must be shewn by at least reasonably clear and satisfactory evidence. I find no evidence of fraud, or dishonesty, or double dealing, or trickery, in this case. This was not a sudden resolution to acquire the plaintiff's land in 1911 for harbour improvement, and as an incident of that commercial and utilitarian scheme; it was the culmination of a long-cherished plan—too long dreamt of and postponed—of which Mr. Ward, so far as the water-front is concerned, was an active and zealous pioneer, for the acquisition and construction of parks, open spaces, connected drives, gardens, etc., commensurate with the city's growth and needs, present and prospective.

The evidence before me is of two classes, documentary and verbal; to my mind, there is a vast difference in the weight to be attached to each. It would, I think, be more accurate to say that the evidence of what the council contemplated, planned, and did, is of record, as effective municipal action must be, and it is progressive, although not rapid, and all consistent, and consistent only, with the position taken by the defence; the verbal evidence for the plaintiff is an attempt to contradict this record by the testimony of some three or four councillors, each testifying as to some unexpressed thought or understanding in the back of his head, or, as he thinks, "a thought" that might be in the head of some one else—when the by-law, or the subsequent by-law to take possession, was passed, and as to which they have been silent ever since. Take it in the most unqualified sense, and it falls far short of shewing fraud or that any one ever dreamed of abandoning the park scheme or of diverting the western water-front to any purpose other than a driveway and park. The utilisation of this part of the city-front for commercial or dockage purposes has never been suggested.

Mr. Hocken, called by the plaintiff, although not clear as to the order of events, makes it quite plain that the plaintiff's and other lots along the western front were conveyed to the Commission to be "developed" for the city as park and driveway lands, according to the scheme advocated by Mr. Ward as early as 1905 or 1906, and to connect with the Home Smith scheme.

"Q. Do you remember Mr. Home Smith offering the city a driveway down the Humber river? A. Yes.

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"Q. Do you remember any proposition of Mr. Ward's in connection with running a sea-wall and parkway west along the lake front to the Humber river? A. Yes, Mr. Ward worked on that for many years.

"Q. Do you remember that properties had been expropriated from time to time going further and further west? A. Yes. . . . They began in 1905 or 1906.

"Q. Do you remember there was a scheme as far back as 1908 for having a boulevard, park, and driveway from Dufferin street to the Humber? A. Yes—Mr. Ward's scheme, which was afterwards enlarged by the Board's plan of the harbour. That was 200 feet. The harbour scheme goes out 600 feet."

And, Mr. Hocken's attention being called to exhibit 11, the agreement with the Harbour Commission, he said: "Perhaps the reason I would not charge my memory with that, it was always a part of the harbour scheme *to develope a parkway for the city and the city to provide the lands for that.* It provided some across the Island."

"Mr. McMaster: Q. Always part of the harbour scheme? A. Yes."

The Home Smith scheme was carried out.

In another place Mr. Hocken says: "The Harbour Commission was always regarded as something created by the city to administer the lands better than the council could do it."

This is not enough, even if it were all one way, but it is not. There is verbal evidence in support of the by-law, quite as dependable in itself as the evidence attacking the by-law; and, if a case can be conceived in which I should be justified in ignoring the intrinsic evidence of the municipal records, including the by-law, I would, on the verbal evidence alone, find that the by-law was passed in good faith, in pursuance of a long-contemplated parkway scheme, and for the purpose in the by-law briefly expressed. But this is not the way to determine this question. Not to go back beyond the period distinctly covered by the evidence, it is abundantly clear that, instead of a dishonest scheme to utilise the powers conferred upon this and other large centres of population, through the intervention of the Official Arbitrator, in lieu of the ordinary assessment tribunal, for the purpose of vesting this land in the Harbour Commission for dock and harbour pur-

poses, the by-law was passed in continuation of a long-established system for the gradual acquirement of land for park purposes, as the result of a steadily growing appreciation of the need of greater activity in creating parks, and the realisation of the obvious circumstance that the dredging and deepening of the harbour afforded an opportunity of reclaiming water-lots at a tithe of the expense to be incurred if the two enterprises, both in the interests of the city, were carried out as independent works.

Referring now to something that is not mere matter of opinion or conjecture, for the verbal evidence is characteristically of that class: in 1905 the city endeavoured to obtain one of these lots; and, as is shewn by the records of the application, the city council wanted it as part of the land to be set apart as a park at the mouth of the harbour, and extending along the water-front to Bathurst street and beyond. In 1905 or 1906 and for many years, Mr. Ward, laughed at and impeded by men of narrower vision, was yet able to obtain the assistance of a sufficient number of councillors, who looked ahead as he did, to obtain appropriations from time to time for his "sea-wall" and driveway, and other improvements along the city-front.

In 1906-7, Assessment Commissioner Forman, on instructions of the council, was steadily at work in a systematic effort to secure the land and water-lots between the Humber and Bathurst street as the basis of comprehensive park extensions, driveways, etc. In 1907 he had recently acquired 1,520 feet of frontage east of the plaintiff's land, and had been in negotiation with the plaintiff for the water-lots in question for a long time. That the city council, including the board of control and parks committee, were quite alive to the necessity of park extensions in January, 1907, is clear from the fact that they were regularly paying $1,000 an acre for land for this purpose; and, on the 24th January, by letter from Mr. Forman to Mr. James Bicknell, K.C., acting for the plaintiff, the council definitely offered $10,852.50 for the land in question. See correspondence, exhibit 25. The offer was refused on the 20th February, 1907; and, on the 28th May, the board of control decided upon expropriation. See again exhibit 25.

On the 18th February, 1909, the city council prepared a plan of the water-front improvements from Bathurst street to the Humber. It was not so broad or ambitious as the scheme now being carried out, but was on the same lines. See exhibit 4.

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There must have been a good deal of activity and investigation during 1909; for, on the 24th January, 1910, Mr. James Wilson, on the order of the parks committee, reported upon "a suitable system of boulevards and connecting park driveways for the City of Toronto," providing for a continuous driveway of more than 40 miles beginning at the Humber, encircling the city, crossing the Island, and returning to the mouth of the Humber—a plan or system of park development practically identical with the present park scheme now being carried into execution; the work on the water-front section being executed in connection with harbour development under improved conditions, and I should judge at greatly reduced cost. See exhibit 18 and map attached. For the order in which it is recommended that the acquisition of the land and the execution of the work should be proceeded with, see p. 12 of this report. That the board of control were still looking to the acquisition of the plaintiff's water-lots in the spring of 1911 is shewn by its order of the 17th and the report of Commissioner Wilson of the 18th May, 1911 (exhibit 27).

The city corporation has not abandoned its park scheme. On the 11th May, 1912, by-law 6269 was passed expropriating other land of the plaintiff north of the Grand Trunk Railway—a part of the same park scheme, but wholly distinct from the water-front; and for this compensation had been determined upon and paid. I find no more reason for attributing bad faith in the one case than in the other.

The Harbour Commission, the majority of its members being, as I have said, directly appointed by the city council, in addition to the carrying out of the development and improvement of the harbour along commercial lines, and the development of Ashbridge's Bay for industrial purposes, undertook, at the instance and on behalf of the city council, to combine the development of that part of the city's park scheme extending westerly by way of the Island, from Woodbine avenue to the mouth of the Humber —a distance of twelve miles. Mr. Cousins was appointed Chief Engineer of the Board in February, 1912, and on the 13th November reported to the board of control the recommendation of the Harbour Commission as to the combined scheme of harbour improvements and water-parks, boulevards, drives, ornamentation, etc.; and the proportion of expense to be borne by the city cor-

poration for that part of the work not essentially pertaining to harbour development. Founded upon this and the report and recommendations of the board of control to the city council, an agreement was entered into between the Harbour Commissioners and the city corporation (exhibit 11), by which the Harbour Commissioners undertake to fill in and reclaim, wall in and protect, 894 acres of land now covered with water, including the land of the plaintiff in and along the city-front, and to hand it over to the city council "for the use and enjoyment of the inhabitants of the City of Toronto as open spaces, parks, drives, boulevards, gardens, and other civic purposes," as in the agreement set forth, and in consideration of annual payments during forty years based on actual cost as therein set forth; and after forty years at a rental of $1 a year. As late as the 29th October, 1914, Mr. Bicknell, then counsel for the plaintiff, in the arbitration based upon this by-law, evidently regarded the by-law as a *bonâ fide* expropriation "for park purposes," and obtained the $50,000 already referred to as a payment on account of this and other lands upon that basis. See letter and receipt, exhibit 22.

Are the water-lots sufficiently described *or identified* in the by-law?

Nothing turns upon these matters in the decision I am about to give, but I mention as circumstances that may or may not become of consequence later on:—

(*a*) Section 576 of the Municipal Act of 1903, 3 Edw. VII. ch. 19, is not confined to land within the expropriating municipality.

(*b*) It is not provided in this Act that the lands to be expropriated are to be described in the by-law. The first statutory enactment in which I find it stated that the by-law shall contain "a description of the land" is sec. 322, sub-sec. (3), of the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43. There is undoubted identification here; and, if the description is faulty, the expropriating corporation and its assigns, only, are prejudiced.

(*c*) If the land was not shewn to be within the city limits, by reason of errors in the Proclamation of 1903 and the remedial Act, can the words "in the City of Toronto" be rejected as surplusage, and the by-law read as expropriating land in an adjoining local municipality, thus conforming the description to that contained in the patents under which the plaintiff claims? The descrip-

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tion in the patents should be enough if the limits of the municipality are not legally shewn to have been altered in the meantime; and this the plaintiff contends. If I understand Mr. McMaster aright, he argued that the words, "the said point of intersection being where the south-westerly boundary of the said City of Toronto meets the said southerly limit of the Lake Shore road," might be rejected as an unnecessary addition, the specific point being already sufficiently defined; but, while I am disposed to agree with this, I have not gone into it carefully to see whether this would obviate the difficulty, as I think there is broader and clearer ground.

(*d*) As to the effect of the by-law, without more, sec. 576 of the Act of 1903 is significantly altered in wording and punctuation from earlier Acts, and differs, I think, from the present Act as well. The effect of the comma after "upon," which may be clear enough and the repetition of the conjunction "and," is what I refer to.

Taking up the issue then, without reference to (*a*), (*b*), (*c*), or (*d*), the contention of the plaintiff is, that the by-law does not expropriate this land, because by the Proclamation of 1903, by which, admittedly, this land and other lands were intended to be annexed, the south-westerly boundary of the city stops 1,000 feet south of the new road-bridge at the Humber, and so does not completely enclose the intended area. The language of the Proclamation, so far as relevant, is: "And we Ordain and Declare also that the south-westerly boundary of the said City of Toronto be extended and defined by a line drawn from the light-house on the Island to a point on the easterly boundary of the channels of the river Humber south of the new road-bridge, distant 1,000 feet measured southerly from the southerly face of eastern abutment of the said bridge, and that the area," etc. The objection is, that the line is not traced along and over this 1,000 feet.

After a great deal of evidence had been given, upon a reference before the Official Arbitrator, as to the value of the land in question and land of the plaintiff expropriated under another by-law (assessment under the two by-laws being taken together), counsel for the plaintiff successfully objected that, by reason of what I have referred to, the land in question was not sufficiently described or defined in the by-law. Assuming, without deciding, that the Proclamation was fatally defective, and that this by-law could not

be read as expropriating the land, whether in the city of Toronto, or in the township of York, in the county of York, as hereinbefore suggested, I am of opinion that the defect, if any there was, is remedied by the Ontario statute of 1916, 6 Geo. V. ch. 96, sec. 2, which is retroactive, and defines the south and south-westerly boundary of Toronto as: "commencing at the light-house on the Island; thence south-westerly to a point on the easterly boundary of the channel of the river Humber distant one thousand feet measured at (on?) a course south sixty degrees three minutes and twenty-two seconds east from the south-westerly angle of the easterly abutment of the new road-bridge; thence north sixty degrees three minutes and twenty-two seconds west one thousand feet to the south-easterly angle of the easterly abutment aforesaid."

I am asked to declare that the south-westerly boundary of the City of Toronto is not yet defined; and the reason and the only reason advanced is, that, instead of defining the first line as running north-westerly from the light-house, as it is in the Proclamation, it is said to run "south-westerly." I do not think I should give effect to this manifest blunder, and so prevent the decision of this action on the merits. If it created an uncertainty, it would be another matter—it creates none. The Legislature defines two points as to which there is no uncertainty. A line is to be drawn from the one to the other. In the absence of words to the contrary, a line means a straight line—the shortest possible course. Neither "westerly" nor "north-westerly" is needed to give direction to the line, and the erroneous introduction of unnecessary words cannot destroy a description otherwise clear. This has been recognised almost from time immemorial. The Courts have gone a good deal further than merely rejecting surplusage; but this is all that I need do here. They do not hesitate to read "north" for "south" or "west" for "east," or *vice versâ*, to give effect to what obviously was intended.

In *County of Welland* v. *Buffalo and Lake Huron R.W. Co.* (1870), 30 U.C.R. 147, affirmed in appeal (1871), 31 U.C.R. 539, the course was said to be "south," and should have been "north." The description was sufficient without either, and judgment was given at the trial affirming the sufficiency of the description, subject to the opinion of the Court; and Wilson, J., and Morrison,

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J. (Richards, C.J., not being present during the argument), held that the word "south" should be rejected. The case went to appeal; this point was not again raised.

The same kind of point came up squarely in *Ferguson* v. *Freeman* (1879), 27 Gr. 211; the first boundary being defined as running "northwards," it should have been "westward." On re-hearing by the defendant of the decree pronounced by Vice-Chancellor Proudfoot, the full Court held that the description was sufficient, and the deed could be read either with the word "northwards" omitted, or by omitting it and substituting the word "westward."

It is to be noted that this boundary was sufficiently defined in the Proclamation; but, aside from this, I find that the land in question is, and by virtue of the retroactive provisions of the statute was at the date of expropriation, within the limits of the City of Toronto.

If I am right as to the interpretation of the statute, the answer to the third question becomes unimportant. I will, however, deal with it. Mr. McMaster submits that, in any event, the plaintiff was estopped from raising the question of boundary or the description in the by-law at the time the point was taken, that is, when Mr. Dewart became counsel in the arbitration after the death of Mr. Bicknell; and I am entirely of that opinion. I have been referred to many authorities on estoppel, but I do not think any useful purpose would be served by referring to them here. The conclusion to be come to is dependent upon a few facts, all of them undisputed, except one. The one disputed is as to whether Mr. Bicknell, on the opening of the reference, referred to the defect in the Proclamation and waived objections upon that point. Mr. Fairty swore to this. Mr. Bicknell's statement is not in the notes of evidence, and Mr. Fairty gave reasons for the omission. This question is not of capital importance, if as a matter of fact Mr. Bicknell knew of and appreciated the defect before or when the reference was taken up and refrained from making objection then or thereafter. It is not pretended that Mr. Bicknell ever objected to the by-law or reference upon this ground. It is shewn beyond question that Mr. Bicknell was aware of the terms of the Proclamation and alive to the possible effect of it before the by-law was passed.

In the course of negotiations by Mr. Forman to purchase this property on behalf of the city corporation, Mr. Bicknell, on the 20th February, 1907, wrote Mr. Forman: "Besides, you apparently have not considered the fact that part of the property you wish to buy is outside the city limits," etc. On the 29th May, 1907, Mr. Forman wrote inquiring as to whether Watson had further considered the city's offer to purchase, and asking an explanation as to what was meant as to part of the land being outside the city limits; and, on the 30th May, Mr. Bicknell replied that Watson did not desire to sell, and added: "The map which you have is wrong. The order in council which made the last addition to the Lake Shore road did not include that part of the property which theretofore was in the township of York" (exhibit 1, marked "without prejudice," but put in by the plaintiff). Whether there was an express waiver or not, with the by-laws and appointments, etc., in his hands, Mr. Bicknell attended the reference, joined in arranging for a joint hearing under the two by-laws, took no objection at all events, and proceeded with the reference and to give evidence of values from time to time from the 26th August, 1914, until the case for the claimant was completed, and hundreds of pages of evidence had then been taken. The attitude of Mr. Bicknell on the opening of the reference is of consequence. He put in the two by-laws, No. 5755—the one in question—and No. 6269, and said: "By-law 5755 expropriates the water-lot, and by-law 6269 expropriates," etc. He read the by-laws and added: "It is agreed that counsel will check up the measurements and agree upon the same later." He stated that a plan would be agreed upon, shewing different frontages, and that notice of expropriation would be put in and marked exhibit 3.

On the 2nd October, 1914, Mr. Bicknell wrote Mr. Johnston, city solicitor, in part as follows:—

"*Re Watson Arbitration.* The property at the Humber which belongs to Mr. T. H. Watson was expropriated under by-laws passed in 1911 (5755) and 1912 respectively. An arbitration has now been pending for some time, and the evidence of Mr. Watson has been completed; but, owing to other engagements of the Official Arbitrator, the city's case cannot be presented until November. It has been a great inconvenience to Mr. Watson to have his property tied up during such a long period of time. . . .

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The evidence shews the value of the expropriated property to be from $50,000 up. I do not know what the evidence of the experts on behalf of the city may be, but in my view it cannot be below $60,000. Under the circumstances, I would respectfully ask that the city make an advance of $50,000 on account of the purchase-price, to Mr. Watson. . . . I would be glad if you would forward this application . . . with such recommendations," etc.

This payment on account was made, and a letter of acknowledgment and formal receipt returned, for payment of account on land expropriated at the Humber.

I am of opinion that, whatever may be the proper conclusion as to the preceding questions, the objection as to the city limits taken in this action comes too late.

It was stated, during the trial of this action, that the Official Arbitrator proposed to resume the reference without waiting to know the result of this action, and I then said I was not disposed to believe he would do so. Subsequently, Mr. Drayton was courteous enough to call upon me, and I found that the opinion I had expressed was correct.

It is argued by Mr. Bain, on the other hand, that the arbitrator cannot resume the reference. I am not directly concerned as to this, but I am not of that opinion; and, while I do not propose to give any directions or pronounce any judgment upon this question, I think he will proceed; and I know of no reason why he should not.

To summarise and put all matters arising in this action as clearly as I can: I find that by-law 5755 was passed in pursuance of a well-considered, definite plan for park extension and construction, upon the lines, generally, outlined in the report submitted by Mr. Wilson on the 10th January, 1910, in the *bonâ fide* exercise of powers conferred by sec. 576, and with the intention of administering and permanently using this and other land embraced in the park area for the purposes in that section defined; that the council did not abandon its purpose or lose its control by the conveyance in question, and is morally, and I think legally, bound to make good the title it purported to convey in pursuance of a combined scheme of park and harbour improvements; that the land in question and lands in the neighbourhood of the Humber generally are not required for or adapted to and cannot be utilised

for harbour development or improvement in a commercial sense; that, before and at the time of the execution of the deed, it was intended by the parties thereto that the city corporation should retain or resume effective control of the Watson and other lands at the mouth of the Humber and easterly to Woodbine avenue, as park lands, and that this is effectively secured by the agreement executed in pursuance of this purpose on the 26th November, 1914, and validated by an Act respecting the City of Toronto, 5 Geo. V. ch. 76 (O.), in which, amongst other things, it is declared that "the said parties are hereby authorised *to . . . carry out* the provisions thereof;" that, if the Proclamation of 1903 was defective, the defect was remedied retrospectively by 6 Geo. V. ch. 96, sec. 2, so as to read as if the omitted line on the west had been delimitated therein; that the land in question was therefore properly located and described in the by-law, and legally expropriated; and, at all events, that, after all that has occurred and been done, to the knowledge and with the concurrence of the plaintiff, including possession and expenditure of money upon the property, the plaintiff cannot now be heard to object.

As to the costs of the action: the agents of the council, by a series of blunders, so astounding as to be almost inconceivable, have afforded some excuse for this litigation; and sufficient, I think, to make it right to modify the general rule as to the adjudication of costs. Substantially the Harbour Commission and the city corporation are the same body. I have considered whether I should annex a condition that there will be no appeal, but I think that should only be done in very exceptional cases. I am in favour of an unfettered right of appeal. This is an important case, and it is better, if I am wrong, that I should be set right.

There will be judgment dismissing the action without costs.

Action dismissed.

FARNELL v. CONWAY.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., and White and Grimmer, JJ. April 19, 1918.

1. WILLS (§ I D—35)—BENEFICIARY UNDER—PROCURING EXECUTION—BURDEN OF PROVING GENUINENESS OF WILL AS LAST FREE ACT OF TESTATOR.

If it be shewn that a party taking a benefit, under a will, himself wrote that will, or participated in the preparation of it or in the procuring of its execution, the law casts upon such beneficiary, in proving the will, the additional burden of proving that the testator knew and approved of the

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contents of the will; the rule of law being that, under such circumstances, a suspicion is cast on the will which must be removed by testimony which leaves no reasonable doubt of the genuineness of the will as the last free act of the testator.

Each case must be decided upon its own peculiar circumstances and it is for the jury to consider all the surrounding facts and circumstances, and decide whether or not they are such as to justify the conclusion that the testator had been influenced to such an extent as to have lost the power of free agency.

2. NEW TRIAL (§ II—9a)—IRRELEVANT EVIDENCE—IMPROPER ADMISSION—SUBSTANTIAL WRONG—SETTING ASIDE VERDICT.

A verdict will not be set aside on account of the improper admission of irrelevant evidence where it has not occasioned any substantial wrong or miscarriage of justice.

Statement. APPEAL by defendants from a verdict in favour of the plaintiffs in the King's Bench Division in an action to recover possession of certain property and for mesne profits, which the defendants claim under a will. Affirmed.

D. Mullin, K.C., and *W. M. Ryan*, support appeal.

M. G. Teed, K.C., and *J. F. H. Teed*, contra.

The judgment of the court was delivered by

Hazen, C.J. HAZEN, C.J.:—This case was tried at the Queen's Circuit in May last before Mr. Justice Crocket and a jury, and a verdict entered for the plaintiff. Before the jury was called, counsel for the defendant challenged the array on the ground that the sheriff of the county did not enter in a book provided by him for that purpose an alphabetical list of the persons qualified to act as jurors, and after this challenge had been refused by the learned judge, who sustained the plaintiff's demurrer thereto, the defendants' counsel raised the objection to the jurors as they came to the book, on the ground that they were not qualified, and challenged each one of them in addition on the ground that their occupations were not given. The challenges are substantially the same and depend on the construction of the Jury Act, c. 126 Cons. Stat., which provides (s. 7 (1)) that the sheriff of every county shall annually, in the month of January, enter in a book which he shall provide for that purpose an alphabetical list of all persons qualified, with their additions and residences, and return the same to the county secretary to be kept among the records of the county. S. 9 provides that no person shall be empanelled to try any issue joined in any court of record whose name is not upon the said list, while s. 30 provides that the neglect of an officer to make out the jury list, or the omission of the name of any qualified person or the insertion of the name of any unqualified person therein, or any

error in description, or other defect shall not be a cause of challenge. While there is some inconsistency between ss. 9 and 30, I think that the proper construction to be placed upon the Act is that it is the duty of the sheriff to make up a list annually, and that no person shall be empanelled to try any issue joined in any court of record whose name is not upon the said list if the same has been made up, but that the neglect of the officer to make up the jury list does not deprive the litigants of the right to try their action, or delay the trial of the cause. In this case no list had been made up or filed by the sheriff for the year 1915 or 1916. There was, however, a list filed by the sheriff for 1914, and one juror whose name did not appear on this list was challenged, and the challenge was allowed. The names of the other jurors did appear and under ss. 7 and 30 were held to be qualified. I agree with the learned judge that the only way to give a reasonable construction to the provisions of the Act, read together, is to hold that the omission of the sheriff to file a list shall not be a cause of challenge. I do not see how it is possible to find otherwise and give adequate meaning to the language of s. 30, and as the learned trial judge pointed out, to hold otherwise would be to hold that the administration of justice would be absolutely obstructed by the omission of the sheriff to file a list.

The plaintiffs in this suit were the heirs and next of kin of Elizabeth Conroy, an unmarried woman, who died at Chipman, in the County of Queen's in the month of January, 1916, and the action is brought to recover possession of certain lots of land situate in the said parish of which the said Elizabeth Conroy was seized and possessed at the time of her death, and also for mesne profits and damages for trespass thereto. The defendant, Edward J. Conway, claims title under the will of Elizabeth Conroy, and the defendant Lafferty justified under him. The substantial question involved in the case was whether Elizabeth Conroy had duly executed her last will and testament whereby she devised and bequeathed her property to one of the defendants, the Reverend E. J. Conway. Elizabeth Conroy resided by herself on a farm in Chipman which had belonged to her father, William Conroy, the grandfather of the plaintiffs. William Conroy died in 1874, and by his will devised to his son John Conroy the property in dispute in the present action.

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The plaintiffs in the action are children of Anna Farnell, the daughter of William Conroy. She and her husband removed from the Province of New Brunswick when the plaintiffs were children. The children remained for some years, and were brought up by their grandfather, William Conroy, and their uncle John Conroy, and their aunt Elizabeth Conroy. Their grandfather died before they left home. After his death they continued to reside with and to be taken care of by their uncle John and their aunt Elizabeth. When they had grown up they left home, and Daniel C. Farnell and William J. Farnell went to the United States, where they now reside in the State of California. The evidence goes to show that the plaintiff Daniel C. Farnell was on terms of intimacy and friendship with his uncle and aunt, and that after he went to California he wrote them frequently, sent them money from time to time, and on one occasion went back and visited them, and the letters in evidence written to him by his aunt shew that she entertained feelings of affection for him. By deed dated September 14, 1909, John Conroy conveyed the property in question to his sister Elizabeth Conroy, and this deed was not registered until 1914. John Conroy died September 14, 1914, and his sister Elizabeth continued in possession of the property down to the time of her death.

Certain questions were left to the jury by the learned judge, and they with the answers thereto are as follows:—

1. Was the paper writing which has been put in evidence as the will of Elizabeth Conroy duly executed by her?

Answer: No.

2. Was the testatrix of sound and disposing mind when she executed the will?

Answer: Yes.

3. Did the testatrix know and assent to the contents of the will?

Answer: No.

4. Was the testatrix induced to make the will by undue influence?

Answer: Yes.

5. At what sum do you assess the mesne profits?

Answer Rental $8 per month; lumber $630.

6. At what sum do you assess the damages by reason of the cutting of the lumber?

Answer: Fifty dollars.

Questions 5 and 6 were subsequently corrected by the jury as follows:—

Answer to Question 5: $124.

Answer to Question 6: $680.

Certain questions were also submitted at the request of the defendants' counsel, and answered as follows:—

1. Was the document purporting to be the will of the said Elizabeth Conroy read over to the said Elizabeth Conroy before she put her mark to the same?

Answer: Doubtful.

2. Did Angus Daigle take the instructions of the said Elizabeth Conroy as to her wishes regarding the will?

Answer: Doubtful.

3. Is the handwriting Angus Daigle, purporting to be the handwriting of one of the subscribing witnesses to the said will, in the same handwriting as the name Angus Daigle signed by the witness Angus Daigle in court?

Answer: We think it is.

4. Is the handwriting William Gallagher, purporting to be the handwriting of one of the subscribing witnesses to the said will in the same handwriting as the name William Gallagher signed by the witness William Gallagher in court?

Answer: We think not.

5. In whose handwriting is the name Elizabeth Conroy, purporting to be signed to said will?

Answer: We do not know.

6. In whose handwriting is the name Angus Daigle, purporting to be a subscribing witness to said will?

Answer: Answered by number 3.

7. In whose handwriting is the name William Gallagher, purporting to be a subscribing witness to said will?

Answer: We do not know.

When the jury came into court with their answers to the questions submitted by the learned judge, the following question was asked them by the judge as appears by the stenographer's notes:—

Court: You find that the will was not executed by Miss Conroy—that she did not place her mark on the will?

Juror: We do not believe that the signature of William Gallagher on the will and the signature William Gallagher on the exhibit, P. 2, was written by the same hand—that is the comment we make.

Court: You base your finding on the first question upon that finding.? It is upon that finding that you have answered question number 1 "No.?"

Juror: Yes.

Counsel for the defendant asked that the jury be polled, and it was stated that that was the finding of the whole jury, and the court was informed that that was what the jurors agreed on. The judge then said that he did not think with regard to the first answer that that could be accepted as a satisfactory answer to the question under the directions which he had given them, as he had instructed them that the proof that the law required was that Miss Conroy affixed her mark to the document which had been produced

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as her will, and that she did so in the presence of two witnesses who were present at the same time and who signed their names in her presence and in the presence of each other, and a little later in the case, defendant's counsel—before the entry of the verdict—took the objection that the finding of the jury on the first question was not sufficient to warrant a verdict to be entered for the plaintiff.

Now let us see what the finding of the jury on the first question was. It undoubtedly was that the paper writing which had been put in evidence as the will of Elizabeth Conroy had not been duly executed by her, and they so answered because they did not believe that the signature of William Gallagher, one of the subscribing witnesses to the will, and the signature of William Gallagher on the exhibit P2 was written by the same man. The will which was signed by Miss Conroy, or rather to which her mark was affixed, was alleged to have been witnessed by Angus Daigle and William Gallagher. When he was on the witness stand Gallagher was asked to write his name, which he did, and having compared that name with the name signed as a witness to the will the jury came to the conclusion that they were not written by the same man. Having come to this conclusion they were, in my opinion, justified in finding that the will had not been properly executed, for the signature that was undoubtedly in the handwriting of William Gallagher was the one that he made in the presence of the jury in the court-room, and if they were correct in finding that it was not made by the same hand as the signature of the witness to the will, then it was quite clear that William Gallagher had not signed the will, and that it had not been duly and properly executed.

It is claimed on behalf of the defendant that the verdict should be set aside, as the answer to question 1 is entirely against the weight of evidence, and that the finding on this question was not such a one as the jury, acting as reasonable men, could have found. It will be necessary, therefore, to state what the evidence was which the jury had before them with reference to the execution of the will, and what were the facts leading up to the making of the same.

On Saturday, January 8, 1916, some neighbours called upon Miss Elizabeth Conroy, who lived alone, and found that she was very ill, and two ladies, Miss Annie Langin and Miss Jennie Fleming, neighbours of hers, both of whom had had experience as

nurses, were sent for. Miss Langin arrived there first, and a neighbour, Mr. Demmings, was asked to go for the doctor. The doctor was unable to come, but sent some medicine and came over on the following morning and pronounced her to be a very sick woman. Miss Langin and a Mrs. Jardine stayed with her over night, and remained with her until three o'clock Sunday afternoon, when they were relieved by Miss Fleming, who stayed with her until Monday afternoon. Miss Conroy was a member of the Roman Catholic Church, and the defendant in the suit, Father Conway, had been parish priest at Chipman for a period of about three years. During that time Miss Conroy had not attended his church, and had been very much incensed apparently over the fact that her brother was buried without having any religious service performed, and one of the witnesses, Mr. H. M. Demmings, said that she had said she knew that the priest didn't come to the funeral "because there was nothing for him to grab; that was why he didn't come," and the witness added that she was very ugly and very cross about it. She was also offended because of the place in the cemetery where his grave was located, and she told Mr. Demmings "that they were trying to slight John because he never went among them, and they wanted to bury him out with old Pat Welch and among the Italians." She said this on the day of her brother's funeral, and subsequently she had his body removed and placed in the cemetery up near where the rest of the family were buried. Further than that the witness had several times stated to different people that no priest nor Old Home would ever get her money, and she made this remark in consequence of suggestions having been made to her that she should sell her place and go to a Church Home provided for old people; and a witness, William Bishop, states that in conversation with him about a year and a half after her brother died he asked her why she didn't sell her property, as it would fetch enough to keep her happy all her life. In reply she said no one could pay for it right down that could buy it, and the storekeepers would not buy it, and that he then said to her, "Lizzie, the priest will have it yet." She said, "No, the priest will not get it nor the Church neither, and if I don't sell it I will leave it to my heirs."

Mr. H. L. Demmings, a neighbour, stated in his evidence that she informed him, speaking of her property, that no one would get

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it all and she would remember all her heirs when she died. Another neighbour, James Jardine, states that after her brother died she was talking some about selling her property and said she would not sell it; that Dan Farnell, meaning her nephew in California, was going to take care of her and she would do nothing with it until he returned and she expected him in the spring. Another witness, Andrew Fleming, stated that she and her brother John spoke quite frequently about the Farnell boys, and always spoke of them in terms of affection, as though they were their boys, and she also said something about Daniel Farnell having sent her money. This was after his visit to Chipman a few years ago.

On Tuesday morning Mr. Demmings was sent for a priest. According to the evidence of Miss Langin this was done at Miss Conroy's request. Miss Langin said that she said to her, "Annie, I am very sick and want to see the priest," and in consequence of this Miss Langin sent Mr. Demmings for him. Father Conway arrived about three o'clock on Tuesday afternoon. Mrs. Jardine and Miss Langin left the house while the priest was engaged with Miss Conroy and went out and attended to the work in the barn. Later they were called back, and Miss Conroy in the defendant's presence told Miss Langin to get some money from a trunk which was in her room. The money, amounting to about $88, was obtained, and Miss Conroy told Father Conway that if she died he was to do certain things for her, and she gave him certain directions which were reduced to writing by Miss Langin. The witnesses do not agree with respect to the contents of this paper. Father Conway says that it contained among other things a statement to the effect that he was to get Angus Daigle to do her business. Miss Langin, who drew up the paper, denies this. The document was handed to Father Conway, but was not produced on the trial, and he stated that it had been lost. He also stated that he had shewn it to his solicitor Mr. Ryan, but Mr. Ryan, who was in court at the time of the trial, was not called to give evidence with regard to it.

Before Miss Langin had sent for the priest at Miss Conroy's direction, she with Miss Conroy's approval, had telegraphed to Miss Conroy's niece in Boston. Father Conway states that after he arrived at the house he went into the kitchen where Miss Conroy was in bed, that they spoke to one another and he then

told her he had brought the Blessed Sacrament, and asked if there were any candles in the house. She said there were. After making a search for them, accompanied by Miss Langin and Mr. Jardine, he could find none, and lighted a lamp and turned it down low and used it instead of the candles. The ladies who were present retired to the barn and he administered the rites of the Church to Miss Conroy, having done which he proceeded to her bedside and knelt at one side close to her bed, where she could hear him and he could hear her, and she then said to him, "Father, I want to settle my business," and he said, "It will be wise to attend to your spiritual affairs first and look after any business and temporal affairs afterwards." He then administered communion to her and heard her confession. He was unable to administer extreme unction as he did not have the holy oils with him at the time. Having administered the rites of the Church he said, "Now, Miss Conroy, we can talk any business you wish," or something to that effect, and she said, "Father, I want to settle all my business," or words to that effect. He asked her what she wanted to do, and she said, "Father, I am going to leave my property to you." He said, "What about your relatives, are they going to get nothing?" and she said "No, I am going to give it all to you." Then he asked her if she had any money besides the property that she had in mind when she spoke of giving her property to him and she said, "Yes, I have some in the bank and there is some in the house," and he asked her about how much she had in the house, and as he recalled it she said about $75 or $80, or something to that effect. He says that she then gave him a secret trust in speaking when she referred to this money and that the trust related to a conversation they had just had regarding something she wished done. He says that he asked her where she got the money and she said she got $25 of it from Dan Farnell, and that he then asked her if he (Farnell) were going to get what she said he had given her, and she replied, "No, he owed me that and more." The priest then said to her that she could not give him the property just simply by saying so, but it would have to be put down in proper form, and that he could get a justice of the peace to transact or do her business in the proper way, and that he said to her to put this in the form of a will, and he mentioned Squire Parkhill and Angus Daigle, and she told him to get Angus Daigle. That she told him to take

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the money that was in the house, and indicated to him where it was. He said to her that he could not take anything from her house or assume any charge of her affairs unless he had something to shew, for he said he saw the condition in which the woman was and felt she needed more attendance and it could not be given her. After this he called in Miss Langin and Mrs. Jardine and told them that Miss Conroy wanted to get Angus Daigle to transact some business for her, and that she also wanted him (the priest) to look after her business during her sickness and in the event of her death, and asked Miss Langin to make a note and she did so and Mrs. Jardine and Miss Langin signed their names that it was her wish to bring Angus Daigle—as previously stated. Miss Langin, who wrote the note, stated that no reference was made to Daigle in it, and the note unfortunately was not produced. The defendant took it away with him. After the money had been counted the defendant went away and drove to the house of Mrs. Philip Gallagher, where he asked Mrs. Carol Daigle if she would go up to Miss Conroy's and if she could get some little thing in the way of refreshments. He then went down to Chipman, and on his way home he called upon Angus Daigle and asked him if he would go up with him after supper to Lizzie Conroy's, and he said that he would. After supper he got Daigle and started for the Conroy place. Daigle is a shoemaker and a justice of the peace residing in Chipman. He stated that he had never made a will in his life. He is also a very prominent member of Father Conway's congregation. On the way up he told Daigle that Miss Conroy wanted to make a will and wanted him to draw it up for her. When they arrived at the Conroy place, Miss Langin, Mrs. Carol Daigle, Daigle's daughter-in-law, William Gallagher and Miss Elizabeth Conroy were there. Miss Langin says she was very much surprised to see him as he had told her he was tired and his horse was was tired, and he would not return until the next day. He went into the kitchen where Miss Conroy was in bed, and told her that he could anoint her and give her the last blessing, so all the others retired from the room. Mrs. Carol Daigle, however, was called in afterwards and assisted the priest in the service. They then went out and Mr. Daigle went in. After waiting a few minutes he called the defendant in to the kitchen and said, "Father, she is going to make her will and she is going to leave all her property to

you." The priest said, "You will need a witness beside yourself," and he called in William Gallagher. The door was closed. They looked around for paper and found a piece like wrapping paper on a shelf and also a pen and ink. Mr. Daigle, after attempting to write stated that he could not write with the pen and asked the priest to do so, saying, "You are more used to writing than I am." Father Conway took the pen up and tried it and said, "All right," and asked Daigle what to put down on the paper, to which Daigle replied, "She wills and bequeaths all her real estate and personal property wherever situated to Reverend E. J. Conway." The priest says he added to that some little phrase to include this secret trust that Miss Conroy had given to him in the afternoon, for his satisfaction and for hers, adding to it a promise that he had made to her to look after her spiritually or temporally before she would die or during her sickness or in the event of her dying. The will as finally written out read as follows:—

Chipman; Queens County, N. B.

January 11th, 1916.

I, Elizabeth Conroy, hereby will, and bequeath any and all of my real and personal property, *i.e.*, (real estate and personal property) to Reverend E. J. Conway, who has promised to look after all my business before and after death. Any interest I have in any property wheresoever situated I hereby will and bequeath to said Reverend E. J. Conway.

Her
ELIZABETH X CONROY.
Mark.

Witness: ANGUS DAIGLE.
WILLIAM GALLAGHER.

It is to be observed that all the words after E. J. Conway, viz., the words, "Who has promised to look after my business before and after death," were added by he priest himself without any suggestion from Miss Conroy or Angus Daigle. He states that as he recalls it that in reading over what he had written that he had omitted "wheresoever situated," and he recalled Mr. Daigle, telling him to put in real estate and personal property wheresoever situated, and he added some words to cover that at the end. The will having been written, the priest states he read it over to Mr. Daigle and Miss Conroy and Mr. Gallagher, that the first reading was more for Mr. Daigle to see that he had placed what he had told him, and he says that he explained to Mr. Daigle something about adding on "who has promised to look after all my business before and after death." He states that the three of

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them, Daigle, Gallagher and himself, then went to the bed and at Daigle's request he read the will over slowly to Miss Conroy and asked her if she understood perfectly and clearly everything that was there and he states he is almost positive he read it over twice, and that when he asked Miss Conroy if this was her mind on the thing—if she understood what was on the paper—she replied, "Yes," and that he emphasised those words that he had written "who has promised to look after all my business before and after death," and that she stated she clearly understood what he was reading to her. He also states that at that time she appeared to be in a normal state mentally. He gave the paper to Mr. Daigle and went out of the room and it was handed to him after a while by Mr. Daigle that same evening and he was not present when the will was executed.

Now the evidence of the execution of the will is given by Angus Daigle and William Gallagher. Daigle states that after Father Conway went out that he took a book and put it under the will and that Miss Conroy took hold of the pen and he put his hand underneath, that she took hold with her right hand and he took hold of her wrist and that she made a mark, that she made it in the presence of himself and William Gallagher, both being present at the same time and both being in a position to see her make her mark. This evidence is then given:—

Q. After you signed your name what else took place? A. William Gallagher signed it.

Q. Is that his signature (indicating)? A. I saw him write but I could not tell.

Q. You saw his name immediately after he wrote it? A. Yes.

Q. He wrote it then and there? A. Yes, I watched him.

Q. And he signed his name William Gallagher as a witness in your presence and in the presence of Elizabeth Conroy? A. Yes.

He further states that when he took the paper it had these signatures—Elizabeth Conroy, and witnesses William Gallagher and Angus Daigle—that he called Father Conway in and gave him the will. Mr. Daigle also stated that everything he did and all that William Gallagher did was at the request of Father Conway, and that he thinks it was Father Conway who asked Gallagher to come in to witness the will.

It is claimed by the plaintiffs that the evidence given by William Gallagher was given in a halting, hesitating and unsatisfactory manner, and that the members of the jury who witnessed

his demeanour on the stand were justified in drawing certain conclusions from it that were adverse to the contention that the will was properly executed. He stated that he was at Miss Conroy's house on the night in question; that his sister, Mrs. Daigle, was there and his father-in-law, Angus Daigle; that after Father Conway and Mrs. Daigle came out from having administered the last rites to Miss Conroy the former said, "I want you to come in as she is going to make her will and I want you to be a witness;" that after they went in Mr. Daigle started to write the will and said the pen was so poor he did not think he could write with it, and told Father Conway he had better do the writing. Father Conway took the pen and Daigle worded over what to write. He does not remember what it was Daigle told him to write. After the will was written Father Conway read it over; that he then went over to the bed and read it twice to Miss Conroy and asked if that was all right and she said yes; that Father Conway then went into the other room and that Miss Conroy told Daigle her hand was too weak to write, so Daigle told him (Gallagher) to write her name and leave room between for her mark, which he did. At this stage the will was shewn to Gallagher, and he was asked, having reference to his name as a witness to the will:—

Q. Is that your handwriting? A. Yes, as near as I can tell.

Q. You know your handwriting? A. Yes.

Q. You say that is your own writing? A. Yes.

Q. Look at the name of Elizabeth Conroy—can you tell me whether that is in your handwriting? A. I could not just say to that.

Q. Don't you recognize your own handwriting? A. Yes.

Q. That name there William Gallagher is in your handwriting? A. Yes.

Q. You say you wrote the name Elizabeth Conroy there? A. Yes.

Q. Is that the paper you wrote the name of Elizabeth Conroy on? A. I could not say to that.

Q. What is your best recollection? A. Yes I think that is—it looks to me like the same paper.

Q. What is your best recollection as to whether that writing Elizabeth Conroy there is in your handwriting at the foot of that paper (indicating)? A. I think it is.

Q. At all events you remember writing the name of Elizabeth Conroy? A. Yes.

Q. At the request of Mr. Daigle? A. Yes.

At page 171 his attention is again called to the signature on the will, and he is asked:—

Q. And your name is here—William Gallagher (indicating)? A. Yes.

Q. Is that name William Gallagher in your handwriting? A. Yes—I couldn't swear to that—I think it is as far as I can tell.

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Q. That is your best recollection? A. Yes.
Q. Have you any doubt about that? A. No.

As I stated before, his evidence, it is claimed by the plaintiffs, was given in a way that must have created an unfavourable impression upon the jury—that it was doubtful, halting and hesitating, and when he was asked the question, "What is your best recollection as to whether the writing Elizabeth Conroy is in your handwriting at the foot of that paper (indicating)?" he answered "I think it is." It is also claimed that his final acquiescence that it was, was only after pressure from his own counsel. The plaintiffs further claim that there was undoubted similarity between the writing of the words Elizabeth Conroy on the will, and the writing of Father Conway, and that the jury concluded that the words Elizabeth Conroy were written by Father Conway and not by Gallagher, and that the fact that Elizabeth Conroy as written by Gallagher in court was spelled "Elizebeth," while Elizabeth Conroy on the will was spelled "Elizabeth," taken together with a comparison of the handwriting justified the jury in concluding that they were written by different people.

The whole question is whether the verdict was one which the jury could as reasonable men have found. I have given a summary at considerable length of the evidence that was given in support of the execution of the will, and it is fair in this connection also to say that Gallagher was apparently called in for the purpose of witnessing the will and it is not easy to understand why he did not do so or why somebody else should have signed his name for him. On the other hand, the jury had the opportunity of seeing Daigle and Gallagher on the stand and observing their conduct and demeanour. They were at liberty to believe them or not as they saw fit. In addition to this they had before them the signature which Gallagher wrote when on the witness stand and were able to compare it with his signature as a witness to the will, and they have evidently come to the conclusion that they were not written by the same individual. The jury apparently all agreed in this. They also had the different spelling for the word Elizabeth, which it was claimed Gallagher had written on the will and which he again wrote in court, and the jury apparently believed that he had not written the "Elizabeth Conroy" on the will. They further had before them, in considering the evidence of Gallagher and

Daigle, this fact. When evidence was being given the witnesses were excluded from the court room. When Angus Daigle was being examined he was asked if he had talked over the events of that night when the will was signed very frequently, and he said that he had not, that it was none of his business, and that he never talked about it with William Gallagher or Father Conway. William Gallagher, however, stated that he talked it over with Mr. Daigle within a month or two months of Miss Conroy's death; that during the last month, since he came to court and before he came to court, he had talked it over a good many times with Daigle, and further on he said that he had talked it over with Daigle and they had gone into all the details about what occurred there that night—that they had spoken about some parts of it—about her making her will and the like of that. It is quite clear that there is a distinct conflict of statement between Daigle and Gallagher as regards this, and this may have influenced the jury with respect to their credibility in other respects.

Having regard to all the circumstances of the case, to the evidence that was given in support of the execution of the will, and to the evidence to the contrary, and after the most careful consideration, I cannot convince myself that the answer to the first question was one which reasonable men ought not to have given, or that it was so unreasonable that they could not properly give it if they really performed the judicial duty cast upon them. It is not the province of this court to determine what verdict it would have found, as the case was so unquestionably within the province of a jury that the verdict ought not to be disturbed, for in view of all the evidence I am not prepared to say that it was one that they reasonably could not properly find. *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152.

The learned judge instructed the jury with regard to the signatures, and told them that it was their duty to examine them and to consider the evidence which had been given by Mr. Daigle and Mr. Gallagher in connection with the impression they might have with reference to those signatures, and as to whether the signatures that appeared in the specimens were in the same handwriting as the handwriting of the subscribing witnesses as they appear on the will. He said that he had not had an opportunity

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of examining all of these, but it was not for him to say whether the writing was done by the same hand that wrote the signatures on the will or not. That was their duty as a jury.

The jury found in answer to the second and third questions that the testatrix was of sound and disposing mind when she executed the will. They also found that she did not know and assent to the contents of the will. There was ample evidence to justify their finding to the second question, but it is contended on the part of the appellants that there is no evidence which warrants the finding that she was induced to make her will by undue influence. In order to consider this contention it will be necessary to go further into the facts and to shew what occurred after the will had been executed.

Miss Langin was not present at the execution of the will. She was in the room adjoining the kitchen in which Miss Conroy was in bed, and which was connected with it by a door opening directly into it. Mrs. Daigle was with her. After a time the door was opened—by whom it does not appear—and she went into the kitchen. She says she found Mr. Daigle in a bending position over the bed, about half-way between the foot and the head. She found Miss Conroy very much excited, in a high fever with a rapid pulse, laboured breathing and repeating as rapidly as she could, "You will get no more out of me—you will take no more out of me," then again, "You will get no more our of me—your two dirty old mouths have been in my face for the last two hours." That she (Miss Langin) said, "Ha, ha, ha, Lizzie, you are not dead yet." At this time, according to Miss Langin's evidence, Miss Conroy, Father Conway, Angus Daigle and William Gallagher were in the room, and these words were uttered in the presence of all. She states that Father Conway asked, "What did she say?" and that she said, "Oh, nothing;" then he said, "But what did she say?" and that she said "Something that reminds me of what she would say if she were well." He said again, "What did she say?" and she said, "She said you would take no more out of her—your two dirty old mouths had been in her face for the last two hours." Miss Langin asked what is Mr. Daigle doing, and Father Conway said, "We forgot about the bank book and he is wanting a paper to make mention of it, wanting Miss Conroy to sign a paper to make mention of it." Miss Langin then said, "Well, she won't

do it," to which Father Conway replied, "No, the old man is not handling her right, she would have done it if I had gone to her." Then preparations were made for leaving. This statement is contradicted by Father Conway, by Daigle and by Gallagher, all of whom state that they heard nothing of the sort and that they were in a position to have heard it, but Father Conway states that Miss Langin made a remark about Lizzie not being dead yet—something of that nature, but that Miss Conroy made no remark other than the answer that she made to Mr. Daigle that she was tired, when he asked her if she would give an order on the bank for the money in the bank. It does not seem at all likely that Miss Langin would make such a remark as she is said to have made about Lizzie not being dead yet, unless something was said to which it was in some sense an answer or response, but Father Conway is the only one who heard this remark, the others all denying having heard it or the statement which Miss Langin attributed to Miss Conroy.

Mr. Daigle, Father Conway and Mr. Gallagher then went away and a little later on the same evening Father Conway and Mr. Daigle returned, and according to the evidence of Miss Langin said they had come back for the deed that John had given Lizzie. They went upstairs with Miss Langin and hunted in some trunks, but did not find it. They then came downstairs and did not go out to the room where Miss Conroy was, but Miss Langin says she heard them talking and called out, "The deed is in the house somewhere." Father Conway and Daigle admit coming back, but say they did not come for a deed but to search for a bank book.

The question arises as to whether or not there was any evidence which would justify the jury in concluding that undue influence had been exercised. In a case when a party who is a beneficiary of a will interferes in any way in its preparation, he must, in order to satisfy the conscience of the court, remove the suspicion which under the circumstances surrounds his act. This is settled law. In this case Father Conway, who was the beneficiary, wrote the will himself, part of it according to the witnesses, at the dictation of Mr. Daigle, part of it on his own initiative, and therefore suspicion naturally attaches to his connection with it. He sought to remove that suspicion by evidence of the will having been read over to the testatrix, of her having been in sound mental condition at the time, and of the will having been duly executed in the

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presence of two witnesses, Messrs. Daigle and Gallagher, after the testatrix had been duly informed of its contents. In the case of *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448, at 460, Lord Cairns says:—

It is said that it has been established by certain cases to which I will presently refer that in judging of the validity of a will or part of a will, if you find that the testator was of sound mind, memory and understanding, and if you find farther that the will was read over to him, or read over by him, there is an end of the case, that you must at once assume that he was aware of the contents of the will and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My Lords, I should in this case, as indeed in all other cases, greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by Act of Parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the legislature has, in the shape of an Act of Parliament, distinctly imposed that rule.

He also lays down the rule as laid down in *Barry* v. *Butlin* (1840), 2 Moore P.C. 480, in the language of Baron Parke:—

The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: the first that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and is judicially satisfied that the paper propounded does express the true will of the deceased. These principles to the extent that I have stated are well established; the former is undisputed, the latter is laid down by Sir John Nicholl in substance in *Paske* v. *Ollat* (1815), 2 Phill. 323; *Ingram* v. *Wyatt* (1828), 1 Hagg. Ecc. 388; and *Billinghurst* v. *Vickers*, 1 Phill. Eccl. 187; and is stated by that very learned and experienced judge to have been handed down to him by his predecessors, and this tribunal has sanctioned and acted upon it in a recent case, namely, *Baker* v. *Batt* (1838), 2 Moore P.C. 317,

and adds:—

It is very difficult to define the various grades or shades of fraud, but it is a very important qualification to engraft upon the general state of things that the reading over of a will to a competent testator must be taken to have apprised him of the contents. If your lordships find a case in which persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared for their own benefit a will disposing in their favour of a large portion of the property of the testator. and if you submit that case to a jury it may well be that the jury may consider that there was a want on the part of those who propounded the will, of the execution of the duty which lay

upon them to bring home to the mind of the testator the effect of his testamentary act, and that that failure in performing the duty which lay upon them amounted to a greater or less degree of fraud on their part.

Lord Hatherley in the same case says:—

A matter which appears to me deserving of some remark, and upon which the Lord Chancellor has already fully commented, is the supposed existence of a rigid rule by which when you are once satisfied that a testator of a competent mind has had his will read over to him and has thereupon executed it, all farther inquiry is shut out. No doubt those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator. Still circumstances may exist which may require that something farther shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory and also having had read over to him that which had been prepared for him and which he executed as his will. It is impossible, as it appears to me, in the cases where the ingredient of fraud enters, to lay down any clear and unyielding rule like this.

Again he says:—

There is one rule which has always been laid down by the courts having to deal with wills, and that is that a person who is instrumental in the framing of a will . . . and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of comprehending it. But there is a farther onus upon those who take for their own benefit after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.

In the case of *Baker* v. *Batt*, *supra*, it is stated:—

If the person benefitted by a will himself writes or procures it to be written the will is not void as it would have been by civil law, but the circumstance forms a just ground of suspicion and calls upon the court to be vigilant and jealous and requires clear and satisfactory proof that the instrument contains the real intention of the testator.

After summing up these cases, in *Adams* v. *McBeath* (1897), 27 Can. S.C.R. 13, Mr. Justice Gwynne says, at p. 25:—

In short the fact of the will being made in favour of the person who has prepared it or procured it to be written is *primâ facie* evidence of fraud, which must be displaced to the satisfaction of the tribunal before which the case is tried by clear and satisfactory proof, and when the will is an inofficious one the evidence required must of necessity be of a much stronger and more conclusive character than that which might be sufficient where the party so claiming under the will was a relative of the testator.

In *Parker* v. *Duncan* (1890), 62 L.T.N.S. 642, Sir James Hannen said:—

It is the duty of any man who expects that a will is about to be made in his favour to see that the testator receives proper and independent advice and he should take care that the testimony called in support of the will should not be that of himself alone but that it should be independent and impartial.

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A person (that is a testator) is entitled to have his mind perfectly free and untrammelled and when one is so very ill (referring to the testator in that case) he will do any thing to get rid of importunity.

The learned trial judge charged that if the jury found that Miss Conroy signed the will knowing what she was doing, then the onus of proving undue influence was on the plaintiffs and they must satisfy the jury that although it was a free act, that the act was procured under undue influence, and the question was whether there was influence enough to justify a finding of that sort. He further told the jury that if it be shewn that a party taking a benefit, or any benefit, under a will himself wrote that will or participated in the preparation of it or in the procuring of its execution, the law casts upon that beneficiary in proving the will the additional burden of proving that the testatrix knew and approved of the contents of the will, the rule of law being that if the evidence establishes these facts a suspicion is cast on a will and requires that the suspicion must be removed and removed by testimony which leaves no reasonable doubt of the genuineness of the will as the last free will of the testatrix. Undue influence means such influence as deprives a will of its character as the free act of the testatrix. It does not follow that if undue influence has been used the testatrix is incapable of properly understanding what she is doing, for one may quite understand and appreciate one's act and yet not be a free agent in the performing of it, and in this case Miss Conroy may have fully understood what she was doing and yet her act may not have been a free or voluntary one, but may have been in consequence of certain influences that were exerted upon her in her dying moments. It is not necessary that actual violence be used or threatened, but in the language of the learned trial judge, any pressure of any kind, whether acting on the fears or the hopes of the testatrix, if so exerted as to overpower her will without convincing her judgment, would be undue influence within the meaning of the law in that regard. Each case must be decided upon its own peculiar circumstances, and it has been truly said that words which might be quite lawful and unobjectionable in one case might be tantamount to coercion and undue influence in another. It was for the jury to consider all the surrounding facts and circumstances and decide whether or not they were such as to justify the conclusion that the

testatrix had been influenced to such an extent as to have lost the power of free agency in the sense pointed out by the trial judge.

The learned judge told the jury it would be for them to consider all the evidence which might go to shew or which was put forward and relied upon as shewing undue influence within the meaning of the instructions given by him, and he further told them that if they found in answer to Question No. 1 that the paper writing was in fact duly executed by Miss Conroy, and in answer to No. 2 that she was of sound and disposing memory when she executed it, and in answer to No. 3 that she knew and approved of the contents in that will so executed by her, that when they came to deal with question No. 4 the onus was on the plaintiff to establish that fact to their satisfaction, and that the plaintiff must shew affirmatively undue influence. The jury, however, in answering question No. 1 found that the paper writing had not been duly executed, for the reasons previously set forth in this judgment, and in answer to question No. 3 found that she did not know and approve of the contents of the will executed by her.

Now the evidence relied upon by the plaintiffs to prove undue influence is first with reference to the relations which existed between Miss Conroy and her nephew in California, with respect to the declarations that she is said to have made as to her intentions to save the property for her heirs, and the evidence of one witness indicating an intention to give it to Daniel C. Farnell. This was a circumstance which would go to shew to some extent the improbability of her making the will which she did make, though the fact that she intended to make a will in favour of a certain person at one time and changed that intention and made her will in favour of another, would not be evidence of undue influence. There are also the statements that Miss Conroy made with respect to the priest and to the Church—that her property would never go to the priest or an Old Home, and the circumstance that she had never attended Father Conway's church during the time he had been in Chipman, and that she was greatly incensed over the fact that her brother had been buried without any services of the Church being performed, and that he had been buried in a place in the cemetery of which she disapproved. Then there was the evidence of Miss Langin of the statements which she alleges were made by Miss Conroy when she entered the room after the

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execution of the will, which of itself is some direct evidence, if the jury believes it, of the exercise of undue influence. The learned trial judge told the jury that if that statement was in fact made he was not prepared to say that that, taken with other circumstances, would not be sufficient to warrant a finding that undue influence was used, and that he was not prepared to say that if that evidence was true that that, taken with other circumstances, might not justify a jury in finding undue influence, but their first duty was to decide if Miss Langin's statement with regard to what occurred in the room was true or not. The jury evidently found it was true. It was contradicted by others. It was for the jury to weigh the testimony and to decide who they would believe, and the jury having evidently believed Miss Langin's testimony—and so far as her character and reputation are concerned there was nothing to impeach them—and having given consideration, no doubt, to the evidence of the others present at the time who denied it, and there being no apparent motive for the witness making a statement that was not true—came to the conclusion that that statement was made by Miss Conroy on her death bed, after she had executed the will in favour of Father Conway under the circumstances that had been detailed in evidence and that I have referred to. If the statement is true and the jury accepted it as such, is it possible then to believe that the will was executed by her with a knowledge of its contents, giving Father Conway her property, and that if such was the case she would have made such a statement as she did make concerning him; and was it reasonable for the jury, accepting the statement as true and having in mind the fact of the testatrix's relations with Farnell—the letters that passed between them, the friendship and relationship which existed and the views that she had expressed with regard to the priest and the disposition of her property after death—to conclude that undue influence had been exerted? On the other hand, the learned judge asked the jury to consider if they thought it likely that one who had made her confession to the priest in the afternoon and had received holy communion at his hands and the last rites of the Church, would in his presence and in the presence of the others utter such words as that, "Your two dirty old mouths have been stuck in my face for the last two hours," and told them it was for them to say whether they believed that that statement was consistent with the evidence that

Miss Langin gave. The charge of the learned judge on this subject was very full and exhaustive and after putting all considerations from the standpoints of both parties told them that if they believed the evidence of Miss Langin, the words that Miss Conroy used might be evidence of undue influence, inasmuch as they would seem to import that while she was lying in the condition in which the evidence shewed she was, that there had been some importunity or pressure applied to her. He told them that in considering whether the evidence of Miss Langin was true or not, they would consider whether the statement was consistent with the rest of her evidence, and that they might also test the credibility of it by examining it with the other evidence she gave, by her manner and demeanour all through her examination and cross-examination and generally her manner on the stand. He told them it was a statement for them to test thoroughly and to satisfy themselves if it was actually made or not before they proceeded to give it any effect in the consideration of other matters with reference to the question of undue influence.

The charge of the learned judge, it seems to me, was not open to exception from the defendants' standpoint. The question was left to the jury with absolute fairness and impartiality and every circumstance that could bear upon it and all the evidence was reviewed by him. I believe the question as to whether undue influence was exercised or not was one for the consideration of the jury, having regard to all the evidence under the direction of the learned judge, and having considered all that evidence and all the circumstances in connection with the case they came to the conclusion that undue influence had been exercised, and in my opinion it was a decision that might fairly be reached by a jury of reasonable men and was supported by evidence that was given in the case. With regard to the repetition by Miss Conroy of the statement, "You will get no more out of me," Miss Langin stated that she had a habit when she was a little angry of repeating anything over and over again.

The defendant objects to the admission in evidence of an account of $11.75 rendered by Miss Langin to the defendant Conway, and a letter which he wrote in reply thereto. It is contended that it had a direct bearing as to the credibility of the witness, Father Conway, who was then undergoing cross-examination. The

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only objection seems to be that the evidence was irrelevant. Although the letter written by Father Conway was, I think, an unjustifiable one in its references to Miss Langin, and I feel quite sure that he must upon reflection regret having written it, yet I entirely fail to see, even if it was inadmissible, how it occasioned any substantial wrong or miscarriage, or how it would have any effect upon the decision of the jury one way or the other. Objection is also taken to certain evidence of Daniel C. Farnell, which was taken under commission in California. He was asked if he ever knew of any reason why Miss Conroy should disinherit her relatives and leave her property to the Reverend E. J. Conway and the answer was "No." In my opinion this would not have any substantial effect upon a jury or occasion any substantial wrong or miscarriage, but no objection was taken to it by the counsel who appeared for the appellant before the Commissioner, and it is not open, therefore, to the defendant to take the objection on the trial. Objections have been also taken to the charge of the learned judge—a charge which I have already discussed at some length, and which I regard as a very excellent one and one which clearly set out the law and the different considerations which had to be taken into account by the jury, in a fair, learned and impartial manner. It consists chiefly of objection to his telling the jury that evidence with respect to the previous declarations that the testatrix might have made of an intention to dispose of her property otherwise than as mentioned in the will, and that evidence bearing on the probability or improbability of Miss Conroy making a will in the terms in which it was made—that is to say, by devising and bequeathing all her property to Father Conway, might be taken into consideration by them. Much of the evidence as to the intention of Miss Conroy as to the disposal of her property was admitted without objection, but after a perusal of the authorities I have come to the conclusion that the evidence of a declaration of an intention was entirely admissible in this case. See *Adams* v. *McBeath*, 27 Can. S.C.R. 13; *Brown* v. *Fisher* (1890), 63 L.T.N.S. 465; Taylor on Evidence, 1136; Wigmore on Evidence, 2243, s. 1738, sub-sec. B. It is said:—

> The normality of the will's dispositions with reference to the natural and uninfluenced desires of the testator must be investigated . . . For this purpose his utterances indicating the state of his affections, if any, whether prior or subsequent, may all be considered.

Error is also charged on the part of the learned judge in telling the jury that they were not bound to accept the statements of the three witnesses as to the reading over of the will, and as to the reply which Miss Conroy is alleged to have made, simply because it had been sworn to, and also that there was error in directing the jury in the following words: "It is for you as a jury to test the credibility of this evidence and you may use all methods which are ordinarily employed to test the credibility of witnesses." On reference to the learned judge's charge, p. 508, what the learned judge said was this, "It is for you to say whether you believe that these three witnesses, Father Conway, Mr. Daigle and Mr. Gallagher, are telling the truth or have sworn untruthfully in this court so far as the writing and reading of the will is concerned, because it would be necessary in any event to establish the validity of the will in this case that the will should be read over or at any rate some knowledge brought home to her of its contents. You have that direct evidence bearing upon that point, and it is for you to say whether you believe that these witnesses have come to this court and told the truth or whether they have come to this court and made a statement which you do not in your own consciences believe. The fact that these three witnesses have sworn to that effect does not necessarily establish it, that is to say, you are not bound to accept the statements of the three witnesses as to the reading over of the will and as to the reply which Miss Conroy is alleged to have made, simply because it has been sworn to. It is for you as a jury to test the credibility of this evidence and you may use all methods which are ordinarily employed to test the credibility of witnesses. It will be for you to consider as to whether there is anything in the statements which have been made which are incredible or which are inconsistent in themselves; whether there was anything in the manner in which the witnesses gave their testimony to cause you to withhold full credence from it, or whether the evidence is inconsistent with other facts that you may find have been proved in the case; but that is the only direct evidence that has been given with respect to the reading." It seems to me that taken as a whole this is quite proper, and certainly cannot be said to unduly favour the defendants. Further, error was charged in leaving to the jury to consider the letters which had passed between herself and her nephew, as tending to

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shew the unlikelihood or improbability of her executing such a will and in telling the jury in that connection, "It is for you to say whether these letters shew such feelings and considerations for him as would be likely to induce in her mind a desire to give Farnell her property, and also you will consider the evidence which has been given with reference to the declarations that Miss Conroy is alleged to have made with respect to her previous intentions as to the disposition of the property; also the evidence which has been given as touching her relations with Father Conway and her feelings towards him, the declaration that she is alleged to have made that the priest or Church would never get her property, and all the evidence along that line. Your first duty, therefore, in considering that is to decide whether such declarations were actually made. That involves the question of the credibility of the testimony of different witnesses dealing with that subject (that is your first duty), if you think that these are facts which might bear upon the credibility of the direct evidence which has been given as to Miss Conroy having understood the will. These are matters entirely for your consideration." Also error on the part of the learned judge in telling the jury, "It is for you to say whether the fact—if you find it is a fact—that she had intentions previously to dispose of her property otherwise, is such a fact as casts discredit upon the direct evidence which has been given as to the reading over of the will to her and her knowledge and appreciation of its contents. You may also consider in this regard the relations which existed between Father Conway and the testatrix and the evidence which has been given pointing to a feeling of resentment which is alleged to have existed against Father Conway at one time. Decide first whether that evidence is true and then consider its effect as bearing upon the question of the direct evidence that has been given as to her having the will read over to her and understanding its contents. I will say to you that these facts in themselves, if you decide that they are facts, that is the relations and the fact that she had a contrary intention are not in themselves conclusive against the validity of the will, and should have only such effect as you jurors think they should have in the testing of the truthfulness of the direct evidence which has been given as to the will having been read over to Miss Conroy, and Miss Conroy having fully understood its terms."

The admission in evidence of the letters of Miss Conroy to the

plaintiffs were not objected to on the trial. They were properly before the court and were therefore a proper matter to which the judge should direct the jurors' attention, and in my opinion the charge of the learned judge is correct as a statement of law. See *Lamoureux* v. *Craig*, 17 D.L.R. 422, 49 Can. S.C.R. 305.

Error is also claimed because the learned judge with reference to the third question told the jury as follows: "I think these are all the directions I need give you with regard to question 3 except to repeat what I have aleady said, that it is for you to be fully satisfied before you answer this question in the affirmative that Miss Conroy was of sound and disposing mind, that the will was read over to her in such a way as to convey its full meaning and effect to her, and that after it had been so read over to her she signed it while still of sound and disposing mind and memory" If you believe that, then it will be your duty to answer "yes" to that question. If you are not satisfied, and satisfied beyond all reasonable doubt as to that ,you will answer "no." The objection is as to the words "all reasonable doubt." The learned judge has been pointing out to the jury that the burden of establishing the will is on the defendants, and that they must satisfy the jury that the will was a true will of the testatrix. The force of the objection is not apparent to me. Error is also claimed with regard to the learned judge's charge with respect to the question of undue influence. It is contended that the question, "Was the testatrix led to make the will under undue influence," should not have been left to the jury. That he should not have directed the jury that, "If she were impelled to make the will by fear, fraud, complusion or coercion it would not be her free act but one obtained by undue influence," in the absence of any evidence to shew that she was induced to make her will by fear, fraud, compulsion or coercion. Also error on the part of the learned judge in leaving it to the jury that the evidence that the plaintiffs relied upon for undue influence is the evidence that I have already referred to with reference to the relations that existed between Miss Conroy and her nephew in California, etc. This is practically an objection upon the ground that there is no evidence whatever of undue influence. I have already pointed out the evidence and circumstances that I thought the jury were justified in taking into consideration in dealing with that question. The evidence was contradicted, but the veracity of the witnesses was entirely and solely a matter for the jury.

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Speaking generally, the objections to the judge's charge are to certain sentences and parts of paragraphs which are dealt with as if they were isolated, but they should be read in connection with the charge as a whole, and reading it in that way I have come to the conclusion that no injustice is done to the defendant thereby, and that there is no error in it that would justify the setting aside of the verdict that has been entered for the plaintiff.

In my opinion the application should be dismissed with costs.

Application dismissed.

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BURKETT v. OTT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. January 11, 1918.

CONTRACTS (§ I C—26)—MAINTENANCE OF AGED COUPLE—MONEYS IN BANK PLACED IN JOINT ACCOUNT—AGREEMENT NOT IMPROVIDENT—ACTION AFTER DEATH OF SETTLOR FOR DECLARATION THAT FUNDS BELONG TO PERSONAL REPRESENTATIVE.

Where a letter addressed to a bank in which deceased had his moneys deposited, directing the bank to open an account in the names of the deceased, his wife, and daughter and authorizing the bank to pay all moneys to the credit of such account to any one of the three and the survivor or survivors and signed by all three, is shewn to be in pursuance of an agreement whereby the daughter and her husband were to take care of the deceased and his wife during their lives in return for which he was to give them all his property and where the agreement is being carried out and the widow of the deceased is living with the daughter and is strenuously opposing the action which is in the circumstances not improvident, an action against the mother and daughter for a declaration, that the money in the bank belongs to the personal representatives will be dismissed.

[*Empey* v. *Fick* (1907), 13 O.L.R. 178, 15 O.L.R. 19, followed.]

Statement.

APPEAL from a judgment of Britton, J., in an action by Emma Burkett, one of the two daughters of Joseph Arber Ott, deceased, against her mother, Catherine Ott, her sister, Minerva Barrick, and the Bank of Hamilton, for a declaration that a sum of money deposited in the bank was the property of the personal representatives of the deceased, and for other relief. Affirmed by an equally divided court.

The judgment appealed from is as follows:—

Joseph Arber Ott resided at the time of his death in the town of Welland, and died there in the month of January, 1917, leaving him surviving his wife, Catherine, and two daughters, viz., the plaintiff Emma Burkett and the defendant Minerva Barrick, his heiresses at law.

The two daughters are the executrices of their father's will. This will is dated the 9th January, 1910. It does not appear that probate of the will was obtained or even applied for.

By the will, the deceased devised to his widow a house and lot, and bequeathed the balance of his estate to his daughters above mentioned.

This action is brought to recover a sum of money now in possession of the defendants the Bank of Hamilton.

The claim of the plaintiff is that an order held by the bank, if signed by her father Joseph Arber Ott, which the plaintiff denies, was not signed by him with a full knowledge of the effect of said order, and was not so signed of his own free will, but was obtained by the defendants Catherine Ott and Minerva Barrick through and by reason of fraud, duress, and undue influence.

The plaintiff asks for a declaration that the money is the property of the personal representatives of the deceased. The plaintiff also asks for a return of all moneys withdrawn by her sister or mother or either of them; and for an injunction restraining the defendants from withdrawing or using the said money or any part thereof.

The house and lot devised to the wife of the deceased were sold during his lifetime. The proceeds of the sale were given to his wife.

It is alleged by the defendant Minerva Barrick that, on or about the 6th November, 1916, the deceased and his wife agreed with Minerva Barrick and her husband that, if the said Barrick and wife would give them a home and suitably provide for them for the remainder of their lives, and the life of the survivor, they, the husband and wife, would give all the money and other property they had for so doing.

The defendants agreed to this, and the husband and wife went there and so remained until the husband's death, and the widow is now living with and being maintained by the defendant Minerva Barrick and her husband.

On the 6th November, when the alleged agreement was made, the power of attorney dated the 22nd July, 1916, was withdrawn or superseded, and another blank was produced by the manager of the Bank of Hamilton at Dunnville, and was filled out and signed by the Otts and by the defendant Minerva Barrick. This was not so much a power of attorney as it was a direction to the bank that cheques would be honoured drawn upon the Ott account.

There was, as it appears to me, a want of care in drawing up this document: for example, the power of attorney of the 22nd July

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was one authorising the appointee to transact for Joseph Ott a general banking business, and that was not the real intention of Joseph Ott. He was a retired farmer, and had no intention, in July, 1916, of going into a banking business, either by himself or by any attorney. So in November, 1916, what was done was a way of paying money over to Mrs. Barrick and her husband.

On the 6th November, 1916, the date and time of the alleged agreement, there stood to the credit of Joseph Ott the sum of $3,110. This is what the defendants say was to be given to Minerva Barrick and her husband for the maintenance of the aged couple. The only way this was paid to them was by the following direction to the Bank of Hamilton at Dunnville.

"Dunnville, Ont.
"November 6th, 1916.

"To the Bank of Hamilton.

"The undersigned hereby request you to open an account or accounts under the following title, Joseph Arber Ott and Catherine Ott and Minerva E. Barrick, or to continue the present account or accounts now carried on with you under such title (during your discretion), and the undersigned authorise you to pay all moneys at the credit of such account or accounts to the undersigned or either or any of them, or upon the cheques of the undersigned or either or any of them, whether the same be signed in the same name or names as the title of the said account or accounts, or in the name or names of the individual or individuals signing the said cheques or otherwise; and in case of death of the undersigned, or either or any of them, to pay the same to the survivor or survivors, or any one or more of them. In case of any overdraft or any indebtedness or liability being incurred in your favour in connection with such account or arising thereout, then the undersigned jointly and severally agree to pay the same to you forthwith, and the undersigned agree to become jointly and severally liable to you as principal debtors therefor.

"Witness
"as to all three signatures

"Cyrenus Barrick.

"Joseph Arber his X mark Ott

"Catherine her X mark Ott.

"Minerva E. Barrick."

This in itself was not a transfer or paying over of the money. It was a direction only to the bank to pay to either himself or wife or Minerva Barrick.

This has given me some trouble; but, accepting as I do the statement that the money was to be paid, and that the form was that of the bank, rather than that of Ott and his wife, I find that the money was placed and is now in the control of the daughter Minerva for her and her husband's use, in return for which the maintenance was to be given.

The contract, I think, must be interpreted that the defendant Minerva and her husband must provide clothing, food, and a comfortable home while living, and a suitable burial of each after death.

From that time the money was treated by the Barricks as their own money, although, according to the direction, Mrs. Ott, the widow, could by signing a cheque have drawn all or any of the money from the account.

I find that Joseph Ott, at the time of signing this direction, was competent to do so. The evidence given concerning his not being in a state of mind to comprehend and understand the true meaning of the direction was of a weak character; a few incidents were spoken of, but were not sufficient to indicate by a lack of memory, or in any other way, his want of capacity to understand the direction. There was no evidence of duress or fraud.

It was argued by counsel for the plaintiff that, even if Mr. Ott was of sound mind and memory at the time of signing this direction, that was not in itself sufficient to pass the property in the money from him and his wife to the Barricks.

As before stated, Mrs. Ott, the widow, unquestionably owned part of the money, which was in part the proceeds of and arising from the sale of the house and lot which were her own.

In view of the fact that Mrs. Ott is still living, and is now living with, and being maintained by, the defendant Minerva and her husband, I cannot say that the agreement was an improvident one, considering the reasonable expectation of life and that they were not very old people, and considering that the only persons who would be the objects of their bounty would be the two daughters, one of whom is the defendant and the other the plaintiff in this action; and these daughters were married and apparently well provided for.

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The fair interpretation of the agreement was that the cost of maintenance of the husband, while living, and the funeral expenses in reference to him after death, should be borne out of the money received by Minerva Barrick, and that there will be no charge against the plaintiff for past or future services in reference to the maintenance or burial of her parents.

This is a case in which there can be no declaration against the husband, Benjamin Franklin Barrick, as to liability or otherwise, as he is not a party to the action. In dealing with the case the difficulty is increased by Catherine Ott being a party to the agreement and a defendant in this action.

There is no course open to me but to direct the dismissal of the action. This I do with the hope that the agreement as interpreted by me will be faithfully and honourably carried out as regards Catherine Ott by Minerva Barrick.

Part of the trouble has arisen from the blank forms which the bank handed out.

The judgment will be dismissing the action, but without costs as against the plaintiff.

R. S. Colter, for appellant; *W. M. German*, K.C., for defendants Catherine Ott and Minerva E. Barrick, respondents; *Robert Bradford*, for defendants, the Bank of Hamilton.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—In the month of November, 1916, Ott, now dead, was the owner of about $3,200, which was deposited in his own name, in the Bank of Hamilton, at Dunnville, in the county of Welland, at interest. The man was 77 years of age and feeble in mind and body: and that money was all the property or means he had, or could be expected ever to have.

In that month, Benjamin F. Barrick, who was a son-in-law of Ott, and had been and was Ott's business adviser, having a power of attorney to act for him in his business affairs, went to the manager of the bank at Dunnville and had him prepare a writing for the purpose of having Ott's money in the bank placed to the credit of Ott and of Ott's wife so that either could draw upon it during their joint lives, and also so that the survivor could draw upon it after the death of the other; and the writing, so prepared, was taken by Barrick to be signed by the Otts and then returned to the bank.

Soon afterwards, the writing was so returned, but in the meantime it had been changed, by Barrick, by making his own wife a

joint party to it, so that any one of the three might draw upon the fund, and that the survivor of the three should take what remained after the death of the other two. The conflict between the testimony of the bank-manager and that of Barrick as to this transaction is significant.

Ott died on the 19th January, 1917, testate, having by his will made an equal division of his property between the plaintiff, Mrs. Burkett, and Mrs. Barrick, his only two children, subject to the provision he made in the will for his wife: and the substantial purpose of this action is, to have the money in the bank, which is all the means Ott had, made subject to Ott's will.

Although Barrick is not nominally a party to this action, he is really the defendant in it, and as such has conducted the defence of it throughout; and the defence which he has set up is this: that Ott agreed with him that he should have all Ott's means for taking care, apparently, of Ott and Ott's wife. But Barrick's testimony upon this all-important subject is so indefinite that it is difficult to find in it just what his claim really is: therefore I read now his own words respecting it:—

"Q. Now, what about this document transferring the account? Just explain that? A. Well, he told me, he says, 'Everything is yours and you can fix things just to suit yourself.' He says, 'Everything is yours.' 'Well now,' I said, 'I don't want the money in my own name, all I want is if I am to take care of you I want it so it will be mine.' I said, 'For the present I will have it put in the bank in a joint account, and then, after we get to Welland, we will have writings drawed,' and he said, 'All right.'

"Q. You knew you were going to Welland? A. Yes, we knew we were going to Welland, and he said, 'Anything at all that suits you, fix things just to suit yourself.' "

No writings were ever drawn up except that which I have mentioned, authorising the withdrawal of Ott's money from the bank.

From this testimony, and from all the circumstances of the case, two things appear to me to be certain: (1) that there was no concluded contract between the parties, and was to be none until the writings were drawn in Welland: (2) and that, if there had been, it was so manifestly improvident and incomplete that in a court of equity it must be considered ineffectual.

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Whether it would have been a contract unenforceable by reason of the 4th section of the Statute of Frauds because of its analogy to a contract to pay an annuity—see *Sweet* v. *Lee* (1841), 3 M. & G. 452—or was not, because of such cases as *Souch* v. *Strawbridge* (1846), 2 C. B. 808, and *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424, need not be considered: but, however that may be, the question is one bearing upon the providence or improvidence of the transaction.

That there was no concluded contract and that there was to be none until put in writing, at Welland, is, as it seems to me, that to which Barrick, in substance, testified: and, if he had not so testified, it was self-evident: for otherwise what was the contract? "Taking care" of Ott and his wife, if she were included, might well mean feed and lodge them; but who was to clothe them, provide them with "pocket money," and with medical and surgical, if needed, attendance and nursing, and bury them when they died, and afterward erect a suitable tombstone in memory of them? And who was to pay their debts, if they had, or incurred, any?

And when was Barrick to get Ott's money; and, if at once, what security was Barrick to give for the due performance of his contract?

Then Barrick was Ott's business adviser and attorney, with full power over all Ott's means, and so it was proper, and indeed needful, that Ott should have an independent, competent adviser, before Barrick could rightly, or with any degree of fairness, enter into any binding contract with him such as that which it is said it was their intention to make; and in Welland, where the writings were drawn, that could be provided for and obtained.

It is impossible for me to find that there was any concluded contract, under which Barrick has become entitled to all of Ott's means. The fact that the money was not turned over to him is against it also.

And, if there were, is it not manifest that the transaction was a most improvident one? First, in regard to its uncertainty in fact and in law: uncertainty as to its terms, as well as being dependent altogether upon word of mouth: second, the entire absence of any security to the Otts, nothing in writing to prove Ott's rights, and nothing in property to secure them: third, the entire absence of any independent advice or assistance to Ott, notwithstanding the con-

fidential relationship between the men: fourth, Ott's mental and physical feebleness, evidenced so plainly in these transactions: like a child, capriciously changeable, contented in no place but for a while; changing from living with one son-in-law to the other; and then to a home of his own: and discontented with all in turn; and at the time of the last change from the home of one son-in-law to that of the other acting like a discontented child wanting a new doll and willing to give the world to get it: dissatisfied with the Burketts and ready to do anything and give everything to get away from them: only to be followed by another periodical revulsion of feeling if the man had lived a few months longer.

It therefore seems to me that Barrick has no legal or equitable right to the moneys in question in this action under the contract which he alleged, but has failed to prove; and which, if proved, would be invalid: and that seems to me to be all that is substantially in controversy.

The action is not well-brought; but no one has at any time objected to its constitution; and so the Court should, in so far as it can, determine the real matters in question between the parties.

And the real question is, as I have said, whether Barrick can, under the contract which he alleges, defeat the plaintiff's substantial rights under Ott's will. If there was such a valid contract as Barrick alleges, then the plaintiff cannot get anything under the will; otherwise she must; and there is no reason why that question should not, as between the parties to this action and Barrick, be determined in this action, adding Barrick as a party: though, it need hardly be said, the proper method of dealing with all questions arising out of the circumstances in question would have been in an action by the legal personal representative of Ott, with Barrick also a party defendant.

But any want of formality should be, and is easily, cured. The plaintiff can and should be appointed representative of her father's estate for the purposes of this action: Barrick can, and should be made a party defendant. If he be unwilling that that be done, then the plaintiff, as the legal personal representative of her father's estate, is entitled as against the present defendants to the money in question, which was her father's money, and to which the defendants make no claim, but merely set up Barrick's claim, which they have failed to prove: but the money should not be paid to

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the plaintiff, it should be paid into Court, until the plaintiff has obtained letters of administration with the will annexed or probate of the will.

This case has no real resemblance to that of *Empey* v. *Fick*, 13 O.L.R. 178, 15 O.L.R. 19: in that case the man had lived under the agreement for four years, and, instead of avoiding it, had done all he could to ratify it. *Empey's* case was based upon the case of Mrs. Geldard—*Mitchell* v. *Homfray* (1881), 8 Q.B.D. 587—in which the Lord Chancellor said (p. 591): "She was determined to abide by her acts; this is not a case of mere acquiescence; she determined that she would not undo what she had done."

In this case no contract had really been made: there was no time to undo it, and it had not been done. And that case was not one of an improvident transaction: see *Hatch* v. *Hatch* (1804), 9 Ves. 292, and *Moxon* v. *Payne* (1873), L.R. 8 Ch. 881. Ott was willing, was anxious, to make any kind of contract that Barrick chose to exact: but, if he had lived a little longer, his tri-monthly or semi-annual or other periodic revulsion of feeling, doubtless, would have come, and he would have been willing, doubtless, to make any kind of contract his other son-in-law saw fit to exact, so long as he could get away from the Barricks. Such things are not uncommon in second childhood: and it is the duty of the confidential and business adviser and attorney of such an one not to take from him all that he possesses without giving as much as the scratch of a pen for it, but to protect him from those who might: and it need hardly be said that the right of action which one has to recover his property taken from him in an improvident transaction is not one which dies with him: that, as in all other cases of fraud, of every kind, the transaction may be voidable as well after as before the death of the person imposed upon.

I would allow the appeal, and direct that judgment be entered in one or other of the ways I have mentioned, depending on Barrick's consenting or refusing to be made a party to the action.

Lennox, J.

LENNOX, J.:—I am of opinion that the appeal should be allowed and judgment entered up as directed by the learned Chief Justice presiding in this Court.

Riddell, J.

RIDDELL, J.:—The late Joseph Arber Ott, a man of 68 years of age, owning a house and lot at Burnaby, in the township of Wain-

fleet, made a will in 1910 leaving the house and lot to his wife, the defendant Catherine Ott, for life, at her death to be sold and the proceeds thereof divided between his only children, two daughters, the plaintiff, Mrs. Burkett, and the defendant Mrs. Barrick. The remainder of his estate he divided equally between his wife and his two daughters: his two daughters were made executrices. He had already disposed of his farm and paid the proceeds into the bank.

In the fall of 1916, he disposed of his house and lot at Burnaby for $600, gave $100 to each of his daughters, and divided some furniture between them—the remainder of his money he deposited in the bank (on the 5th October). That done he went with his wife to live with his daughter, the plaintiff; remained there for a few weeks; and, on the 6th November, 1916, removed to the house of his other daughter, the defendant Mrs. Barrick. In July previous he had given the husband of Mrs. Barrick a power of attorney, in form for bank purposes only, but it is alleged by Barrick, intended to be a power of attorney to do all Ott's business for him.

On the 6th November, Ott with his wife and his daughter the defendant Mrs. Barrick, signed a document in the following terms —the document being witnessed by a brother of the husband of Mrs. Barrick:—

[The learned Judge set out the document transcribed in the judgment of BRITTON, J., *supra*.]

A sum of $60 was drawn out in November by Barrick for Ott's purposes, and later replaced; early in December, the Barricks sold out and removed to Welland, accompanied by Ott and his wife; he took sick early in the year 1917 and died on the 19th January.

Before his illness (on the 1st December, 1916) there was a sum of $500 drawn by Barrick under his power of attorney—he alleges this was to pay debts &c.

Further sums of $300 and $225 were drawn out in the same way, on the 5th and 9th December, 1916, respectively; and, after Ott's death, the defendant Mrs. Barrick drew $300 on her own cheque (on the 12th March, 1917).

On the 29th January, 1917, the plaintiff brought an action against her mother (Mrs. Ott), her sister (Mrs. Barrick), and the bank—in her statement of claim she alleges the will and the document of the 6th November, the incapacity of Ott to understand this document, and that it was obtained from him by "fraud, duress, and undue influence" by Mrs. Ott and Mrs. Barrick.

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The prayer asks for a declaration that the moneys originally in the bank were the property of the personal representative of Ott, and an order for the return of all moneys withdrawn by Mrs. Ott and Mrs. Barrick; an injunction and general relief are also sought.

The defence of Mrs. Ott and Mrs. Barrick alleges an agreement by Ott with Mr. and Mrs. Barrick that, in consideration of their giving him and his wife a home and taking care of them for life, he would give them all his property; that the bank document was intended to evidence this agreement &c.; and claims that the money in the bank is the property of Mrs. Ott and Mrs. Barrick.

The reply is that, if any such agreement was entered into, Ott did not understand its effect; he was "not in a fit and proper state of health to enter into any agreement;" and it was not in his "interests" (I presume this is intended to plead the improvidence of the agreement).

This case came down for trial before Mr. Justice Britton, at Welland, without a jury: the action was dismissed without costs—the plaintiff now appeals.

It will be seen that there are only three issues presented, all dealing with the bank document of the 6th November: (1) Was Ott induced by fraud, duress, or undue influence of his wife and Mrs. Barrick to execute the bank document? (2) Was he competent to understand and did he understand its effect? And (3) was it so improvident that it should be set aside?

It will be observed, too, that Barrick is not a party to the action, and no charge is made against, no relief claimed from, him.

I agree with the learned trial Judge that the answers to the first two questions must be against the plaintiff: there is no evidence of fraud or improper conduct of any kind; and it is, I think, plain that he was of normal capacity. Several trivial matters are alleged against his capacity, but none of them is of any more consequence than the trivialities alleged in *Empey* v. *Fick*, 13 O.L.R. 178, 15 O.L.R. 19(C.A.)

(I retain the opinion expressed by me in *Empey* v. *Fick*, that an action of this kind should be brought by the personal representative: but, in this particular case, those who would be the personal representatives are before the Court: and we could, and if necessary should, make the plaintiff administratrix *ad litem*. I deal with this case then as though the plaintiff had a right of action.)

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(3) However the case would have stood had the deceased brought the action, I accept the law in *Empey* v. *Fick* as shewing that the plaintiff cannot succeed after his death.

The claim as made by the defendant Mrs. Barrick is abundantly supported by the evidence, believed as it is by the trial Judge; I quote and apply here the language of my Lord in *Empey* v. *Fick*, 15 O.L.R. at p. 22:—

"It was not attacked by the grantor, or by his wife, in his lifetime; on the contrary, it was throughout treated by them as if satisfactory and binding; and is now earnestly supported by the widow. There can be no sort of doubt that had it been attacked in his or her name, or in the names of both of them, the action would have been repudiated, and at their instance would have failed. How, then, can any one representing, or claiming under, them, succeed in a like action? The mental condition of the grantor cannot be said to have been such that he could not have prevented such an action, or such as to make him entirely unable to acquiesce in or confirm the transaction in any manner: see *Mitchell* v. *Homfray*, 8 Q.B.D. 587"—especially at p. 591.

Vanzant v. *Coates* (1917), 37 D.L.R. 471, 39 O.L.R. 557, 39 D.L.R. 485, 40 O.L.R. 556, is quite a different case.

I would dismiss the appeal with costs.

ROSE, J., agreed with RIDDELL, J. Rose, J.

Appeal dismissed the Court being equally divided.

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NORCROSS BROS. Co. v. GOHIER.

Supreme Court of Canada, Fitzpatrick, C.J., and Idington, Anglin and Brodeur, JJ. April 15, 1918.

EVIDENCE (§ II B—108)—ACCIDENT CAUSING DEATH—INANIMATE OBJECT—PRESUMPTION OF FAULT—BURDEN OF PROOF.

In an action claiming damages for the death of an employee due to an accident caused by an inanimate object, the French jurisprudence creates a presumption of fault against the custodian of such object and places upon him the burden of proving that the injury proceeded from a cause to which he was a stranger.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Court of Review, which had reversed the judgment of the Superior Court, District of Montreal, and maintained the action.

The trial judge found that the death of the respondent's husband was ascribable solely to his own imprudence, the Court of

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Review decided that he was entirely free from blame; and the Court of King's Bench was of opinion, Cross, J., dissenting, that the damages, assessed at $8,000 by the Court of Review, should be apportioned on account of contributory negligence.

Lafleur, K.C., and *Crêpeau*, K.C., for appellant; *St. Germain*, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—In the present case an appeal has been taken from the judgment rendered by the Court of King's Bench for the Province of Quebec. The action that the respondent brought to recover damages as compensation for the injury caused to her by the death of her husband was dismissed by the court of first instance. The Court of Review reversed this judgment, but its decision was modified by the Court of King's Bench, and it is from the latter judgment that the appeal has been taken.

The evidence has established that the deceased was in the employ of the appellant as assistant foreman at the time he was killed, and it is also admitted that his death was caused by an elevator which the appellant used to perform work in which the deceased was employed.

The mere fact that this death was caused by an inanimate thing under the care of the appellant creates a presumption of fault on the latter, the custodian of this thing. (Art. 1054 C.C., par. 1.) In other words, it suffices that the plaintiff prove that the accident was caused in the manner alleged in order to make the guardian liable at law. He only escapes from this liability if he can prove that the injury proceeded from a cause to which he was a stranger. The French jurisprudence is set out below, and the most reliable jurists have stated this principle of law with a precision which does not leave room for doubt.

In the case of an accident caused by an inanimate object, the French jurisprudence to-day considers that art. 1384 (which corresponds to art. 1054 mentioned above) creates a presumption of fault in respect to the custodian of this inanimate thing, and consequently places upon him the burden of proof. It is not sufficient for the defendant to establish that he was not guilty of any negligence, nor imprudence, he must prove that the injury proceeded from a fortuitous event either by *force majeure* or some other extraneous cause, for example, from the fault of the victim or that of a third party. In a word, it is necessary that he indicates the origin of the injury suffered by his adversary.

Dalloz. 1908, 1. 217; 1909, 1. 73—Planiol's note; Serie 1910, 1. 17—Note by Esmein. Serie 1913, 2. 257; Dalloz 1913, 2. 80; Serie 1913, 2. 164; Gaz. Pal. 7th February, 1914; See Dalloz, 1913, 1. 427; Laurent, vol. 20. p. 475;

Planiol, vol. 2, No. 930; Esmein, Notes—1910 1. 17; Saleilles—Revue de Jurisprudence, 1911; Colin et Capitant, vol. 2, 291.

In a memorandum which my predecessor, Sir Elzear Taschereau prepared to explain the sense of arts. 1053 and 1054 of the Civil Code of the Province of Quebec we read at p. 2:—

The distinction to be made between 1053 and 1054 is patent and is clear on a mere reading. Under art. 1053 no liability without proof of personal fault in the defendant and a resulting injury; under 1054 liability for an injury caused by a thing either without fault of its custodian or by a fault unknown to the plaintiff but presumed against the custodian, the one who had it under his care.

Art 1054 would only be a repetition of 1053 if it required the proof of fault. Now the codifiers did not intend to say the same thing twice, to twice make provisions for the same state of affairs. It is in order to add to 1053, not to repeat it, that they inserted 1054 in the case of fault by the custodian of the thing. In other words it is only because 1053 does not cover the case of injury caused by a thing without fault proved that 1054 was considered necessary. Where there is fault *cadit questio;* 1054 is then useless, has no application; the injury caused by the fault of a person is not an injury caused by a thing in the sense of the article. The codifiers have said this and they must be considered to have meant what they did say; "Any person is liable for injury caused by the thing that he has under his care." How could they express it in more explicit terms?

Obstinately to ignore what the legislators have said in order to prop up controversies upon what it intended or did not intend to say would inevitably lead to heresy.

At p. 10 of this memorandum, Sir Elzear Taschereau insists again upon the fact that fault is presumed:—

To sum up—the liability for the injury caused by a thing under art. 1054 is founded upon fault by the person who had it in his care, but this fault is presumed and the plaintiff is not obliged to prove it.

Therefore, he has, for example, only to prove his damages and the fact that the injury was caused by a thing under the care of the defendant to obtain judgment when the defendant does not appear or to put him on the defensive if he appeared.

Taking for granted that this is the law which determines the liability in the case of an accident as this one is by an inanimate object manifestly under the control or the care of the defendant or of its employees, the mere fact that he suffered an accident creates the presumption of fault, and the head of the enterprise in that capacity alone is liable for the consequences resulting therefrom. In the case submitted to us we have, therefore, only to ask ourselves if the appellant has proved that he was not liable for the act which caused the injury.

Let us examine the evidence on the record. The appellant company had undertaken the construction of a building at the

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corner of Ste. Catherine and Peel streets in the city of Montreal. On each story of the building in construction it had stationed a foreman to oversee the work and exercise a general supervision. The building contained in all 10 storeys and the deceased was employed as foreman on the fourth.

To hoist the materials at the height at which they were to be used the appellant company made use of elevators. At each end of the part of the building on Ste. Catherine street, a wing extended to the north. Between these two wings there was a well in which power elevators were installed. The two nearest to the main part of the building were operated by steam and the two others by electricity. The accident was caused by an electric elevator. These elevators were worked in a timber frame and on each story a passageway had been fixed in one of the windows of the wings to afford access. The entrance was protected by a moveable plank and, in addition, by a bar solidly nailed to the top of the frame across the opening above, 5 ft. in height from the floor of the passageway.

The electric motor on the ground was under the care of a mechanic. It is indeed said in the evidence that this mechanic had charge of 4 elevators. But, given the principle upon which I rely to decide this case, it is not necessary to do more than mention this fact. The traction cables were fixed to two drums on the ground and worked by electric motors. Marks of white paint along the cables were used to indicate on which storey the elevator would be found after having left the ground. When the elevator was required on a certain story, the mechanic was notified by an electric bell. Here, moreover, the factum of the appellant explains the system of signals which the company had adopted to notify the mechanic Woods:—From the top of the frame work at the left of the opening giving access to the elevator, there was a button for an electric bell. By pressing this button, a bell was sounded placed near the position of the mechanic at the bottom.

Further, no one had the right to give a signal to put the elevator in movement except on the storey he was stationed at the moment. The only exception to this rule was when the elevator was at the bottom. Therefore, if a man on the fourth storey had needed the elevator stationed—let us say on the third storey—it was necessary for him to go down to that storey to give the desired

signal, or to ask someone then on the third storey to give the signal for him.

The instructions in this respect were very precise and were intended to prevent the elevator leaving the storey where it was if there was no signal given by a person on the same storey.

I rely especially upon this provision in the regulations governing the working of the elevator, because, in my opinion, the accident was caused by the fact that the foreman Rice has called out from the ninth storey to Robillard who was working on the fourth to have him ring for the elevator before it had reached the fourth.

After giving all the evidence the attention called for by the conflicting judgments of the courts below, I have arrived at the conclusion that the system adopted by the company for the working of the elevator afforded sufficient security for the employees if all the instructions had been strictly obeyed in all their details. But as the general superintendent, Hutton, says, it was an error capable of involving fatal consequences to ring from any other storey than that where the elevator was stationed in order to have it put in motion, and it was an error not less deadly, as in this case before us, to signal the elevator when it was in motion. It is evident that the accident would never have happened if the signal had been given at the storey on which the elevator was stationed or when it had reached the bottom. The accident is due to the fact that Rice called out to Robillard to have the elevator sent up when it was in motion and had not yet reached the fourth storey. This request distracted the attention of Robillard from his work, and he omitted to give the signal to notify the mechanic to stop the elevator at the fourth storey.

If we put aside the evidence of Desjardins—and I agree with the judge of first instance in his appreciation of the evidence of this man as to the circumstances of the accident—we must admit that the deceased committed an imprudence in putting his head inside of the well to answer to the request of Rice and that he became guilty of negligence in omitting to give the required time to signal to have the elevator stop on the fourth storey. But if Robillard omitted to give the signal which he no doubt intended to give, and if he put his head in the well to better reply to Rice, the fault lies in part at least in the request of Rice which distracted the attention of Robillard from his work and forced him

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to change his position. Considering the conditions of the premises and the system in force to govern the working of the elevators, this request of Rice is an act which no circumstance can justify and an inexcusable imprudence which would make the company responsible.

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In fact, to assure to its employees the desired protection, the company was bound to organize the conditions of employment so that the workmen would accomplish their labour in security. In this case this security depended merely on the system in force to govern the working of the elevators. The one which had been adopted provided, in my opinion, and I repeat it, sufficient security, provided that all the instructions in respect to it were observed with absolute fidelity. But since the accident can reasonably be attributed to a defective or irregular operation in the system of working, or to a fault of omission or commission by whoever did work for which the company had to be responsible, the company is from this fact made liable.

Taking into consideration all the evidence on the record, I consider that the appellant has not fulfilled, in a satisfactory manner, the obligation which fell upon it under the law to rebut the presumption of its liability and that, although there was negligence and imprudence on the part of the deceased, the accident is attributable also to the intervention of Rice at a time when the elevator was proceeding to its destination on the fourth storey. Laurent, whom we have cited above is precise upon this point:—"The slightest fault is a ground of liability."

The cross-appeal presents difficulties hard enough to solve, but, after a long study of all the evidence as I have already said, I am unable to reverse the decision rendered by the Court of King's Bench.

For all the above reasons I am in favour of dismissing the appeal and the cross-appeal with costs.

Idington, J.

IDINGTON, J. (dissenting):—I incline to agree with the opinions expressed in the court below, and entertained, I understand, by some of my colleagues, that there was negligence on the part of the appellant in not having supplied a better system of signalling, and controlling the movements of the elevator, than the one in use. I am unable to see as clearly as they do the relation of such defect to the accident in question as the determining cause thereof. I agree

with Cross, J., that the effective cause of the accident was the negligence of the deceased in placing his head where it should not have been under any such circumstances as presented, in any view of the evidence. I cannot find as much to justify or excuse his doing so as seems to have been held insufficient in the case of *Canadian Pacific Railway Co.* v. *Fréchette*, in the Judicial Committee of the Privy Council, [1915] A.C. 871, 22 D.L.R. 356, where the brakeman was held disentitled to recover by reason of his imprudence in going between the cars, when moving, to uncouple them. Indeed the court above, in order to reach its conclusion in that case, had to discard the verdict of a jury which had found contributory negligence on the part of the defendant appealing, whilst in this case the trial judge expressly relieved the appellant from any blame which could be said to have contributed to the accident.

I agree with him in his conclusions.

I cannot, having regard to the respectively attendant consequences, either in fact or law, distinguish between the case of a man imprudently getting, without excuse, in the way of a freight car when moving horizontally, and that of one doing so when it is moving perpendicularly, and therefore think the appeal should be allowed with costs.

Anglin, J.

ANGLIN, J.:—There has been, in this case, a remarkable diversity of judicial opinion as to the proper conclusions to be drawn from the evidence. The trial judge found that the death of the plaintiff's husband was ascribable solely to his own imprudence; the Court of Review that he was entirely free from blame and that his death had been caused by fault on the part of the defendant; the Court of Appeal that faults of both contributed to cause the accident and that the damages, assessed by the Court of Review at $8,000, should therefore be apportioned. Cross, J., dissenting, would have restored the judgment of the trial judge.

If the story told by the plaintiff's witness Desjardins should be accepted, as it was by the Court of Review, the conclusion based upon it by that court would be unassailable. But his testimony had been rejected by the trial judge as "*invraisemblable*," and the same view of it was also taken unanimously in the Court of Appeal. I am not satisfied that it is clearly wrong.

On the other hand, the fault attributed to the defendant by

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the majority of the judges of the King's Bench—its failure to provide an electric enunciator in the engine room—while somewhat canvassed in the examination of one witness at the trial, does not appear to be covered by the allegations of negligence in the plaintiff's declaration. I therefore—not without diffidence—venture to question the advisability of founding a judgment against the defendant upon the absence of an enunciator as a specific proven defect in its installation. Yet the conclusion reached in the Court of Appeal should, I think, be upheld on broader grounds not open to this objection.

Notwithstanding an allusion in the first *considérant* of the judgment of the Court of Review to the fact that the plaintiff's claim is founded upon arts. 1053 and 1054 C.C., the presumption of fault on the part of a person who has under his care a thing which causes damage arising under art. 1054 is not invoked by it in support of the defendant's liability. With deference, however, that seems to me to be the basis on which the present defendant's responsibility, if it exists, must rest. At all events, in the absence of satisfactory affirmative proof of definite actionable fault on its part, this seems to me to be the point from which the inquiry into its responsibility should begin.

It is common ground that the unfortunate Robillard's death was caused by the defendant's elevator, and, if not common ground, it is indisputable that the elevator was under its control and care and was being used for its purposes and profit. The case, therefore, falls within the very terms of par. 1 of art. 1054. For reasons fully stated in *Shawinigan Carbide Co.* v. *Doucet*, 42 Can. S.C.R. 281, at 334 *et seq.* (to which I refer merely for convenience and to avoid repetition), I am of the opinion that the responsibility created by that article rests upon a presumption that an injury caused by an inanimate thing is attributable to fault on the part of the person under whose care it is—*presumptio juris, sed juris tantum et non de jure*—and therefore rebuttable.

I have had no reason to change the view also expressed in the *Shawinigan* case that the exculpatory provision of par. 6 of art. 1054 does not apply to par. 1 thereof, but is confined in its application to pars. 2-5 inclusive. It is because of its nature and its consequences that I regard the presumption of fault on the part of a person having the care of a thing that causes damage as rebut-

table. This is the view taken of it by the modern French authorities cited by my lord the Chief Justice.

In the case at bar, it is not necessary to determine whether, in order to rebut the presumption of fault thus raised, a defendant is obliged to establish that the injury complained of was due to pure accident, *vis major*, or some other cause not imputable as a fault to him. D.P. 1909. 1. 73. He must, no doubt, meet and overcome the presumption of fault. D.P. 1914, 1. 303. He must prove that the injury was not caused by any negligence or misdeed attributable to him. Owing to the inherent difficulty of proving a negative such as this and the necessarily exhaustive character of the evidence requisite to establish it, a defendant will in many cases find himself compelled to specify and prove affirmatively the precise cause of the injury. Although not attempting to do this directly, should he succeed in demonstrating that the injury happened without any fault imputable to him, he will in most, if not in all, instances in so doing establish indirectly that it must be ascribed to pure accident, *vis major*, or some other cause not imputable as a fault to him. D.P. 1913. 1. 427, 428, 430.

In the case at bar, however, far from demonstrating that the defendant is entirely free from blame, the evidence rather suggests (if indeed it falls short of *primâ facie* proof) that the lack of an electric enunciator was a material defect in the defendant's installation and also that the call of Rice to Robillard when the ascending elevator was approaching the fourth floor, calculated as it was to distract the latter's attention and to cause him to overlook giving the necessary stop signal, contributed to bring about the unfortunate occurrence and amounted to a fault attributable to the defendant. If its system of signalling permitted such a call to be given at that moment, it would seem to have been dangerously defective; if it did not, Rice, its servant, was culpably negligent in giving it.

No doubt the unfortunate Robillard's own imprudence materially contributed to his death, and cannot be wholly excused because he may have been distracted by Rice's improper call from the ninth floor. But upon the record before us it is, in my opinion, equally impossible to say that the presumption of fault *dans locum injuriæ* on the part of the defendant, arising under art. 1054 C.C.,

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has been satisfactorily rebutted. I would, for these reasons, dismiss both the appeal and the cross-appeal.

BRODEUR, J.:—This is an action for damages instituted by the respondent in consequence of an accident of which her husband was the victim when he was in the employ of the defendant company, the appellant. She alleges that the death of her husband, Charles-Edouard Robillard, was caused by the things in charge of the employer and that there was fault on the part of the latter. The appellant claims that the accident was caused by the fault of Robillard himself.

The Superior Court dismissed the action and maintained the claim of the employer. The Court of Review reversed this judgment and decided that the employer should be held liable because the accident was due to his fault. The Court of King's Bench decided that there had been common fault and reduced the amount of the damages which had been awarded to the plaintiff by the Court of Review.

The Norcross company appeals from this latter judgment. There is a cross-appeal on the part of the plaintiff.

Here are the circumstances under which the accident occurred: The Norcross company was constructing a building of 9 storeys in Montreal. In order to facilitate the transport of materials, it had temporarily connected two wings of the building by platforms which corresponded with the 9 storeys and had installed elevators. There was at each storey an electric button by which the elevators could be called for, but this bell was of the most primitive kind and could not indicate to the one who had to start the elevators the storey on which they wished to have them stopped.

Robillard worked on the fourth storey and having need of the elevator he rang the bell. The engineer in charge, one named Woods, who was in the basement, then put the elevator in motion. In order to stop the elevator at the fourth storey where he was, it was necessary for Robillard to ring again at the moment when the elevator came near this storey.

There is in evidence a very important divergence. The witness Desjardins, who was beside Robillard, says that the latter rang the bell and the elevator stopped, but that it was stopped with difficulty; that it started again without any order on their part, and Robillard had his head crushed by the elevator and instantly died. On the other hand, Woods, the engineer, says that the elevator did

not stop at the fourth storey, and that he had no signal for it to stop there. He contradicts then precisely the evidence of Desjardins, and upon this point he is corroborated by the witness Rice, who was at a higher storey, and noticed the movements of the elevator as he had need of it himself.

The judge presiding at the trial preferred to accept the version of the witnesses Woods and Rice. Moreover, Desjardins himself had signed a declaration after the accident that Robillard had not signalled to stop the elevator at the fourth storey, and to explain this contradiction between his evidence and his prior declaration, he merely said that he was not under oath when he made the declaration. If he deemed it proper to say what was false, it follows that his testimony is very weak and should not be accepted; especially when it is directly contradicted by two other persons.

The Court of Review, however, chose to accept the version of Desjardins, saying, among other things, that the latter was absolutely disinterested, while the two witnesses Woods and Rice had an interest in throwing the liability on Robillard since otherwise they themselves would be in fault. The first, Woods, for not having stopped his machine, and the other for having called Robillard from a higher storey and having induced him to put his head into the well of the elevator to answer his call.

After reading and re-reading, carefully, the evidence, I am led to believe that the most probable theory of the accident is that Robillard had not had time to withdraw his head from the well when he answered the call of his working companion, since these elevators move very quickly.

Neither has the Court of Appeal accepted Desjardins' version, but has found that there was common fault on the part of the employees and the employer; the first in putting his head into such a dangerous place, and the latter in not having a bell which would indicate to the engineer the storey at which the elevator would be required to stop.

We have no evidence as to the value of a system more perfected than that in use. But there is reason for assuming that the cost of it would be very little and that it would be more valuable to the company to incur this additional expense than to have to depend upon the foresight and conduct of the numerous employees which it was necessary to have in the building.

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Further, on whom is the burden of this proof?

The accident is due to the fact that Robillard was struck by an elevator, *i.e.*, by a thing which his employer had in his custody. The presumption of law is that according to the provisions of art. 1054 of the Civil Code there was fault on the part of the one who had the care of this thing.

This question of presumption has been the subject of interesting discussion in the jurisprudence for the last 20 years in France.

In 1896 the Civil Chamber of the Court of Cassation declared that the liability of the owner of a thing was provided for in art. 1384 of the Code Napoleon, which corresponds to our art. 1054, and that it was established from the time that the judge of the fact negatived fortuitous event and *force majeure*. Dalloz, 1897, 1, 433.

The present President of the Cour de Cassation, M. Ballot Beaupré, said in 1904, at the celebration of the Centennary of the Code Napoleon, that this decision was the consecration of the professional risk. (Centennary of the Civil Code, p. 33.)

This decision of 1896 of the Civil Chamber of the Cour de Cassation does not appear, however, to several authors to have the bearing that some others desire to find in it; and it is necessary to admit that the want of precision in the terms used would justify this diversion of opinion. However, the adhesions, numerous enough and formal enough on the part of the appeal courts, to the theory of the professional risk as well as what appears in the following decisions: Dalloz, 1900-2-289; 1904-2-257; 1905-2-417; 1906-2-249, permit us to see the beginning of a formal consecration on the part of the Cour de Cassation. Thus in 1908 (Dalloz 1908-1-217) the Cour de Cassation decided that

> Art. 1384, par. 1, C.N. in saying that everyone is liable for injury caused by things under his care establishes a presumption of fault. But this presumption should give way before proof of the exclusive fault of the victim.

This jurisprudence has always been followed since. Dalloz, 1909-1-73; 1910-1-17; 1913-1-427; 1914-1-303.

The authors who, following Planiol, had first opposed this theory of presumption of fault have been definitely rallied to its support and to-day this old divergence of opinion which appears to exist in the doctrine relates only to the manner in which this presumption can be rebutted.

In the present case the employer has attempted to prove that the accident was due to the fault of the victim. It appears to me that Robillard was in fact guilty of imprudence, but this fault was not the only one which contributed to the accident.

The employer did not rebut the presumption of fault which was made against him. There was, then, common fault, and the Court of Appeal properly decided and they divided the damages between the two parties and its judgment should be affirmed.

The appeal and the cross-appeal are dismissed with costs.

Appeal and cross-appeal dismissed.

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.

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LIVERPOOL & LONDON & GLOBE INS. Co. v. KADLAC.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. June 28, 1918.

INTERPLEADER (§II—20)—*Right to—Rule 489—Admission by fire insurance company as to part—Mortgagee—Lienholders—Priorities between—Mechanics' Lien Act.*]—Appeal by plaintiffs from a judgment of Walsh, J., allowing an appeal from the master in chambers. Affirmed.

The judgment appealed from is as follows:—

These companies insured Kadlac against loss by fire to amounts aggregating $5,000, the loss under each policy being made payable to the Imperial Lumber Co. Limited. A fire has occurred and an adjustment of the resulting loss has been made between Kadlac and the companies at $2,000. Mechanics' liens are recorded by several lienholders upon the property covered by these policies and a claim is made by them to the proceeds of this insurance under s. 12 of the Mechanics' Lien Act, which claim is contested by the Imperial Lumber Co., which claims to be alone entitled to the money for which the insurance companies are liable. The master in chambers at Calgary has, upon the application of the insurance companies, under r. 489, given them leave to pay this sum of $2,000 with interest, less their costs, into court, and has directed that, thereafter, they should, to that extent, be relieved from further liability under these policies. From this order, the Imperial Lumber Co. appeals.

From the material before me it appears that, though the loss under these policies is made payable to the appellant, the proofs of loss and the adjustment of it were made by and with Kadlac alone to the exclusion of the appellant which was not recognised or consulted in any way in the same. It claims to be a mortgagee of the insured premises and says that the policies in question were issued upon its application and the premiums upon the same

were paid by it. It is dissatisfied with, and apparently does not intend, if it can avoid it, to be bound by the adjustment made with Kadlac and fearing, apparently, that the order made by the master may, in some manner, prejudice it with respect to its claim for the amount of the loss over this sum of $2,000, though I am quite unable to appreciate how it could, it desires to have his order reversed. Its claim as mortgagee is sworn to at $3,984.02 with interest at 10% from February 27, 1915.

R. 489 provides that "where the person seeking relief is under liability for any debt, money, goods or chattels for or in respect of which he is or expects to be sued by two or more persons making adverse claim thereto," relief by way of interpleader can be granted. The appellant's contention briefly is that these insurance companies are not within this rule as the liability which they are under is not for a debt, money, goods or chattels. Their liability certainly is not for goods or chattels. Is it for a debt or for money?

But for the adjustment of this claim made between Kadlac and the companies, it is quite clear that the claim against it would be one for damages and not of debt. See *Hartt* v. *Edmonton Steam Laundry Co.*, 2 A.L.R. 130, and cases there cited. How far such an adjustment as this made between the assured and the companies in entire disregard of the appellant to whom the loss is payable, can be said to convert into a debt what but for it would be but a claim for unliquidated damages is, however, quite another question.

It was not argued before me that the appellant could not sue upon these policies. On the contrary, it was assumed that it could. My own search of the authorities has led me to the conclusion that it can. That is the law in Ontario as decided by the Court of Appeal in *Agricultural, etc., Loan Co.* v. *Liverpool and London and Globe*, 3 O.L.R. 127. This case went to the Supreme Court of Canada, 33 Can. S.C.R. 94, but it was not found necessary to decide this point there as the appeal was allowed upon other grounds. Two of the judges, however, referred to it in terms suggestive of doubt, upon their part, of the correctness of the view taken by the court below and that is the only reference to it in the reasons for judgment. The policies here in question are in the same form as the policy there in question but here they are not

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under seal. My opinion is that the appellant has a right of action under these policies.

Then if it sues or if, as may be the proper course in this instance, proceedings are taken to have the amount of the companies' liability settled by arbitration will the appellant be bound by the adjustment made with the assured. I should say not. One of the statutory conditions of each of the policies in question provides that proof of loss must be made by the assured although the loss is payable to a third person. Standing by itself, this condition would seem to create some difficulty, for if in this case Kadlac is the party upon whose proof the amount of the companies' liability is to be determined, it would seem unreasonable that they could be made to pay more than the amount so claimed. There is a doubt, however, upon the facts before me, whether or not he really is the assured under these policies. He is certainly named as such in them, but if in fact, as is alleged, they were issued upon the application of the appellant and for its protection and at its expense with the loss made payable to it I would be inclined to think that, notwithstanding their form, this company and not Kadlac is the assured under them. In any event each of the policies contains another statutory condition that "any person entitled to make a claim under this policy is to observe the following directions," and then follow detailed provisions as to the proof of loss. I should say that the two conditions to which I have referred must be read together and so reading them that the appellant as the party entitled to make a claim may furnish its own proofs of loss, if dissatisfied with those which Kadlac has sent in. It would certainly be a most unfair thing that it should lose its right against the insurance companies entirely if Kadlac refused to make claim for it at all or that it should be forced to accept in settlement any sum for which Kadlac might see fit to make claim.

I think that there has not been any adjustment of this claim as between the appellant and the insurance companies and, therefore, that the liability which they are under to it is still one for unliquidated damages and not for a debt.

It was not argued before me that the companies are under liability for money within the meaning of the rule and perhaps I am wasting time in discussing the matter from that point of view. A liability for unliquidated damages can hardly be said to be a liability for money, even though at the end money may be paid in

settlement of it. The following definition of money met with the approval of Darling, J., in *Moss* v. *Hancock*, [1899] 2 Q.B. 111, at 116:—

> That which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities.

I think that it is in this sense that this word is used in the rule. It means some specific sum of money in the applicant's possession or under his control either in what we ca l cash or to his credit in his bank account or elsewhere and not a sum of money which he is willing to pay or may be forced to pay in discharge of a liability for unliquidated damages.

The appeal will be allowed with costs and the order of the master set aside with costs.

A. H. Clarke, K C., for appellants; *A. M. Sinclair*, for respondents.

HARVEY, C.J., concurred with STUART, J.

STUART, J.:—One Kadlac was the owner of certain property in the town of Mirror and two insurance companies had issued fire insurance policies covering the buildings thereon. These policies, which were made payable to the Imperial Lumber Co. Limited, who were equitable mortgagees of the property, amounted to $5,000. There were a number of mechanics' liens registered against the property, which were still in force and unsatisfied. The building was destroyed by fire and then Kadlac, without reference to the mortgagees, made proof of loss claiming only the sum of $2,000. This sum the insurance companies placed in the hands of their solicitors who then began a correspondence with the Imperial Lumber Co. Ltd., the mortgagees, stating that the companies were prepared to hand this amount over to the proper parties but pointing out the existence of the mechanics' liens as a reason for entertaining some doubt as to who the proper parties were. In their letter of November 29, they quoted s. 12 of the Mechanics' Lien Act, c. 21 Alta. (1906), and proceeded to say:—

> You will see therefore that the moneys in our hands have to be treated as though they were moneys realized by the sale of the property in an action to enforce the mechanics' liens.

The solicitors of the mortgagees replied repudiating the settlement made by Kadlac and stating that their clients claimed that

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more than $2,000, indeed the whole $5,000, was due under the policies and asserting the right of the mortgagees to the whole of that sum. In another letter of December 8 the solicitors for the insurance companies again said:—

> You will see that the money is to be treated exactly as though it were money realized from the sale of the property in an action brought by the lienholders.

The solicitors for the mortgagees contended that s. 12 of the Act did not apply inasmuch as the money was not "receivable by the owner" but apparently overlooking the succeeding words "prior mortgagee or chargee."

The solicitors for the insurance companies then corresponded with the lienholders and their common solicitor who also asserted their right to share in the moneys payable under the policies. Being unable to secure any settlement the insurance companies applied to the master in chambers for an interpleader order with respect to the $2,000 for which they admitted liability under the policies. The master granted an order authorising the companies to pay the $2,000 into court, declaring that, upon such payment into court, the various claimants should be barred from all claim to the said $2,000 "as against the insurance companies" and that each company should each be discharged from further liability to the extent of $1,000. The master held that the companies were entitled to interplead with respect to the $2,000 but it was intended that the exact terms of an interpleader order should again be spoken to. Against this order the Imperial Lumber Co. Ltd. appealed to Walsh, J., in chambers who decided that, under terms of r. 489, the companies were not entitled to interplead, and he, therefore, allowed the appeal and dismissed the application. From this order the insurance companies have brought this appeal.

It appears that subsequent to the application for the interpleader the Imperial Co. Ltd. began an action against the insurance companies to recover the full amount of the policies.

The situation, therefore, is that as between the beneficiaries under the policies and the companies the amount "receivable thereon by the owner, prior mortgagee or chargee" is in dispute in an action. It appears of course that the mortgagee's claim under its mortgage will amount to nearly if not quite the sum of $5,000, and, perhaps, more than that. Nevertheless it may be that the situation will turn out to be such that, under the terms

of the Mechanics' Lien Act, the lienholders may be entitled to priority over the mortgagee to the extent to which their work or materials increased the value of the property. The amount of the liens exclusive of interest and costs appears to be some $1,600 or thereabouts, and it is, therefore, apparent that the lienholders might also be interested in maintaining that a larger sum than $2,000 was due under the policies. The value of the land itself, that is the town lot or lots, does not appear, but it cannot be very large in any case. In my opinion an interpleader proceeding at the instance of the insurance companies is not the most suitable method of settling all the questions which will arise between the various claimants. The claimants are jointly interested and not at all adversely to one another, in establishing as great a liability as possible in the insurance companies. Once the amount of that liability is established the fund takes the place of the property under s. 12 of the Mechanics' Lien Act, as the solicitors of the insurance companies insisted from the first and with its division and disposition the insurance companies will be in no way concerned. So far, therefore, as the liability of the insurance companies is concerned, there are no rival claimants at all. The interests of the claimants in that regard are identical. Once that liability is settled then it is not a question, as I apprehend the matter, of an interpleader but of the respective rights and priorities of the parties under the Mechanics' Lien Act. Just as the owner after a sale under the Act never thinks of interpleading, so, I think, the application of the companies for leave to interplead was misconceived. There was, of course, some more excuse for it before the action was begun by the mortgagees, but my present impression is that owing to the terms of s. 12 of the Act the companies would have been entitled to apply for leave in some form to pay the money into court where it would take the place of the property and be in the same position as a sum realised by a sale. If, for instance, there had been no dispute whatever as to the amount of the liability what should an insurance company do with money in in its hands which under s. 12 are to represent the proceeds of a sale and where there are disputes between a number of parties, lienholders and mortgagees, as to how the money is to be divided? The situation would be that instead of the money being in court it was in the hands of the insurance company. Surely, the simple

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thing to be done is for the insurance company to pay it into court. The Mechanics' Lien Act makes, it is true, no provision for this but r. 448 refers to a petition for leave to pay money into court under the Trustee Ordinance and s. 27 of that ordinance is clearly wide enough to cover the case. The insurance companies were, by the effect of s. 12 of the Mechanics' Lien Act, made trustees of the money admittedly in their hands.

Without, therefore, endeavouring to decide the question of the strict right in the circumstances to interplead, I think the appeal should be dismissed with costs. But I think the appellants can properly be allowed the costs of an application to pay into court under the Trustee Ordinance. They have already apparently paid the $2,000 into court in these proceedings after deducting their costs of the application for leave to interplead. As these costs would probably not be very much different in amount, the two may be treated as the same.

As to further proceedings, I think it is sufficient to suggest that the insurance companies will be quite at liberty if they feel so disposed to apply to add the lienholders as parties to the pending action and to have it declared that the money now in court should be deemed to be paid in by them in that action. If they do this, they ought to be at liberty to state in their defence, or in an amendment thereof, the exact terms upon which they are paying it in, so that upon the question of the costs of the action they may be in the same position as if originally paying it in with a defence. If the insurance companies do not apply to add the lienholders and the action goes on to trial, it may be that, ultimately, after the amount of the liability is determined, the lienholders themselves would want to apply to come in. But that is a matter which may be properly considered by the judge trying the action. These are merely suggestions at this stage and the only order that need now be made is the order dismissing the appeal with costs, but this is not to be treated as an order that the money in court be paid back to the companies for the reason above indicated.

BECK, J.:—This is an appeal from Walsh, J., who made an order setting aside an order made by Master Clarry directing the sum of $2,000 to be paid into court to form the subject matter of an interpleader between the claimants, the Imperial Lumber Co. Ltd., to whom, on the face of policies issued by the applicant

insurance companies, the insurance moneys were payable and the other claimants, who are persons who had filed mechanics' liens against the property insured. The application to the master was by the insurance companies for an interpleader order. This $2,000 is part of $5,000 which the Lumber Co. claims is the amount payable upon the policies.

On the face of the policies, Kadlac is named as the insured. Kadlac filed proofs of claim, claiming only $2,000. The Imperial Lumber Co. claims, however, that the facts are that the policies were in reality issued upon its application; that it paid the insurance premiums; that the purpose was to insure its interest in the property; that all this was quite understood by the insurance companies who must treat the lumber company, and not Kadlac, as the insured; that the lumber company is not bound by the proofs of claim put in by Kadlac. Since these proceedings were commenced the lumber company has brought an action against the insurance companies to recover the $5,000.

The master was of opinion that the applicants, the insurance companies, were entitled to and ought to be granted an interpleader order with respect to the $2,000. Walsh, J., set aside the master's order on the ground that r. 489, which says that, "besides a sheriff, a person is entitled to relief by way of interpleader who is under liability for any debt, money, goods or chattels for, or in respect of which, he is, or expects to be sued by two or more persons making adverse claim thereto," does not apply to such a case for the reason that the claim of the lumber company against the insurance companies is not one either for "debt" or "money" as those words, as they occur in the rule quoted, are to be interpreted. It may be admitted that, until the amount of the loss has been fixed by some method, the claim against an insurance company for a loss is a claim for damages—not for debt; but is it not a claim for "money?"

In *Walter* v. *Nicholson*, 6 Dowl. P.C. 517, it is said:—"The claim must be something in its nature distinct and tangible."

In *Ingham* v. *Walker* (1887), 31 Sol. Jo. 271; on appeal, 3 Times L.R. 448, the applicant was an auctioneer who had sold a horse and the seller was demanding the money paid by the purchaser as money had and received and the purchaser was held to be demanding damages for misdescription, though those damages

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might be assessed at the amount of the purchase price, yet it was held that the rival claims could not be considered to be to the same money.

In *Re C.P.R. Co. and Carruthers*, 17 P.R. (Ont.) 277 (the master and Robertson, J.), it was held that interpleader lay where the railway company were carriers or bailees of wheat under a liabi ity not to return the identical wheat but wheat of the same grade and quantity, and there were two claimants of the wheat. The wheat had lost its identity; there was no specific body of wheat in respect of which the property was in either claimant. If corresponding wheat had not been forthcoming from the bailees, the right against them would certainly have been not for some specific body of wheat but technically for damages.

I think that decision was right. I think too that there is no just ground, in reason or authority, for interpreting the word "money" as restricted either to money *in specie* or to money, the precise amount of which has been ascertained, and has, therefore, become a "debt" for that is covered by that word, and, unless it is so restricted, it must, I think, extend to money owing, not as a debt, but as damages; otherwise rival claims to the purchase money of land in respect of which the title has not yet passed, would ordinarily not be a subject of interpleader, because technically the remedy would be in damages. I think the word "money" is intended to be, and ought to be, interpreted in a wide sense as comprising a claim for money which the applicant for interpleader is "under liability" to pay whether his liability is to pay the money as debt or damages or otherwise and whether the precise amount of the money which he is under liability to pay has been ascertained or not; provided that the rival claims are in respect of the same money.

In *Molsons Bank* v. *Eager*, 10 O.L.R. 452, a Divisional Court held, under an identical rule, that an interpleader order was rightly granted where the fund in dispute was $4,000, purchase money of land. The conveyance of the property had been executed but the purchase price was not paid because the purchaser, before accepting the conveyance or paying the purchase money, had been appraised of the registration of a certification of *lis pendens* issued in an action by the plaintiff bank claiming that the sale was fraudulent as against the creditors of the vendor. The plaintiff bank was

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willing to let the purchase money stand in place of the land and and form the subject matter of the contest in their action. The claim of the bank in the first instance was to make exigible for it and other creditors of the vendors, the price of the land when sold under the direction of the court and to prevent a sale otherwise, that is, to prevent the coming into existence or to bring about the dissolving of a debt from the purchaser to the vendor. It was only by consent that the purchase price took the place of the land. Previously to the consent, there could scarcely be a technical debt because the title had become clouded by a *lis pendens*. It was "money."

The rule in question undoubtedly was compiled from the provisions of c. 58 of 1 & 2 Wm. IV. (1831)—an Act to enable Courts of Law to give Relief against Adverse Claims made upon Persons having no Interest in the Subject of such Claims, and the Common Law Procedure Act, 1860.

Under these Acts the application for interpleader could be made only after an action had been commenced and the first Act gives the right to interplead in any action "of assumpsit, debt, detinue or trover." The second Act in s. 12, after expressly referring to the first Act, speaks of the "claimants to the money, goods or chattels in question or to the proceeds or value thereof." Clearly the word "money" in the enactments upon which the rule is based was intended to have as wide a meaning as I have attributed it.

Then, it is contended that, inasmuch as the demand of all the claimants against the applicants, the insurance companies is for $5,000 and these companies admit only $2,000, and dispute the rest of the claim, there can be no interpleader as to the $2,000 only.

Reading v. *School Board for London*, 16 Q.B.D. 686, is a case in which interpleader was ordered with respect to part of a larger sum, liability for the residue being in dispute. The facts were these: Reading sued for £977 12s. for work and labour under one contract. The defendant Board pleaded that, as to £861 18s. that was the amount owing to the plaintiff on the architect's certificate but it was not payable till a future date; as to the balance they denied any liability. The Board were notified by third parties that they had an assignment of the whole of the moneys owing by the Board to the plaintiff. The Board took out a summons under the interpleader rules, calling in the plaintiff

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and the assignees and A. L. Smith, J., made an order that the Board should pay into court the sum of £861 18s. to abide any order that might thereafter be made and that the plaintiff's action should be stayed as to the amount paid into court and should proceed as to the balance, £151 14s., and that an issue should be framed to determine the rights of the plaintiff and the claimants.

This order was affirmed by a Divisional Court with the variation that the stay was removed. There seems, therefore, to be no solid argument against the right or propriety of directing an interpleader issue in respect of an admitted part of a larger liability.

In *Molsons Bank* v. *Eager*, *supra*, the court, while directing an issue, suggested that the parties should "agree upon what would seem a more easy way of settling the dispute"—to let the purchaser be made a party to the action, then pending by the Molsons Bank and pay his money into court in that action and then let the bank and the vendor fight out the question who was entitled to it—the bank and the other creditors or the vendor.

In the present case, I think that the applicants were within their rights in applying for an interpleader order, taking the chances, however, of the court, in its discretion, declining to make the order as unsuitable under the circumstances. No action had, as yet, been commenced. They might have waited but were not obliged to. Now that an action has been commenced, it seems to me that it will be much more convenient that the several claimants to the insurance moneys, other than the lumber company, which is the plaintiff, should be added as parties defendants as persons appearing to have some interest in the insurance moneys, which, on their behalf, it is suggested form a fund substituted *pro tanto* for the buildings, upon which they claimed to have a mechanics' lien, in accordance with the provisions of s. 12 of the Mechanics' Lien Act, whereby insurance moneys are made subject to the same liabilities as the property destroyed or damaged and that the insurance company should be allowed to pay into court in the action the $2,000 (less the costs before the master) by transferring it to the action, the costs before the master being allowed as the costs of a motion merely to pay into court.

Subject to what I have said above, I would dismiss the appeal with costs.

HYNDMAN, J.:—I would dismiss this appeal with costs on the grounds given by Walsh, J. *Appeal dismissed.*

FRANCO-BELGIUM INVESTMENT Co. v. DUBUC.

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Alberta Supreme Court, Walsh, J. June 21, 1918.

COSTS (§ I—14)—*Application for—Security for—Action by foreign company—Company in hands of receiver—Sanction of court to institution of proceedings—Liability of receiver.*]—Appeal by defendant from an order of the master at Edmonton dismissing his application to dismiss or stay this action for security for the defendant's costs of it. Affirmed.

E. B. Edwards, K.C., for appeal; *S. W. Field, contra.*

WALSH, J.:—One of the grounds for the motion is that the plaintiff is not properly bringing the action, or rather, perhaps, that it is brought under the instructions of one who has no right to institute it. The plaintiff is a foreign company incorporated in Belgium. One Kimpe was appointed its director and attorney to manage and administer its affairs in Canada, and under the power given to him in at least one of the two documents conferring his authority upon him, he named one Barry as his substitute. Some time after this one Blais, a shareholder in the plaintiff company, commenced an action against it and by an order made in that action by Beck, J., one Galibois was appointed receiver and manager of the company's assets in Alberta under the direction of a board of inspectors thereby appointed. By subsequent orders, Barry was appointed such manager and receiver, and a new board of inspectors was appointed and Barry occupied that position when this action was commenced.

Barry does not profess to have acted under the authority conferred upon him by Kimpe's substitution of him as the plaintiff's director and attorney in instructing the commencement of this action, nor do I very well see how he could have done so in the face of the orders made in the Blais action above referred to. The order appointing him receiver and manager and those which preceded it, in my opinion, put an end to or at any rate suspended during their currency the authority conferred upon Kimpe under the two powers of attorney from the plaintiff to him as well as the authority, if any, conferred by Kimpe upon Barry in the exercise of the right said to be given him by them to appoint a substitute for himself thereunder. Barry, by force of this order, became the receiver and manager of the plaintiff's assets in Alberta to the

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exclusion of Kimpe and to the exclusion of himself as Kimpe's substitute. If Kimpe himself had been acting as the company's manager or if some person other than Barry himself had been appointed to the position by Kimpe in the exercise of the authority given to him by his powers of attorney the order of the court appointing Barry would, I think, have superseded him. I think there was undoubted power in the court to make the order, and that, so long as it stands, Barry is in charge of the company's affairs here subject to, and under the direction and supervision of the board of inspectors appointed by the court. That order was in force when this action was commenced and Barry had the authority of the board of inspectors so appointed for the institution of this action. It seems idle to say under these circumstances that the action is improperly brought.

I am unable to agree with Mr. Edwards' contention that the action should have been brought in the name of Barry as receiver instead of in the name of the company. No cause of action is vested in him in respect of this debt. It is still vested in the company. Boyd, C., said, in *McGuin* v. *Fretts*, 13 O.R. 699, at p. 702:—

> The receiver is no more than an officer of the court who becomes custodian of the assets when received and has no right to sue in his own name for a debt.

Fry, L.J., said, in *Re Sacker*, 22 Q.B.D. 179, at 185:—

> There may no doubt be exceptional cases in which a receiver can bring an action in his own name—when for instance he is the holder of a bill of exchange. In that case he can maintain an action not because he is a receiver but because he is the holder of the bill. So too if he is possessed of chattels as receiver and those chattels are unlawfully detained from him, he may well be able to maintain an action to recover them as being the person in possession of them, quite independently of the fact that he is a receiver. And there may be other cases in which having an independent cause of action, the fact that he is receiver does not disqualify him from suing. But in such cases he does not sue in his character of receiver.

See also 24 Hals., par. 741, and cases there noted.

Nor do I think that his failure to secure the previous sanction of the court to the institution of this action must result either in its dismissal or in a stay of proceedings in it. A prudent receiver would, I think, procure this sanction before setting such a proceeding on foot, but that is only because he runs the risk of having his costs disallowed if his action is not approved. As put at p. 157 of Riviere on Receivers and Managers (1912):—

A receiver will not lose his right to indemnity by reason of his not having obtained the leave of the court to incur the expense if it was such that the court would have granted leave but he may be required to shew that he was justified in incurring the expense without leave.

Or as put in par. 743 of 24 Hals.:—"A receiver who either institutes or defends proceedings without the previous sanction of the court runs the risk of having his costs disallowed if his action is not approved." If he sees fit to incur the risk of having his costs of this action disallowed to him because he instituted it without leave of the court, I think he may do so, but I cannot because of that stay or dismiss it. No case for ordering security for costs has been made. The appeal will be dismissed with costs.

Appeal dismissed.

REX v. CLARKE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Hyndman, JJ. June 27, 1918.

CERTIORARI (§ I A—9)—*To quash conviction—Intoxicating liquors—Second offence—Amendment of statute—Evidence.*]—Application by way of *certiorari* to quash a conviction for keeping intoxicating liquor for sale. Conviction affirmed by equally divided court.

McLaughlin, for the Crown; *Winkler*, for accused.

HARVEY, C.J.:—I agree with my brother Beck with regard to the first two objections but I am unable to come to the same conclusion with regard to the evidence.

It has been said repeatedly, but it, perhaps, will do no harm to point out again, that upon such an application as this the judge or court is not an appellate tribunal and has no right to weigh the evidence given before the magistrate. That, in our opinion, it may not have been such as should have satisfied him, is no ground for quashing the conviction. To warrant the quashing of the conviction for want of evidence, it must be such, that no reasonable person could infer from it that the offence had been committed. Though the charge here is of keeping liquor for sale, by virtue of ss. 51 and 54, if it is shewn that the liquor was in the defendant's possession that is sufficient to convict unless the defendant satisfies the magistrate, not this court in this application, that he had it rightfully. For the present case, the last consideration is of no consequence, because, under the circumstances of the case, if

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the liquor was in the possession of the defendant, nothing which would make that possession lawful can suggest itself to me.

It is established that the defendant was the proprietor of the premises where the liquor was found as a tenant from month to month, from October 15 to January 15, and it is stated that for the month from January 15 to February 15, the rent was paid by another man named Hawkins in the presence of the defendant and that the receipt for the payment was made out to both of them. There is no suggestion that Hawkins ever was in the premises or that he was seen at any time about the premises, other than when the rent was paid. There is evidence that the defendant, a few days before the end of the month for which he claims to have transferred his possession to Hawkins and entirely freed himself from the tenancy, inquired of the landlord when the rent would be due again, that shortly before or shortly after the seizure of the liquor by the police on February 12, he inquired of the landlord, who lived in the front of the lot, if he had seen any one about the premises.

The landlord was asked: "From January 15 to February 15 who was coming and going to the shack intermittently?" to which he answered, "All I saw was Clarke."

The defendant, after denying that he was at the shack on February 12, admitted that he was. Then, after denying that he was in the shack on that day, he admitted that he was. Having regard to all these facts and to the fact that the reason given by the defendant for renting the shack was probably not true, and to some of the other facts recited by my brother Beck, it appears to me that a reasonable person might quite properly infer that there was, in fact, no real, but only a sham or pretended transference of the propreitorship of the shack to Hawkins, and that the defendant continued to be the real possessor of the premises, and that the liquors were, therefore, in his posssession, which is all that the Crown is required to establish. I think that this objection should not prevail.

The only other objection is that there could not be a second conviction, because the section providing for the offence and also the section providing for the penalty, had been repealed and new sections enacted after the first conviction. As to the section providing for the offence, while that is what took place in form, it

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was, in fact, only an amendment of the section in no way affecting this offence and the defendant's act was the same offence before as after.

The penalty was changed but as far as the penalty for this offence was concerned the effect was to amend the penalty, as a second offence, from a fine of $200, but not exceeding $500, and, in default, imprisonment from 2 to 4 months, to a fine of $250, but not exceeding $500, and, in default, not exceeding 3 months' imprisonment.

It is apparent that this is really only an amendment and, with the single exception of the minimum fine being increased by 25%, the changes are all in favour of an accused person. The fine imposed was $400, which is within either the old or the new section. Whether an alteration of the punishment, which would be materially different, would be a ground for saying that there could not be a conviction of a second offence, need not be considered for I do not see how it can be thought that a slight alteration, such as this, could serve as a remission of the consequences of former convictions.

The point is one which must be of common occurrence, but no authority is given to support the view that the objection is a valid one and I do not see any good reason why one should be made.

I would, therefore, dismiss the appeal with costs and affirm the conviction.

STUART, J., concurred with Harvey, C.J.

BECK, J.:—A motion was made before Scott, J., by way of *certiorari* to quash a conviction for keeping intoxicating liquor for sale on February 12 in a certain designated shack in Edmonton. The grounds of the motion were:—(1) That the accused was arrested by a person who had no legal authority to arrest him. (2) That there was no proper minute of adjudication. (3) That in view of certain amendments to the statute the accused could not be convicted of a second offence. (4) That there was no evidence to support the conviction.

Scott, J., dealt only with the first ground, being under the impression, apparently erroneously, that it was the only one raised before him.

The point was this. The warrant to apprehend was addressed "to all or any of the peace officers of the said province." The

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arrest was made by two constables who had been appointed constables for the City of Edmonton only and had no authority beyond the limits of the city. Scott, J., held that the objection was not sound where, as here, the arrest was made within the limits of the territory within which the constables were authorised to act. I think this is the correct view.

The second ground taken is that there was no, or no sufficient, note of adjudication to found the conviction.

There was, in fact, a complete minute of adjudication. It appears at the end of the stenographer's notes of the evidence and other proceedings before the magistrate. The stenographer was there for the purpose of taking such notes and, I think, the note of the adjudication ought to be taken to have been made by the magistrate, through the instrumentality of the stenographer, acting in the capacity of a clerk to the magistrate. S. 727 of the Code, which says that the magistrate *may* make a minute at the time and draw up the formal conviction afterwards, does not necessitate any minute and I think the court has already held in a case, which I cannot at the moment lay my hand upon, that though there be no minute, yet if the formal conviction is promptly drawn up that is sufficient. The importance of a minute is that the formal conviction must accord with it. The section does not expressly require signature to the minute and the purpose of the minute would seem to be served if it is made virtually by the magistrate in such a way that the formal conviction can be drawn up afterwards with perfect certainty of its according with the expressed decision of the magistrate.

In my opinion, therefore, this objection fails.

These being objections which frequently arise, I have thought it well to deal with them, although, in view of my opinion on the question of evidence, I think the conviction cannot be sustained, but, for this reason, I do not deal with the third question.

The remaining question is whether there is evidence to justify the conviction. The facts disclosed by the evidence are in brief as follows:—

The charge is, as already stated, "unlawfully keeping liquor for sale," Gillam, a detective sergeant, acting under a search-warrant, on February 12 last, found in a certain shack a trunk or box containing 37 bottles of intoxicating liquor. The accused was

not there. The detective and others waited there 5 hours and no one came to the shack. There were no accommodations for any one to live there. The door was locked. A man named Stanton owned the shack. He said in substance that he had rented it to Clarke, the accused, at $2.50 a month from October 15 last; that Clarke paid the rent month by month till January 15, on which latter date Clarke came to him with another man named Hawkins, a returned soldier, and that both of them told him that Hawkins was taking over the shack and Hawkins at that time paid the rent for the month from January 15 to February 15. He gave a receipt at the time to Hawkins he thinks, though he thinks he made it out "in both their names." He is not sure whether he ever saw either Clarke or Hawkins in, or going to, the shack, except just after Hawkins paid the rent he saw Clarke going to the shack, Clarke telling him he was going to let Hawkins in. He says that a few days before the rent fell due for the month, February 15 to March 15, Clarke inquired when the rent would be due again, and a day or two after that Clarke inquired if he had seen any one going to the shack. Shaw, a detective, gave evidence similar to Gillam's.

It seems to me that the foregoing constitutes no evidence that the accused kept the liquor found in the shack at all, much less that he kept it for sale. There is no statutory presumption against him unless (s. 54) he is proved to have had the liquor "in his possession, charge or control." I do not think this was proved.

The evidence for the defence can, of course, be looked at in order to assist the evidence for the Crown; but I find nothing in it to do so, but, on the contrary, an affirmation of the Crown's evidence to the effect that Hawkins was the tenant; he states that he is a married man living with his family in Edmonton; he gives as a reason for renting the shack that his wife was planning to go away for a time and he planned to "batch" while she was away; he admits that he was at the shack on February 12, and the door being open he probably went in; he says he went to see Hawkins who was not there and he has not seen him since. I doubt the truth of the accused's reason for renting the shack but, even if his entire evidence is rejected, and the evidence of the Crown only is looked at, I think it impossible to hold that there is any evidence to justify the conviction. What the Crown had

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to prove was that the accused kept the liquor for sale. In the circumstances, it was necessary, in order to establish this, to establish that the accused had the liquor in his possession, charge or control. This has, clearly to my mind, not been shewn. It does not appear who bought the liquor, or who brought it to the shack, or that it was ever in the possession, charge or control of the accused unless, as undoubtedly the contention of the Crown is, the accused was in possession, charge or control of the shack and, therefore, of its contents. This is, it seems quite clear, not only not proved by the Crown's evidence but positively disproved.

My suspicion is that Hawkins, and other returned soldiers, together, secured the liquor and took the shack as a convenient place in which to "*cache*" it. Possibly the accused originally had it for the same purpose. Possibly the accused and Hawkins and others had liquor there for the purpose, not only of personal use, but for sale, but there is no such proof, and the evidence, to my mind, is far from being sufficient to justify an inference to support the conviction.

This being my view of the evidence I would quash the conviction, with costs.

HYNDMAN, J.:—I think the conviction is bad on the ground that there was no legal or sufficient evidence, that the accused was, at the time of the seizure of the liquor, the owner or tenant of the building in which the liquor was found. At most, I think it was a strong suspicion that the arrangement between Clarke and Hawkins was a scheme to assist them in case of a prosecution under the Liquor Act. There is absolutely no evidence shewing that the accused had either bought, sold or handled any of the liquor. It would seem to me that the evidence of the Crown witnesses established nothing else than that the building had formerly been rented by Clarke, but, that a month prior to the seizure, Hawkins had taken over the place and paid the rent. The fact of accused being in the shack on the day in question is undoubtedly a suspicious circumstance, but not sufficient to justify the magistrate in properly deciding that he was the proprietor of the building or had the liquor in his possession, charge or control.

I would, therefore, quash the conviction with costs.

Conviction affirmed, the court being equally divided.

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WILLIAMS v. LOCAL UNION No. 1562, UNITED MINE WORKERS OF AMERICA.

Alberta Supreme Court, Simmons, J. June, 1918.

CONSPIRACY (§ II B-15)—*To injure one in his employment—Proof—Damages.*]—Action for damages for loss of employment caused by the wrongful action of a local union, in refusing admission to membership.

E. V. Robertson, for plaintiffs; *H. Ostlund*, for defendants.

SIMMONS, J.:—The plaintiffs are coal miners. The defendants, other than Local Union No. 1562, United Mine Workers of America, were officers and members of said local union. The said union is an unincorporated association of miners organized under the principal union known as District 18, United Mine Workers of America. The purpose of the said association or organization of mine workers, as set out in section 1 of article 1 of the Constitution, is

> to improve the material, intellectual, and moral condition of the toilers in and around the mines . . . we extend to all men in and around the mines, without regard to race or colour, an invitation to unite with us that these ends may be obtained.

The plaintiffs allege that, prior to October 14, 1917, they made application to the Local Union No. 1562 for admission to membership and admission was wrongfully refused them, in violation of the constitution of said local union. They allege they made a subsequent application on December 21, 1917, and same was rejected.

The basis of their claim is that, as a result of the action of the local union, the plaintiffs lost their employment and the benefit of their contract of employment with the Wayne coal mine in the Drumheller District.

Before they came to the Wayne mine they were both members in good standing in local unions of the District 18, U.M.W. of A.

There was no local at Wayne when they began work there in 1915. They went from there in 1916 but returned towards the end of 1916 and the Wayne mine was then organized under a local union and they became members in good standing. In January, 1917, the mine operators discharged the men on account of disputes with the union representing certain classes of men who claimed they had grievances against the operators.

As a result, the mine closed down for 3 weeks and the majority

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of the men left the place. A few miners, including the plaintiffs, remained and, after the mine had been closed down for 3 weeks, the operators proposed to a small number of miners in the camp, including the plaintiffs, that these men should go to work and that the mine operate as a non-union mine; which proposition was accepted by these miners then in the camp. The defendant Biggs came to the mine and attempted to have it reorganized into a union camp but failed. Later in the year 1917, the miners went on strike in order to force the operators to allow the men to organize under the union, and the operators of the mine agreed to do so. The defendants, Young and Stefanucci, represented the reorganized union in these negotiations with the operators. They insisted that the operators discharge the plaintiffs, unless they joined the reorganized union.

The plaintiffs claimed they were, at all times, loyal to the union and that when they entered employment in an open or non-union arrangement the existing local union had been disbanded and ceased to exist, and that a scurrilous anonymous letter was received by the plaintiff Williams in March, 1917, and he claims that Biggs, President of District 18, U.M.W. of A., was the author. The plaintiffs said this letter was a slander upon them and upon all Welshman who remained in the mine when it operated as a non-union mine, they insisted, that, since Biggs was the highest officer in the union, that they should receive an apology. At the time of trial of this action, a criminal action for slander was pending against Biggs in regard to this letter and Biggs, through his solicitor, obtained an adjournment of same, on the plea that he was absent in the United States on important business connected with the union.

I am satisfied Biggs was the author of the letter in question, and no denial has been made by him or on his behalf in regard to the same.

The local union issued an ultimatum to the operators that, unless the plaintiffs were dismissed, a strike would be called and the mine would be closed. As a result, the operators advised the plaintiffs that the union proposed to tie up the mine unless the plaintiffs were discharged.

In the meantime, the plaintiffs appealed to the head organization and met Biggs, the president, and Brown, financial secretary,

in Calgary and, as a result, the local union was instructed to reinstate them.

This was on November 13, 1917. Notwithstanding this, the local union refused to admit them as late as January 6, 1918, but advised them the union had no objection to their working in any of these mines.

The plaintiffs started to work again about the middle of January but the boarding-house mistress advised them she could not keep them as the rest of her boarders, who were union men, would boycott her if she gave board to them.

The defendant Young told them they had no business to come back to the mine to work. The driver who furnished cars to the miners in the mine refused to deliver cars to them and the machine men refused to cut coal for them so that they were forced to quit work.

I am of the opinion that, from the date of reorganization of the local union at Wayne in July, 1917, until the middle of January, 1910, the local union, acting through its officers, made strenuous objections to the employment by the company of the plaintiffs, unless the latter joined the reorganized local union. By threatening a general strike, they prevailed upon the employers of these men to dismiss them. The plaintiffs were competent miners. They had always conducted themselves in a loyal manner to the principles of unionized labour by joining the local union where one existed. They accepted employment after the local union was disbanded at Wayne. The president of the United Mine Workers of Ditrict 18 wrote Williams a most insulting, slanderous and abusive letter to which he had not the moral courage to attach his signature. The letter, however, was really addressed to all Welshmen who accepted employment in a non-union camp. The plaintiffs made what seemed a very reasonable demand that the accusations contained therein should be retracted.

The plaintiffs were deprived of a civil right as a consequence of the defendants' actions and the defendants are liable under the principles enumerated in *Patterson* v. *Can. Pac. R. Co.*, 33 D.L.R. 136, 10 A.L.R. 408, and *Quinn* v. *Leathem*, [1901] A.C. 495. The local union, however, is not liable in regard to anything subsequent to the date when the plaintiffs last returned to work, about the middle of January, 1918. What took place after that was

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the individual actic of the union men in the camp and there is no evidence that th cal union authorized it.

It is clear, however, that a corporation, an individual or individuals associated as a partnership, are the only entities known to the common l capable of suing or being sued, with the exception of incorporated trade unions under the Trade Union Acts and as the local union does not come within any of these it can be reached only by suing the individual members.

Taff Vale R Co. v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426.

The officers of the local union were the agents for the individual members and the principal is bound by the authorized acts of the agent acting within the scope of his authority.

The individual members of the association or local union were each liable for what was done by their agents.

The defendants do not deny membership in the local union during the period when the boycott took place. Two of them, Young and Stefanucci, took an active part as officers of the union.

There will, therefore, be judgment against the defendants for each of the plaintiffs for $435.62 for loss of wages and $100 general damages, and costs, each judgment to carry one-half of the costs. *Judgment accordingly.*

McCORD v. ALBERTA & GREAT WATERWAYS R. Co.

Alberta Supreme [Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Hyndman, JJ.A. June 26, 1918.

WATERS (§ II G–125)—*Surface water—Interference with flow—Drainage—Damages.*]—Appeal from the judgment of Simmons, J., 37 D.L.R. 13, in favour of the plaintiff in an action for damages for flooding plaintiff's land. Reversed on the ground that the plaintiff had not established the responsibility of the defendants for the construction of the ditch which caused the damage.

G. B. Henwood, for plaintiff; *N. D. McLean*, for defendants.

HARVEY, C.J.:—The plaintiff alleges that the defendant, by its servants or agents, wrongfully dug or caused to be dug a drainage ditch from its right of way through certain lands and thereby wrongfully flooded the plaintiff's lands, causing him damage. The defendant, amongst other defences, denies that it constructed

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the ditch. The action was tried by my b ther Simmons who gave judgme in favor of the plaintiff for $4. , and the defendant appeals.

I would allow the appeal upon the simple ground that the plaintiff has failed to establish responsibil in the defendant for the construction of the ditch in such a way as to cause the damage, without considering any of the other points raised. The trial judge (37 D.L.R. 13), upon certain of the facts states as follows:—(See judgment of Hyndman, J.)

It is apparent from this that the obligation of the defendant was, at the most, to deliver the water from the right of way. The evidence of Mr. Harvie is clear that Mr. Smith declined to take any responsibility for the laying out of the ditch but that Brown was to construct it and the defendant to pay for it. There is no evidence that a ditch, to accomplish the purpose, could not have been constructed in a way which would have caused no damage to the plaintiff. Indeed, the evidence shews that a not very considerable extension of the existing ditch would not merely have prevented damage but would have benefitted the plaintiff's lands.

From the evidence of Mr. Harvie it seems clear that the creation of the ditch was probably the act of Mr. Brown but that, in any event, it was not the act of the defendant and, such being the case, I fail to see how it can be held liable for the damage.

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

STUART, J.:—After some hesitation I have come to the conclusion that this appeal should be allowed with costs. For a time the view that Brown was the agent of the defendant appeared to me to be the correct one. It seemed to me that the respondent might well contend that the real situation was that the defendants wanted Brown's land; that they were endeavouring to secure it without resort to expropriation proceedings and by an agreement; that before Brown would make any agreement, he insisted on the construction by the defendants of a ditch; that, finally, it was agreed that Brown should build the ditch he thought was desirable and that the company would pay for it. It seemed to me that, in these circumstances, it might fairly be held that the defendants were interested in the construction of the ditch. They certainly wanted title to the land. As a condition of getting that title they

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agreed that a ditch should be constructed by Brown and that they would pay for it. Brown constructed the ditch and the defendants paid him for the cost of doing so, so that, essentially, and in substance, it would be the defendant's act, because it was done by Brown and paid for by them as a condition of their getting the title which they desired.

But, upon further consideration, I think what happened was really nothing more than this, that the defendant added enough more to the price they were paying for the land to recompense Brown for his expense and trouble in building the ditch, which he alone desired to have built. The fact that the defendants permitted Brown to go upon their land and do some of his digging was not, I think, sufficient to make him the company's agent or to attach legal liability to the company for what he did.

BECK, J.:—This is an appeal from Simmons, J., giving judgment for the plaintiff with damages. The action is for flooding the plaintiff's land.

The plaintiff is the owner of the southwest quarter of section 17, and the southeast quarter of section 18, township 57, range 22, west of the 4th meridian, making a half section parcel. He also had a homestead entry for the northwest quarter of seven (lying directly south of 18).

The defendant company's railway runs in a northeasterly direction through the southwest quarter of section 24, township 27, range 23, *i.e.*, the range west of that in which the plaintiff's land lies.

A man named Brown owned the quarter section through which the railway runs, together with the southeast quarter of the same section. On April 1, 1914, the railway being in course of construction, Brown signed an agreement to sell and convey to the railway company such portion of his land as the company would require, approximately 5.31 acres, "at and for the price of $25" (per acre)—"as part of compensation—a continuous drainage ditch will be installed on both sides of track across this quarter that will deliver the water from right of way on this quarter."

Considerable discussion and negotiation took place with regard to the drainage. I shall refer to this presently. In the result, the question is raised whether it was not Brown who did the work of making the drain and who, if any one, is, therefore, liable to the defendant and not the defendant company.

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It appears that the ditch actually constructed is the continuation of a ditch along the easterly side of the right of way commencing somewhere south of Brown's land; then it runs along the easterly side of the right of way on Brown's land to about the northerly boundary of Brown's land; then crosses by way of a culvert under the railway roadbed northwesterly and circling back again crosses by way of another culvert, to the east side of the railway roadbed and goes southwesterly upon the northeast quarter of section 24, the southeast quarter of section 19 (lying directly east of 24) spoken of as "C.P.R. land;" the northeast quarter of section 18 (lying directly south of 19) owned by one Failing; the northeast quarter of 18, owned by one Olson, stopping a very short distance south of the boundary line between section 19 (C.P.R.) and 18 (Failing and Olson) the trial judge finds, in full accord with the evidence, that "there is a well-marked depression on the configuration of the lands" running "from northwest to southeast crossing section 24" (Brown's) and "crossing sections 18" (Failing's and Olson's) "and 17" (the plaintiff's); that "in rainy seasons the surface water collects in this depression and flows with a perceptible current from northwest to southeast;" that "on sections 18 and 17 the beavers built beaver dams 12 to 18 inches high across the west part of this depression." He adds: "It is admitted that the beaver does not construct dams in still-water but only where there is a current of water moving in a definite direction." I understand the judge to mean with regard to the location of the beaver dams that the natural depression on the land is obstructed by a beaver dam on, but close to the northerly boundary of section 18; and that there is another similar obstruction on the southeasterly portion of 17. This, I take it to be, is the correct interpretation of the evidence particularly of Brown and the plaintiff.

Failing says: "Beaver dams on Olson's quarter."

Plaintiff says, referring as I understand to his own land, "Beaver dams there yet—originally a running stream—dammed by beavers into a lake. On 18 a triangular piece 8 acres; on 17 another triangular piece. Land slopes naturally from 24 to 17. Water runs from Brown towards 17; also a fall from Failing's and Olson's land. There are a number of beaver dams, 12 to 18 in. above level. Never broke down any of them to assist drainage.

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When Brown had drain dug through his land, I wanted a drain through mine. Saw Smith, chief engineer of defendant company, and Harvie, secretary of Government Railway Department, and Boyle, Provincial Minister of the Crown. They said they would make the ditch . . . I was satisfied if they dug the ditch." The C.N.R. runs northeasterly through section 7, continues northeasterly upon the southwest quarter of 17 for about 2-3 of its extent and then turns nearly easterly through the rest of that section. It does not appear what, if any, obstructions this line of railway created in the natural depression; but it appears that the C.N.R. constructed a ditch, for the purpose of draining the land in the vicinity of their line, carrying the water southwesterly into a creek known as Deep Creek. The plaintiff says that after the water got on to his land (17 and 18) there were good facilities for draining in to the C.N.R. ditch. It is quite clear too that, had the beaver dam on the plaintiff's land been removed or cut through, the water would have continued flowing in a natural depression from his land to a lake called Roy Lake on the northwest section of section 9, unless the C.N.R. line would perhaps interfere, but in that case the C.N.R. ditch evidently would have carried off the water.

The trial judge says "that if the beaver dam on the plaintiff's land had been cut through and the ditch had been continued through the plaintiff's land and for about a mile further southeasterly, it would have discharged the flow of water into a drain constructed along the right of way of the C.N.R. which latter drain would have carried the water to the river."

Simmons, J., gave his decision on August 28, 1917, and in the course of his reasons refers to the case of *Makowecki* v. *Yachimyc*, 34 D.L.R. 130, 10 A.L.R. 366, decided by this court, but the later case of *Farnell* v. *Parks*, 38 D.L.R. 17, was not decided until November. In this latter, the element of a beaver dam appeared and the court held that in the case of surface water the owner of the lower land is subject to a servitude which obliges him to permit the natural flow of such surface water from higher land along the natural sloughs, ravines and other depressions upon the lower land to its natural place of deposit and that this rule is not affected by the fact that the flow of the water has been obstructed by an adventitious obstruction such as a beaver dam, fallen trees,

etc., and the court consequently held that, where the owner of the higher land had cut through a beaver dam on lower land in order to permit the water from his land to flow along the natural depressions on the lower land to a natural place of deposit further on, the owner of the lower land was not justified in filling in the cutting made through the beaver dam. What follows from that decision and how are the principles involved in it applicable to the present case?

Failing and Olson, it seems, might have cut through the beaver dam on their lands and thus allowed the surface water to flow on to the land of the plaintiff. Their not having done this cannot, one would suppose, have increased but rather diminished the flow of the water on to the lower land. The plaintiff, in either case, might have cut through the beaver dam on his land and thus quickly relieved it of the water, which, upon this being done, would have confined itself to a comparatively narrow space in the natural depression instead of spreading, as it appears to have done, over some 40 acres.

It seems to me that the plaintiff could have relieved his land from the water in this way and that he was, as against any owners lower down, entitled to do: though I gather there was no one lower down who would be at all affected. It is said in *Makowecki* v. *Yackimyc* (p. 139):—

> The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. . . . . The flow, however, may be hastened.

The meaning of this, I take to be, that the lower proprietor is under a servitude to receive all surface water which would naturally flow upon his land by way of natural depressions. The upper proprietor may, by artificial means, hasten the flow of this surface water—this seems obviously in the interest of everybody concerned. But the upper proprietor is liable to the lower proprietor if he causes, by artificial means, to flow over the land of the lower proprietor water led by artificial means or accumulations of surface water, which, without artificial means, would not flow over the land of the lower proprietor. For instance, if the upper proprietor owned two parcels both carrying a quantity of surface water, one of which naturally drained over the lands of a lower proprietor, but the other of which did not so drain, the upper

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proprietor would be liable to the lower if he connected his two parcels by an artificial drain so as to cause the surface water from both to flow upon the lower land. He would be liable to the extent that the increased quantity injured the lower proprietor. So in the present case, if the defendant company is liable at all, it is liable, if it is established that the ditch upon Brown's land, by reason of its being part of a ditch along the railway right of way, brings upon Brown's land, and consequently casts upon the plaintiff's, water from other lands which naturally would not flow upon it—liable to the extent of any damage caused by the increased flow of water thus caused. I think the case was tried with an incorrect view of the law in the minds not only of counsel, but of the trial judge; and that consequently the evidence was not so directed as to enable one to say whether there was such an increase of the flow, and if there was, what quantity, and what proportion of the damage was occasioned by the increased quantity. Furthermore, inasmuch as it seems to be established that the continuance of the injury to the plaintiff's land could be terminated by the digging of a ditch, the cost of which would probably be small, but about which there is no evidence, it seems to me that the plaintiff is bound to minimize his damages and is not entitled to claim damages for loss of hay year after year; but that the measure of his damages, if he is entitled to any, would be, after the first season, what it would cost to construct a ditch which would remove the water. The plaintiff indeed says he would have been satisfied if the railway company had dug a ditch from his land. Mr. Smith for the company says he was always ready to do this. It seems to have been only through some misunderstanding or neglect on one side or the other that this arrangement was not carried into effect and this lawsuit avoided.

On any aspect of the case, therefore, assuming the defendant company liable, it seems to me, that the damages have not been assessed on the proper principle and it would seem that there is not sufficient material in the evidence to enable us to fix the damages. The plaintiff has not established that any water, which naturally would not have passed on to his land through the natural depressions of the soil, did, in fact, pass on to it, or, if by inference some did, it is impossible on the evidence to ascertain what proportion it consisted of and consequently what proportion

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of the actual damage it occasioned, and in any view, the damages have been assessed on a wrong basis.

If there were nothing more in the case I would be inclined to direct a new trial. But there remains the question whether the defendant company is liable at all, or, if any one, only Brown. On this question, with some doubt, I concur with the views of the Chief Justice and Stuart, J., and, therefore, agree that the appeal should be allowed with costs and the action dismissed with costs.

I venture to suggest that, as the cause of the whole dispute can be so easily removed, the parties ought now, at least, to make a serious effort to settle and avoid an appeal which I fancy would not result in anything better than a new trial.

HYNDMAN, J. (dissenting):—This is an appeal from Simmons, J., who gave judgment in favour of the plaintiff for $480 and costs.

The action was tried in August, 1917, and the hearing was comparatively lengthy. The reporter who took the evidence joined the Expeditionary Forces shortly afterwards and left the province and the appellants have been unable to secure the extended evidence although repeated attempts have been made to do so. The only evidence before us, therefore, are the very meagre notes of the trial judge. I think, therefore, it must be assumed that any finding of fact by the trial judge is supported by evidence though nothing should appear in his notes to that effect unless there is something in his notes which would undoubtedly go to shew that he was in error.

The trial judge finds as a fact that because of the construction of the ditch in question more water was cast upon the plaintiff's land than would have been if the natural channels had not been interfered with. He says it is not clear, and is difficult to ascertain accurately, how much more water descended than in the ordinary and natural course of things would have flowed, but, nevertheless, gave a verdict in favour of the plaintiff for $480 which is a little more than one-fourth of the amount sued for. If plaintiff is entitled to any damages I do not think the amount awarded should, under the circumstances, be interfered with. The trial judge says: "I am satisfied upon the evidence that some of his lands were submerged as a consequence of this increased flow of water upon his lands."

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The appellants' contention is that it is relieved from any liability because the company did not, either by itself or by its agent, construct the ditch. On this point the trial judge says, 37 D.L.R. 13:—

> In April, 1914, the right of way agent of the defendant railway company, obtained from William F. Brown an agreement for the sale from Brown to the railway company of a right of way across the southwest quarter of said section 24 for the price of $25 an acre and the construction of a continuous ditch on both sides of the railway that will deliver the water from the right of way on this quarter. Brown says the sale was completed on the basis of this offer to sell, and Mr. Smith, chief engineer of the company, declares the company did not complete the sale on this basis and did not agree to build the ditch. Subsequent negotiations would indicate that Brown's contention is correct. After the construction of the railway, Brown requested the company to construct the ditch. A meeting of the engineer and Brown took place in the office of Norman L. Harvie, secretary of the Provincial Railway Department, and Harvie says Smith agreed to construct a ditch or pay for the construction of it. This agreement was carried out by Brown constructing the ditch at a price agreed upon, and the railway company paid to Brown the contract price agreed upon between them. The ditch runs parallel with the railway line for some distance through section 24 and crosses the right of way and leaves the railway at right angles traversing the southwest quarter of section 19 in township 57, range 22, and stops just south of the boundary line between sections 19 and 18. The ditch is 7 ft. wide at the top and 4 ft. wide at the bottom, and at the railway line it is 4 ft. deep. It drains the lands through which it passes, *but since the ditch was not continued southeast in the line of depression, the waters collected by the ditch are distributed over the surface of sections 17 and 18 and causing a larger area in these sections to be submerged in rainy seasons, than would occur if the water had been allowed to pass along the depression in its natural flow.*

I would gather from this that the finding, in effect, was that the railway, itself, did the work through the method outlined by the trial judge. But even if that conclusion is not tenable, in my opinion, they are liable because they have become parties to Brown's scheme of drainage and made their property an indispensable part of it. So long as the water lodged in the right of way of course no objection could be made by plaintiff but they, at least, allowed Brown to cut into their right of way. The trial judge says: "The ditch is 7 ft. wide at the top and 4 ft. wide at the bottom and at the railway line it is 4 ft. deep.

The whole trouble might have been avoided by the company refusing to allow this cutting on their property. I think it was their duty to so construct their railway that it would, with the exercise of reasonable care, cause no damage to owners of land in the vicinity. A refusal on their part to allow Brown to make the

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opening in question was a necessary part of the cause of the trouble complained of. Without any agreement, I do not think they should have permitted it; but it was expressly permitted to be done because of the agreement of purchase of their right of way and part of the consideration therefor.

In this particular, the following passage from the appellant's factum is significant:—

> The fact that the railway by reason of pressure exerted upon them by the Railway Department paid for the ditch should not alone make them responsible. It was part payment for Brown's right of way, and Brown was in no way their agent to build the ditch. *At the time the railway were forced to agree to pay for it, they expressly refused to assume any responsibility for laying it out, or for any damages* that the building of it might entail. The building of the ditch by Brown was merely a method of assessing the compensation for right of way taken, the cost of the ditch being determined, the railway paid Brown that amount for his right of way.

Having become party in this manner to the work, I do not think they can escape liability under the circumstances.

I would, therefore, dismiss the appeal with costs.

Appeal allowed.

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Re HARRISON.

British Columbia Supreme Court, Macdonald, J. June 13, 1918.

HABEAS CORPUS (§ I B—5) — *Application for — Fugitive Offenders Act—Warrant of commitment by magistrate—Strong presumption of guilt—Evidence as to offence.*]—Application for writ of *habeas corpus* under the provisions of the Fugitive Offenders Act. Application refused.

J. A. Aikman, for applicant; *W. H. Bullock-Webster*, for the Government of New Zealand.

MACDONALD, J.:—John C. Harrison applies for a writ of *habeas corpus* under the provisions of s. 17 of the Fugitive Offenders Act, R.S.C. (1906), c. 144. He is held under a warrant of commitment issued by the police magistrate of the city of Victoria under s. 12 of that Act. The charge upon which he is so committed is that he, on January 15, 1908, at Te Awamuta in New Zealand, with intent to defraud, obtained from one Ernest James Taylor the sum of £21 12s. by a certain false pretence, to wit, by represent-

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ing that a certain preparation sold by the said Harrison to the said Taylor for the said sum of £21 12s., called "Anconia" sheep and cattle dip, was an effectual sheep and cattle dip, whereas in fact such preparation was useless for such purpose.

The magistrate upon investigating the matter, apparently, came to the conclusion that the evidence submitted raised a "strong or probable presumption" that Harrison committed the offence mentioned in the warrant under which he had been arrested.

Upon a previous application made for release of Harrison, the matter was discussed as to whether or not I should treat the matter upon the same basis as if it were, in a sense, an appeal from a decision already rendered by an inferior court upon the evidence. I have been assisted on this application by the case of *The Queen* v. *Delisle*, 5 Can. Cr. Cas., 210. In that case it was held by Taschereau, J., in the Province of Quebec, that extradition from Canada to another British possession will not be confirmed on *habeas corpus* unless a *primâ facie* case of guilt is made out to the satisfaction of the Superior Court to which the accused has made application for discharge; and that this confirmation should be made irrespective of the decision of the committing magistrate. Without entering into further discussion of this case thus cited, I propose to follow such judgment as far as it applies, not only out of respect for the decision, but because I think it is incumbent upon a judge, if possible, to follow decisions in criminal cases as rendered in other provinces, in order to create and perpetuate a uniformity of decisions in criminal cases throughout Canada.

I have, then, to consider whether or no the evidence before me raises the strong or probable presumption referred to in s. 12 of the Fugitive Offenders Act. This involves consideration of the essentials that constitute the crime of false pretence.

In the first place, there must be a false statement which represents, as existing, something which does not exist. Here, it is stated, that the preparation sold to Taylor was useless for the purpose intended. This contention is supported by the evidence of Parker, the analyst in New Zealand, and corroborated to some extend by Willes, a wholesale chemist, who also appears to have a technical education in chemistry, but whose evidence is not as direct as to the goods sold as that of Parker. Now, standing by itself, and irrespective of the after events, this would be sufficient

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to create a *primâ facie* case as to the preparation being useless. I accept the statement of Parker that the preparation is valueless. I take it, that he means, by using the word valueless, not that the preparation had no particular commercial value in its ingredients, but that it is worthless. This interpretation of the meaning attached to the word is emphasised by the subsequent portion of his evidence. Because, he adds, it is of no value "for that purpose or any other purpose mentioned on the label." He then emphasises his opinion of the preparation by saying that it is a swindle, even if it were given away. This evidence, however, is met by that of J. H. Keown, a local veterinary surgeon, and to a certain extent such evidence is contradictory to that given by Parker. I do not think, however, that the matter should be weighed as between the evidence thus in controversy; I think the proper course to pursue is to assume a position of whether or no a *primâ facie* case has been made out as to this essential ingredient of the offence of false pretence. And I find the evidence sufficient in this connection.

Then, we require to consider the important feature of the crime, that not only must there be a false statement, but that such statement should be operative in its effect, and that the complaining party should have parted with his money or goods on the strength of such false statement. It is argued that the evidence of Taylor taken orally before the magistrate is subject to criticism, because he did not dwell upon this branch of the offence when he had previously given his evidence in New Zealand; further, that when he gave his evidence in Victoria, a decision had already been rendered by the court releasing the accused on the Smith and Woodman charge, on the ground that this essential ingredient of the crime had not been proven. That is doubtless the fact, but I am not to assume that, because such event had occurred, that the witness, a merchant doing business in New Zealand, would come to this province and give his evidence falsely, simply in order to fill up, what might be termed, the gap that was wanting in the previous charge. It is not necessary that all the statements made should be proved to be false, nor is it necessary that all the statements, subject of discussion, and which are alleged to have been false, should have operated upon the mind of the party who paid out his money on the strength of such representations.

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In view of the conclusion which I have arrived at upon the application, I must say, at this stage, that I feel some hesitation in expressing myself at great length as to the evidence. I fear that if I were to do so, it might be used perhaps unfairly against the accused at some future time when he is upon trial. However, I find it necessary to discuss the evidence to some extent in order to shew the reasons for my conclusion.

Then I come to the next essential, forming one of the ingredients of the crime, and that is as to whether or no there was an intent to defraud on the part of Harrison. Standing by itself, if Harrison simply had received from some manufacturer a quantity of goods that were alleged to be sufficient for the purpose of getting rid of parasites or insects on sheep, and had sold such goods either at wholesale or retail to other parties, it would require strong evidence to shew that he knew that such preparation was in fact insufficient for the purpose, or that it was so worthless as to be an intentional fraudulent imposition upon parties purchasing it. I have in mind a case where a party was charged with passing even a Confederate bank bill, and was discharged as there was no evidence produced to the court shewing any knowledge as to the Confederate States having ceased years ago to have any existence, or that the party had any knowledge of the existence of the Confederate States, or any other matter that would have pointed to a guilty knowledge on his part in dealing with the money; nor did he act in any manner that was inconsistent with innocence. It is a difficult matter to determine, where a party sells that which, upon the evidence at present adduced, I consider an article, worthless for the purpose intended, whether he does so with a knowledge of the want of value or worth in such article and the fraud he is committing. It is a matter to be passed upon usually by a jury, acting not on admissions nor direct evidence, but drawing proper inferences from proved facts. I presume that I should take the same position in determining whether, on this branch of the case, a *primâ facie* case has been made out.

Assuming for the moment, then, that the article is worthless, what were the surrounding circumstances that should influence me in coming to a conclusion in this connection as to the fraudulent intent? I find that Harrison interviewed Taylor with a view of selling Anconia sheep dip; on January 15, 1918, a contract or

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agreement was entered into by Harrison, purporting to act on behalf of John Harrison & Sons; whereby, in consideration of Taylor purchasing 12 dozen of their goods, which are shewn to have been the Anconia preparation, they made Taylor their agent, giving him the wholesale and retail rights for territory, which is not named. Then this important statement is made, that this agency is to last for 12 calendar months from its date. There is a further provision that, if Taylor is desirous of relinquishing the agency at the end of 12 months, they agree to repurchase from him for the same amount per dozen, any of the goods which Taylor may not have disposed of. If John Harrison & Sons are a responsible firm, and this is a genuine contract, it was one that Taylor could not, with any degree of danger, have entered into. I can assume, as I have a right to assume, that he was honest in his idea of doing business with his customers, and that he would not be purchasing a worthless article. He had the protection that should the article not prove up to all the recommendations made by Harrison, but prove ineffectual for sale, he could then turn to Harrison under his contract and ask him to repurchase the goods on hand or which might have been returned. This feature of the matter was not developed apparently, so far as the evidence goes. It is not shewn to have had any weight on Taylor's mind in making the purchase and parting with his money, but I think it worthy of consideration on the point under discussion. This, then, was the condition of affairs on January 15, 1918.

Meantime, according to the evidence, Harrison was busy developing the business, particularly in advertising it. He obtained literature for the purpose of bringing the article before the public; engaging printers, supplying copy, which resulted at the end of February, or at any rate in the beginning of March, in his having a quantity of printed material on hand, and some of the preparation ready for delivery. What then happened? On February 18, 1918, he went to Wellington, the capital of New Zealand, and obtained a permit to leave on the "Niagara" for Canada, the date of sailing being March 5, 1918. He certified to this permit being correct in its statements by his signature on the margin; he described himself as a grazier, giving as his nationality and birthplace, London, England. Now, in order to obtain this permit, it would be necessary for Harrison, as I am informed, to take a trip

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of four or five hundred miles from Auckland, where, according to his card, he was then carrying on his business. It is worthy of comment, I cannot refrain from referring to it, that during this period he was still purchasing goods, or rather engaging in contracts for printing, as late as February 27, at least, I take it from the account of Park, verified by Mattheson, that the dates on the exhibit filed at Auckland, A22, are correct. So much so, that on this February 27, he had, according to this exhibit, delivered to him 19,173 cartons, for which he was incurring the liability of £79 1s. 9d., making a total unpaid at the time of his departure of £149 18s. 9d. He left other outstanding accounts. Of itself, that would not be, of course, any ground to support the allegation of false pretence on January 15, 1918; but, exercising properly, I think, the right to look at surrounding circumstances, it has some weight with me in coming to the conclusion as to the intent—sufficient, at any rate (and I wish it particularly noted that I am not deciding upon the guilt of the accused), to warrant me in saying that a *primâ facie* case has been made out, on this branch, as well as the others, shewing the ingredients necessary to satisfy the crime alleged. In thus deciding, I have considered many circumstances outlined in the evidence of a number of witnesses.

It has been pressed upon me that some remarks in *R.* v. *Delisle*, 5 Can. Cr. Cas. 210, should have weight, as to a person coming to Canada, not being sent back for trial to another portion of the Empire except under certain conditions. The freedom of the subject is involved, but it is true that I do not feel that, while it is true New Zealand had, as its greatest industry, the production of wool, and that the care of such industry is of great importance to the citizens of that Dominion, still, that Harrison, if placed upon his trial, will not receive full and ample justice.

There may be other matters which come into my mind in dealing with the case, and which may have affected me in coming to this decision which can be thoroughly and completely explained by Harrison to the satisfaction of a court and jury. It is contended that I should not be, to any extent, controlled by the fact that this party, engaging in business and entering into contracts for at least a year, instead of remaining at his place of business, is now in the city of Victoria. He came to this province, without having made any arrangements of a business nature, or otherwise,

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prior to his departure. The excuse is given that he came to Canada for the purpose of medical treatment. If that be the fact, it is capable of proof. But I cannot shut my eyes to the fact that he left New Zealand and without having given any explanation to the parties who are complaining, before his sudden departure. His business ceased; but I do not deem it advisable to add further to my remarks in this connection. Order refused.

The exhibits are of importance and should not be given out except upon application. *Order refused.*

E. & N. RAILWAY Co. v. DUNLOP.

British Columbia Supreme Court, Macdonald, J. June 17, 1918.

PLEADING (§III D—333)—*Crown grants—Attacking—Right to have attorney-general added as a party—Action by—Petition of right.*]—Application to have the attorney-general added in an action in which certain Crown grants are attacked.

H. B. Robertson, for plaintiff company; *Mayers*, for defendants.

MACDONALD, J.:—In both these actions plaintiff attacks the Crown grants issued with respect to the lands in question. I understand the ownership of valuable coal deposits is involved. Defendants, in their statement of defence, amongst other grounds, contended that the Crown grants can only be impeached in an action in which the Crown is a party. Plaintiff now seeks to have the attorney-general of the province, as representing the Crown, added as a party; and the defendants, claiming the right to oppose such application, submit that there is no practice permitting an order so adding the attorney-general, and that he can only be proceeded against in an action of this nature through a petition of right.

Plaintiff relies upon the judgment in *Dyson* v. *Att'y-Gen'l*, [1911] 1 K.B. 410, where a declaratory judgment was sought against the Crown. There, the form of the action was fully considered, and it was held that a plaintiff is not bound to proceed by petition of right.

The Crown grants in question here purport to have been issued to a settler, under the Vancouver Island Settlers Rights Act, 1904, B. C. stat. 1903-4, c. 54, and s. 4 of such Act provides that the rights granted to the settler under the Act shall be "asserted by and be defended at the expense of the Crown." It may be pre-

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sumed that this statutory duty would be complied with by the Crown, even though its interests are not threatened nor in jeopardy. It is true that the action of the Crown in issuing such grants is being attacked, but, it is only sought, as I take it, to add the Crown as a party to the action for conformity, and in order to remove the objection to the form of the action as now constituted.

I think, as a judge sitting in chambers, I should apply and follow the decision in *Dyson* v. *Att'y.-Gen'l*, *supra*. A distinction is sought to be drawn between the powers of the Supreme Court in this province and those possessed by the courts in England. Cozens-Hardy, M.R., in giving the judgment in *Dyson* v. *Att'y-Gen'l*, does not point out any distinction, such as is here suggested. And at the foot of p. 417 he thus broadly states the rights of a party seeking redress against the Crown: "In my opinion the plaintiff may assert his rights in an action against the attorney-general, and is not bound to proceed by petition of right." It may be successfully contended that this quotation simply applies to the rights of the plaintiff in that particular action; but it is worthy of mention that the plaintiff in that action was seeking a declaratory right that, indirectly, at any rate, involved a matter of revenue, affecting the Crown; whereas here the real contest is between two Crown grantees, where the Crown has divested itself of any interest in the property, and is not affected by the result. It would thus appear that the position of plaintiff in seeking a declaratory judgment in the actions now being considered is stronger than the position of the plaintiff in the *Dyson* case.

In granting the order, thus adding the attorney-general, I appreciate the fact that I am dealing with an important and novel point of practice. Notwithstanding this fact, I think that the *Dyson* case is properly applicable to support such a course. Counsel for the defendants desires that I should give a stay of proceedings in order that he may launch an appeal from the order. I think, considering the importance of the matter, that an early trial is desirable. For that reason I will not deal with the application to stay, but leave it to be disposed of upon a subsequent application, to any judge, based upon such ground as may be deemed advisable.

The defendants are entitled to the costs of the application, such costs to be costs in the cause to the defendants in any event.

Application granted.

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FITZ RANDOLPH v. FITZ RANDOLPH.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J.K.B.D., and Grimmer, J. June 21, 1918.

DIVORCE AND SEPARATION (§ III E—38)—*Action by husband—Adultery by wife—No direct evidence of offence—Proof required—No other reasonable conclusion.*]—Appeal by defendant from decision of Crocket, J., in the Court of Divorce and Matrimonial Causes. New trial ordered.

J. B. M. Baxter, K.C., supports appeal; *A. J. Gregory*, K.C., *contra.*

The judgment of the court was delivered by

HAZEN, C.J.:—This case was heard before the judge of the Court of Divorce and Matrimonial Causes, at the regular sitting of the court in January, 1918. The respondent sought a divorce from his wife on the ground of adultery, it being aleged that she had been guilty of the offence on three occasions, with different co-respondents. These may be briefly described as the *Golf Club* case, the *Prince William Apartment* case, and the *Waterloo Row* case. There was also evidence given regarding most dissolute and disgraceful conduct of the appellant at the Queen Hotel, Fredericton, in company with a female friend, but there was no allegation or claim that anything took place on that occasion that would entitle the respondent to a divorce *a vinculo matrimonii*. At the conclusion of the evidence, the judge directed that a decree of divorce from the bond of matrimony be granted on the ground of adultery charged in par. 10 of the libel, known as the *Golf Club House* case. In none of the cases was there any direct evidence of the offence charged, and the judge based his judgment on inferences drawn from the facts as disclosed in evidence and was of opinion that there was but one inference that could reasonably and justly be drawn from the facts in the *Golf Club House* case, and that that was an inference of adulterous intercourse with Dr. Irvine.

It is desirable at the outset that there should be an understanding of the principles upon which a divorce would be granted in such a case, and I cannot, I think, do better than cite from the decision in the case of *Allen* v. *Allen*, [1894] P. 248. In delivering the judgment of the court, Lopes, L.J., after alluding to the fact that there was no direct evidence of any adultery said as follows:—

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It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place, because, to use the words of Sir William Scott in *Loveden* v. *Loveden*, 2 Hagg. Cons. 1, p. 2—"if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct act of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion, and unless this were the case, and, unless this were so held, no protection whatever could be given to marital rights." To lay down any general rule, to attempt to define what circumstances would be sufficient, and what insufficient, upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury, in a case like the present, ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the parties sought to be implicated.

I have very carefully read the evidence in regard to the *Golf Club House* case, and the judgment of Crocket, J., and with all respect, have been unable to come to the conclusion that the circumstances are not capable of any other reasonable conclusion than that of the guilt of the parties sought to be implicated.

It appears from the evidence that Mrs. Fitz Randolph, whose husband was serving overseas at the time, and who was residing in her house on Waterloo Row, in the City of Fredericton, with several of her children and a housekeeper, was asked over the 'phone by a Mr. Worrell, a bank man then residing in Fredericton, if she would arrange for a game of bridge on that evening. She declined to do so, stating that she would be unable to make up a party, and he then invited her to go for a drive, which invitation was accepted. About 9 o'clock in the evening, or possibly a little later, he called for her, accompanied by a Dr. Irvine, with whom Mrs. Fitz Randolph had no acquaintance whatever, and who had not been mentioned by Mr. Worrell at the time he telephoned to her. The three started out on the drive, and, after proceeding a short distance, the motor was stopped and Dr. Irvine left for a few minutes, returning with several bottles of intoxicating liquor, one of whiskey and two of porter or beer. They then proceeded to the Golf Club House, a few miles further on, where Worrell tried to unlock the door, and afterwards effected an entrance by forcing down the sash on one of the windows, climbing through and un-

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locking the door from the inside. During this time Mrs. Fitz Randolph was on the verandah, and a motor was seen coming up the hill, whereupon she and Worrell hid themselves in some bushes, while Dr. Irvine, who drove the car that night, ran to his car and spoke to or was addressed by the driver of the other car. It then moved away and Mrs. Fitz Randolph, Dr. Irvine and Mr. Worrell returned to the Club House and entered it. They remained there for several hours—in fact, until early in the morning. They drank and smoked together and it appears that, in the course of the night, Worrell, becoming overcome by the liquor he had consumed, went into the kitchen, which was directly off the main room of the Golf Club House, and went to sleep on the table. The evidence is to the effect that he did that several times during the night. The appellant and Dr. Irvine sat down by a table and talked together for some time. Dr. Irvine was suddenly overcome with liquor and lay down on a cozy corner. He began to shiver and Mrs. Fitz Randolph spread her coat over him, and later laid upon him a mattress from the hammock. This hammock was on the verandah, but the evidence was to the effect that every night the mattress was taken from the hammock and placed in the house before it was closed. When she left the Golf Club House, her coat was left behind and was found there the next day, together with a hat pin which she admitted was her property, and she and Irvine and Worrell motored back to her home in the early hours of the morning. They entered the house with her, and she there assisted the housekeeper to prepare a supper, and joined them in it. It was daylight when Dr. Irvine left, while Worrell remained for some time longer.

From this set of facts Crocket, J., concludes there is but one inference that can reasonably and justly be drawn, and that is an inference of adulterous intercourse with Dr. Irvine. As I said before, I cannot draw the same conclusion. I think that these circumstances are capable of other solution than that of the guilt of Mrs. Fitz Randolph and Dr. Irvine. It must be borne in mind that she had never met Irvine before, and that she did not go to the Golf Club House by appointment with him, that when she left her home she did not know where she was going, and was accompanied by both men. It appears from the evidence that these men had been drinking together previously, and I should

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judge from all the circumstances of the case, if not intoxicated, were in a fair way to become so when they started out from Mrs. Fitz Randolph's house that evening, and that after they reached the Golf Club House a few drinks would practically put them in that condition. Worrell was not called as a witness, and I believe is out of the province, though, it appears to me that if he was aware of the charge that was made against Mrs. Fitz Randolph, nothing should have prevented him from returning to Fredericton and offering himself as a witness, more especially in view of the fact that he was more directly responsible than anybody else for the unfortunate position in which she was placed.

It is extemely improbable that any woman except a common prostitute would commit the offence charged with a man whom she had only known for a few hours, with whom she had made no appointment, and would do so when in the adjoining room there was another man who the evidence shews came in and out of the room in which Mrs. Fitz Randolph and Irvine were, on several occasions; and the evidence to the effect that Irvine had to lie down and was covered by Mrs. Fitz Randolph with the mattress is not to my mind an impossible one in view of the condition in which he evidently was after partaking of the liquor which he had brought with him.

It was contended that Mrs. Fitz Randolph when she found herself in the situation as described, at the Golf Club House with the two men both more or less intoxicated, should have communicated by telephone and obtained some means of leaving the place. Had she done so public scandal would have been created, and the matter would have been the subject of discussion, and I can readily understand how any woman would, under such circumstances, shrink from taking such a course.

To conclude that the only inference to be drawn from the facts is an inference of adulterous intercourse is to find that Dr. Irvine and Mrs. Fitz Randolph were guilty of deliberate perjury, and, while it may be argued that, under such circumstances and in view of the fact that the offence was one of the most serious with which any married woman could be charged, they would probably deny it even if true, yet I cannot under all the circumstances of the case bring my mind to that conclusion, and cannot find, in the language of the court in *Allen* v. *Allen*, *supra*, that the circumstances are

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not capable of any other reasonable solution than that of her guilt. It seems to me that if adultery was committed on that occasion, there is quite as much reason for thinking it was committed with Worrell as with Dr. Irvine, in view of the fact that Worrell was the one with whom she agreed to go for a drive, and that she did not know that Dr. Irvine was to be of the party until after Mr. Worrell called for her, and that Worrell remained at her house for some time after Irvine had left there. I am not in any way attempting to extenuate the conduct of the appellant. It was certainly most indiscreet, not to use a stronger term, but I feel that, under the circumstances, a divorce should not be granted on this ground, and that the judge was in error in holding as he did.

Evidence was given with regard to the two other cases before referred to, viz., the *Prince Wililam Apartment* case and the *Waterloo Row House* case. In both cases, there were circumstances from which inferences could be drawn unfavourable to the appellant, inferences possibly stronger than those which could be drawn from the circumstances already enumerated in regard to the *Golf Club House* case. The judge, however, having found the appellant guilty upon the latter charge, did not deem it necessary to consider the evidence with respect to these two charges, and consequently made no finding upon them.

It would be open to this court, under the powers given it by the Judicature Act, O. 59, r. 8, to draw an inference of fact which might have been drawn by the court below, and to give any judgment and make any order which ought to have been made, but, in my opinion, and after full consultation with my brother judges, who heard the appeal, I have concluded that it is not desirable to do so. I think it is to be regretted that the Judge of the Court of Divorce and Matrimonial Causes did not deal with the two other charges and make findings thereon, as I believe the parties to the suit were entitled to such finding, and that they would have been of great importance to the court and of great assistance when the case was heard on appeal, and the members of the court would have had the advantage of hearing the conclusions and the reasons therefor of the judge who heard the case and had the opportunity of hearing the examination of the witnesses under oath. This was especially desirable in view of the conflict of evidence in both

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cases. This, however, was not done, and as the court is of the opinion that the finding of the trial judge in regard to the *Golf Club House* case was not warranted, and as there is no finding in regard to the other two cases of misconduct that are charged, I am of opinion that the judgment should be set aside and a new trial ordered with costs.

Judgment set aside; new trial ordered.

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NOVA SCOTIA STEEL & COAL Co. v. SYDNEY MINES.

Nova Scotia Supreme Court, Russell, Longley and Drysdale, JJ. April 27, 1918.

TAXES (§ III D—137)—*Assessment Act (R.S.N.S. 1900, c. 73)—Objections to valuation—Statement under oath—Assessors—Appeal—Assessment Act Court—Taxing Act—Construction—No appeal to County Court—Procedure.*]—Appeal by the defendant town from the judgment of Finlayson, Co.C.J., for District No. 7, allowing the appeal of the plaintiff company for the purpose of setting aside the finding of the Board of Appeal under s. 47 of the Assessment Act by which the Board proceeded of its own motion to deal with the company's assessment, increasing it from the amount fixed by the assessor, $466,340, to $1,810,795.

T. R. Robertson, K.C., for appellant.

J. McG. Stewart, and *D. A. Cameron*, K.C., for respondent.

The judgment of the court was delivered by

RUSSELL, J.:—The notice provided for in s. 23 (1) of the Assessment Act, c. 73 R.S.N.S. (1900), was served on the respondent company requiring them if they objected to the valuation put on their property by the assessors, to furnish a statement under oath of the actual value of their property. No statement was furnished within the time limited by the statute and in the notice. The statute enacts, s. 25, that if such statement is not furnished within 14 days by the manager or agent, the assessors shall proceed upon their own original valuation and such valuation shall then be binding "subject only to appeal under the provisions of this chapter."

The only appeal that I can find applicable to such a case is an appeal to the Assessment Appeal Court constituted of 3 members of the town council and the town solicitor. Such an appeal was taken on behalf of the town by the town clerk—I presume in his

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quality of a ratepayer of the town, in which capacity alone he would have any right to appeal. This appeal does not seem to have been dealt with by the Assessment Appeal Court, for what reason does not clearly appear. But the court, assuming that it had the power under s. 47 of the chapter to deal with the matter of the assessment of its own motion, added to the amount for which the property was assessed. I think that this was not a decision on the appeal and that in this case the power of the court to so deal with the assessment of its own motion has been excluded by the provision above quoted, making the valuation by the assessors binding subject only to appeal under the provisions of the chapter.

A taxing Act must be strictly construed in favour of the taxpayer, and it would seem to me a broad rather than a strict construction to hold that the Assessment Appeal Court could add to, as in this case it has nearly quadrupled, an assessment which the statute says is binding subject only to appeal.

It is contended that all the provisions in the statute providing for appeal must be held applicable and among them the section giving an appeal to the County Court. But that appeal I should think would apply only in the case where the Assessment Appeal Court had jurisdiction to act on its own motion, and if the court had no such jurisdiction in this case there can be no appeal to the County Court from its action. The proper remedy would be *certiorari*.

If, however, there was a right of appeal to the County Court I think the proper decision for that court to have given was that which it has given to the effect that the Assessment Appeal Court had no power to deal with the matter otherwise than by hearing the appeal of the town clerk, and that the case should have been remitted to the Assessment Appeal Court for the purpose of hearing the appeal. The order based on the decision of the Judge of the County Court annuls the assessment made by the Court of Appeal, which, I think, was thus far correct, but it seems to affirm finally the assessment made by the assessors. I think this was an error, and that the proper order for this court to make is one allowing the appeal from the County Court and remitting the case to the Assessment Appeal Court to be there heard on the town clerk's appeal.

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CANADA LAW BOOK Co. v. YULE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. July 15, 1918.

CONTRACTS (§ I D—46)—*Sale of goods—Innocent misrepresentation—Delivery—Delay—Breach of warranty.*]—Appeal from a judgment of Bigelow, J., in an action for goods sold and delivered. Reversed.

G. H. Barr, K.C., for appellant; *F. W. Turnbull*, for respondent.

The judgment of the court was delivered by

ELWOOD, J.A.:—The plaintiff's claim is for the balance due on a bill of exchange accepted by the defendant for the price of law books sold and delivered by the plaintiff to the defendant.

The defendant paid into court a certain sum which he claimed was the balance owing to the plaintiff over and above the price of the English Reports (reprint). The order for these latter reports was a written one, obtained from the defendant by plaintiff's agent, one Corlis. The order shews that the set of English Reports in question was a set that had been shipped to one F. M. O'Neil, of Medicine Hat, and they were apparently to be reshipped, and, in fact, were reshipped to the defendant. It was claimed in the statement of defence that the sale of these Reports to the defendant was induced by certain fraudulent representations alleged to have been made by the said Corlis.

The trial judge found that the said Corlis falsely represented to the defendant that the said O'Neil's name was not on the books in question, when, as a matter of fact, it was on. Judgment was given for the plaintiff for the sum admitted and paid into court by the defendant. From this judgment the plaintiff appeals.

There was no finding by the trial judge of fraud. The defendant wrote a letter to the plaintiff in May, 1915, in which he says that he would prefer to think that Mr. Corlis made the statements without being fully advised of the facts, and I think that the proper finding on the evidence would be that the statements were not made fraudulently, but were innocent misrepresentations. In fact, the appeal before us was argued on the basis of these representations having been made innocently.

The evidence shews that the books in question were received by the defendant in October, 1914; that he did not unpack them, but stored them, first in the Canada Building and then in another

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building; that during a part of that time he placed insurance upon them (I take it—from the evidence—in his own favour). He did not open the books until May, 1915, when he discovered, for the first time, that O'Neil's name was stamped on the back of them. He then wrote to the plaintiff repudiating any liability. In the meantime, however, and prior to the discovery that O'Neil's name was stamped on the books, the defendant had accepted bills of exchange for the price of the books. He made some payments thereon, and in March and April, 1915, had written to the plaintiff asking the plaintiff to take back these books, as he was financially unable to pay for them.

Under the above state of facts, it seems to me that the property in the books in question passed to the defendant, and it would, therefore, seem to me that, under s. 13 (*b*) of the Sale of Goods Act, c. 147 of the R.S.S. (1909), the misrepresentation made by Corlis could, at the most, give rise to a claim for breach of warranty and is not a ground for rejecting the goods.

I am, therefore, of the opinion that the trial judge was in error and that there should be judgment for the plaintiff against the defendant for the amount of the plaintiff's claim and costs, and the plaintiff should have the costs of this appeal.

Judgment for plaintiff.

MONTREAL ABATTOIRS Ltd. v. WILLIAM DAVIES, Ltd.

QUE.

C. R.

Quebec Court of Review, Fortin, Greenshields and Lamothe, JJ.
December 21 1917.

SALE (§ III—52)—*Of goods—Inspector's certificate—Delivery—Warranty as to quality—Burden of proof.*]—Action for the price of goods sold and delivered.

Monty & Duranleau, for plaintiff; *Cook & Magee*, for defendant.

The plea says, in substance, that the meat delivered was tainted and unfit for human consumption; that it was inspected by an authorised Dominion government inspector for the City of Toronto and condemned by him.

The Superior Court gave judgment in favour of plaintiff for the following reasons:—

Considering that it is proved that the meat mentioned in the first and last items of plaintiff's account was tainted, not fit for human consumption when delivered to defendant at the City of Montreal and was condemned by the

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government inspectors as such, and plaintiff is not entitled to recover the amounts of said items making a total of $146.32;

Considering that although plaintiff knew that the meat mentioned in plaintiff's account, items two and three, was to be shipped to Toronto by defendant, yet the delivery of it was to be made and was made at the City of Montreal;

Considering that said meat is proved to have been packed in barrels furnished by defendant, that it was sound when put into the barrels, was inspected by the government inspectors before it left plaintiff's premises, and was inspected again by a government inspector when received by defendants at defendant's places and certificates were issued establishing its soundness at both places, defendant's place being that of delivery;

Considering that the certificates given by the government inspectors of their inspection of said meat, at Montreal, at plaintiff and defendant's establishments, are by law *primâ facie* evidence of the soundness of said meat; (Meat and Canned Foods Act, 6-7 Edw. VII (1907) c. 27 s. 21, amended 9-10 Edw. VII (1910) c. 38 s. 11).

Considering that defendant gave the Grand Trunk Ry. Co., a declaration at the time of loading said meat on the cars of the company to the effect the said meat was in sound condition;

Considering that though defendants have established that said meat when inspected at Toronto was not fit for human consumption, the burden of proof is on them to establish that it was in that condition when delivered to them at their establishment at the City of Montreal, which they failed to do: the Court condemns defendants to pay plaintiff $1,001.94 with interest from December 15, 1914, and costs.

Judgment confirmed in review.

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