Dominion Law Reports

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CASES REPORTED

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TABLE OF ANNOTATIONS

(Alphabetically arranged)

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CASES REPORTED, VOL. XIX., PART 1.

FRASER v. COLUMBIA VALLEY LANDS.

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British Columbia Supreme Court, Macdonald, J. December 3, 1914.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT—SALE OF LOT BY PROPOSED PLAN—CONVEYANCE BY METES AND BOUNDS—EFFECT.

The fact that the agreement of sale refers to the land as a lot of a particular number according to a subdivision plan "to be registered" and that a deed with that description cannot be recorded until after the recording of the plan will not entitle the vendee to rescind on vendor's failure to record the plan, if the vendor offers a deed which can be recorded containing a description of the same land by metes and bounds.

[*Re Ryan and District Registrar*, 16 D.L.R. 259, 19 B.C.R. 165; *Springer* v. *Anderson*, 19 D.L.R. *post*, *Hatten* v. *Russell*, 38 Ch. D. 334, referred to.]

Statement

TRIAL of action to rescind an agreement for sale or, in the alternative, specific performance.

Judgment was given for specific performance or, in the alternative, payment back.

Bowser, Reid & Wallbridge, for plaintiff.

Affleck & MacInnes, for defendant.

Macdonald, J.

MACDONALD, J.:—Plaintiff on July 11, 1908, purchased a parcel of land from the Nakusp Fruit Lands Ltd. under an agreement for sale. The description of the property in the agreement of sale is as follows: Lot number one according to a plan to be registered of part of a subdivision of district Lot 7892, Kootenay District, containing 1,250 acres more or less. The whole price was $1,080. He made the down payment of $270. The Nakusp Fruit Lands Ltd. had purchased a large parcel of land from the defendant company and then subdivided it for the purpose of sale. Default having occurred, it released all its claims upon such property to the defendant company which assumed the benefits and obligations of any agreements for sale that had been entered into by the Nakusp Fruit Lands

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Ltd. Defendant company sought the benefit of the agreement for sale with the plaintiff, and in 1909 recognized him as a purchaser. The company pressed for payment and proposed to plaintiff that if interest were paid to extend time of payment of principal until the following year. The evidence of the plaintiff in this connection is supported by letters and by a receipt given by the defendant company, August 16, 1909, for $48.50, being interest to July, 1909. Plaintiff negotiated with the defendant for a reduction in price on account of insufficiency of first-class land, and on the strength of a letter received from the agent, F. A. Courier, who had made the sale, obtained a concession in price, so that only $560 remained to be paid in order to entitle the plaintiff to a conveyance. It was contended that this reduction in price was given not only in consideration of the deficiency in first-class land, but was also based upon the inability of the defendant company to give title at the time, and that it was agreed that the time should be extended for furnishing title. I accept the evidence of the plaintiff as to the sole ground for reduction being as stated by him. S. V. Robertson, secretary of defendant company, was called as a witness on behalf of the defendant, and he did not support the evidence in this respect given by Hugo Carstens, president of defendant company on his examination at Winnipeg. I am satisfied that the entire arrangement arrived at between the parties is outlined in the letter from Roberts to the plaintiff, dated May 5, 1910 (ex. 22). I quote this letter at length:—

Winnipeg, May 5th, 1910.

Henry S. Fraser, Esq.,
477 Spence Street,
Winnipeg.

Dear Sir,—In reference to conversation with you some time ago I have now obtained authority to make you the following proposition, if you will in writing accept the following within one week of this date, that is for the sum of five hundred and sixty dollars ($560) which includes principal, overdue interest and taxes on lot 1, block 7892, Whatshan Valley, we will deliver you clear title for the aforesaid lot. This is giving you a reduction of about three hundred dollars interest and principal, and considering the location we think that you are obtaining a snap.

Yours truly,
S. V. ROBERTS.

Plaintiff became aware that the defendant company could not execute a deed to the property according to the description of the agreement, but could convey by means of metes and bounds, but such mode of conveyance is not referred to in the letter. Subsequently, plaintiff came to Vancouver, B.C., and seems to have had the impression, according to his letter of July 10, 1911, to the president of the defendant company, that a deed for lot 1, block 7892, would be registered in the registry office and wrote enquiring as to whether this event had taken place and that he was ready to make payment. He states he did not receive any reply to this letter. His troubles then began and he retained Messrs. Wade, Whealler, McQuarrie & Martin to act for him in the matter. On July 21, 1911, defendant company, by letter of that date, stated that it would have the necessary papers drawn and forwarded without delay with reference to lot 1, block 7892. This undertaking was not carried out. In July, 1912, plaintiff employed Messrs. Haney & Hill, solicitors in Vancouver, to act for him, and, presumably, delivered to them all his papers in connection with the matter. They did not adhere to the provisions of the agreement for sale whereby the deed was to be prepared by the solicitors for defendant "at the expense of the purchaser" but prepared a conveyance themselves, following the description in the agreement for sale. This deed was enclosed to the defendant company on July 17, 1912, such solicitors stating that they were advised by the Land Registry Office that "the lot is registered in the company's name clear of all encumbrances" so the deed only required to be executed in order to close the matter. Defendant company acknowledged receipt of the deed on July 23, 1912, stating that the deed could not be executed until the return of its president when it would be forwarded at once. The deed was properly executed by the company, and with some slight change in the description, forwarded with draft attached. Plaintiff's solicitors having been placed in funds for that purpose retired the draft and then sought to register the conveyance. They were met with the difficulty that there was no certificate of title in the Land Registry Office, but, on this being overcome, they then found it impossible to register the conveyance on account of there being no plan

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registered, so that the description in the conveyance was defective. Correspondence then ensued and the company offered various excuses for the plan not being registered. The plaintiff was not, however, able to obtain registration of his conveyance. It does not seem to have occurred to his then solicitors to have sought a conveyance by metes and bounds, nor did the defendant company suggest such a course being pursued. There was a duty cast upon the defendant, after having received the purchase price, to take such steps as would enable the plaintiff to have his title registered, especially in view of the undertaking contained in the letter of May 5, 1910. Their solicitors had enquired on October 30, 1912, as to the registration of the plan and on November 8, 1912, the president wrote such solicitors, taking the ground that the solicitors for the plaintiff had accepted the conveyance and retired the draft for the amount due under the agreement for sale and presumed therefore that they could register such conveyance. He seemed satisfied to retain the purchase price and leave the plaintiff to worry about his title. The matter remained in abeyance until February 19th, 1913, when the defendant company enquired of its solicitors whether, in order to satisfy the demand of the plaintiff's solicitors, the lot could not be described by metes and bounds "as the company is not now able to decide on a plan, and would not want to register the old plan." Still, the company did not offer to give the plaintiff a conveyance in this manner, and having sold in the meantime to one Beaton, the property became encumbered with mechanics' liens. This was explained to the plaintiff in a letter of the defendant company dated January 6, 1914, in reply to his letters of December 8, 1913, and January 2, 1914. Plaintiff then engaged another firm of solicitors—Bowser, Reid & Wallbridge—and they wrote the defendant company on January 27, 1914, stating that the deed received by the plaintiff was useless as there was no plan registered, and they demanded payment of the money with interest, on the ground that defendant "had no title to the property" and the deed could not be registered. Defendant replied on February 16, stating that the company had a clear title to the property, and the plaintiff knew when he accepted transfer thereof that the plan had not been re-

gistered, and that it would now be necessary to have a new survey made which would be done during the spring, and that information would be given when the plan had been registered. This was not satisfactory, and on February 16, 1914, plaintiff's solicitors stated that in default of repayment of the money, suit would be entered to recover same. This action was then brought (1) for rescission of the agreement and return of the moneys paid, or (2) in the alternative, for specific performance. It appears that at the time when the conveyance was given, it could have described the property by metes and bounds and that a clear title could have thus vested in the plaintiff. Subsequently this could not have been accomplished until the mechanics' liens were removed; but at the trial such a conveyance was proposed though not formally tendered. Plaintiff refused to accept the conveyance, taking the ground that the property was of a speculative character, and it was too late now to force him to take title. Defendant, while setting up various grounds of a more or less technical nature in its statement of defence, did not make the offer as to giving the conveyance in the manner suggested at the trial. Plaintiff contended that the letters of his solicitors amounted to a rescission of the contract and that he was entitled to recover the moneys paid with interest, expenses and costs. It was argued that a conveyance by metes and bounds was not a compliance with the agreement for sale, and that a conveyance should be according to a registered plan. I cannot see any virtue in the description being thus confined. I assume that the plaintiff purchased the property in good faith as fruit lands, and if by any mode of conveyance he obtained title, he had accomplished the end desired. In *Laycock* v. *Fowler*, 15 W.L.R. 441, the agreement provided that if the plan could not be registered then the vendor should convey the actual land, describing it by metes and bounds and this seems to have been there suggested as a satisfactory solution to the difficulty. That case turned on the failure of the plaintiff to obtain title and not on the form of the conveyance. I think both parties herein agreed and understood as to the parcel of land intended to be sold, and reference to the plan might, as to any other document, be used, in case there had been any dispute, to determine the description

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or designation of such property. See *Ferguson* v. *Winsor*, 10 O.R. 13; reversed in 11 O.R. 88, but not on this point; also *Kenny* v. *Caldwell*, 21 A.R. (Ont.) 110, 24 Can. S.C.R. 699. As the piece of land in question was at the corner of the district lot, it could have easily been described, and there would have been the surveyor's stakes on the ground to assist in a proper description. As to the vendor not being confined to the specific description contained in an agreement for sale, *vide Springer* v. *Anderson*, 19 D.L.R. *post*.

Plaintiff contends that, under the circumstances, he was entitled to a rescission of the contract, either by the letters referred to demanding payment, or by commencement of this action. He relies on *Fortier* v. *Shirley*, 2 Man. L.R. 269; and *Gregory* v. *Ferrie*, 14 W.L.R. 219, but both these cases dealt with the inability of the vendor to give title and the extent of the notice demanding that such title be produced and do not relate to the form of conveyance. *Re Ryan and the District Registrar of Titles*, 19 B.C.R. 165, 16 D.L.R. 259, decides that where the plan of a subdivision has been rejected, the registrar is bound to register a conveyance of the parcel of land intended to be described according to such plan, if the conveyance describe the property by metes and bounds and has a sketch plan attached. This being the state of the law, in my opinion, if defendant, after being called upon to give a conveyance by metes and bounds, had refused to do so, then, in view of the time that had already elapsed, this would have amounted to a rescission of the contract and the plaintiff would be entitled to recover payment of the moneys. Plaintiff, however, took a different course and claimed that there was a want of title in the defendant, and for that reason the contract should be rescinded. I think the course indicated in *Hatten* v. *Russell*, 38 Ch.D. 334, should have been pursued, and that the plaintiff should have said to the defendant—You have received the purchase price and agreed to give a conveyance, and unless same be given within a reasonable time the contract is repudiated and action will be taken to recover the moneys paid.

Some sections of the Registry Act were referred to in the pleadings and argument, but abandoned. No reference was

made as to sec. 104 having any bearing upon the rights or liabilities of the parties.

It is further submitted that, in view of the time that had elapsed and the expense and trouble to which the plaintiff had been put, he is entitled to recover the purchase price. He certainly has suffered great inconvenience and been put to a great deal of trouble and expense. Defendant company has treated him in a casual manner, but his legal position was, I believe, as indicated. If I am right, that the defendant could compel the plaintiff to accept a conveyance by metes and bounds, then the difficulty in the conveyance drawn by the plaintiff's solicitors "was quite easy to remedy and it was not likely that any considerable time would be taken up in remedying it." While the plaintiff was thus, to an extent, in error, the defendant continued up to the time of trial in its total disregard of the plaintiff's rights and the duty was cast upon it of enabling the plaintiff to become a registered owner of the property. If it is desired to relieve itself from liability, it should have executed a conveyance with proper sketch plan attached and tendered it to the plaintiff. It would thus appear it was only by this action, brought to trial, that the defendant was forced to realize its obligation. If it should now deliver a proper conveyance it should still be liable for costs through its fault and neglect.

It should implement its offer, made through counsel at the trial, within a reasonable time. The defendant company is required on or before January 11, 1915, to execute and deliver to the plaintiff a conveyance capable of registration and free from all encumbrances. In default of such conveyance being so delivered, the plaintiff is entitled to recover the moneys paid together with interest and expenses. Plaintiff is entitled to his costs of action.

Judgment for specific performance or payment back.

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Alberta Supreme Court, Stuart, Beck, and Simmons, JJ. December 18, 1914.

1. APPEAL (§ VII M—657)—SUFFICIENCY OF FINDINGS—VERDICT NOT DISTURBED, WHEN—EMPLOYER'S LIABILITY ACTION.

A verdict denying the plaintiff's right of action against his employer founded on negligence, will not be set aside as perverse unless the evidence is such that only one conclusion can be drawn from the evidence and that no jury could properly find a verdict on it other than one for the plaintiff.

[*Paquin* v. *Beauclerk*, [1906] A.C. 148; *McPhee* v. *Esquimalt & N.R. Co.*, 16 D.L.R. 756, 49 Can. S.C.R. 43; *Toulmin* v *Millar*, 12 A.C. 746; *Skeate* v. *Slaters*, [1914] 2 K.B. 429; *Allcock* v. *Hall*, [1891] 1 Q.B. 444, and *Sydney Post Co.* v. *Kendall*, 43 Can. S.C.R. 461, referred to.]

Statement

APPEAL by plaintiff from the dismissal of the action.

The appeal was dismissed, BECK, J., dissenting.

L. T. Barclay, for the plaintiff.

Short, Cross, Biggar, Sherry & Field, for the defendant.

Stuart, J.

STUART, J.:—This is an appeal by the plaintiff in which he asks the Appellate Division to set aside a judgment entered by the trial Judge in favour of the defendant in consequence of an answer by the jury that the defendant had not been guilty of negligence, and in which he asks further, that judgment be now directed to be entered in his favour for the sum of $750, being the amount at which the jury assessed the damages suffered by him in consequence of the accident, or for a new trial.

No evidence was given at the trial on behalf of the defendant. It is suggested that the Appellate Division has power to do what is asked by the appellant by virtue of a provision of r. 326 which states that "the Court shall have power to draw inference of fact and to give any judgment and make any order which ought to have been made."

The effect of a similar British Columbia Rule was considered by the Supreme Court of Canada in *McPhee* v. *Esquimalt and Nanaimo R. Co.*, 49 Can. S.C.R. 43, 16 D.L.R. 756. In that case Mr. Justice Duff, at p. 762 said:—

By the law of British Columbia, the Court of Appeal in that province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence. The power given by O. 58, r. 4,

"to draw inferences of fact . . . and to make such further or other order as the case may require," enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial Judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given *for the defendant* if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously: *Paquin* v. *Beauclerk*, [1906] A.C. 148, at p. 161; and *Skeate* v. *Slaters*, 30 Times L.R. 290.

In *Paquin* v. *Beauclerk*, [1906] A.C. 148, Lord Loreburn, L.C., referring to the corresponding English Rule, said:—

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

It is to be observed, however, that in *Paquin* v. *Beauclerk*, *supra*, what had been done by the Court of Appeal was to enter a judgment for the defendant, and this was affirmed in the House of Lords by an equal division; while in *McPhee* v. *Esquimalt and Nanaimo R. Co.*, all that was done was to send the case back for a new trial.

In *Toulmin* v. *Millar*, 12 App. Cas. 746, the jury had found a verdict for the defendant. The Court of Appeal entered judgment for the plaintiff for a certain sum. In the House of Lords Lord Halsbury said:—

I only wish to add that if I entertained a different view of the facts I should be unable to concur with the course pursued by the Court of Appeal. It becomes unnecessary in the view which I take to pronounce any absolute judgment in the matter, but I doubt very much whether O. 18, r. 4, gives any such jurisdiction as the Court of Appeal claimed to exercise in finding a verdict for themselves and actually assessing damages for breach of a contract. As I think the judgment of the Court of Appeal was wrong upon the facts it is not absolutely necessary to determine that question.

In *Hamilton* v. *Johnson*, 5 Q.B.D. 263, the Court acted upon a different rule from that which is invoked here, and in any case the original judgment was for the plaintiff and all that the Court

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of Appeal did was to restore that judgment after it had been set aside by a Divisional Court.

Campbell v. *Cole*, 7 O.R. 127, was a similar case. It was decided under the same rule as *Hamilton* v. *Johnson*, *ubi supra*, and in any case all it did was to set aside a verdict for a plaintiff in an interpleader issue and direct judgment to be entered for the defendant. I have been unable to find any case, except *Toulmin* v. *Millar*, *supra*, in which, under such a rule as we have here, a Court of Appeal has undertaken to set aside a jury's verdict for the defendant and to enter one for the plaintiff.

There does come to my memory a British Columbia case in which I think it was done though I cannot now discover it, and moreover, I am under the impression that it was reversed at Ottawa. With regard to *Toulmin* v. *Millar*, *supra*, I cannot take it as of much weight as an authority in view of Lord Halsbury's criticism above quoted.

In *Paquin* v. *Beauclerk*, *supra*, from which I have quoted the remarks of Lord Loreburn, there was a disagreement by the jury and Lawrence, J., the trial Judge entered a judgment for the plaintiffs. The Court of Appeal merely reversed the decision and entered a verdict for the defendants, a result which was upheld on an equal division in the House of Lords. The words of Lord Loreburn therefore cannot be taken as an express authority for the proposition that, in the face of a jury's verdict for a defendant, a Court of Appeal may enter a verdict for the plaintiff.

In *Allcock* v. *Hall*, [1891] 1 Q.B. 444, all that was done was to set aside a verdict for a plaintiff and dismiss the action, that is, to enter a judgment for the defendant.

In *Skeate* v. *Slaters*, [1914] 2 K.B. 429, Phillimore, L.J., cites, at p. 445, what he believes to be all the cases decided upon the point, and, on examination of them, there does not appear to be any except *Toulmin* v. *Millar*, *supra*, in which the Court ever went so far as we are asked to go here. They all, with that exception present the case of setting aside a verdict for the plaintiff which is a very different matter. The case which I have just referred to contains the most recent and a very exhaustive discussion of the meaning of the rule. It was an action for dam-

ages brought by a customer at a restaurant against the proprietors for supplying him with unwholesome food whereby he had been made ill. At the conclusion of the plaintiff's evidence, Lawrence, J., refused to withdraw the case from the jury although he thought the evidence was very meagre. After the defendant had also adduced evidence, the Judge again refused to withdraw the case. The jury disagreed. Lawrence, J., then refused to enter judgment dismissing the action, and from this refusal the defendant appealed. The case therefore does not bring up the exact point now under consideration. Lord Reading C.J., in his judgment refers to *Toulmin* v. *Millar*, 12 App. Cas. 746; *Allcock* v. *Hall*, [1891] 1 Q.B. 444, and *Paquin* v. *Beauclerk*, [1906] A.C. 148, but after all he only concludes that the Court has power, and ought on a proper case, to enter judgment for a *defendant*. The judgment of Buckley, L.J., is also confined to the power to do that much as will be seen by his words at p. 439, where he says:—

> We are entitled upon the evidence as a whole to say whether the evidence is such as that twelve reasonable men could properly arrive at the conclusion that the plaintiff was entitled to a verdict and we are of opinion that they could not. The Court has, I think, full power to enter judgment for the defendants not because they find facts, for that is the province of the jury, but because they find that there are no facts sufficient to support a verdict in favour of the plaintiff. If in this case the jury had found a verdict for the plaintiff and the application had been for a new trial or for judgment the Court would certainly have had power if it thought right to enter judgment for the defendants.

And again in referring to *Toulmin* v. *Millar*, *supra*, he says:—

> That decision as to the jurisdiction of the Court was criticized by Lord Halsbury in the House of Lords, but his criticism was made upon the footing not that the Court of Appeal were saying as we are here asked to say, that the plaintiff failed, but that they were *giving an affirmative judgment* in the plaintiff's favour, thus, as he says, claiming to exercise a right to find a verdict themselves and assess damages. That criticism has no bearing upon the power of the Court to do that which is in question here, namely, not affirmatively to give any relief, but negatively to say that no case for relief has been made out.

These words express very clearly the seriousness of the step taken by the Court of Appeal in *Toulmin* v. *Millar*, 12 App. Cas. 746, and which we are asked to take here. It is true that

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there are expressions in the judgment of Phillimore, L.J., in the same case, for example at p. 446 which would appear to suggest a jurisdiction in a proper case to do what was done in *Toulmin* v. *Millar;* but after all the facts remain that *Toulmin* v. *Millar,* is the only case in which it has been done, at least in the English Courts, that the course adopted was criticised by Lord Halsbury and that the words of Lord Loreburn in *Paquin* v. *Beauclerk* so far as they touch the present point are *obiter.* Mr. Justice Duff in *McPhee* v. *Esquimalt and Nanaimo R. Co.,* 49 Can. S.C.R. 43, 16 D.L.R. 756, also confines his declaration of the Court's power under the rule to the case of entering a verdict *for a defendant.*

I do not think a decision of the English Court of Appeal is in any case binding on this Court, any expressions to the contrary by the Privy Council being really an exercise of a legislative, and not a judicial function. And where the decision has the criticism of Lord Halsbury I do not think we ought necessarily to follow it. I think the words of r. 326 should be particularly observed. The Court (meaning the Appellate Division) is given power to draw inferences of fact and to give any *judgment* and make any order *which ought to have been made.*

Now, surely those words mean, "which ought to have been made *by the Judge below.*" A jury does not give a "judgment," neither does it make an "order." A jury answers questions directed to it or renders a general "verdict." That the word "judgment" in the rule does not include "verdict" is clear from a consideration of the terms of r. 321 which says that "notice of appeal shall be given within 20 days—in the case of a finding or verdict after the judgment or order *founded thereon* has been signed and entered or issued." Obviously there is intended a distinction between the verdict of a jury and the judgment founded thereon. The final words of the sentence in r. 326, viz.: "and to make such further or other order as the case may require," do not advance the matter at all in my opinion, because they are clearly only auxiliary to the previous phrases. I can therefore see nothing in the rule which gives the Appellate Division power to place itself in the place of the jury itself, give a verdict, and enter judgment thereon.

The old-time common law jurisdiction to enter a judgment for the defendant *for lack of any evidence at all* is a different matter. The Court in such a case merely says that there is no evidence upon which a jury can reasonably act at all, but what is suggested now is that the Court shall say that there *is* evidence, that the jury must take a certain view of that evidence or otherwise we shall ourselves reject that view, place ourselves in the jury's place, give a verdict and enter judgment thereon. I am unable to conclude that any such power is in any case intended by the rule. An ample meaning may be given to it without going that far. If the verdict of a jury was intended to be included, then there was no reason why it could not have been mentioned separately and distinctly as was done in r. 321. Again in r. 337 we find a full use of all necessary words. It speaks of "a judgment, order, decision, finding or verdict appealed from," when it was thought right to use other words than "judgment" or "order" it was apparently easy to do so. And with regard to r. 337, of course, a "finding," "decision," or "verdict" may be "appealed from" and may be set aside, but that does not necessarily involve the substitution of another finding or verdict in its place for a new trial may be granted under r. 328. If any such a grave increase in jurisdiction had been intended, I think, clear and express words should in any case have been used. If the jurisdiction exists, then I fear that to most minds it will often mean little else than the right to accept a jury's verdict when it pleases us and to give one ourselves if it does not.

I think, therefore, that the most we could do in the present case is to act under r. 328, and give a new trial. That, I think, is the extreme limit to which we have any power to go. In *Sydney Post Publishing Co.* v. *Kendall*, 43 Can. S.C.R. 461, the Supreme Court of Canada upheld a decision of the Supreme Court of Nova Scotia by which a verdict for a defendant in a libel action was set aside and a new trial ordered. The Court seems to have been unanimous in concluding that, where it is clearly impossible that a jury of reasonable men could fairly reach any other conclusion than that the article was libellous, a Court of appeal may set aside the verdict and (not give a ver-

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dict for the plaintiff for that was not suggested, perhaps, because there was no such rule in Nova Scotia as we have here) direct a new trial. The disagreement in the Supreme Court was only upon the point whether a jury of reasonable men could fairly conclude that the article was not libellous. Davies, and Duff, JJ., thought they could, and that the verdict should not have been disturbed. Girouard, Idington, and Anglin, JJ., thought they could not, and that the order for a new trial should be upheld. The case is a good example of how difficult a task the Court undertakes when it ventures to say that no jury of reasonable men could fairly find a verdict for the defendant. In many cases, and the present is one of them, the task becomes more hazardous because, while in that case, it was only a question of the meaning of an admitted publication we have here the possibility that the jury may really have disbelieved some things testified by the plaintiff's witnesses.

There is no doubt, however, that we could, in view of the decision in the last case I cite, order a new trial if we were prepared to say that, upon the evidence, no reasonable jury could have done anything else than find the defendant guilty of negligence. But, for myself, I am not prepared to take that view of the evidence. What amounts to negligence or absence of reasonable care is a question which a jury of six ordinary everyday men are peculiarly qualified to decide, because it amounts to the fixing of a standard for the ordinary reasonably prudent man. I find myself unable to conclude that the jury could not reasonably have come to the conclusion at which they arrived. It is to be observed that the plaintiff was suggested to the defendant as a blast man by one of the plaintiff's co-workers, one who was in fact a kind of leader of the gang. It is also to be observed that there was a noticeable difference in the colour of the dry fuses as compared with the wet. The latter were white, the former yellow. Without saying that I should have come to the same conclusion myself, I cannot bring myself to decide that the jury were unreasonable, if, for example, they took the view that the defendant properly assumed that the plaintiff, being suggested to him as a blastman by the plaintiff's leader, was an experienced man who would know all about fuses, about

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the possibility of these being sometimes dry and sometimes wet, and would be able to understand the difference. There was admittedly no defect in the fuse supplied. The negligence suggested lies solely in failing to point out to the plaintiff the difference between the two kinds. But in view of the difference in colour, and in view of the way the plaintiff was selected for the work, I think a jury might not unreasonably conclude that the defendant was entitled to assume a sufficient knowledge and experience on the part of the plaintiff to enable him and to cause him to discover any differences in the time to be allowed for ignition which might exist between the fuses supplied at one time and those supplied at another. I say that while I might not take that view myself yet I cannot say that six reasonable men could not possibly take such a view. This being a view which they may have taken I think that there should not even be a new trial. No objection was taken to the trial Judge's charge except upon one point, with respect to which the jury found in the plaintiff's favour, viz.: that the plaintiff was an employee of the defendant. I think there is, to say the least, as much reason for saying the jury were unreasonable in this finding as in the answer as to the defendant's negligence although in the actual situation it was not perhaps very material.

I, therefore, think the appeal should be dismissed with costs.

It was practically intimated upon the argument that the cases already decided in this Court unfortunately prevent any possibility of the plaintiff having recourse to the Workmen's Compensation Act, owing to the delay in bringing the action.

Beck, J. (dissenting)

BECK, J.:—This is an appeal from the judgment of my brother Scott, entered upon a special verdict given in answer to questions, and from the verdict and certain rulings of the learned Judge. No evidence was given on the part of the defendants and there seems to be no pretence that the plaintiff and his witnesses were not honest in giving their evidence or that there is anything unreasonable in their story. Their evidence, therefore, must be accepted, and it was the duty of the jury to consider, with reference to the questions in issue, what inference of fact ought to be drawn from it. Doubtless they

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were not *bound* to draw any inference which was probable or, I suppose even, highly probable, but only such inferences as can be called either the necessary inferences or the inferences which a jury of reasonably minded men could not avoid drawing.

The facts proved were briefly these:—

The defendant Parsons was employed among others to do some work on the construction of a railway grade which involved the blasting of a large quantity of rock. Parsons asked the leader of the gang of men of whom the plaintiff was one, if there was a good blastman among them; the leader designated the plaintiff. Parsons consequently put him at that kind of work. He commenced work on May 17, 1912, and continued until the time of the accident, which is the subject-matter of the action, namely, July 20, 1912. Parsons was to furnish all the materials and implements necessary for the work of blasting and in fact did so. Continuously from the commencement of the work until immediately before the accident, the fuses supplied by Parsons to the plaintiff were damp, and consequently were slow in effecting an explosion; the fuses supplied for use just preceding the accident were dry and consequently effected an explosion more quickly. The plaintiff was not informed of the difference, and taking no more care than formerly, was consequently injured.

These facts are quite clear upon the evidence, and I see no evidence of contributory negligence on the part of the plaintiff, upon which, moreover, the jury were not directed, and made no finding. In my opinion, under the circumstances stated, it was the duty of Parsons to warn the workmen engaged in blasting, of the difference in the new supply of fuses. It does not expressly appear that Parsons was aware that there was a difference in the character or condition of the fuses supplied just prior to the accident from those formerly supplied, but this would not relieve him. He, as an employer, was bound to take all reasonable precautions for his workmen's safety; and was responsible for personal injuries occasioned by a defective system of using appliances or material; and it is not necessary to shew that he had knowledge that the system or the appliances or material were defective; he was bound, at his peril, to make proper provision in these respects: *Webster* v. *Foley*, 21 Can. S.C.R. 580.

The jury found that "there was no direct negligence on the part of the defendant Parsons." Then the foreman said: "the word 'direct' possibly should have been—may have been left out; we meant to convey they were not responsible." Then the jurors on being asked if they concurred with the statement of the foreman, said that they did.

In my opinion, the answer of the jury was against the evidence. Under such circumstances it seems clear to me that, instead of directing a new trial this Court has power to direct judgment for the plaintiff, notwithstanding the finding of the jury. In my opinion this power appears in r. 326 and the decisions under the corresponding English and Ontario Rules, which are referred to at length in the opinion of my brother Stuart. It is to be noted that the jury have assessed the damages. I would therefore allow the appeal with costs and direct judgment to be entered for the plaintiff for the amount of damages found by the jury, namely, $750.

SIMMONS, J.:—The plaintiff brought an action against the defendants for an accident arising out of alleged negligence of the defendants, their servants or employees. The plaintiff says he received injuries while in the employ of the defendants and in charge of blasting operations on the work which was then carried on by the defendants in the construction of a railway. The trial Judge submitted to the jury one question only for their consideration in regard to negligence, namely, whether there was negligence in regard to a certain fuse which the defendant supplied to the plaintiff.

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The defendants supplied the plaintiff for some time with fuse which had been subjected to moisture and therefore did not burn as rapidly as a dry fuse. Subsequently they supplied the plaintiff with a dry fuse which burned more rapidly and as a result a shot which the plaintiff was setting off ignited sooner than the plaintiff anticipated, and the explosion injured the plaintiff.

Questions were submitted to the jury, the first one being: "Were the plaintiff's injuries caused by negligence on the part of the defendant Parsons?" and the second question: "If so, in what respect was he negligent"?

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The jury answered the first question as follows: "No, we find there was no direct negligence on the part of the defendant Parsons."

And they answered "no" to the second question.

Afterwards the foreman of the jury, in reply to a question by the Court, said, "the word *direct* possibly should have been, may have been left out. We meant to convey they were not responsible,"—"that Parsons was not responsible for negligence."

Counsel for the appellant argues that this verdict is perverse, and that only one conclusion could be arrived at upon the evidence by a jury, namely, that the defendant was negligent. "If the evidence is such that only one conclusion can be drawn, the Court may enter judgment in cases where no jury could properly find a different verdict," *per* Lord Loreburn, in *Paquin* v. *Beauclerk*, [1906] A.C. 148.

It is quite apparent from the case that there are circumstances from which a jury would be properly entitled to draw inferences, and these circumstances are the relations between the parties in regard to the employment, involving questions of skill—questions as to what extent the defendants relied upon the plaintiff's knowledge and skill as a blast man in charge of a particular kind of work; and to what extent the plaintiff should, under the circumstances, rely upon the defendants' care in the supply of material rather than upon his own judgment as a workman, skilled in the use of explosive materials which are in their nature dangerous.

It is admitted that the fuse which it is alleged was the cause of the accident was of a different colour from that used on previous occasions.

The legal relation arising out of a duty which the employer owed to the employee to use reasonable care, under the circumstances, must be determined upon the facts which involve answers to questions above suggested. And this Court cannot, therefore, under the circumstances, say that only one conclusion can be reached.

I therefore dismiss the appeal with costs.

Appeal dismissed.

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Alberta Supreme Court, Scott, Beck, Stuart and Simmons, JJ.
December 18, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS—FILING IN LAND TITLES OFFICE—PRIORITY—MORTGAGE BASING CAVEAT—EFFECT OF NON-REGISTRATION OF.

A caveat filed in respect of a registrable mortgage, which latter and the transfer on which the mortgagor's title depended, the registrar declined to receive without production of the duplicate certificate of title is by virtue of sec. 97 of the Land Titles Act, Alta., as effective for the period of the caveat as if the mortgage itself had been registered; and, from the time of filing such caveat, it prevents the acquisition or the bettering or increasing of any interest in the land adverse to or in derogation of the claim of the caveator as it then existed.

[*Stephens* v. *Bannan*, 14 D.L.R. 333, and *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, applied; and see Annotation on Caveatable Interests, 14 D.L.R. 344.]

2. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS—UNREGISTERED INSTRUMENT BASING CAVEAT—SUBSTITUTION OF INSTRUMENT—RIGHTS OF INTERMEDIATE REGISTRATIONS.

The discretion allowed to the registrar under sec. 97 of the Land Titles Act, Alta., to allow the withdrawal of a caveat and the substitution therefor of the registrable instrument on which it was based was not intended as a mode of disposing of substantial rights where there are intermediate registrations; the registrar will properly decline to make the substitution where questions of the validity of the caveat may be raised by persons who have subsequently entered claims on the register.

3. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS—SUBSEQUENT REGISTRATION OF MORTGAGE BASING CAVEAT—MERGER—EFFECT ON INTERMEDIATE REGISTRATIONS.

A merger does not take effect against the intention of the parties, and where it is plain that the subsequent registration of the mortgage referred to in a caveat based on same was with the intention of retaining the priority secured by the caveat, the mortgage will not merge the caveat so as to vest a better title in the mortgagee under an intermediate mortgage than he had when he registered subject to such caveat.

Statement

STATED case for a declaration of the priority rights under certain mortgages, of which one was based on a caveat duly filed, and involving the effectiveness of the caveat.

Order sustaining the caveat, STUART, J., dissenting.

E. B. Edwards, K.C., for the Bank of Hochelaga.

H. R. Milner, for the Royal Bank of Canada.

Scott, J.

SCOTT, J., concurred with BECK, J.

Beck, J.

BECK, J.:—This is a stated case. Schwalbe gave a mortgage to Muller, dated December 7, 1910. On this mortgage, proceedings were taken resulting in a sale. There is a surplus in Court

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after satisfying the plaintiff's claim, and the question for decision is which of the two banks is entitled to it. The dealings with the title subsequent to the mortgage were as follows:—

1910. December 14. Schwalbe transferred the land to Gustave Gardel, to whom a certificate of title was issued.

1911. January 13. Gustave Gardel deposited his duplicate certificate of title with the Royal Bank of Canada as security for past due advances.

May 13. Gustave Gardel executed a transfer to George Gardel.

July 17. George Gardel executed a mortgage to La Banque d'Hochelaga as security for past advances. This was done with the knowledge and at the request of Gustave Gardel and the bank had in its possession the transfer of May 13 from Gustave Gardel to George Gardel.

July 19. La Banque d'Hochelaga, having attempted to register the transfer from Gustave Gardel to George Gardel—(which was refused owing to the duplicate certificate of title to Gustave Gardel not being in the Land Titles Office nor produced)—and the bank's mortgage, filed a caveat grounded on its mortgage of July 17.

July 27. Gustave Gardel executed a mortgage to the Royal Bank securing the amount, to secure which he had deposited with the bank his certificate of title on January 13.

August 1. The mortgage, Gustave Gardel to the Royal Bank of Canada, was registered.

August 22. The transfer from Gustave Gardel to George Gardel was registered and certificate of title to George Gardel issued.

September 9. La Banque d'Hochelaga registered its mortgage requesting the registrar to register it as of the date of the bank's caveat of July 17, under sec. 97 of the Land Titles Act. This the registrar declined to do.

Sec. 71 of the Land Titles Act provides that

In every case where land is subject to a mortgage or encumbrance signed by the owner, the duplicate certificate of title shall be deposited with the registrar, who shall retain the same on behalf of all persons interested in the land mentioned in such certificate.

No explanation was given why, notwithstanding that the land was subject to the mortgage of December 14th, 1910, Gustave Gardel's duplicate certificate of title had not been retained by the registrar.

Sec. 97 of the Land Titles Act is as follows:—

97. Registration by way of caveat, whether by the registrar or by any caveator, shall have the same effect as to priority as the registration of any instrument under this Act and the registrar may in his discretion allow the withdrawal of such caveat at any time and the registration in lieu thereof of the instrument under which the person on whose behalf such caveat was lodged claims his title or interest, provided such instrument is an instrument that may be registered under this Act; and if the withdrawal of such caveat and the registration of such instrument is simul-

taneous, the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat.

Sec. 87 says:—

So long as any caveat remains in force the registrar shall not register an instrument purporting to affect the land, mortgage or incumbrance in respect to which such caveat is lodged, unless such instrument be expressed to be subject to the claim of the caveator.

In my opinion, the caveat filed by La Banque d'Hochelaga was, by virtue of sec. 97, as effective as if the memorandum of mortgage which the bank held had then been registered. I would put this on the grounds stated by me in *Stephens* v. *Bannan*, 14 D.L.R. 333, where I distinguish *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551; but the distinction is of no consequence in the present case for the case in the Supreme Court of Canada decides that

a caveat when properly lodged prevents the acquisition or *the bettering or increasing* of any interest in the land legal or equitable, adverse to or in derogation of the claim of the caveator—at all events, as it exists at the time when the caveat is lodged (*per* Anglin, J., giving the opinion of the majority of the Court) [1 D.L.R. 606].

At the time of the filing of the caveat, La Banque d'Hochelaga had a registrable mortgage and a transfer to its mortgagor and could and would have registered both, if the duplicate certificate of title to the mortgagor's transferor had been in the Land Titles Office which was, owing to the land being subject to a prior mortgage, its proper place of custody. The Royal Bank's right at that time depended solely upon the deposit by way of equitable mortgage of the duplicate certificate of title in favour of Gustave Gardel, bearing on its face a memorandum of the Muller mortgage and thus shewing, to one knowing the provisions of the Land Titles Act that *primâ facie* (see sec. 20 (2)) its proper place of custody was the Land Titles Office and that therefore Gustave Gardel had *primâ facie* no right to its custody. The fact that La Banque d'Hochelaga registered its mortgage, notwithstanding that the registrar refused to register it as of the date of the filing of the caveat does not, in my opinion, prejudice the bank's position. The matter is expressly put in the discretion of the registrar. I should fancy he would seldom, if ever, exercise this power, where the register shewed subsequent dealings with respect to the land, but that otherwise he

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would do so; in the latter case no complications could arise, for the instrument would take the place of the caveat which thenceforth would be of no importance; in the former, questions of the validity of the caveat might well be raised by persons subsequently interested. It cannot have been the intention that the substantial rights of parties should depend upon the mere discretion of the registrar. No doubt they may depend upon the intention of the parties; but there was in this case clearly no intention on the part of La Banque d'Hochelaga in registering its mortgage, to abandon any benefit derived from the caveat. No doubt, too, in some cases the law worked a merger, even against the intention of the parties, but in equity—and therefore now in law—a merger does not take effect against the intention of the parties unless, perhaps, where new rights accepted on the faith of an apparent merger have intervened. See generally, Pomeroy's Eq. Jur. 2nd ed., secs. 786 *et seq.* tit. "Concerning merger" and sec. 719 and notes, tit. "Concerning priorities." I am quite satisfied, however, that there was no rule of law which would work a merger in such a case as this. At all events all the circumstances are clearly to my mind against a merger.

The caveat was notice; the mortgage to La Banque d'Hochelaga was the foundation for the bank's caveat which was obviously filed for the purpose of securing its priority, the mortgage to the Royal Bank executed and registered after the filing of the caveat was, by virtue of sec. 87 of the Land Titles Act, subject to the claim of the caveator; the intention of La Banque d'Hochelaga in registering its mortgage was to retain the priority secured by the caveat, and there was nothing to lead anyone to suppose otherwise.

In my opinion, it is quite clear that La Banque d'Hochelaga is entitled to the money in question, and there should be an order for payment out accordingly, and La Banque d'Hochelaga should have its costs against the Royal Bank of Canada.

Stuart, J. (dissenting)

STUART, J. (dissenting):—Chronologically the facts, so far as revealed, seem to be as follows: 1. Schwalbe mortgaged to Muller. 2. Schwalbe transferred to Gustave Gardel who became registered owner subject to the mortgage. 3. On January 13,

1911, Gustave Gardel deposited the duplicate certificate of title with the Royal Bank by way of equitable mortgage as security for previous advances made to him. I say "previous advances" because I understood that to be admitted though the case does not so state. 4. On May 13, 1911, Gustave Gardel executed a transfer to George Gardel which was not then registered. 5. On July 17, 1911, George Gardel, with knowledge of Gustave and at his request executed a mortgage to La Banque d'Hochelaga to secure advances theretofore made by the bank to Gustave Gardel. 6. On July 18, 1911, the solicitor for La Banque d'Hochelaga tried to register the transfer to George Gardel and the mortgage, but owing to the certificate of title not being in the Land Titles Office, this could not be done and a caveat was filed in respect of the mortgage on July 19, 1911. 7. Gustave Gardel on July 27, 1911, executed a mortgage in the regular form to the Royal Bank to secure its advances. 8. On August 1, 1911, this mortgage was registered in the Land Titles Office. 9. On August 22, 1911, the transfer to George Gardel was registered. 10. On September 9, 1911, the mortgage to Banque d'Hochelaga was registered and registrar asked to register it as of date of the caveat, but he merely registered it as of September 9, subject to caveat. 11. The property was sold under the Muller mortgage by an order made in the present action, and after the satisfaction of Muller's claim, a balance remained in Court. The above facts are stated as a special case in order to obtain the opinion of the Court as to which of the two banks is entitled to the money in Court.

I was at first inclined to the view that the Banque d'Hochelaga had a right to complain that the certificate of title was not in the Land Titles Office, but upon consideration, I do not see how such a complaint could be well founded. That bank had no more right to complain than the person through whom it claimed, which person, though formally George Gardel, was in reality Gustave Gardel. The latter was the bank's debtor and it was practically from him that the bank obtained security. The request by Gustave to George to give the mortgage must have been by arrangement with the bank. If, then, Gustave could have no right to complain that the certificate was not in the

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Land Titles Office, what right had the bank, which claims through him, to make any such complaint unless it were shewn, which it is not, that it had altered its position in some way owing to reliance upon the certificate being where the statute says it should be. Gustave Gardel, himself, was responsible for the certificate not being forthcoming because he had previously deposited it with the Royal Bank. No doubt it was very disappointing to the solicitor of the Banque d'Hochelaga not to find the certificate of title in the Land Titles Office, but he could have discovered that fact from Gustave Gardel, from whom he was getting the mortgage, just as well. And if Gustave Gardel had said "there is a transfer to George and a mortgage from George to you, but I have not the certificate of title, the Royal Bank has it, I pledged it to that bank," would the Banque d'Hochelaga have made a complaint against the Land Titles Office? How could it have been prejudiced except by the act of the very person from whom it was securing title? The Banque d'Hochelaga simply got all it could get from Gustave Gardel and if it wanted more it should have insisted on his securing the certificate of title from the people with whom he had deposited it. I am therefore unable to see how, when the security was merely for past advances, the Banque d'Hochelaga can claim any higher rights than Gustave Gardel himself in so far as the absence of the certificate of title from its proper place in the Land Titles Office is concerned.

This brings up again squarely the question discussed in *Stephens* v. *Bannan and Gray*, 14 D.L.R. 333. I have heard nothing in the argument in this case which induces me to alter the opinion I there ventured to express as to the effect of the filing of a caveat. The present case is, of course, distinguishable on the one important point that the instrument upon which the caveat is based is a registrable instrument, whereas in *Stephens* v. *Bannan and Gray*, it was based upon a document which could not be registered under the Act.

There is no doubt that the registration of the caveat prevented the Royal Bank at least from thereafter acquiring any further rights either by obtaining a mortgage executed in the local form or by registering it when obtained.

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The real point is whether, the equities of the two banks being equal except as regards time, the Banque d'Hochelaga, being second in point of time, secured a prior right by registering a caveat. It is common ground, I think, that by the transfer from Gustave Gardel and the mortgage from the latter to the Banque d'Hochelaga, that bank secured only an equitable interest. No legal estate passed by the transfer until it was registered. Also, the Royal Bank secured by the mere deposit of the certificate of title only, an equitable interest and one of no higher effect than that created by the transfer and the mortgage. It is also common ground that the equitable interest of the Royal Bank being prior in time ought to prevail unless the filing of the caveat created a new and higher right in the Banque d'Hochelaga.

In my humble opinion, the words "registration by *way* of *caveat*" at the beginning of sec. 97 in the Land Titles Act cannot be interpreted as meaning anything more than "registration of a caveat." If, as applicable to the present case, they are to be interpreted as meaning "registration of a mortgage by means of filing a caveat based thereon" then what, one may ask, becomes of the provisions of the Act which render it necessary to produce the certificate of title before a mortgage can be registered at all? If he can keep this mortgage in his pocket and merely file a caveat which will give him all the advantages of filing his mortgage, not only with respect to subsequent transactions, but with regard to all prior unregistered instruments or securities, then it simply amounts to this, that the registration of a caveat based on a mortgage is equivalent to registration of the mortgage, and the latter ceremony is entirely unnecessary. Neither certificate nor mortgage need be produced and yet a caveat based on the latter is to be given all the legal effect, even as regards prior rights, of the registration of the mortgage although sec. 41 of the Act says that "no instrument until registered shall have the effect of passing any estate or interest, etc."

I do not overlook the provisions of section 97 with respect to the discretion vested in the registrar to permit a withdrawal of a caveat and the registration in lieu thereof, of the instrument upon which the caveat is based. The registrar in his dis-

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cretion refused to permit that course in the present case. And while the concluding words of the section seem to suggest that it was in the mind of the legislature that the substituted instrument should, when thus substituted, give as extensive rights to the person claiming under it as if it had been registered instead of the caveat in the first instance, still, that is not what it says. It merely says that it shall have the same effect with respect to priority of rights as the caveat had for which it is substituted. I do not know that I can usefully add anything to what I said in *Stephens* v. *Bannan and Gray, supra*. I can only repeat my view that a caveat is a warning, a notice and a prohibition, that it creates no new rights but prevents new ones arising in others thereafter, that it is intended strictly to preserve the *status quo ante*, to keep things exactly as they are and no more. The enactment as to priority can be applied quite effectively to a giving of a notice or a warning or a prohibition, and I think that is all that is intended. This being so, I think that, as the Royal Bank were prior in time, the equitable mortgage by deposit of title deeds ought to prevail. They can, of course, for the reason I have given claim nothing by virtue of their registered mortgage.

As to *McKillop and Benjafield* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, it seems to me to be of little assistance, because the person whose equitable interest was *prior in time* was there declared to have secured, by the filing of a caveat, a superior right over legal interests acquired after that filing. He had, by virtue of the maxim, always had a prior right over the equitable interest acquired after his own and before the filing of his caveat.

I think judgment should go for the Royal Bank.

Simmons, J.

SIMMONS, J.:—This is a stated case which came before the Appellate Division wherein the question is raised whether the Royal Bank of Canada who held an equitable mortgage by way of deposit of title deeds, or a subsequent mortgagee, who registered a caveat founded upon a mortgage executed in conformity with the Act took priority.

The lands in question were subject to a mortgage made by

the former registered owner Frederick Schwalbe to William Muller, the plaintiff, dated December 7, 1910, and were sold under this mortgage.

Schwalbe transferred to Gustave Gardel subject to this mortgage, and Gustave Gardel likewise transferred to George Gardel subject to this mortgage, which transfer is dated May 13, 1911.

On January 13, 1911, Gustave Gardel deposited the duplicate certificate of title for the land with the Royal Bank of Canada by way of equitable security. On July 17, 1911, George Gardel, at the request of Gustave Gardel, executed a mortgage to the Banque d'Hochelaga to secure advances heretofore made by the bank to Gustave Gardel. On July 18, 1911, the solicitor for the Banque d'Hochelaga presented to the registrar of Land Titles, for registration, the two transfers and the mortgage to the bank. The registrar refused to register these instruments because the duplicate certificate of title was not in the registry office. The Banque d'Hochelaga filed a caveat under its mortgage on July 19, 1911.

On July 27, 1911, Gustave Gardel executed a mortgage to the Royal Bank to secure an indebtedness of $1,229.40, which was registered on August, 1911, as No. 6442 A. E., subject to the caveat of the Banque d'Hochelaga of July 19, 1911.

It appears that the Royal Bank of Canada brought into the registry office the duplicate certificate of title when they registered their mortgage. The Banque d'Hochelaga then brought in their transfers from Gustave Gardel and George Gardel and registered them on August 22, 1911.

On September 9, 1911, the Banque d'Hochelaga applied to the registrar to have their mortgage registered as of the date of the caveat pursuant to sec. 97 of the Real Property Act. The registrar registered it, however, as of the date of September 9, 1911, and it was expressed to be subject to this caveat of July 19, 1911.

The claim of the Banque d'Hochelaga rests upon the effect which should be given to sec. 97 of the Real Property Act. The section is as follows:—

> Registration by way of caveat, whether by the registrar or by any caveator, shall have the same effect as to priority as the registration of

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any instrument under this Act, and the registrar may in his discretion allow the withdrawal of such caveat at any time and the registration in lieu thereof of the instrument under which the person on whose behalf such caveat was lodged claims his title or interest, provided such instrument is an instrument that may be registered under this Act; and if the withdrawal of such caveat and the registration of such instrument is simultaneous, the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat.

A consideration of relative claims to priority outside of this section may be of some assistance in giving to this sec. 97 its proper effect.

The general scheme of the Real Property Act in common with other Torrens statutes is, to recognize only one legal estate or interest in land, and that the person who appears by the register to be the proprietor of such estate should have full and unfettered rights of ownership and alienation. Hogg, Australian Torrens System 1028.

The Act does not, however, prevent the creation of equitable interests, but the effect of registration on behalf of a *bonâ fide* holder for value in the absence of fraud may entirely defeat what would otherwise be a claim which would be enforceable under the equitable jurisdiction of the Courts.

The owner of the registered estate or interest is afforded special facilities for disposing of the property to a third party even though he may have already created a beneficial interest in a second party which said beneficial interest in so far as the claim to the property is concerned is peculiarly liable to be defeated if the registered title passes to an innocent third party.

The caveat was intended as a species of injunction to prevent the defeat of such beneficial interests and prevent any dealing with the property subsequent to the filing of the caveat which would prejudice the beneficial interest. Hogg on Australian Torrens, 1028.

To obtain this purpose a caveat did not require further effect than to act as a prohibition against the acquisition of any estate or interest in the land in derogation of the interest alleged as ground of the caveat whatever that interest might be when determined by a Court of equity.

In New South Wales, Queensland, and Tasmania Torrens Acts, no instrument could be entered on the register until the

caveat was removed; in New Zealand, no entry is to be made in the register affecting the estate or interest. In South Australia the registrar shall not register any dealing with the land contrary to the requirements of the caveat. In Victoria and Western Australia, the provisions are similar to our Act if sec. 97 is omitted from our Act.

The Dominion Land Titles Act (1894) provided for the filing of a caveat by any one claiming to be interested under any will, settlement or trust deed, etc. . . . or otherwise howsoever in any land, to the effect that no disposition shall be made of the land unless the same be subject to the claim of the caveator.

Sub-sec. 1 of 99 of 1894 was repealed and substituted by sec. 14 of ch. 32, 1898, and this section was carried into our Act as sec. 84 with the words "mortgage or encumbrance" added after "or otherwise in any land."

The Saskatchewan Act continued the above sections with some addition and emendations which are, however, of no importance to the present issue. Sec. 97 of our Act had no counterpart and no parallel in the Australian Acts or in the Dominion Act or the Saskatchewan Act. It was apparently taken from the Manitoba Act where it appears as sec. 143. *Alexander* v. *McKillop and Benjafield*, 1 D.L.R. 586, 45 Can. S.C.R. 551, has settled the law except so far as sec. 97 may modify it.

The effect of a caveat under the Saskatchewan and under the Alberta Act if sec. 97 did not appear therein is, that it prevents the acquisition or the bettering or the increasing of any interest in land, legal or equitable, adverse to, or in derogation of the claim of the caveator, as it existed at *the filing* of *the* caveat—*per* Anglin, J.

Different views have been expressed by different members of this Court as to the effect to be given to sec. 97.

In *Brooksbank* v. *Burn*, 15 W.L.R. 661, Chief Justice Harvey held that the caveator who registers his claim under an agreement to purchase thereby obtains priority for his claim over any other purchaser (though prior in time) who registers his claim by way of caveat at a subsequent time.

In *Stephens* v. *Bannan and Gray*, 14 D.L.R. 333, Stuart, J., held that sec. 97 did not give to caveats any greater effect than

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Alexander v. *McKillop and Benjafield*, *supra*, decided should be given to them. And Mr. Justice Walsh concurred in this view.

Beck, J., held that of two innocent persons claiming under equitable titles—and all unregistered interests were equitable interests—the one who lodges a caveat first secures priority, still leaving open to the equitable jurisdiction of the Court (1) Whether the respective dealings with the land—were it not for the other—created an interest, and that in the same interest in the land, and (2) where the claim of either of the caveators is voided by fraud. I concurred in the judgment of Beck, J., but in that case the Court were unanimous in the result, the first caveator being in fact also first in time, and no laches sufficient to disentitle him having been found against him.

In the present case the issue is pretty clear. The Royal Bank and the Banque d'Hochelaga each acquired equitable interests, the first by deposit of title deed by way of equitable mortgage, the second by acquiring an instrument, namely a mortgage capable of being registered.

Counsel for the Banque d'Hochelaga claims, it is true, that they were entitled to rely upon sec. 71 of the Act which requires that the duplicate certificate of encumbered land shall be deposited with the registrar who shall retain the same on behalf of all persons interested in the lands described therein, and that the Royal Bank in taking the pledge of the certificate did so knowing that any person dealing with the land had the right to assume that the certificate was deposited with the registrar. There is nothing in the stated case to warrant the inference that the Banque d'Hochelaga were misled, nothing to indicate that they searched the register or made inquiries of the mortgagor and if the Banque d'Hochelaga is entitled to succeed, it must be by virtue of their caveat.

I feel bound to say that if to sec. 97 is ascribed the effect of absolute priority between two innocent equitable claimants that it is a somewhat startling innovation and one which to a large extent does away with the equitable jurisdiction of the Court in regard to equitable claims, and I would be glad to be able to find in the reading of the section some qualification of this view.

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After careful consideration I cannot read into the section any qualification. The manner of registration and the effect thereof is defined in sections 20 and 23, 41, 42, 43 and 44. These sections apply only to registration of instruments and the definition of instrument in the interpretation clause 2 (*k*) is very wide and includes "any other document in writing relating to or affecting the transfer of or other dealing with land or evidencing title thereto." Sec. 46 by implication forbids the registration of any instrument which is not executed in accordance with the provisions of the Act. In the Torrens Acts of other jurisdictions, provision is made for filing or lodging caveats. In this section first appears the term "Registration by way of caveat."

If registrations by way of caveat were confined to instruments which were in the form required by sec. 46 and therefore registrable instruments, then effect could be given to the section which would not conflict with the general scheme of the Act, and the section would allow just what was attempted to be done in this case, namely to register an instrument properly executed in accordance with the Act, but which through the inadvertence of the absence of the duplicate certificate could not be registered. Indeed sub-sec. 2 of sec. 20 prevents the registrar from ever receiving any such instrument as a mortgage or entering the same in the day-book unless the certificate of title is produced to him, except by leave of the Court or a Judge.

The words in sec. 97, relating to the withdrawal of the caveat and registration in lieu thereof of the instrument, "provided such instrument is an instrument which may be registered under the Act," clearly indicate that sec. 97 applies to instruments that may be registered under the Act and instruments that may not be so registered, and that in the case of the former the instrument may at a subsequent time, be substituted for the caveat and may in the discretion of the registrar be registered as of the date of the caveat. Were it not for this proviso I think sec. 97 would be applicable only to such instruments as may be registered under the Act, and if this were the effect the section would not introduce any serious innovation upon the general principle of the Act.

I am not, however, able to find within the words of the sec-

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tion, an effect restricted within narrower limits than is given to it by Harvey, C.J., and Beck, J., in the cases noted above, and in the result the Banque d'Hochelaga, by virtue of their caveat, obtained priority over the Royal Bank and are entitled to the moneys in question and the costs of the reference to the Appellate Division.

Order sustaining the caveat.

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GAGNON & MACKINNON v. NELSON.

British Columbia Supreme Court, Macdonald, J. December 16, 1914.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT—LANDS REPRESENTED AS "HIGH AND DRY"—RELIANCE UPON—IMMATERIAL REPRESENTATION, WHEN.

To justify the rescission of an agreement of sale of subdivision lands for alleged misrepresentation that they were "high and dry," it must appear both that the representation was untrue and that the other party acted on it and was thereby induced to some extent to make the purchase.

Statement

ACTION by the vendor for specific performance of an agreement for the sale of lands, with a concurrent action by the purchaser for rescission.

Judgment was given for the plaintiffs, the purchaser's action being dismissed.

G. E. McCrossan, for plaintiffs.

Robert Smith, for defendant.

Macdonald, J.

MACDONALD, J.:—On March 20, 1913, plaintiffs by an agreement in writing under seal agreed to sell that defendant lot 22 in block 26 in the subdivision of district lots 757 and 758, group 1, New Westminster District. This lot was in the City of New Westminster in that portion known as Queensborough. Defendant covenanted to pay the sum of $1,400 for the property, of which $150 was paid on the execution of the agreement and $100 was to be paid by monthly instalments. Defendant continued to make payments as stipulated until June 20, 1914, when he became in default and an action was brought on September 24, 1914, to recover payments overdue under the agreement. Defendant on October 1, 1914, brought an action against the plain-

tiffs and one Heidman to rescind the said agreement on various grounds, and such action was consolidated and tried with the action already launched by the plaintiffs against such defendant. Want of title on the part of the plaintiffs was alleged as one of the grounds for rescission, but this was abandoned at trial and two points only remained for consideration, upon which the defendant Nelson accepted the onus and sought to set aside the agreement. Fraud was not alleged, but it was submitted that Heidman, as agent for the plaintiffs, had misrepresented the property as being high and dry and that adjoining and surrounding lots had either been sold or were selling at the time at $1,200 per lot for inside ones and $1,400 for corner lots. Heidman was not available to be called as a witness on behalf of the plaintiffs at the trial so that the statements made by the defendant remained uncontradicted. As to the alleged representations with respect to the value of the property adjoining the lot sold to the defendant, there was contradictory evidence. Defendant did not give evidence in support of the specific representation as outlined in the statement of defence, but said that Heidman had represented, as to the adjoining property, that lots which were not in as good a location were selling for from $1,200 to $1,500. Assuming the correctness of this statement on the part of Heidman as agent for plaintiffs, I find it was not untrue, and, in any event, it would be a very indefinite representation upon which to base a rescission. The other point upon which the defendant relied was that Heidman had represented the lot in question was "high and dry." In considering this ground, I approach the subject in a critical mind as I believe the defendant bought the property for speculation. While the real estate market at the time was certainly not at its height and was rather on the decline, still there appears to have been a temporary revival in the locality in question. This lot formed part of a subdivision of New Westminster which it was supposed would be beneficially affected by prospective harbour improvements and the establishment of further industries. These benefits were pointed out to the defendant at the time of the sale and assisted in its consummation. There is no clear evidence as to the extent to which these improvements and industries developed, but the defendant con-

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tinued to make payments until becoming in arrears he was pressed for settlement. On June 4, 1914, he was notified of an instalment maturing on June 20 and in reply wrote the plaintiff Gagnon on June 22, stating that he was sorry he was not in a position to meet the payment. He referred to the general depression in business and that his earnings had been affected thereby. He stated that he needed money and if he were given $100 he would abandon any claim to the lot upon the agreement being returned to him. Defendant would thus be losing a large amount of money paid on account of a purchase, concerning which he had no fault to find at the time. He also suggested that if the time were extended for payment he might "get things straightened out and go ahead with the payments later on." Plaintiffs did not accept either of these propositions. Defendant states that in the end of June or July he met a Mr. Parsons and it was not until the month of July that he made up his mind that the lot was not as representated. He enquired from Mr. Parsons as to the condition of the place, prices and one thing and another and Parsons told him that he could not see how the lot could be worth the price paid. After his conversation with Mr. Parsons, defendant met plaintiff Gagnon for a short time, but nothing was said as to repudiating the agreement. Subsequently, defendant and some other parties who had purchased lots in the plaintiffs' subdivision got in touch with one another and concluded to obtain rescission of their agreements, if possible. Having already disposed of the ground as to misrepresentation as to the value of the property, the point remains as to whether, assuming that the statement made by the defendant is correct as to Heidman representing the lot as being "high and dry," rescission should result therefrom. It is not necessary that a misrepresentation should be the sole cause operating to induce the defendant to make the purchase. The matter for consideration is whether the statement, even though innocently made, was untrue and whether the defendant acted on it and was thus to any extent induced to purchase. Although defendant is a railway conductor and of necessity brought in touch with a large number of people while pursuing his vocation and could thus acquire information, he states that he did not know that the land

adjoining the Fraser River was dyked, and that when he found that the locality in which this lot was situate was so protected and was not in his opinion high and dry, he took this as a ground of misrepresentation. I think that the statement as to a lot being "high and dry" when applied to a building lot is a relative term. If the defendant were purchasing an area of land for agricultural purposes and it was represented to him that the property was high and dry when it was simply dyked and would require underdraining in order to carry on farming operations, then that would be a substantial misrepresentation and beyond question would have influenced the purchaser. This particular lot is one of a number in the subdivision forming a portion of New Westminster and many substantial houses have been erected in the locality. It is supplied with school accommodation, post office facilities and improved highways. It might be more expensive to construct a comfortable basement in the event of a building being erected, but this is a condition which pertains to a large number of the building lots comprised in the cities of the lower mainland of British Columbia. Even if the statement were made by Heidman, I doubt whether as applied to such a building lot it is untrue. In any event I do not think it operated in any way upon the defendant's mind in inducing him to purchase the property. I believe this ground is an afterthought. He doubtless expected he was making a purchase, on the advice of a friendly agent, that would bring him a profit through re-sale. The expected advance in price did not occur and he now seeks to escape payment. I accept defendant's statement as to the influences that operated in his mind in making the purchase, as given to his own counsel:—

Q. Now what influenced you to buy?

A. Knowing Mr. Heidman and having full confidence in him and he was telling me what was doing there; there was a nail factory to be built right close, which would increase the value and also that he called this a water front lot, being close to the water, and on account of the harbour improvements which were going on, that it was the best buy. He said they had been subdivided and put on the market and it was the best buy at that price in that vicinity as the other lots in not as good location, were selling for more money.

It is thus quite evident that the condition of the lot for build-

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ing purposes was not present to the mind of the defendant as a factor in his purchase.

There will be judgment for the plaintiffs for the amount due under the agreement with interest. The action of the defendant for rescission is dismissed. As the plaintiffs could have brought their action in the County Court, I think a proper disposition of the costs would be to allow the plaintiffs one set of costs on the Supreme Court scale.

Judgment for plaintiffs.

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LEE v. SHEER.

Alberta Supreme Court, Scott, Beck, and Simmons, JJ. December 18, 1914.

1. VENDOR AND PURCHASER (§ I E—29)—DEFECTIVE TITLE—REPUDIATION—EQUITABLE RIGHT PLEADABLE AGAINST SPECIFIC ENFORCEMENT, HOW.

A purchaser's right to repudiate the contract on the ground of want of title is an equitable right arising from want of mutuality and may be a defence to an action for specific performance.

[*Halkett* v. *Dudley*, [1907] 1 Ch. 590, followed.]

2. VENDOR AND PURCHASER (§ I E—29)—SPECIFIC PERFORMANCE—APPLICATION FOR BY VENDOR—DEFECTIVE TITLE—PURCHASER'S REMEDY.

Where the vendor has obtained a decree for specific performance, the purchaser cannot, without leave of the Court, repudiate the contract on the ground that the vendor cannot make a good title, but he may move the Court to be discharged from the contract.

[*Halkett* v. *Dudley*, [1907] 1 Ch. 590, followed.]

3. SPECIFIC PERFORMANCE (§ I E—36)—DOUBTFUL TITLES — IMPOSITION OF TERMS—COMPENSATION OR ABATEMENT.

On an application to discharge the purchaser from the contract for want of a good title in the vendor following a decree obtained by the latter for specific performance, a discharge should be refused in respect of trifling defects of title if the vendor submits to make compensation or to permit an abatement of the purchase money.

[*Halkett* v. *Dudley*, [1907] 1 Ch. 590, followed.]

4. SPECIFIC PERFORMANCE (§ II E—40)—ORDER FOR—FORM AND SCOPE OF—EMBODYING ORDER TO PAY IN PURCHASE MONEY.

In an action by a vendor against a purchaser, an order for specific performance and an order for the payment into Court by the purchaser of the balance due and owing for purchase money may be embodied in the same judgment.

[*Robinson* v. *Galland*, 37 W.R. 396, followed; *Schurman* v. *Ewing*, 7 W.L.R. 610, and *Hargreaves* v. *Security Co.*, 19 D.L.R. *post*, disapproved.]

Statement

APPEAL from Walsh, J., and motion for leave to defend or to discharge the defendants from the contract.

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Order for discharge on terms was granted.

A. U. G. Bury, for the plaintiff, respondent.

C. C. McCaul, K.C., for the defendants, appellants.

The judgment of the Court was delivered by

BECK, J.:—This is an action by the plaintiff as vendor of land for specific performance and asking for a personal order for payment against the purchasers—four of the five defendants. An appearance was entered for four of the five defendants, but none for the defendant Wilton, who was one of the purchasers. A statement of defence was delivered by one of the defendants—Hacket.

A notice of motion for judgment was given to the defendants who had appeared. On April 30, 1914, an order was made by Walsh, J.:—

(1) Ordering payment by the four purchasers of the whole balance of purchase money and interest, $9,261.48, together with the costs.

(2) Providing for payment to the plaintiff or into Court of this amount and the costs with interest within one month of service of the order and for transfer in case of payment.

The order of Mr. Justice Walsh was made in presence of and without objection by the solicitor for the four defendants who entered an appearance.

On June 30, 1914, default in payment being shewn, an order was made by Stuart, J., for the sale of the land by public auction, fixing a time and place and the form and method of publication of the notice of sale. In passing, I remark that in all cases coming before me I have made the final order for sale in the form of an order for sale with the approbation of a Judge without more. Leaving all further proceedings to be dealt with separately on the foundation of the general order for sale and thus leaving it open to sell either by public auction or private sale in or out of Court either on the first application or subsequently in the event of the method adopted proving abortive. The sale in pursuance of Mr. Justice Stuart's order did in fact prove abortive.

On July 31, 1914, two of the defendants who had entered an appearance—Elisa Sheer and Margaret Fairweather—the present applicants and appellants moved before Ives, J., for an

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order to set aside the order of Mr. Justice Walsh and an application on behalf of the plaintiff for a new order for sale by public auction, etc., came on at the same time. Mr. Justice Ives directed both these applications to stand over and to come on along with a motion on behalf of the present applicants and appellants for an order extending the time for appealing from the order of Mr. Justice Walsh and for moving the Court *en banc* for an order setting aside that order and allowing them to defend and also setting aside the order of Stuart, J., for sale. Mr. Justice Ives made an order extending the time for appeal as asked and adjourning the plaintiff's application for a new order for sale.

The present applicants and appellants then moved this Court by way of appeal from the order of Walsh, J., and by way of substantive motion for an order setting it aside and allowing them to defend; and on the argument counsel for them asked that the notice of motion be amended by asking in the alternative for an order to discharge the defendants, the purchasers, from the contract. The grounds on which the appeal and motion are based are that in respect of all the land all the minerals other than gold and silver are reserved and in respect of a portion of the land, it is subject to certain rights under the North-West Irrigation Act. It is pointed out that the reservation includes oil and it stated in an affidavit used in support of the application that the reserved minerals are of "very material value"; and there is no denial of this statement.

Furthermore, the affidavits filed on the part of the applicants allege facts for the purpose of shewing that the plaintiff is acting in collusion with the defendant Hacket, one of the several purchasers who holds the security from the applicants upon their interest in the lands in question. In the view I take of the matter before us it is not necessary to investigate this affair. The order of Mr. Justice Walsh—for specific performance—contains no recital or declaration that the plaintiff has shewn a good title nor does it direct an inquiry as to title. And again I remark in passing that I think that the order was defective in this respect.

In the case of *Halkett* v. *Earl of Dudley*, [1907] 1 Ch. 590, Parker, J., deals at length with the substantial question which is now before us. His opinion, which I accept is, thus: A pur-

chaser's right to repudiate the contract on the ground of want of title is an equitable right arising from want of mutuality and may be a defence to an action for specific performance; but that in order to avail himself of that defence, he must repudiate the contract promptly after finding out that the vendor cannot make a good title or if he had not repudiated promptly after the lapse of a reasonable notice to the vendor to prove a good title; but that where repudiation is not set up as a defence and a judgment for specific performance has gone, the purchaser cannot repudiate without leave of the Court; and that the purchasers proper course in the latter case is to move to be discharged from the contract, and that in each case the Court will consider the circumstances and grant the relief or refuse it, as may appear to be equitable. The Court in dealing with such an application should in my opinion in the case of trifling defects in title refuse to permit repudiation upon the vendor submitting to make compensation or to permit an abatement of the purchase money (see p. 596).

In the present case there is a complete absence of title to the base minerals including oil, and it appears that in the locality in which these lands lie the mineral rights, though improved, add materially to the value of the land. Their real value can be ascertained only by somewhat extensive and expensive operations—operations, in the event of an inquiry—in which the purchaser would be entitled to take part and thus incur considerable expense. It, therefore, seems to me it is not a case of such a trifling defect of title as to make it fair that the vendor should be permitted to hold his contract subject to compensation or abatement of purchase money to be ascertained on an enquiry.

Under the circumstances I think a fair order to make is that the purchasers be discharged from the contract and that the order of Mr. Justice Walsh be discharged unless the vendor makes a good title to the minerals as well as the surface to the satisfaction of a Judge within three months, reserving further directions to a Judge. The applicants and appellants should pay the costs of the proceedings before this Court and before Mr. Justice Ives.

The form of the order for specific performance, etc., leads

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me to make some observations upon the practice in that regard. In *Schurman* v. *Ewing*, 7 W.L.R. 610, I declined to give an order for specific performance, and at the same time a personal order for the payment of the balance of purchase money, and the same opinion was recently expressed by the Saskatchewan Court in *Hargreaves* v. *Security Co.*, 19 D.L.R. *post*.

A more careful investigation of the late English practice and a consultation with some of my brother Judges leads me to the conclusion that I was wrong.

In Seton on Judgments and Orders, 7th ed., vol. 3, ch. 50 tit. "Specific Performance," sec. II.(11) "title accepted, established or disproved," there are several forms indicating the practice. Form 3, where the title is accepted, (1) declares that the agreement ought to be specifically performed and orders accordingly; (2) orders certain accounts, etc.; (3) recites the acceptance of the title; and orders

> that upon the plaintiff's executing a proper conveyance of the said estate to the defendant at the expense of the defendant according to the said agreement, or to whom he shall appoint, such conveyance to be setttled by the Judge and delivering to the defendant upon oath all deeds and writings in their custody or in their power relating to the said estate . . . the defendants do pay to the plaintiffs the balance which shall be certified to remain due to them in respect of such purchase money and interest and costs. . . .

Form 4 so far as it relates to payments is substantially the same as form 3.

Such an order, however, is obviously not one upon which execution can be issued; the delivery of the conveyance and the title deeds are undoubtedly to be in exchange contemporaneously for the purchase money; an absolute order for payments, that is, one upon which execution could be fixed would have to be obtained subsequently upon shewing execution of a proper conveyance and a readiness and willingness to deliver it with the title deeds upon payment. The foregoing forms were those used in *Morgan* v. *Brisco*, 34 W.R. 193, and *Bell* v. *Denver*, 54 L.T. 729, 34 W.R. 638. In the latter case, the plaintiff vendor executed the conveyance and assignment and tendered it with the title deeds to the defendant purchaser who refused to pay the pur-

chase money. A motion was made for leave to issue execution. The Court (North, J.) said:—

> I think the best course will be for the plaintiff to deposit the executed assignment and the deeds in Court. . . . Upon the plaintiff's depositing in Court the assignment of the deeds, I make an order (which is not to be drawn up until the deeds have been deposited in Court) that the defendant do pay to the plaintiff the amount certified to be due to him within four days after the service of the order.

In the former case, the defendant purchaser not having tendered a conveyance nor paid the purchase money, the plaintiff vendor on motion obtained an order that the plaintiff vendor be at liberty to prepare and execute a conveyance to the defendant purchaser as an escrow to be delivered to the defendant on payment of the purchase money within the time limited, the conveyance to be settled by a Judge, and that the defendant do pay to the plaintiff at a time and place to be appointed by the Judge when the said conveyance shall be so approved as aforesaid, the sum of, etc., . . . and that thereupon the plaintiff do deliver to the defendant the said conveyance of the said premises, duly executed by him, together with all deeds and writings in his custody or power relating to the said premises.

In *Robinson* v. *Galland*, 37 W.R. 396, it was held that this latter form of order was one upon which execution by way of *fi. fa.* could be issued. The Court (Chitty, J.), saying:—

> It is a newer form of order adopted on purpose to prevent it being said by the defendant that the order is conditional. A further development of the practice is expressed by Form 5, which, after adjudging specific performance, etc., directs the defendant purchaser to lodge in Court the balance of the purchase money and then order that upon such lodgment being made, the plaintiff do execute to the defendants at their expense a conveyance of the said estate to be settled, etc., and deliver to the defendant all deeds and writings in his custody or power relating thereto. The note thereto says: "This form of order awards the inconvenience and expense to the plaintiff of preparing and executing a conveyance, as in *Morgan* v. *Brisco*, 34 W.R. 193, which the purchaser may be unable to take up.

Such an order as the foregoing could, under the English Rules, be enforced by sequestration, attachment (English O. 47, r. 4) or equitable execution by way of a receiver, but under our own Rule 579 it can be enforced by *fi. fa.* the ordinary form being appropriately modified.

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In view of the foregoing, I abandon my former opinion. I now think that in an action by a vendor against a purchaser, there is no reason why an order for specific performance and an order for the payment by the purchaser of the balance of the purchase money should not be embodied in the same order. The title of the plaintiff—a thing generally overlooked—should be (1) indicated and be stated by way of recital to have been admitted or proved; or (2) a reference as to title should be directed. In the former case the order for payment might quite properly be unconditional; in the latter conditional on a good title being shewn. Whether the payment should be directed to be made to the plaintiff or into Court, should be made to depend upon the state of the title: to the plaintiff if his title consists of a certificate of title clear of incumbrance, otherwise into Court. But in either case the order should not be made until the plaintiff has done what may be necessary to protect the defendant, which, I think, having in view our land registration system, should be the registration of the order itself or a separate declaratory order declaring the defendants' interest and the deposit in Court of a transfer or other appropriate conveyance and such instruments of title as are or ought to be in his custody or power.

As to including also in the order an order for the sale or rescission, there seems no reason why this cannot be done, but it seems to be inexpedient, because it concludes the plaintiff from selecting the alternative remedy in case of default and in neither case a subsequent application for an order absolute is necessary. In the case of a sale this is the settled practice. In the case of rescission it is certainly equally necessary for no registrar under the system of land titles could properly recognize that an order of rescission, conditional on non-payment, had become effective by reason of default.

Order for discharge on terms.

Re WESTERN TOLLS.

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Board of Railway Commissioners for Canada, April 6, 1914.

Upon complaint (1) that the tolls charged in the Provinces of Western Canada (Manitoba, Saskatchewan and Alberta) are higher than those charged in Eastern Canada (Ontario and Quebec), and, (2) of unjust discrimination by the Canadian Pacific Railway Company,

(*a*). In tolls from Vancouver, B.C., to interior points in the Western Provinces as compared with the tolls charged to the same points from Eastern Canada,

(*b*). In the tolls on wheat and oats from Alberta to the Pacific Coast as compared with the tolls on same commodities from the Prairie Provinces to Lake Superior, and

(*c*). In the passenger tolls in British Columbia as compared with those in other portions of Canada.

1. CARRIERS (§ IV C—535)—TOLLS—REDUCTION—HIGHER — COMPARISON —EASTERN AND WESTERN CANADA—DISCRIMINATION.

The history of toll making in Canada East and West of Fort William was reviewed, the Board finding that no reduction in tolls had heretofore been made in Eastern Canada as a result of charging higher tolls in Western Canada, although it was admitted that the tolls are higher in Western than in Eastern Canada, and that *prima facie* discrimination in such tolls exists.

2. CARRIERS (§ IV C—540)—TOLLS — UNJUST DISCRIMINATION—UNDUE PREFERENCE—QUESTION OF FACT.

The Railway Act does not forbid all discriminations and preferences, but only forbids unjust discrimination or undue preference, and whether either one or the other exists in any particular case is a question of fact to be decided.

3. CARRIERS (§ IV C—540)—TOLLS—UNJUST DISCRIMINATION—EFFECTIVE COMPETITION—BY WATER AND FOREIGN CARRIERS.

The Board found that the existing discrimination between the tolls in Eastern and Western Canada is not unjust, but is justified by effective water competition, and by the competition of U.S. Railways throughout Eastern Canada (The International and Toronto Board of Trade Rate Case).

4. CARRIERS (§ IV—515)—CONSTRUCTION—MILEAGE INADEQUATE—FACILITIES—HAULS.

The existing railway mileage is inadequate for the needs of those engaged in farming (in Saskatchewan and Alberta). In the former Province 39 per cent., and in the latter 48 per cent. of the total acreage is unprovided with railway facilities within a haul of ten miles. Thus, farmers living at greater distances spend more in hauling the grain to the railway than it costs to haul the grain by rail from the railway station to Fort William. The Governments of these provinces are therefore justified in assisting railway construction so as to shorten the average haul for the farmers.

5. CARRIERS (§ IV—515) — PARALLELING EXISTING LINES — OVERLAPPING—FACILITIES—DUPLICATION.

The Board found also that through the paralleling of existing lines a certain amount of overlapping exists in all the Western Provinces, and that control by the Government is necessary to prevent unnecessary duplication of Railway facilities in the future.

6. CARRIERS (§ IV—515)—TOLLS—HIGHER—REASONABLE — TRAFFIC RETURNS—SATISFACTORY.

The Board should not assist the construction of the additional railway lines required in these Provinces by authorizing higher rates over

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a railway system than would be reasonable having regard to the older portions of the railway producing satisfactory traffic returns.

7. CARRIERS (§ IV—515)—TOLLS—FAIR RETURN—INVESTMENT — SECURITIES—MARKETABLE — RESERVES OF LIABILITIES.

It is in the public interest that railway tolls should be of such a character as to attract investment and render railway securities marketable. These tolls should be such as to give a fair return to the railway company independent of the reserves or liabilities of such company.

8. CARRIERS (§ IV—515)—TOLLS—BASIS—COMPARISON—REASONABLE.

Thus railway tolls in Western Canada cannot be based upon consideration of the position of anyone of the three existing lines of railway either completed or partially completed, viz., C.P.R., C.N.R., or G.T.P.R. The question to be decided is what tolls are fair irrespective of the financial position of any of such companies.

9. CARRIERS (§ IV—515)—TOLLS—BASIS—FIXED PERCENTAGE—OVERHEAD OR CAPITAL CHARGES—COMPARISON—FOREIGN CARRIERS—STANDARD TARIFFS—MILEAGE TOLLS—MAXIMUM—RAILWAY ACT, SEC. 326.

The contention that rates should be made on the basis of cost plus a fixed percentage to cover overhead or capital charges cannot be sustained nor can effect be given to contentions based upon results obtained by lines in the United States.

[*Boileau* v. *Pacific and Lake Erie Ry. Co.*, 22 I.C.C.R. 640, at p. 653, followed.]

10. CARRIERS (§ IV—515)—The Board decided that the five standard tariffs under sec. 326 of the Railway Act known as:—

(1) The Manitoba Scale.
(2) The Saskatchewan Scale.
(3) The Mountain Scale.
(4) The Lake Scale between Lake Ports in B.C.
(5) The Lake and Rail and Inter Lake Scale B.C. in effect at the time of the inquiry should be reduced to three to be called:—
(1) The Prairie Standard Tariff extending from the Great Lakes to the Rocky Mountains.
(2) The Pacific including mainland rail lines in B.C., and
(3) The B.C. Lakes including inland navigable waters in that Province.

11. CARRIERS (§ IV—515)—The local passenger business being found by the Board to be conducted at a loss, no reduction in the rates would be justified until the result is ascertained of the improvements in railway grades and operating facilities, which the Canadian Pacific Ry. Co. is at present making.

[*Pea Millers' Association* v. *Grand Trunk and Canadian Pacific Ry. Cos.* (*Pea Millers' Case*), 3 Can. Ry. Cas. 433; *Rideau Lumber Co. et al.* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 8 Can. Ry. Cas. 339; *Montreal Board of Trade* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 10 Can. Ry. Cas. 319; *Mount Royal Milling & Manufacturing Co.* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 11 Can. Ry. Cas. 347; *Montreal Board of Trade* v. *Canadian Freight Association*, 14 Can. Ry. Cas. 347; *International Paper Co.* v. *Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos.* (*Pulpwood Case*), 15 Can. Ry. Cas. 111; *Liverpool Corn Traders' Association* v. *Great Western Ry. Co.*, 8 Ry. & Ca. Tr. Cas. 114; *Pickering, Phipps, et al.* v. *London & North Western Ry. Co.*, 8 Ry. & Ca. Tr. Cas. 83; *Castle Steam Trawlers* v. *Great Western Ry. Co.*, 13 Ry. & Ca. Tr. Cas. 145; *Desel-Boettcher Co.* v. *Kansas City Southern Ry. Co.*, 12 I.C.R. 222; *Malkin & Sons* v. *Grand Trunk Ry. Co.* (*Tan Bark Rates Case*), 8 Can. Ry. Cas. 183; *Commercial Club of Hattiesburg* v. *Alabama & Great Southern Ry. Co.*, 16 I.C.C.R. 534, at p. 545; *Elder, Dempster Steamship Co.* v. *Grand*

Trunk and Canadian Pacific Ry. Cos., 10 Can. Ry. Cas. 334, referred to.

Great Western Ry. Co. v. *Sutton*, L.R. 4 H.L. 226, at p. 237; *Niagara, St. Catharines & Toronto Ry. Co.* v. *Grand Trunk Ry. Co.* (*Stamford Junction Case*), 3 Can. Ry. Cas. 256 at pp. 259, 260; *In re Canadian Freight Association and Industrial Corporations*, 3 Can. Ry. Cas. 427, at p. 428; *Wegenast* v. *Grand Trunk Ry. Co.* (*Brampton Commutation Rate Case*), 8 Can. Ry. Cas. 42; *City of Toronto and Town of Brampton* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, [*Brampton Commutation Rate Case* (No. 2)], 11 Can. Ry. Cas. 370; *Almonte Knitting Co.* v. *Canadian Pacific and Michigan Central Ry. Cos.* (*Almonte Knitting Co.'s Case*), 3 Can. Ry. Cas. 441; *Canadian Oil Cos.* v. *Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos.*, 12 Can. Ry. Cas. 350, at p. 351; *Blind River Board of Trade* v. *Grand Trunk and Canadian Pacific Ry., Northern Navigation and Dominion Transportation Cos.*, 15 Can. Ry. Cas. 146; *Montreal Produce Merchants Association* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 9 Can. Ry. Cas. 232; *British Columbia Sugar Refining Co.* v. *Canadian Pacific Ry. Co.*, 10 Can. Ry. Cas. 169, at p. 171; *Lancashire Patent Fuel Co.* v. *London & North Western Ry. Co.*, 12 Ry. & Ca. Tr. 79; *Kerr* v. *Canadian Pacific Ry. Co.*, 9 Can. Ry. Cas. 207; *Michigan Sugar Co.* v. *Chatham, Wallaceburg & Lake Erie Ry. Co.*, 11 Can. Ry. Cas. 353; *Regina Board of Trade* v. *Canadian Pacific and Canadian Northern Ry. Cos.* (*Regina Toll Case*), 11 Can. Ry. Cas. 380, affirmed 45 S.C.R. 321, 13 Can. Ry. Cas. 203; *British Columbia Pacific Coast Cities* v. *Canadian Pacific Ry. Co.* (*Vancouver Interior Rates Case*), 7 Can. Ry. Cas. 125, followed.]

James Bicknell, K.C., *H. W. Whitla*, K.C., *F. A. Morrison*, for the Dominion Government.

M. K. Cowan, K.C., and *J. F. Orde*, K.C., for the Provinces of Alberta and Saskatchewan.

W. A. Macdonald, K.C., *L. G. McPhillips*, K.C., *J. F. Smellie*, for the Province of British Columbia.

F. H. Chrysler, K.C., *E. W. Beatty* (General Counsel), for the Canadian Pacific Railway Company.

E. Lafleur, K.C., *W. H. Biggar*, K.C., (General Counsel), for the Grand Trunk and Grand Trunk Pacific Railway Companies.

Andrew Haydon, for the Great Northern Railway Company.

The following among other associations and boards of trade were represented at various sittings of the Board or submitted their representations in writing:—

The United Farmers of Alberta, The Canadian Manufacturers Association, Montreal Board of Trade, Toronto Board of Trade, Vancouver Board of Trade, Calgary Board of Trade, Victoria Board of Trade, Regina Board of Trade, Edmonton Board of Trade, Brandon Board of Trade, Moose Jaw Board of Trade, Saskatoon Board of Trade, Lethbridge Board of Trade,

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Prince Albert Board of Trade, Portage la Prairie Board of Trade, Medicine Hat Board of Trade, Nelson Board of Trade, North Battleford Board of Trade.

The circumstances of the case are sufficiently set out in the head-notes.

The Chief Commissioner.

THE CHIEF COMMISSIONER:—The issues in this case involving so much have so often been confused, the hearings so protracted and the evidence so conflicting, and the subject of freight rates in the North-West has been a matter of consideration and comment for so many years, that an extended reference to the manner in which this investigation was commenced, and its scope, is advisable.

The first step leading up to the present inquiry into Western Freight Rates is the resolution of the Winnipeg Board of Trade, passed at a general meeting held on November 14, 1911. The resolution is as follows:—

Whereas the rates charged by the Canadian Pacific Railway Company for the carriage of freight from Winnipeg and throughout the whole western country were originally based on a much higher scale than those charged for a similar service on the same road in the eastern portions of the Dominion, and

Whereas the complaint being made to W. C. Van Horne, the then head of the said railway, he stated that as the volume of traffic increased the rates of freight would naturally decrease, and

Whereas the rates of freight have not decreased since then, notwithstanding continued complaints made, and the fact that the tonnage to be hauled now taxes the capacity of the Canadian Pacific Railway and the Canadian Northern Railway to the utmost, as shewn by congestion in their yards, and

Whereas the rates charged are greatly in excess of not only those charged for a similar service in the east, but also those charged on the Soo Line, an allied company of the Canadian Pacific Railway in the States to the south of us, and

Whereas the burden of excessive freight rates has for many years been a source of great complaint as well as being a grave injustice to the people of the entire western portion of our Dominion, and

Whereas the Railway Commission, whether from want of sufficient jurisdiction, or whatever cause, have failed to deal with the matter.

Therefore be it resolved that, in the opinion of this Board, the time has arrived when the Government of this Dominion should, by legislation, lay down the principle that the rates allowed to be charged by the railways in the

western provinces shall not exceed those charged in Ontario and Quebec for a similar service to a greater extent than necessary to cover any excess there may be in the cost of operation in the west over that in Ontario and Quebec, and it is recommended that this Board take immediate action in respect hereto, and ask the co-operation of western Boards in the presentation of facts to the Government through the Hon. Robert Rogers and other western members of parliament.

This resolution was subsequently printed and circulated among different Boards of Trade in the western provinces, and, speaking generally, almost unanimously adopted by them. The complaints ceased to be those of Winnipeg and became those of the western provinces generally. The resolutions were forwarded by the Minister of Railways and Canals to the Board, and as a result the Hon. Mr. Justice Mabee, the late Chief Commissioner, on November 24, 1911, wrote the secretary of the Winnipeg Board of Trade as follows:—

The Honourable the Minister of Railways has forwarded to me a copy of a resolution passed at the general meeting of your Board held on November 14, inst. This is the first complaint that has been made direct to this Board regarding freight rates generally in the West. There is no necessity of calling upon the Government to deal with the matter, nor is there any further legislation required. The powers of the Board are ample to deal with not only specific rates but those generally. The resolution that you have forwarded is of an extremely general character. If you desire the whole subject investigated by this Board, it would greatly facilitate matters if you would have your traffic officials formulate a specific case. Our rules are by no means hard and fast, nor do we confine ourselves to the specific case set forth in the complaint; but it is a difficult matter to take up in the way it is placed in this resolution. Indeed, strictly speaking, the resolution is not a complaint to this Commission at all, but is a request that the Government pass legislation.

I shall be glad to have your views upon the foregoing.

This letter of the late Chief Commissioner was replied to by the Board of Trade on December 4, 1911, in the following terms:—

I beg to acknowledge the receipt of your letter of the 24th November, and I am instructed to inform you in reply that this Board is of the opinion that Parliament, by legislation, should affirm the principle that the railway rates in the prairie provinces should not exceed the rates for a similar service in Eastern Canada except to the extent that the cost of rendering such service is greater, and it was on that account that the Board communicated directly with the Honourable the Minister of Railways and Canals.

In view of the above explanation and of the information afforded in

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your letter of November 24, I am further directed to enclose to you herewith a copy of a letter sent forward to-day to the Honourable the Minister of Railways and Canals, which is in reply to his letter of November 20, 1911, informing this Board that he had transferred this Board's communication to him to the Board of Railway Commissioners.

The letter referred to in the above letter from the Board of Trade as being sent by it to the Honourable the Minister of Railways and Canals is of the same date (December 4, 1911), and is as follows:—

This Board has the honour to acknowledge receipt of your letter of November 20, 1911, in reply to the resolution of the Board forwarded to yourself and the Honourable the Premier of the Dominion stating that the rates charged for freight within the prairie provinces are greatly in excess of those charged for a similar service in Ontario and Quebec, and asking that the principle be affirmed that the rate of charges shall be no greater in these Provinces than in Ontario and Quebec. And the Board is also in receipt of a communication from the Chairman of the Railway Commission stating that the said resolution has been turned over to him, and that the Commission has full power to deal with the same, and that no further legislation is required, and the Board now desires to lay before yourself and the members of the Government the reason for asking that the principle be affirmed by Act of Parliament, namely, that the Railway Commission has now been in power for a considerable number of years, and this Board complained of the freight charges in this country in 1907, when a stated case was prepared shewing the charges which were then being put in force by the railways operating in western Canada, and which were not only higher than those charged in the east, but were a material advance upon those previously in force in Manitoba, and that on that occasion they were refused relief; and further, that, during the summer now past, the express companies were authorized to put into effect a scale of charges based on $5.00 per 100 pounds in this territory for a similar service for which they were allowed three dollars in the east, or an advance of 66 2/3 per cent. over eastern rates; and this Board has felt that a grave injustice was done to the western country by the continuance of such a state of affairs, and felt that the prairie provinces were entitled to be put on an equal basis with the east except to the extent that it could be shewn that the cost of operation in the western country exceeded that in the east.

This principle this Board believed to be a fair, equitable one, and one that as a matter of public policy should be affirmed and carried out, and that the government and parliament of Canada are the right parties to affirm and see to the carrying into effect of the same.

This Board begs to enclose herewith a copy of the letter received from the chairman of the Railway Commission, in which it asks that our traffic officials should formulate a specific case. This is exactly what the Board objects to doing. Their charge is that the whole scale of rates in the prairie provinces is in excess of those charged in the east. They attached to their original resolution a copy of rates covering distances respectively

in the east and west, and covering from 100 miles up to 1,050 miles, shewing that in each case the charges in the three prairie provinces were materially in excess of those in the east, the whole averaging an increase of 78 per cent., a copy of which statement is hereto attached; and it is this whole matter of grave injustice to the west that it wishes to have taken up and remedied, and the Board believes that the cost of operation in the three prairie provinces is no greater, if as great, than in the provinces of Ontario and Quebec.

That if it is the desire of the Government that the matter should be relegated to the Commission, and an investigation held by them and the facts ascertained, under such circumstances this Board would urgently request that, under the terms of the Railway Act, the Board of Railway Commissioners be instructed to inquire into the facts regarding the whole scale of charges in the prairie provinces and their relation to those in the east, and that an investigation with this object in view should be held in the city of Winnipeg, and elsewhere in the west, if necessary; and in view of the fact that it is a matter of public policy in which the whole people of the west are concerned, they would further ask that counsel resident in this city and free from all railway corporation control, be appointed to act with this Board and other public interests in establishing the facts complained of; and that further, so soon as such facts are established, the railway companies be required to reduce their charges in the west to the basis before alluded to.

As a result of the different representations made, the Board, by its Order of January 8, 1912, declared it to be advisable that a general inquiry be at once undertaken by the Board into all freight tolls in effect in the provinces of Manitoba, Saskatchewan, and Alberta, and in the province of Ontario west of and including Port Arthur, with the view that, in the event of its being determined that the said tolls, or any of them, are excessive, the same shall be reduced as the Board may determine.

As a further result of the representations made, the Government, in compliance with the request of the Winnipeg Board of Trade, appointed counsel to represent the complainants in the inquiry.

I find that, prior to the complaint originating with the Winnipeg Board of Trade, and subsequent to the judgment of the Board delivered in the *Coast Cities'* case in August, 1907, an application was made by the Board of Trade of Vancouver in the interests of shippers of the Pacific Coast, on October 8, 1909. The application practically called in question the decision in the *Coast Cities'* case and was for an Order directing the Canadian Pacific Railway Company to

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"(*a*) Cease from making and charging discriminating rates on goods transported by such railway from Vancouver, B.C., to points located in British Columbia, Alberta, Saskatchewan, and Manitoba, on the main line, and on the Crow's Nest Branch Line, as compared with the rates charged by such railway to the same territory (for the greater distance), from Montreal, Quebec, and other points on the Atlantic seaboard.

"(*b*) Cease from making and charging discriminating freight rates on wheat and oats consigned from Alberta to the Pacific Coast, as compared with the charges on wheat and oats (for the greater distance), from points in the Prairie Provinces to Lake Superior.

"(*c*) Cease from making and charging discriminating passenger rates to passengers in British Columbia, and especially commercial travellers, as compared with the passenger rates charged by such railway in other portions of Canada.

Many hearings were held and much evidence given on this complaint. The evidence was closed and final argument made on February 13th, 1912.

As it appeared to the Board that the issues raised in this complaint were intimately related to the complaints as to freight rates in Alberta, Saskatchewan, and Manitoba, West of Port Arthur, the Board, on February 15th, 1912, made the following Order:—

Thursday, the 15th day of February, A.D. 1912.

Hon. J. P. Mabee, Chief Commissioner.
S. J. McLean, Commissioner.

In the matter of rates for the carriage of freight traffic upon railway lines operating in Canada West of Port Arthur: File 18755.

The complaint of the Vancouver Board of Trade alleging discrimination in freight rates by the railway companies operating in the Province of British Columbia having been fully heard and the Board having, during the progress and before the completion of that case, undertaken a general enquiry into freight rates in Alberta, Saskatchewan, Manitoba, and Ontario west of Port Arthur, and it appearing that the questions arising in the Vancouver Board of Trade case are so intimately related with the rates now under enquiry in the other provinces above mentioned that this matter cannot be satisfactorily disposed of separately:—

THEREFORE IT IS ORDERED THAT:

1. The province of British Columbia be added to those above mentioned and that the said general enquiry shall extend to and cover all the freight and passenger rates in that province.

2. That all the evidence and exhibits as well as the argument shall form part of the record in said enquiry.

3. That any interested party may supplement as he may desire to the said evidence and argument.

The result is, therefore, that the Board's judgment in this matter must be based upon and deal with not only the evidence and issues raised in the Western Freight Rates inquiry proper, but also those raised in the protracted investigation held at the instance of the Vancouver Board of Trade.

[The text of the Railway Board's judgment is exhaustive and sums up as follows:—]

The reductions made by this judgment are the result of the best thought and consideration which the Board has been able to give to the situation as a whole. The Board is of the view that the serious drop in railway earnings that the past few months has shewn is not a permanent condition, notwithstanding that the earnings of the Canadian Pacific for 1912 and 1913 probably represent a maximum of return, and that, just so soon as the other lines are in through operation, it will be some time before that maximum will be again reached.

The conclusions which have been arrived at represent what the Board considers a just and reasonable mean between the extremes; and it is of the opinion that the results, having regard to the railway situation in the west, are fair not only to the people but to the railway companies.

The tariff changes herein directed to be made are to be effective not later than September 1st. It has been the earnest desire and attempt of the Board to have the changes come into force at the earliest possible moment after the issuance of the judgment. A careful consideration of what is necessary to be done shews that these rate changes affect not only the rate situation west of Fort William and Port Arthur, but also the situation east thereof. In addition, the rates west of Fort William and Port Arthur are tied up with the rates between eastern and western Canada in so far as American rail carriers are made use of. The result is that the preparation and publication of the tariffs will take a considerable period of time, and the Board feels that this preparation and publication of tariffs cannot reasonably be expected to be completed so as to be effective any earlier than the date above fixed.

THE ASSISTANT CHIEF COMMISSIONER and COMMISSIONERS MILLS, MCLEAN and GOODEVE concurred.

Asst. Chief Commissioner. Com. Mills. Com. McLean. Com. Goodeve.

Judgment accordingly.

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VOYER v. LEPAGE.

Alberta Supreme Court, Scott, Beck, and Simmons, JJ. December 18, 1914.

1. EVIDENCE (§ IV J—434)—MORTGAGES—PAROL EVIDENCE TO SHEW DIFFERENT ADVANCE FROM THAT RECITED AS PAID—CORROBORATION—BROTHER AND SISTER—TRUST.

On a claim against the estate of a deceased person for lands alleged to have been held in trust by the deceased for the claimant, who was his sister, a claim in the pleadings of the attacking parties (the other next of kin) that the property was partnership property between the deceased and his sister, may, although not established by the evidence, operate as an admission that the sister had at least a beneficial interest in the properties, and thus corroborate her testimony that the deceased brother acted as her business agent and employee in real estate investments and as such held the lands, purchased with her money and registered in his name, in trust for her.

[*Cook* v. *Grant*, 32 U.C.R. 511, distinguished; *Voyer* v. *Lepage*, 17 D.L.R. 476, affirmed.]

Statement

APPEAL by the plaintiff from the judgment of Stuart, J., *Voyer* v. *Lepage*, 17 D.L.R. 476.

The appeal was dismissed.

E. B. Edwards, K.C., for plaintiff, appellant.

J. Cormack, for defendant, respondent.

Scott, J.

SCOTT, J., concurred with SIMMONS, J.

Beck, J.

BECK, J.:—My brother Simmons has set out the facts and I concur in his opinion and his disposition of the appeal, but I have thought it well to examine the Ontario decisions upon the provision of the Evidence Act with regard to corroboration as virtually the whole question before us depends upon the interpretation to be put upon that provision.

The statement of claim alleges that the deceased at the time of his death was the registered owner of four parcels of land. With some amendment of the description this was proved and the four parcels were spoken of in the case as (1) the farm, (2) the Inglewood lots, (3) the Dorval lots, (4) the Hudson Bay lots. As to the farm, the plaintiff alleged that a mortgage upon it for $4,500 from the deceased to the defendant was without consideration.

As to the three other properties, the plaintiff alleged that the defendant and the deceased had "entered into partnership"

for the purpose of carrying on the business of acquiring lands and other property and that they were together entitled to these three properties "as such partners and as being jointly interested in the same."

As to the farm the burden of shewing that the mortgage was without consideration was, of course, upon the plaintiff and obviously the provision of the Evidence Act had no application to that part of the case. The learned trial Judge found in favour of the defendant and his judgment in that respect must stand. As to the Dorval lots there was evidence clearly and distinctly corroborating the defendant's claim—made with regard to all three parcels of land—that the deceased was merely a trustee for her of the entire estate in the lands. The trial Judge believed the defendant and the witness who corroborated her with respect to this transaction and his finding must be accepted. As to the other two parcels of land, namely, the Inglewood lots and the Hudson Bay lots, the trial Judge finds no evidence, corroborative of the defendant referring directly and specially to the particular lands or to the transactions through which they were acquired. He nevertheless holds that the evidence of the defendant was corroborated within the requirements of the Evidence Act and in my opinion he was right.

In *Orr* v. *Orr* (1874), 21 Gr. 397, Draper, C.J., at p. 403 said:—

> In view of the effect of the statute enabling parties to give evidence on their own behalf, our legislature have deemed it wise to make a positive enactment; while the decision in England (*Hill* v. *Wilson*, L.R. 8 Ch. 888) enables this Court to see that such was already the law; and I think it should not be construed as introducing a new principle, but as declaratory of the common law. The Act, however, does not define what is to be considered a corroboration, except by the words "material evidence," that is, as I take it material to the issue to be sustained by the party to be corroborated.

In *McDonald* v. *McKinnon* (1878), 26 Gr. 12, it was held by Spragge, C., that the evidence of the party setting up a claim or seeking to establish a position against the estate of a deceased is not by the statute required to be corroborated in every particular; that *it is sufficient if independent support is given to the party's statements in so many instances that it raises in the mind of the Court the conviction that such statements may be de-*

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pended upon even in respect of those matters in which there is otherwise no corroboration. He says, at p. 16:—

With regard to corroborative evidence under the statute, I do not agree that the evidence of a party claiming must be corroborated in every particular. If it were so, it would be requiring the party to establish his whole case by independent evidence. The observation of Sir James Hannen, in the case of Lord St. Leonard's will—*Sugden* v. *Lord St. Leonards*, 1 P.D. 179, are apposite to this point. Let me observe, however, with regard to this corroborative evidence, it is not necessary that I should find corroboration in every particular, and to the full extent of what Miss Sugden has said, before I give credit to her statements. Because that would be, in other words, to say that I ought not to use any evidence standing in need of corroboration, unless there were proofs enabling me to dispense altogether with the evidence to be corroborated. *It is sufficient if I find that independent support is given to Miss Sugden's statements in so many instances, that it raises in my mind the conviction that she is to be depended upon, even in those matters in which I do not find corroboration elsewhere.*

In *Parker* v. *Parker* (1881), 32 U.C.C.P. 113. Armour, J., considered *Orr* v. *Orr*, *supra*, and said of it:—

If the learned Chief Justice . . . meant to say that the interested party must be corroborated as to every issue raised in the cause by some other evidence material to that issue, I think he was putting too narrow a construction upon the provision under discussion.

He quotes from *McDonald* v. *McKinnon*, *supra*, evidently with approval.

He also quotes the language of Sir James Hannen in *Sugden* v. *Lord St. Leonard*, *supra*, and says:—

Having pointed out step by step, her *statements* in which she *was* corroborated, and the corroboration of them, he points out at page 193, the statements in which she was *not* corroborated; and among several unimportant ones, important statements as to the bequest of the residuary estate, in which according to her statement, she was largely interested; and the devisees of the estates in the event of the failure of the several limitations; and *as to these statements*, he found that she was to be relied upon.

He sums up his view in these words:—

I think that, under the provision, if there is any evidence adduced corroborating the evidence of the interested party in support of his claim or defence *in any material particular*, it must be submitted to the jury as sufficient corroboration in point of law, the weight to be attached to it in point of fact being a matter for their consideration.

In *Re Ross* (1881), 29 Gr. 385, Boyd, C., at p. 389, said:—

The statute (R.S.O., ch. 62, sec. 10) requires (what was before the statute the rule of the Court) that as against the estate of a deceased per-

son, no one should recover in respect of any matter occurring before the death of such person, unless his evidence is corroborated by some other material evidence. It is urged that this account, consisting of 29 items, is corroborated in two or three points by independent evidence. But this cannot be sufficient, *where each item is or might be the matter of a separate and independent cause of action*. Corroboration given of an agreement to repay a loan in one year, or of an agreement to pay interest on a certain sum of money cannot, by implication, substantiate an agreement to pay interest on a different sum of money lent in a later or earlier year, or of an agreement to repay money advanced at another time. Each of such claims stands on its own merits, and some material corroboration as to each should be adduced to satisfy the statute. It would be of dangerous consequence to hold that a person could recover claims for goods supplied and moneys lent in large amounts against the estate of a deceased person, no matter how extended the dealings *and however isolated* from each other, by verifying something material to the maintenance of his claim as to one or two out of the list.

In *Cook* v. *Grant* (1882), 32 U.C.C.P. 511, Osler, J., refers to *Orr* v. *Orr*, 21 Gr. 397, and *Parker* v. *Parker*, 32 U.C.R. 113, with evident approval. He says:—

> When separate and independent matters, to use the term (matter) employed in the Act are embraced in the same action, I find no authority for the plaintiff's contention that it is only necessary that her evidence should be corroborated as to one only.
>
> I agree that it is *not* necessary that the interested party should be corroborated upon *every issue* raised in *the cause on each separate matter*, treating that expression as equivalent to claim or cause of action. . . . What is material evidence in corroboration of the evidence of the interested party as to *one* part of his claim *may* not be of the slightest importance as to *another* or of the least value in enabling a jury to determine whether his (otherwise) uncorroborated testimony ought to be credited.
>
> The Act in my opinion plainly requires that his evidence as to both (parts) should be corroborated in some particular. *I do not understand that the rule has been differently laid down in any case decided under the Act.*

Radford v. *Macdonald* (1890), 18 A.R. (Ont.) 167, approved of in *Parker* v. *Parker*, 32 U.C.C.P. 113.

Green v. *McLeod* (1896), 23 A.R. (Ont.) 676, holds that "some other material evidence" may either be direct or consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement. In that case the defendant admitted that she had received the moneys sued for by way of cheque but stated that she had so received them at the deceased's request as his messenger and

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had in due course paid them over to him. It was proved that for a number of years before the death of the deceased the defendant—his sister-in-law—had been in the habit of getting money for the deceased on his cheques: that the deceased was a close, careful and intelligent man who lived for over a year after the transaction in question and during that time conversed with many persons and made no complaint of the non-receipt of these moneys. It was held that the defendant's evidence was sufficiently corroborated.

McDonald v. *McDonald* (1903), 33 Can. S.C.R. 145, lays down the same principle. In that case the facts and circumstances proved were held to result in such inferences as rendered it improbable that the facts sworn to by the claimant of a *donatio mortis causâ* were not true and as reasonably tended to give certainty to the contention of their proof. Armour, J., who dissented thought that the evidence did not go as far as that in *Green* v. *McLeod*, 23 A.R. (Ont.) 676.

I think that from these decisions the rule may be laid down that while it is true that where there are in issue a number of properties, transactions or other items so distinct, separate and independent that they might form distinct, separate and independent causes of action on the one side or the other, corroborative evidence directed specifically to each is *primâ facie* essential to meet the requirements of the provision of the Evidence Act, yet where an underlying connection between several items is testified to by the interested party and his evidence is corroborated with respect to some of these items so as to satisfy the mind of the Court not only of the truthfulness and correctness of his testimony with regard to the latter items, but of his general credibility and his evidence is thereby corroborated as to the residue of the items.

This proposition is exemplified in the case of *Sugden* v. *Lord St. Leonards*, 1 P.D. 179, where the evidence of Miss Sugden, who was largely interested, was as to the contents of a lost will. She was admittedly honest in intention in giving her evidence. There was specific corroboration of her statements as to the contents of the will in many instances, but in some instances there

was no specific corroboration; it was held that these circumstances constituted corroboration in regard to the latter instances.

It is also exemplified in *Green* v. *McLeod*, 23 A.R. (Ont.) 676, where the defendant had admittedly received two cheques from the deceased shortly before his death. Her answer to a claim for them was that she was a mere messenger for the deceased; that she had gone to the bank and got the cheque cashed; returned to the house and paid over the money to the deceased. The fact that she was shewn in many other instances to have acted as she said she acted in the particular instance in question was accepted as part of the corroborative evidence required and she was found not liable.

This principle has its application in the present case. (1) There was a relationship between the deceased and the defendant with regard to the parcels of land in dispute; that that relationship was something different from what appeared on the face of the document was admitted by the plaintiff, and this admission is, it seems to me, of extraordinary weight. The plaintiff, the deceased and the defendant—brothers and sisters—and other members of the family lived either in the same town (Edmonton) or within easy reach of each other for many years; visits between them were of frequent occurrence; the relationship—the conduct one towards the other—of the defendant and the deceased was open to observation by the plaintiff and other members of the family through this long period of time and on the evidence thus gathered—evidence much of which it would be impossible to present to a Court—the plaintiff put forward a claim based not upon the rights appearing on the face of the documents, but one contrary to them.

(2) What precisely that relationship was has been found by the trial Judge in respect of one of three parcels of land to be that the deceased was a bare trustee for the defendant; and this finding was based on the testimony of the defendant corroborated in accordance with requirement of the Evidence Act.

(3) The learned trial Judge expressed himself as being convinced of the honesty and substantial correctness of the defendant's evidence throughout.

Under these circumstances without more—though I think

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there are a number of additional corroborative circumstances—the learned trial Judge was, in my opinion, authorized as a matter of law to find as he did upon the facts, and if right in law it is scarcely contended that his findings of fact can be disturbed.

SIMMONS, J.:—Louis Lepage died in Edmonton intestate in the fall of 1910. He was unmarried at the time of his decease, and had lived for some years prior to his decease at a boarding-house in Edmonton with his sister, Victoria Lepage, the defendant in this action, who paid his board and gave him $35 per month pursuant to an agreement made between them, which will be hereinafter referred to. At his death he was registered owner of a farm near Fort Saskatchewan, which was subject to a first mortgage to the Great West Life Assurance Co. for $800 and subject to a second mortgage to the defendant, Victoria Lepage for the sum of $4,500. He was also registered owner of 15 lots in a subdivision of the City of Edmonton, known as Inglewood, a half interest also in five city lots designated as the Dorval lots; and an unregistered transfer to himself of two city lots in the Hudson's Bay Reserve in the City of Edmonton. Ten of the Inglewood lots had been sold and paid for by the purchasers during his lifetime and are, therefore, not subject to the controversy which forms the subject of this action. The defendant, Victoria Lepage, was registered owner of considerable property in the City of Edmonton. The plaintiff, Martene Voyer, is a sister of the defendant and of the deceased. The defendants, Fortunat Lepage, Macaire Lepage and Napoleon Lepage, were joined as defendants, as only next of kin, and are brothers and sister of the plaintiff and defendant, Victoria Lepage. Shortly after the death of Louis Lepage, the defendant, Victoria Lepage, obtained grant of letters of administration of his estate and then transferred to herself as beneficial owner the above named properties which were in the name of her brother at his decease. The sum of $383.75 in the bank to the credit of the deceased was also claimed by Victoria Lepage as moneys belonging to her. In the inventory filed by her on application for the grant of administration, the property of the deceased was inventoried at $50 personal property.

The plaintiff's statement of claim alleges a partnership entered into by the deceased and Victoria Lepage for the purpose of carrying on business and acquiring lands and other property, and that pursuant to such partnership, Louis Lepage was in his lifetime *jointly interested with the defendant* in the lands hereinbefore referred to, and the defendant, Victoria Lepage, having dealt with the same as her own property, and having sold and disposed of other lands to which the deceased was entitled, has wrongfully refused to account for the same as part of the estate of the deceased.

The plaintiff asks for a declaration that the defendant, Victoria Lepage, is a trustee for the estate of Louis Lepage for the said farm at Fort Saskatchewan free from the mortgage to her of $4,500, and that she is such trustee as to the half interest of the deceased in the remainder of the land. Three members of the family, Napoleon Lepage, Louis Lepage and Charles, came from their home in the Province of Quebec to Alberta about the year 1891 and settled in the vicinity of Fort Saskatchewan. In the same year the defendant, Victoria Lepage, joined them as she says at the request of Louis Lepage. She had been teaching school in the Province of Quebec for seventeen years on a very moderate salary, $200 per year, when she left Quebec province. Immediately upon coming to Alberta she resumed her profession of teaching at a salary of about $600 per year and continued to teach until 1904, when she and Louis removed to Edmonton.

In regard to the farm which is described as the northeast quarter of section 36, township 55, range 22, west of the fourth meridian, the plaintiff claims that the mortgage of $4,500 does not represent moneys loaned by Victoria Lepage to the plaintiff, and suggests that the mortgage was executed for the protection of the property from any unwise disposal of the same by the deceased.

The evidence adduced by the plaintiff in support of a partnership is practically confined to the transactions between the deceased and Victoria Lepage in regard to the farm. In so far as the real estate transactions carried on in Edmonton subsequent to 1904 are concerned, the inference supporting a partnership is sought to be drawn from the transactions prior to that

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date and from the fact that part of this property was in the name of Louis Lepage at his decease.

Dealing first then with the farm, it appears that Louis Lepage had no property when his sister, Victoria Lepage, came to visit him in 1891. She says she decided to stay in Alberta and assist him to get established on a farm. He secured homestead entry for the above quarter section and she says she lent him money to purchase stock and implements.

Napoleon Lepage, plaintiff's witness, a brother with whom Louis was living in 1891, says there was a partnership and she was to furnish the money, and that Victoria gave Louis money to get back to Quebec in the same year to see his parents, and that he, Napoleon himself, borrowed $300 from Victoria in 1901. This brother also says that Victoria furnished the money to clear the homestead and to purchase cattle and horses for the farm, and his only knowledge of the alleged partnership which he has is what is told him by his brother Louis and his sister Victoria in 1891.

It appears that subsequently a quarter section of land was purchased by Louis Lepage from the Canadian Pacific Railway and this witness cannot say who supplied the money, but the land was subsequently sold and does not concern this action. T. Lamoreaux, a witness for the plaintiff, says Victoria Lepage bought cattle to put on the farm. Francis Fortin, a witness for the plaintiffs says that Louis Lepage was an educated man and a good business man. Upon this evidence and upon the inferences to be drawn from the actual business transactions between Louis Lepage and Victoria Lepage rests the plaintiff's claim.

In regard to the farming transactions, the documentary evidence is clearly corroborative of the defendant's claim that the mortgage represented actual advances made by her or at least that this was the lump sum which the parties mutually agreed should represent this indebtedness. H. H. Robertson, a solicitor practising in Edmonton, identified an agreement in writing (ex. 54) made in 1895 and prepared by him then when he was a law student in Taylor's law office in Edmonton. He says that there was a dispute about the disbursements of some stock on the farm and the document represents the settlement. The docu-

ment begins by reciting the indebtedness of $5,000 and a real estate mortgage on the farm of $5,000, and a chattel mortgage on the personal property for the same amount dated April 22, 1895, and that the said mortgagee (Victoria Lepage) had entered into control and possession of all the said lands and chattels and is desirous of employing the mortgagor (Louis Lepage) to act as her servant in working and in using the land and property thus described so as to make the same remunerative and so as by the profits to pay off said chattels and real estate mortgages. The document then proceeded to recite that Louis Lepage will cultivate the said farm and look after the chattel for a salary of $35 per month. The agreement concludes with the covenant of Victoria Lepage to the effect that when by virtue of this arrangement the indebtedness is returned retired, she would discharge the said mortgage.

The parties were in a lawyer's office for the purpose of adjusting difficulties and an agreement is made presumably after they had stated exactly what the relations were which existed at that time, but no suggestion of a partnership occurs. Subsequently Victoria Lepage wished to obtain an $800 loan on the security of the farm and it was arranged that the $5,000 mortgage should be discharged by Victoria Lepage and a first mortgage to the Great West Life Assurance for $800 was registered, and then Louis Lepage executed a second mortgage to Victoria for $4,500. Just why it was not reduced to $4,200 does not clearly appear. A number of witnesses for the defence gave evidence of admissions made by Louis Lepage to the effect that he was in the employment of his sister at a salary of $35 per month and that he had transferred all his property to his sister Victoria Lepage and that she was supporting him. The deceased, it is admitted, was a shrewd man and well educated, but was addicted to drink and apparently relied upon his sister to care for him and provide a home for him. The learned trial Judge accepted the explanation of the defendant as to the relations between her and her brother in regard to the various properties in question.

When they came to Edmonton in 1904, she alleges she embarked upon real estate speculations and her brother had a better

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knowledge of the English language than she had and was able to make sales more readily and expeditiously by having the agreements to purchase in his name. There is no suggestion in the mass of evidence upon record that Louis Lepage had any means to embark upon business of this kind. The learned trial Judge took the view that notwithstanding the pleadings this was a case where sec. 12 of the Evidence Act should be applied against the defendant and that in regard to the proportion standing in the name of the deceased that she must supply corroboration of her claim to the whole beneficial interest in the same.

In regard to lots one to four in block nine known as Dorval lots, Mr. Leclaire corroborated her statement that the purchase moneys were supplied by her. The trial Judge held that in the case of these lots, although the registered title was in the name of the deceased, yet the whole beneficial interest belonged to the defendant, that this circumstance might be treated as corroborative of the defendant's statement in regard to the other property. In *Cook* v. *Grant*, 32 U.C.R. 511, Osler, J., held that when each item of an account against the estate of a deceased person is an independent transaction and constitutes a separate independent cause of action, to satisfy the statute R.S.O., ch. 62, sec. 10, some essential corroboration of the interested party must be adduced to each item. Our sec. 12 is sec. 10 of the Ontario Act and I accept the judgment of Osler, J., as the correct principle in applying the statute. In the present case, however, the plaintiff had admitted in the claim that the defendant had a beneficial interest in the properties registered in the name of her deceased brother, but her claim rests upon the allegation that this was not the whole, but only a one-half interest.

The plaintiff says that the divided interest arose out of a partnership agreement. The defendant alleges that her beneficial interest was an entire interest and the title was in the name of her brother as an incident of the relation of principal and agent between herself and her brother. The plaintiff failed to establish a partnership, and if held strictly to the pleadings her whole action necessarily fails.

But even if a wider issue is allowed the plaintiff I am of the opinion she is bound by her admission that the defendant had at

least a beneficial interest in these properties and that is corroborative of the defendant's version that each transaction was not an isolated one, but that each arose out of and formed a part of a general business relation throughout the whole of which her brother acted as her business agent and employee. In this view, then, each transaction should not be separated and, therefore, would not come within the rule enumerated by Osler, J., in *Cook* v. *Grant*, 32 U.C.R. 511. It might quite properly be said that if the plaintiff had based her claim upon the fact that these properties were in the name of the deceased and that *primâ facie* he was the sole beneficial owner, that the defendant would be called upon to substantiate her version of each transaction by corroborative testimony.

This was not, however, the case which the defendant was called upon to meet. At the argument upon the appeal counsel for the plaintiff announced that he withdrew the claim to an interest in the Dorval lots and lot 135 in block 9 of the Hudson's Bay subdivision, and consented that the farm should go to the defendant in satisfaction of her mortgage. While the statement of counsel removed these properties from the issue, the evidence at trial in regard to them is before us and has an important bearing on the issues in regard to the remaining property, which was in the name of the deceased. I am glad to be able to come to the same conclusion as the trial Judge, that the defendant has satisfied the onus placed upon her in regard to the lands in question, and although the summary method of obtaining title through the administration grant might seem open to criticism, her counsel assumed full responsibility for this, and stated it was done under his advice, and although in the result she acquired considerable property through the means of real estate speculating when the same was rife in Edmonton, she seems at all times from 1891 until the decease of her brother to have undertaken to hold up, care for, and maintain an unfortunate brother who was, through the influence of drink, unable to look after himself, and that during the same period there is evidence which strongly suggests that the plaintiff in this action was only too

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willing to have that care shifted upon the defendant, Victoria Lepage.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

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CANADIAN PACIFIC R. CO. v. BRITISH AMERICAN OIL CO.

Judicial Committee of the Privy Council, The Lord Chancellor, (Viscount Haldane), Lord Dunedin, Lord Moulton, Lord Parker of Waddington, and Lord Sumner. July 14, 1914.

1. CARRIERS (§ IV B—522)—JOINT THROUGH TOLLS—RAILWAY BOARD—JURISDICTION—ABSENCE OF EXECUTIVE ORDER.

The Board of Railway Commissioners for Canada has jurisdiction by virtue of the Railway Act sec. 26 to make a declaratory order as against the carrier that rates exacted by it between certain dates were illegal, although by reason of a subsequent change in the authorised tariff no executive order was necessary nor was any made by the Board.

[*Canadian Pacific* v. *Canadian Oil Companies*, 47 Can. S.C.R. 155, 14 Can. Ry. Cas. 201, affirmed.]

2. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—STANDARD, COMPETITIVE OR THROUGH TARIFFS—RAILWAY ACT, SEC. 321.

Sec. 321 of the Railway Act (Can.) applies to all tariffs whether standard, competitive or through tariffs.

Statement

CONSOLIDATED appeals from the judgment of Supreme Court of Canada dismissing appeals from an order of the Board of Railway Commissioners for Canada in favour of the respondents on an application complaining of an over-charge in rates for carrying petroleum from the United States to Canada.

The appeals were dismissed.

Sir R. Finlay, K.C., *F. H. Chrysler*, K.C. and *Geoffrey Lawrence*, for the appellants.

Balfour Browne, K.C., for the respondents.

The judgment of the Board was delivered by

Lord Dunedin.

LORD DUNEDIN:—In these consolidated appeals exception is taken to the unanimous judgment of the Supreme Court of Canada affirming a determination of the Board of Railway Commissioners.

The dispute arose in connection with the through rates charged by the Canadian railway companies on petroleum and its products

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carried from certain points in Ohio and Pennsylvania to Toronto and other points in Canada. The oil companies considering that they were aggrieved by the rates which had been exacted from them since January 1, 1907, presented, in August 1910, three applications to the Board of Railway Commissions against the two Railway companies asking for a declaration that they had been over-charged, in respect that the railway companies had refused to carry petroleum and its products at joint tariff rates for the fifth class in accordance with the official classification.

The three applications were heard together, and judgment was given in all on May 16, 1911. The order pronounced in each case, though not in exactly the same words, was really exactly the same, and it is sufficient here to quote that pronounced in the application of the Canadian Oil Cos. Limited, against the Grand Trunk and the Canadian Pacific which was in these terms:—

> It is declared that the legal rates chargeable on petroleum and its products in carloads, from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth class joint through rates in effect at the time the said shipments moved, as shown in the joint through tariffs published and filed with the Board, and in accordance with the official classification No. 29, and subsequent issues thereof.
>
> J. P. Mabee,
> Chief Commissioner,
> Board of Railway Commissioners for Canada.

The Board granted leave to the railway companies to prosecute an appeal on the following question of law:—"Did the Board place the proper legal construction on the documents referred to in the judgment"? In addition to this, by means of an application in Chambers, the companies obtained leave from Mr. Justice Idington to raise upon this appeal the additional question of whether the Board had jurisdiction to make the order it did.

The facts which raise the dispute may be very shortly stated. The railway companies in conjunction with the corresponding railway companies in the United States filed a joint tariff which specified certain rates for the different classes, as per the official classification in use in the United States. Up to January 1, 1907 the official classification did not classify petroleum or its products, which were accordingly carried at a special commodity rate, being the sum of the local rates. On January 1, 1907 official

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classification No. 29 came into force. This classification inserted petroleum in class 5. The result of this was to apply the fifth class rate to petroleum and its products. In other words, taking a concrete instance of a transit in question, the through rate became 20 cents per 100 lbs. instead of 32 cents per 100 lbs. In order to avoid this result the railway companies filed with the Board documents which they entitled supplements. The wording of those supplements, and the dates at which they were declared to be effective varied somewhat. One illustration will suffice. The Indianapolis Southern Railroad Co. with the concurrence of the two Canadian Railway Companies filed the following:—

> Rates named in above described tariff will not apply on petroleum and its products to points in Canada. Rates to Canadian points will be on basis of lowest combination to and from the Canadian gateways.

The question therefore on the merits is simply whether such a proceeding was effective to relieve the railways from their obligation to carry petroleum at fifth class rates.

The question as to jurisdiction arises thus: The railway companies would not deliver unless the sum of the local rates was paid. The oil companies were therefore forced to pay the higher rate, and this continued up to the time of the presenting of the application to the Railway Commissioners. By the time, however, that the application came to be disposed of, the railway companies of their own free will had consented to carry at fifth class rates. In these circumstances an order of the Board could only be declaratory , as it was unnecessary to pronounce an executive order. And the railway companies contend that such an order is *ultra vires* of the Board.

The Supreme Court of Canada held unanimously that the Board had jurisdiction to make such an order. Their Lordships agree with that view and concur with the reasons set forth in the judgments of the learned Judges of the Supreme Court. Sec. 26 of the Railway Act confers jurisdiction on the Board

> to inquire into, hear, and determine, any application of a party interested complaining that any company . . . has done or is doing any act, matter, or thing, contrary to, or in violation of this Act, or the Special Act.

If the charges exacted were illegal charges because the Acts did not allow them, it seems clear that the railway companies were doing something contrary to or in violation of the Acts, and it

seems impossible to refuse a person interested a declaration to that effect. It was urged by the companies that a declaration was in the circumstances unmeaning as to the future, and would only prejudice them as to the past in a possible action of repetition. It is probably not right to allow considerations as to actions of repetition to enter into the matter if the point on jurisdiction be clear. But even if it were it is evident that the railway companies suffer no real prejudice. Any action for repetition to be successful must begin in substance though not in form by a declaration of right. All pleas of a prejudicial character based on the fact of money in fact paid, settlement with other parties, &c., will be just as good or just as bad as replies in a future petitory action, whether the declaratory finding—if such is justified on the merits—is settled for the first time in that action, or is taken as settled by the determination of the supreme tribunal in this.

Turning now to the merits. Argument was adduced to their Lordships on various topics, embracing the rights of railway companies in Canada to resist joint tariffs filed by American companies, subjects which were dealt with in what is known as the *Stoy Case* (43 Can. S.C.R. 311). In the view of their Lordships such topics do not arise for decision in this action, and their Lordships express no opinion upon them. It seems to their Lordships that there is a short ground of judgment which is conclusive so far as this case is concerned.

All tariffs are composed of two parts, (1) what may be termed the tariff proper and (2) the classification. Now the matter of classification is regulated by sec. 321 of the Railway Act which applies to *all* tariffs, whether standard, special, competitive, or through, and that section is as follows:—

> 1. The tariffs of tolls for freight traffic shall be subject to and governed by that classification which the Board may prescribe or authorise, and the Board shall endeavour to have such classification uniform throughout Canada, as far as may be, having due regard to all proper interests.
>
> 4. Any freight classification in use in the United States may, subject to any order or direction of the Board, be used by the company with respect to traffic to and from the United States.

Joint tariffs for through routes from points outside Canada into Canada (which is the class of traffic referred to in the application) are regulated by sec. 336, which is in the following terms:—

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As respects all traffic which shall be carried from any point in a foreign country into Canada or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board.

The effect is prescribed by sec. 338:—

Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board may except from the provisions of this section the filing and publication of any or all passenger tariffs of foreign Railway Companies.

The Board may require to be informed by the company of the proportion of the toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received.

Now in the first case it is admitted that a joint tariff was filed; and it is admitted that the companies did not, so far as the classification is concerned, make use of a classification which the Board has prescribed or authorised, under sec. 321 (1), but availed themselves of the liberty given them by sec. 321 (4) to use a classification in use in the United States. What, however, the railway companies sought to do by means of their so-called supplements was to introduce a classification which was neither a classification in use in the United States—for that ex-hypothesi was No. 29 which they sought to amend—nor a classification authorised by the Board, for no one says that the Board ever authorised the charges proposed by the so-called supplements. This in their Lordships' judgment was quite beyond their powers: with the result that they proceeded to exact charges which were not sanctioned by any joint tariff framed with classification in the way in which the statute permits it to be framed.

Upon this short ground, and without entering into the other matters argued, their Lordships are of opinion that the Supreme Court was right in upholding the jurisdiction of the Board to make the order it did, and in deciding that that order embodied a declaration which was right on the merits; and they will humbly advise His Majesty to dismiss the appeals with costs.

Appeals dismissed.

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Manitoba King's Bench, Galt, J., October 28, 1914.

1. JUDGMENT (§ II D—112)—AGREEMENT OF SALE—FORECLOSURE—REDEMPTION—PERSONAL REMEDY—MORATORIUM ACT, 1914 (MAN.)—APPLICABILITY TO PENDING AS WELL AS SUBSEQUENT ACTIONS.

The period of one year to be allowed for redemption of land under the Moratorium Act, 1914, Man., (sec. 8), in Court decrees applies not only to actions commenced after the passing of the Act, but also to actions then pending.

2. MORATORIUM (§ I—1)—MORATORIUM ACT, 1914 (MAN.)—EFFECT OF IN FORECLOSURE ACTIONS—RIGHT TO PERSONAL JUDGMENT.

Section 5 of the Moratorium Act, 1914, Man., which stays actions "for the recovery of possession of the land charged" until after the lapse of a six months' period does not limit the recovery of a personal judgment for the amount due under a sale agreement for principal and interest, and where an action which was pending when the Act was passed had not proceeded to the entry of final judgment before August 1st, 1914, the limitation of sec. 4 as to actions to enforce a covenant or agreement in respect of lands does not prevent the subsequent entering up of judgment, although it stays proceedings to enforce payment by writ of execution or by registration of the judgment.

Statement

ACTION for foreclosure under an agreement of sale, the defence invoking the Moratorium Act, 1914 (Man.) as to form of judgment and redemption rights.

Judgment was given for the plaintiff, with stay as to enforcement.

J. P. Foley, for plaintiffs.

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GALT, J.:—Motion for judgment.

In this action the plaintiffs issued their statement of claim on June 6, 1914; the defendant was personally served on June 10; interlocutory judgment was signed on July 6, and the action came before the Court on motion for judgment on September 23. The plaintiffs allege that under an agreement for sale dated June 29, 1911, the defendant agreed to purchase from the plaintiffs certain lands in Manitoba, for the sum of $6,000 payable as follows: $1,000 in cash; $500 on April 1, 1912; $500 on the first day of April in each year thereafter until the whole of the purchase moneys were fully paid and satisfied, together with interest at the rate of 7 per cent. from the date of said agreement on so much of the said sum as should from time to time remain unpaid, whether before or after the same became due, such interest to

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become due and be paid with each payment of principal money and the first of such payments of interest to become due and be paid on April 1, 1912. It was further agreed that all interest on becoming overdue should forthwith be treated as purchase money and bear interest at the rate aforesaid.

The plaintiffs also allege that at the time of the said agreement there were two mortgages registered against the said land in favour of the Toronto General Trusts Corp. and Edith L. Middleton, to secure payment of the sums of $875 and $160 respectively, which the defendant covenanted and agreed to assume and pay off and to save harmless the plaintiffs in respect thereof. The defendant also covenanted to pay taxes and insure the buildings on the land. It was further provided by the said agreement that in the event of default being made by the defendant in the payment of principal, interest, taxes, premiums of insurance, or any part thereof, the whole purchase money by the said agreement secured and at that time remaining unpaid should at once become due and payable.

The plaintiffs allege that on April 18, 1913, there was due, owing and unpaid by the defendant to the plaintiffs for past due payments of principal and interest the sum of $823.35, and they also allege subsequent defaults. Particulars of the amounts due for principal and interest appear in the statement of claim and the plaintiffs claim: (a) Specific performance; (b) Payment of the amount due for principal and interest; (c) In default of payment that the agreement be cancelled, and the defendant foreclosed of and from all equity of redemption in the said lands; (d) That the defendant be ordered forthwith to deliver up possession of the said lands; (e) Further and other relief, and costs of action.

On September 18, that is to say, a few days before this motion was heard, the legislature passed an Act respecting Contracts Relating to Land, commonly known as the Moratorium Act. The question is, having regard to the provisions of the said Act, what relief, if any, the plaintiffs are entitled to.

Dealing first with the personal remedy of payment. Sec. 4 provides:—

> No action shall be brought to enforce a covenant or agreement to pay money contained in any such instrument, except as hereinafter provided.

until after the lapse of six months from the happening of the default in payment giving rise to such action, and proceedings to enforce payment by writ of execution or registration of certificate of judgment in any such action now pending wherein final judgment has not been entered before the said first day of August, 1914, are hereby stayed for a period of six months from the coming into force of this Act if the judgment recovered includes the principal money secured by such instrument or any portion thereof.

The first clause of this section need not be considered as it relates to actions not yet commenced. The second clause applies to actions pending, but "wherein final judgment has not been entered before the said first day of August, 1914." Suppose a case in which final judgment was entered on July 31: the Act does not appear to affect such a case at all. Suppose another case in which final judgment was entered on August 1: all proceedings upon the judgment are stayed for 6 months from the coming into force of the Act, namely, September 18, if the judgment recovered includes the principal money secured by such instrument or any portion thereof.

Sec. 4 prohibits proceedings to enforce any judgment which may be recovered after August 1, but does not appear to interfere with the entering up of judgment.

Dealing next with the right to foreclosure. Sec. 3 provides as follows:—

In all actions for the redemption of land or any mortgage or charge thereon and in all actions or proceedings, whether before a Court or a district registrar, foreclosure or sale of land under any instrument referred to in section two hereof, the period to be allowed for redemption, whether by the Court or by the Master on a reference or by the district registrar, shall be one year, and in all pending actions for such redemption, foreclosure or sale, in which the time fixed for redemption is after the thirty-first day of July, 1914, the same is hereby extended for one year from the date so fixed for redemption, and no final order for foreclosure or sale shall be made in any such action until after the lapse of such extended period.

If the first clause of the section had been limited to actions not yet commenced, as is the case with sec. 4, I should have to hold the section inapplicable, because, although the action is pending, no time has yet been fixed for redemption. But there appears to be no such limitation. The words are, "In all actions for the redemption of land, foreclosure, etc., . . . the period to be allowed for redemption . . . shall be one year." I

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think these words apply to all actions whether pending or not at the date of the Act.

Dealing next with the claim to possession, which appears in the statement of claim. Sec. 5 of the Act provides:—

> Notwithstanding any provision contained in any such instrument, no action or proceeding in Court for the recovery of possession of the land charged by any such instrument shall be brought or taken until after the lapse of six months from the happening or default in payment of any of the moneys secured thereby; and, if any such action or proceeding be pending at the time of the coming into force of this Act, the same shall not be proceeded with or continued until after the lapse of six months from the said last-mentioned date, nor shall any order or judgment for the recovery of possession of any such land, made after the thirty-first day of July, 1914, and before the coming into force of this Act, be enforced by any writ or order or other process of any Court until after the lapse of six months from the date thereof.

This clause manifestly stays all pending proceedings for the recovery of possession until after the lapse of six months from September 18. The question is, has the section any wider effect than staying the claim to possession. It says: "If any such action or proceeding be pending at the time of the coming into force of this Act, the same shall not be proceeded with or continued until after the lapse of six months," etc. I think this section ought to be construed as being intended to deal only with a claim to possession and that it leaves untouched any personal or other remedies sought in the action, which are dealt with in the earlier sections of the Act.

Up to the passing of this Act, the plaintiff had a perfect right to all the relief which he claimed. In construing such a statute, Maxwell (Interpretation of Statutes, 3rd ed.) says, at p. 399:—

> Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property or to encroach upon the rights of persons, and it is therefore expected that if such be its intention it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt.

I think the present statute should be construed in such a manner as to not interfere with the plaintiffs' rights to any

greater extent than is expressly, or by necessary implication, provided. On the one hand it stays all that portion of a plaintiff's claim which relates to redemption, foreclosure, payment of principal or possession of land, but on the other hand, it fails to impose any stay upon the plaintiff's right to sign final judgment for all the money due to him, whether principal or interest, and it preserves the usual remedies to recover his interest.

Lastly, dealing with the claim for interest. Sec. 4(*a*) provides as follows:—

> Notwithstanding anything contained in this section, actions may be brought upon covenants or agreements for the payment of interest on unpaid principal at the rate specified in any such instrument or of taxes or premiums of insurance on buildings on any such land so soon as the same shall be in arrear, and, upon the recovery of judgment in any such action, a writ or writs of execution against the goods of the defendant may be issued and enforced, but no certificate of the judgment shall be issued or registered against any lands of the defendant, until after the lapse of six months from the date of such judgment.

The language employed by the legislature in secs. 3 and 4 is far from clear, but sec. 4(*a*), at least, allows actions to be brought upon covenants or agreements for the payment of interest on unpaid principal and for taxes, and premiums of insurance. Even this clause is ambiguous to this extent, that while it provides that actions may be brought, it says nothing about actions now pending, of which there are a great number already before this Court. Bearing in mind that the Act operates as an interference with the legal rights of persons, I think it ought to be construed in such a manner as to minimize the hardship imposed upon those who are legally entitled to their money. No good reason can be suggested for allowing persons to bring an action for interest and yet denying this relief to those who have already brought their actions. I would, therefore, construe sec. 4(*a*) as applying to pending as well as future actions. But it will be necessary to sever the interest from the principal. I see no reason why this should not be done.

Under Rules 259 and 260, where an action is brought for the foreclosure of any mortgaged property or of the rights and interests of the purchaser under an agreement of sale of land the defendant or other person entitled to redeem may, either before

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or after judgment, move to dismiss the action upon paying into Court the amount then due for principal, interest and costs, according to the terms of the mortgage or other instrument without reference to, and notwithstanding any provision therein for the acceleration of the time or times for payment of any subsequent instalment or instalments of such principal in case of default of payment of an overdue instalment of principal or interest and he shall thereupon be relieved from the consequences of non-payment of so much of the principal money and interest as may not then have become payable by reason of the lapse of time.

The plaintiffs were quite within their rights when they commenced this action, and relied upon the acceleration clause in their agreement. The legislature has intervened and stayed proceedings as far as regards the principal money, but it expressly authorized the plaintiffs to recover their interest. The amount due for interest, taxes and costs can readily be ascertained by a reference to the Master.

For the above reasons I find the plaintiffs entitled to: (1) Judgment for the amount due to them for principal money as set forth in the Statement of Claim; (2) Judgment for the amount due to them for interest and taxes, to be ascertained by a reference to the Master to fix the amount, together with the plaintiffs' costs of action, and of said reference, in order to entitle the plaintiffs to enforce payment of the total amount thereof; (3) Foreclosure of the agreement in the Statement of Claim mentioned, unless the amount due for principal, interest, taxes and costs, together with interest thereon to date of payment, be paid within one year from the date of the Master's report.

Leave will be reserved to the plaintiffs, in case the above-mentioned Act be repealed under the provisions of sec. 10 thereof, before the expiration of the said period of one year, to apply to the Court to vary this judgment and for such further and other relief as they may appear to be entitled to.

Judgment for plaintiff.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Magee, J.A., Sutherland and Leitch, JJ. March 30, 1914.

1. BUILDINGS (§ I A—9a)—BUILDING PERMITS—MUNICIPAL REGULATIONS—BY-LAW, ULTRA VIRES, WHEN.

A fire limit by-law under the Municipal Act, 1903 (Ont.), which authorizes a municipal council to prohibit the erection of any building the main walls of which are not of "brick, iron or stone" will be invalid for excess of jurisdiction if it purports to include in the prohibition buildings with main walls not constructed of "brick, stone, concrete or other approved-of incombustible material," for under the latter heading the by-law contemplates some one approving of the proposed incombustible material and that his approval shall be necessary to the taking of the proposed building out of the prohibited class; this as to buildings to be constructed of galvanized iron is beyond the powers conferred by the statute.

[*Attorney-General* v. *Campbell*, 19 Gr. 299; *State* v. *Fay*, 44 N.J. Law 474, referred to.]

Statement

APPEAL by the defendants from the judgment of LATCHFORD, J., at the trial, on the 3rd November, 1913, in favour of the plaintiffs.

The following statement of the facts is taken from the judgment of MULOCK, C.J.Ex.:—

This action is brought to restrain the defendants from erecting a certain building within what is known as limit "B," in the city of Toronto, and the plaintiffs' case is, that the proposed erection would be in contravention of the provisions of by-law No. 6401 of the Corporation of the City of Toronto, the plaintiffs.

In the statement of claim the plaintiffs allege that the defendants are lessees of certain lands in that portion of the city of Toronto known as limit "B," and are proposing to erect thereon certain buildings, the outside walls of which are of frame, covered with galvanised iron; that on the 1st April, 1913, the plaintiffs enacted a by-law number 6401, which provides, amongst other things, that the outside and party walls of all buildings in limit "B" shall be constructed of brick, stone, concrete, or other approved of incombustible material; that the outside walls of the proposed building are to be frame, covered with galvanised iron, and not to be of brick, stone, concrete, or other incombustible material; and that, therefore, the defendants have no right to erect such buildings.

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The plaintiffs further allege in their statement of claim that by-law 6401 provides that the erection of any building shall not be commenced in said city until a permit for such erection shall have been first obtained from the plaintiffs' inspector of buildings; that they have no such permit; that the defendants are erecting certain frame buildings upon said lands without having first obtained such permit; and they ask that the defendants be restrained from erecting upon the said lands any buildings other than those of brick, stone, concrete, or other approved of incombustible material; and also that they be restrained from erecting any such buildings on said lands without having first obtained a permit from the said inspector.

The defendants in their statement of defence allege that on the 5th May, 1913, they applied to the plaintiffs' architect for a permit for the erection of certain buildings, plans and specifications of which were filed with the plaintiffs, and that on or about the 21st May, 1913, they received a permit from the said architect authorising the construction of the buildings described in the said plans and specifications; that on the 22nd May, 1913, they located the site for the proposed buildings and commenced building operations and proceeded with the contemplated work until forced by the proceedings in this action to abandon the same. They also allege that the outside walls of the proposed buildings are to be of approved incombustible material, and that the said architect so certified by issuing the said permit.

They also claim that the said by-law is *ultra vires*.

There is no dispute as to the facts. The defendants filed with the city architect (who is also the inspector) the plans and specifications for the proposed buildings. Certain changes were made by the architect, and that officer issued to the defendants a building permit. Thereupon they began the work and continued building operations until restrained by an injunction.

The learned trial Judge, considering himself bound by *Badley* v. *Cuckfield Union Rural District Council* (1895), 64 L.J.N.S. Q.B. 571, gave judgment in the plaintiffs' favour; and from that judgment the defendants appeal.

The appeal was allowed.

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Argument

M. K. Cowan, K.C., and *J. W. Pickup*, for the appellants, argued that the plaintiffs were estopped from enforcing their by-law No. 6401 by reason of the permit granted to the defendants to build according to plans and specifications filed, and the action of the committee on property of the plaintiff corporation in authorising the issuance of such permit by the city architect, who was the inspector under the by-law. The by-law provides that the inspector "may permit such deviations from the by-laws regulating the erection of buildings in special cases as, in his opinion, will afford proper and safe construction under the circumstances," and the permit granted by the inspector was an exercise of his discretion under this clause. The section of the by-law relied on by the plaintiffs was *ultra vires*, as it assumed to prohibit the erection of buildings with main walls of iron, and the walls of the building in question are of such material. They referred to *Athens* v. *Georgia Railroad* (1883), 72 Ga. 800; *Masters* v. *Pontypool Local Board of Health* (1878), 47 L.J. Ch. 797; *Slee* v. *Corporation of Bradford* (1863), 4 Giff. 262; *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229; *Attorney-General* v. *Campbell* (1872), 19 Gr. 299; *City of Marion* v. *Robertson* (1899), 84 Ill. App. 113; *City of Buffalo* v. *Chadeayne* (1889), 7 N.Y. Supp. 501; *Thompson* v. *Failsworth Local Board* (1881), 46 J.P. 21.

Irving S. Fairty, for the plaintiffs, the respondents, argued that the plaintiffs could not be estopped by any action of a committee or officer of the council from enforcing a by-law thereof. The section of the by-law granting the inspector power to allow deviation from the strict terms of the by-laws governing the erection of buildings did not clothe him with authority to disregard the provisions of the by-law as to their location so as to set at naught the sections creating fire limits. The walls of the proposed building were of wood, not iron; and, if the by-law did assume wrongfully to prohibit iron buildings, the by-law was severable, and the valid portion thereof sufficed to prohibit the building in question. He referred to *City of Toronto* v. *Williams* (1912), 27 O.L.R. 186; *Yabbicom* v. *King*, [1899] 1 Q.B. 444; *Badley* v. *Cuckfield Union Rural District Council*, 64 L.J.N.S. Q.B. 571; *Re Ryan and McCallum* (1912), 7 D.L.R. 420; *City of*

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Toronto v. *Wheeler* (1912), 4 D.L.R. 352, 3 O.W.N. 1424; *City of Toronto* v. *Garfunkel* (1912), 23 O.W.R. 374.

March 30. MULOCK, C.J.Ex.:—The provisions in the Consolidated Municipal Act, 1903, authorising municipal corporations to regulate the erection of buildings are as follows:—

Section 542: "By-laws may be passed by the councils of . . cities . . .

"1. (*a*) For regulating the erection of buildings;

"(*b*) For preventing the erection of wooden buildings . . ;

"(*c*) For prohibiting the erection or placing of buildings, other than with main walls of brick, iron or stone, and roofing of incombustible material within defined areas of the city," etc.

The following appear to be the provisions of the by-law in question material to the present case:—

Section 1 declares that "the city architect and superintendent of building shall be the inspector of buildings, whose duty it shall be to see that the provisions of this by-law are carried out."

Section 2 declares that "the erection . . . of any building . . . must not be commenced . . . until a permit for such erection or alteration shall first be obtained from the inspector of buildings by the owner or his agent, and no such owner or agent shall proceed with the erection or alteration of any building . . . until such permit has been obtained."

Section 2 requires applications for permits to be made in writing.

Section 3 requires that when "an application for a permit is made . . . drawings and specifications sufficient to enable the inspector of buildings to obtain full and complete information as to the extent and character of the work to be done must be submitted with such application."

Section 4 declares that, "if the matters mentioned in any application for a permit or if the drawings or specifications submitted with such application indicate to the said inspector of buildings that the work proposed to be done will not comply in all respects with the provisions of this by-law, and all civic regulations, he shall not certify to the same, and such certificate

shall not be given until such application, drawings and specifications shall have been made to conform in every respect with the requirements of this by-law and all civic regulations as above referred to."

Section 5 is as follows: "When such applications, drawings and specifications conform to this by-law and all civic regulations, the said inspector of buildings shall stamp the plans and specifications with the official stamp of the department and issue the permit to build, it being conditional, however, that the stamped plans and specifications above referred to are at all times to be kept on the work and available to the inspector of buildings or any of his assistants. It is also provided that neither the granting of a permit nor the inspections which will be made by a civic official or officials during the erection of a structure in any way relieve the owner or his agent, or the architect of such structure, from full responsibility for the carrying out of the work in strict accordance with the plans and specifications approved of by the superintendent of buildings or for the stability of the structure until fully completed and accepted by the civic authorities."

Section 6: "The said inspector, who is hereby appointed for this purpose, may permit such deviation from the by-laws regulating the erection of buildings, in special cases, as, in his opinion, will afford proper and safe construction under the circumstances."

Section 139 is as follows: "In limit 'A' the outside and party walls of all buildings shall be constructed of brick, stone, concrete or other approved of incombustible material, and no wooden structures of any kind, except as hereinafter provided for, shall be erected, and all roofs shall be constructed of incombustible material, except roofs of dwelling-houses not more than two storeys and attic in height, or thirty-five feet to the highest point of the roof, and outbuildings not more than sixteen feet in height to the plate, or twenty-five feet to the highest point of the roof, which may be shingled as hereinbefore specified under the title of roofing. It is, however, provided that this section is not intended to apply to a verandah on the first floor only of a dwelling-house."

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Section 140 of the by-law declares that "in limit 'B' all outside and party walls, except hereinbefore or hereafter otherwise specified, shall be built of similar materials to those specified in the preceding section for limit 'A,'" etc.

The main point to determine is, whether the by-law is for any reason *ultra vires*. Section 542 of the Consolidated Municipal Act of 1903 authorises the council to pass a by-law prohibiting the erection of any building whose "main walls" are not of "brick, iron or stone."

The by-law in effect prohibits the erection of any building whose "outside and party walls" are not "constructed of brick, stone, concrete or other approved of incombustible material." It thus omits iron, one of the materials named in the statute, and adds "concrete or other approved of incombustible material" not named in the statute.

The council has no power to pass a by-law prohibiting the erection of a building whose main walls are to be of iron; but this they purport to do by their by-law, unless the words "other approved of incombustible material" unqualifiedly include iron. The by-law contemplates some one approving of the proposed incombustible material, and that his approval shall be necessary in order to the taking of the proposed building out of the prohibited class. It is not sufficient to say that such a person would in all human probability approve of iron. He is not bound to do so; and, if he withheld his approval, then the proposed building would, under the by-law, fall within the prohibited class.

So far as the material of the main walls is concerned, any one has the statutory right to erect a building whose main walls are of iron, and the council has no right to prevent him doing so; but under their by-law they do deprive him of his statutory right and substitute therefor the arbitrament of some unnamed person.

In this respect the by-law is, in my opinion, *ultra vires;* and, therefore, the sections containing the unauthorised provisions should be set aside.

It may be that in other respects the by-law contravenes the provisions of the statute; but, as I have reached the foregoing

conclusion, it is not necessary to consider other possible objections.

I therefore think, with respect, that the judgment appealed from should be reversed.

The defendants, having obtained a permit from the city architect authorising them to erect the proposed building, began its construction; but, on the ground that it would contravene the by-law in question, have been restrained at the plaintiffs' instance by interim injunction and judgment at the trial from continuing the work, and they are entitled to payment of any damages occasioned to them by such proceedings, and for such purpose it should be referred to the Master to ascertain what, if any, damages the defendants have sustained.

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The defendants are also entitled to their costs of action, including their costs of the interim injunction proceedings and of this appeal.

LEITCH, J.:—I agree.

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MAGEE, J.A.:—The city corporation do not claim to uphold the action or the judgment appealed from, except under sec. 140 of by-law No. 6401, passed on the 1st April, 1913.

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That section in effect enacts that, within the district known as limit "B," "all outside and party walls shall be built of brick, stone, concrete, or other approved of incombustible material," but permits "one and only one wooden stable" of specified limited size, if covered with roughcast or galvanised metal siding, and if the shingles used be laid on a sheet of asbestos paper (as in sec. 48), and also permits wooden sheds not over 10 x 14 x 10 feet in size, if located not less than six feet from any other building, and if the shingles used be laid on asbestos paper. Presumably it was intended to allow a stable for each residence or shop or main building.

The only authority claimed for this section of the by-law is said to be found in clauses (*b*) and (*c*) of sec. 542 of the Consolidated Municipal Act, 1903. The municipal corporation were authorised by the Municipal Amendment Act, 1904, 4 Edw. VII. ch. 22, sec. 20, to apply to restrain breaches of any by-law

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passed under those clauses. By-laws were authorised by clause (*a*) "for regulating the erection of buildings," and by clause (*b*) "for preventing the erection of wooden buildings . . . and of wooden fences in specified parts" of the city, and by clause (*c*) "for prohibiting the erection or placing of buildings, other than with main walls of brick, iron or stone, and roofing of incombustible material within defined areas."

Clauses (*a*) and (*b*) were to be found in one clause of the Municipal Act of 1859, C.S.U.C. ch. 54, sec. 297 (*c*) (see 12 Vict. ch. 81, secs. 81 and 107), and these limited to cities and towns. Clause (*c*) was enacted in 1873 by 36 Vict. ch. 48, sec. 385, (*c*) being then combined in one clause with clause (*b*). It appears to have been enacted in consequence of the decision in *Attorney-General* v. *Campbell*, 19 Gr. 299, that a by-law requiring buildings to be of "stone, brick, iron or other materials of an incombustible nature" was not authorised by the enactment now in clause (*b*), allowing prevention of wooden buildings, and was invalid. But it is to be noted that the Legislature in the new clause (*c*) did not follow the terms of that by-law.

It will be seen that, in so far as clause (*b*) of the statute is concerned, this by-law is no better than its predecessor which was held invalid in *Attorney-General* v. *Campbell*. Equally it exceeds the authority to prevent the erection of wooden buildings, and, therefore, is not valid under that clause, even if the defendants' building can be considered to be a wooden one.

Clause (*c*) becomes thus the only one for consideration. It gives power to prohibit. Section 140 of the by-law does not in terms prohibit anything, but impliedly does so by requiring the walls to be of the specified class of materials, and sec. 2 forbids the erection of any building without a permit, which is not to be granted if the building does not conform to the by-law. As to roofs, sec. 48, which prohibits other combustible materials, allaws shingles in limit "B" if laid on asbestos paper, and declares that a covering of iron is to be deemed incombustible if put on as therein mentioned.

Taking this as substantially a prohibition of all other materials than those mentioned, several matters are noticeable when the by-law is compared with the statute.

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First, the by-law does not allow "iron" to be used unless approved of, even though incombustible. Presumably the approval is to come from the inspector, without whose permit under sec. 2 of the by-law no building can be commenced, but this is not made very clear. Nowhere in the by-law do I find iron approved of for walls. Section 48 declares that a roof covering of iron or other substances shall be considered incombustible if put on as prescribed. As the statute does not allow restriction upon the use of iron, the by-law exceeds in this respect the powers given, and, under the principle in *Attorney-General* v. *Campbell*, is invalid. In that case the defendant's building was of wood thickly plastered; that sort of construction, so far as regards stables, is in this by-law placed alongside of iron sheeting such as the defendants proposed to use.

Second, clause (*c*) would apply to wooden buildings equally with others prohibitable thereunder. The by-law does not prohibit all wooden buildings, but expressly permits wooden sheds, and what it calls a "wooden stable," if the latter be covered with roughcast or iron sheeting, and wooden sheds.

Third, the statute allows prohibition of buildings other than with main walls of brick, iron or stone, and roofing of incombustible material. The by-law (secs. 140 and 48) permits roofs of shingles if laid on asbestos paper.

Fourth, the statute refers to "main walls," the by-law only speaks of "outside and party walls." The latter term is defined in sec. 5 (*b*) of the by-law. There may be many main walls which would not come under either of the terms in the by-law, and I do not find them dealt with elsewhere in the by-law. Therefore, the by-law does not give the protection which the statute intended.

Fifth, the by-law permits walls of "concrete," which was not mentioned in the statute of 1903, and also permits "other approved of incombustible material." The Legislature has, since the by-law, added "cement" and "concrete" to the list of non-prohibitable materials, by the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43, sec. 400 (18), but that amendment cannot affect the validity of the existing by-law. If the council had no right under clause (*c*) to except from prohibition walls of wood, the fact that

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concrete is incombustible does not make the by-law any more valid than if oak were mentioned instead of concrete.

In respect of each of these last four matters, as well as the first, the by-law is, I think, invalid.

These powers with regard to fire limits are intended for the benefit of the community, and should, I think, receive fair and reasonable interpretation, although it is said in Dillon on Municipal Corporations, 5th ed., sec. 727, that, being in derogation of common right, they must be strictly construed in favour of the owners of buildings.

The power to prohibit given by this statute did not, however, in my opinion, give power to discriminate so as to prohibit some things while permitting others over which the power extended. If a municipal council were authorised to prohibit the sale of intoxicating liquors, it could not, I venture to think, forbid the sale of whisky while permitting the sale of beer and wine, nor could it permit the sale in a certain class of buildings while forbidding it in others. So if the council were empowered, as it is under clause (*b*), to prevent the erection of wooden buildings, it could not forbid buildings of pine and permit those of oak or maple; nor could it say, "We will permit workshops or stables of wood, but not residences or shops." The power need not be exercised, but, if it be, it is prohibition which is to be effected.

If this be so, then where the power is to prohibit buildings not of a class having certain qualifications, then equally the prohibition, if any, must be general outside of the class; and, even if that were not so as a general proposition, the wording of clause (*c*) indicates that such was the intention in this case.

Here the Legislature left it to the council to say whether any and what district needed protection from fire; but, if such protection were declared needful, then the Legislature, and not the council, fixed the measure of it, and it was not left to the latter to say that it would not be so strict as the Legislature and would admit some buildings not of the class or not having all the qualifications which the Legislature specified.

The object of the enactment must be considered. If it were power to prohibit within a particular district buildings other

than of Gothic architecture, the object would manifestly be not the prohibition of buildings, but the ensuring of Gothic buildings; and so here the object is not to give power to prohibit buildings, but to prohibit buildings lacking certain characteristics, and to ensure those characteristics. But, if the power is to be considered selective, a council might, under this clause, permit wooden buildings and prohibit all others not of brick, stone, or iron, which would be the very opposite of the intention of the Legislature.

The statute says the council may prohibit "buildings, other than with main walls of brick, iron or stone, and roofing of incombustible material." By the change of conjunction from "or" to "and," coupling the roof with the walls, the intention is shewn of making a specification as it were for the ratepayers' protection and of preventing a council from allowing in a district needing fire protection brick walls with combustible roofs or incombustible roofs with wooden walls.

Had it been intended to give the council such a wide discretion and power of selection, such intention could easily have been clearly expressed. It cannot readily be inferred that it was thought necessary to withhold from a discretionary power the very class of walls which a council exercising the least discretion would hardly think of prohibiting or to save incombustible roofs from the exercise of a power given for the prevention of fires.

The frame of the clause prohibiting buildings other than with such walls and roofs, leads me to conclude that the Legislature was not giving a power of discrimination. The words mean in effect "buildings other than this class" or "buildings without walls and roofs of this character." If such a discretionary power was intended, then a council could, under clause (c), in addition to brick, iron, and stone, allow rough-cast or even wooden buildings, and exclude concrete or cement, or the converse. If the discretionary power was not intended, then the council could not permit, for instance, buildings of concrete as well as those of brick, iron, or stone, while forbidding all others, including wooden buildings. The council need not establish a limit at all under that clause, and could still resort to clause

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(*b*) to keep out wooden buildings from the same district or any district not necessarily co-terminous with it.

In the Municipal Act of 1913, sec. 400, clause 18, which came in force on the 1st July, 1913, three months after the date of this by-law, there is a notable transposition of the words of clause (*c*), but making, as I think, even more plain my reading of it as a specification of the sort of buildings which alone could be erected in a fire limit. The addition therein of "cement" and "concrete" has already been referred to.

This latter amendment can hardly have been made to prevent councils from disallowing walls of cement or concrete within fire limits in these days when such buildings are so common, but would be more likely intended to take those two materials also out of the necessary totality of prohibition in a by-law under clause (*c*) and add them to the specifications adopted by the Legislature.

The Municipal Act gives councils power to prohibit very many things, but I have not discovered any instance of the use of the word "prohibit" alone, where discretion as to the extent of prohibition would manifestly be intended.

There are some *dicta* in some American cases to the effect that a general power of prohibition will authorise partial prohibition, but in any of those which I have seen there were other words combined with "prohibit," and the discrimination was not such as here, and the difference between prohibition and mere restriction is pointed out in *State* v. *Fay* (1882), 44 N.J. Law 474.

Even if I am wrong as to the power to permit other materials in the walls, there was not, I think, any power to permit roofs which did not come within the term "incombustible;" nor was there any power to prevent one land-owner from erecting a wooden or roughcast dwelling and allow his neighbour to erect such a stable or shed close by; nor was there any intention to permit the council to waive the requirement as to any main walls; nor was there any power to subject the use of iron to the approval of any one.

I am, therefore, of the opinion that the by-law was invalid.

In this view, it becomes unnecessary to deal with the question whether the defendants' proposed building is a wooden building, within the meaning of the statute, or within the meaning of the by-law itself, which allows buildings of the same character in this and other fire limits. So, also, with the questions as to the right to require a permit, or the terms of the permit granted, or the effect of granting it when expenditure is made on the faith of it, and also as to the right of the city inspector to allow a deviation from the requirements of this section of the by-law, or to revoke his permit except for the two reasons mentioned in the section giving him power of revocation, and whether in fact there was a revocation by him or only by the board of control. I may point out, however, that sub-sec. 6 of sec. 2 of the by-law, which authorises the inspector to allow deviation, follows the wording (and, under the Interpretation Act, 1907, 7 Edw. VII. ch. 2, sec. 7 (44), the meaning) of the statute 5 Edw. VII. ch. 22, sec. 22, which authorises deviation from the by-laws "regulating the erection of buildings," which are the words used in clause (*a*) of sec. 542, though other parts of the Municipal Act give various powers of regulation as to parts of buildings. If restricted to by-laws under clause (*a*), it would not necessarily authorise a deviation from a by-law under clause (*b*) or clause (*c*).

Magee, J.A.

The action should, in my opinion, be dismissed with costs to the defendants both of the action and appeal.

Sutherland, J.

Sutherland, J.:—The plaintiff corporation seek in this action an injunction restraining the defendant company from erecting coal sheds in the city of Toronto, in contravention of by-law No. 6401, passed on the 1st April, 1913. The by-law was adopted pursuant to the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 542, which enacts as follows:—

"By-laws may be passed . . .

"1. (*a*) For regulating the erection of buildings;

"(*b*) For preventing the erection of wooden buildings, or additions thereto, and of wooden fences in specified parts of the city, town, or village;

"(*c*) For prohibiting the erection or placing of buildings, other than with main walls of brick, iron or stone, and roofing of

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incombustible material within defined areas of the city, town or village."

Section 139 of the by-law is in part as follows: "In limit 'A' the outside and party walls of all buildings shall be constructed of brick, stone, concrete or other approved of incombustible material, and no wooden structures of any kind, except hereinafter provided for, shall be erected, and all roofs shall be constructed of incombustible material, except," etc. And sec. 140 is in part as follows: "In limit 'B' all outside and party walls, except hereinbefore or hereafter otherwise specified, shall be built of similar materials to those specified in the preceding section for limit 'A.' One and only one wooden stable not exceeding sixteen feet by twenty-four feet and sixteen feet high to plate or twenty-five feet to ridge of roof may be erected, provided the entire outside walls are covered with rougheast or galvanised metal siding," etc.

By 5 Edw. VII. (1905), ch. 22, sec. 22, the said Act was amended by adding the following section: "542*b*. The council of any city having a population of 100,000 or over may pass by-laws authorising the city architect, or other officer, appointed therefor, to permit such deviation from the by-laws regulating the erection of buildings in special cases as in his opinion will afford proper and safe construction under the circumstances."

Section 2, sub-sec. 6, of the by-law, is as follows: "The said inspector, who is hereby appointed for this purpose, may permit such deviation from the by-laws regulating the erection of buildings in special cases as in his opinion will afford proper and safe construction under the circumstances."

The defendant company had applied for and obtained a permit, dated the 22nd May, 1913, in part as follows: "Permission is hereby granted to Elias Rogers Co. Ltd., 26 King St. E., to erect one storey gal. iron coal shed on the Belt Line west of Yonge street, north end of avenue, in accordance with plans and specifications approved by this department; estimated cost $18,000; permit fee $12.75. This permit is granted on the express condition that the said building, etc., shall in all respects conform to the provisions of by-law No. 6041, regulating the

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construction of buildings," etc. (Sgd.) "Robt. McCowan, city architect and superintendent of buildings."

The defendant company had cleared the ground of trees, excavated for the foundations, and built a couple of small buildings to store their appliances and materials in, when the plaintiff corporation assumed to revoke the permit, and thereafter applied for and obtained an interim injunction. They ask that it should be made permanent.

The defendant company contend, in the first place, that the permit once given could not be recalled except for the reasons set forth in sec. 2, sub-sec. 10, of the by-law, which says that "every permit shall be subject to revocation should the inspector of buildings, or any of his inspectors, ascertain that the work being carried on under such permit is being done in a manner that does not reasonably comply in every respect with the plans and specifications submitted for approval when such permit was granted, or if, in the opinion of the said inspector of buildings, satisfactory progress is not being made to complete the said work."

It was admitted on the appeal by counsel for the plaintiff corporation that this is so, and that they cannot justify the cancellation of the permit in the manner attempted. They say, however, that it was not competent for the inspector to give any permit wider than the authority conferred on him under sub-sec. 6 of sec. 2. That sub-section only permits him to authorise in special cases such deviation from the by-laws "regulating the erection of buildings" as, in his opinion, might be warranted in the circumstances. It is an authority to deal with and deviate from a stipulated mode of erection of buildings, not to substitute a different kind of material from one required.

I agree with this view, and am of opinion that sub-sec. 6 must be construed as an authority to permit a deviation only in so far as anything is enacted in the by-law pursuant to the power granted under sec. 542 of the Act, sub-sec. 1 (*a*), "for regulating the erection of buildings," is concerned, and no further.

But, aside from this, it is doubtful whether the permit in question can, in view of that part of it which says "that the said

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building, etc., shall in all respects conform to the provisions" of the by-law, be read as authorising the erection of a building with walls of different material than required by sec. 140 of the by-law.

But the defendants attack the by-law itself, and say that sub-sec. 139 is *ultra vires*. If it had not been for the presence of the words "approved of" in sec. 139 of the by-law, it might have been contended, with some force, that we could take judicial notice of what is common knowledge, that iron is deemed an incombustible material; and, in that view, would have to consider whether that material, included in the statute and apparently omitted in the by-law, was in reality embraced in the latter under the term "incombustible material." In that event, and keeping also in mind the fact that it is the common law rights of those proposing to build within the prescribed areas that are being affected and restricted, it might have been necessary to determine whether they would not be less curtailed, rather than more, by the language used in a by-law so expressed than if the exact language used in the statute had been employed therein.

If the by-law had used the exact terms of the statute, those proposing to build within the reserved areas would have been restricted to the materials, brick, stone, and iron. Under the by-law they would be permitted to use brick, stone, concrete, and other incombustible material, which latter term would include iron, and thus the restriction imposed would be less, and the scope of choice as to materials greater, under such a by-law, than under one framed in strict conformity with the statute.

But we are not, I think, called upon to consider or determine this question. The omission of the word "iron" and the inclusion of the words "approved of" between the word "other" and the words "incombustible material" raises the point that, before the words "incombustible material" can be considered to cover iron, some authority, the council, or some other not expressly designated in the by-law, must pass judgment on the matter, and may do so in the negative.

I have had the opportunity of reading the judgments of Sir William Mulock, Chief Justice of this Court, and of my brother

Mr. Justice Magee, and agree that in this respect the by-law is *ultra vires* of the corporation.

I agree, therefore, that the appeal should be allowed, and with costs in favour of the defendants here and below.

Appeal allowed.

B.C. ELECTRIC R. CO. v. VANCOUVER, VICTORIA AND EASTERN R. CO.

Judicial Committee of the Privy Council, Lord Moulton, Lord Parker of Waddington, Lord Sumner, and Sir George Farwell. June 26, 1914.

1. RAILWAYS (§ II B—19)—ABOLITION OF GRADE CROSSINGS—COST—LIABILITY OF STREET RAILWAY—POWER OF COMMISSIONERS TO IMPOSE PART OF COST ON.

Where the Railway Commissioners of Canada make a permissive order on the application of a municipal corporation authorizing the latter to construct viaducts to carry streets over a railway which is subject to Dominion legislation and it is left to the municipality to avail itself of the order or not, sec. 59 of the Railway Act (Can.) does not apply, and it is not competent for the Railway Commissioners to include in their order a direction that a tramway company, whose line and crossing of the other railway would be affected by the change of grade, shall contribute (on the ground of the benefit which it would receive) a certain portion of the expense if the application on which the tramway company appeared was one solely between the other railway and the municipality and no relief was claimed against the tramway company in the notice of motion.

[*B.C. Electric R. Co.* v. *V.V. and E.R. Co.*, 13 D.L.R. 308, 48 Can. S.C.R. 98, 15 Can. Ry. Cas. 237, reversed.]

Statement

APPEAL by an electric railway company from the judgment of Supreme Court of Canada, *B.C. Electric R. Co.* v. *Vancouver, etc.*, 13 D.L.R. 308, dismissing an appeal from an Order of Board of Railway Commissioners in so far as it imposed a part of the costs of certain overhead crossings against appellants.

The appeal was allowed.

Upjohn, K.C., *Bodwell*, K.C., and *Gordon Browne*, for the appellants.

Sir R. Finlay, K.C., *Arthur Page* and *J. G. Hay*, for the respondents the city corporation.

A. H. Macneill, K.C., for the respondents the railway company.

The judgment of the Board was delivered by

Lord Moulton

LORD MOULTON:—The appellants, the B.C. Electric R. Co., Ltd. (referred to herein as the "tramway company"), are a com-

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pany operating street railways in the city of Vancouver under powers conferred upon them by an Act of the Legislature of the province of British Columbia. Their railways are local street railways wholly situated within the province of British Columbia, and have not been declared to be for the general advantage of Canada or for the advantage of two or more provinces, so that they have not passed into the domain of legislation of the Dominion Parliament.

The respondents, the Vancouver, Victoria and Eastern Railway and Navigation Company (referred to herein as the "railway company") are a company owning and operating a railway which has been declared to be a work for the general advantage of Canada. It is therefore under Dominion legislation. Its tracks run through the city of Vancouver, of which the other respondents (hereinafter referred to as the "corporation") are the municipal authority.

The litigation out of which the present appeal arises relates to a portion of the track of the railway which runs along the bottom of a valley with somewhat steep sides, the general direction of which is north and south. That valley is included within the limits of the city of Vancouver, and streets run across and along it, but owing to the inequality of the levels there has been but little building along those streets. One street, known as Raymur Avenue, runs along the valley parallel to the railway track and near to it. Four streets, whose direction is east and west, cross Raymur Avenue and the railway track at right angles. These streets are known as Hastings St., Pender St., Keefer St., and Harris St. Tracks of the tramway company pass along Hastings St. and Harris St., and cross the tracks of the railway company by level crossings.

For some time prior to July, 1912, the corporation had under consideration a plan for carrying the four streets above referred to across the railway track on viaducts, so as to avoid the gradients due to the low level of the railway track. Owing to their not having decided whether or not they should adopt this plan, they had been unable to grant any of the numerous applications which had been made to them for building permits along those streets, inasmuch as the grades of the streets could not be determined. Early in 1912, however, they passed a by-law authorising the

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construction of these four viaducts. Such a by-law required the assent of the citizens to give it validity, and on being put to the vote it failed to obtain the requisite support, on account of the great expense that the construction of the viaducts would entail on the corporation.

Under these circumstances the corporation proceeded to apply to the Railway Board for an order authorising the construction of the viaducts and declaring the respective proportions in which the cost of the bridges, etc., should be borne by the railway company and the corporation. Originally no notice of this application was served upon the tramway company. But at the hearing of the application it was pointed out that, inasmuch as the proposed constructions would affect the crossings of the tramway company, they ought to be served with a copy of the application. Counsel representing the tramway company were present in the Court at the time and consented to accept service, so that the hearing was continued without interruption. But, although the tramway company were thus made parties, their counsel took no part in the discussion except to oppose the contention put forward by counsel on behalf of the railway company, that the tramway should bear a part of the cost of the construction of the viaducts and the street improvements connected therewith.

At the conclusion of the hearing the Railway Board indicated that they would grant the application of the corporation and apportion the cost of the works among the railway company, the corporation and the tramway company, and on October 14, 1912, they accordingly made an order the operative part of which is as follows:—

It is ordered as follows:—

1. The applicant is hereby authorised to construct Hastings Street, Pender Street, Keefer Street, and Harris Street across the tracks of the Vancouver, Victoria and Eastern Railway and Navigation Company, in the said city of Vancouver, by means of overhead bridges, as shewn on the plan filed with the Board under file No. 20062, detail plans of the said structures to be submitted for the approval of the Chief Engineer of the Board.

2. Twenty per cent. of the cost of the actual construction work at each of the crossings on Pender and Keefer Streets, not to exceed in each case the sum of $5,000, shall be paid out of the Railway Grade-Crossing Fund; twenty-five per cent. of the remainder of the cost of such work shall be borne and paid by the applicant, and seventy-five per cent. by the Van-

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couver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing Harris Street Bridge, not to exceed the sum of $5,000, shall be paid out of the Railway Grade-Crossing Fund; twenty per cent. of the remainder of such cost to be paid by the applicant, twenty per cent. by the B.C. Electric R. Co., and sixty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Co. Twenty per cent. of the cost of constructing the Hastings Street Bridge shall be paid by the applicant, twenty per cent. by the B.C. Electric R. Co., and sixty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Co.

3. The cost of depressing the tracks of the Vancouver, Victoria and Eastern Railway and Navigation Company shall be included in the cost of the work.

4. The cost of maintaining the said Keefer, Pender, Harris and Hastings Street bridges shall be borne and paid, fifty per cent. by the applicant and fifty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Co.

5. In case of dispute between the parties in carrying out the terms of this Order, the same shall be settled by the Chief Engineer of the Board.

The tramway company thereupon applied to the Supreme Court of Canada for leave to appeal to that Court from the above order in so far as the said order directed that the tramway company should pay a portion of the cost of the construction of the Harris Street bridge and of the Hastings Street bridge, and duly obtained permission so to appeal on the ground that the Railway Board had no jurisdiction to order the tramway company to pay any proportion of the costs of the bridges and other works mentioned in their order.

The appeal came on before the Supreme Court of Canada on April 7, 1913, and was dismissed with costs by a majority of the Judges of that Court, Duff and Brodeur, JJ., dissenting. The order dismissing the appeal is dated May 6, 1911, and it is from this order that the present appeal is brought.

Their Lordships entirely agree with the remarks of Duff, J., as to the ground and reason of the application of the corporation to the Railway Board. Referring to the statement made at the hearing by Mr. Baxter, who represented the corporation, he says:—

> Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying

for permits to build upon these streets, and these could not be granted owing to the inability of the municipality to give the grade of the streets. The Council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised.

It follows, therefore, that the application was a matter between the corporation and the railway company alone. The tramway company was entitled to be present to see that its interests were not prejudiced by any order which might affect injuriously property belonging to it. But the application was not made against it nor was it asking any privilege from the Railway Board, so that its presence did not give to the Railway Board any jurisdiction to make this order against it. If the Board possessed any such jurisdiction, it must be derived from the provisions of the statutes which created it and gave to it its powers. Their Lordships can find nothing in those statutes which empowers the Railway Board to make any such order against the tramway company. The only portion of the tramway lines which was subject to the jurisdiction of the Railway Board was the actual crossings, and those only so far as concern secs. 227 and 229 of the Railway Act, and these sections have nothing whatever to do with such matters as these street improvements So far as concerns the cost of the bridges or the cost of lowering the track of the railway company (which by the order was included in the cost of the viaducts), the tramway company was in precisely the same position as any private citizen of the city of Vancouver. It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a proportion of the cost of the improvements because they were of opinion that the tramway company would benefit by them. They say:—

> It being a substantial benefit to them we are of opinion that they should contribute to the cost of the two bridges they will use. That is the bridges at Hastings and at Harris.

The same language might have been used about a private citizen owning some large shop on one of the streets, or owning premises on either side of the valley, who would profit by the connection being on the level instead of by two steep and opposite grades, and such a private individual would be just as much under the jurisdiction of the Railway Board as was the tramway

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company. The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefited by the works gave them jurisdiction to make them pay the cost or a portion of it. There is nothing in the Railway Act which gives any such jurisdiction.

An attempt was made to treat the order of the Board as being made under the powers of sec. 59 of the Railway Act, and it was contended that such section entitled the Railway Board to require that the tramway company should pay a portion of the expense. It is sufficient to point out that the order is not made under sec. 59, nor does it come within its provisions. It does not direct that any work should be done. It is an order of a purely permissive character granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of sec. 59 relate to a wholly different class of cases.

It is not necessary for their Lordships to deal with any of the other weighty reasons given in the judgment of Duff, J. On the grounds above stated, they are of opinion that the order so far as it directed the appellants to pay a portion of the costs was made without jurisdiction, and they will humbly advise His Majesty that the appeal should be allowed with costs, and that the order of the Supreme Court should be set aside, and that in lieu thereof an order should be made, with costs, allowing the appeal to the Supreme Court of the present appellants, and setting aside the order dated October 14, 1912, of the Board of Railway Commissioners, in so far as the said order directs that the British Columbia Electric Railway Company, Limited, shall pay a certain proportion as provided in the said order, of the cost of the construction of the Harris Street bridge and the Hastings Street bridge referred to.

Appeal allowed.

UNITED BUILDINGS CORPORATION v. CITY OF VANCOUVER.

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Judicial Committee of the Privy Council, Lord Moulton, Lord Parker of Waddington, and Lord Sumner. June 15, 1914.

1. HIGHWAYS (§ V—240)—LANES—CLOSING BY CITY—LEASING FOR PRIVATE USE.

Under the Vancouver Incorporation Act, 1900, secs. 125 (52) and 215, the city of Vancouver may pass a by-law diverting a public lane, and may without a vote of the ratepayers lease the portion thereof closed by such diversion for building purposes for the period of twenty-five years limited by sec. 8 of the amending Act of 1907; the decision of the City Council that such closing and diversion is in the interest of the general public must prevail notwithstanding the lease of the closed portion to adjoining owners at a nominal rental, where the evidence does not support a charge of *mala fides* against the City Council.

[*United Buildings Corp.* v. *City of Vancouver*, 13 D.L.R. 593, 18 B.C.R. 274, affirmed.]

2. HIGHWAYS (§ V A—246)—CLOSING FOR BENEFIT OF PRIVATE PERSON—PUBLIC INTEREST—VALIDITY OF BY-LAW.

Though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it, a municipal corporation must be taken to give "any bonus" within the B.C. Municipal Act, 1906, sec. 194; nor can a by-law be said to be outside the powers conferred by the Vancouver Act, 1900, sec. 125, merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons.

[*Re Inglis and Toronto*, 9 O.L.R. 562; *Re Barclay*, 12 U.C.Q.B. 92; *Scott* v. *Tilsonburg*, 13 A.R. (Ont.) 237; *Morton* v. *St. Thomas*, 6 A.R. (Ont.) 323, referred to.]

Statement

APPEAL from the judgment of B.C. Court of Appeal, *United Buildings* v. *Vancouver*, 13 D.L.R. 593, dismissing an appeal from the refusal to quash a municipal by-law closing a public lane.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—On July 15, 1912, the corporation of the city of Vancouver enacted a by-law for the diversion of a lane in that city, which was a public highway. Part of it, which led into one thoroughfare, was stopped up and by giving it a right-angled turn the lane was made to lead into another instead. The corporation made provision for an extra space for vehicles to turn in at the corner. Whether that space was in fact sufficient, and whether the change itself hampered the preservation of the adjacent buildings in case of fire, are questions which do not arise before this Board. If the corporation had power to pass the by-law at all, it had authority

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to determine such questions: *Haggerty* v. *Victoria*, 4 B.C.R., at p. 164.

The alteration in the lane was made at the instance and on the petition of the Hudson's Bay Co., whose building-land lay on both sides of the part which was closed. They did not seek to assist the traffic of the locality or to promote the health of the neighbourhood. They wished to obtain a building lease of the closed part of the lane, and so to be able to erect a long unbroken block of buildings instead of two smaller ones. The corporation drove a bargain with the Hudson's Bay Co., and it has not been contended that the bargain did not secure for the city and the public an ample *quid pro quo*. Two points only in that bargain need be referred to. It was known, firstly, that there was opposition to the proposed by-law, and the corporation took an indemnity from the Hudson's Bay Co.

> against any actions or suits which may be brought against the city by reason of the passing of the by-law closing said lane and stopping up thereof.

Secondly, the corporation, having discharged the closed portion of the lane from the public right of highway, leased it to the company at one dollar per annum, without taking any covenant to build on it, for twenty-five years, the longest term within the corporation's leasing powers exercisable without the express assent of the ratepayers, signified by popular vote: sec. 8 of the Act of 1907 amending the Vancouver Incorporation Act, 1900.

In enacting the by-law the corporation acted under the Vancouver Incorporation Act, 1900, sec. 125, sub-sec. 52. It has been argued that the transaction was one which amounted to giving a "bonus" to the Hudson's Bay Co. within sec. 194 of the Municipal Act, 1906, sub-secs. 171 to 184 of the Vancouver Act not applying to this transaction. If so, the by-law enacted required for its validity, the assent of not less than "three-fifths in number of the electors" voting upon it, when duly submitted to the "electors of the municipality" before its "final passage." There is nothing in the evidence to prove any motive for avoiding reference to the electorate, and no evidence, nor indeed any suggestion, of corruption against members of the corporation personally.

Strong opposition to the Hudson's Bay Co.'s petition was offered by the now appellants, who, as owners of property abutting

on the unclosed portion of the lane, considered their premises to be injuriously affected. On the other hand, the petition had the support of an actual majority of the owners of property in the lane. The appellants as ratepayers obtained a rule *nisi* calling on the corporation to shew cause why the by-law should not be quashed, on the grounds that the closing of the lane was not in the interest of the public but was solely in the interest of the Hudson's Bay Co., that it worked hardship to the ratepayers, and was *ultra vires*. Evidence on affidavit was filed, and eventually Clement, J., discharged the rule. An appeal was taken to the Court of Appeal of the province of British Columbia, and the members of that Court being evenly divided in opinion, it stood dismissed, and leave was given to appeal to their Lordships' Board.

The grounds taken before their Lordships have been twofold: First, it was said that there was no power to enact this by-law under sec. 125 (52) because it was not a matter of "public health"; secondly, it was said that the exercise of the power, if any, was not in good faith, but was actuated by motives, and resorted to for purposes, other than those which the section impliedly requires. The latter ground may be taken first.

The direct evidence is that of three aldermen, members of the Board of Works, who swear that the Board, before whom the matter came, decided unanimously, considering the request a reasonable one and thinking that, in the interests of the city it ought to be granted, in view of the class of building, which the Hudson's Bay Co. proposed to erect, and of the facilities offered in return to the other owners in the block in question. Each added his opinion that the change improved the access of light to buildings in the lane, and did not injuriously affect any of the owners in the other lots. To the facts thus deposed to there was no contradiction in the evidence filed, though there was evidence that the opposite opinion was entertained by other persons. The statement of these aldermen, of course, is not conclusive, but it is entitled to very serious consideration. No fact was urged against it except the character of the transaction itself. The personal credit of these deponents was not impugned at all. There can be no doubt on the facts that the site leased will be built on by the lessees in their own obvious interest, though they

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have not covenanted to do so. It is easy, especially for those who conceive themselves to be sufferers by it, to suspect and to suggest and even to argue with some plausibility that such a transaction cannot have been carried through without some improper or sinister motive on the part of those members of the corporation who voted for it, in this case all who were voting: and, since opinions differed on this question in the Court below, their Lordships freely recognise that it might bear one aspect or the other, but judging it, as they must do, upon a judicial survey of the whole proved materials, with the experience of men of the world and the full persuasion that such a charge must be proved by those who make it, their Lordships are unable to differ from the opinion of those members of the Court below, who held that the transaction was free from impropriety or bad faith.

Two grounds were urged for the contention that there was no jurisdiction to enact the by-law. The first was that sub-sec. 52 is to be limited to such acts named therein as are done for purposes of public health. This is inferred from the heading of the fasciculus of sub-sections, to which sub-sec. 52 belongs and also from the character of the acts named in the other sub-sections within the fasciculus as well as in the sub-section itself. The second ground is that the "public health powers" and the "bonus" powers of the corporation must be deemed to be mutually exclusive, especially as the first may be exercised without any ratification by a popular vote, while the second requires it. Hence it is said that as the transaction fell within the "bonus powers," the sub-section conferring public health powers cannot be construed so as to cover it.

The material words of sec. 125 and sub-sec. 52 are as follows:—

Section 125. The Council may from time to time pass, alter and repeal by-laws:—

. . . . . .

Public Health.

. . . . . .

(52) For stopping up . . . lanes . . . within "the jurisdiction of the Council."

Other matters dealt with in this sub-section are:—

Making . . . improving, repairing . . . altering . . . sewers, watercourses . . . streets, squares . . . taking or using any land

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in any way necessary or convenient for the said purposes; conducting the drains and sewers beyond the limits of the said city for fertilizing purposes . . . and for entering upon . . . any land in any way necessary or convenient for the said purpose, and repairing and maintaining all bridges.

That the titles, which a statute prefixes to parts of the Act, may be looked at as aids to the interpretation of the language of such parts is well settled, but the assistance to be derived from such consideration varies very much. The title here is "Public Health," an expression often used very comprehensively and often including much that is only concerned with public welfare. Examination of the specific matters enumerated in this fasciculus of sub-sections shews that the scope of this part of the Act is general. They range from prescribing "the duties of health officers and scavengers" (35), and "filling or closing" any water-closets, privies . . . or cesspools (50), to the repair of bridges (52), and the regulation of the weight of bread (55); from "ordering the removal of laundries from any particular locality where, in the opinion of the Council, such laundries are . . . an eyesore to the locality" (40), to "preventing the encumbering by . . . vehicles, vessels, or other means of any . . . river or water or any road . . . bridge, or other communication" (41), and to declaring "any . . . structure . . . dangerous to the public safety" . . . and ordering "that the same shall be removed" (48). It is not impossible that these last-mentioned matters may have some connection, though remote, with the physical and moral health of the community, but they seem to have as little to do with public health in this sense as with eugenics. A similar observation arises on sub-secs. 21 to 33, which are headed Public Morals and include the regulation of bowling alleys (29), and the prohibition of the sale of cigarettes to children (21), on the one hand, and on the other the prevention of brothel keeping (26), and indecent exposure of the person, as also on sub-secs. 63 to 77, which under the title of Markets extend from light weight and short measure (76), to forestalling and regrating (68). The question is one of construction only and their Lordships agree with Martin, J.A., in the Court below, that sec. 125 has been drawn generally so as to combine together, various powers, many of which are of analogous character, but without adhering to strict classification.

There are various minor difficulties in the way of those who

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seek to quash this by-law, which may be dismissed shortly. So far as the by-law in question stops up part of the lane and diverts the rest, it was made honestly within the powers given by sec. 125 (52). Only by introducing the resolution to lease the disused part to the Hudson's Bay Co. is any semblance produced of giving "any bonus," and this has been carried out by the actual grant of a subsisting lease. The procedure for quashing a by-law (secs. 127-132), and the application and rule *nisi* in the actual case do not extend to setting aside the lease. Their Lordships think that this point of form should not be passed over. Further, there is a separate power of leasing under the principal Vancouver Act of 1900, sec. 125, sub-sec. (215), and sec. 8 of the amending Act of 1907. This power of leasing lanes or portions of lanes, if the lease is for a period not exceeding 25 years, may be exercised without the assent of the electors. It applies to portions of lanes disused because the thoroughfare is stopped, and cannot well apply to them till it is stopped. It is true that the power to lease for 25 years is contained in a proviso upon the older sub-section of 1900, but it would be an untenably narrow construction of that sub-section to say that the power of leasing is confined to such property as has been obtained under a by-law made by the corporation; it is enough that it be property at one time required for the use of the corporation, and no longer so required.

The remaining argument is one of great public importance, but the facts do not raise it in the present case in a shape that involves any new decision upon it. Where the competent legislature has imposed on a municipal corporation such a condition, either precedent or subsequent, to the exercise of its powers as the sanction of a vote of the ratepayers, it is essential that no elastic construction should be placed upon a sub-section, which would enable the local authority to evade the restrictions of the statute. See *Re Barclay*, 12 U.C.Q.B. 92, *per* Sir J. B. Robinson, and *Scott* v. *Tilsonburg*, 13 A.R. Ont. 237, *per* Hagarty, C.J. But, though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it a corporation must be taken to "give any bonus" within the Municipal Act, 1906, sec. 194, nor can a by-law be said to be outside the powers conferred by sec. 125 of the Vancouver Act,

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1900, merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons: *Re Inglis and Toronto*, 9 O.L.R. 562. If no one could benefit by this by-law but the Hudson's Bay Co., and the whole advantage to the public at large, or to other members of the public was to be found in the consideration moving from the Hudson's Bay Co. to the corporation, the matter might well be otherwise. Here, however, the by-law was supported by a majority of property owners affected, who are not shewn to have had any interest but that which consisted in the alteration of the lane itself, and there is uncontradicted evidence of a belief on the part of those or some of those enacting the by-law that the alteration in the lane was a public though a local improvement in facilitating the access of light. This last fact alone is enough to distinguish the cases of *Peck* v. *Galt* (1881), 46 U.C.Q.B. 211; *Morton* v. *St. Thomas* (1881), 6 A.R. (Ont.) 323; *Pells* v. *Boswell* (1885), 8 Ont. 680; and *Waterous* v. *Brantford*, 2 O.W.R. 897, 4 O.W.R 355, which are in some respects similar. There is no sufficient juridical reason for rejecting this evidence. Their Lordships cannot speculate about the unascertainable motives of unknown persons. They must act on the evidence as it stands. To those familiar with the *locus in quo* it may seem improbable, or even impossible, that the advantages to be derived from the change in the lane itself were the reason for enacting the by-law, but as the plaintiffs shaped and left their case, it is quite consistent with the possibility that the mere alteration in the lane itself was, partly and even largely, for the general benefit and was an improvement in the interior communications of the city for the benefit of the public health in a wide sense of the term. This being so, and no bad faith or improper conduct being shewn, their Lordships are unable to say that the decision of the Court below was wrong, and will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

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FRASER v. DUMONT.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Moulton, Lord Sumner, and Sir Arthur Channell. July 27, 1914.

1. EVIDENCE (§ XI Q—865)—PECUNIARY CONDITION—RELEVANCY TO SHEW RELATIONSHIP OF EMPLOYEE TO EMPLOYER—INDEPENDENT CONTRACT, NEGATIVED WHEN.

The solvency of the alleged independent contractor is an element to be considered in determining whether a person employed in driving logs on a river for various timber owners does so as their employee or as an independent contractor; and a finding of fact on that question by the trial Judge should not be disturbed except on some strong ground.

[*Dumont* v. *Fraser*, 48 Can. S.C.R. 137, affirmed on different grounds.]

Statement

APPEAL by the defendants from Supreme Court of Canada reversing a judgment of Quebec King's Bench and restoring a judgment of Quebec Superior Court.

The appeal was dismissed.

The judgment of the Board was delivered by

Sir Arthur Channell.

SIR ARTHUR CHANNELL:—This was an appeal by special leave from a judgment of the Supreme Court of Canada reversing a judgment of the Court of King's Bench for the Province of Quebec, and restoring a judgment of the Superior Court for that Province whereby judgment was entered for the respondent against the appellants for $2,500 damages.

The respondent is an owner of mills and land on each bank of the Cabano River in the Province of Quebec, and he brought his action to recover from the appellants the damage done to his property by timber which in April, 1910, got adrift while being floated down the Cabano River in the actual charge of one Olivier Guérette. At the trial before Cimon, J., it was proved that extensive damage was done to the respondent's property, and that it was occasioned by the negligence of Olivier Guérette, contributed to by negligence on the part of the respondent. These findings of negligence were not questioned before their Lordships. The learned Judge held that the appellants were responsible for the negligence of Guérette, and, acting on the law of Quebec as to damage resulting from the negligence of both parties (which law was admitted here), he divided the damages and gave judgment

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for the respondent against the appellants for the sum of $2,500, being part of the damage actually done. The judgment was reversed by the Court of King's Bench of Quebec by a majority of three Judges to two, and that judgment was again reversed by the Supreme Court of Canada by a majority also of three Judges to two. There has, therefore, been a considerable difference of judicial opinion on the questions in the case.

The principal question is whether the appellants are responsible for the negligence of Olivier Guérette. If they are, no other question arises, but if they are not, then a question of great general importance arises, *viz.*, whether on the true construction of certain articles of R.S.Q., 1909, persons using watercourses for the transmission of timber are liable for damage done to the property of riparian proprietors without proof of negligence. It was no doubt by reason of this point being supposed to arise that special leave to appeal was given. As, however, the Board, after hearing the arguments of the appellants' counsel, are of opinion that the appeal against the decision that the appellants are liable for Guérette's negligence fails, the question on the construction of the statutes does not arise, and the Board, having heard arguments on one side only, gives no opinion upon it. It is only necessary to mention it in order to make it quite clear that the dismissal of this appeal involves no expression of opinion on the construction of the statutes, and this is perhaps the more necessary because, although on the facts there was a majority of the Judges below in favour of the respondent, there was on the question of law a majority in favour of the appellants, and the dismissal of the appeal if not clearly explained might lead to the inference that the Board had approved of the view of the statutes taken by the minority.

Their Lordships pass now to the facts on which the liability of the appellants for the negligence of Olivier Guérette depends, and as the Board have come to the conclusion that there is no sufficient ground for interfering with the findings of fact of the trial Judge on this point, they may be stated shortly.

The appellants are a firm carrying on the business of lumbering and the manufacturing of lumber at Cabano, and they were owners of a part, although a comparatively small part, of the timber which formed the "drive" by which the damage was

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caused. The rest of the timber was owned as to a part by a Mr. Hayes, and as to a part by a Mr. England. It was, however, all under the actual charge of Olivier Guérette, and it all broke adrift, blocked a bridge, and caused a flood, and it was of course impossible to distinguish between damage done by the timber of one owner and that done by the timber of another owner, and the Court held that all the owners were liable "solidairement," or, as would be said in England, "jointly and severally," as joint tort-feasors, so that it was immaterial that the other owners were not joined with the appellants as defendants in the action, and on this point the Board see no reason to differ with the view of the trial Judge. In fact, it was not seriously disputed by the appellants' counsel. The liability of the owners depends upon whether Olivier Guérette was an independent contractor or whether the owners, or the appellants, who through their managing partner, Mr. Archibald Fraser, took the more active part in the matter, had such control over Guérette as to make them liable for his negligence. The timber owners in this district appear to have been in the habit of joining together in many of their operations. They or most of them had joined together to form a company which was duly incorporated under the name of the "Cabano Log Driving Association." The certificate of incorporation of this Company stated that it was formed for constructing works in the river and improving the river for log driving purposes. This was done under art. 4921 of the R.S.Q. of 1888, and the Association as such had statutory rights, and in fact executed certain works on the river. Their business was all done in the offices of the appellants, they had no clerks or servants other than those of the appellants, and no books others than those kept at the appellants' office, and they had no funds other than such as were contributed by the various members from time to time in respect of any joint work in which they were interested. In fact all joint operations of the timber merchants who were members of the Association seem to have been conducted through the machinery of the Association without any regard to whether the particular operations were within or not within the powers of the Association, and it seems clear that many of the operations carried on in the name of the Association were *ultra vires*. On March 15, 1910, a meeting of the directors of the Association was held at the

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offices of the appellants (their usual place of meeting), at which it was resolved "That driving of logs on Cabano River be sold," and the minutes then state that the driving of logs was sold to Archibald Fraser for the base price of 80 cents per 1,000 ft. run of timber.

It had previously been resolved to hold a meeting on March 15 "for the sale of the driving of logs on Cabano River," and this appears to have been advertised or to have in some way come to the knowledge of Olivier Guérette. There was evidence that he, being unable to be present on March 15, had requested Archibald Fraser to bid for the drive on his behalf, and it was shortly afterwards agreed between him and Archibald Fraser, that he (Guérette) should conduct the drive and receive as his remuneration the 80 cents per 1,000 ft. of timber. It is on the terms of this agreement, which are by no means clear, that the whole case turns. There was considerable discussion in the Courts below as to whether this transaction was not *ultra vires* of the Cabano Log Driving Association, and as to the consequence of its being so, if it was, but this does not appear to the Board to be material. It is clear that the owners of the logs which were to be the subject of the drive did entrust them to the conduct of Olivier Guérette on the terms, whatever they were, of the arrangement or agreement made between him and Archibald Fraser, and it is of no importance whether the acts done in bringing about that result by the officers of the Log Driving Association are to be considered as the acts of the corporation or the acts of individuals. Olivier Guérette was a man of experience in log driving, but he was a man of no means whatever. The money required to pay the men who worked under him was found by the appellants. It was said that this would have ultimately been set against the 80 cents, but although the risk of damage to the property of other people in the course of the drive was no doubt greater than the risk to the logs themselves, still there clearly was risk to the logs, and if this was a contract, the solvency of the contractor would appear to be very material to the owners, while if Guérette was a servant only it would not be. The facts as to this part of the case are stated in the judgment delivered by Mr. Justice Cross who dissented from the judgment of the majority in the Court of King's Bench. He states nine reasons, tending to shew that there was

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no *bonâ fide* contract such as would relieve the owners, and that Olivier Guérette remained under the control of the owners, or of Archibald Fraser, acting for the owners.

The Board, agreeing as they do in substance with the way Mr. Justice Cross deals with the facts, think it clear that there was ample evidence to justify the conclusions of the trial Judge. Even on paper, the evidence of Olivier Guérette as recorded in pp. 127 to 144 of the record is extremely unsatisfactory, and the view of the Judge who heard him and the other witnesses should not be disturbed except on some strong ground. If a jury had on this evidence found as the learned Judge did, it would be clear that the verdict must stand, and although Courts of Appeal, both in this country and in Canada do not treat the findings of a Judge of fact (who gives his reasons which can of course be criticised) quite as a verdict of a jury, the Board are of opinion that there is nothing in the evidence on the record in this case to justify a Court of Appeal in arriving at a conclusion different from that of the Judge who tried the case and heard the witnesses.

The Board will therefore humbly advise His Majesty that the appeal should be dismissed with costs here and below. The costs of the appeal will be as between solicitor and client in accordance with the terms of the Order granting special leave to appeal.

Appeal dismissed.

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LEVINE v. SERLING.

Judicial Committee of the Privy Council, The Lord Chancellor (Viscount Haldane), Lord Dunedin, Lord Moulton, Lord Parker of Waddington, Lord Sumner, and Sir George Farwell. May 21, 1914.

1. WRIT AND PROCESS (§ II A—18)—SERVICE OF PROCESS ON INFANTS—APPOINTMENT OF TUTOR.

A minor sued in his own name and served as a defendant is not in truth thereby made a party to the action under Quebec law; and where there was during his minority no service on any person capable of being served on his behalf (ex. gr., as his tutor) and before he attained his majority the time for serving the writ had run out, there was no action any longer existing even in an inchoate state.

[*Serling* v. *Levine*, 7 D.L.R. 266, reversed.]

2. INFANTS (§ III—41)—DEFENCE BY INFANT—EXCEPTION ON GROUND OF MINORITY—STATUTORY PROTECTION.

If a minor is named as defendant in an action for malicious arrest brought under the Quebec law, and excepts on the ground of his minority (C.P., article 174), the court may summon such defendant to

appear and support his exception on issue being joined thereon, but by so appearing he does not affect the generality of the veto under article 78, C.P., whereby no person can be a party to an action either as claimant or defendant in any form whatever unless he has the free exercise of his rights, saving where special provisions apply.

[*Serling* v. *Levine*, 7 D.L.R. 266, reversed.]

3. INFANTS (§ III—41)—SERVICE OF PROCESS—ABSOLUTE PROTECTION BY STATUTE.

Under the law of Quebec the incapacity of minors to sue or be sued is absolute, subject only to certain exceptions; and when it has once been established that the so-called defendant in an action for malicious arrest is a minor, he ceases *ab initio* to be a defendant, and he cannot be treated as if he were a defendant by summons or order in such action.

[*Serling* v. *Levine*, 7 D.L.R. 266, reversed.]

Statement

APPEAL by an infant defendant from the judgment of the Supreme Court of Canada, *Serling* v. *Levine*, 7 D.L.R. 266, reversing Quebec King's Bench, involving the question as to whether minority is an absolute bar to an action.

The appeal was allowed.

Geoffrey Lawrence and *P. Ledieu*, for the appellant.

R. C. Smith, K.C., and *G. Williamson*, for the respondent.

The judgment of the Board was delivered by

Sir George Farwell

SIR GEORGE FARWELL:—This is an appeal from the judgment of the Supreme Court of Canada, *Serling* v. *Levine*, 7 D.L.R. 266, who, by a majority of three to two, have reversed the unanimous decision of the Court of King's Bench for Quebec.

The respondent on November 4, 1908, issued his writ in an action for damages for tort against the appellant, and the appellant duly pleaded that he was a minor, and issue having been joined thereon, established the plea. On May 5, 1909, the time for service of the writ expired (art. 120), and on July 2, 1909, the appellant attained his majority. Ineffectual efforts were made by the respondent during the appellant's minority to obtain the appointment of a tutor to the appellant, and on the 27th September, 1909, Lafontaine, J., made an order on the respondent's motion that the defendant should be properly joined to the action and ordered to plead within the regular time on the ground that the appellant had had notice of the application and made default in appearance, and that there was reason to

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believe that the exception of infancy was made to delay the proceedings, and on January 21, 1911, final judgment was entered *ex parte* against the appellant condemning him to pay $2,000 for malicious arrest.

Their Lordships are in accord with the dissenting judgment of the Chief Justice in the Supreme Court. Minority is an absolute bar to an action.

> Art. 78. No person can be a party to an action, either as claimant or defendant, in any form whatever, unless he has the free exercise of his rights, saving where special provisions apply. Those who have not the free exercise of their rights must be represented, assisted, or authorized in the manner prescribed by the laws which regulate their particular status or capacity.

Every action is commenced by writ of summons, which remains in force while unserved for six months from its date (art. 120). Service must be made either on the defendant in person or at his domicile, or at the place of his ordinary residence, speaking to a reasonable person belonging to the family (art. 128). The defendant when summoned must file an appearance (art. 161). It is clear from these articles that a minor sued and served as a defendant is not in truth thereby made a party at all. There is an absolute bar to the right to sue him in his own name. He is by art. 174 enabled to take exception to any action in which he is named as defendant, notwithstanding that he is not in law capable of being one, and by art. 1177 he can obtain revocation of a judgment pronounced against him if no defence or no valid defence has been made on his behalf.

In the case before their Lordships, there was no properly constituted action against the appellant at any time; while he was a minor there was no service on any person capable of being served: before he attained his majority the time for serving the writ had run out and there was no action any longer existing even in an inchoate state. Their Lordships are, with great respect for the majority of the Supreme Court, unable to concur in the reasoning of Brodeur, J. They do not agree with the statement that the incapacity of minors is relative and not absolute: in their opinion the incapacity to sue and be sued is absolute, subject only to certain expressed exceptions. Nor do they altogether agree with the statement that the Code has nowhere

declared that *l'assignation* or summons to appear before the Court of a minor is null; if the minor is named as a defendant and excepts on the ground of his infancy and issue is joined on that issue, the Court can of course summon the defendant who so takes exception to their jurisdiction to appear and support it, but by so appearing he does not affect the generality of the veto in art. 78: that veto depends on an issue of fact, and the Court must necessarily have the parties raising the issue in Court before the point can be properly determined. But when it has once been established, as in this case, that the so-called defendant is an infant, then he ceases *ab initio* to be a defendant and cannot be treated as if he were by summons or order: this is not a mere question of procedure but of legal right, and is therefore not a matter of judicial discretion but of determination on the facts. The proceedings after the infant attained his majority in this case are open to the further objection that there was then no longer any action in existence.

Their Lordships will, therefore, humbly advise His Majesty to allow this appeal with such costs as the appellant is entitled to have appealing *in formâ pauperis*. The respondent must pay all the costs of the proceedings of the Courts below.

Appeal allowed.

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Judicial Committee of the Privy Council, The Lord Chancellor (Viscount Haldane), Lord Moulton and Lord Sumner. July 3, 1914.

1. COSTS (§ I—2*e*)—ON APPEAL TO PRIVY COUNCIL—ORDER FOR LEAVE TO APPEAL IN FORMA PAUPERIS—SCOPE AS TO DATE OF EFFECT.

An order for leave to appeal *in formâ pauperis* to the Judicial Committee of the Privy Council takes effect only from the date at which it is made and has no effect whatever on costs incurred before that date; so where the appeal is allowed with costs the appellant's costs of the petition for special leave to appeal *in formâ pauperis* are not limited to the pauper scale.

Statement

PETITION of the respondent on taxation of costs of an appeal from a judgment of the Supreme Court of Canada, *Serling* v. *Levine*, 7 D.L.R. 266.

Order accordingly.

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LEVINE v. SERLING.

Lord Moulton

The judgment of the Board was delivered by

LORD MOULTON:—Their Lordships have examined the authorities as to the practice of this Board with regard to the date from which an order for leave to appeal *in formâ pauperis* takes effect, and they are clearly of opinion that the settled practice is the same as that of the High Court, namely, that the order takes effect only from the date at which it is made, and has no effect whatever on costs incurred before that date.

The application, therefore, that the costs of the petition for special leave to appeal *in formâ pauperis* may be taxed upon the pauper scale must be dismissed, but there will be no costs of the application.

Order accordingly.

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REX v. SULLIVAN.

Nova Scotia Supreme Court, Graham, E.J., Meagher, Russell and Drysdale, JJ. June 1, 1914.

1. COSTS (§ I—12)—CERTIORARI PROCEEDINGS—OFFENCE AGAINST TOWN ORDINANCE—CRIMINAL MATTER—UNOPPOSED MOTION.

Where a conviction under a municipal ordinance has been removed by writ of certiorari and is quashed by the Court for want of jurisdiction in the convicting justice, and terms are imposed that no action is to be brought against the prosecutor, the Court has jurisdiction and discretion to give or withhold costs and may do so even though the motions for the writ and to quash are unopposed.

Statement

MOTION to vary order quashing a summary conviction with costs.

The defendant was convicted after preliminary arrest under the R.S.N.S. 1900, ch. 71, sec. 263 (67), by the stipendiary magistrate of the town of Stewiacke, and fined $10.00 and, in default of payment, imprisonment for one month, etc., etc., for unlawfully selling musical instruments without the license required by law. The conviction was removed into the Supreme Court by writ of *certiorari* on the order of a Judge at Chambers, and was afterwards quashed for want of jurisdiction in the convicting justice, at the March term, 1914, by the Court *en banc*, which ordered that no action should be brought against the prosecutor. Both applications were made on notice to the prosecutor, but neither was opposed, and, by the order quashing the conviction,

the costs of both motions were given to the defendant against the prosecutor, the mayor of the town.

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Argument

J. J. Power, K.C., for the prosecutor, moved the Court *ex parte* for an order *nisi* returnable next term to strike out that part of the order quashing the conviction giving the defendant the costs of the motions on the ground that, apart from the question of its jurisdiction, the practice of the Court under the Crown Rules was not to give costs on unopposed motions in criminal cases, on motions for writs of *certiorari* and for quashing convictions thereunder, and cited N.S. Crown Rules, 34 and 191; *Re McNutt*, 21 Can. Cr. Cas. 157, 10 D.L.R. 834, 47 Can. S.C.R. 259; *R.* v. *Somers*, 1 Can. Cr. Cas. 46; *R.* v. *Banks*, 1 Can. Cr. Cas. 370; *R.* v. *McLeod*, 30 N.S.R. 471; *R.* v. *Smith*, 3 Can. Cr. Cas. 467; R.S.N.S. 1900, ch. 161, sec. 67; *R.* v. *Crandall*, 27 C.R. 63, 65; *R.* v. *Steel*, 26 O.R. 540.

Judgment

THE COURT refused the motion holding that it always had jurisdiction and discretion in such cases to give or withhold costs according to circumstances, and especially where as in this case, terms were imposed that no action should be brought against the persons for whose illegal acts the defendant had suffered, and he cannot recover his expenses in that way.

R. v. *Freeman*, 21 N.S.R. 483 and *Ricken* v. *York*, [1908] A.C. 454, referred to.

Order nisi refused.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Brown, JJ. July 15, 1914.

1. BRIBERY (§ I—5)—CORRUPT OFFER FOR OFFICIAL INFLUENCE.

To corruptly offer to give a sum of money to a member of the Police Commission appointed for a city by its municipal council from amongst its members, for the purpose of inducing such Commissioner to use his official position to aid in procuring the appointment of a third party as Chief of Police by the Board of Police Commissioners is an indictable offence under sec. 163 of the Criminal Code.

[*R.* v. *Vaughan*, 4 Burr. 2494; *R.* v. *Casano*, 5 Esp. 231; *R.* v. *Pollman*, 2 Camp. 229, referred to.]

2. BRIBERY (§ I—5)—SALE OR PURCHASE OF OFFICIAL POSITION—REWARD FOR ASSISTANCE TO PROCURE.

An attempt to improperly procure the appointment of another to the position of Chief of Police for a city by promising a reward to a mem-

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ber of the appointing board for his influence, will not support a charge under sub-section (*b*) of Code sec. 162 making it an indictable offence directly or indirectly to give a reward for the purchase of an appointment to an office or to agree or promise to do so; such facts do not disclose an attempted sale or purchase of an office under sec. 162 (*b*), but may sustain a count laid for an attempted offence under sec. 163 (*b*) relating to giving or procuring rewards "for any interest, request or negotiation about any office."

Statement

CROWN case reserved by Elwood, J.

The accused was tried before Elwood, J., and a jury on the following charge:—

"C. J. Hogg, of the City of Regina in the Province of Saskatchewan, stands charged by Herbert E. Sampson, agent within the judicial district of Regina, for the Honourable the Attorney-General of the Province of Saskatchewan, by the direction of the said the Honourable the Attorney-General of the said Province, for that he the said C. J. Hogg, in or about the month of October or November, 1913, at the City of Regina aforesaid, did corruptly and unlawfully offer to give $500 to James M. Wessel, then a member of the Municipal Council of the City of Regina, and Chairman of the Police Commission for the said city, for the purpose of inducing him, the said James M. Wessel, to use his position as Chairman of the said Police Commission, and as such alderman, to aid in procuring the appointment of Charles A. Mahony as Chief of Police for the City of Regina, and was thereby guilty of attempted bribery;

And further, that he, the said C. J. Hogg, in or about the month of October or November, 1913, at the City of Regina aforesaid, corruptly and unlawfully promised to give to James M. Wessel, then a member of the Municipal Council of the said City of Regina, and Chairman of the Police Commission of the said City $500 for the purchase of the appointment of Chief of Police of the City of Regina, in favour of Charles A. Mahony;

And, further, that he, the said C. J. Hogg, in or about the month of October or November, 1913, at the City of Regina aforesaid, did corruptly and unlawfully solicit and negotiate about the appointment to the office of Chief of Police of the City of Regina of one Charles A. Mahony, in expectation of profit thereby."

The third count of this charge was withdrawn from the

jury, and the jury found the accused guilty on the first and second counts thereof. The learned trial Judge reserved for the consideration of the Court *en banc* the following questions:—

(1) Was there any offence charged in either the first or second count, and if so, in which?

(2) Does the evidence prove an offence under either the first or second count, and if so, under which?

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Statement

H. Y. MacDonald, K.C., for the accused.

T. A. Colclough, K.C., Deputy Attorney-General, for the Crown.

HAULTAIN, C.J.:—I cannot agree that the evidence in this case supports a charge under section 161 (*b*) of the Criminal Code. The "offer, proposal, etc.," mentioned in that section must be made not only to a member or officer of a municipal council, but must be made in reference to the "passing of a vote or the granting of any contract or advantage" by the municipal council of which the person mentioned is either a member or officer. The person to whom the "proposal or offer, etc.," is made may be, as in this case, a member or officer of a municipal council, but it must be made to him in that capacity and in relation to some proposed action by the municipal council.

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The first count of the charge in question describes Mr. Wessel as a member of the council of the city of Regina and chairman of the police commission for that city. The appointment of a chief of police is made by the police commission and not by the council; so that, in my opinion, an offer made to Mr. Wessel in either of his stated capacities was not made for the purpose of affecting any action by the municipal council. A member of the police commission is not, in my opinion, an "officer" of the council, and even if he is, the promise made in this case was not made to induce an officer of the council to use his influence in that capacity in connection with any vote or other action of that body.

I am, however, of the opinion that the first count states, and the evidence discloses, an attempt to commit the offence defined by section 163 (*b*) of the Criminal Code. The provisions of that section may be stated as follows: Everyone is guilty of an in-

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dictable offence who directly or indirectly gives or procures to be given any profit or reward or makes or procures to be made any agreement for the giving of any profit or reward for any interest, request or negotiations about any office. I am also of the opinion that the first count states and the evidence discloses an offence under the common law.

Bribery is defined in Russell on Crimes, 7th ed., at 627, as "the receiving or offering any undue reward by or to any person whatsoever, in a public office in order to influence his behaviour in office and induce him to act contrary to the known rules of honesty and integrity." It is an indictable misdemeanour at common law to bribe or attempt to bribe any person holding a public office. *Rex* v. *Vaughan*, 4 Burr. 2494, *Rex* v. *Cassano*, 5 Esp. 231.

An attempt to improperly procure an office by offering a bribe or other improper inducement in an indictable misdemeanour at common law. *Rex* v. *Vaughan, supra; Rex* v. *Pollman*, 2 Camp. 229.

There is no evidence, in my opinion, to support the second count. The evidence does not disclose an attempted sale or purchase of an office, but rather, as stated above an attempt to improperly procure an appointment to an office. See remarks of Mr. Justice Yates in *Rex* v. *Vaughan*, 4 Burr. 2494, at p. 2501.

The questions submitted for our consideration must therefore be answered as follows:—

Question 1: The first count of the charge is sufficient and charges an attempt to commit the offence defined by section 163 (*b*) of the Criminal Code. It also sufficiently charges an offence under the common law. The second count charges the offence defined by section 162 (*b*) of the Criminal Code.

Question 2: The evidence proves the offence under the first count both at common law and under the Criminal Code. The evidence does not prove an offence under the second count.

Newlands, J. NEWLANDS, J., concurred with LAMONT, J.

Lamont, J. LAMONT, J.:—I agree that the first count states, and the evidence discloses an attempt to commit the offence defined by section 163 (*b*) of the Code.

BROWN, J. (after stating the facts as above):—The evidence shews that James M. Wessel was at the time of the matters complained of, a member of the council of the city of Regina and chairman of the board of commissioners of police for the city. The office of chief of police was about to become vacant, and the accused employed one Birkenstock to visit Mr. Wessel, as chairman of the board of police commissioners, and to promise him $500 if he (Wessel) would use his influence to secure the appointment of one Mahony to the office of chief of police. Wessel exposed the matter, with the result that the accused was prosecuted, committed for trial, and found guilty on the count as aforesaid.

The first count is laid under sub-sec. (*b*) of sec. 161 of the Criminal Code, and it is contended on behalf of the accused that this section does not apply to the case at bar, for three reasons:—

(1) The chairman of police commissioners is not an officer of the council;

(2) The section contemplates that the action sought for through the officer or member of the council is that of the council itself, whereas, in the case at bar, it was action on the part of the board of police commissioners that was sought;

(3) There was no evidence to shew that the appointment would be of any advantage to Mahony or that he would have accepted same, and that such appointment is not an advantage within the meaning of the section.

The section of the City Act which provides for the appointment of a board of commissioners of police is No. 78, and reads as follows:—

"78. The council may from among its members or otherwise appoint a board of commissioners of police for the city consisting of not more than five members who shall hold office for one year or until their successors are appointed; and if the council appoint such a board then such board upon appointment shall have the sole charge and control of the police force and police department of the city and subject to the provisions of the next following section as to expenditure may exercise all the powers and authority in respect of the same that the council might have exercised had such a commission not been appointed."

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It will be seen that this section refers to members of the board as holding "office." Each member of the board is appointed by the city council to the office of police commissioner, and therefore holds office under the city council and must, in my opinion, be deemed an officer of the council. The mere fact that the members of the board of police commissioners act in the performance of their duties independent of the council does not, in my opinion, make them the less officers of that council. The question of whether or not they are officers does not depend upon the degree of independence which they enjoy in the exercise of their duties, but rather on the fact of their appointment by the council to an office whose duties are such as pertain to the welfare of the city.

With reference to the second objection, I see no reason why the section should be confined to advantages to be granted by the council alone. The statute, in my opinion, is intended to punish any attempt to purchase by bribery the influence of a city official in securing an advantage from the council or a committee of the council or other body, such as the board of police commissioners, which is appointed by the council to perform certain municipal duties in any matter in which the officials as such would have any influence and in which thus the city would be interested. It is equally inimical to the city's interests whether the favour sought is in the gift of the board of police commissioners or the council. In either case it is an attempt to have the official prostitute his office and to thereby improperly gain an advantage from the city. The wording of the English Public Bodies (Corrupt Practices) Act (1889, 52 & 53 Vict. ch. 69), sec. 1, is somewhat instructive on the point. There the language used is as follows:—

"1.—(1) Every person who shall by himself or by or in conjunction with any other person corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, *in which such public body as aforesaid is concerned*, shall be guilty of a misdemeanour."

As to the third objection, I am of opinion that it is not necessary to shew that Mahony would have actually profited by the acceptance of the position or would have accepted same if offered him. The word "advantage" is used as descriptive of the thing sought rather than as to the value placed upon it by the person for whom it is sought. By sec. 7 of the English Act above referred to, the expression "advantage" is defined to include *inter alia* any office or dignity. Section 72 of the City Act regards the chief of police as an officer. It reads as follows:—

"The police force shall consist of a chief of police and as many constables or other officers and assistants as may by the council be deemed necessary from time to time."

The position of chief of police is an important office, and the appointment to same must, in my judgment, be considered as an advantage within the meaning of the section.

The second count of the charge is laid under sub-sec. (*b*) of sec. 162. The whole section reads as follows:—

"*Selling or purchasing office.*—Every one is guilty of an indictable offence who, directly or indirectly—

(*a*) sells or agrees to sell any appointment to or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof; or,

(*b*) purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so;

and in addition to any other penalty incurred, forfeits any

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right which he may have in the office and is disabled for life from holding the same."

This section, in my opinion, aims to prevent the selling and purchasing of the office itself, and in this respect differs from sub-sec. (*b*) of sec. 161, which aims to prevent the purchasing of the influence of the officer or member of the council in securing the office. The facts in the case at bar are such as to bring the same within sub-sec. (*b*) of sec. 161 rather than sub-sec. (*b*) of sec. 162.

In the result, therefore, the answer to the first question submitted by the learned trial Judge should be "Yes, in both"; and the answer to the second question should be "Yes; under the first count only."

Conviction affirmed.

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N.B.—Similar questions were reserved in this case, and for the reasons given in *Rex* v. *Hogg*, *supra*, the Court *en banc* also affirmed the conviction of this accused.

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Saskatchewan District Court, Moose Jaw, Ousley, J. March 16, 1914

1. APPEAL (§ III E—91)—FROM SUMMARY CONVICTION—PROOF OF SERVICE.

It is sufficient that a notice of appeal from a summary conviction to which the procedure of the Criminal Code is applicable should be proved by affidavit and not by calling a witness on the return of the appeal to prove the service.

[*R.* v. *Gray*, 5 Can. Cr. Cas. 24; and *Pahkala* v. *Hannuksela*, 20 Can. Cr. Cas. 247, 8 D.L.R. 34, considered.]

2. INTOXICATING LIQUORS (§ III C—65)—AGENTS OR SERVANTS—AFFIDAVIT NEGATIVING OFFENCE ON TAKING APPEAL.

Where the affidavit required from the appellant on appealing from a summary conviction under the Liquor License Act, R.S.S. 1909, ch. 130, negativing the offence refers to agents and servants in the plural while the statute requires the affidavit that the appellant did not, by himself "or by his agent, servant, or employee," etc., commit the offence, the variance is not fatal to the appeal, as the affidavit must be construed as including the agents, etc., individually as well as collectively.

[Compare *R.* v. *Skelton*, 4 Can. Cr. Cas. 467.]

3. INTOXICATING LIQUORS (§ III F—82)—SALES TO GUESTS AT MEALS WHEN BAR IS CLOSED—ORDERS FOR FLASK OF WHISKEY—TAKING AWAY UNCONSUMED PORTION.

If the hotel proprietor supplies liquor to guests in the dining room of the hotel on a Sunday, the exception in the Liquor License Act R.S.S. 1909, ch. 130, sec. 65 as to such sales of liquor to be drunk by guests "at their meals at the table," demands that the hotelkeeper shall not sell to any guest more liquor than he reasonably believes a man can drink at the meal and if he supplies a bottle of hard liquor he must see to it that the guest does not carry away in the bottle any left-over portion of its contents.

[*R. v. Stephens*, 1 S.L.R. 509, applied.]

4. INTOXICATING LIQUORS (§ III K—94)—SECOND OFFENCE—FORFEITURE OF LICENSE—OFFENCES OF DIFFERENT CLASS.

A prior conviction of the licensed hotelkeeper for permitting persons to be in the barroom during prohibited hours of sale is not sufficient under sec. 83 of the Liquor License Act, R.S.S. 1909, ch. 130, to warrant a conviction as for a second offence with a consequent forfeiture of license on proof of a later offence of selling during prohibited hours.

5. APPEAL (§ IX—698)—FROM SUMMARY CONVICTION FOR SECOND OFFENCE —LIQUOR LAW—RE-HEARING—PROVING PRIOR CONVICTION.

On an appeal from a summary conviction under the Liquor License Act, R.S.S. 1909, ch. 130, all the facts necessary to shew that the offence has been committed must be proved before the district Judge hearing the appeal; and where the appeal is from a conviction as for a second offence with increased penalties the alleged former conviction must be proved and it is not sufficient that the magistrate in the conviction appealed from had included a statement that the accused had been previously convicted giving the alleged particulars thereof, where neither the prior conviction nor formal proof thereof was produced on the appeal.

[*Re Ryer and Plows*, 46 U.C.Q.B. 206, referred to.]

Statement

APPEAL from a summary conviction made November 7, 1913, by John D. Simpson, of William P. Curran for unlawfully selling liquor during the time prohibited by the Liquor License Act for the sale of the same.

The appeal was allowed in part.

J. F. Hare, for the appellant.

E. T. Bucke, Acting Deputy Atty.-Gen., for respondent, prosecutor.

Ouseley, J.

OUSELEY, J.D.C.:—The appellant was convicted on November 7, 1913, by J. D. Simpson, under the provisions of the Liquor License Act, for that the appellant William P. Curran on October 12, 1913, at the city of Moose Jaw in the said province did, in his premises, the Windsor Hotel, being the place where liquor may be sold, by retail, unlawfully sell liquor during the time prohibited by the Liquor License Act, R.S.S. 1909, ch. 130, for the sale of the same.

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The conviction further sets out that it appeared to the convicting justice of the peace that the said William P. Curran was previously, to wit, July 13, 1913, at the city of Moose Jaw, before the same convicting magistrate, duly convicted of having on July 19, unlawfully permitted persons to be in the barroom of his licensed premises, to wit, the Windsor Hotel, in the said city, during the time prohibited by the Liquor License Act.

The conviction further sets out that the offence of the said William P. Curran hereinbefore mentioned, being his second offence against the Liquor License Act, it is adjudged that the said William P. Curran for his second offence do forthwith pay the sum of $100 to be paid and applied according to law with absolute forfeiture of the license of the said William P. Curran and further provides for the payment of costs.

From this conviction Curran appealed, and on the hearing of the appeal before me, Mr. Bucke, for the respondent, took several preliminary objections. He contended, firstly, it was not sufficient to prove service of the notice of appeal by affidavit, citing *Queen* v. *Gray*, 5 Can. Cr. Cas. 24 at 25. I do not see that the decision cited has any application to the objection raised by Mr. Bucke because in the *Gray* case which was an appeal from a summary conviction whereby the appellant made a money deposit in lieu of a recognizance and it was held that the defendant must see that such deposit is returned by the justice into Court to which the appeal is taken, and, in default, that the appeal cannot be heard; consequently, that the fact that the appellant had made such a deposit is a matter of record and is not properly provable by affidavit. McDougall, Co.J., in giving his decision, at page 25, said:—

> I think that the obligation laid on an appellant by the Code extends beyond the mere leaving of the money with the justice. Its return by the justice into Court, before the time for hearing the appeal, must, in some way, have been secured, and even if what was done had been sufficient it could not be established by affidavit.

The service of the notice of appeal and the payment of the money deposit in lieu of the recognizance into Court are two separate and distinct things. The service of the notice of ap-

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peal is usually made before any record is in Court. It is not a matter of record.

There is nothing in the Code as to how the fact of the service of the notice of appeal is to be proved, and the practice in the Province of Nova Scotia has been uniform to prove the notice of appeal by affidavit. There is no record of a service to be made by the clerk of the Court. It is not a matter of record and is done before any record in the appeal is made up. I therefore held that the service of the notice of appeal having been proved by affidavit is sufficient.

The case of *Pahkala* v. *Hannukscla*, 20 Can. Cr. Cas. 247, 8 D.L.R. 34, is not in point. In that case the question was whether where the respondent is not served more must be shewn than service upon a person to whom the witness, called in proof of service, had been directed on enquiry for a man bearing the same surname and initials as the justice; the appellant should prove that the person served was the justice who tried the case.

There is nothing in the decision of Farrell, J., to shew that service of the notice of appeal could not be proved by affidavit, providing that the affidavit shewed that the convicting justice had been served, for while the affidavit of service is silent that the John D. Simpson served was the John D. Simpson the convicting justice, this omission was cured by the evidence of John D. Simpson who was called as a witness and stated that he had been so served with the notice of appeal.

Objection was taken also to the affidavit as being insufficient in that the appellant did not negative that he committed the offence through his agent with his (the appellant's) knowledge or consent. Sec. 102, R.S.S. 1909, ch. 130, says:—

> No appeal shall lie . . . unless the party appealing . . . shall . . . make an affidavit . . . that he did not by himself or by his agent, servant or employee or any other person with his knowledge or consent, commit the offence charged in the information and such affidavit shall negative the charge in the terms used in the conviction and shall further negative the commission of the offence by the agent, servant or employee of the accused or any other person with his knowledge or consent.

The appellant Curran in his affidavit sets out:—

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(1) That I did not by myself or by my agents, servants or employees or by any other person with my knowledge or consent on October 12, 1913, . . . unlawfully sell liquor. . . .

(2) That I did not either by myself or my servants, agents or employees or by any other person with my knowledge or consent on the 12th day of October, 1913, unlawfully sell liquor.

Mr. Bucke objected that the affidavit was evasive in that it was drawn in the plural so that this man might be able to make affidavit that his agents collectively did not commit the offence but might not have been able to take oath that one servant in his employ did not break the law.

The section of the statute requires that the affidavit shall be made that the appellant did not by himself or his agent, servant or employee or any other person with his knowledge or consent commit the offence charged in the information. I do not know why the affidavit should be drawn in the plural when the plain provision is that he shall negative the sale by himself or his agent, servant or employee. I think, however, that we must use a little common sense in construing the affidavit and that when the appellant swears that he did not by himself or by his agents, servants, or employees, that this was to include his servants, agents or employees individually as well as collectively. The statute does not say that he shall negative the fact that he did this by his employees collectively as well as individually. An objection might just as well be made if the affidavit read the other way, that he did not commit the offence by his servant, agent or employee, that he did it collectively by employees and not by an individual employee.

The facts relied on by the prosecution as establishing the offence complained of are as follows: On Sunday October 12, 1913, two men by the name of Emsden and Cause went to the Windsor Hotel a few minutes after six o'clock in the evening; sat down in the rotunda, and while there saw a couple of men go into the lavatory; that they followed these men into the lavatory and saw the bartender come in and hand one of them a bottle of what seemed to be liquor; that Emsden asked one of these men if he could get him (Emsden) anything to drink there; that the man said "give me $1.50 and wait until I come

back"; that Emsden would not trust the man to go out with the money and that the money was returned to him; that Emsden then stepped up to the party who had served these two other men in the lavatory and asked him about getting something to drink and that this party said, "Nothing doing unless you go into the dining-room," that he said further, "Go and pay for a meal; go into the dining-room and I will give you what you wish"; that to this Emsden said, "I have had supper" and this party said, "Well, go pay for a meal and go in"; that he and Cause went into the dining-room and that this party followed immediately behind and asked what they wished; that Emsden ordered a small flask of Scotch whiskey and that Cause ordered a pint bottle of beer and that they were served therewith at the dinner table; that Emsden paid $1 for the bottle of whiskey and the bottle of beer for Cause; that he took a drink from the flask and carried the remainder of the liquor away with him.

Even assuming that Emsden and Cause were *bonâ fide* guests of the hotel, do the facts shew an infringement of subsection 1, of section 65 of the Liquor License Act, R.S.S. 1909, ch. 130. Sub-section 1 of section 65 of the Liquor License Act enacts:—

> In all places where intoxicating liquors are licensed to be sold by retail, no sale or other disposal of liquors shall take place therein or on the premises thereof or out of or from the same to any person or persons whomsoever save as hereinafter provided from or after the hour of seven of the clock on Saturday night till seven of the clock on Monday morning thereafter nor from and after the hour of ten o'clock at night elsewhere than in cities and half past ten o'clock at night in cities until seven o'clock the following morning on the other nights of the week.

Now, if the provisions of the section stopped there no sale of liquor could legally be made between the hours of "seven of the clock on Saturday night until seven of the clock on Monday morning thereafter." But the section says "save as hereinafter provided." The proviso is at the end of the section and reads:—

> Provided that in hotels compelled by law to give meals, liquor may be sold during meals on Sunday to the guests *bonâ fide* residing or boarding in such houses between the hours of one and three and five and seven in the afternoon respectively to be drunk at their meals at the table; but

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this provision shall not permit the furnishing of liquor at the bar or place where liquor is usually sold in such houses.

There is not a tittle of evidence before me to shew that Emsden and Cause were "guests *bonâ fide* residing or boarding" in the appellant's hotel, and, although the point has never been taken before me, I am inclined to the opinion that strong argument could be made to shew that *bonâ fide* guests residing or boarding in such houses means registered guests of the hotel and does not mean persons coming into the hotel as these two men did for the sole purpose of obtaining liquor. This phase of the matter was not urged before me and it is not necessary for me to decide it. But, even assuming that they were *bonâ fide* guests residing and boarding at this hotel, it seems to me that the appellant has, under the facts as disclosed in the evidence, committed an infraction of the provisions of section 65 of the Act.

I do not think that the hotel proprietor is justified in serving liquor in this manner unless the liquor is to be "drunk at their meals at the table." The evidence here shews that one man purchased a small bottle of whiskey from which a very little was drunk at the table and the balance was carried away from the premises of the hotel. It could not possibly be said that this liquor was "drunk at the table." In fact it was admitted that it was not so drunk at the table but was carried away presumably to be drunk outside the hotel.

If this practice were allowed it would be quite competent for four, six or even eight men to go to the hotel, go through the farce of eating a second meal, purchase eight quarts of whiskey, drink a small portion of each bottle, pocket the rest and carry it away from the hotel. I think this is against both the intention and the spirit of section 65 of the Act and the party selling the liquor would be guilty of an offence against section 65 of the Act. In this respect I wish to quote *Rex* v. *Stephens*, 1 S.L.R. 509. The facts in this case were as follows:—

It was shewn that one G. applied to the licensee to purchase three quart bottles of whiskey, the quantity which the licensee could, under his license, sell being one quart. The licensee said to G. "one at a time," and gave him one quart, which was paid for. The purchaser under-

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stood the licensee to mean that he would sell the three bottles, but separately. Subsequently and at intervals of fifteen minutes each, two other bottles were purchased and these were stored in the bar until called for by the purchaser.

It was held that the evidence disclosed that the real nature of the transaction was not a separate and distinct sale of separate and distinct quarts, but one sale delivered in instalments for the purpose of evading the Act, and the conviction should therefore be affirmed.

Mr. Justice Lamont, at page 510 in his judgment, says:—

When Gillis first went into the bar he asked for three bottles of Scotch whiskey. The defendant, who was behind the bar, said, "One at a time, boy," meaning and being understood to mean that he could not sell three bottles at once, but only one bottle at a time. Gillis got one bottle at that time and paid for it. After an interval of about fifteen minutes he got a second bottle and paid for it, and after a further interval of about fifteen minutes he got a third bottle. These bottles which were quart bottles . . . were placed at the end of the bar in a box supplied by the defendant for that purpose until Gillis was ready to go home when the box was carried out and placed in their conveyance. Do these facts shew that there were three separate and distinct sales of a quart bottle each, or do they shew, as the prosecution contends, a single transaction with three separate deliveries? As was said by Meredith, C.J., in *Rex* v. *Lamphier*, 12 O.W.R. 685, "everything depends upon the intention of the parties and the circumstances of each particular case." . . . The test to be applied in determining whether or not there has been a violation of the ordinance is: what was the real nature of the transaction? what, in truth, was the intention of the parties? Each case must be determined by the circumstances peculiar to that case. In the present case Gillis went into the bar and asked the defendant for three bottles of Scotch whiskey. The defendant said, "one at a time, boy." What did he mean by that? I cannot come to any other conclusion than that he meant that he would sell Gillis three bottles, but that he could only let him have one at a time. That Gillis so understood it is shewn by the fact that he bought a bottle at that time and the other two at intervals of fifteen minutes each. Can it be reasonably doubted that in replying to Gillis as he did the defendant was agreeing to sell him the three bottles, but insisting on an interval of time elapsing between the delivery of the several bottles in order to keep within what he believed was the meaning of the Ordinance. The defendant stated in his evidence that he honestly believed that under his license he could sell in quantities exceeding a quart if he handed out not more than a quart at a time. A mistaken conception on his part as to the meaning of the ordinance, is, however, no justification for a breach of its provisions. . . . In Maxwell on Interpretation of Statutes (4th ed.), at page 171, the following principle for the interpretation of a statute is laid down: "It is the duty of the Judge to make such construction as shall suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute it must be so construed as to defeat all attempts to do or avoid

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in an indirect or circuitous manner that which it has prohibited or enjoined."

It seems to me that the reasoning of the learned Judge in the *Stephens* case can be equally applied to the case before me. These two men go into the hotel and ask a servant of the appellant to sell them liquor in a part of the hotel where the appellant was prohibited to sell on Sunday. They are told to go to the dining-room and go there. They ask for and receive a small bottle of whiskey and a bottle of beer. Only a small portion of the whiskey is drunk at the table and the balance is taken away presumably to be consumed elsewhere.

Following the reasoning of the learned Judge in the *Stephens* case, if there had been four or six men instead of two and they had each ordered a quart bottle of whiskey and each had drunk a small portion from each bottle at their meals, afterwards recorking same and carrying the liquor out of the hotel with them, could it reasonably be argued that the liquor was "drunk at their meals at the table"? It might be argued that the hotel proprietor is not supposed to stand over his guests and see that they drink this liquor at their meals at the table. The answer to this is, I think, that if the proprietor chooses to sell to any guest more liquor than he reasonably believes a man can drink at his meals at the table he has committed an offence against the provisions of section 65 of the Act; and further that whether he sells him a half pint, a pint or a quart of hard liquor, he must see to it that the liquor is either consumed by the guest at his meals at the table or that the balance is left on the table and is not carried away.

Mr. Hare for the respondent argued that the appellant had not sold liquor in any greater quantity than he is by law permitted to sell; that the liquor was supplied to *bonâ fide* guests to be drunk at their meals at the table, and that consequently the appellant has not been guilty of any infringement of the provisions of the section.

I cannot adopt this argument as I am clearly of the opinion that this would be an evasion of the Act and would be an attempt "to do or avoid in an indirect or circuitous manner that which the Liquor License Act has prohibited or enjoined."

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Adapting what was said by Meredith, C.J., in *Rex* v. *Lamphier*, 12 O.W.R. 685, "Everything depends upon the intention of the parties and the circumstances of each particular case."

In this case the evident intention of Cause and Emsden as expressed to the servant of the appellant was to obtain liquor without the necessity of obtaining it at the table in the dining-room. The servant of the appellant knew these men had already had a meal but he refused to serve them until they at least went into the dining-room and paid for a meal. Can it be said, therefore, that he sold them a small flask of whiskey and would have sold a large bottle of whiskey with the intention that it should be drunk at their meal at the table. The liquor is brought to the men, delivered to them and paid for by them. So far as the appellant is concerned he evidently thought that his duties ceased when the liquor was supplied and he received payment for it. In this he is, I think, clearly wrong because to permit a sale at all, the liquor must be sold to be drunk at their meals at the table.

I think the agent of the appellant was put on his guard and knew or should have known that the small flask of whiskey was not to be drunk at the table, especially as he knew that these men had already had their meal, and if the appellant sells or allows his servant or agent to sell to guests of the hotel, liquor which is not drunk at the meals at the table but, on the contrary, is carried away to be consumed outside, he is guilty of an offence against the provisions of section 65 of the Act.

There is, however, in this case a further question which I must discuss and that is as to whether or not this is a second offence under the Act which would enable the magistrate to impose the penalty of forfeiture of the license on the appellant.

According to the conviction, the appellant on July 22, 1913, was convicted under sub-section 4 of section 65 of the Act, and on October 12, 1913, he was convicted of an offence under sub-section 1 of section 65 of the Act.

Section 83 of the Act enacts:—

> Violations of any of the provisions of sub-sections 1, 2 and 4 of section 65 shall be an offence for which the person violating shall be liable on summary conviction.

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(1) For the first offence to a penalty of not less than $50 nor more than $100 and in default of payment forthwith after conviction, to not less than two months nor more than four months' imprisonment.

(2) For a second or any subsequent offence to a penalty of not less than $100 nor more than $200 with absolute forfeiture of license, and in default of payment forthwith, after conviction, to not less than four months' nor more than six months' imprisonment with absolute forfeiture of license or to imprisonment for not less than one month nor more than six months with absolute forfeiture of license or to both fine and imprisonment with absolute forfeiture of license.

Under the provisions of section 78 of the Act it is an offence to sell liquor to minors; and, under sub-section 2 it is an offence to allow any male under the age of 21 years or any female to dispose of any form of intoxicants on the premises.

Under sub-section 4 of section 78 it is an offence to suffer or permit any person of either sex apparently or to the knowledge of such licensee, under the age of eighteen years unaccompanied by his or her parent or guardian, and not being a resident on the premises to linger or loiter about any barroom.

Under section 81 of the Act

it is an offence for any person who sells liquor by wholesale or retail to sell to any person whom he knows or has reason to believe is selling liquor without a license.

(*b*) It is an offence for any licensee licensed to sell liquors not to be consumed on the premises who takes or carries or employs or suffers any other person to take or carry away any liquor out of or from the premises of such licensee for the purpose of being sold on his account or for his benefit.

By section 93 it is enacted:—

Every second conviction for any offence against the provisions of section 78 or 81 hereof and every conviction for an offence against the provisions of either of the said sections when there has been a previous conviction for an offence against the provisions of any other of them and every third conviction for an offence against the provisions of this Act or any of them shall *ipso facto* operate as a forfeiture of the license of the offender when not otherwise provided.

By sub-section 4 of section 109, it is provided

in case any person who has been convicted of a contravention of any provision of any of the sections of this Act mentioned in section 93 hereof is afterwards convicted of an offence against any of the said sections such conviction shall be deemed a conviction for a said second offence within the meaning of the said section and shall be dealt with and punished accordingly although the two convictions may be under different sections.

It will be noted that there is no similar sub-section as we find under section 109 in connection with the offences under section 65 of the Act.

The argument of Mr. Hare for the appellant is that the justice had no right to declare a forfeiture of the license because there was not a conviction for a second offence which would enable the justice to determine that there was a second conviction. For example, the offence committed on July 23, 1913, was an offence against sub-section 4 of section 65 of the Act, whereas the offence for which he was convicted on November 7, 1913, was that he did on October 12, unlawfully sell liquor by retail during the time prohibited by the Liquor License Act which is an offence against sub-section 1 of the Act. The two convictions, therefore, being for two separate offences and not two convictions for the same offence, the magistrate had no jurisdiction to declare a forfeiture of the license.

It is to be noted, as I have already said, that, under section 65, we have no provision such as we find in sub-section 4, of section 109, nor have we any such sub-section corresponding to sub-section 4 of section 109 to apply to offences set out in sections 78 and 81 of the Act.

Before considering the question as to whether or not the prosecution have proved a second conviction for an offence against any of the provisions of section 65, which I will deal with later on, let us consider the provisions of section 65 in order to ascertain, if possible, whether it was the intention of the Legislature that an offence against sub-section 1 of section 65, and an offence against sub-section 4 of section 65 was intended by them to be a second conviction against the section such as would justify the Court below to declare the license forfeited. As I have already pointed out there is no section similar to section 93 which applies to section 65, and the justification, therefore, of the magistrate to declare a forfeiture of the license, must be found in the sections of 65 read in connection with section 83 of the Act.

When we come to read over section 83, it is enacted that:—

Violation of any of the provisions of sub-sections 1, 2 and 4 shall be

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an offence for which the person violating shall be liable on summary conviction:—

(1) For the first offence to a penalty of not less than $50 nor more than $100.

(2) For the second or any subsequent offence to a penalty of not less than $100 nor more than $200 with absolute forfeiture of license.

Now, when we come to consider the grave consequences which attach to a second conviction under section 65, it is necessary that we should find definite and distinct authority that an offence against sub-section 1 of section 65, and an offence against sub-section 4 of section 65 could be construed to be a second offence.

The Legislature have seen fit to exempt section 65 from the operation of section 93, and in section 83 we do not find the words which are in section 93, that:—

> Every second conviction for an offence against the provisions of section 78 and 81 hereof and every conviction for an offence against the provisions of either of the said sections when there has been a previous conviction for an offence against the provisions of any other of them . . . shall *ipso facto* operate as a forfeiture of the license of the offender when not otherwise provided.

It seems clear that the Legislature intended that as to sections 78 and 81, a first offence against sub-section (*a*) of section 81 and a first offence against sub-section (*b*) of section 81 would be a second offence under sub-section 81 and the same applies to section 78.

But section 65, having been exempted from the operation of section 93, I cannot find in the provisions of sub-section 83 any authority which would justify the magistrate in declaring that a first offence under sub-section 1 of section 65, and a first offence against sub-section 4 of section 65, could be construed as a second offence as defined by the provisions of section 83.

Sub-section 1 of section 83 reads: "For the offence" and a penalty "of not less than $50." Now, supposing that the charge is laid as it was laid here for an offence against sub-section 1 of section 65; in that case section 83 says: that for the first offence the penalty shall be $50. Sub-section 2 says, for a second or any subsequent offence and a penalty of not less than $100 nor more than $200, with absolute forfeiture of license. Now, what do the words, "For a second or any subsequent of-

fence" mean? They must mean for a second or subsequent offence against any of the provisions of sub-sections 1, 2 and 4, and I think it clear that if the Legislature intended that a first conviction against sub-section 1, and a first conviction under sub-section 4 should constitute a second conviction against the provisions of section 65 they would have declared it in the same explicit terms as they have under section 93. Not having done so I cannot read into the provisions of section 83 the language used in section 93 of the Act, and being unable to do this, it seems to me that there has been here no second conviction for a second offence against the provisions of section 65 of the Act, and, therefore, the magistrate exceeded his jurisdiction when he declared an absolute forfeiture of the license of the appellant.

Under the provisions of the Summary Convictions Act it has been held that, on an appeal to the District Court, I must try the matters *de novo*. The only proof of a conviction for an offence under sub-section 4 was a statement in the conviction which was put in at the hearing before me, and which was really a conviction for the last offence which was charged against the appellant, namely, that he did on October 12, 1913, at the city of Moose Jaw, in the said province, in his premises the Windsor hotel, being a place where liquor may be sold by retail, unlawfully sell liquor during the time prohibited by the Liquor License Act for the sale of the same.

Absolutely no proof was given before me as to the identity of the parties, nor was the conviction proved before me or produced in any way.

Under sub-section 3 of section 757 of the Code it is enacted:—

> Upon any indictment or conviction against any person for a subsequent offence a copy of such conviction certified by a proper officer of the Court or proved to be a true copy shall be sufficient evidence to prove a conviction for a former offence.

The practice relative to appeals from the decision of the justice of the peace to the District Court Judge and that on *certiorari* on a motion to quash are totally different so far as the proof of a first conviction is concerned. On *certiorari*, the Court will not enquire beyond the statement made in the conviction for the second offence that the appellant had been pre-

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viously convicted of a similar offence, but on an appeal to the District Court the proceedings are wholly different. I am trying the accused as if in the Court of original jurisdiction. I cannot be bound by statements in the conviction, and all the facts necessary to shew that the offence has been committed and that the accused had been previously convicted of a similar offence must be proved before me.

There is not a tittle of evidence to shew that the accused was convicted of a previous offence other than the statement made in the conviction which, of course, is not evidence, and is not, as I have said, binding on me.

In *Re Ryer and Plows*, 46 U.C.Q.B. 206, Osler, J., at page 209, said:—

> There is nothing that I am aware of which makes it necessary that the formal conviction should have been returned and filed before the appeal is entered or even before the hearing has commenced. It must, no doubt, as the authorities I have referred to shew, be proved at some time during the hearing but at what time is a matter of practice and in the discretion of the Court: Paley on Convictions, 370, 371, and 372.

The obligation of proving a first conviction being upon the respondent, it was the duty of the respondent to prove the fact of the first conviction. So far as the evidence shews, this was not done. Consequently there is no proof before me that the appellant has been convicted of any offence except the one charged, that he did on October 12, 1913, at the city of Moose Jaw in the said province, in his premises, the Windsor Hotel, being a place where liquor may be sold by retail, unlawfully sell liquor during the time prohibited by the Liquor License Act for the sale of the same.

In Clark's Magistrate's Manual, 4th ed., 255, it is said:—

> A conviction before a magistrate can only be proved by the production of the record of conviction or an examined copy of it, citing *Hartley* v. *Hindmarch*, L.R. 1 C.P. 553.

The law, therefore, both at common law and under the Code, sub-section 3 of section 757, shews that a conviction for a former offence must be proved by a copy of such conviction certified by the proper officer of the Court or a copy proved to be a true copy.

In my opinion, therefore, the appellant has been guilty of an

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offence against the provisions of sub-section 1 of section 65 of the Act, but that this offence being a first offence against this sub-section, the appellant is only liable for the penalty which is provided by the Act.

Under the provisions of section 83, therefore, I find the appellant guilty for that he did in his premises, the Windsor Hotel, being a place where liquor may be sold, by retail, unlawfully sell liquor during the time prohibited by the Liquor License Act for the sale of the same and I adjudge William P. Curran, the appellant herein, for the said offence, to forfeit and pay the sum of $50, to be paid and applied according to law and also to pay to C. A. Mahoney, the respondent herein, the sum of $7.55 being the costs of the Court below, together with the costs of the appeal herein, and if the said several sums be not paid forthwith I adjudge the said William P. Curran to be imprisoned in the common jail at Regina in the said province and there to be kept for a space of four months unless said sums and costs and charges of conveying said William P. Curran to the said common jail shall be sooner paid.

Appeal allowed in part.

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Ontario Supreme Court, Middleton, J. June 5, 1914.

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1. LIMITATION OF ACTIONS (§ III F—130)—TORTS—NEGLIGENCE—BURNING DECAYED TIES—"OPERATION OF THE RAILWAY."

The burning on the right of way of worn out and decayed ties removed in the ordinary course of the maintenance of the railway is within the term "construction or operation of the railway" so as to bar an action in Ontario against the railway for injury sustained by the spreading of the fire to adjoining property unless brought within one year under the Railway Act, R.S.C. 1906, ch 37, sec. 306.

[*McArthur* v. *Northern and Pacific R. Co.*, 15 O.R. 733; *Ryckman* v. *Hamilton G. & B. R. Co.*, 10 O.L.R. 419; *Canadian Northern* v. *Robinson*, [1911] A.C. 739; and *West* v. *Corbett*, 12 D.L.R. 182, 47 Can. S.C.R. 596, referred to.]

ACTION for damages for destruction of the plaintiff's property by fire set out by the defendant company, and negligently allowed to spread to the plaintiff's land, as the plaintiff alleged.

Judgment for plaintiff as to one period; action dismissed as to the other.

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Middleton, J.

W. Laidlaw, K.C., for the plaintiff.

Angus MacMurchy, K.C., for the defendant company.

June 5. MIDDLETON, J.:—The action is in respect of two independent fires. The parties have agreed upon the amount of damage sustained in each case, and it is admitted that the railway company is responsible for the fire taking place in the year 1913. The facts with reference to the fire of 1911 were admitted, and the responsibility of the railway company therefor, unless relieved by the limitation found in sec. 306 of the Railway Act, R.S.C. 1906, ch. 37.

In accordance with the custom of the railway company, worn-out and decayed ties, removed in the ordinary course of the maintenance of the railway, are burned upon the right of way. The sectionmen of the defendant company, while burning such ties, permitted the fire to spread, and, reaching Greer's lands, it destroyed timber to the amount admitted. It is also admitted that a proclamation was issued under the Fire Prevention Act, R.S.O. 1897, ch. 267, prohibiting the setting out of fires between April and November.

By sec. 306 of the Railway Act, all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained. The damage here sustained took place some time between April and November, 1911. The writ was not issued until the 6th January, 1914. The sole question, therefore, is, whether such a claim as that here sued for is one "for damages or injury sustained by reason of the construction or operation of the railway."

In the Railway Act of 1903, the corresponding provision first assumed this form. In the Railway Act of 1888 and in the prior legislation it read "sustained by reason of the railway." The words of the earlier Act have given rise to much discussion and wide difference of opinion. From this discussion several matters have been determined, and the change in the wording of the statute leaves these points untouched.

It is, for example, clear that liability upon a contract is not

within the statute. It is also clear that the statute has no application when the damage results from an omission to perform a statutory duty. And it is clear that, as the statute is a complete answer to any claim with respect to anything done in pursuance and by the authority of the Act, this limitation must apply to actions in which the Act itself does not constitute a defence, and the difficulty has been occasioned by the attempt of the Court to read into the statute something which will give to this limitation some meaning without going beyond what the statute really intends.

The amendment is probably little more than a recognition by the Legislature of that which had been determined by the Courts, that "by reason of the railway," in view of the last clause, covered all things done in supposed pursuance of the Act and intended to be in conformity with the Act—looking to the construction and operation of the railway.

So long as there was, as the basis of the facts giving rise to the action, an intention to carry on the railway in good faith, the limitation was regarded as affording a qualified protection, even though there should be negligence which would destroy the protection otherwise afforded by the sanction of the Legislature to the undertaking. The decisions have not been uniform, and have been so much canvassed in reported judgments that little needs to be said.

In *McArthur* v. *Northern and Pacific Junction R.W. Co.* (1888), 15 O.R. 733, Street, J., had to consider a case in which a railway company cut timber outside of its right of way, both within and outside of the belt mentioned in the then Act, R.S.C. 1886, ch. 109, sec. 6 (12). This he held to be within the section. His decision was affirmed by an equally divided Court, in 1890, 17 A.R. 86; Hagarty, C.J., and Osler, J.A., being in favour of the view of the trial Judge; Osler, J.A., holding that there is this limitation when the act "was really in the corporate capacity of and for the purposes of the company, or in the course of its business and in the promotion of the contemplated works." Although the dissenting judgments of Burton and Maclennan,

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JJ.A., weaken the authority of this case, the result is binding upon me.

The decision in *Ryckman* v. *Hamilton Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419, was delivered by Osler, J.A. The question there was the effect of the clause upon an action brought by a passenger for breach of the common law obligation to carry safely. The holding was, that the limitation did not apply. The value of the case is the full review of the earlier cases, and the statement (p. 427): "To one class of cases it is generally conceded that the section applies, those, namely, in which the damage arises from the execution or neglect in the execution of the powers given to or assumed by the company for enabling them to construct and maintain their railway."

Prendergast v. *Grand Trunk R.W. Co.* (1866), 25 U.C.R. 193, which at first sight seems at variance with the general line of cases, depends, as is shewn in *McCallum* v. *Grand Trunk R.W. Co.* (1871), 31 U.C.R. 527, upon the fact that the fire was not shewn to have been caused by the railway.

So much for the cases before the amendment. From what has been said it will be seen that this amendment is only the addition of words chosen by Osler, J.A., in ascribing meaning to the bald expression of the earlier statute.

Since the amendment, the wish expressed by Osler, J.A., that a case might be carried to a higher Court has been gratified; but unfortunately in neither case was the precise point here involved, nor the general question now under discussion, determined; but expressions of opinion are found indicating the acceptance of the view adopted by the majority of our Court of Appeal.

In *Canadian Northern R.W. Co.* v. *Robinson* (1910), 43 S.C.R. 387, the Supreme Court had to consider an action for damages sustained by reason of the railway having removed a spur line to the plaintiffs' factory, and so having refused to comply with its statutory obligation to furnish proper facilities for the forwarding of freight. The majority of the Court held that this did not fall within the words of the limitation—the damages were not sustained by the operation of the railway. The act

complained of was an act of omission, and not of commission, to which alone the statute applies. This case was taken to the Privy Council, and there the judgment was affirmed ([1911] A.C. 739). It is said (p. 745) that the limitation is "confined to damages or injury sustained by reason of the construction or operation of the railway. . . . 'Operation' seems to signify simply the process of working the railway as constructed. . . . The special provisions . . . do not apply to a case of refusing or discontinuing facilities."

In *West* v. *Corbett* (1913), 12 D.L.R. 182, 47 Can. S.C.R. 596, the question was, whether the provision only protected railways or covered an action against a contractor for construction. The holding was in favour of the more liberal construction. Davies, J. (at p. 185), adopts during the course of the discussion the view put forward in our Courts: "In my opinion they" (the words of this clause) "refer to damages the result of negligence in the exercise of statutory powers given for the construction and operation of railways. For damages resulting from the exercise of such statutory powers without negligence no action at all would lie." The words are as broad and general apparently as language could make them respecting damage sustained by reason of the construction or operation of the railway.

Mr. Laidlaw argues that, as the liability here relied on is a liability at common law, the statute cannot be invoked. This is to ignore what has been taken from the first to be the meaning of the statute. It is a statutory limit within which common law actions must be brought. Originally the Act from beginning to end contained no provision imposing liability; it afforded complete protection so long as the railway complied with its provisions. More recently there is imposed a statutory liability with respect to fire, but this cannot affect the construction of the section in question.

Then it is argued that the particular thing complained of is neither construction nor operation. I cannot assent to this. As pointed out by Mr. Justice Anglin in the *Robinson* case, all the operations of the road are in the Act classified under the heads of "construction" or "operation," and this affords a key to the scope of the section. I am not justified in making another

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classification, "construction, maintenance, and operation," and then placing certain things under the head of maintenance. When a railway company receives under its charter power to construct and operate a line from one place to another, all that might be called "maintenance" must be regarded as either construction or operation, it does not matter which.

What was done in this case—the removing and destroying of worn-out and decayed ties—falls under the heads of "construction and operation;" and, though there was negligence, and so common law liability, the action must be brought within the year.

There will be recovery for the loss within the year. The action fails as to the loss in 1911. The amount, I understand, of the loss in 1913 has been adjusted. The plaintiff will have the general costs, but must pay the costs of the issue on which he has failed.

Judgment accordingly.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. November 13, 1914.

1. LIMITATION OF ACTIONS (§ III F—130)—TORTS—NEGLIGENCE—"OPERATION OF THE RAILWAY"—INTERPRETATION OF—BURNING WORN-OUT TIES ON RIGHT OF WAY—DAMAGE RESULTING.

The injury done to adjoining property by the railway company setting out fire on its right of way for the purpose of destroying worn-out ties, and by its omission to prevent the spread of the fire, is an injury caused by the "operation of the railway" within the time limitation for bringing action therefor imposed by the Railway Act, R.S.C. 1906, ch. 37.

[*Greer* v. *C.P.R.*, 19 D.L.R. 135, 31 O.L.R. 419, affirmed; *McCallum* v. *G.T.R.*, 31 U.C.R. 527, followed; *Ryckman* v. *Hamilton G. & B. R. Co.*, 10 O.L.R. 419, *Northern R. Co.* v. *Robinson*, [1911] A.C. 739, *Grant* v. *C.P.R.*, 36 N.B.R. 528, distinguished.]

Statement

APPEAL by the plaintiff from the judgment of MIDDLETON, J., 19 D.L.R. 135, 31 O.L.R. 419.

The appeal was dismissed

W. Laidlaw, K.C., for the appellant.

Shirley Denison, K.C., for the defendant company, respondent.

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Meredith, C.J.O.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of Middleton, J., dated the 5th June, 1914, pronounced after the trial of the action before him, sitting without a jury, at Bracebridge, on the 19th May, 1914.

The action is brought to recover damages for the loss sustained by the appellant owing to two fires which were set out by the respondent on its line of railway having spread to the adjoining land of the appellant. The fires were set out for the purpose of burning old ties, which had been removed from the track and replaced by new ones, and it spread to the lands of the appellant, owing, as was admitted, to the negligence of the respondent.

The learned trial Judge found in favour of the appellant upon the issue as to the liability of the respondent, but gave effect as to one of the fires to the defence set up that the cause of action in respect of it was barred by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37.

It was contended by counsel for the appellant that the liability of the respondent was a liability at common law, and that sec. 306 has, therefore, no application; and in support of that contention, among other cases, *Prendergast* v. *Grand Trunk R.W. Co.*, 25 U.C.R. 193, was cited; but that case is, in my opinion, clearly distinguishable. As I understand the reasons for judgment, the ground of the decision was, that it was not alleged or proved that the fire which caused the damage was set out in the course of the operation of the railway, and that for all that appeared it may have been set out for a purpose altogether unconnected with its operation, and that the limitation section had, therefore, no application.

In the subsequent case of *McCallum* v. *Grand Trunk R.W. Co.*, 30 U.C.R. 122, 31 U.C.R. 527, the declaration alleged in substance that a large quantity of trees, cordwood and timber, growing and being on the land of the plaintiff, were burnt by a fire which was caused by dry wood, leaves, etc., which had been negligently allowed to accumulate beside the railway track on the defendant's land, being ignited by the red hot ashes and other igneous matter which fell out of an engine being propelled along the track, and which spread to the plaintiff's land owing to the

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negligence of the defendant in not taking due precaution to prevent the fire from so spreading. In the Court below it was held that the injury of which the plaintiff complained was an injury sustained by reason of the railway, and that the cause of action was, therefore, barred by the limitation section of the Railway Act then in force. This decision was affirmed by the Court of Error and Appeal, and it was pointed out by the Chief Justice (p. 531) that *Prendergast* v. *Grand Trunk R.W. Co.* was distinguishable on satisfactory grounds, which are thus stated: "The action was for negligently permitting a fire to remain in and upon the track of the railway, and near the close of the plaintiff, at a time when by reason of the state of the wind and weather it was improper so to do; so that through negligence and want of proper caution the fire extended out of the railway upon the plaintiff's close, and burnt fences, trees, etc. And the Court held that the injury was one at common law, by one proprietor of land against an adjoining proprietor, for negligently managing a fire supposed to be caused on the land of the latter without his neglect or default, and therefore this section of the Railway Act did not apply." And at pp. 531, 532, again distinguishing *Prendergast* v. *Grand Trunk R.W. Co.*, the Chief Justice said: "There was nothing in the cause of the fire, or in the negligence which allowed it to spread, to distinguish it from any fire which had been kindled on one man's lands and was negligently suffered by him to extend to the premises of his neighbour. The jury acquitted the defendants of negligence, which according to the report was not even charged in the declaration, for that only alleged that the defendants wrongfully permitted a fire to remain on the track of the railway near the close of the plaintiff in a careless, negligent, and improper manner, when by reason of the state of the wind and weather it was dangerous so to do. Nothing of which the plaintiff complained and for which he got his verdict was therefore by reason of the railway, unless in the remote connection that the defendants being a railway company were possessed of the land upon which the railway was constructed. In the case now in judgment, so far as appears, the fire originated from the engine of the defendants (which the first count states) and it was in the lawful and necessary use of

fire in order to carry on the ordinary business of the defendants, and *without any negligence on their part*, which fire spread and did the mischief complained of. The *causa causans* was therefore a part of the working of the railway, and the effect was 'by reason of the railway;' and we are not deciding whether the defendants were guilty of negligence in letting the fire extend in manner and form as the second count charges, but whether, admitting that the second count is proved, it is a count claiming indemnity for a damage or injury by reason of the railway."

Ryckman v. *Hamilton Grimsby and Beamsville Electric R.W. Co.*, 10 O.L.R. 419, was also much relied on by counsel for the appellant. It is, no doubt, well settled that the limitation section does not apply to a cause of action for a breach of the duty of a railway company as a common carrier; and all that was decided in that case was that the action was for breach of the duty of the defendant as a common carrier to carry safely; and that the limitation section did not, therefore, apply.

As was said by Richards, J., in *Auger* v. *Ontario Simcoe and Huron Railroad* (1859), 9 U.C.C.P. 164, 169: "There is no doubt the Courts have held repeatedly that the limitation clauses do not apply where the companies are carrying on the business of common carriers . . . but the liability arises in those cases from the breach of contract, arising from their implied undertaking to carry safely. . . ."

And in *Carpue* v. *London and Brighton R.W. Co.* (1844), 5 Q.B. 747, 757, in which the action was for breach of the defendants' duty to carry safely, Denman, C.J., said: "The injury has arisen from the defendants' misconduct as carriers, and not as proprietors."

In *Grant* v. *Canadian Pacific R.W. Co.*, 36 N.B.R. 528, no question as to the limitation section arose. In that case the fire had been set, as in this, on the defendant's right of way, for the purpose of burning old ties as well as other rubbish, and all that was decided was that there was sufficient evidence to justify the verdict for the plaintiff. Two of the Judges expressed the opinion that certain Provincial Acts to prevent the destruction of forests and other property were not *ultra vires;* and that, as the fires were set out in contravention of these statutes, the de-

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fendant was liable irrespective of any other negligence; and one of the Judges (McLeod) was of opinion that, as the defendants were not authorised by any law or statute to get rid of the ties and rubbish by burning them, and, not having shewn that "the escape of the fire was owing to the plaintiff's fault, or *vis major* or the act of God," they were "liable irrespective of negligence in allowing it to escape" (p. 543).

Smith v. *Denver and Rio Grande R.R. Co.*, 54 Col. 288, does not help the appellant. The action in that case was brought to recover damages for property alleged to have been destroyed by fire negligently set out and caused by the defendant. There was in force a statute which provided that "every railroad company operating its line of road, or any part thereof, within this State shall be liable for all damages by fires that are set out or caused by operating any such line of road, or any part thereof, in this State, whether negligently or otherwise; and such damages may be recovered by the party damaged, by the proper action, in any Court of competent jurisdiction: provided, the said action be brought by the parties injured within two years next ensuing after it accrues." What was decided was that this statute did not create or comprehend a liability founded on negligence; and that, as the plaintiff's action was based on negligence, the limitation provision did not apply. The case has, therefore, no application to the question under consideration.

In *Canadian Northern R.W. Co.* v. *Robinson*, 43 S.C.R. 387, [1911] A.C. 739, it was held that the limitation section did not apply to a cause of action for a breach of the railway company's statutory duty to provide facilities for the plaintiff by means of a siding outside the railway as constructed, it not being an act done in the operation of the railway. In delivering the judgment of the Judicial Committee, Lord Haldane said (p. 745): "In the opinion of their Lordships the special provisions" (*i.e.*, the limitation section) "do not apply. They are confined to damages or injury sustained by reason of the construction or operation of the railway. The words of exception in the subsection relate to carriage of traffic and to tolls, and do not require any construction which extends the meaning of the phrase 'operation of the railway.' Such operation seems to signify simply

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the process of working the railway as constructed. The refusal or discontinuance of facilities for making a siding outside the railway as constructed and connecting it with the line does not appear to be an act done in the course of operating the railway itself."

None of the cases relied on by counsel for the appellant appears to me to support his contention.

In my opinion, the injury done to the appellant by setting out the fire and failing to prevent its spread to his lands was as much an injury caused by the operation of the railway as the injury caused by the negligent omission of the defendants in the *McCallum* case to remove the inflammable material on the line, which was ignited by the hot ashes that fell from the locomotive, and to prevent the spreading of the fire to the plaintiff's lands, was an injury by reason of the railway.

By sec. 297 of the Railway Act, the duty is imposed upon railway companies of at all times maintaining and keeping their right of way free from dead grass, weeds, and other unnecessary combustible matter, and it was in performing that duty that the injury to the appellant was done. That the mode in which the work was done was a negligent one, or even, having regard to the statute, unlawful, is beside the question. If it was negligent, as it has been found to have been, or unlawful, the respondent was answerable for the damage which the appellant suffered; but the act was, in my opinion, none the less an act done in the course of the "operation of the railway," and the injury to the appellant none the less an injury sustained by the "operation of the railway."

The performance of the duty imposed by sec. 297 is recognised by the Act itself as part of the operation of the railway; as the group of sections of which that section is one is headed "Operation." This indicates, I think, that the phrase "operation of the railway" was not used in the narrow sense of running trains, but was intended to include such acts as that in which the respondent was engaged in the doing of which the injury of which the appellant complains was occasioned; and I am of opinion that the section applies where the damage or injury "arises from the execution or neglect in the execution of the powers

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given to or assumed by the company for enabling them to construct or maintain their railway:" *per* Osler, J.A., in *Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.*, 10 O.L.R. at p. 427.

Appeal dismissed with costs.

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Ontario Supreme Court. Trial before Boyd, C. February 14, 1914.

1. WATERS (§ II A—65) — WATERCOURSES — MARSH LANDS — RIPARIAN RIGHTS—ASHBRIDGE'S BAY.

No right analogous to a riparian right is acquired by the owner of land abutting upon a bog which could be travelled only as land, and which intervened between the parcel granted to him and his predecessors in title and the navigable waters of Ashbridge's Bay, Toronto, although an outlet had been made by dredging, if the use of the waters for boats by the owners of the land in question was over property granted by the Crown to the city and was permissive only.

[Compare *Merritt* v. *City of Toronto*, 6 D.L.R. 152, 27 O.L.R. 1.]

2. MUNICIPAL CORPORATIONS (§ II G—235)—SEWERS—WORK ON—DELAY IN RESTORING STREET—MUNICIPAL LIABILITY.

A city municipality may be held liable in an action for damages for injury sustained by want of proper access to business premises by reason of the city's failure to exercise reasonable expedition in completing the restoration to a travellable condition of a street abutting the business premises after it had been opened up for the purpose of putting in a concrete sewer.

Statement

ACTIONS against the Corporation of the City of Toronto and the Toronto Harbour Commissioners for a declaration that the waters of Ashbridge's Bay were navigable waters, that the plaintiffs were entitled, as owners of land bordering on the bay, to riparian rights, that the defendants the Corporation of the City of Toronto had created a nuisance in the bay; and for an injunction and other relief.

Actions dismissed as to Harbour Commissioners; also dismissed as against city, except its delay in restoring street to a travellable condition.

H. E. Irwin, K.C., for the plaintiffs Rickey.

W. E. Raney, K.C., and *E. F. Raney*, for the plaintiff company.

G. R. Geary, K.C., and *C. M. Colquhoun*, for the defendants the Corporation of the City of Toronto.

A. C. McMaster, for the defendants the Toronto Harbour Commissioners.

BOYD, C. (after reviewing the evidence):—There can be no reasonable doubt that the same relative condition of the marsh existed at the time the patents were granted as existed in 1872, when McKee first placed his ice-house at the water's edge. My conclusion from the evidence is, that this was an act of encroachment upon the property of the Crown and on the possessory rights of the city.

The boundary then, as at the date of the patents, was, I think, the edge of the marsh, not the water's edge. Between the water's edge and the mainland or broken front was a strip of boggy land in a state of transition to tillable soil. When the boundary was defined in 1877, the surveyors' quest should have been for the edge of the marsh and not the water's edge (whether at high or low water); and that boundary could easily have been found, if not apparent on the surface, by boring or other method of underground search. However, that was not done, and the right of McKee to the larger area now claimed by the plaintiffs was then settled; but the fact of what was the original and proper boundary is of moment in the claim for riparian rights. In my opinion, these never existed and never began to exist, either by the act of spoliation in severing the frontal marsh, or in the concession of a conventional line now apparently on a water front.

The evidence shews that 1872 was a year of unusually low water, and a considerable space would then appear between the water's edge and the bank. This space of land was level to the water, and there began to slope gently down under water till another flat was reached at the bottom of about three or four feet of water (Moss, p. 286; Williams, p. 32; Hendry, p. 84), then probably not more than two feet of water. On this level land space McKee placed the ice-house. He says it was about 100

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feet long, and close at the edge it was staked in front to keep the earth from coming down. There would be no difficulty in putting up the slight frame and structure of such building on this surface. Towards the water it might be more moist, but that could be overcome by planks or logs for the substructure. In the dry season, when all the water went off in front of this same lot, Hendry excavated the bottom out as far as Keating's cut, by means of planks laid along for the runway of wheelbarrows, occupying two or three men at a time for two or three weeks (p. 316*b*); and Pickering tells us that when hauling in hay the passage from the boggy front to the marsh was made by putting down logs as a sort of corduroy road (p. 518*c*.) That was near the cow-byres, at the west end of the marsh, where the grass was thickest and the bottom "more sludgy" than usual. (see McNamee's report on dredging, and also p. 513*c*.)

David Smith's strip or breadth of wild hay was relatively in the same position as the floating mat of hay-growth from which the witnesses took the hay in the seventies. The only difference would be the advancement of the marsh. It was growing and encroaching yearly on the shallow water; but there was then, as in later days, the boggy strip between what was afloat and what was relatively solid—that is, the bog—a bog which of itself has then and always foreclosed riparian rights.

It is not important, in my view, to attempt to trace all the changes and developments arising in consequence of the Keating cut, which, though they were largely exploited in this litigation, are quite outside of the real issues.

After coming to the end of a necessarily devious course in the consideration of this contest, I have reached, for the various reasons given, the conclusion that the plaintiffs have no claim to riparian rights, and have no right of access by water to what may be the navigable water or may be made the navigable water in Ashbridge's Bay.

This disposes of the main causes of action as to water rights. The plaintiffs also complained of other matters: first, that the nuisance created by the discharge of sewage, especially by the additional output in the year 1913, should be restrained and abated; and next, as to the plaintiff Schofield, that damages

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should be given for the injury done through opening Carlaw avenue, and so interfering with his business and with access to his premises.

As to nuisance from the pollution of the water and the air by reason of the discharge of fecal and other malodorous substances into Ashbridge's Bay, no case is made out for interference on behalf of an individual. In these respects of water and air no special and particular injury to the plaintiffs has been proved by the evidence at the date of the writ. No doubt pollution existed, as a necessary result of the sewage discharged into the water; but the prejudicial effects were common to all the neighbourhood. Wherever the wind blew in that direction, nauseous smell was carried, and so as to the foul water. It was a public nuisance. Both causes of injury might have been proper matters of investigation by the Court at the instance of the Attorney-General or upon criminal prosecution.

Schofield says that a cesspool was made in front of his place, because the city had not dredged Keating's cut; but the whole locality was in like condition for a short period. It is so put in the pleadings, para. 9: "The effect of the sewage was to fill up the channel to Keating's cut and the surrounding waters and turn the same virtually into a cesspool;" and so it goes on, in para. 10, to set forth that the same conditions are repeated at the foot of Morse avenue and of Leslie street and of Morley avenue, of Logan avenue and of Booth street, and at the point where the Don discharges into the Keating channel.

The whole locality was infected in the same way, and the nuisance was distributed all around as the wind blew the air and the waters one way or the other. The whole situation was one for redress, not by individual suit, but by some representative of the injured public. This legal aspect was referred to by me in a late case, *Cairns* v. *Canada Refining and Smelting Co.* (1913), 5 O.W.N. 423, in which I followed the practice as laid down by Kindersley, V.-C., in *Saltau* v. *De Held* (1851), 2 Sim. N.S. 133, 142.

No doubt, the business of both plaintiffs was affected injuriously by the floating filth that got on the shore and clung to the sides of their boats; but that was damage resulting from the

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use they made of the water in order to reach Keating's cut. It was distasteful and repellent to do business in such pollution; but, as I have already found, the plaintiffs had no right to go over the city property to get to Keating's cut, or to use Keating's cut, except *sub modo*.

Schofield's claim is generally, in this respect, much the same as Rickey's. Rickey claims for the labour and expense incurred in cleaning his boats, when coated with the slime and refuse dumped into the water in front of his place. His approach by water to his place of business was thus fouled and obstructed. He found the sewage beginning to get troublesome in this way about the time in September or October that the action was begun (p. 186). "Q. And your damage is confined to the extra labour and the cleaning off of these boats when you hauled them out? A. And the closing of Keating's cut, the condition of the cut" (p. 190).

This damage to the business of the plaintiffs on the water side is not recoverable from the city. The plaintiffs had no right to go to and fro with boats over this part of the marsh, which belonged to the city. The use of the water of Keating's cut was at most permissive, and in such user the parties must be content to take the place as they find it. No obligation rested on the defendants, *quoad* the plaintiffs, to keep the water free from refuse or from being blocked. The city was pursuing as best it could the plan to relieve the citizens in the matter of domestic drainage; and the drawback was, that it could not be done at once or without some mistakes and inconvenience to the public.

I do not find in the evidence that Rickey makes any complaint or that he has sustained damage, as to the landward side of his business. A good collection and review of cases is in *Stevenson* v. *Corporation of Glasgow*, [1908] Sess. Cas. 1034.

Besides, the whole of Rickey's front, as occupied, is an encroachment over the Unwin line, and so is Schofield's to a great extent—all but the slip. What accumulation of sewage there was at any time was within the limits of Unwin's line, and not on the land or water lots owned by the plaintiffs.

As to the damages claimed by Schofield for interruption to his business on the landward side, I think the city was justified,

upon and after the ratepayers' vote for the money required, in going on with the work forthwith in respect of the new sewer system. It was essential for the well-being of the citizens; and, in a choice of difficulties as to where relief should begin, the city elected in good faith to do as it did. There is, however, some evidence to shew that the city failed to exercise reasonable expedition in completing the restoration of Carlaw avenue to a travellable condition alongside Schofield's place. He appears to have sustained loss of business, probably for some months, on this account, for which he may recover in this action. For other injuries, if any, arising from the method of construction, compensation must be sought by process of arbitration, and not by action.

It will be referred to the Master to assess damages for injury suffered by the plaintiff Schofield for want of proper access by land to his business premises by reason of delay in completing the restoration of Carlaw avenue after it had been opened alongside his premises for the purpose of putting in the concrete sewer in the year 1912 and prior to the 30th October, 1912. Costs of this part of the case and costs of reference will be reserved till further directions.

As to the Harbour Commissioners, both actions are dismissed with costs.

Schofield's action against the city, so far as water rights are concerned, is dismissed with costs; so far as nuisance and sewage is concerned, it is dismissed without costs; so far as damage to business is concerned, costs reserved till after reference.

As to the city, Rickey's action concerning water rights is dismissed with costs; for the nuisance and sewage, dismissed without costs.

Judgment accordingly.

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KELLUM v. ROBERTS.

Ontario Supreme Court (Appellate Division), Mulock, C.J. Ex., Riddell, Sutherland, and Leitch, JJ. March 30, 1914.

1. TRIAL (§ I A—2)—SEPARATION OF JURORS—SUCCESSFUL PARTY DISCUSSING CASE BEFORE TWO JURORS—EFFECT ON VERDICT.

A verdict should not be allowed to stand where the course of justice has been or may possibly have been interfered with by any improper conduct on the part of the successful party (ex. gr., discussing the case with one of the opposing witnesses in the presence of two of the jurors during an adjournment of the hearing), and this irrespective of his motives and although he was not guilty of intentional wrong-doing.

[*Campbell* v. *Jackson*, 29 C.L.J. 69, applied; *Van Mere* v. *Farewell*, 12 O.R. 285; *Stewart* v. *Woolman*, 26 O.R. 714; and *Cameron* v. *Ottawa Electric*, 32 O.R. 24, referred to.]

Statement

APPEAL by the defendant from the judgment of the Senior Judge of the County Court of the County of Bruce, in an action in that Court, tried with a jury, in favour of the plaintiff, for the recovery of $270, upon the verdict of the jury.

The appeal was upon the ground that the trial was not a fair one by reason of the misconduct of two of the jurors, and of remarks made by the trial Judge in charging the jury.

The appeal was allowed.

A. G. Slaght, for the appellant.

W. Proudfoot, K.C., for the respondent.

March 12.

The judgment of the Court was delivered by

Mulock, C.J.Ex.

MULOCK, C.J.EX.:—This case was tried with a jury by his Honour Judge Barrett, Senior Judge of the County Court of the County of Bruce, and resulted in a verdict for the plaintiff for $270, for which amount, with costs, judgment was entered for the plaintiff. From that judgment the defendant appeals.

The chief grounds of attack on the verdict are the misconduct of the plaintiff and a juryman, and the objectionable nature of the learned trial Judge's reference thereto in his charge to the jury, whereby, the defendant says, a fair trial was not had.

The action arose out of an agreement between the parties for the purchase by the plaintiff for the defendant of certain cattle. The terms of the agreement were in dispute, and the real issue was as to the nature of these terms.

The trial began on the 10th December, 1913, the taking of evidence being completed at six p.m., when the case was adjourned until the following morning, the jury being allowed to

separate. On the following morning, the case was concluded, resulting in a verdict for the plaintiff.

The defendant complains that John McDougal and Archibald McIntyre, two of the jurymen trying the case, were present at a discussion regarding it between the plaintiff, a witness named Linn, and a witness named Ackert, at the Hartley House, in the town of Walkerton, on the evening of the 10th December.

On the opening of Court on the 11th December, the jury having apparently retired, the defendant's counsel reported the incident to the trial Judge, and moved that the jury be dispensed with. The learned trial Judge inquired what evidence there was as to the alleged misconduct, when the defendant's counsel stated that three of the witnesses of the incident were then in Court. Thereupon the trial Judge interrogated juror McDougal in regard to the matter, and then announced that, if the defendant's counsel desired it, he would dispense with that juryman, and try the case with the remaining eleven jurors.

The defendant's counsel was unwilling to accept this disposition of his motion, and the case was completed with the twelve jurymen. A number of affidavits have been filed in regard to the incident; and, although they differ on some points, there is no dispute as to the following facts:—

Jurors McDougal and McIntyre, and John A. Ackert, one of the plaintiff's witnesses, were staying at the Queen's Hotel in Walkerton, and in the evening proceeded together to the Hartley House, and there entered the sitting-room. William Linn, who had given evidence for the defendant, was a guest at the Hartley House and was in the sitting-room when jurors McDougal and McIntyre and the witness Ackert entered. There is a dispute as to whether the plaintiff came in with them, and I am inclined to think from the conflicting evidence that he did not, but preceded them by a few minutes. However that may be, the plaintiff was in this room along with the jurors and precipitated a discussion with the defendant's witness Linn in regard to the case. The two jurors were present and attentive listeners during at least part of this discussion, though they may not have heard the commencement.

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The controversy for a time was between the plaintiff and Linn, then the plaintiff's witness Ackert joined in it, and it grew animated, much feeling being manifested by the disputants, and juror McDougal in his affidavit says: "That the plaintiff in this case was not with us, nor did we know he was in said Hartley House when we went in; that, when we so went into said Hartley House, some one, I cannot say who, but not the plaintiff, said to John H. Ackert, who was with me, 'What do you know about cattle?' or words to that effect. Ackert at once replied, and the discussion immediately became very hot; and, to quiet the matter, I said, 'Leave that to the jury, they will very soon settle that to-morrow,' and may have said, 'They will do so in a few minutes,' but I did not say I had made up my mind in a minute, or tell Linn we would teach him to come up there to tell us the price of cattle, or anything to that effect; and that, after saying this, McIntyre and I immediately left the said Hartley House; that, when we went into said Hartley House as aforesaid, the plaintiff and Linn, who gave evidence at the trial, were there talking."

Whilst particulars of the statements or arguments of the plaintiff and witnesses Linn and Ackert in the presence of the two jurors are not given, it is clear from McDougal's version of his utterance, "Leave that to the jury, they will very soon settle that to-morrow," that these statements or arguments had reference to this case.

The plaintiff has not denied taking part in the discussion before the two jurors, nor has he offered any explanation of his conduct. The circumstance of his coming to the hotel and precipitating a discussion of the case, and the arrival in the room of the two jurors with Ackert in time to hear the discussion, and the plaintiff continuing the discussion in their presence, called for exculpatory explanation, if the facts admitted thereof; but, none being forthcoming, I view his conduct as that of a litigant improperly endeavouring to interfere with the course of justice.

In *Van Mere* v. *Farewell*, 12 O.R. 285, at p. 294, Cameron, C.J., says: "There is nothing more important than that litigants should be made thoroughly to understand that any attempt to unduly influence the due course of justice by interference with

the jury or those whose duty it is to decide between them, will prevent the enjoyment of any success that may actually or possibly be obtained thereby; and, if it had been made to appear that the defendant in this case had gone among the jury and talked his case over with them before the trial, I should have felt it my duty to take the opinion of another jury upon the case."

In *Stewart* v. *Woolman* (1895), 26 O.R. 714, the plaintiff had discussed the case with some of the jury; and MacMahon, J., at p. 718, quotes with approval the observations of Pierrepont, J., in *Nesmith* v. *Clinton Fire Insurance Co.* (1858), 8 Abb. Prac. 141, at p. 146: "It should be made the interest of both parties to prevent, as far as possible, all improper interference with the jury; and though in a particular case the rule may operate with severity, yet it were far better that ten righteous verdicts should be set aside where the jury have been tampered with, than one verdict should stand where the jury have been approached, and about the justice of which verdict the Court entertains a doubt."

In the same case, Meredith, C.J., at p. 719, says: "These discussions took place after the jury had been sworn; and the principle upon which awards are set aside where the arbitrator has heard a statement with regard to the case from one of the parties in the absence of the other, applies, I think, with equal force to statements made by a litigant to a juror who is called upon to pass between him and his opponent on the facts in issue in an action."

In the same case, Rose, J., says (p. 720): "As said by Field, J., in *The Queen* v. *Justices of Great Yarmouth* (1882), 8 Q.B.D. 525 at p. 527: 'The administration of justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt.' Again, in *Proctor* v. *Williams* (1860), 8 C.B.N.S. 386, Erle, C.J., said at p. 389, speaking of another tribunal: 'It is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal.' In *Darling* v. *Pierce* (1878), 15 Hun (N.Y.) 542, it is stated at p. 549: 'Next in importance to the duty of rendering a righteous judgment is that of doing it in such a

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manner as will beget no suspicion of the fairness or integrity of the Judge.'"

And Rose, J., with reference to these views, says, at p. 721: "If a party to a suit being tried before a Judge or jury, by intent or indiscretion, place the Judge or jury in such a compromising position as to give rise to suspicion of want of fairness or integrity, or to throw a substantial doubt upon the impartiality of the tribunal, such party cannot complain if a decision made by such tribunal is, at the instance of the opposite party, set aside, and a new trial granted, so that all grounds of suspicion may be removed, and especially so when, as here, the result arrived at is unsatisfactory."

In *Cameron* v. *Ottawa Electric R.W. Co.*, 32 O.R. 24, at p. 26, Boyd, C., says: "It is essential to the maintenance of public confidence in the jury system, not only that the trial should be fairly conducted, but that it should appear to the parties and those interested to be fairly conducted."

To set aside the verdict of a jury because of any improper interference with it in the trial of a case, it is not necessary to shew that such interference had the effect of influencing the jury. It may be difficult or impossible to shew the actual effect; but, in my opinion, it should be and is sufficient ground for setting aside a verdict if such interference might be reasonably supposed to have deprived the innocent party of a fair trial. No verdict should be allowed to stand where the course of justice has been or may possibly have been interfered with by any improper conduct on the part of the successful party, irrespective of his motives, even though he was not actually guilty of intentional wrong-doing (*Campbell* v. *Jackson* (1892), 29 C.L.J. 69).

The conduct of the plaintiff in discussing this case in the presence of two jurors was most improper. It may not have affected the result, but it is impossible to say that it did not. If the decision were to turn on the question whether or not his conduct did in fact interfere with the course of justice, the onus was on him to satisfy the Court that it did not, and this he has not attempted to do, nor has he offered any satisfactory explanation of his conduct.

I think that where, as here, the conduct of a party has been

so improper as to cast discredit on the fairness of the trial, public policy demands that the guilty party should not be allowed to retain the verdict obtained under such circumstances.

For these reasons, the verdict should be set aside with costs of the trial and of this appeal to be paid by the plaintiff to the defendant forthwith after taxation.

The conduct of jurors McDougal and McIntyre is also open to serious criticism. If they are, as I must assume them to be, competent to serve as jurymen, they must have known that they were guilty of very improper conduct in listening to a discussion between the plaintiff and certain witnesses in regard to a case then in the jury's hands. They say they were present by mere accident. If so, it is somewhat surprising that it did not occur to them at once to withdraw when reference was made to the case, and to report the occurrence promptly to the trial Judge. Further, they should have withdrawn from the room when they found the plaintiff there; for it is unseemly, and likely to give rise to grave suspicion, if during the trial jurymen associate with any of the litigants. The same criticism, though perhaps in lesser degree, applies to the association of jurymen with witnesses; and it is to be regretted that, in addition to McDougal's and McIntyre's misconduct in being attentive listeners to the conversation between the plaintiff and Linn, they should have proceeded in the company of Ackert, one of the plaintiff's witnesses, to the Hartley House. The circumstance that Ackert soon took part in the discussion with the plaintiff and Linn in regard to the case suggests that Ackert was espousing the plaintiff's cause, and probably discussed it with the two jurors on the way to the Hartley House.

The conduct of these jurors appears to me so unsatisfactory that it might properly, I think, have been the subject of thorough investigation at the time by the trial Judge with a view to the punishment of the jurors, if found guilty of punishable misconduct.

Dealing next with the learned trial Judge's offer that, if the defendant desired it, he would drop McDougal from the jury and take the verdict of the remaining eleven jurymen: as both McIntyre and McDougal were disqualified from continuing as jury-

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men, the learned Judge's offer to proceed with eleven jurymen did not get over the difficulty; but, even if the Judge had offered to proceed with a lesser number, a jury of less than twelve men cannot be forced upon an unwilling party, it being his right to have his case tried before a jury of twelve.

The learned trial Judge being unwilling to dispense with the jury, his proper course was to have discharged the jury and called a new one.

No exception, I think, can be taken to the learned trial Judge's address to the jury when dealing with the merits of the case. It seems to me to be eminently fair; but, with all respect, I think he erred in his observations to the jury in regard to the conduct charged against McDougal and the motion to dispense with the jury.

For obvious reasons, the jury does not appear to have been permitted to be in Court during the discussion of this branch of the case, and they were likely to misunderstand, to the prejudice of the defendant, his counsel's motion to take the case from them. In the general conduct of cases before juries it is advisable to avoid, as far as possible, the risk of confusing or perchance misleading them, by bringing to their attention matters upon which they have not to pass and which are not within their province.

New trial ordered.

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PEASE v. TUDGE.

Saskatchewan Supreme Court. Lamont, J. November 28, 1914.

LEVY AND SEIZURE (§ III A—40)—*Execution—Sale of Mortgage—Duty of Sheriff—Price.*]—Application to confirm sheriff's sale of mortgage seized under execution.

H. Y. MacDonald, K.C., for plaintiff.
A. G. MacKinnon, for defendant.

Lamont, J.

LAMONT, J.:—This is an application to confirm a sale made by the sheriff of a mortgage seized under execution. The facts are as follows: The plaintiff, having obtained a judgment against L. T. Tudge, and Sarah Tudge, his wife, issued execution thereon

on January 5th, 1911, for $92.25. The execution was duly filed in the land titles office. At that time Sarah Tudge was the owner of a mortgage for $2,265 on the north-west quarter of 13-15-1, W. 2nd, made by Albert Schwalm to her. She had sold the quarter section to Schwalm, and had received the mortgage back. The mortgage was subject to a prior mortgage of $1,800. The value of the land covered by the mortgage I find to be $6,500. In May, 1913, the sheriff made seizure of the mortgage belonging to Sarah Tudge. He advertised the mortgage for sale by posting a notice of sale in his own office and in the office of the local registrar and six other places in Moosomin. On June 21 he offered the mortgage for sale. There were no bidders present. On June 28 he again offered it, with a similar result. On July 5 he again offered it, on which occasion he received an offer of $100 from A. T. Procter, and sold the mortgage to him for that sum. On the application to confirm the sale, counsel for Mrs. Tudge offered to pay the amount of the execution, interest, and all costs to date. This was refused. The affidavit of Mrs. Tudge shows that since January, 1911, she has been living in British Columbia, and that the first information she received that the mortgage had been seized was the notice of motion to confirm the sale. It also shews that at the time the mortgage was seized there was due to Mrs. Tudge from the mortgagor far more than enough to satisfy the execution and costs. I am of opinion the application must be refused. The duty of a sheriff in selling property seized under execution is laid down in Hals. Laws of England, vol. 14, p. 56, as follows:—

> It is the duty of the sheriff within a reasonable time after seizure, to sell the goods for a *reasonable* price.

And he cites as authority for that proposition the case of *Keightley* v. *Birch* (1814), 3 Campbell 521, the headnote of which in part reads:—

> The sheriff, having taken goods in execution under a *fi. fa.*, is not justified in selling them to the highest bidder, but if he cannot obtain a reasonable price should return that they remain in his hands for want of buyers.

In giving judgment in that case, Lord Ellenborough said:—

> If the goods taken in execution were really worth £300 or £400. I think the sheriffs are liable for selling them at £72 15s. 10d. The return ought to have been that they had taken goods which remained in their hands from want of buyers. If a chattel worth a thousand pounds is put up for

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sale and only five pounds bid for it, the sheriff ought not to part with it for that sum, and he may fairly say that it remains in his hands for want of a buyer. He ought to wait for a *venditioni exponas*, the meaning of which is, "Sell for the best price you can obtain."

A return by a sheriff that goods and chattels seized remain in his hands unsold for want of buyers is applicable not only to a case where no bids have been made for the goods, but also where no offer is made of a sum reasonably approaching their value: 14 Hals. 58 & 59. I am, therefore, of opinion that the sheriff should not have sold a mortgage worth $2,200 for $100, but that he should have made a return that the mortgage remained on his hands for want of buyers. If, then, the execution creditor desired, I am of opinion that, following the English practice, he should have made an application for an order directing the sheriff to sell for the best price he could obtain. This order would be obtained upon personal notice to Mrs. Tudge, and if upon such notice being given and the order being made, Mrs. Tudge did not pay off the execution or find someone to purchase the mortgage at a reasonable figure, she could not complain if a reasonable price was not obtained for the mortgage.

As pointed out by Lord Ellenborough in *Keightley* v. *Birch*, *supra*, sheriffs may often find themselves in difficult positions in which they must act at their peril. Cases may arise in which a sheriff may be honestly in doubt as to whether the price offered is a reasonable one or not. In such cases I take it that, if there was any reasonable evidence on which a Court could hold that a reasonable man would have reached the same conclusion as the sheriff, the course followed by the sheriff would be upheld. In the present case no one can say that $100 is a reasonable price for a mortgage which is a security for over $2,200 on property worth $6,500, which there is only a prior incumbrance of $1,800. Furthe[illegible]re, having seized the mortgage, and there being more tha[illegible]ough due from the mortgagor to satisfy the execution and costs, I cannot see why the sheriff could not have collected from him sufficient to pay off the judgment.

The application will, therefore, be refused.

Application refused.

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CASES REPORTED, VOL. XIX., PART 2.

GOODCHILD v. BETHEL.

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Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ.
December 18, 1914.

1. VENDOR AND PURCHASER (§ I C—10)—TITLE—TORRENS SYSTEM—VENDOR'S IMPLIED OBLIGATION—WHAT HE MUST PRODUCE.

On an open contract for sale and purchase of land in Alberta it is an implied term that the vendor is bound, when the time for showing title has come, to produce on request of the purchaser a registrar's abstract and general certificate, and, in case the registrar's abstract does not shew a sufficient title, he must produce also a written statement shewing how the apparent defects are met.

2. VENDOR AND PURCHASER (§ I C—10)—SUFFICIENCY OF TITLE—SUBJECT TO ENCUMBRANCES—TEST.

A good title is shewn if, although the vendor is not in fact the registered owner, he is entitled to compel a transfer to him; it is good although subject to encumbrances, even though exceeding the purchase price, provided the encumbrancer is compellable to take his money by the time a good title is to be proved.

Statement

APPEAL from Walsh, J., at trial.

The appeal was dismissed.

O. M. Biggar, K.C., for the plaintiff, respondent.

R. D. Tighe, for the defendant, appellant.

Scott, J.

SCOTT, J., concurred with BECK, J.

Beck, J.

BECK, J.:—This is an appeal from the decision of my brother Walsh ordering specific performance of an agreement for purchase, the plaintiff being the vendor and the defendant Bethel the purchaser. The plaintiff was not the registered owner at the time of the making of the agreement. The registered owner was one Cook. The plaintiff obtained an agreement for sale from Cook dated July 4, 1911, for $20,000, payable $4,000 down, $5,333.33 on July 4, 1912, $5,333.33 on July 4, 1913, $5,333.33 on July 4, 1914, with interest at 8 per cent. per annum. This agreement contained provisions accelerating the payment of the deferred payments in case of default, and for forfeiture of all interest in the land and in all moneys paid in case of default after a thirty days' notice.

The agreement from the plaintiff to the defendant Bethel is dated May 25, 1912. The price was $60,000, "on which the purchaser has paid the sum of $15,000 by way of deposit"; the balance being payable: $15,000 on May 25, 1913, $15,000 on

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May 25, 1914, and $15,000 on May 25, 1915. The agreement contains the following provision:—

> The vendor hereby agrees that should he fail to make payment of the sums due by him in respect of the said lands, the purchaser shall be entitled to pay the same and shall be entitled to credit under this agreement for all sums so paid.

There is no express reference to the agreement under which the plaintiff's vendor held the land, but this clause makes it plain that the defendant Bethel was aware of the character of plaintiff's title.

The plaintiff's statment of claim, in which he takes advantage of the acceleration clause, is in effect a claim, not for specific performance, but for a sale of the land for the purpose of realizing the plaintiff's lien for the unpaid balance of purchase money. The action was commenced on September 13, 1913. The plaintiff became the registered owner of the land on January 6, 1914, his vendor having given him a transfer and accepted as security for the balance of the plaintiff's purchase money a promissory note, secured by the deposit of the certificate of title in the hands of a third party.

The defence was delivered on December 24, 1913. Taking the defence as repudiating the agreement (which it does not do expressly though I suppose it does impliedly—and this interpretation is expressly admitted by plaintiff's counsel), the ground of repudiation is a "defect" in title of the plaintiff. A purchaser is undoubtedly entitled to repudiate his contract if at the time of repudiation the vendor has not in fact a good title. The practice in this jurisdiction, where the Torrens System only is in force, of shewing a title by production of an abstract, differs greatly, as it must, from the practice in England.

I think that on an open contract for sale and purchase there is an implied term to the effect that the vendor is bound when the time for shewing title has come to produce on request of the purchaser a registrar's abstract and general certificate, and in case the registrar's abstract does not shew a sufficient title also a written statement shewing how the apparent defects are met. Owing to the simplicity of titles under our system, this obligation is often waived altogether or a verbal explanation merely of the condition of the title is accepted. The obligation, of course, in

either case remains of producing proper proof that the vendor has in fact a good title.

A good title is shewn if although the vendor is not in fact the registered owner he is entitled to compel a transfer to him. It is good even if subject to encumbrances even though exceeding the purchase price provided the encumbrancer is compellable to take his money by the time a good title is to be proved. See Williams on Vendors and Purchasers, 2nd ed., pp. 154 *et seq.*; Fry on Specific Performance, 5th ed., sec. 1385.

When the time for completion of the contract by transfer by the vendor and payment of the purchase money by the purchaser arrives both must be ready to fulfil these mutual obligations, subject, I think, to this, that in a proper case the purchaser will be ordered or permitted to pay his money into Court for the purpose of discharging encumbrances against the land. This, I think, is the settled practice of this Court. If either is not ready at the time fixed or appointed, a time may be fixed by a notice to the other fixing a reasonable time for completion and making time of the essence (Williams, pp. 579, 1035-6), on non-compliance with which the party giving the notice may call the contract off.

If a good title is shewn and proved within the rules above stated and the vendor, though apparently entitled under an enforceable agreement to get in an outstanding interest is resisted in the enforcement of it, the vendor is entitled to a reasonable time within which to procure the enforcement of the contract. What is a reasonable time in such a case and where a notice making time of the essence whether the time fixed is reasonable are questions which must be decided according to the circumstances of each case. See Fry, sec. 1368 *et seq.*

It is admitted that the plaintiff was not the registered owner till January 6, 1914; that up to that date Cook was the registered owner; that up to that date the plaintiff was in default in respect of his agreement with Cook; that there was no encumbrance or cloud on the title.

The learned Judge in effect finds on the evidence—as he could scarcely avoid finding—that before the defendants attempted repudiation of the agreement the plaintiff and Cook had come to an agreement that on payment of a certain sum on account of the arrears under the Cook agreement the plaintiff should have

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time for the payment of the balance, and that this arrangement was carried out according to its terms resulting in the plaintiff becoming the registered owner on January 6, 1914. It is contended that this agreement was not binding on Cook because there was no consideration for it. One of its terms was the payment down of $1,000, and this payment was made. So that the agreement was a concluded agreement, not a mere arrangement which one or other party did not take advantage of. I think that although a greater sum was in fact at the time in arrear, there was a consideration for the agreement in the advantage of getting an immediate payment of part of those arrears, no part of which probably would otherwise have been paid. I think this is at all events so under the provision of the Judicature Act, which says:—

> Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor as satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation.

The plaintiff therefore, in my opinion, was at the time of the attempted repudiation by the defendant in a position to shew a good title, that is, a title in such a condition at that time that it appeared that when he was bound to prove a good title he could do so. No objection is taken to the judgment being for specific performance in the usual form rather than a direct order for sale to realize the vendor's lien.

For the reasons given I would dismiss the appeal with costs.

Stuart, J.

STUART, J.:—I think this appeal should be dismissed with costs. The defendant's default arose on May 25, 1913, when he failed to make the stipulated payment of $15,000 and interest. The plaintiff did not become in default to his vendor until July 4, 1913, when he failed to make a payment of $5,333.33 and interest. On September 3, 1913, the plaintiff issued his writ, and on December 24, 1913, the defendant filed a defence to an action, caused by his default of May 25, 1913, wherein he raises as a defence a default of the plaintiff which occurred only on July 4, 1913. And yet the agreement between the plaintiff and the defendant contains this clause:—

> The vendor hereby agrees that should he fail to make payment of the sums due by him in respect of the said lands, the purchaser shall be entitled

to pay the same and shall be entitled to credit under this agreement for all sums so paid.

This shews that the defendant knew of the existence of the plaintiff's agreement for purchase from Cook, the registered owner, and I think we ought, in the circumstances, to assume either that he was acquainted with its terms or could easily have ascertained them if he so desired. It is a case in which the defendant is seeking to get an advantage from his own default and from the plaintiff's complaisance. If the plaintiff had sued promptly on May 26, no such defence as is now suggested could possibly have been raised by the defendant, because he would at once have been met with the objection that he was at liberty to make the payment which was to fall due to Cook on July 4 and to take credit for it upon his payment to the plaintiff. As the matter stands, the defendant is seeking to get an advantage which could have come to him only by his own delay and default. Inasmuch as there is now in fact no difficulty about the title, I do not think the defendant should be allowed to take advantage of a possible difficulty which did not exist when he was first in default, which he could himself without costs have easily prevented from ever arising by simply paying part of his debt to the plaintiff in a manner permitted to him by the agreement and which has now in any case entirely disappeared.

This view of the cause rests entirely upon the defendant's knowledge of the prior agreement and the stipulation in regard to it. The position might be otherwise if he, on December 24, first became aware, not merely of the default of July 4, but of the nature of the plaintiff's title. In that case, however, he would no doubt be met by the special agreement between Cook and the plaintiff, by which the plaintiff's default was, to say the least, waived by Cook.

SIMMONS, J., concurred with BECK, J. Simmons, J.

Appeal dismissed.

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S. C.

DANIELS v. IMPERIAL BANK OF CANADA.

Alberta Supreme Court, Walsh, J. December 4, 1914.

1. BANKS (§ IV A—58)—DEPOSITS—BANK CONTROL OVER—RIGHT TO CHARGE PERSONAL ACCOUNT WITH OVERDRAFT AGAINST TRUST ACCOUNT.

Where the customer of the bank has two accounts with it, one his personal account and the other in his name with the addition of the words "in trust," but in which he alone was dealt with, the bank has *prima facie* a right to set off an overdraft of the trust account against its indebtedness to him in respect of a credit balance on the personal other.

[*Foley* v. *Hill*, 2 H.L.C. 28, applied.]

Statement

ACTION by a depositor against a bank denying its alleged right to apply the depositor's personal balance to cover a deficit in his trust account also on deposit.

The action was dismissed.

F. W. Griffiths, for plaintiff.

James Short, K.C., and *G. H. Ross*, K.C., for defendant.

Walsh, J.

WALSH, J.:—The plaintiff, W. C. Daniels, in May of this year opened a deposit account with the defendant at its Calgary branch, the account being in the name of "W. C. Daniels, in trust." He was the managing director of the Ætna Investment Trust Co., and this account was opened by him for the carrying on through it of his banking business as such managing director. He says that when he opened this account he explained these facts to the defendant's manager, and this is not denied. In June he opened a deposit account of his own at the same office, and there was on June 12, to his credit in this account, the sum of $1,544.35. On this day a deposit of $1,174.57 was made to the credit of the trust account, making the amount then to the credit of that account $1,338.61, as shewn by the ledger, although as a matter of fact the real credit balance was but $1,238.61. This deposit was made up in part of a cheque drawn by the plaintiff upon the trust account on June 10 in favour of one Hole, which had by subsequent indorsement found its way back to the plaintiff, who thus became the holder of his own cheque, which he deposited in this way to the credit of this trust account. The deposit of $1,174.57 was first entered in the ledger to the credit of the trust account, and before the $750 cheque which formed a part of it reached the ledger keeper for entry to the debit of the same account

another cheque drawn against it for the $737 had been charged up, and the real credit balance of $1,238.61 had been thereby reduced to $501.61, so that there were not sufficient funds to the credit of the account for the payment of the $750 cheque. The ledger keeper thereupon, without any notice to, or consent of the plaintiff, charged it up against the plaintiff's personal account, thereby reducing the amount to the credit of that account to the sum of $794.35. This balance was subsequently withdrawn by the plaintiff and the account closed. No one but the plaintiff had authority to sign cheques drawn against that, the trust account. The cheque in question and the $737 cheque above referred to were signed by him. The trust account has also since been closed. The plaintiff sues now to recover the above sum of $750, which he claims the defendant still owes him, as it had no right to charge the trust cheque for that amount against his private account.

The relation between a bank and its customer is primarily that of debtor and creditor. This was settled as long ago as 1848 by the House of Lords in *Foley* v. *Hill*, 2 H.L.C. 28. The bank becomes a debtor to the customer for sums which pass to the credit of his current account. The property in the money so deposited passes to the bank, and the customer's right is to have repayment of the debt thus created upon demand. If the customer has two or more accounts in his own right with the same bank, it is undoubtedly entitled, in the absence of agreement to the contrary, to combine them and to consider the balance resulting from this combination as the amount really owing from the one to the other. If, however, one of the accounts in the customer's name is to the knowledge of the bank a trust account, the right to combine it with the customer's personal account does not exist in the bank. In other words, there is no right to set off against a balance standing to the credit of the customer as a trustee a sum standing to his debit in his private capacity. Abundant authority for these propositions is to be found in such cases as *Bailey* v. *Finch*, L.R. 7 Q.B. 34; *Ex parte Morier*, 12 Ch.D. 491; *Garnett* v. *McKewan*, L.R. 8 Ex. 10; *Buckingham* v. *London, &c.*, 12 T.L.R. 70; *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A.C. 693; *Greenwood* v. *Williams*, 11 T.L.R. 56; *Ex parte Adair*, 24 L.T.R. 198, etc.

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If, therefore, these two accounts had been the plaintiff's in his own right, no question could have arisen as to the right of the defendant to combine them for the purpose of striking a balance and thus covering the overdraft created by this cheque in the account against which it was drawn. Neither is there any doubt that if the cheque in question had been drawn against the plaintiff's private account, creating an overdraft in it, the defendant would have had no right to combine that account with the trust account so that the balance to the credit of the latter account might have been available to wipe out the overdraft in the personal account. The facts, however, do not bring the case within either of these propositions, but constitute rather the converse of them.

Sir John Paget, in the second edition of his work on the Law of Banking, says, at p. 307:—

> Either by right of lien or set-off, a banker appears entitled to retain a credit balance on a purely private account against overdraft on any other account for which the customer is personally liable, though by reason of being earmarked or even fiduciary, the latter account is exempt from lien or combination. Reasonable notice must, of course, be given before so doing, and cheques previously drawn must be honoured.

No authority is given for this proposition, nor have I been able to find any. In fact, after a careful reading of the authorities, I have been unable to find the report of any case in which a condition created by facts of the character of those which are in evidence here has been under consideration. I am of the opinion that the defendant had not the right to do what it did in the way in which it did it. I cannot understand upon what principle it acted in charging up against one account a cheque drawn against an entirely different account. Its proper course, I think, was to have debited the trust account with the amount of this cheque, and then asserted its right to payment of the overdraft by the plaintiff. There was to the credit of the trust account $501.61, which could, in this manner have been applied on this $750 cheque, leaving but $248.39 of an overdraft, for which the defendant might have tried to hold the plaintiff liable. This, however, is perhaps but a matter of bookkeeping, for in practice it would have been worked out just as it has under the plan adopted by the defendant. If the plantiff would have been liable to the defendant under the plan above suggested for the above sum of $248.39, he would in addition have been liable to it for the

amounts subsequently charged against the trust account, the net amount of which was $501.01, making in all a liability for this same sum of $750, though this liability would have been in a different form and created by a different method than that adopted by the defendant.

It comes down, in my judgment, to the question: Was the plaintiff personally liable to the defendant for the indebtedness of the trust account to it whether that indebtedness was represented by this cheque for $750 or by the overdraft of $348.39 and the subsequent debits as I have worked them out? If he was, the defendant has the right to set off that liability against the balance of $750 which without the charging up of this cheque the defendant undoubtedly owed him. In other words, even if the defendant had not the right to combine the accounts for the purpose of working out in that way the plaintiff's liability of $750, it would have the right to say that while it owed the plaintiff $750 on his private account he owed it $750 on the other account, and his right to set that off against his claim would not be disputed. Was he, then, liable to the defendant in respect of the undoubted indebtedness to the defendant on trust account?

I am of the opinion that he was. He was the customer of the bank in respect of the transactions carried on through the medium of the trust account. It was with him alone and in and on his name that the defendant was dealing. It was by his hand alone that the cheques drawn on this account were signed. It was his act which created the indebtedness of the trust account to the defendant. The cheque for $750 in the hands of a holder other than the bank would undoubtedly have involved the plaintiff in liability to such holder if there were not funds to the credit of the account for its payment, for the words "in trust" written after his signature would not have relieved him from the personal liability otherwise attaching to him as drawer of the cheque. And being of this opinion, I must hold that, while the defendant owed the plaintiff on his current account this sum of $750, he owed the defendant $750 on trust account, which it is entitled to set off, and I must dismiss this motion, which I do with costs.

Action dismissed.

ALTA.

S. C.

Re WESTERN CANADIAN FIRE INS. CO.: CRAIG'S CASE.

Alberta Supreme Court, Stuart, J. December 8, 1914.

1. CORPORATIONS AND COMPANIES (§ V F—241)—LIABILITY OF SHAREHOLDERS —IN DE FACTO CORPORATIONS.

That the company regularly formed began business before it was legally entitled to do so is no answer to a claim to place a shareholder on the list of contributories.

2. CORPORATIONS AND COMPANIES (§ V F—235)—LIABILITY OF SHAREHOLDERS —RECEIVING SHARE CERTIFICATES—FAILURE TO REPUDIATE.

The receipt of share certificates following allotment, and their retention without repudiating their ownership, may establish a *prima facie* case of liability as a contributory.

Statement

APPLICATION for a declaration as to the validity of certain stock subscriptions.

Judgment was given holding the subscribers as contributories.

A. L. Smith (Clarke, Carson & Co.), for Western Canadian Fire Insurance Company.

Broomfield (Broomfield & Sellars), for the Craigs.

Mann (Lent, Jones & McKay), for contributories.

Stuart, J.

STUART, J.:—In view of the principles laid down in Lindley's Law of Companies, 6th ed., vol. 2, pp. 1066 and 1067, and in the cases there cited, particularly *Challis's Case*, 6 Ch. 266, and *Hare's Case*, 4 Ch. 503, I think a good deal of the argument which was presented to me on behalf of the Craigs is really irrelevant. It must be remembered that the company which is now in liquidation is the company which was incorporated by the provincial statutes, *viz.*, ch. 24 of the statutes of 1910, 2nd sess. There can be no doubt as to the validity of that statute, and therefore no doubt of the legal and effectual incorporation of the company which is now in liquidation. There can be no doubt that the company was entitled to make an issue of shares. There can also be no doubt that in respect of any shares issued by that company there is no possibility of having any recourse to the provisions of the Companies' Ordinance with a view of questioning the propriety of the proceedings. By the statute in question only certain specified provisions of the Companies' Ordinance are made applicable to this company, and these provisions relate entirely to the question of inspection by the Lieutenant-Governor in Council. This statute contains a large number of provisions relating to the

method of organizing and carrying on the business of the company, many of which are quite inconsistent with the provisions of the Companies' Ordinance. In my opinion, therefore, if it can be found that there has been made an agreement between the company incorporated by the statute and which is now in liquidation and an alleged contributory that the latter should take shares in the company, there can be nothing more to be said. No authorities were quoted to me to uphold the contention that merely because the company may have begun to do business before it was legally entitled to do so, therefore, persons who have made agreements to take shares in the company may be relieved and struck off the list of contributories in the winding-up proceedings. It would be strange, indeed, if, merely because the company had commenced to do business before it was legally entitled to do so, and in doing this business had incurred obligations, these creditors should be prevented from looking to the persons who had subscribed for the shares in the company to get satisfaction of their claim.

The only questions, therefore, so far as the present alleged contributory is concerned, is this: Did they make an agreement to take shares in the company? With respect to the bulk of the shares in question, it appears to me quite unnecessary to go back of the shares register and the share certificates. It is admitted that on March 15, 1911, John Craig made application for 105 shares in the present company. Apparently this application was made on behalf of Jessie Craig, but however that may be, Mrs. Craig does not deny that on April 10, 1911, share certificates were issued to her for 100 shares, and that she had retained them ever since. She made no repudiation of them, and only now, when the company is in liquidation, does she make any attempt to repudiate the ownership of them. In my opinion these shares must be treated as being really in existence, and in the circumstances Mrs. Craig must be held to at least having impliedly agreed to take them because of her receipt of the share certificate, and her omission to reject or to return them in any way.

Then, with respect to John Craig, I think the same may be said, at least, regarding the 100 shares. It is true that certificates for only 8 shares are produced as having come from his possession, but it appeared in the evidence—at least, that is the inference

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which I think must be made from what is stated—that an additional certificate for 20 shares had been issued to him; that he had transferred these to Brown, but the transfer had not been registered. I think, therefore, it must be assumed that John Craig did receive share certificates for 100 shares in the company, and I think it must be, therefore, held that he—impliedly, at least—agreed to take these 100 shares. He never repudiated the issue to him of these shares, but retained the certificates. With regard to the remaining 10 shares, there seems to be a little obscurity as to the exact position.

The situation is this: there had been a previous company incorporated under the Companies' Ordinance, called the Western Canadian Fire Insurance Company, Limited. John Craig had applied for 105 shares in that company of $100 each, and he had apparently paid in cash one-half of the amount, and had given a mortgage and some notes or a note for the balance. The statute incorporating the present company provided for a merger, by means of certain procedure, of the old company with the company now in liquidation. The application to the new company of March 15, 1911, for 105 shares, was made by John Craig, apparently for the purpose of getting his wife, Jessie Craig, an equal amount of stock in the amalgamated company to that already held by him, and that application contains upon it the following clause: "And I hereby assign one-half the amount paid on my present holdings in payment . . ." The idea, apparently, was that he and his wife should each hold the same amount of stock in the present company, and that the payments made by him on the old stock should be divided and one-half of it be allocated to the new stock. For some reason or other, which was not very clearly explained, Mrs. Craig was only allotted 100 shares in the present company, and certificates for only that number were issued to her, while John Craig was entered in the share register of the new company for 110 shares, with respect to which the sum of $5,500 was stated to have been paid. Upon the whole, I think that the proper inference to draw is that Mrs. Craig must be taken to have agreed to take 105 shares in the present company. It was admitted that John Craig made the application on March 15, 1911, on her behalf, and as the present company had really taken over all the assets of the old company, it seems to me that they must be

treated as having agreed to the appropriation of one-half the amount previously paid by Craig himself on his shares as a partial payment upon the shares given Mrs. Craig. Mrs. Craig is entered on the share register of the present company for one hundred shares, and $5,000 is expressed as having been paid. I think the proper disposition of the matter is to direct a rectification of the share register so that Mrs. Craig will appear as the holder of 105 shares and John Craig will also appear as the holder of 105 shares. Neither John Craig nor Mrs. Craig gave any evidence, and, in the absence of any explanation or objections from them, I think that I am entitled on such evidence as I have to make the inference that Craig did agree to take not only 100 shares in the new company, but 105 shares. He was a director of the company, or, at least, acted as such, and I think that I have enough evidence before me to justify the inference that what was done was done with his knowledge and consent, and he must therefore be taken to have agreed to it. The exact amount which should be treated as having been paid on these shares is not explained, but it appears in the share register that $5,500 has been paid on John Craig's 110 shares and $5,000 for Mrs. Craig's 100 shares. I think this has probably arisen from some misapprehension, and the $500 should be divided, and that John Craig should be credited with $5,250 and Mrs. Craig with the same amount. This would leave the liquidator open to proceed upon the securities given by John Craig in respect of the amount unpaid upon the original 105 shares.

One argument addressed to me was that Mrs. Craig got no consideration for her 105 shares, because the assets of the old company had not been transferred to the present company in the way provided by the statute, but it was not disputed that the present company was in possession and control and enjoying all the assets of the old company, whatever they were, and I cannot see that this objection can be upheld.

I refer especially to the *Hare's Case*, L.R. 4 Ch. 503, and *Challis's Case*, L.R. 6 Ch. 266. With respect to *Stace & Worth's Case*, L.R. 4 Ch. 682, it is to be observed that the agreement which was necessary to sustain the amalgamation there in question was held to be wholly void. That case does not touch upon the present circumstances; we have here, as I pointed out, a company validly

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incorporated and entitled to issue shares, in which I have held that Craig has agreed to take 105 shares and Mrs. Craig also has agreed to take the same amount. In this view of the case any illegality on the merger cannot be material in so far as the present proceeding is concerned. It might be material if the shareholders were to ask the liquidators to dispute the liability of the present company on the debts of the old company on the ground that the merger had not been properly carried out, but that question is not now before me.

In view of what I have said in the beginning, the question of the prospectus is not material at all. There is no provision in the present statute requiring a prospectus of the present company to be issued. Inasmuch as it was intimated to me that in the course of the liquidation and with respect to other contributories, some questions of misrepresentation would be likely to arise, I would suggest that counsel intending to raise this objection should consider very carefully the decisions in *Oakes* v. *Turquand*, L.R. 2 H.L. 325; *Kent* v. *Freehold Land and Brick Making Co.*, L.R. 3 Ch. Appeals 493.

I think the Craigs should also pay the liquidator's costs of the hearing of their cases.

Judgment accordingly.

IMP.

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WILLS v. CENTRAL R. CO. OF CANADA.

Judicial Committee of the Privy Council, Lord Moulton, Lord Sumner, Sir Charles Fitzpatrick, and Sir Joshua Williams. August 4, 1914.

1. INJUNCTIONS (§ I—1)—RIGHT TO, AND WHEN GRANTED—QUEBEC AND ENGLISH LAW AND PROCEDURE COMPARED.

Injunctions are not authorized to be given under the Quebec Code of Civil Procedure in cases where a similar remedy would not be given under English law, from which the procedure of injunction was adopted.

2. INJUNCTIONS (§ I—1)—RIGHT TO, AND WHEN GRANTED—PECUNIARY INTEREST TO BE COMPENSATED IN DAMAGES ONLY, WHEN.

An injunction will not be granted to restrain a railway company from repudiating its contract with the construction company for the building of the railway by employing anyone else to complete it after the construction company had entered upon the work where the latter's interest under the contract was pecuniary only and could be compensated in damages.

3. SPECIFIC PERFORMANCE (§ I A—12)—BY WAY OF INJUNCTION—PERSONS ENTITLED TO ENFORCE PERFORMANCE.

An injunction will not be granted to enforce specific performance of a contract or to prevent the other contracting party securing others

to perform what was to be done, when the party claiming that relief had wrongfully refused to carry out his part of the contract and still persisted in so doing.

APPEAL by the plaintiffs from the judgment of Quebec King's Bench, refusing to enjoin the defendant company from itself completing certain construction work contracted for by the plaintiffs.

The appeal was dismissed.

Statement

The judgment of the Board was delivered by

LORD MOULTON:—The appellants in this case are the plaintiffs in the action and are a firm of contractors carrying on business in Westminster, and having an office (among other places) in Montreal, in the Dominion of Canada. The respondent is a railway company whose head office and principal place of business is in Montreal. It was incorporated for the purpose of constructing and operating a railway between the town of Midland, on the Georgian Bay, and a point in the vicinity of the city of Montreal. The railway so to be constructed (including certain branch lines) was of a total length of 381 miles.

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By a contract dated October 6, 1910, the appellants, for the considerations and upon the conditions therein stated, agreed to construct the railway for the respondent. The general nature of the contract may be briefly stated as follows: The appellants were to purchase the right of way and all necessary material and execute all the works. The respondent, on the other hand, undertook to use all their statutory powers to enable them so to do. The accounts were to be rendered to the respondent by the appellants by the eighth day of each month for all work done, supplies furnished or expenditure made during the preceding month, and, upon verification, the respondent undertook to pay the amount of such outlay with 10 per cent. commission within seven days. It was known to the appellants at the time of entering into the contract that the finances of the respondent company entirely depended on the flotation of its bonds, and that it was by no means certain that it would obtain thereby the money requisite to construct the railway. Accordingly, on the said October 6, 1910, a contemporaneous agreement was entered

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into to the effect that the contractors should not be bound to commence work under the contract until the respondent should have satisfied them that arrangements had been made to finance the undertaking and to provide funds to meet the payments which would from time to time become due to the appellants thereunder.

Between the date of the said contract and July, 1911, no effective steps had been taken by the respondent to obtain the necessary funds for the creation of the railway. On July 25, 1911, however, arrangements were made for an issue of £1,000,000 first mortgage 5 per cent. bonds, of which the appellants agreed to underwrite £30,000. In the agreement between the appellants and the respondent relating thereto there was inserted the following stipulation in favour of the appellants.

> It is agreed between us that if you should commence the execution of the works under your contract you shall be at liberty at any time in your uncontrolled and uncontrollable discretion to refuse to proceed further with the works if you are not absolutely satisfied that there are funds available for the payment of your monthly contract payments, including your 10 per cent. commission.

At the hearing of the appeal there was much discussion as to whether the true meaning of this clause was that it gave to the contractors the right to suspend work under the contract if and so long as, in their opinion, adequate funds were not in the hands of the company, and to resume it again as soon as they were satisfied that the funds were in hand, or whether it only gave to the contractors the right to throw up the contract at any time if they were not satisfied as to the provision of adequate funds, thus terminating the contract altogether. In their Lordships' opinion the latter, which is the interpretation contended for by the respondent, is the correct interpretation. The issue of the bonds was only partially successful, but work was commenced under the contract, and by October, 1912, accounts had been delivered by the appellants in respect of work done, money expended, and commission to the amount of $257,000, and had been duly paid. Some further accounts were subsequently delivered at various times down to January, 1913, and were also paid. The appellants' accounts for February, 1913, amounting

to $3,825.30, were rejected by the respondent, and the amount of these accounts forms part of the sum claimed herein, and judgment in respect of it (subject to a deduction in respect of a cross account) was given in favour of the appellants at the hearing, and forms no part of the present appeal.

In the month of October, 1912, the difficulties of the respondent company became acute. Mutual recriminations took place. The railway company reproached the contractors with delay in going on with the track-laying and the ballasting, and in not procuring the track-laying equipment, and the contractors reproached the company for not having provided the funds necessary for carrying on the works. Finally, on October 21, 1912, the contractors wrote to the company a letter, the material portion of which is as follows:—

It is with great reluctance that we are compelled now to give you notice that unless further moneys are paid to the trustees for the bondholders, we shall have to cease operations on the construction of your railway. You will, therefore, please note that, unless in the meantime satisfactory arrangements in this respect are made we will cease work on the 1st of November next.

On being advised that the trustees have received further and sufficient cash to ensure the payment of our charges and commitments, and to warrant the continuation or resumption of the work, we shall be pleased to carry on the construction, as we are at all times fully prepared and anxious to complete the contract undertaken by us, which still remains in full force and effect.

To which the company replied on October 24, 1912:—

Under the circumstances, if you cease work on the 1st of November next, as stated in your letter, the company will consider your contract cancelled, and arrange to go on with the work itself as it may see fit, holding you responsible for any loss or damage which it may suffer through the non-fulfilment of your contract. Although you repeat that you have been at all times fully prepared to complete the contract undertaken by you, we cannot admit that this is correct, but, on the contrary, we claim that you have at no time taken the necessary steps to accomplish the work according to the terms of the contract.

You say it is useless to discuss these terms, and therefore I will not do it.

Contemporaneously with this correspondence, each party by a notarial protest attempted to strengthen its case against the other. The protest by the contractors is dated October 26, 1912, and it notified (after reciting the various proceedings and events

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on which they based their case) that if sufficient moneys were not deposited forthwith in London with certain trustees, the contractors would not proceed further with the works after the 1st day of November next, 1912, and would take such further action in the premises as by counsel they might be advised. The protest on behalf of the railway company did not confine itself to making protest against the breaches of contract alleged to have been committed by the contractors, but it went on to give them notice (under a power reserved to that effect under the contract) that, unless within one month from that date the work covered by the said contract was proceeded with in such a manner as to ensure its completion at the time agreed upon and in such a manner as to satisfy the company's chief engineer, the said work would be taken out of the contractors' hands.

Their Lordships are of opinion that this threat to take the works out of the contractors' hands was not in accordance with the terms of the contract. Clause 12 of the contract under which it purports to be given makes the right of the railway company to turn the contractor out depend on the opinion of the engineer, who is made the sole judge as to whether the contractors have so failed in their duty as to bring the clause into force. In the present case the threat was given by the railway company without reference to the engineer. He was not consulted about it, and his own evidence shews that he had never, even in his own mind, come to the conclusion that the contractors were guilty of any such default as would warrant the clause being put into force. This notice or threat on behalf of the railway company was therefore a mere *brutum fulmen*, and would not have justified any proceedings taken in accordance with it.

Correspondence continued between the parties during the succeeding six months ending with a letter from the solicitors of the railway company to the appellants, dated March 10, 1913, notifying that the work had been taken out of their hands in conformity with the notice given on October 22, 1912, by the protest above referred to and that the company

> will take such steps as may be deemed proper and necessary to continue and complete the works of construction covered by the said contract under the superintendence of the company's engineer or by letting the work to another contractor as the company may see fit.

This was followed by the appellants bringing the present action on March 19, 1913.

The relief prayed by the appellants in their declaration so far as is relevant to the present appeal is two-fold. In the first place they claim a sum of $18,825.30, which is made up of the sum of $3,825.30 already referred to, and which has now been disposed of, and a sum of $15,000 claimed by them as damages for breaches of contract committed by the respondent prior to the bringing of the action. They were required to give particulars of these damages and they duly delivered them and evidence was to some extent called by them at the trial to support the particulars, but that evidence was wholly insufficient.

According to English procedure this part of the claim would have been dismissed and no further action could have been brought in respect of damages thus sued for and not supported by evidence at the trial. But the learned Judge by his judgment reserved to the plaintiffs the right to recover in a future action any damages which they had suffered or might in future suffer from breaches of contract by the defendant, including those sued for in the present action. On appeal to the Court of King's Bench for the Province of Quebec (Appeal Side) this part of the judgment was reversed. The opinion of their Lordships is entirely in favour of the propriety of this decision of the Appeal Court. But even if that were not the case, it is clearly a matter of procedure dependent at best upon the discretion of the Court. It cannot be a matter of right that a plaintiff having put in issue damages already accrued and having attempted to prove them and failed, should be at liberty to bring a fresh action in respect of them, and accordingly their Lordships would be very unwilling to interfere on such a point with the decision of the Court of Appeal.

This, however, is a very minor and subsidiary point. The real substance of the appeal relates to the judgment of the Judge at the trial with regard to the following claim in the plaintiffs' declaration:—

> That by judgment to be rendered herein, the company defendant be enjoined and prohibited from itself completing the work of construction under the superintendence of the company's engineer, or otherwise, or from

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letting the work to any other contractor or contractors, and that it be declared that the plaintiffs alone are entitled, by reason of the premises, to complete the said work according to their agreements.

The judgment of the trial Judge in respect of this reads as follows:—

The Court doth enjoin and prohibit the defendant from itself undertaking or completing the work of construction under the superintendence of the company defendant's engineer, or otherwise, or from letting the work to any other contractor or contractors; and doth grant acte to the plaintiffs of their willingness and intention to enter upon and complete their work under said contract with all diligence, according to the terms thereof, so soon as the defendant shall have performed its obligations to make such financial arrangements as shall satisfy the plaintiffs with regard to the payment of their expenses and commitments, including their commission, and doth condemn the defendant to pay the plaintiffs' costs.

On appeal to the Court of King's Bench (Appeal Side) this part of the judgment was set aside. The main question in this appeal is, whether that Court was right in so deciding.

The contract between the parties is for the execution of certain works, the cost of which is to be borne by the respondent, the appellants being entitled to charge ten per cent. on that cost as their remuneration for their services in actually carrying out the work. There can be no doubt that (at all events so soon as the money they have expended is repaid to them with the addition of their remuneration in respect of the same) all the work, materials, etc., become the property of the company. No doubt there remains to the appellants the right to complete the work and to earn the remuneration to which they would be entitled therefor under the terms of the contract; but that is all. Their interest is therefore pecuniary only. They have no interest in the thing produced.

Their Lordships are of opinion that this is a typical case of a contract, the breach of which can be fully and completely measured by damages. In such a case the Courts in England would certainly refuse to decree specific performance or to compel the company to continue to employ the contractors in the completion of the railway by granting an injunction against their employing any other person to complete it. By bringing in another contractor the company would no doubt be treating

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the contract as at an end, and if this constituted a wrongful repudiation on their part the contractors would be entitled to sue them for the whole of the profit to which they would have become entitled by the completion of the work. This would be full compensation for the breach, for it would give to the contractors the full return that the execution of the entire work would have brought them.

But there is here a further reason why no such injunction could be granted. The appellants neither alleged nor proved that they were willing to proceed with the contract. On the contrary, they insisted and still insist that they have a right, at their own uncontrolled and uncontrollable discretion, to suspend the works during such time as they are not absolutely satisfied that there are funds available for the payment of their monthly contract payments, including their 10 per cent. commission. This is not a mere expression of their opinion on a legal point. They have acted upon it and, indeed, at the date of the bringing of the action, they had definitely and formally acted on it for several months, and they have continued to do so ever since. Their Lordships have already decided that they had no such right as they thus claimed, so that their refusal to proceed with the contract works was wrongful. Now, the granting of an injunction is always a matter of discretion to some degree, and no Court would grant an injunction to enforce specific performance of a contract or to prevent the other contracting party securing its performance by other means, when the party seeking its aid had wrongfully refused to carry out his part of the contract, and was still persisting in so doing. Such, then, is the position of the case looked at from the point of view of English law. Is the law of Quebec different in this respect?

So far as regards the second of the above grounds there can be no doubt that the law is the same in Quebec as it is in England, for it goes to the root of the plaintiff's right to ask a Court to protect him in the enjoyment of his contract. It is well nigh impossible to believe that the law or the procedure of any civilised country would provide that one contracting party could call in aid the powers of a Court to compel the other contracting party to observe a contract which he himself, without lawful

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excuse, was persistently refusing to perform. At all events no authority has been cited, and no grounds suggested in support of the view that either Quebec law or procedure would, under such circumstances, assist the plaintiffs in the way which they seek by their claim.

But their Lordships are also of opinion that there is nothing in the Civil Code of Lower Canada which countenances the view that injunctions are intended to be given under its provisions in cases where injunctions would not be given by our Courts in England. Indeed, the presumption is the other way. The remedy by specific performance or injunction is not one that originally formed part of the law of Quebec. It has been introduced in imitation of the law prevailing in England. The clauses of the Code of Civil Procedure relating to it were discussed at length on the hearing of the appeal, but their Lordships are of opinion that they afford no support for the contention of the appellants. They relied chiefly on art. 957 which specifically relates to interlocutory injunctions only, and which shews by its express language that it is dealing only with the procedure necessary to keep matters in an unchanged state during the period of the litigation so far as is necessary to prevent the final judgment from being rendered ineffectual. The absence of specific directions as to the cases in which injunctions will be granted points to an intention to follow the well-known rules of English law on this subject which are based, not on specific enactments, but on the practical experience of Courts that have exercised the jurisdiction for centuries past and have thus arrived at the rules which it is necessary or prudent to follow. Their Lordships are of opinion that the law of Quebec certainly does not go further than the English law in these respects. It is not necessary in this case to decide whether it goes so far.

Their Lordships are, therefore, of opinion, that the decision appealed from was correct, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

ARMSTRONG v. MARSHALL.

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Alberta Supreme Court, Walsh, J. December 16, 1914.

1. ASSIGNMENT (§ III—30)—SALE—CONTRACT—CHOSE IN ACTION—GIVING NOTICE OF ASSIGNMENT—REQUIREMENT.

Notice in writing of the assignment of a chose in action is a prerequisite to action thereon in the sole name of the assignee under the Judicature Ordinance, Alta., Stat. 1907, ch. 5, sec. 7; but leave may be given to add the assignor either as plaintiff if consenting or as defendant if not consenting.

[*Dell* v. *Saunders*, 17 D.L.R. 279, applied.]

Statement

ACTION by the assignee of a chose in action.

Judgment that action be dismissed, unless assignor be added as party.

I. W. McArdle, for the plaintiff.

C. A. Wright, for the defendant.

Walsh, J.

WALSH, J.—I think that the agreement in question is a legal chose in action upon which the plaintiff could sue in her own name under her assignment from the purchasers only after express notice in writing of such assignment given to the defendant under sub-sec. 14 of sec. 10 of the Judicature Ordinance as enacted by sub-sec. 3 of sec. 7 of ch. 5 of the Statutes of Alberta, 1907: *Torkington* v. *Magee*, [1902] 2 K.B. 427, [1903] 1 K.B. 644. See also *Dell* v. *Saunders*, 17 D.L.R. 279, and cases there cited.

That notice not having been given, I think that the plaintiff cannot maintain this action in its present form. She should, however, have an opportunity given her to bring her assignors before the Court either as plaintiffs or defendants if she so desires. I direct, therefore, that no judgment be entered after the trial of the action until Thursday, January 7, 1915. The plaintiff may before then apply to me as she may be advised for the adding of her assignors as parties plaintiff or defendant on two days' notice in writing to the defendant's solicitors. If no such application is made the action shall upon January 7, 1915, stand dismissed with costs without prejudice to the right of the plaintiff to bring another action.

Order accordingly.

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POSTMASTER GENERAL v. MILLAR.

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

1. OFFICERS (§ II B—80)—POSTMASTERS—COMPENSATION AND FEES—COMMISSION—IMPROPER USE OF STAMPS—LIABILITY—PROCEDURE.

Where a postmaster receiving a commission from the government on the sale of postage stamps uses postage stamps in bulk to pay trade debts in contravention of the Post Office regulations, an action lies at the suit of the Postmaster General for repayment to him of such commission.

Statement

ACTION for repayment of certain commission on the sale of postage stamps.

Judgment was given against the defendant.

C. F. Adams (*Muir, Jephson, Adams & Brownlee*), for the plaintiff.

R. T. D. Aitkin (*Aitkin, Gilchrist & O'Rourke*), for the defendant.

Walsh, J.

WALSH, J.:—With the exception of the admitted sales to G. F. and J. Galt, Ltd., there is no direct evidence of any sale of stamps by the defendant to persons transacting their postal business elsewhere than at Millarville. The large increase from $951.68 for the year ending on March 31, 1908, to $1,766.82 and $2,029.44 respectively for the two next succeeding years, is undoubtedly most suspicious. The drop from this last sum to $1,367.27 for the next year is significant in view of the fact that a few months before that year expired the inspector drew the defendant's attention to the existence of the regulation which he is charged with contravening. The decrease to $685.25 for the following year is striking particularly when it is remembered that the defendant was postmaster for only about two of these twelve months. The figures of the next year ending on March 31, 1913, are still more striking, shewing as they do a reduction to $482.40 for the first full year under the management of the defendant's successor.

The checks kept for two or three weeks at Priddis and Calgary upon the mail reaching these offices from Millarville shew a tremendous disproportion between the gross postal revenue at Millarville and the amount of postal matter actually mailed there. These facts, coupled with the admission as to the Galt sales, constitute practically the evidence upon which the plaintiff's

claim rests. The certificate under sec. 139 of the Post Office Act (ch. 66, R.S.C.) is not evidence in such a case as this. It only applies to an action "for the balance remaining unpaid of moneys received by such post-master or officer by virtue of his office," and that is not this case. I can see nothing abnormal in the returns down to March 31, 1908. I am inclined to agree with the defendant that a considerable part of the increase in the next three years is to be attributed to the general prosperity and expansion of the province in those years, in which I have no doubt the Millarville district shared, and that some part of the decreases since then may be traced to the change in these conditions which had their commencement a couple of years ago. I am satisfied that the estimate of the post office inspector as to the proportion of the mail matter originating in that district which was mailed through other offices is far too low. I have no doubt but that many more residents of the district than he allows for availed themselves of the opportunities which the attendance of themselves and members of their families and neighbors at their market towns afforded to secure quicker dispatch for their mail through the offices there than was available to them through the weekly service of the Millarville office. The more inconvenient location of the new office would, I think, account for no small part of the decrease in the revenue since the defendant's resignation.

In the face of the positive oath of the defendant to the contrary, I do not see how I can find the plaintiff's case proved as to other than the Galt charges. The circumstances to which I have referred quite justified the department in being suspicious. I am not entirely satisfied that I have all of the facts of the matter before me, but I do not feel justified on mere suspicion in determining the case against the defendant, especially when, as I have pointed out, many of the circumstances relied upon are susceptible of explanation. I thought that the other statistics in the returns might be helpful, but they are not. They relate simply to the money order business. It is a peculiar fact that whilst the gross revenue for the year ending on March 31, 1913, was the smallest in eight years, the money order and postal note business for the same year was the largest in that period. I must hold that the plaintiff has not proved anything against the defendant except with regard to the sales to G. F. and J. Galt, Ltd.

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The defendant admits that payments on account of the liability of the Millarville Trading Co., of which he was a member, to G. F. and J. Galt, Ltd., were made in stamps delivered from the Millarville office. The suggestion that these stamps were sold to the Trading Company and therefore do not constitute a contravention of the regulation cannot be accepted. That would be too transparent a subterfuge for circumventing the regulation. There is no evidence before me to shew the amount of the payments so made or of any of them. The defendant on his examination for discovery said that he "could pretty near figure it out at home." I think that he not only could, but that he should have done so. And yet he came to the trial with his mind a perfect blank on the subject. The books of the Galt company are in Winnipeg, I am told, as it has gone out of business in Calgary, and Mr. Newton, with whom these transactions were had for the Galts, was not available as a witness.

I declare that the plaintiff is entitled to an account of all stamps sold, delivered or furnished by the defendant to G. F. and J. Galt, Ltd., and to be repaid the amount received by the defendant by way of allowance or remuneration or otherwise in respect of the same. Strictly speaking, these amounts can only be ascertained by a reference. I estimate the value of the stamps thus delivered at $400 for each of the years ending on March 31, 1909 and 1910, and $200 for the year ending on March 31, 1911. If either party is dissatisfied with this estimate, he may, by notice in writing filed with the Clerk and served upon the solicitor for the other party by January 25, 1915, elect to have the amount to which the plaintiff is entitled under this finding ascertained by a reference to the Clerk. If no such notice is so filed and served by either party, it will be assumed that neither of them desires a reference, and judgment may go accordingly. In that event the amount to which the plaintiff is entitled on the above basis must be ascertained, as there is no evidence before me by which I can fix it. If the parties are unable to agree as to the amount, I will give an appointment for the purpose of fixing it on the return of which evidence on the point may be submitted by either party. I reserve the question of costs until the amount to which the plaintiff is entitled has been ascertained. For the purpose of comparison the Midnapore figures might be looked at. They

shew an even more startling expansion in the years in question than do the Millarville figures. The two places are in practically the same district and they exist under nearly the same conditions.

Judgment for plaintiff.

GILLESPIE v. BENDING.

Alberta Supreme Court, Walsh, J. December 3, 1914.

1. CONTRACTS (§ I E—110)—EFFECT OF FRAUD—REAL ESTATE BROKER'S LISTING CONTRACT—WRITING—PAROL EVIDENCE.

Where brokers with whom defendant had listed for sale to a fixed date a particular property held by him under option, on obtaining a renewal of the listing, got defendant to sign a listing agreement in which, without his knowledge, they had added to the reference made to the particular property the words "and properties belonging to myself," the latter addition may be shewn by parol to have been fraudulently obtained and will not be binding when promptly repudiated on discovery of the fraud; a reference to the listing as then "expiring" is evidence that only the property covered by the expiring contract was to be included in the renewal.

Statement

ACTION to recover commission.

The action was dismissed.

W. Beattie and *R. B. Davidson*, for the plaintiffs.

C. S. Blanchard and *G. L. Frazer*, for the defendant.

Walsh, J.

WALSH, J.:—In my judgment the plaintiffs are not entitled to recover this commission, or any part of it. The first written listing admittedly covered only the lots in Redcliffe, and the Redcliffe acreage which the defendant had under option. That listing was good only until October 14, and I have not a shadow of a doubt, upon all of the evidence, both documentary and oral, that the intention of the second agreement, ex. 2, was simply to extend for a few days longer the listing which was given by the first listing of October 4. It appears that the plaintiffs talked over amongst themselves the advisability of getting a broader listing, a listing which would cover more land than the first listing, but they took very careful steps to conceal that fact from the defendant when they were getting ex. 2 signed. It is admitted that there was not a word said by any of them to draw his attention to the fact that he was being asked to give a more extensive listing than he had already given, and, to my mind, the reason for that is quite obvious. He signed the listing, I am perfectly satis-

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fied, in absolute ignorance of the fact that there was more property covered by it than was covered by the original listing. I think he discovered that fact immediately, and that he at once drew the plaintiffs' attention to the fact and repudiated their right to sell under that listing anything but the Redcliffe property that he held under option. I accept the statement made by him, corroborated as it is by Brown, to that effect, in the conversation which he says he had with Gillespie on the next day, when Gillespie practically agreed that the property owned by the defendant himself would be cut out of the listing. The very language of the new listing, ex. 2, carries to my mind the idea that it was intended simply to extend the date. It speaks of "the listing of the Redcliffe properties and properties belonging to myself, which expires to-day." There was only one listing which expired on that day, on October 14, and that was the listing of the Redcliffe property. The limiting of the right to sell under this to Fitzgerald and his associates must have been put in there because of the fact that it was these Redcliffe properties that were under negotiation, this limitation being due to the fact that Price was endeavouring to dispose of the same property in New York. It seems to me unreasonable to think that the defendant, with the large holdings of real estate that he had, not only in and near Redcliffe, but also in and near Medicine Hat, should think of such a thing as giving to these plaintiffs, without some discussion, at any rate, the right to sell them. There is nothing to indicate that there was any price fixed upon any of the properties covered by the original listing, and I am at a loss to know under what arrangement the plaintiffs would have gone to work if they had the right to sell some of the defendant's own lands. The only prices that are mentioned in the original listing are $175 per acre for the acreage and $75 per lot for the Redcliffe lots, and it seems to me it would be a most unreasonable thing to say that these prices were to be applied to every lot that Bending owned in Medicine Hat, and to every acre that he owned outside of the Redcliffe acreage.

That being so, I am convinced that it was never his intention to give the plaintiffs a listing of anything but the Redcliffe lots and acreage, and that the words "and properties belonging to myself" were put in without his knowledge and without his consent, and that his attention was not drawn to those words

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at all when he signed the document. It is certainly something not exactly fair and right that these men who were the agents in a sense for Bending in this other transaction should not have expressly drawn his attention to the fact that the second listing was so much wider and broader than the first one was. Even if Gillespie did not say to Tindall and to Hale as they say he did that he had "put one over" on Bending by the insertion of those words, it looks to me very much as if that is what he had done. The statements made by Bending to the plaintiffs with respect to the payment of commission when they applied to him for it afterwards, and the clause in the new agreement of February, 1913, with respect to the payment of commission to the plaintiffs, are satisfactorily explained by the commission slip, ex. 3, which Hale got from Bending. The plaintiffs were not parties to that. The explanation which both Bending and Hale have given of that is a satisfactory one to me. A commission of 10 per cent. was added to the contract price, and the commission slip, ex. 3, was drawn for signature by Bending to shew that when the terms had been complied with that commission would be payable. The insertion of the $2\frac{1}{2}$ per cent. to the plaintiffs out of that 10 per cent. was something which was put in at the request of Hale, and, as explained, was done because Fitzgerald said that the plaintiffs were good fellows and had been good friends to them and they wanted to secure that much to them out of the 10 per cent. which would be payable to Hale under this contract. It certainly would make no difference to Bending whether they gave them $2\frac{1}{2}$ per cent. or 5 per cent., or even the whole of it, if Hale had earned it under this commission slip. I think that would amount to nothing more than a direction by Hale to pay the plaintiffs out of this commission, if it ever became due to him. That did not constitute any liability of Bending to the plaintiffs and the promises that he made, if he did make them, or the references that he made at any rate to the commission after it was due, I have not the slightest doubt were due to the fact that, under that commission slip, if the commission were payable to Hale at all, the plaintiffs were to get their one-fourth. The clause in ex. 3 was put in, I think, exactly as any careful solicitor would put it in, for the protection of his client. If, as the result of the claim made by the plaintiffs against Bending he was held

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liable for the commission, it was part of the arrangement between him and the other parties to that agreement that they should indemnify him against it. That clause has its origin, just as Bending's statements to which I have referred, in the commission slip.

For these reasons I think that the plaintiffs were never employed by the defendant to sell the land which is covered by the Fitzgerald agreement. Some difficulties might arise in the plaintiffs' way under the statute even if I had a different opinion on the facts, but it is not necessary for me to discuss that. All the other elements are here to entitle the plaintiffs in my opinion to a judgment if they were the agents of the defendant for the purpose of finding a purchaser for this property, but as I do not think they were, I do not think they ever had the slightest authority from Bending to find a purchaser for this property, and I must dismiss their action, which I do, with costs.

Action dismissed.

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Re CUST.

Alberta Supreme Court, Beck, J. November 28, 1914.

1. EXECUTORS AND ADMINISTRATORS (§ II A—28)—POSTPONING SALE AND DISTRIBUTION—SECURING AGAINST ANNUITIES UNDER WILL.

Where the will bequeaths to one person a sum of money to be paid from the produce of lands devised to another, the executors upon whom the land devolves under the Alberta system of land tenure upon the owner's decease cannot safely transfer the land under the provisions of the Land Titles Act, Alta., to the devisee without obtaining from him a registrable charge in respect of the annuity or obtaining and registering a Court order establishing the charges.

2. WILLS (§ III K—185) — CHARGE UPON LAND DEVISED — ANNUITIES — TRUST.

On a bequest of an annuity out of the rents and profits of lands in Alberta devised to another, the succession which under Alberta laws goes to the personal representative effects a trusteeship for the beneficiaries, and the executor must consider the annuity a charge upon the land, although it is not expressly stated so to be in the will.

[See also *Re Cust*, 18 D.L.R. 647, on question of succession duty.]

Statement

APPLICATION for the construction of a will, involving the right of executors to insist upon security for an annuity before transferring lands.

Order accordingly.

E. B. Edwards, K.C., for the executors and devisees.
C. B. F. Mount, for the legatees.

BECK, J.:—The will in this matter contains the following clause:—

I also bequeath to my wife the sum of $360 to be paid in monthly instalments of $30 per month, to be paid from the produce of the lands I bequeath to my nephews John H. Cust, James Cust and Richard Cust. I further bequeath to my wife Olive Cust the sum of $50 to be paid by my above-mentioned nephews upon her decease in defraying her burial expenses.

Mr. Justice Scott, on being asked for an opinion and advice upon this, among other clauses of the will, said:—

Notwithstanding the fact that the title to the lands must (by virtue of other clauses in the will) remain in the executors during the minority of the youngest devisees, I think that the devisee who is now of full age, and the guardian of those who are infants, are entitled to immediate possession, and that it will be their duty to see that the rents and profits, so far as necessary for that purpose, are applied in payment of the annuity to the widow. In case of a deficiency, the annuity will be lessened by the amount of the deficiency, as it appears to be the plain intention of the testator that it shall be chargeable against the rents and profits only and not against the corpus.

I should doubt whether the payments on account of the annuity as they mature or the annual payment for any one year should be absolutely lessened by reason of a deficiency in the rents and profits at the time of maturity or at the end of any year. I am inclined to think that the legatees of the annuity would be entitled to have any deficiency made up from any surplus in succeeding years, and even by a sale of the lands ultimately if that were necessary. I fancy this aspect of the matter was not put before my brother Scott. In any case it must be clear that the devisees of the land are bound to use all prudent means to produce in each year such rents and profits as a prudent farmer would produce.

According to English law based upon historical reasons, a devise of rents and profits of land is equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interest therein: 2 Jarman on Wills, 6th ed., pp. 1297, 2005. The rents and profits issue out of the land and where the whole rents and profits are given it is in effect the whole estate in the land. And although it may be questionable under the English decisions whether a legacy, payable in a lump sum, or a legacy payable by

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way of an annuity, out of the rents and profits, would there be held to be a charge upon the land, I have no doubt that under our quite different system of land tenure and devolution in the case of the owner's decease being not by way of descent to the heir but by way of succession as in the case of goods to the executor or administrator as the case may be, thus effecting a trusteeship in the personal representative, the annuity in such a case as this should be taken to be charged upon the land. If this is so, the executors in this case cannot safely or properly, in view of the provisions of the Land Titles Act, transfer the land to the devisees without requiring from them concurrently a registrable instrument executed by the devisees charging the land with the annuity or obtaining from the Court a registrable declaratory order declaring the charge.

It was this question of the right of the executors to insist upon security being given for the payment of the annuity as a condition of the transfer of the land that I was asked to answer.

Order accordingly.

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SMITH v. SMITH.

Judicial Committee of the Privy Council, The Lord Chancellor (Viscount Haldane), Lord Moulton and Lord Sumner. July 21, 1914.

1. WILLS (§ I F—60)—CODICIL—REVOKING EFFECT OF, HOW LIMITED.

A will is revoked by a codicil only in so far as an intention to revoke is expressed in clear and unambiguous terms by the testator.

[*Re Smith* (No. 2), 15 D.L.R. 44, 5 O.W.N. 501, affirmed; *Hearle* v. *Hicks*, 1 Cl. & F. 20, applied.]

Statement

APPEAL from the decision of the Court of Appeal for Ontario *Re Smith* (No. 2), 15 D.L.R. 44, 5 O.W.N. 501, which reversed the decision of Middleton, J., in *Re Smith*, 11 D.L.R. 20, 4 O.W.N. 1115.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—On March 12, 1913, John David Smith, as executor of the will and codicil of his deceased wife, Emma Josephine Smith, moved the High Court Division of the Supreme Court of Ontario for the determination of certain questions

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which had arisen in the administration of her estate. He joined as defendants to the motion his three sons, Elias, Vernon, and Carl, and Dale M. King, the husband of his deceased daughter Bertha, as executor of her estate. John David Smith has since died and his place has been taken by Seth S. Smith, as executor and trustee of his will, but the contesting parties are his three sons on the one hand and on the other the legal personal representative of his deceased daughter.

Mr. Justice Middleton decided for the sons. On appeal the Appellate Division of the Supreme Court of Ontario reversed his decision, but granted leave to appeal to His Majesty in Council.

The testatrix, Emma Josephine Smith, died on August 9, 1896, having made her will in 1889, with a codicil made in 1894. At the latter date Bertha, her only daughter and youngest child, was in her fifteenth year, and Vernon, her next older child and youngest son, was about twenty-one. Bertha did not marry till she was thirty-one. She survived her marriage only about a twelvemonth, and her husband, Dale M. King, survived her and proved her will.

It is evident that Mrs. Smith's will was the work of a lawyer, and, so far as concerns the present appeal, it was perfectly clear. It began with a series of specific bequests by which Mrs. Smith divided some silver goblets and other articles among her four children, and gave to Bertha most of her trinkets and jewellery. Some property, which came to her on the death of one Robert Charles Smith, was left to her husband, in trust for himself for life and after his death for the benefit of her children equally, each child becoming entitled on attaining twenty-one.

She next disposed of her household furniture and effects, her books and pictures, piano and so forth equally among her children, the delivery of the several shares to take place on her death, with a power to her executor to postpone, but not beyond the times at which each child should attain twenty-one.

It was a common feature of both these dispositions that her grandchildren should stand in the place of their parents dying before the periods respectively fixed for the operation of the gift. Then came a gift of the residue of real and personal estate to her husband as trustee, in trust to apply the income, first,

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for the education and maintenance till the age of twenty-one of such of her children as should be minors at her death; next, to making up her husband's income from Robert Charles Smith's property to $600 per annum; and then, subject to setting aside enough to secure this accretion to him for life, in trust to convert into money and divide the proceeds among her children equally (grandchildren again standing in the place of children deceased), as soon as her youngest child for the time being should attain twenty-one. As all Mrs. Smith's children survived her and came of age, Bertha thus became entitled to a vested share of this residue under the will in 1901. Their Lordships were informed that part of this residue consists of real property in Toronto, which has considerably increased in value of late years.

The short question is whether Bertha Smith's share in this residue, which vested by the terms of the will, was taken away by those of the codicil. Her brothers are, of course, concerned to say the latter, and her husband to maintain the former, and a substantial sum depends on the answer.

The codicil, by whomsoever drawn, is not the work of a lawyer, but it affects a legal style and employs some terms of art, a fertile source of confusion. It must have been carefully considered, and was the fruit of much thought. No doubt the testatrix knew what she wanted, so far as she could anticipate events that might occur, but probably she failed to exhaust the different ways in which questions might arise. With her, as with other testators, knowing what she wanted and saying what she meant were probably very different things.

The codicil begins thus,

> Not feeling satisfied with the provision made in my will for Bertha Hope Smith, my only daughter, I hereby add this codicil.

These words are only introductory and are far from being conclusive, but they establish at the outset two things, that the testatrix had her will in mind, and that her dissatisfaction was not with her will as a whole, but only with her daughter's share under it. She could only increase her daughter's share at the expense of the other beneficiaries, but that was no reason for wishing practically to make a new will. The codicil is intended to "add;" it does not start with an intention to take away.

She then gives her daughter, Bertha, a minimum income for

life, diminishing if she marries before attaining twenty-five. The general sense is clear, though there are several difficulties, which need not now be discussed. They serve to contrast the lucidity of the will with the obscurity which naturally arises from altering such a will by means of a codicil without a lawyer's help. The crux of the case is that part of the codicil which deals with the dispositions of the testatrix on and after Bertha Smith's death. This runs as follows:—

> Whatever my estate realises over and above the payment of this bequest to Bertha and the provision made for my husband and executor J. D. Smith—in my will—is to be equally divided between my surviving sons or their surviving child or children as provided in my will.
>
> This bequest to Bertha is to supersede all others made in my will, with the *one* exception of the provision made for J. D. Smith, my husband.
>
> Following the bequest to Bertha I solemnly charge my executor or executors with a provision for Vernon's education or profession until he attains the age of twenty-five years.

Mr. Justice Middleton held and declared that by these words "the whole will is revoked except in so far as it provides for the husband," and that the reference to "the surviving sons of the testatrix or their surviving child or children as provided in the said will," was only a compendious way of providing in the codicil that grandchildren should take in a certain event, and did not keep any provision of the will alive as such.

On this construction the testatrix swept away all the specific bequests, which carefully divided her personal valuables among her four children, and these things fell into residue. It swept away dispositions, the differences in which as to vesting and so forth showed that they had been the subject of anxious consideration, and this as regarded the sons and not the daughter Bertha only. As Bertha's $600 per annum is to be "paid her out of my estate," there could be no division of the *corpus* till her death, for the whole of it might some day be needed for her annuity, and then the division is to be among "my surviving sons," that is obviously the sons who survive their sister, not those who survive their mother. Yet there is a charge for Vernon's education during the next four years, which, failing a surplus of income, he could only enjoy, if his sister died before that time expired. If Bertha leaves children they get nothing, unlike their cousins who survive their parents. This is a drastic change indeed, and all because the testatrix was not "satisfied with the

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provisions made in my will for Bertha," and wished to "add" a codicil. There can be little doubt that this interpretation proves too much.

It is mainly, though not exclusively, rested on the word "supersede." If single words are to be examined narrowly, though "all other bequests in my will" are "superseded," the devises contained in it are not, which would leave a good part of the will standing. On the other hand, if the testatrix used the word "bequests" without exactly knowing what it meant, why should it be held that she used the word "supersede" in the sense in which it is used ordinarily and correctly, and not in some loose sense of her own?

Again, if this construction prevails, what is the meaning of the words

> unless the income realised through or by my property on division should yield more to each surviving child or children,

and

> should such be the case, then I authorise such division to be made, Bertha having attained the age of twenty-five years as aforesaid?

They would appear to make the *corpus* divisible in one clause on Bertha's twenty-fifth birthday and only on the day of her death in the other. Nor does this exhaust the difficulties. Reliance is placed on the words

> whatever my estate realises over and above the payment of this bequest to Bertha and the provision made for my husband . . . is to be equally divided between my surviving sons,

as pointing to a division of *corpus* taking place only on Bertha's death, from which any children of hers are excluded, and not to a mere division of surplus income, as if it ran "whatever income my estate realises . . . " and so forth. If so, the difficult clause, "This bequest to Bertha is to supersede all others . . . " is mere surplusage: all that it can effect has been effected already. It is not, however, necessary to pursue the anomalies which arise on the appellants' construction.

Upon appeal the Appellate Division reversed the order of Mr. Justice Middleton, and rightly so, as their Lordships conceive. Some of the judgments contain passages and put interpretations upon particular words, with which their Lordships are not prepared to agree, nor are they confident, as the learned Judges

were, that an interpretation can be found which would reduce the whole of this codicil to consistency and clearness. It is not, however, necessary to solve all these questions for the purpose of this appeal.

It is a well-established rule as stated by Tindal, C.J., in advising the House of Lords, in *Hearle* v. *Hicks*, 1 Cl. and F. 20, at 24, that

> if a devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to shew that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include this particular devise, then such devise ought undoubtedly to stand.

The present case falls, if not within the exact words, entirely within the spirit and substance of this rule.

Their Lordships are of opinion that the meaning of the material words in the codicil, if any (and some may be beyond reconciliation with the rest), is so far from being as clear as the language of the will, and is so far from establishing a revocation free from doubt of Bertha Hope King's interest in the *corpus* under her mother's will, that the disposition of the will in her favour undoubtedly ought to stand. They will accordingly humbly advise His Majesty that the order appealed from was right and that this appeal ought to be dismissed with the like order as to payment of costs out of the estate as was made by the order appealed against.

Appeal dismissed.

BROCK v. ROBSON.

Manitoba King's Bench, Galt, J. November 14, 1914.

1. INTOXICATING LIQUORS (§ I C—33)—BY-LAWS — LOCAL OPTION — PROCEDURE—AFFIDAVIT PROVING SIGNATURES—ESSENTIALS AS TO FORM —RESTRAINING MUNICIPALITY FROM ACTING THEREUNDER.

The amendments to the Liquor License Act (Man.) contained in sec. 10 of Manitoba Statutes 1914, ch. 58, apply only to local option by-laws already voted upon and passed when such 1914 statute took effect; as to later local option by-laws it remains obligatory under the Liquor License Act, Amendment 1910, sec. 74B, that the affidavit or declaration proving signatures to the petition should set forth in the affidavit the names of the petitioners whose signatures it purports to verify; a general reference in the affidavit to all of the signatures in the petition is insufficient, and the municipality may be restrained by injunction from acting under it.

[*The Strathclair case*, Man. 1910, followed.]

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BROCK v. ROBSON.

APPLICATION for an injunction to restrain a municipality from submitting a local option by-law, owing to defective affidavit on signatures to the petition.

The injunction was granted.

F. M. Burbidge, for the plaintiff.

F. K. Hamilton, for the defendant.

Galt, J.

GALT, J.:—This is an application for an injunction to restrain the council and municipality of Sifton from submitting a local option by-law to be voted upon by the resident electors of the municipality of Sifton in pursuance of the Liquor License Act. Under the Liquor License Act amendment, passed in March, 1910, it is provided, amongst other things (sec. 74B):—

> A petition for the submission or the repeal of a local option by-law, or the different sections or parts of such a petition, if in more than one section or part, shall be verified by affidavit or statutory declaration of a witness or witnesses present when the said petition, or part or section of said petition, was signed by the persons respectively signing the same, setting forth his name, place of residence and calling, and proving the following facts:—
>
> (*a*) That he was present and saw the petition, or section or part of petition, signed by the persons respectively whose names appear thereon, *and which are set forth in such affidavit or declaration.*

In the form of affidavit set forth in this amended section, the witness swears: "(1) That I was present and saw . . . sign the annexed petition, and that the signatures of each of the said petitioners are in the respective hand-writing of each," etc.

In the case of the *Strathclair Municipality*, which came before the Court of Appeal towards the end of the year 1910, the petition was supported by a statutory declaration made by one Hillis Wright, who deposed, amongst other things: "(1) That I was present and saw the petitioners sign the annexed petition, and that the signatures of each of said petitioners are in the respective hand-writing of each."

It is greatly to be regretted that, up to the present time, our Court of Appeal has not been supplied with a reporter, for many important cases are disposed of by the Court orally, and no report of the judgments delivered by the members of the Court is to be found. The *Strathclair* case is an example in point, and

I have to rely upon such fragmentary materials as counsel have been able to procure in order to ascertain what the decision was.

I am informed that the Court of Appeal decided that the affidavit verifying the petition as above mentioned was not a compliance with the Act, inasmuch as it failed to set forth the names of the petitioners who had signed the petition.

In the present year the Liquor License Act has again been amended under ch. 58 of the statutes of 1914. This Act contains the following provisions:—

10. The said Act is amended by adding thereto the following sections:—

264A. Upon any proceeding to quash a local option by-law or repealing by-law, the following rules shall prevail:—

(1) No local option by-law or repealing by-law shall be quashed or declared invalid because of any defect in or the absence of a petition under this Act.

(2) Failure to observe the directions contained in sections 249, 250, 251, 252, 253, and 256 of this Act shall not be ground for quashing any such by-law, unless it be proved by testimony that, but for such non-observance, the by-law would not have been carried.

265A. It is declared that the provisions of law as to the taking of poll upon a local option by-law or repealing by-law, and as to the proceedings at such poll and for the purposes thereof, shall be directory only, and the non-observance of such provisions shall not be ground for quashing any such by-law, unless it be proved by testimony that but for such non-observance the by-law would not have been carried.

In the present instance a petition for a local option by-law addressed to the municipal council of the municipality of Sifton, contains all requisite signatures and the affidavit verifying the petition is written out upon the face of the petition itself. The petition is in fact in triplicate for use in the three wards, and in each case the affidavit verifying the petition shews that the witness was present and saw the above signatures of the resident electors of the ward sign the annexed petition, and that the signatures of such petitioners are in the respective hand-writing of each; but the names are not set out in the affidavits.

It is objected by Mr. Burbidge, on behalf of a resident elector, who holds a liquor license in the municipality, that the affidavits verifying the petition fall exactly within the decision of the Court of Appeal in the *Strathclair* case, and that the amendments passed by the legislature during the present year do not assist the respondents in any way, because the amendments set

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forth in section 10, above quoted, only apply to a by-law already voted upon and passed. I can see no answer to this objection. It is quite true that the objection is of the most technical nature. Nobody could be misled, having the petition, with its signatures, and the affidavit inscribed on it, before him, yet the words of the statute are clear, requiring that the names of the petitioners be set forth in the affidavit, and this has not been done.

I think the plaintiff is within his rights in endeavouring to protect himself against loss by attacking the petition before any by-law has been passed. If he were to wait until after the by-law passed, his rights would probably be gone.

For these reasons I hold that the plaintiff is entitled to the injunction which he seeks, and to the costs of this motion.

Injunction granted.

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VANCOUVER POWER CO. v. HOUNSOME.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. February 23, 1914.

1. MASTER AND SERVANT (§ III B—303)—INDEPENDENT CONTRACTOR—LIABILITY OF EMPLOYER—INJURIES TO ADJOINING OWNER—RAILWAYS.

A railway company will be liable for damage to land adjoining its right of way occasioned by the negligent operations of its contractors for the construction of the road-bed, if in letting the contract no care was exercised by the railway company to provide that in the blasting operations which were an essential part of the contract the "top-lofting" method which would throw debris upon the lands of the adjoining owner should not be adopted, and the contractors damaged the adjoining property by following that method where another course of operations was open to them under which the injury might have been avoided.

[*Hounsome* v. *Vancouver Power Co.*, 9 D.L.R. 823, 18 B.C.R. 81, affirmed; *Hardacre* v. *Idle District*, [1896] 1 Q.B. 335, and *Robinson* v. *Beaconsfield Council*, [1911] 2 Ch. 188, referred to.]

2. RELEASE (§ II B—12)—WHAT INCLUDED IN—RIGHT TO DAMAGES—RAILWAY INJURING ADJOINING PROPERTY.

A release of all damages which the landowner conveying a strip of land for a railway right of way may sustain "by reason of the construction and operation of the railway," and which does not specifically cover injuries due to the company's negligence, will not prevent a recovery for damages occasioned to the adjoining lands of the grantor by blasting operations conducted by the construction contractor, in respect of which the railway company in letting the contract was negligent in imposing no precautions for protecting the adjoining land.

[*Hounsome* v. *Vancouver Power Co.*, 9 D.L.R. 823, 18 B.C.R. 81, affirmed.]

Statement

APPEAL by the defendant from the judgment of B.C. Court of Appeal, *Hounsome* v. *Vancouver Power Co.*, 9 D.L.R. 823,

maintaining the plaintiff's claim in damages for injury to his lands. The judgment of the Court of Appeal for British Columbia, 9 D.L.R. 823, 18 B.C.R. 81, reversed in part the judgment of Morrison, J., at the trial, and maintained the plaintiff's claim in so far as it concerned the damages for injury to his lands. The learned trial Judge dismissed the plaintiff's action in respect of the damages claimed for injury to his lands occasioned by the blasting away of the hillside for the purpose of constructing the company's road-bed on the ground that the injuries were not caused by the company, but were the consequences of the methods followed by an independent contractor. By the judgment now appealed from, the Court of Appeal for British Columbia reversed this decision and maintained the plaintiff's claim for the damages in question.

Statement.

The appeal was dismissed.

Ewart, K.C., for the appellants.

M. A. Macdonald, for the respondent.

FITZPATRICK, C.J.:—I do not wish to enter a formal dissent, because I am not satisfied that, on the pleadings, the point with which I am concerned was properly raised. But I must say that the conclusion I reached at the argument and in which a careful examination of the evidence confirms me is that this is a case of collateral negligence by a contractor and that, if the work of blasting had been carefully proceeded with, no injurious consequences would have resulted to the adjoining proprietor.

Fitzpatrick, C.J.

It is common knowledge that, in this country, railways and other large undertakings are built by contractors, and that the work of excavation and blasting in connection therewith is carried on over large areas and in thickly populated centres with little inconvenience; such work cannot now be considered *per se* dangerous or of such a character that injury to the property of adjoining owners must be expected to arise in the natural course of its execution. I cannot find in the special circumstances of this case anything to justify the conclusion that the work was one from which mischievous consequences must arise unless preventive measures were adopted, and there was, therefore, no duty on the company to take special precautions. If, as is prac-

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tically admitted here, there were two ways of carrying on this piece of work, one perfectly safe and the other dangerous, and, if the contractor chose to adopt the latter, the company is not responsible for the consequences.

Fitzpatrick, C.J.

For the general rule as to the liability of a contractor, see Halsbury, Laws of England, vol. 3, p. 315, No. 669, para. 2.

Davies, J.

DAVIES, J.:—I concur in dismissing this appeal.

Idington, J.

IDINGTON, J.:—I think this appeal should be dismissed with costs.

The principle of law illustrated by the cases cited in the judgment of Mr. Justice Irving in the Court of Appeal and applied herein by the learned Judge and that Court must prevail. Whether stated too broadly or not in any particular case does not dispose of the existence of the principle relied upon or the possibility of its application to any given case. And it seems applicable to the facts in this case. The appellant offered no excuse and probably had none to offer for its conduct in ignoring the principle involved.

The economies involved in the operation of the contractors do not appear to me to have been as alleged only for their own benefit. The fair inference, in the absence of any evidence to modify such inference, is that it was absolutely necessary for these contractors to adopt the cheap and reckless methods used to save themselves from loss when working within what was possible in that regard, on the basis of prices promised by appellant. Else why should they incur the responsibility for what they as well as appellant might have been called upon to answer for?

Primâ facie, at least, it is to be so presumed or we should have heard pretty loudly from appellant to the contrary, unless the nature of contractors or human nature, has recently changed. The condition of things and of work to be done or dealt with by appellant being dangerous the appellant was bound to take some precaution, but apparently took none.

Duff, J.

DUFF, J.:—The appellant company is a company incorporated under the provisions of the British Columbia Water Clauses Act, ch. 190, R.S.B.C. 1897, having power *inter alia* to construct

certain tramways. The course of one of these tramways being through the respondent's lands, the strip required by the appellant for its right-of-way was purchased from the respondent in June, 1910. At the locality in question the line follows the side of a hill and the construction of the road-bed necessitated the blasting out of the rock of which the hill is formed through the whole width of the right-of-way. The result of this operation as conducted (by the contractor to whom the work had been let) was that large quantities of rock were thrown upon the plaintiff's property in such a way as to constitute a substantial interference with his enjoyment of it. For this the Court below has held the appellant company to be responsible and assessed the damages at $500.

There are two questions: 1st, Was the appellant company responsible for the wrongful act of its contractor? and 2ndly, Is a certain release contained in the deed of conveyance of June, 1910, from the respondent to the appellant company an answer to the respondent's claim?

The points of fact material to the consideration of the first question are: that in letting the contract for the construction of the road-bed the appellant company must have contemplated the use of high explosives for breaking up the rock, and (owing to the fact that the blasting was to be done on a hillside immediately adjacent to the respondent's land) they must have known that in the ordinary course of things, unless proper precautions should be taken to prevent it, large quantities of rock would be thrown, as in fact happened, upon the respondent's land. It is not disputed, on the other hand, that by the exercise of proper care the contractors could have avoided the injurious consequences from which the respondent suffered. In these circumstances I can entertain no doubt that the Court below rightly held the appellant company answerable for those consequences.

Under the provisions of the Water Clauses Consolidation Act the appellant company had authority to construct and work this tramway. It was entitled, therefore, to make use of all necessary and reasonable measures to accomplish that object. But in doing so it was under a duty to exercise all proper care in order to avoid doing harm to others in exercising the powers conferred upon it. The company was entitled, of course, to make use of

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explosives in effecting the necessary excavations for the construction of its right-of-way, and in doing so, as it was acting under statutory authority, it would escape the somewhat stringent rule (in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330) which, in the absence of such authority, would have determined its responsibility for any injurious consequences arising from the use of such agencies. But while the legislative authority under which it proceeded protects it from the more rigorous rule, there arises out of the grant of that authority a correlative duty which is to employ all proper means and to take all proper care to see that, in the exercise of its powers, it does no unnecessary harm to the property of third persons. In the present case the company was exercising its powers not through its own servants but through the contractors whom it employed to construct its road-bed. That it may properly do; but it does not thereby escape responsibility for the performance of its own duty, the burden of which it necessarily undertakes when it puts in exercise the authority the Legislature has conferred upon it. The beneficiary of statutory authority, such as a railway company, cannot appropriate the benefit of the powers with which the Legislature has invested it without at the same time assuming full responsibility for the performance of the obligations by which its right to exercise those powers is conditioned. This is very clear law, and there ought to be no necessity for citing authority in support of it. The observations of Lindley, L.J., however, in *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335, at 340 and 342, are so apt that I cannot forbear quoting them verbatim:—

> The powers conferred by the Public Health Act, 1875, on the district council can only be exercised by some person or persons acting under their authority. Those persons may be servants of the council or they may not. The council are not bound in point of law to do the work themselves, *i.e.*, by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. This principle lies at the root of the modern decisions on the subject.

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I pass now to consider the duty of the district council in the present case. Their duty in sewering the street was not performed by constructing a proper sewer. Their duty was, not only to do that, but also to take care not to break any gas-pipes which they cut under; this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all.

See also *Robinson* v. *Beaconsfield Rural District Council*, [1911] 2 Ch. 188.

That the contractors were exercising the statutory powers of the power company cannot be disputable. Conceive an action brought against them to recover damages for injury caused by the use of dynamite upon this particular section of the line. They could not be successfully charged with responsibility under the rule in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330; the answer would be that they were exercising statutory powers and were, consequently, only chargeable for negligence under the rule in *Dunphy* v. *Montreal Light, Heat and Power Co.*, [1907] A.C. 454. The power company and the contractors must be presumed to have settled the terms of their bargain on the footing that the contractors, in the executing of their contract, would be entitled to all the protection afforded them by the legislative authority under which the work was being carried out. Sufficient has been said to dispose of the first point.

The second question ought also, I think, be answered in the sense contended for by the respondent. The words in which the release upon which the appellant company relies are not apt to cover, that is to say, they do not necessarily cover, claims based upon a charge of negligence against the company. They do, doubtless, cover all claims for compensation in respect of the loss suffered by reason of the proper exercise of the appellant company's statutory powers in respect of the construction or working of its tramway. But there is abundance of authority for holding that such general words do not afford an answer to a claim based upon such a breach of duty as that in respect of which the Courts below held the appellant company to be liable.

I think the appeal should be dismissed with costs.

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Anglin, J.

ANGLIN, J.:—The Court of Appeal of British Columbia, reversing Morrison, J., awarded to the plaintiff $500 as damages for injury done to his land by contractors, who threw large quantities of rock upon it while blasting, in the course of constructing the defendant's railway. The defendants seek to have this judgment set aside on two grounds, *viz.*, that these damages are covered by a release given them by the plaintiff, and that what is complained of was a deliberate, wilful and wanton act of independent contractors for which the defendants are not responsible.

The defendants acquired a strip of land through the plaintiff's farm for their right-of-way. The release, which is found in the conveyance of this strip, was given for damages to which the plaintiff might be or become entitled by reason of the taking of this land, the severance of his farm, and the construction and operation of the defendant's railway in the ordinary manner and with due care. The general language in which it is couched must be given a construction which will restrict its application to the subject-matter that the parties had in mind when it was executed. Negligence, whether in operation or construction, was something they did not contemplate and against the consequences of which they did not intend to provide. The release does not seem to have been relied upon in the provincial Courts as affecting this cause of action. This ground of appeal, in my opinion, fails.

On the other branch the defendant is without a finding that what is complained of was a deliberate, wilful and wanton act of the contractors. And that is not surprising, because, so far as the record discloses, this contention was not made at the trial. It is very questionable whether the evidence sufficiently supports it. Had this defence been pleaded and an issue upon it clearly raised, it is impossible to say what evidence might have been adduced by the plaintiff to meet it. He might have shewn by the contractors that what they did was in the ordinary course of blasting operations such as they had undertaken and was not, as now charged, a wanton trespass; or he might have established that the contract under which the work was done contemplated its being done in the manner in which it was. No reference is made to this point in the judgments delivered in the Court of Appeal, which proceeded on the ground that the defendants are

responsible for the failure of their contractors to take proper precautions to avoid the doing of injury, which, unless such precautions were taken, was likely to be caused in the execution of the inherently dangerous work that they undertook. If the defendants proposed to contend that this case does not fall within the well-known rule which holds proprietors responsible under such circumstances, because the injury was ascribable not to mere negligent omission, but to a wilful and wanton act of commission by the contractors, they should have alleged that fact specifically in their plea and should have clearly taken that position at the trial. They appear to have done neither. It is too late now to set up such an answer to the plaintiff's claim.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Wood.*

Solicitors for the respondent: *Ogilvie & Brown.*

REX v. EDWARDS.

Quebec Superior Court, Saint-Pierre, J. October 13, 1914.

1. BAIL AND RECOGNIZANCE (§ I—20)—DISCHARGE—TAKING ACCUSED IN CHARGE AFTER CONVICTION—CHANGE OF SENTENCE.

Where, after verdict of "guilty," the accused is taken into custody thereunder, his bail are discharged; so where on a plea of guilty by the accused appearing for summary trial, imprisonment is first adjudged, but after the accused has been taken in charge by the deputy sheriff, the magistrate has the accused recalled and imposes instead a fine with imprisonment in default, the bail is not responsible for the fine where the accused was not held in custody until paid, under a recognizance in terms to "appear and answer the charge and to be further on treated according to law."

2. BAIL AND RECOGNIZANCE (§ I—21)—CALLING THE BAIL UPON THE RECOGNIZANCE.

A previous notice to the bail is essential before a certificate of forfeiture can legally be issued for default of the accused to appear, where the latter and his bail were not called upon their recognizance on the day when he was bound to appear, and it is sought to estreat the recognizance at a later date.

[*R. v. Croteau*, 9 L.C.R. 67, and *Atty.-Genl. v. Beaulieu*, 3 L.C. Jur. 117, referred to.]

3. BAIL AND RECOGNIZANCE (§ I—17)—ESTREAT—EX PARTE JUDGMENT—ATTACK.

The *ex parte* entry of judgment by the prothonotary of the Superior Court in Quebec on a certificate of forfeiture of recognizance whether

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from the Court of King's Bench, criminal side, or from a magistrate's Court, is subject to attack in the Superior Court by any one of the modes of procedure authorized by its practice in regard to *ex parte* or default judgments.

4. BAIL AND RECOGNIZANCE (§ I—17)—ESTREAT—QUEBEC PRACTICE.

In the Province of Quebec (differing from the practice in other provinces) two modes of procedure are available for the collection of recognizances forfeited in the criminal Courts; one is by means of the *ex parte* judgment resulting upon the entry in the records of the Superior Court of the Province of Quebec of the recognizance and certificate of default, and the other by direct action at the suit of the Attorney-General of Canada, or of the Attorney-General of Quebec, or of other officer authorized to sue for the Crown.

[Cr. Code secs. 1114, 1115, and 1117, and R.S. Que. articles 3396, 3398, 3399, considered; *Re Hopfe's Bail*, 22 Can. Cr. Cas. 116, 10 D.L.R. 216, referred to.]

5. BAIL AND RECOGNIZANCE (§ I—17)—CERTIFICATE OF FORFEITURE—CONCLUSIVENESS.

A certificate of forfeiture of recognizance for appearance taken before a justice of the peace or police magistrate in Quebec is "conclusive evidence" under Cr. Code sec. 1114, and R.S. Que. article 3395, only for the purposes of the entry of the *ex parte* judgment authorized by Cr. Code sec. 1115; after such entry is made, the certificate of the breach of the recognizance as well as the judgment thereon may be attached by an "opposition to judgment" under the Quebec Code of Civil Procedure.

[Cr. Code secs. 1097, 1114 and 1117, and R.S. Que. article 3397, considered.]

6. COURTS (§ II A 6—177)—RECOGNIZANCE OF BAIL IN CRIMINAL COURTS—JURISDICTION ON ESTREATING.

In the Province of Quebec the bail against whom an *ex parte* judgment has been entered in the Superior Court on the removal thereto of the original recognizance and certificate of default (Cr. Code sec. 1113) from a criminal Court has no remedy in revocation of such certificate in the Court from which it issued; the sole jurisdiction in that regard is in the Superior Court after such removal, and may be exercised either before or after a writ of fieri facias and capias has been issued thereon.

[*R.* v. *Hogue*, 21 Que. K.B. 24, dissented from.]

Statement

OPPOSITION to judgment entered on a certificate of default against bail in a criminal proceeding in the Police Court, Montreal. A petition in revocation of such *ex parte* judgment was joined with the "opposition."

Estreat set aside.

R. G. deLorimier, K.C., for opposants and petitioners.

P. R. Du Tremblay, for the Crown.

St.-Pierre, J.

SAINT-PIERRE, J.:—On the 27th day of December, 1912, a group of theatrical performers composed of four men and about a dozen of women were arrested and brought before the police

magistrate on the complaint of one John H. Roberts, who denounced them for having taken part in some indecent performances in one of the theatres of the city. They pleaded "not guilty" to the charge, and their trial which was to be under the Summary Convictions Act, was fixed for the 3rd day of January, 1913. On the same day (27th December), they all gave bail to secure their appearance on the day of their trial.

The bailsmen for Tom Mayo and James A. McInerney, two of the accused, were William A. Edwards and Oliver McBrien, for the sum of $100 in each case.

As the punishment for such an offence when tried by summary conviction may be six months' imprisonment or a fine of fifty dollars, or both, and as those actors and actresses formed part of a company which had early engagements to fill in the United States, it was arranged, on the suggestion of their counsel, that on the 3rd of January, they would all put in a plea of "guilty," and be allowed to go free on suspended sentences, the Crown, however, reserving its rights to proceed against the lessees of the theatre, who were Montreal men, the latter agreeing to stand their trial on the charge of having allowed such performances to take place in their theatre, and assuming all the responsibility consequent upon said charges, if found guilty.

This arrangement was submitted to Seth P. Leet, Esquire, the police magistrate who was to preside over the Court on that day. The learned magistrate gave no formal assent, but offered no opposition to it.

Pursuant to the proposed arrangement, all the accused appeared in person on the 3rd day of January, 1913, and put in a plea of "guilty" to the charge.

The magistrate, however, would not consent to extend to all the accused the extreme leniency which was expected from him. He caused the complainant to give his evidence, and condemned the four men to five days' imprisonment and to a fine of twenty dollars and the costs, and to a further imprisonment of five days in the event of their failing to pay such fine and costs. All the other defendants were allowed to depart upon suspended sentences.

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This sentence once pronounced against the four male accused, the magistrate left the bench and retired to his room.

Mr. Cinq-Mars, the high constable, who before the Police Court fills the functions of deputy-sheriff, at once took charge of the four condemned men and brought them to the prisoners' cells.

Upon representations, however, being made to the magistrate, the latter consented to modify his sentence by striking off the five days' imprisonment. He, therefore, returned upon the bench, and the four prisoners being brought back before him, a modified sentence was then pronounced, said sentence being a condemnation to a fine of twenty dollars and the costs, and to five days' imprisonment in default of the said defendants failing to pay such fine and costs.

No time was fixed, at least at that particular moment, for the payment of said fine. True, the conviction which was drawn out later on contains the word "forthwith," but such word is not to be found in the minutes of the proceedings, and the evidence shews that the four men were allowed to leave the court room without any objection being offered, and to depart along with the female defendants whose sentence had just been suspended.

They never returned and the fines were never paid.

Some time later, the following certificate was inscribed on the back of the recognizance entered into by James A. McInerney as principal and William A. Edwards and Oliver McBrien as sureties:—

"I hereby certify that James A. McInerney did not appear at the time and place mentioned in the condition of the present bond, and that he hath failed to do so. Therefore, in consequence of said failure on his part, the amount mentioned in said bond is forfeited.

"(Signed) SETH P. LEET,
"*Police Magistrate.*"

A similar certificate was also entered on the back of the bond given by Tom Moya, the bailsmen in this last case being the same as in the case of McInerney.

This certificate bears no date, but Mr. Corriveau, the clerk of

the Crown and of the peace, tells us in a sworn certificate which has been filed in the present case that it was made and signed on the 3rd day of February, 1913, one month exactly after the trial.

The condition of the bail bond (said bail bond which was drawn up in the French language being the same in each case) was that the principal party should appear on the 3rd of January, 1913, before the police magistrate who was to hear the case "to the end that he might answer the charge of 'indecency' preferred against him and be further on treated according to law."

It is conceded that the four accused were personally present at their trial and at the time when their sentence was pronounced, but the contention of the Crown is that they should have remained in Court until the sentence was satisfied either by the principal parties paying the amount of the penalty imposed together with the costs of the suit, or by their offering to submit to the five days' imprisonment mentioned in the sentence in the event of their failing to make such payment. It is alleged that they having failed to do either, the magistrate under the terms of the recognizance was authorized by law to enter his certificate of default and to declare forfeited for the benefit of the Crown the amount mentioned in each of the two recognizances.

I cannot bring myself to agree with this contention thus put forward by the Crown, and this for several reasons: First, I find that under the terms of the recognizances, the obligation of the principal cognizors did not extend beyond their appearance in Court until after sentence was pronounced.

Article 1092, Cr. C., says: "The arraignment or convictions of any person charged and bound as aforesaid shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence as the case may be."

Now it is admitted that the principal parties to the two recognizances were present at their trial and that they actually received their sentence; they, therefore, fulfilled their obligation "to appear so that they might answer the charge of 'indecency' preferred against them and be further on treated according to law" as was required by the recognizances. Having been personally present in Court to answer the charge, they were further on treated according to law when they received sentence.

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But there is more to be said.

After receiving their first sentence, they were apprehended by the high constable and taken to the prisoners' cells. Now I hold that from the moment the sureties or bailsmen ceased to be the custodians or gaolers of their principals, their obligation under the bond came to an end.

The following citations from the American & English Encyclopedia of Law appear to me to be applicable to the above-mentioned facts:—

"If the principal was present during the trial at the rendition of the verdict and when sentence was pronounced against him, and immediately thereafter was taken into custody by the sheriff, the sureties are discharged."—"If the defendant departs subsequently with the leave of the Court or sheriff his recognizance cannot be forfeited or his sureties liable thereon, as the recognizance is not conditioned that the defendant or his sureties shall pay or satisfy the judgment."

(See 3 American and English Enc. of Law, pages 721 and 722 and judgments cited.)

Again: "Where after verdict of 'guilty,' a deputy sheriff seized hold of the principal and left the court room with him to conduct him to jail, it was held that the manual caption of the prisoner by the sheriff in the presence of the Court abated and dispensed with the necessity of a formal surrender of the prisoner by his bail and that they were released."

(3 idem., page 722, and cases cited.)

Commenting upon the above and other decisions cited by him, the compiler continues as follows:—

"After sentence is pronounced, the sheriff and not the bail is the proper custodian of the convict, and it has been held that the legal effect of the sentence is equivalent to a special order directing the sheriff to hold him in custody, and operates as an 'exoneratur' of the bail without formal entry to that effect."

"If the sheriff or his deputy, in fact, arrest the principal," adds the compiler, "the bails are, for stronger reasons, discharged."

(See American & English Enc. of Law, vol. 3, p. 721.)

At page 715: "When, by virtue of a warrant lawfully issued

upon an indictment for the identical offence for which the principal was held to answer, the sheriff has by his arrest taken the prisoner out of the custody of his sureties, they are released from liability, and nothing short of a new bond lawfully executed by them can restore their liability. If the sheriff afterwards release the prisoner believing the sureties to be bound by the original recognizance they cannot be held liable for his escape."

There is more still to be said.

The proof shews that after the pronouncing of the modified sentence, McInerney and Moya were allowed to leave the court room freely and unopposed by any one. The high constable tells us that on hearing the modified sentence, which was a condemnation to the payment of a fine, he concluded that he had nothing more to do with his two prisoners and that he allowed them to go free.

On the other hand, we have also in evidence that the certificate of default was only entered by the magistrate on the 3rd day of February, 1913, one month after the day of the trial. Now it is clear that under such circumstances, no certificate of default could be validly inscribed on the bond without a previous notice being given to the sureties.

The following authorities which I also find in the same compilation will support that contention:—

"A recognizance conditioned that the prisoner appear at the next term and thereafter from day to day, binds the surety for the appearance of the prisoner during the first term of the Court only, and if the Court adjourns without making any order, the sureties are discharged."

(See Am. & Eng. Encyclopedia of Law, p. 714.)

On referring to the English text writers, I find that the same rule prevails in England:—

"Neither the defendant nor his bail, says the author of Bacon's Abridgement (vol. I., p. 497), can be called upon their recognizances without notice, except on the day on which the defendant is bound to appear."

Petersdorff (3 vol., p. 349) cites the following decision:—

"A motion was made that defendant and his bail might be called upon their recognizance. No notice had been given."—*Per*

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curiam: "We must refuse the application for as the defendant is not called upon at the day upon which he is bound to appear, but at a particular day, notice should have been previously given him."

The case of *Regina* v. *Croteau* and of the *Attorney-General* v. *Beaulieu*, decided by our own Superior Court, are also in point. See 9 Lower Canada's Reports, p. 67, and 3 Lower Canada Jurists, p. 117.)

For all those reasons I have come to the conclusion that the certificate referred to in this cause was wrongfully and illegally entered upon the back of the two recognizances mentioned above and that the same should be declared null and void and set aside.

On the 6th day of February, 1913, the two recognizances in question, together with the certificates of default and forfeitures were estreated (that is to say, extracted and withdrawn from the Police Court) and sent up to the Superior Court where a judgment was entered up in the books of said Court, in order that the amount declared forfeited might be collected and recovered by the Crown, as provided for by article 1113 of the Criminal Code and 3394 of the Revised Statutes of the Province of Quebec.

Four judgments were thus entered up in the books of the Superior Court: A first one against William A. Edwards, and a second one against Oliver McBrien, in the case of Tom Moya, and a first one against the same William A. Edwards, and a second one against Oliver McBrien in the case of James A. McInerney; and on the tenth day of March, 1913, four writs of execution were issued and four seizures were practised against the goods and effects of the said William A. Edwards and Oliver McBrien.

The two defendants joined together and met those four *ex parte* judgments and the executions and seizures which had followed, by two "oppositions to judgment" in which they intermingled the allegations usually found in "petitions for revocation of judgments."

Their conclusions contain among other things the following prayer:—

"Wherefore the said opposants and petitioners pray . . . that the judgment of the 6th day of February last (1913) be annuled, rescinded, revised and revoked, and the executions and

seizures of the goods and moveable effects of the said opposants and petitioners practiced in these cases set at nought and that *main levée* thereof be granted to said opposants and petitioners, the whole with a recommendation that their costs on their present proceedings be paid by the Crown."

As may be seen by the mode of procedure here resorted to, the two joint opposants and petitioners took it for granted that their remedy was to be urged before the Superior Court, and that the entering up in the books of said Court of the estreated recognizances together with the certificates of default of the two principal parties, and the attestation that the amount of the penalty mentioned in their recognizances had, in consequence of said default, been estreated for the benefit of the Crown, constituted an *ex parte* judgment of the Superior Court against which they had the right to oppose all the reasons or causes of nullity which might be urged against any ordinary judgment of said Court thus pronounced *ex parte* or by default.

I am now called upon, therefore, to decide whether the remedy (which no doubt must exist somewhere in favour of a defendant who has been the victim of a wrongful or illegal certificate of default and forfeiture) should in our province be sought for before the Superior Court or elsewhere.

I must declare at once that in my opinion, not only is the Superior Court the proper tribunal before which such a remedy should be sought for, but that said Superior Court is the only tribunal before which it may be urged by the aggrieved party, and by which it can be applied.

This question has in the past opened the door to much discussion and has lead to contradictory decisions in our Courts of justice. The error into which some of our Judges have fallen was due first to the assumption that the certificate of default, coupled with the declaration that the amount mentioned in the bond or recognizance had been forfeited, constituted a final judgment which could not be opposed nor set aside by our Superior Court. They could not entertain the idea that such a pretended judgment pronounced, for instance, by the Court of Queen's Bench, criminal side, could be interfered with by an inferior tribunal such as the Superior Court of the Province of Quebec is, when

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put in regard with the Court of Queen's Bench, which is the highest Court in our province.

It was clearly when labouring under such an erroneous impression that the learned Judges of the Court of Queen's Bench (appeal side) pronounced their judgment in the case of *The King* v. *Hogue et al.*, on the 23rd day of May, 1911.

(See *The King* v. *Hogue et al.*, vol. 21st Official Reports, King's Bench, p. 24.)

In that case the Court of Appeals (Sir Louis A. Jette, Chief Justice, Trenholme, Cross, Archambault and Carroll) held, reversing the unanimous judgment of the Court of Review (Tellier, Delorimier and Dunlop), that "when an order of estreat of a recognizance is made by the Court of Queen's Bench, Crown side, for a breach of its conditions, the subsequent entering up of a judgment by the prothonotary of the Superior Court, under art. 1115, Cr. C., is not a judicial, but a purely ministerial act of that officer, and does not vest the Superior Court with jurisdiction to inquire into or in any wise deal with the order of estreat."

With due respect for the learned Judges who pronounced that judgment, I purpose to shew (1) that the judgment entered up by the prothonotary on such occasion is a judgment of the Superior Court pronounced *ex parte* or by default, just as a judgment entered *ex parte* or by default upon a promissory note or upon a deed of obligation by the same prothonotary is a judgment of that Court; (2) that such judgment thus pronounced *ex parte* may be opposed by means of any one of the various modes of procedure provided for by our Code of Civil Procedure against such *ex parte* or default judgments; and (3) that when an estreated recognizance upon which an illegal or wrongful certificate of default has been entered, is taken to our Superior Court for collection, our said Superior Court is the only tribunal before which an aggrieved defendant may seek redress, and is the only tribunal which has the power and the authority to come to said defendants' relief.

First, let us disentangle our minds from any notion about criminal law or criminal procedure in this matter. The giving of a bond or the entering into a recognizance by a defendant or

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an accused person before a Court of criminal jurisdiction is not an act which falls under the authority of the criminal law; it is a civil contract by which the principal cognizor obliges himself to pay to the Crown a certain sum of money, in the event of his failing to be present in Court on a given day, or of his failing to fulfil some other conditions mentioned in the bond or the recognizance in question. Such a contract may happen to have been entered into before a Judge of the Court of Queen's Bench holding the Criminal Assizes, but it may equally have been entered into before a simple justice of the peace, and the obligation assumed by the cognizor towards the Crown is no greater in the one case than in the other. It constitutes a civil contract and the action which arises in favour of the Crown as a result of the failure of the defendant or of the accused to fulfil its conditions, is a civil action for breach of contract. The certificate of default given by the justice of the peace or the Judge presiding the assizes is not a judgment which has any force in our province. It is simply an attestation given by the Judge or magistrate entered upon the back of the bond or recognizance as proof that the conditions of the bond or recognizance have not been fulfilled; and the declaration by the magistrate or the Judge that, in consequence of said breach of the contract, the amount mentioned therein has been escheated to the Crown is but the affirmation of what the contract itself states.

This certificate or attestation makes *primâ facie* proof of what is stated in it. But we will see that such *primâ facie* proof, sufficient and conclusive though it may be, if uncontradicted, to justify the entering up of irregular judgment, is susceptible of being rebutted by contrary proof before the Superior Court, in the same manner, for instance, as the examplification of a judgment *ex parte* or by default pronounced in the Province of Ontario may be contested when it is produced to form the basis of an action before the Superior Court in the Province of Quebec.

Before looking into the articles of the Criminal Code and of the Revised Statutes of the Province of Quebec which have reference to the mode of collecting extreated recognizances, let us first ascertain what the law in England is on the subject.

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The following citation from Petersdorf (vol. 3, p. 355) will tell us what the old law was:—

"The causes which operate as a discharge of the recognizance have been considered (above)."

"If any of the conditions of that instrument" (the bail bond or the recognizance) "be not complied with, it becomes liable to be estreated, that is, taken out from among the records" (of the Court of criminal jurisdiction) "and sent to the Exchequer, which renders the party absolute debtor to the Crown for the sum or penalty therein mentioned."

The author next refers to the remedy which may be applied for against an illegal or wrongful certificate or default. He says:—

"But as a forfeiture of that security is frequently incurred through mere inattention and ignorance, the statute of 4 Geo. III. ch. 10, empowers the Barons of the Exchequer to relieve, on petition, any person whom they deem object for indulgence."

(See also on the same point I. Chitty's Criminal Law, p. 92, and Burn's Justice, vol. I., p. 941.)

This was the old law in England.

What is the law in force now?

It is exactly the same with the exception that by the 36 and 37 Viet. (Imperial Statute), ch. 66, secs. 16 and 32, and by an "Order in council dated 16 December, 1880," the High Court of Justice (which Court, for the object in view, corresponds to our Superior Court) was substituted to the Court of Exchequer. (See Archbold, Criminal Cases, pp. 100 and 101.)

Two things must be observed in the law as it existed formerly and as now exists in England: the first one is that it is from the time when the estreated document is entered up in the books of the High Court of Justice, that the alleged defaulting cognizor becomes absolute debtor to the Crown, just as by the entering up of the same instrument in the books of our Superior Court by means of what our law calls "a judgment" the defaulting cognizor becomes similarly the absolute debtor to the Crown.

The second thing to be observed is that the remedy given to the aggrieved defendant against a certificate illegally or improvidently entered on the back of the bond or of the recogniz-

ance, is vested in the Court to which the estreated document has been sent up, to wit, formerly the Court Exchequer, but now the High Court of Justice, both being Courts of civil jurisdiction, just as said remedy is vested in our Superior Court, as I will shew further on.

I find in "Sweet's Law Dictionary" that the practice in England in matters of estreated recognizances is the following:—

"Estreated recognizances in the superior Courts of assize are sent to the Exchequer, now to the High Court of Justice, while those before justices of the peace are sent to the sheriff with writs of execution to enable him to levy the amount."

(See vol. III. Amer. & Eng. Encyclopedia of Law, p. 451.)

We will now turn to our own Criminal Code in order to ascertain what variances exist between the laws in force in the English provinces of the Dominion, and those enacted for the Province of Quebec.

Under Part XXI. of our Criminal Code, the articles referring to forfeited recognizances are distributed under three distinct heads:—

1. Those the application of which is general and which are the law for all the provinces of the Dominion; 2. Those which are applicable to all the provinces except Quebec, and finally, 3. Those which apply solely to the Province of Quebec. Article 1097, which is one of general application enacts that when the conditions of the recognizance have not been complied with by the principal party, the justice who took the recognizance or any justice who is then present having certified upon the back of the recognizance the non-appearance of the person or the non-compliance with the condition, as the case may be, may transmit such recognizance to the proper officer in the province appointed by law to receive the same to be proceeded upon in like manner as other recognizance.

Such certificate, says the same article, shall be *primâ facie* evidence of such non-appearance or non-compliance.

In the Province of Ontario such recognizance and certificate of default are transmitted to the clerk of the peace of the county for which such justice is acting; and the Court of General Sessions of the peace for such county at its next sitting orders all

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such recognizances to be forfeited and estreated, and the article further enacts that the same shall be enforced and collected in the same manner as any fines, forfeitures or amercements imposed by or forfeited before such Court.

(See article 1098, Crim. Code.)

In British Columbia, the proper officer to receive such recognizance and certificate is the clerk of the County Court, and the recognizance is enforced and collected in the same manner as any fines, forfeitures or amercements imposed by or forfeited before such Court.

In the other provinces of Canada such proper officer shall be the officer to whom the recognizance have been heretofore accustomed to be transmitted under the law heretofore in force; and such recognizances shall be enforced and collected in the same manner as like recognizance have heretofore been enforced and collected. (See article 1099, Crim. Code.)

Article 1100 provides that any forfeited recognizance shall be estreated by the Court before which the principal party thereto was bound to appear.

"In all the provinces of the Dominion except Quebec, all fines, issues, amercements and forfeited recognizances, set, imposed, lost or forfeited before any Court of criminal jurisdiction shall within twenty-one days after the adjournment of such Court, be entered and extracted on a roll by the clerk of the Court or in case of his death or absence, by any other person, under the direction of the Judge who presided at such Court, which roll shall be made in duplicate and signed by the clerk of the Court, or in case of his death or absence, by such Judge." (See article 1102, Crim. Code.)

If such Court is a superior Court having criminal jurisdiction, one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer (a) in the Province of Ontario, of the High Court of Justice; in Nova Scotia, New Brunswick and British Columbia of the Supreme Court of the Province, and on or before the first day of the term next succeeding the Court by or before which such fines or forfeitures were imposed or forfeited. (See article 1104, Crim. Code.)

If such Court is a Court of general sessions of the peace, or

a County Court, one of such rolls shall remain deposited in the office of the clerk of such Court.

The other of such rolls aforesaid shall as soon as the same is prepared be sent by the clerk of the Court making the same, or in case of his death or absence, by such Judge as aforesaid with a writ of *fieri facias* and *capias* to the sheriff of the county in and for which such Court was holden. (See article 1105, Crim. Code.)

Let us see now what remedy is given to the defendant in the case when a recognizance was wrongfully or illegally estreated.

Such remedy may be applied for either before or after the *fieri facias* and *capias* is handed over to the sheriff.

With respect to all recognizances estreated, says article 1108, if it appears to the satisfaction of the Judge who presided at such Court (that is to say, at the Court in which the person was bound to appear) that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such Judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied, and the clerk of the Court shall for such purpose, before sending to the sheriff any roll, with a writ of *fieri facias* and *capias*, submit the same to the Judge who presided at the Court, and such Judge may make a minute on the said roll and writ of any such forfeited recognizance and fines as he thinks fit to direct not to be levied.

The sheriff shall observe the direction in such minute written upon such roll and writ or endorsed thereon. (See article 1108, Crim. Code.)

This article, as we see, explains how the remedy may be applied prior to the writ of *fieri facias* and *capias* being handed over to the sheriff.

The next question is: How is the remedy to be applied if such writ has been issued, and if the property of the party who is liable under the estreated recognizance has been put under seizure?

The answer to this query is to be found in article 1110 of the Criminal Code under the heading "Discharge of forfeited recognizances."

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Article 1110. The Court into which any writ of *fieri facias* and *capias* issued under the provisions of this part is returnable, may inquire into the circumstances of the case and may in its discretion, order the discharge of the whole of the forfeited recognizance or sum of money paid or to be paid in lieu or satisfaction thereof, and make such order thereon as to such Court appears just; and such order shall accordingly be a discharge to the sheriff or to the party according to the circumstances of the case.

The decision in the case of *Hopfe* v. *The King*, reported in 22 Canadian Criminal Cases, p. 116, will make this point quite clear. It reads as follows:—

"Where an order has been made estreating bail and for a writ of *fi. fa.* and *capias*, the Court before which the writ is returned for further disposition of the matter, may, with the concurrence of the Judge who made the order, set aside the same, and the writ issued thereunder, if it appears that the bail was taken by justices in a case in which they had no jurisdiction to bail and that the estreat order was in consequence made improvidently."

(See *Re Hopfe's Bail*, 10 D.L.R. 216, 22 Can. Crim. Cas. 116, 23 W.L.R. 751.)

This is the law which prevails in all the provinces of the Dominion, except Quebec.

Let us now look into the law which on this subject was enacted to be applied exclusively to our own province.

That law is to be found in article 1113 and following, down to article 1119 in the Criminal Code, and in article 3393 down to article 3400 of the Revised Statutes of Quebec.

There are two modes by which, in the Province of Quebec, the amount mentioned in a forfeited recognizance may be collected at the suit of the Crown. The first one is by means of a judgment *ex parte* based upon the estreated recognizance entered up in the books of the Superior Court, as provided for by article 1115 of the Criminal Code and 3396 of the Revised Statutes of Quebec.

The second mode is by a direct action before the same Court, taken out at the suit of the Attorney-General of Canada or of

Quebec, or of other person or officer authorized to sue for the Crown.

In each case the remedy which may be urged by the party sued varies accordingly to the mode adopted by the Crown, but should in either case be urged before the Superior Court.

Let us refer to each of those two modes separately.

Under the title head "Transmission of recognizance to Superior Court," article 1114 of the Criminal Code, contains the following disposition:—

"Such recognizance shall be transmitted by the Court, recorder, justice, magistrate or other functionary before whom the cognizor (or the principal cognizor where there is a surety or sureties), was bound to appear, or to do what by his default to do which, the condition of the recognizance is broken, to the Superior Court in the district in which the place where such default was made is included for civil purpose, with the certificate of the Court, recorder, justice, magistrate or other functionary as aforesaid, of the breach of the condition of such recognizance, of which, and of the forfeiture to the Crown of the penal sum therein mentioned, such certificate shall be conclusive evidence." (See art. 1114, Crim. Code, and 3395, Revised Statutes.)

It will be observed that this article makes no distinction between one Court or another. It applies equally to the Court holding the assizes or to the recorder's Court or that held by a justice of the peace.

This first step taken, what is next to be done by the prothonotary of the Superior Court?

Under the heading, "Judgment to be entered," article 1115 will make quite clear the answer to this query:—

"Article 1115. The date of the receipt of such recognizance . . . and certificate by the prothonotary of the said Court shall be entered thereon by him, and he shall enter judgment in favour of the Crown against the cognizor for the penal sum mentioned in such recognizance, and execution may be reckoned from the time the judgment is entered by the prothonotary of the said Court." (See article 1115, Crim. Code, and 3398, Revised Statutes.)

Article 1115 does not say that the prothonotary shall register

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or enter the judgment or a judgment already pronounced by some other Court or Judge against the principal party and his sureties, but it says that said prothonotary shall enter judgment in favour of the Crown against the cognizor for the penal sum mentioned in the recognizance. It is only after the entering of such judgment that said recognizor becomes the debtor of the Crown, as I have already shewn by the authorities I have cited above.

The same article 1115 tells us that under the authority of this judgment, execution may issue after the same delay as in other cases from the date of said judgment, and article 1117 explains that when sufficient goods and chattels, lands and tenements are insufficient to satisfy the judgment, upon a return to that effect made to the Court by the sheriff, the defendant may be lodged in the common gaol of the district until satisfaction is made or until the Court which issued such warrant, upon cause shewn, as hereinafter mentioned, makes an order in the case, and such order has been fully complied with.

Now follows the remedy just referred to, which is given to the defendant against the certificate of default and the forfeiture when such certificate has been given either upon an error of fact or a misconception of the law. It is to be found in sub-section 3 of the same article 1117 of the Criminal Code.

"3. On petition of the cognizor of which notice shall be given to the clerk of the Crown of the district, the Court (that is to say, the Superior Court) may inquire into the circumstances of the case, and may, in its discretion, order the discharge of the amount for which he is liable, or make such order with respect thereto and to his imprisonment as may appear just, and such order shall be carried out by the sheriff."

Strange as the thing may appear at first sight, this sub-section 3, of article 1117, is not to be found in article 3397 of the Revised Statutes of Quebec, which is the article corresponding to article 1117 of the Criminal Code. A moment's reflection, however, will easily lead to a proper explanation of this omission in the Revised Statutes. Any legist knows that the Parliament of Canada has no jurisdiction to enact laws on civil matters, and far less laws on civil procedure intended to be applied to

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the Province of Quebec. Laws of that description enacted by the Parliament of Canada can have no power nor authority in our province unless they have been re-enacted by our own legislature. Now, this is exactly what took place with regard to the seven articles of the Criminal Code which deal with the mode of collecting estreated recognizances by means of our Superior Court. When our own legislators saw this sub-section 3 of article 1117, they at once perceived that not only was said sub-section useless for the plain reason that our own Code of Procedure contained all the remedies required against *ex parte* judgments or judgments taken by default, but that it limited the mode of procedure allowed to the defendant and circumscribed it to a summary petition, when our own Code provides several other modes, some of which would be clashing with the one there suggested. For those reasons sub-section 3 was omitted, leaving the aggrieved defendant to the more logical remedies provided for under our own Code of Civil Procedure.

The second mode to be found in the Criminal Code is by means of a direct action taken out by the Crown against the cognizor either before the Superior Court or even before the Circuit Court. This is to be found in article 1114 of the Criminal Code and in articles 3398 and 3399 of the Revised Statutes of Quebec. This last article reads as follows: "In such case the sum forfeited by the non-performance of the condition of such recognizance shall be recoverable with costs, by action in any Court having jurisdiction in civil cases to the amount, at the suit of the Attorney-General or other party or officer authorized to sue for the Crown."

"In any such action," says the same article, "it shall be presumed that the party suing for the Crown is duly empowered to do so, and that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the Crown" (now comes the remedy in favour of the cognizor against a wrongful or illegal certificate of default) "unless the defendant proves the contrary."

From all those excerpts and citations of the law, I pretend to have demonstrated conclusively, (1) that in the Province of Quebec the modes provided for in favour of the Crown for the

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collection of the amount mentioned in recognizances in respect of which a certificate of default has been entered are entirely and absolutely different from that adopted and followed in the other provinces; (2) that in our province, two distinct modes are provided for in order to attain the same object, (1) by the prothonotary entering up a judgment *ex parte* or by default in the books of the Superior Court based upon the estreated recognizance and the certificate of default, against which judgment, the cognizor thus condemned, may seek redress by opposing any reasons which might justify him in praying for the setting aside of the judgment so pronounced *ex parte* or by default against him, (2) by the taking out by the Crown of a direct action either in the Superior Court or even in the Circuit Court according as the amount sought to be recovered would fall under the jurisdiction of either the one or the other of said Courts, and in the latter case, the cognizor (defendant in the suit) would again have the right to oppose such action by putting in a plea shewing that said direct action is unfounded either in fact or in law, and should not be maintained against him.

All this is so clear and so manifest that I cannot for a moment conceive how it may have been the occasion of any misconception or misapprehension on the part of any one.

It has been pretended at the argument that the certificate signed by the Court, Judge or magistrate was conclusive evidence of the breach of the condition of the recognizance and of the forfeiture to the Crown of the sum therein mentioned, and that such being the case, the circumstances under which said certificate was written could not legally be inquired into, nor questioned before the Superior Court. (See article 1114, Crim. Code, and 3395 Revised Statutes, P.Q.)

There is no doubt that the certificate in question is *primâ facie* conclusive evidence as to the facts which it asserts; were it otherwise, no sufficient proof would exist against the defendant, and as a consequence, no judgment could be entered up in the Superior Court against the alleged defaulting cognizor. But are we to conclude from that disposition of the law, that the certificate in question can in no way be impugned, nor set aside?

Article 1097 of the Criminal Code, which is one of the articles applicable to the Province of Quebec (sub-section 2), declares that such certificate is but *primâ facie* evidence of the non-appearance of the principal party to the recognizance or of his non-compliance with its condition. But there is a still more pre-emptory answer to such pretention.

Article 1119 of the Criminal Code and articles 3398 and 3399 declare in so many words that the amount of the penalty mentioned in the forfeited recognizance may be sued for by the Crown before the Superior Court and even before the Circuit Court and that in any such action it shall be presumed that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the Crown, unless the defendant proves the contrary.

I have said above that under the system which the legislator has created for the Province of Quebec in matters of forfeited bail bonds, not only was the remedy sought to be obtained by the alleged defaulting cognizor to be applied for before the Superior Court, but that said Superior Court was the only tribunal by which said remedy could be granted. According to the system followed in the other provinces, which system I have fully explained above, the amount to be collected under a forfeited recognizance is assimilated to a fine, and is put upon a list or roll comprising all the fines, amercements which are due to the Crown and then is handed over for collection to the sheriff together with a *fieri facias* and a *capias*, which process, after being executed, are returned before the Court from which they had been issued, and that upon said process being thus returned the aggrieved cognizor could obtain relief by applying by petition to the Court before which such return had been made, in other words before the Court which is in possession of the estreated recognizance.

Now, in the Province of Quebec, could the party against whom default has been entered, or his sureties, seek their remedy before the Court by which such default was pronounced? Clearly not, and this for the plain reason that the estreated recognizance, including the certificate of default, is no longer in the possession of the Court before which the principal party was

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bound to appear. After said instrument has been estreated, or as article 1113 of the Criminal Code expresses it, has been withdrawn from the record or proceedings in which it then was, it is handed over to the Superior Court where it remains of record. It is not a certified copy of the recognizance nor of the certificate of default which are taken over to the Superior Court, but the original document itself, which, ever afterwards, remains there of record. (See article 1113, Crim. Code.) The writ of execution against the goods and chattels of the defaulting cognizor is issued from the Superior Court and is returned into the same Court after seizure and not before the Court of criminal jurisdiction from which, owing to the default of the principal cognizor, the recognizance was declared estreated. Therefore, it is before the Superior Court only that the remedy given to the party aggrieved can be applied for.

In the present case, though the proceeding resorted to by means of two joint oppositions to the four judgments mentioned above intermingled with Petitions in Revocation of judgment may perhaps appear to be rather ambiguous and even contradictory, still, I believe it to be sufficiently explicit to justify me in granting the prayer contained in the conclusions which I find at the foot of said pleadings.

The two joint oppositions to the judgments in question are, therefore, maintained, and I shall add to my judgment a recommendation to the effect that the costs of the joint opposants and joint petitioners be paid by the Crown.

Estreat set aside.

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Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 24, 1914.

1. CRIMINAL LAW (§ II B—49)—ELECTION AGAINST SUMMARY TRIAL BY MAGISTRATE—SUBSEQUENT ELECTION OF SPEEDY TRIAL.

The option which under Code sec. 778, as amended 1909, is given the accused under Part XVI. of the Code to be tried by the magistrate without the intervention of a jury or to remain in custody or under bail to be tried "in the ordinary way by the Court having criminal jurisdiction" includes upon an election of the latter alternative the prisoner's right after having been brought before the County Court Judge or other officer under the speedy trials clauses (Part XVIII.) to decide whether he will take a "speedy trial" without a jury or be tried at the jury Court; and, since the amendment of 1909, this right is not affected by Code sec. 830 as the election against summary trial by the magistrate is no longer an election "to be tried by a jury." (Code sec. 830.)

[*R.* v. *Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608; *R.* v. *Sorercen*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356; *R.* v. *County Judge's Criminal Court*, 23 Can. Cr. Cas. 7, 16 D.L.R. 500, considered.]

Statement

CROWN case reserved by Mathers, C.J., of the Court of King's Bench.

On November 6, 1914, the prisoners were charged at the Winnipeg Police Court before the police magistrate of the said city (Winnipeg being a city having a population of over 2,500 according to the last decennial census taken under the authority of an Act of Parliament of Canada) with having obtained $35 by false pretences with intent to defraud. The said police magistrate thereupon made to the prisoners the statements required by sub-sec. (2) of sec. 778 of the Criminal Code. The prisoners after such statements were made to them elected for trial before a jury. The said police magistrate then proceeded as directed by sec. 785 of the Code and the prisoners were committed for trial and such election is stated in the warrant of commitment for trial. An indictment against these prisoners was taken before the grand jury on November 7, 1914. On the morning of November 9, 1914, the accused, through their counsel, notified the sheriff that they elected for trial by a Judge without a jury under the provisions of the Code relating to speedy trials. The sheriff refused to take the proceedings required by sec. 826 of the Code. On the afternoon of the same day, the grand jury returned the indictment into Court endorsed "true bill." Imme-

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diately thereafter the prisoners were arraigned, when their counsel objected that they should not be asked to plead to the indictment as the accused elected to be tried by a Judge without a jury. The regular term or sittings of the Court at which such trial by jury would take place commenced on November 3, 1914, and was still in session. The learned Chief Justice of the King's Bench ruled that sec. 830 of the Code applied and that the prisoners had not, under the circumstances, the right to elect for trial by a Judge without a jury and he directed that their trial should proceed before the jury at the assizes then being held. The prisoners were then called upon to plead and pleaded "not guilty."

Upon application of counsel for the accused, Mathers, C.J. K.B., reserved for the opinion of the Court of Appeal, the following question:—

> 1. Was I right in holding that the prisoners had no right to re-elect for a speedy trial by a Judge without a jury under the circumstances stated?
>
> If the answer to the above question is in the affirmative the trial of the prisoners to be proceeded with before this Court.
>
> If the answer be in the negative the prisoners to be at liberty to withdraw their plea and elect to take a speedy trial under the appropriate sections of part 18 of the Criminal Code.

Defendants' appeal was allowed.

E. R. Levinson, for accused, appellant.
John Allen, Deputy Attorney-General, for the Crown.

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HOWELL, C.J.M.:—By the Criminal Code, R.S.C. 1906, sec. 825, every person committed for trial for certain offences had a right to elect to be tried by a County Court Judge, and it was made the duty of the sheriff to give him the opportunity to elect. This provision is by sub-sec. 4 made applicable to any person "in custody awaiting trial on the charge." After this enactment follow a number of sections under the heading of "procedure" amongst which is sec. 830. To give any meaning to this

section I must hold that under the Code, as it was in the Revised Statutes, notwithstanding the very inclusive language of sec. 825, that section did not apply to a prisoner committed under sec. 778. By the last mentioned section [prior to amendment of 1909—ED.] the prisoner is asked if he consents to be tried by the magistrate, with the alternative, "or do you desire that it shall be sent for trial by a jury at the (naming the Court)."

Sec. 785 requires the magistrate to state in the warrant the election, so if he made an election of trial by jury (the only method of trial permitted by clause 778) the magistrate must state in the warrant that the prisoner elected to be tried by a jury.

Sec. 830 then states that, 1st, if the accused has been asked to elect to be tried by the magistrate or before a jury; 2nd, if he has elected to be tried by a jury; 3rd, if such election is stated in the warrant; the sheriff shall not be required to take the party before the County Court Judge for election. Sub-sec. 2 of that section is as follows:—

> 2. If such person, after his said election to be tried by a jury, has been committed for trial he may, at any time before the regular term or sittings of the Court at which such trial by jury would take place, notify the sheriff that he desires to re-elect.

It is apparent that by this sub-section it was treated as a case where the accused had only a right of electing to be tried by a jury, and this is accentuated by the last word "re-elect." Sub-sec. 3 but reiterates that the prisoner has elected to be tried by a jury, for it provides "shall be proceeded against as if his said election in the first instance had not been made."

Briefly then, under sec. 778 [prior to amendment of 1909—ED.] the prisoner's rights were only to elect to be tried by the magistrate or by a jury at a Court which is named. Under sec. 785 the magistrate must set forth in the warrant that the accused has elected to be tried before a jury if that is his election. Under sec. 830, if he has so elected, and if the warrant so states, then the accused has limited rights to get an election before the County Court Judge.

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I shall now consider the amendments of the Code by 8 & 9 Edw. VII. ch. 9.

Sub-sec. 2 of sec. 778 is amended by changing the question to be put by the magistrate to the accused. By it the magistrate shall state to the accused "(*b*) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction," and this, of course, is the only election which the accused has. He must elect between trial by the magistrate, or "in the ordinary way by the Court having criminal jurisdiction." He has not power there to elect to be tried by a jury.

Now the ordinary way is pursuant to sec. 825; the Court having criminal jurisdiction is either the County Court Judge or the assizes with a jury, and it is the prisoner's right, after being brought before the County Court Judge, to decide which shall be the Court.

With the change in sec. 778 it seems to me the magistrate should not set forth in his warrant as required by sec. 785 that the accused elected to be tried by a jury (a thing he was not called upon to do, and had no power to do), but should have set forth "the fact of such election having been made," that is, the election required by the amendment to sec. 778. It follows that the committal by the police magistrate thereby becomes an ordinary one and sec. 825 applies. The accused has not been called upon to elect and has not elected to be tried by a jury and, therefore, sec. 830 does not apply to this case and is not applicable to Part XVI. of the Code.

I think an accused person dealt with under sec. 778 as amended must now be dealt with as provided by sec. 825 without regard to sec. 830.

In *Rex* v. *Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, it was held in this province that a prisoner had a right to elect under sec. 825 even after the grand jury had found a true bill. That decision came up for discussion in *R.* v. *Sovereen*, 20 Can. Cr. Cas. 103, 4 D.L.R. 356, 26 O.L.R. 16. The Chief Justice of Ontario and Mr. Justice Maclaren refused to follow that case. Mr. Justice Magee agreed with the Manitoba decision and the

other two Judges express no opinions on the subject. I think I can state that in the case before them any remarks on *Rex* v. *Thompson, supra*, might well be considered as *obiter*.

The Manitoba case came up for consideration very recently before the Full Court of Nova Scotia, in the case of *Rex* v. *County Judge's Criminal Court*, 16 D.L.R. 500, 23 Can. Cr. Cas. 7. In that case the Judges at some length discussed the Ontario case above referred to and followed the Manitoba case in preference to it, and clearly the Nova Scotia Court has taken the same view of the law as that taken in *Rex* v. *Thompson*.

Howell, C.J.M.

With great deference to the carefully considered judgment of the Chief Justice of the King's Bench, I think the accused is entitled to an election before the County Court Judge.

I would answer the question submitted by the learned Chief Justice in the negative.

Richards, J.A.

RICHARDS, J.A.:—The learned Chief Justice, who has stated the case under consideration, held that, because of sec. 830 of the Code, the accused, who had been committed for trial after the beginning of the Winnipeg Assizes, "the regular term or sittings of the Court" at which the accused's trial by jury would take place, he, the accused, had not the right to elect to be tried at the County Court Judge's Criminal Court.

The application of sec. 830 to a case such as this depends, as I read it, on the happening of three things, which seem to me to be conditions precedent to such application: 1st. If under Part XVI. . . . any person has been asked to elect whether he would be tried by the magistrate . . . or before a jury. 2nd. And he has elected to be tried by a jury. 3rd. And if such election is stated in the warrant of committal for trial.

The second sub-section says, "If *such* person," etc., thereby limiting it to a person in whose case the above three conditions have arisen. Since the amendment made in 1909, to sec. 778, the accused, in such a case as this is no longer asked whether he will be tried by the magistrate without a jury, or be tried by a jury, as he was, in effect, asked before that amendment. Since 1909 the law has been that, in such a case as this, the accused is told that he has the option to be tried by the magistrate or "to

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be tried in the ordinary way by the Court having criminal jurisdiction."

A choice of the latter alternative does not imply an election to be tried by a jury. It only means that the accused refuses to be tried by the magistrate and reserves to himself all rights he has as to his manner of trial if committed for trial. Those rights include the right to elect to be tried at the County Court Judge's Criminal Court. Therefore it seems to me that the first of the conditions precedent to sec. 830 applying has never arisen. I also doubt if the second condition has arisen, though that need not be decided.

If I am right in the above, sec. 830 has probably become inoperative as to Part XVI. of the Code. The argument that if that had been the intention of Parliament it would have been repealed when the Act of 1909 was passed, is met by the fact that sec. 830 applies to Part XVII. as well, and the election before the magistrates in the latter part (by sec. 807) has not been changed. So that there is because of Part XVII. still a reason for the existence of 830.

Before the true bill was bound the accused, by their counsel, notified the sheriff that they elected to be tried by the County Court Judge's Criminal Court. Later, on the same day, a true bill was found by the grand jury.

Assuming, however, that the bill was so found before the accused did elect, I think the case of *Rex* v. *Thompson*, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, applies, and that the accused still has the right of election.

With deference I would answer in the negative the question asked by the stated case.

Perdue, J.A.
Cameron, J.A.

PERDUE and CAMERON, JJ.A., concurred with HOWELL, C.J.M.

Haggart, J.A.

HAGGART, J.A.:—Section 778 of the Criminal Code, ch. 146, R.S.C., as amended by ch. 9, 8 & 9 Edw. VII., provides that—

> (2) If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused (*a*) that he is charged with the offence, describing it, (*b*) that he has the option to be forthwith tried

by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction.

There was open to the prisoners the two alternatives. The prisoners exercised their option and chose the latter, namely, "to be tried in the ordinary way by the Court having criminal jurisdiction." That does not mean that the prisoners elected to be tried by a jury. It is true that the assizes is a "Court having criminal jurisdiction." The County Court Judge is also a "Court having criminal jurisdiction." Sec. 824 of the Code enacts that—

> The Judge sitting on any trial under this part, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a Court of record, etc.

There was clearly no election here and could be no election as between a jury and a County Court Judge.

Under these circumstances the prisoners were after the commitment entitled to the benefit of sec. 826 and following sections relating to procedure, and to be brought before the Judge and pursuant to sec. 827 to be told by the Judge that they had "the option to be tried forthwith before a Judge without the intervention of a jury or to remain in custody or under bail as the Court decides to be tried in the ordinary way by the Court having criminal jurisdiction."

With all due respect to the Chief Justice of the King's Bench, I would answer in the negative the question reserved for the opinion of this Court, and would direct that the prisoners be at liberty to withdraw their plea and elect to take a speedy trial under the appropriate sections of Part XVIII. of the Criminal Code.

I do not think under the circumstances that this case is a re-election as is contemplated by sec. 830—which the Chief Justice considered to be decisive of the question before the Court. A careful reading of this section shews that it applies to a "person after his election to be tried by a jury." Here, strictly speaking, the prisoners have never elected to be tried by a jury. If there is

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any discrepancy or apparent contradiction between this section of the Code and the former sections referred to as amended in 1909, then the former, being the later enactments, would govern.

The Crown simply wants a judicial interpretation of the statute and the foregoing is my reading of it.

Defendants' appeal allowed.

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K. B.

Re CHAMRYK.

Manitoba King's Bench, Galt, J. November 14, 1914.

1. ALIENS (§ III—19)—ALIEN ENEMIES—ARREST BY MILITARY AUTHORITIES.

In performing the duty of arresting and detaining (*inter alia*) persons of a nationality at war with Great Britain who attempt to leave Canada and in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assist the enemy (Proclamation of August 15, 1914) a wide discretion is left to the military commanding officers, which will not ordinarily be reviewed or interfered with by the Courts under habeas corpus process.

Statement

MOTION for a writ of habeas corpus.

The writ was refused.

H. M. Hannesson, for the applicant.

E. Anderson, K.C., for the Dept. of Justice, and for Col. Lindsay, respondent.

Galt, J.

GALT, J.:—The material upon which the motion is based is an affidavit by the applicant as follows:—

1. That I was born in Galicia in the Empire of Austria-Hungary, but left the said empire at the age of 17 years, coming to Canada shortly thereafter.

2. That I am now of the age of 23 years and since my departure from Austria-Hungary and arrival in Canada I have continually resided in and worked as labourer in the said Dominion of Canada.

3. That I never enlisted in or served in the armies or forces of the Empire of Austria-Hungary or Germany, or any other enemy of the Kingdom of Great Britain and Ireland and the British Empire, and am not a reservist or otherwise subject to call for services in any of said armies.

4. That on or about the 28th day of September, 1914, I was arrested near Assiniboia, in the Province of Saskatchewan, by an officer of the Royal North West Mounted Police and sent to the City of Winnipeg.

5. That I have since and am now detained as a prisoner by the military authorities and in particular Col. Lindsay, in the said City of Winnipeg and unlawfully refused my liberty and forcibly detained against my will.

6. That at the time of my said arrest the said representative of the Royal North West Mounted Police enquired of me as to what I was doing and where I was going and I informed him that I was going to the State of Montana in the United States of America, for the purpose of homesteading, which was at that time my *bonâ fide* intention.

7. That I have never been in the service of the Empires of Austria-Hungary or Germany, or other enemy of the Kingdom of Great Britain and Ireland or the British Empire and have committed no criminal act or infringement of the criminal or other Code of the British Empire to my knowledge.

8. That I had no intention of leaving, did not and do not intend to leave Canada for the purpose of serving armies of or otherwise assisting any of the enemies of the Kingdom of Great Britain and Ireland or the British Empire, and I am prepared and willing to take my oath of allegiance and otherwise acquire the rights of citizenship with its attending obligations in the Dominion of Canada.

The applicant's brother, Iwan Chamryk, of the City of Winnipeg, states (paragraph 2): "That my brother is now of the age of 23 years, having arrived in Canada at the age of 18 years," and he believes his said brother Josef Chamryk is not friendly or working in the interests of the Austrian or German Empires, and was not leaving, and had no intention of leaving Canada for the purpose of enlisting or serving in any of the said armies or otherwise against the Kingdom of Great Britain and Ireland or the British Empire.

An affidavit by the applicant's solicitor was also read, setting forth the efforts he has made to obtain the release of his client.

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and shewing that the military authorities were holding an investigation with regard to the applicant, and a final conclusion that the applicant would not be given his liberty.

The application is opposed by Mr. Anderson, appearing both for the Department of Justice and for Col. Lindsay. An affidavit by Col. William Henry Lindsay contains the following statements:—

1. That I am a Lieutenant-Colonel in the militia of Canada on active service on the staff of military district No. 10, the head-quarters of which are at the city of Winnipeg aforesaid.

2. I am in charge of the prisoners of war interned at Fort Osborne barracks, the head-quarters for military district No. 10 aforementioned, and am acting under instructions from Col. Samuel Steele, District Officer commanding said military district, and also under Colonel Sherwood, Chief Commissioner of Dominion Police for Canada.

3. In the month of September, 1914, a member of the North West Mounted Police Force of Canada delivered over to me in my capacity as above mentioned Josef Chamryk to be interned as a prisoner of war upon the ground that the said Josef Chamryk attempted to depart from Canada with a view of assisting the enemies of Canada and of Great Britain, and the said Josef Chamryk is retained by me as a prisoner of war.

4. In my opinion there is reasonable ground to believe that said Josef Chamryk attempted to depart from Canada with a view of assisting the enemies of Canada and of Great Britain.

5. The persons who are attempting to obtain the release of the said Josef Chamryk are his brother and brother-in-law, who are both reservists in the army of Austria-Hungary, both married men, and their families residing in Austria.

It appears from the above material that the applicant is a subject of Austria-Hungary, now at war with Great Britain, and that he has been resident for some years in Canada, but shortly after the war broke out he decided to leave Canada for the

alleged purpose of homesteading in the state of Montana, one of the United States of America.

On August 15, 1914, the following proclamation was published in the Canada *Gazette*:—

Whereas a state of war exists between the United Kingdom of Great Britain and Ireland and the German Empire, and between the United Kingdom of Great Britain and Ireland and the Austro-Hungarian Monarchy;

And whereas certain instructions have been received from His Majesty's government in connection with the arrest and detention of subjects in Canada of the German Empire and of the Austro-Hungarian monarchy and particularly of those who attempt to leave Canada;

And whereas there are many persons of German and Austro-Hungarian nationality quietly pursuing their usual avocations in various parts of Canada, and it is desirable that such persons should be allowed to continue in such avocations without interruption—

Now know ye that by and with the advice of our Privy Council for Canada, we do by these presents proclaim and direct as follows:—

1. That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation.

2. That

(a) All German or Austrian or Austro-Hungarian officers, soldiers or reservists who attempt to leave Canada;

(b) All subjects of the German Empire or of the Austro-Hungarian monarchy in Canada, who attempt to leave Canada, and in regard to whom there is reasonable

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ground to believe that their attempted departure is with a view to assisting the enemy; and

(c) All subjects of the German Empire or of the Austro-Hungarian monarchy in Canada engaged or attempting to engage in espionage or acts of a hostile nature, or giving or attempting to give information to the enemy, or assisting or attempting to assist the enemy, or who are on reasonable grounds suspected of doing or attempting to do any of the said acts;

be arrested and detained.

3. That in addition to and without affecting the power already vested in the militia in that behalf power to effect the arrest and detention of all or any person or persons coming within any of the classes mentioned in paragraph (2) hereof be vested in the Chief Commissioner and the Commissioners and constables of the Dominion Police Force; the Commissioner, officers and constables of the Royal North West Mounted Police; and such other persons as may be authorized so to do by the Chief Commissioner of Dominion Police.

4. That such authorities and officers mentioned in paragraph (3) hereof, or the militia, be authorized to release any such person so arrested or detained as aforesaid of whose reliability they may be satisfied on his signing an undertaking in the form following:—

Undertaking.

I, at present of in the Province of , in the Dominion of Canada, do hereby declare that I am a German / an Austro-Hungarian subject; I now in consideration of my exemption from detention as a subject of Germany. / Austria-Hungary, do hereby undertake and promise that I will report to such official and upon such terms as the Canadian authorities may from time to time prescribe; that I will carefully observe the laws of the United Kingdom of Great Britain and Ireland and of Canada and such rules as may be specially laid down for my conduct; that I will strictly abstain from taking up arms and from doing any act of hostility towards

the government of this country, and that, except with the permission of the officer under whose surveillance I may be placed, I will strictly abstain from communicating to anyone whomsoever any information respecting the existing war or the movements of troops, or the military preparations which the authorities of Canada or Great Britain may make, or as respects the resources of Canada, and that I will do no act that might be of injury to the Dominion of Canada or the United Kingdom of Great Britain and Ireland and the Dominions and possessions thereof.

Dated this day of , 1914.

Witness:

....

5. That any such person so arrested and detained as aforesaid, of whose reliability the officer or authority making the arrest is not satisfied, or who refuses to sign such undertaking, or having signed same fails to abide by its terms, be interned by such authorities and officers or militia according to the usages and laws of war in such place as may be provided by the militia, and that if it be deemed necessary that guards be placed on persons so interned, such guards be furnished by the active militia of Canada on the request of such authorities or officers to officers commanding divisional areas and districts.

6. That all such authorities and officers or militia who may exercise any of the powers above mentioned be directed to report in each case to the Chief Commissioner of Dominion Police stating the name, address and occupation of the person detained or paroled, the date and place of detention and generally the circumstances of the arrest and detention and all such information as may be necessary or useful for the purposes of record and identification.

Of all which our loving subjects and all others whom these presents may concern, are hereby required to take notice and to govern themselves accordingly.

The following public notice dated September 2, 1914, was published in the Manitoba *Gazette* of September 19, 1914, by the authority of the Under-Secretary of State for External Affairs:

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To all whom it may concern.

It has come to the attention of the Government that many persons of German and Austro-Hungarian nationality who are residents of Canada are apprehensive for their safety at the present time. In particular the suggestion seems to be that they fear some action on the part of the Government which might deprive them of their freedom to hold property or to carry on business. These apprehensions, if they exist, are quite unfounded.

The policy of the Government is embodied in a Proclamation published in the Canada *Gazette* on the fifteenth day of August, A.D. 1914. In accordance with this Proclamation restrictive measures will be taken only in cases where officers, soldiers or reservists of the German Empire or of the Austro-Hungarian monarchy attempt to leave Canada or where subjects of such nationalities engage or attempt to engage in espionage or acts of a hostile nature or to give information to or otherwise assist the King's enemies. Even where persons are arrested or detained on the grounds indicated they may be released on signing an undertaking to abstain from acts injurious to the Dominion or the Empire.

The Proclamation after stating that "there are many persons of German and Austro-Hungarian nationality quietly pursuing their usual avocations in various parts of Canada and that it is desirable that such persons should be allowed to continue in such avocations without interruption," directs as follows:—

That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council, or proclamation.

Thus all such persons so long as they respect the law are entitled to its protection and have nothing to fear.

It is argued on the one hand by Mr. Hannesson that the applicant has been quietly pursuing his usual avocation in Canada, and although he is of Austro-Hungarian nationality, he is entitled to enjoy the protection of the law under the provisions of the Proclamation of August 15. On the other hand, Mr. Anderson contends that the applicant is an alien enemy and therefore disentitled to the usual rights of citizenship.

The questions arising in connection with this case are unusual and, having regard to the terms of the Proclamation, and Public Notice above quoted, are quite unprecedented.

Under a recent proclamation in England, set forth and commented on in the *Solicitor's Journal* for September 12, 1914, page 817:—

> The expression "enemy" in this proclamation means any person or body of persons of whatever nationality, resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country.

The writer of this article says:—

> It will be seen that the vexed question as to the position of German or Austrian subjects resident in this or a neutral country has been solved by the Proclamation in the way we have all along maintained; such aliens are not to be regarded as alien enemies.

The difficulty in which the applicant finds himself is that, on his own shewing, he is not entitled to the protection specially afforded by the Proclamation to persons of German and Austro-Hungarian nationality quietly pursuing their usual avocations and desiring to be allowed to continue in such avocations without interruption. His intention was, and probably still is, to leave the country.

A suspicious circumstance is noticeable in his affidavit where his age has been changed from 18 to 17 years, when he left

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Austria-Hungary, but his brother swears he was 18. The obligation to serve in these foreign armies as commonly understood is from 18 upwards.

Our Proclamation of August 15, sec. 2, expressly provides that persons in the position of the applicant, in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assisting the enemy, be arrested and detained. The applicant states in paragraph 8 of his affidavit that he is prepared and willing to take his oath of allegiance and otherwise acquire the rights of citizenship with its attending obligations in the Dominion of Canada; but he does not attempt to take advantage of the undertaking set forth in para. 4 of the Proclamation, which provides

> that such authorities and officers mentioned in paragraph (3) hereof, or the militia, be authorized to release any such person so arrested or detained as aforesaid of whose reliability they may be satisfied on his signing an undertaking in the form following, etc.

It is manifest from the Proclamation that a large number of German and Austro-Hungarian subjects are residing in Canada, many of them desiring to peaceably continue to follow their usual avocations; but there is undoubtedly good reason to believe that a large number would assist the enemy, if they could, either by joining the enemy's armies or by removing to a neutral country and giving valuable information to the enemy as regards conditions in Canada. The military authorities have been entrusted with the duty of arresting and detaining all such persons of enemy nationality in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assisting the enemy.

The duty is one of public policy and in performing it a wide discretion is left to the commanding officers in charge of the various districts.

In the present instance, Col. Lindsay states that, in his opinion, there is reasonable ground to believe that the said Josef Chamryk attempted to depart from Canada with a view to assisting the enemies of Canada and of Great Britain. He further points out that the persons who are attempting to obtain

the release of the said Josef Chamryk are his brother and brother-in-law, who are both reservists in the armies of Austria-Hungary, both married men, and their families residing in Austria.

I think it would be most unwise to hamper the actions of the militia to whom has been entrusted the duty of protecting this country from hostile acts of aliens.

The general nature of the writ of habeas corpus, as set forth in Halsbury's Laws of England, vol. 10, para. 90, is this:—

> The writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or private custody. It is a prerogative writ by which the King has a right to inquire into the causes by which any of his subjects are deprived of their liberty. It is a remedial mandatory writ by which the High Court and the Judges of that Court, at the instance of a subject aggrieved, can command the production of that subject and inquire into the cause of his imprisonment.

It is clear from the Proclamation set forth in the *Solicitor's Journal* that a German or Austrian subject resident in England is not to be regarded as an alien enemy. On the other hand it appears to me equally clear that such residents in Canada are not subjects of His Majesty.

Under existing conditions, and having regard to the terms of our Proclamation of August 15, I doubt whether any of such aliens has a right to this particular and extraordinary remedy of habeas corpus. At all events, I hold that the applicant has no such right.

For these reasons, the motion will be dismissed.

Application dismissed.

N. S.

S. C.

REX v. GOVERNOR OF CITY PRISON.
Ex parte GREEN.

Nova Scotia Supreme Court, Graham, E.J., Russell, Longley and Drysdale, JJ. December 3, 1914.

1. CRIMINAL LAW (§ IV E—125)—PLACE OF IMPRISONMENT—COMMON JAIL.

The "city prison" for the City of Halifax is a common jail within the Canadian Naval Service Act, 1910, ch. 43, to which the commander of a ship in the Canadian Naval Service may sentence one of his seamen to be imprisoned for insubordination.

2. CRIMINAL LAW (§ IV D—122)—IMPRISONMENT—WHEN NINETY DAYS EXCEEDS THREE MONTHS' LIMIT.

Where the imprisonment has commenced under a sentence for ninety days and at a time of the year which would not include the month of February, and, consequently, the sentence would not in the ordinary course exceed three months which was the maximum penalty allowed for the offence, it is not a ground for discharge on habeas corpus that a ninety day sentence may under certain contingencies exceed the statutory limit of three months.

[*R.* v. *Gavin*, 1 Can. Cr. Cas. 59, distinguished.]

Statement

MOTION by way of *habeas corpus* for prisoner's discharge. The prisoner who was a member of the crew of H.M.C.S. "Diana" was sentenced by the commanding officer of that ship to 90 days' imprisonment in the city prison at Halifax for several minor infractions of the English Naval Discipline Act 1866 (9 Chitty's Statutes, p. 159) and the Naval Service Act (Can.) 1910, ch. 43.

The warrant was dated and the imprisonment was to run from the 1st day of October, A.D. 1914. Russell, J., granted an order in the nature of a writ of *habeas corpus* returnable before himself in chambers, and on the return of same referred the matter to the Full Court.

The motion was dismissed.

W. J. O'Hearn, K.C., for the application.

A. G. Morrison, K.C., for the Canadian Department of Naval Service.

The judgment of the Court was delivered by

Graham, E.J.

GRAHAM, E.J.:—This is an application, under the statute, in the nature of a *habeas corpus* proceeding, addressed to the Governor of the City Prison for the City of Halifax, to release

a man by the name of Thomas Green. Green was imprisoned under the Naval Discipline Act, 1866 (Imperial) and the Naval Service Act of Canada, 1910, ch. 43, sec. 51. He was committed to prison by the commander of His Majesty's ship "Diana" at the port of Halifax for remaining absent over leave, and making use of threatening and insulting language towards a petty officer, and refusing duty and having a bottle containing spirits in his possesion in His Majesty's Dockyard.

It is unnecessary to deal with the question whether an application for *habeas corpus* can be made in time of war as the case can be decided upon other points.

The two points raised against the conviction in this case are: first, that the commander sent the prisoner to serve his term in the wrong place.

By the Canadian Naval Service Act the commander of such a ship may sentence the prisoner to a common jail of the district in which the sentence is imposed. The provision is in the following terms:—

"If such prisoner is senteneed to a term of less than two years he may be sentenced to imprisonment in the common jail of the district, county or place in which the sentence is pronounced, or if there is no common jail there, then in that common jail which is nearest to such locality, or in some other lawful prison or place of confinement other than a penitentiary in which imprisonment may be lawfully executed."

Here the place of imprisonment is the City Prison at Rockhead, and by statute, both by the City Charter and by Dominion Acts, this City Prison at Rockhead is constituted a jail for the City of Halifax, and it was the nearest prison to the Dockyard.

The second point upon which the conviction is attacked is that it is for the term of ninety days and by the statute the commander could not impose a sentence of more than three months.

The only point that could be taken is that the term imposed exceeds three months.

In the present case the imprisonment has commenced and a computation of time could not be possible where the present term would exceed three months. That is, in the ordinary course the month of February will not be included in the computation.

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There is no authority to controvert this. A decision of this Court was cited, *R.* v. *Gavin*, 1 Can. Cr. Cas. 59, in which, as the prisoner was not then serving his sentence, it might be possible that the month of February would come into the term. No objection can be raised in this case that the term would be less than the term imposed by the statute. Such a condition might arise where there was no maximum penalty but a fixed term of imprisonment. This point, then also fails, and the application must be dismissed.

Under the statute relating to *habeas corpus* proceedings it has been decided that there can be no costs.

Motion dismissed.

SASK.

S. C.

IMPERIAL ELEVATOR v. OLIVE.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown, and Elwood, JJ. July 15, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAUTIONS, CAVEATS AND ADVERSE CLAIMS—EQUITABLE MORTGAGES—MAY SUPPORT CAVEATS THOUGH NOT REGISTRABLE, WHEN.

A document in the form of a promissory note to which is added a clause whereby the maker as the registered owner of lands under the Land Titles Act, Sask., for valuable consideration "encumbers" lands specifically described for the benefit of the payee with the amount which he has promised to pay, will support a caveat filed by the payee in respect of the equitable mortgage which such document creates, although the document not being in the form prescribed by the Land Titles Act is in itself not capable of registration as a mortgage under the Act.

[*Imperial Elevator* v. *Olive*, 15 D.L.R. 103, varied; *Wilkie* v. *Jellett*, 26 Can. S.C.R. 282, applied; *Re Ebbing*, 2 S.L.R. 167; *Gaar Scott* v. *Gignere*, 2 S.L.R. 374; *Gilbert* v. *Reeves*, 4 S.L.R. 97; *Shore* v. *Weber*, 11 D.L.R. 148, distinguished.]

Statement

APPEAL by the plaintiff from the judgment of Lamont, J., *Imperial Elevator v. Olive*, 15 D.L.R. 103, involving the effect of an equitable mortgage as support for a caveat though in form not registrable under the Land Titles Act.

The appeal was allowed, NEWLANDS, J., dissenting, varying the trial judgment.

Alex. Ross, K.C., for appellants.

E. Gravel, for respondent.

Haultain, C.J.

HAULTAIN, C.J., concurred with ELWOOD, J.

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Newlands, J. (dissenting)

NEWLANDS, J. (dissenting):— The instrument under which the plaintiff company claims a lien against the lands of the defendants is in the form given in the Land Titles Act, ch. 41, R.S.S., for an incumbrance, being Form F, in the schedule to that Act. This form is provided by sub-sec. (2) of sec. 87 of the Act.

(2) Whenever any such land (that is land for which a certificate of title has been granted) is intended to be charged with or made security for the payment of an annuity, rent, charge or sum of money other than a debt or loan, in favour of any incumbrancee, the incumbrancer shall execute an incumbrance in form F in the schedule to this Act or to the like effect.

The word "incumbrance" is given a wide meaning by the Act, being a charge on land created or effected for any purpose whatever, and includes mortgages, mechanics' liens, and executions: sub-sec. 7, sec. 2. This, however, does not mean that a mortgage, mechanics' lien, or execution may be created by Form F, that form being by sub-sec. (2) of sec. 87 provided for that class of incumbrance given to secure an annuity or rent charge, while a mortgage is to be in the Form E to the Act as provided by sec. 87. Now, a

"mortgage" means any charge on land created merely for securing a debt or loan: sub-sec. (5), sec. 2,

which is the purpose for which the instrument in question in this case was given. As to whether or not such a document can be registered under the Land Titles Act was decided by this Court in *Rumely Co.* v. *The Registrar*, 4 S.L.R. 466. Lamont, J., in giving the judgment of the Court (p. 471), said:—

The document presented for registration, as I have said, shews on its face that its object is to secure a debt. It is therefore a mortgage, and can only be registered when it complies with Form I (Form E under the present Act). As it does not comply with that form it is not a registrable document.

My learned brother enters fully into the reasons for coming to that conclusion in the judgment cited, so that I need not repeat them here. The language which I have quoted applies with equal force to this case, therefore the document set out in the statement of claim is not a registrable document. By sec. 69 of the Act an instrument becomes operative "according to the tenor and intent thereof as soon as registered, and shall thereupon

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create, transfer, surrender, charge or discharge, as the case may be, the land or estate or interest therein mentioned in such instrument. Now, if the document in question cannot be registered so as to charge the land, can effect be given to it by registering a caveat founded upon it? This question was considered by this Court in *Re Ebbing*, 2 S.L.R. 167. At p. 176, Lamont, J., says:—

> If, under the circumstances of this case, the mortgagees were allowed to file the caveat, they would, so far as the protection of their claim is concerned, be obtaining practically the registration of the mortgage, and thus doing indirectly, by means of a caveat, what was prohibited under the Act without the statutory affidavit. That such was the intention of the legislature should only be held where the language of the Act is so clear as to leave no room for doubt, for it is a well recognized principle of interpretation, that "to carry out effectively the objects of a statute, it must be so construed as to defeat all attempts to do in an indirect or circuitous manner that which has been prohibited:" Maxwell on Interpretation of Statutes, 4th ed., p. 171,

and it was there decided that a caveat founded upon such an instrument could not be registered.

It was further contended on the part of the plaintiffs that the document in question was an equitable mortgage and that equitable interests were protected under the Act. That equitable interests are protected under the Act has been held in a number of cases. In *Sawyer Massey* v. *Waddell*, 6 Terr. L.R. 45, the instrument in question stated,

> and the purchasers hereby further agree with the said company that they shall have a charge and specific lien for the amount of the said purchase money and interest upon the said lands,

which were afterwards described, and I held that that language created an equitable mortgage on the land described, that the plaintiff had a lien upon the land and was entitled to a sale of it. When I used this language it was not my intention to hold that it was an agreement to give a charge in the Form F, but that is was an agreement to give a mortgage which would be in the Form E, as it was for a debt, and, therefore, an agreement to give a registrable instrument, and as the Courts will enforce agreements between the parties and would therefore compel the defendant in that case to give the plaintiffs a mortgage, and as equity considers as done what ought to be done, the plaintiff

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had such an interest as could be properly protected by caveat and enforced against the land. That is, however an entirely different case from the present one. When parties enter into an agreement which when carried out will result in an instrument which can be properly registered under the Act, then the Courts will compel the execution of such instrument and the plaintiff has an equitable interest in the land which can be turned into a legal interest, and he therefore has an interest in the land which can be protected by caveat. Now the document in this case is not an agreement to give a mortgage, it is a document which is complete in itself and there is no liability on the part of the defendant Olive to execute any other document to carry into effect the intention of the parties. The plaintiffs have got what they contracted for and neither in law nor in equity can they compel the defendants to give them anything else. The plaintiffs have deliberately selected for their security a form of document which the Courts have decided cannot be registered under the Act and one which, therefore, cannot charge the land in their favour as security and they have no equity to compel the defendant Olive to give them any other or further security, they therefore, in my opinion, have no interest in the land that can be protected by caveat. By their statement of claim they make no such claim, they do not say that the defendant Olive intended or agreed to give them a mortgage nor do they ask to have the document in question reformed to give them a mortgage, they ask solely to have it enforced as a lien against the land and to have it enforced they must either have it registered or given effect to by the Courts as if it was registered, and as I have pointed out this Court has decided that this cannot be done.

I am, therefore, of the opinion that the appeal should be dismissed with costs.

Brown, J.

BROWN, J.:—The Land Titles Act was not intended to have, and has not, the effect of shutting out equitable interests. Registration under the Act is not necessary to create such an interest: *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, 26 Can. S.C.R. 282. The document in question is clearly an equitable mortgage, and

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therefore creates an equitable interest in favour of the plaintiffs in the land mentioned therein: 21 Hals., p. 74; *Gorringe* v. *Irwell India Rubber & Gutta Percha Works*, 34 Ch.D. 128, at 134. It is admitted that the document, being in effect a mortgage, and not being in the form prescribed by the Land Titles Act, cannot be registered as such. In *Re Rumely Co.*, 4 S.L.R. 466, the learned trial Judge has held that the document is not only not registrable as such, but, further, is not registrable by way of caveat, and in support of that contention the following cases are cited: *Re Ebbing*, 2 S.L.R. 167; and *Gaar Scott* v. *Guigere*, 2 S.L.R. 374. In these cases an attempt was made to register, by way of caveat, a mortgage on land for which the patent had not as yet reached the Land Titles office. The Land Titles Act allowed the registration of a mortgage given before the issue of patent, provided there was produced and left with the registrar an affidavit made by the mortgagor shewing that he was entitled to give the mortgage. The question to be determined was, as stated by Lamont, J., at p. 173 of the report in the *Ebbing* case:—

> Is it the duty of a registrar under our Act on receiving a caveat in the statutory form, to file the same against lands, the patent for which is not of record in his office?:

and it was held in that case, at p. 178, that:—

> Where, therefore, there is presented to the registrar for registration a mortgage or a caveat founded thereon affecting lands, the patent for which is not of record in his office, the registrar is entitled to refuse to register the mortgage or file the caveat unless the applicant first satisfies him by affidavit, in Form K, that the mortgagor is entitled to create the mortgage, and in case the mortgagor mortgages land entered for by him as a homestead or pre-emption under the Dominion Lands Act, the affidavit must also state that he has been recommended for patent and has received his recommendation in accordance with the provisions of the said Act.

I am of opinion that what was laid down in these cases should not be extended any further than the special circumstances of those cases warrant. In the case at bar there was no question of the patent not having been issued or of the right of the mortgagor to create the mortgage. The section of the Land Titles Act which empowers registration by way of caveat is No. 125, and is in part as follows:—

Any person claiming to be interested in any land under any will, settlement or trust deed, or under any instrument of transfer or transmission, or under any unregistered instrument or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is registered in the name of some other person or otherwise, may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed as hereinafter provided unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat.

This section is very broad in its scope, and, in my opinion, is intended to do what in very plain language it purports to do; namely, to confer the right of registration by way of caveat on any one claiming any beneficial interest in land for the purpose of thereby protecting such interest. Wetmore, C.J., referring to this section in the case of *Re Wark Caveat*, 2 S.L.R. 431, at 434, says:—

The expression in sec. 136 of the Act, that "any person claiming to be interested in the land" . . . "may lodge a caveat with the registrar," is not governed by sec. 79. The word "claiming" gives this section a wider significance, and I apprehend that it is good, therefore, to enable any person claiming a beneficial interest of any sort to lodge his caveat so as to prevent the land being disposed of, and obtaining a decree of the Court retaining his rights against the person whom he deems likely to be disposed to interfere with them.

The wording of the section is surely broad enough to cover the case of an equitable mortgage, and the mere fact that the Act prescribes a form of mortgage for registration, and that the unregistered instrument which creates the equitable mortgage is not in that form, should not, in my opinion, constitute a bar to the protection of such mortgage interest.

The provision for registration by way of caveat is, in my judgment, for the very purpose, *inter alia*, of enabling parties to protect interests which, owing to a defect in the instrument or want of form or otherwise, they cannot protect by the ordinary process of registration. The caveator does not in this way stand in the same position as a party whose mortgage is in proper form and duly registered; he must go to the Courts for the purpose of enforcing his remedy.

In my judgment, the appeal should be allowed, and the judg-

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ment of the learned trial Judge varied in the manner suggested by my brother Elwood.

ELWOOD, J.:—Prior to April 25, 1911, the defendant Margaret J. Olive, was indebted to the plaintiff in the sum of $289 for lumber supplied to her by them. On that day, in consideration of the release of other securities and an extension of the time for the payment of said indebtedness, she executed and delivered to the plaintiff a document in the following form:—

Moose Jaw, Sask., April 25, 1911.

On or before the first day of July, 1911, for value received, I promise to pay to Imperial Elevator & Lumber Co., or order, the sum of $289.00 at the office of the Imperial Elevator & Lumber Co., Moose Jaw, with interest at the rate of 10 per cent. until due and 12 per cent. per annum after due until paid.

In consideration of Imperial Elevator & Lumber Company extending the date for payment of the above indebtedness to the date of maturity above mentioned, and in consideration of said indebtedness, I, being registered as owner of an estate in fee simple, subject, however, to such mortgages and encumbrances as are notified by memorandum underwritten in the undermentioned land and desiring to render the said land available for the purpose of securing to and for the benefit of Imperial Elevator & Lumber Company the amount of the above mentioned indebtedness and interest as aforesaid, do hereby encumber the said land for the benefit of Imperial Elevator & Lumber Company with the amount of the said indebtedness to be paid as hereinbefore mentioned and subject as aforesaid the said Imperial Elevator & Lumber Company shall be entitled to all powers and remedies given to an encumbrancee under the Land Titles Act. If I should sell and dispose of any real property or permit judgment to be recovered against me or make default in payment of principal and interest on any prior encumbrance on the said land, or if for any reason Imperial Elevator & Lumber Company should consider the said indebtedness insecure, the said company may immediately declare the said indebtedness due and payable forthwith by mailing a notice of such declaration to me at the undermentioned post-office, and immediately thereafter all remedies hereby given for recovery of said sum shall be available to and enforceable by said company. Any action to be brought hereunder may be brought, carried on, and completed by the company in the Judicial District of Regina, where the head office of such company for Saskatchewan is situated. The taking of this security shall not prejudice the right of the said company to file a lien under the Mechanics' Lien Act in respect of said indebtedness. And for the consideration aforesaid, I hereby waive all rights to exemptions given to me by any statute or ordinance in force in this Province. The land above referred to is Lots 31, 32, 33, Block 42, Victoria Heights, City of Moose Jaw, Province of Saskatchewan.

Witness: MARGARET J. OLIVE, (Name)

F. A. Lenhart. Moose Jaw. (P.O.)

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On the strength of this agreement the plaintiff registered in the Land Titles office a caveat against the said lots, which caveat was registered on April 25, 1911. On May 11, 1911, Margaret J. Olive executed an agreement in writing by which she agreed to sell lot 33 to the Russell Realty and Brokerage Co., which was comprised of the defendant Primeau and his brother. On May 27, she gave them an agreement of sale of the other two lots. In December, 1911, the plaintiffs saw Primeau and told him that they had a lien upon the lots, and that unless Mrs. Olive's indebtedness to them was paid they would foreclose their lien. Primeau then went to Mrs. Olive in reference to the matter, and she gave him an order to pay the plaintiffs the amount due to her on November 11, 1911, and on November 27, 1911, under the agreements of sale on the said lots. On December 16, 1911, Primeau went to the plaintiff and was again told by the plaintiff that if he did not pay up this indebtedness the plaintiff would foreclose on the lots. By reason of this, and not by reason of having an order from Mrs. Olive, Primeau then paid the plaintiff company $165.70, being one-half the principal and all interest due up to that time. He was then granted a further extension of time of 60 days in which to pay the balance of the said indebtedness, on the condition that he would undertake and agree with the plaintiff to pay the balance of this debt at the time stated. Primeau thereupon orally agreed to pay said debt, and at the request of the plaintiff, signed his name on the back of the document sued upon in this action. Subsequently Primeau came to the conclusion that the plaintiffs had no valid lien on the property, and refused to pay the balance of the debt in question. The plaintiffs then brought this action against all the defendants, claiming personal judgment against the defendants Olive and Primeau, and also a declaration that they had a valid lien upon the land, and asking for a sale of the lots.

Section 125 of the Land Titles Act, ch. 41, R.S.S., provides in part as follows:—

> Any person claiming to be interested in any land under any will, settlement or trust deed, or under any instrument of transfer or transmission, or under any unregistered instrument . . . or otherwise, may lodge a caveat with the registrar to the effect that no registration of any transfer

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or other instrument affecting the said land shall be made and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed, as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat.

The judgment appealed from in part (15 D.L.R. 103, at 104) contains the following:—

> The first question is, did the plaintiffs have a valid caveat on the property? The document on which the caveat was founded shews on its face that the security attempted to be taken was for a past indebtedness. Being given to secure payment of a debt *it is in effect a mortgage*. Where a creditor takes a mortgage security, that security must be in the form prescribed in the Act: Land Titles Act, sec. 87; *Re Rumely Co.*, 4 S.L.R. 466. Being in effect a mortgage, and not being in proper form, it is not, under the Act, a security for the debt, and the plaintiffs could not, therefore, found a valid caveat upon it: *Gaar Scott* v. *Guigere*, 2 S.L.R. 374; *Shore* v. *Weber*, 11 D.L.R. 148. To justify the filing of a caveat, the instrument on which it is founded must shew that under it some interest in the land has passed to the caveatee. As the document upon which the plaintiffs base their right to file a caveat does not give them any interest in or security on the land, the caveat founded thereon is invalid.
>
> The plaintiffs in the present case are in no better position than were the appellants in *Gilbert* v. *Reeves & Co.*, 4 S.L.R. 97, and therefore are, so far as the land is concerned, simply contract creditors. As *against Mrs. Olive they might be entitled to a lien* upon all her interest in the lots. That lien could, in any event, only bind the interest she had at the time of the decree, and as she has now no interest in the property, the title having passed to Primeau and his brother, there is nothing to which the lien could attach.

I shall proceed to deal with the cases above referred to.

The case of *Re Rumely Co.* above cited merely decides that where the document by which an owner of land seeks to charge his land shews on its face that its purpose is to secure a debt or a loan it is a mortgage within the meaning of the Act, and in order to be registrable must be in Form J or to a like effect: 4 S.L.R. 472. All that was decided in that case, as I understand it, was that *the document* in question, being in effect a mortgage, but not in the form provided by the Act, could not be registered.

With deference to the opinion expressed by the learned trial Judge as to the effect of *Gaar Scott* v. *Guigere*, *supra*, that case, as I understand it, is simply authority for the proposition that where there is presented to the registrar for registration a mortgage or a caveat founded thereon affecting lands, the patent for

which is not of record in his office, the registrar is entitled to refuse to register the mortgage or file the caveat unless the applicant first satisfies him by affidavit in the proper form that the mortgagor is entitled to create the mortgage; and, in that case, there being no evidence either that such an affidavit had been made or that the mortgagor had been recommended for patent, the land being the homestead of the mortgagor under the Dominion Lands Act, the registrar should have refused to file the caveat.

The case of *Re Ebbing*, 2 S.L.R. 167, referred to in the last case merely decided that the registrar could not accept and register a mortgage which the caveator claimed until the Crown grant was received by the registrar or until he was satisfied by a proper affidavit that the mortgagor was entitled to create the mortgage; and that as the mortgage could not be registered, a caveat founded on such a mortgage could not be registered.

Those decisions do not, in my opinion, go anything like as far as is contended. They simply hold, under the particular circumstances of those cases, that, in order to register a mortgage or a caveat, founded on a mortgage, there must be evidence to satisfy the registrar that the mortgagor is *entitled to create a* mortgage, and that until there is evidence that the mortgagor is entitled to create a mortgage the registrar should refuse to register the mortgage or the caveat founded upon the mortgage.

The case of *Shore* v. *Weber*, 11 D.L.R. 148, merely holds that an encumbrance which, on the face of it, shews that it was given for a debt due by the defendant to the plaintiff, is in effect a mortgage, and, not being in the form provided by the Act for mortgages, could not be registered. At the conclusion of the judgment in the last case, a reference is made to *Gaar Scott* v. *Guigere*, above, and if the judgment in *Shore* v. *Weber*, *supra*, is intended to express the opinion that *Gaar Scott* v. *Guigere* is authority for the proposition that a mortgage which is not in the form prescribed by the Act cannot in any case be registered by way of caveat, I must dissent from any such opinion.

The case of *Gilbert* v. *Ullerich*, 17 W.L.R. 157, was a case in which the defendants Reeves & Co. claimed to be subsequent encumbrancees and to be entitled to have paid out to them cer-

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tain moneys paid into Court after the satisfaction of the first mortgage. The matter came up by way of originating summons, and it appeared that Reeves & Co.'s claim was under an order in writing for certain farm machinery, which order contained an agreement to deliver to Reeves & Co. at any time upon demand a mortgage on the lands therein mentioned. This order was not registered, but a caveat founded on the order was registered. It was held that the order for machinery not being registered, the land did not become liable for security, that the order was neither an encumbrance by which the land is charged nor was it a lien upon the land, that before Reeves & Co. could have a lien against the land they must prosecute their claim to judgment, and either obtain an order of the Court making their claim a lien upon the land or obtain judgment for the amount due them and file the execution in the Land Titles office, and that this could not be done under an originating summons. It will be perceived that in that case a caveat was filed, and if I understand that judgment correctly it merely held that the procedure therein taken to realize under the caveat was not the correct one; that if an action had been brought in the Court to realize under the caveat and the document upon which it was founded, that such an action could be properly brought, and that if the facts justified it an order could be made charging the land with the amount of the order with respect to which the caveat was lodged. In fact, Mr. Justice Newlands, in his judgment at pp. 157 and 158, quotes Mr. Justice Lamont, whose judgment was appealed from, as follows:—

> The matter was heard in Chambers before my brother Lamont, and he held that the document under which they claimed did not create an incumbrance against the said land, and that they were not, therefore, entitled to share in the moneys realized from the sale of the land until their claim was prosecuted to judgment and they were given a lien upon the land by order of the Court.
>
> And he further held that this could only be done by action, and not under proceedings by originating summons for foreclosure upon a mortgage.

In *Tucker* v. *Armour*, 5 W.L.R. 36, the facts were briefly as follows: the defendant, on October 18, 1904, leased the land in question to one Herbert Tucker for the term of ten years from March 23, 1903, at a monthly rental of $12, which lease was duly

registered in the land titles office at Regina, and a memorandum thereof endorsed on the defendant's certificate of title. On May 10, 1905, Herbert Tucker assigned all his interest in the lease to William Tucker, the plaintiff, by an assignment duly executed under seal. Since then the plaintiff had paid rent to the defendant by cheque up to November 30, 1905. This assignment of lease was never registered. In September, 1905, the plaintiff sublet the premises to one Glassermann from September 15, 1905, to June 1, 1906. On March 6, 1906, there being three months' rent due to the defendant by the plaintiff, the defendant re-entered on the premises, and at the time of the trial held the same. On March 9, 1906, the plaintiff tendered to the defendant all the rent due by him, which the defendant refused to accept, and the plaintiff brought his action to recover possession. It was objected on the part of the defendant that the plaintiff had no title to the premises, the assignment to him from the original lessee never having been registered as required by the Act. Mr. Justice Newlands, in his judgment, at p. 36, says:—

> This section is similar to sec. 59 of the Territories Real Property Act, under which *Wilkie* v. *Jellett*, 2 Terr. L.R. 133, affirmed by the Supreme Court of Canada, 26 Can. S.C.R. 282, was decided. There it was held that, though the registered owner was the legal owner of the lands, he was a bare trustee for an unregistered transferee, and that the Courts would give effect to the title of the equitable owner, and no action for the recovery of land can be defeated for the want of the legal estate where the plaintiff has the title to the possession.

This judgment was affirmed by the Court *en banc*, 6 W.L.R. 93. At p. 94, Mr. Justice Scott says:—

> I am of opinion that the trial Judge was right in the view he expressed that the principle laid down in *Wilkie* v. *Jellett*, is applicable as well to the Land Titles Act as to the Territories Real Property Act, and that, therefore, the assignment, though unregistered, transferred to the plaintiff all the interest of the original lessee.

It was contended that the document in the case at bar, being substantially in the form provided by the Act for incumbrances, and the facts of the case having shewn that it was not an incumbrance within the meaning of the Act, it could not be treated as a mortgage: Hals., vol. 21, states, at p. 70:—

> A mortgage consists of two things. It is a personal contract for a debt and an estate pledged as security for the debt.

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At p. 74:—

An equitable mortgage is a contract which creates a charge on the property, but does not pass the legal estate to the creditor.

And, at p. 83:—

An equitable charge is a security which does not transfer the property with a condition for reconveyance, but only gives a right to payment out of the property. It entitles the holder to have the property comprised therein sold to raise the money charged thereon, but it does not amount to an agreement to give an equitable mortgage, and the strict mode of enforcing it is by sale and not by foreclosure.

And later on:—

An agreement to charge real or personal estate made for valuable consideration by a person who has power to create such a charge operates as a valid equitable charge thereon.

In *Gorringe* v. *Irwell India Rubber & Gutta Percha Works*, 34 Ch.D. p. 134, Cotton, L.J., says:—

When there is a contract for value between the owner of a chose in action and another person which shews that such person is to have the benefit of the chose in action, that constitutes a good charge on the chose in action. The form of words is immaterial so long as they shew an intention that he is to have such benefit.

In *Sawyer Massey Co.* v. *Waddell*, 6 Terr. L.R. 45, at p. 48, Mr. Justice Newlands, referring to an agreement whereby the purchasers agreed that the vendor should have a charge and specific lien for the amount of the purchase-money and interest, says, as follows:—

This language, in my opinion, creates an equitable mortgage on the land described in this document. In Robbins on Mortgages, p. 50, it is stated, "any agreement in writing and properly signed, however informal, by which any property, real or personal, is to be security for a sum of money owing or advanced, is a charge and amounts to an equitable mortgage."

In *Shore* v. *Weber*, 11 D.L.R. 148, there is the following:—

The incumbrance on the face of it shews that it was given for a debt due by the defendant to the plaintiff. Being given to secure payment of a debt, it is in effect a mortgage.

In *Re Wark Caveat*, 2 Sask. L.R. 431, at 434, Wetmore, C.J., says:—

The expression in sec. 136 of the Act, that "any person claiming to be interested in land . . ." may lodge a caveat with the registrar is not governed by sec. 79. The word "claiming" gives this section a wider significance, and I apprehend that it is good, therefore, to enable any person claiming a beneficial interest of any sort to lodge his caveat so as to prevent the land

being disposed of, and obtaining a decree of the Court retaining his rights against the person whom he deems likely to be disposed to interfere with them.

In *McEacharn* v. *Colton*, [1902] A.C. 104, at 107, Lord Macnaghten says:—

> The remedy by injunction seems to be all the more necessary in Australia, because, if the assignee gets on the register, very serious mischief may be done, as the learned Judges of the Supreme Court have pointed out.

And at p. 105 I find the following:—

> Boucaut, J., referred to sections 69, 70, and 151 of this Act, and observed that "a registered title thus being made indefeasible with provisions which would enable the perpetration of gross fraud unless some mode were provided of summarily preventing an attempted fraud or wrongdoing, the system of caveats was devised by which any person claiming to be interested in land may lodge a caveat forbidding the registration or any treating with land."

The report does not say so, but I assume that Boucaut, J. is one of the Judges referred to by Lord Macnaghten in the above quotation.

In *McCullough & Graham*, 5 D.L.R. 834, it was held that where the claim of the caveator is not founded upon a written document, the words "or otherwise howsoever" which follow the description of interests which may be protected by the recording of a caveat are broad enough to cover a partnership interest in land not based upon any writing.

In *Re Massey & Gibson*, 7 Man. L.R. 172, 178, Killam, J., says, as follows:—

> The position of trusts and equitable interests under the corresponding statute of the colony of Victoria is clearly stated in Mr. A'Beckett's work upon the Transfer of Land Statute of that colony. At page 58 he says, "There is no doubt that, as against the proprietor, trusts and contracts may be enforced as formerly, and although a trustee may be absolute proprietor under the Act, a Court of equity will reduce or deprive him of his interest or compel him to apply its proceeds as justice may require. There is this marked distinction between the statute and the general law, that the statute will not by registration recognize a trust or permit the separation of legal and beneficial ownership for the purposes of dealing. The trust may be created as between the parties to the instrument in any manner they please, as under the general law, and a copy of the trust deed may be deposited with the registrar for safe custody and reference. The land may be reached through the trustee, although the trust will not be attached to the land in such a manner as to be enforced against a person acquiring it without fraud on his part." He shews, further, that the method by

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which a vendee of land is to protect himself from a transfer of the vendor's estate to any other than himself is by entering a caveat.

At p. 180, Bain, J., says:—

It is quite clear, I think, that equitable estates and interests can be created and will arise by implication in these lands just as in the case of lands that have not been brought under the Act, and that Courts of equity acting upon the registered owner *in personam* will still recognize and give effect to them.

In *National Bank of Australia* v. *Morrow*, in Hunter's Torrens Title Cases, at p. 306, it was held that a sale by the sheriff under a *fi. fa.* does not necessarily exclude the rights of an unregistered equitable mortgagee whose right has accrued before the service of a copy of the writ of *fi. fa.* upon the registrar of titles. In Hogg's Australian Torrens System, at p. 1034, I find the following:—

The extreme view has been taken in New Zealand, that, in order to confer the right to protection by caveat, the interest claimed must be the right to have a registered estate or interest in the land, or, in other words, must be an interest which can be turned into a registered estate or interest, but it seems to have been admitted that in order to be entitled to become a registered interest it would have been sufficient if the interest were such as would, in an English Court of equity, have been considered an actual interest in the land, and not a mere personal or collateral contract.

And again, at p. 1036:—

But the interest of a mortgagor or a mortgagee, *however informal*, or of a person who claims the whole of or a share in the purchase-money or the proceeds of the sale of the land, is sufficient to confer a right to caveat.

In *Wilkie* v. *Jellett*, 26 Can. S.C.R. 282, above referred to, the Chief Justice of Canada, at p. 288, says:—

I am of opinion that this judgment, and the reasons given for it in the opinion of the Court, written by Mr. Justice McGuire, were entirely right, and that there is no foundation for the present appeal.

And, at p. 294:—

So far from equities being shut out, there are numerous indications, as pointed out in Mr. Justice McGuire's judgment, that it was the intention to conserve them. As regards authority, the *National Bank* v. *Morrow* (quoted above), appears to me directly in point. In that case the Supreme Court of Victoria held that an unregistered equitable mortgage was entitled to priority over a registered execution, and not only over the execution creditor but also over a purchaser from a sheriff under the execution but whose transfer had not been registered.

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In *Thompson* v. *Yockney*, 8 D.L.R. 776, the plaintiff sued for specific performance of a contract for the sale by him to the defendant H. Y. of lot 39. By the agreement the deferred portion of the purchase-money was to be secured by a mortgage on lot 39 and on a portion of lot 38 owned by H. Y. The plaintiff registered a caveat against lot 38, and afterwards a mortgage of lot 38 by the defendant H. Y. in favour of the defendant C. E. Y. was registered. The defendant C. E. Y. counterclaimed for the removal of the caveat. It was held that the plaintiff's caveat was properly registered, and that he was entitled to specific performance of the agreement set out in the statement of claim, a declaration that the agreement formed an equitable mortgage on lot 38, and an order for sale thereof in default of payment. Mathers, C.J., 8 D.L.R. 776 at 778, says:—

> Under the Australian system a mortgagee is held to have an interest, but not an estate. A mortgage is a charge and nothing more. . . . It confers an interest but no estate. *Per* Owen, J., in *Reid* v. *Minister of Public Works*, 2 S.R.N.S.W., at p. 416. Even a mortgage by deposit of the certificate of title gives the mortgagee an interest in the land: *Tolly* v. *Byrne*, 28 Vict. L.R. 95. In that case O'Beckett, J., said, at p. 101, "I cannot conceive any sound ground for saying that it is not an interest in the land. It amounts to a contract between the parties that security shall be given over that land for the debt for which it is deposited." According to the principles of the Torrens system, any right conferred by contract relating to land against the registered proprietor is a sufficient interest to support a caveat: Hogg, p. 1037.

The above decision was affirmed on appeal to the full Court of Manitoba.

In *Loke Yew* v. *Port Swettenham Rubber Co.*, [1913] A.C. 491, one Eusope was the registered owner of 322 acres of land in Selangor, as to 56 acres of which the appellant was in possession under unregistered Malay documents constituting him the owner subject to the payment of an annual rent to Eusope. The respondents, who had knowledge of the appellant's interest, bought from Eusope the 322 acres excepting the said 58 acres. A transfer of the whole 322 acres was prepared, and in order to induce Eusope to sign it the respondents' agent told him that if he did so the respondents would purchase the appellant's interest, and signed a document which stated, "As regards Loke Yew's interest I shall have to make my own arrrangements."

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The respondents, having obtained thereunder registration of the entire 322 acres, called upon the appellant to give up possession of the 58 acres, and upon his failing to do so commenced an action, claiming possession thereof and damages. The appellant asked for rectification. Held, that the action should be dismissed and the respondents ordered to execute and register in the appellant's name a grant of the 58 acres subject to the rent reserved. It would appear from a perusal of the above case that the documents as to the 58 acres were of a very informal nature, in the Malay language, and quite insufficient for registration purposes.

From a perusal of an article by James Edward Hogg in vol. 29 of the *Law Quarterly Review*, p. 438, it would appear that affecting the above case were the following Australian enactments, namely:—

Land shall not be capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with this regulation (statutory enactment), and every attempt to transfer, transmit, mortgage, charge or otherwise deal with the same except as appointed *shall be null and void and of none effect.*

The duplicate certificate of title issued by the registrar to any purchaser of land shall be taken by the Courts as conclusive evidence (of title), and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.

Instruments registered in respect of or affecting the same land shall, notwithstanding any express, implied or constructive notice, be entitled to priority according to the date of registration and not according to the date of such instrument itself.

At p. 440 Mr. Hogg says:—

There is the same conflict between the cases in Canada as in Australia with respect to the effect of notice of an unregistered title, and so far as Canadian statutes are framed upon the model of the Australian, the decision in *Loke Yew* v. *Port Swettenham Rubber Company* will apply.

At p. 504 of the 1913 Appeal Cases, dealing with the above case, Lord Moulton says:—

Counsel for the plaintiffs therefore argued that under the provisions of the Registration of Titles Regulation, the plaintiffs possessed an indefeasible title to the land, and that under the provisions of section 4, all the sub-grants were null and void and of none effect.

And further down:—

Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The Court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly.

That case seems to me to be very strong authority for the contention that the Courts will, notwithstanding the provisions of the Land Titles Act, recognize and give effect to all equitable interests where they are, of course, properly protected if protection is required. It seems to me quite clear from the extracts which I have quoted from numerous cases above, that the effect of the document sued on in this action was to create an equitable mortgage; that the plaintiff, having filed a caveat, protected its interest under that equitable mortgage, and now, having come into Court, is entitled to have granted to it the relief which it claims under the mortgage. The contention that the Land Titles Act having provided a form for a mortgage, and that form not having been followed, deprives the plaintiff of its rights, surely is not any stronger than the contention in *Wilkie* v. *Jellett*, *supra*, and *Tucker* v. *Armour*, *supra*, that the same Act having provided that no instrument until registered shall be effectual to pass any estate, deprives the holders of unregistered instruments of the rights purported to be granted to them by such instruments. Counsel for the appellant on the argument admitted that he could not succeed in any personal claim against the defendants other than Margaret J. Olive.

In my opinion, therefore, the judgment of the learned trial Judge should be varied by ordering the usual sale of the lands in question and directing the proceeds of that sale to be applied on account of the judgment which was ordered to be entered against the defendant Olive, and on account of the costs of the original action and of this appeal against the defendant Primeau. The plaintiff should have its costs of this appeal.

Appeal allowed.

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DAYNES v. BRITISH COLUMBIA ELECTRIC R. CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. March 2, 1914.

1. TRIAL (§ II C—111)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY WHEN—WITHDRAWN UNDER WHAT TEST.

Contributory negligence is *primâ facie* a question for the jury, and only where it is very clear that no jury could reasonably find otherwise should a case be withdrawn from the jury on the ground that contributory negligence has been established.

[*Daynes* v. *B.C. Electric*, 7 D.L.R. 767, 17 B.C.R. 498, reversed.]

2. WITNESSES (§ II A—32)—REFRESHING MEMORY—REFERENCE TO NOTES MADE AT TIME OF TRANSACTION.

A witness may properly be asked to refresh his memory by looking at a copy of his notes which he was prepared to verify as having been made by himself from the original which was a transcript of his stenographic report of the interview between the parties; and refusal to permit that course is ground for a new trial where it is impossible for the appellate Court to say that its rejection did not materially affect the issue.

[*Daynes* v. *B.C. Electric*, 7 D.L.R. 767, 17 B.C.R. 498, reversed.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, 7 D.L.R. 767, 17 B.C. Rep. 498, reversing the judgment entered by Hunter, C.J., on the findings of the jury at the trial, and dismissing the plaintiff's action with costs.

The appeal was allowed, and a new trial granted.

S. S. Taylor, K.C., for the appellant.

Ewart, K.C., for the respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I concur in the judgment ordering a new trial.

Idington, J.

IDINGTON, J.:—I think this appeal should be allowed with costs, save so far as the costs incidental to the appeal may have been increased by reason of the appeal seeking to resist the granting of a new trial. It does not seem to me a case where the rule applicable to divided success can be applied.

The rule invoked by the judgment of the learned Chief Justice of the Court of Appeal does not seem to me to have had any statutory support binding the company and its employees to observe same.

And on the evidence, the rules, which are put forward as binding the appellant do not seem to have been adopted by the company. Indeed, they seem to have been so ignored by the manage-

ment of the company in the running of the cars in question that respondent cannot now rely on same as binding appellant and other employees.

The defence set up by the pleading and particulars given thereunder makes no allusion to the breach of any such rules by respondent. The case before us, therefore, does not permit of any such defence save in so far as the rules themselves be conformable with good practice according to the recognized system of the management of the company in running the cars in question.

The case must be tried according to the recognized system or practice of the company in that regard, and the duty which the law imposes on any such company to adopt reasonable methods of safety and, upon any one occupying such a position in the service as appellant did, to take due care in avoiding negligence so far as he reasonably could in accordance with the requirements of such a service and the discharge of his duties thereunder.

It would seem from what transpired at the trial as if the company's management looked upon the exchange of staffs carried by crossing cars as a sort of block system and in itself thus excluding the application of the rule invoked.

There is evidence to support the verdict, and no such clear, unconflicting evidence to sustain the charge of contributory negligence as the proximate cause of the accident as would entitle a Judge to withdraw the case from the jury and dismiss the action.

However, I, with great respect, think the learned trial Judge erred in rejecting the evidence tendered during the examination of the witness McCutcheon, and see no escape from directing a new trial.

Under the circumstances I cannot say that there has been no miscarriage of justice resulting from such misdirection. The costs of the trial should abide the event of the new trial.

DUFF, J.:—I think Mr. Taylor has succeeded in establishing his contention that r. 91, which was so much relied upon in the Court below, was not observed by the company in the operation of the line in question. The rule in its nature seems to be one impossible to apply in its entirety to a line operated as this was. Rule 210 shews that this system required, and, indeed, it is the very basis of the system, that all trains shall move either by time-

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table or pursuant to special written orders. Admittedly there was no time-table, and if there were written orders they were apparently exceptional. The defence based upon the rule was obviously an afterthought. It was not set up in the pleadings, and appears to have occurred to nobody until counsel for the respondents began to examine the book of rules which was put in evidence by counsel for the appellant. The question of substance appears to be whether the jury could reasonably reject the defence set up in the pleadings, and insisted on at the trial, *viz.*, that the appellant cannot be acquitted of contributory negligence in approaching Strathcona Station without having his car under better control. I have carefully considered all the circumstances bearing upon this point. The point is a doubtful one, but on the whole I think the view of the learned Chief Justice, before whom the case was tried, is the better view, and that it was proper that the jury should be asked to pass upon the question. I do not enter into the evidence in detail, because I concur with the opinion expressed by two of the learned Judges of the Court of Appeal that the evidence of McCutcheon was improperly rejected, and that on that ground there ought to be a new trial. As to the costs, I think the appellant is entitled to the costs in this Court, and the respondents should be entitled to the costs of the appeal to the Court of Appeal. The costs of the former trial should abide the result of the new trial.

Anglin, J.

ANGLIN, J.:—The jury was fully justified in finding that the defendants were guilty of gross negligence because of their defective system, or utter lack of system, in the operation of their railway. With great respect, the earlier part of r. 91, for breach of which the majority of the learned Judges of the Court of Appeal have found the plaintiff to have been guilty of contributory negligence, cannot, in my opinion, be invoked by the defendants. The particulars of contributory negligence delivered by them make no allusion to this breach of rules. The evidence shews that r. 91 was not enforced in the practice of the company. Indeed, the methods adopted in operating their railway would seem to have made it impracticable to carry out that rule in so far as it relates to keeping trains five minutes apart. The necessary means were not provided. I rather think that if disposing of this

case as a trial Judge sitting without a jury I would not improbably take the view of the learned Chief Justice of the Court of Appeal that the proximate cause of the accident in which the plaintiff was injured was his own failure to have his car, when coming into Strathcona Station, under proper control, having regard to his expectation that the preceding car, the "Cloverdale," might still be stopping at that station, to the fact that the night was dark and foggy, the range of vision being only from eight to twenty feet at the point in question, and to the requirement of r. 91 (which, though not capable of being enforced in practice in other respects, is, in this particular merely an expression of an obligation entailed by common prudence in entering a station where it is not unlikely that another car is standing) that

> when the view is obscured by curves, fog, storms or other causes, they (trains) must be kept under such control that they may be stopped within the range of vision.

But in so dealing with the case I would be discharging the functions of a jury. I cannot say that the evidence bearing on the issue of contributory negligence is not susceptible of another view, or that any other conclusion than that reached by the learned Chief Justice would be so clearly unreasonable that it would be perverse. I am, therefore, unable to agree in the judgment of the Court of Appeal dismissing this action, which was necessarily based on the opinion that it should have been withdrawn by the trial Judge from the jury. *Primâ facie* an issue of contributory negligence is for the jury, and the case must be very clear when a trial Judge is justified in taking it from them on the ground that contributory negligence has been so conclusively established that no jury could reasonably find otherwise.

But the verdict cannot be reinstated. I agree with Martin and Irving, JJ.A., that the evidence of McCutcheon was improperly rejected. In order to refresh his memory he was entitled to look at the copy of his notes, which he was prepared to verify as having been made by himself from the original which was a transcript of his stenographic report of the interview between the plaintiff and the defendant's superintendent. His evidence would have borne directly on the main issues, and it is impossible to say that its rejection did not materially affect the determination of those issues. There must be a new trial.

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BRODEUR, J.:—I concur in the opinion of my brother Duff.

Appeal allowed with costs.

Taylor, Harvey, Grant, Stockton & Smith, solicitors for the appellant.

McPhillips & Wood, solicitors for the respondents.

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THE KING v. TRUDEL AND PAQUIN.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. March 2, 1914.

1. DAMAGES (§ III L—241)—EMINENT DOMAIN—VALUE AT DATE OF TAKING—RAILWAY ACT.

In expropriation for railway purposes under the Railway Act, R.S.C. 1906, ch. 37, the land owner's compensation is to be fixed according to the value at the date of expropriation, taking into account the future potentialities of the property only as they affect the present market value.

[*Cedars Rapids* v. *Lacoste*, 16 D.L.R. 168, 30 Times L.R. 293, and *Re Lucas and Chesterfield*, [1909] 1 K.B. 16, followed.]

Statement

APPEAL from the judgment of the Exchequer Court of Canada, which awarded the defendants, respondents, the sum of $18,203.72, as compensation and indemnity for the expropriation of their lands taken, under the provisions of the National Transcontinental Railway Act, 3 Edw. VII., ch. 71, and sec. 198 of the Railway Act, R.S.C. 1906, ch. 37, for the purposes of the National Transcontinental Railway.

The circumstances of the case and the issues on the present appeal are stated in the judgments now reported.

The appeal was allowed.

G. G. Stuart, K.C., and *Alfred Désy*, for the appellant.

Belcourt, K.C., and *Guillet*, K.C., for the respondents.

Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—In this case, His Majesty, upon the information of His Attorney-General, asks that the compensation due the respondents for certain lands taken for the right-of-way of the National Transcontinental Railway be ascertained.

The tract of land expropriated contains sixteen acres and a

fraction, and forms part of lots Nos. 26, 27, 28, 29 and 30 in the township of Mailhiot, County Champlain, Province of Quebec; the amount offered as compensation by the Crown is $3,280.51, the amount claimed by the respondents is $43,688.94, and the amount of the award below is $18,203.72 with interest. The total area of the five lots traversed by the line of railway, and out of which the sixteen acres in question were taken, is about 914 acres. These lots were acquired from the Crown between the year 1881 and 1903 for $274.20. The respondents purchased them for $3,211.25 in 1910 and 1911. The line of railway was first located across the property in question in 1905, and it was subdivided into building lots several years afterwards.

In July, 1908, formal notice of expropriation was given. The question to be determined is the value of the land at the time the property was taken by the Crown.

In a very recent case, the *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste*, 30 Times L.R. 293, 16 D.L.R. 168 at 171, their Lordships said:—

> The law of Canada as regards the principles upon which compensation for land taken was to be awarded was the same as the law of England, and it has been explained in numerous cases—nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, where Lord Justices Vaughan Williams and Moulton deal with the whole subject exhaustively and accurately.
>
> For the present purpose, it may be sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

And their Lordships add further:—

> That price must be tested by the imaginary market which would have ruled had the land been exposed for sale (at the time notice of expropriation was given).

In railway expropriation cases, sec. 198 of the Act provides:—

> The arbitrators or the sole arbitrator in deciding on such value or compensation, shall take into consideration the increased value common to all lands in the locality that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands: 3 Edw. VII., ch. 58, sec. 161.

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It is common ground that the lots in question are totally unfit for agricultural purposes, and their bare value is very trifling. The respondents, however, contend that they are in large part well adapted for building sites, hence their claim that they should be dealt with as building lots. The value of the property for that purpose depends upon the law of supply and demand. The evidence is not, it is quite true, very satisfactory, but it establishes beyond all doubt, in my opinion, that in view of the quantity of land available, the needs of the relatively sparse population and the prospect of future industrial development, the amount awarded is out of all proportion to the present value of the land or to any advantage which it has or is at all likely to possess for many years to come.

The total population of LaTuque in 1905 was under 1,000. It increased to two thousand in 1908 and to four thousand in 1912. Any future increase depends admittedly upon the further development of a water-power which is in the immediate neighbourhood of the land taken. In 1911, or thereabouts, a pulp-mill was built, which, when completed, will employ five or six hundred people. That is the only local industry permanently established, and the possibility of further development is very remote. There is no reasonable prospect that other industries will be established there in the near future. LaTuque is the western terminus of a branch line of the Lake Saint John Railway built to serve the purposes of the pulp-mill, and it is traversed by the National Transcontinental Railway, but it does not appear that any material addition to the population has resulted, or is likely to result, from the existence of those roads; on the contrary, there is some evidence produced by the respondents to shew that, by reason of the construction of the railway bridge across the river the development of the water power has been retarded, if not permanently prevented, so that, on the whole, there is a very poor prospect of anything like a fair demand for building lots.

The next question is: What is the area of the land available to satisfy any demand that may reasonably be expected to arise? In addition to the 914 acres owned by the respondents there is available and open for purchase the large area, owned by the Stuart and Tessier Syndicate, more favourably situated as regards the water-power and the pulp-mill, and therefore more attractive

for places of residence for those engaged in that industry. That property has this additional advantage that the church, the convent, the school and the railway stations are all built upon it.

In these circumstances I find evidence that there is no considerable demand for building lots—the floating population engaged at the mill and in connection with the railways in process of construction is not likely to reside permanently in LaTuque, and the area available is far in excess of the demand. It is impossible, in my opinion, to say that, if, at the time the land was expropriated, it had been put up for sale, it could have been sold for building purposes, and, if sold at public auction in the open market, it would not have brought anything like the price awarded by the Judge of the Exchequer Court.

It is quite true that there is evidence of the sale of some lots at six cents a foot, but I am not satisfied that these sales represent anything like the value realizable at an open, honest sale. In any event, in 1908, barely three per cent. of the lots located were sold, and there were in all ten to twenty small houses built on them. If one compares the prices at which the property held by the Stuart and Tessier Syndicate was sold, we get, I think, the only reliable evidence of value on which a satisfactory conclusion can be reached. That syndicate sold, on January 30, 1908, 19 acres for $2,850, on December 20 of the same year three acres and a fraction for $477; on November 11, 1910, thirty-two acres for $4,914.60. As I have already said, these are the prices realized in the open market for land more advantageously situated than that of the respondents. On the whole, I am satisfied that the indemnity offered by the Crown was not only fair, but generous. The respondents will be recouped the whole of their original outlay and they will still have available for sale, as building lots, over 930 acres. If their previsions are realized they will have a very handsome profit out of the balance of their lands, due, no doubt, to some extent, to the existence of the National Transcontinental Railway.

Much reliance was placed upon the evidence of witness Bourgeois.

I do not think that such evidence can be taken into consideration in the face of that given by Tessier, Scott and others.

I would allow the appeal with costs on the ground that the

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amount offered by the Crown was full compensation for the land taken.

IDINGTON, J.:—This is a most unsatisfactory case. The judgment seems to have some evidence to support it. Indeed, there can be found evidence in the case to support almost any conceivable judgment.

Yet the result seems apt to shock the ordinary man if allowing his stock of common knowledge to be brought to bear upon the evidence. It is the market price which must govern.

To say that the market price for a block of ninety-three lots, not to be selected by way of picking them out, but by virtue of an arbitrary line drawn directly across a survey of over two thousand such lots cut out of a recent wilderness to form part of a future city, must be measured by the prices got for isolated sales of a few single lots a year, spread over a period of years, seems to me unsound. Yet something like this seems the process of reasoning adopted, default evidence having been directed to the purchase or possible purchase of such large blocks as is involved herein.

There is only one instance given in this survey of such way of looking at the matter and that is of an alleged offer for twenty lots which was refused and it affords no fair comparison with the block here in question. That block seems to have been compact, and may have presented exceptional advantages which this does not, stretching over a long space of some possibly well-situated, and of others ill-situated.

If, as seems likely, the whole survey is on the average no better or worse than this block in question, then it is worth four hundred thousand dollars. I imagine, if valued for purposes, for example, say of succession duties, those concerned would be much surprised if asked to pay on such basis as adopted. By comparison of this with sales made by a syndicate of a neighbouring block the price seems grossly excessive. And allowing most liberally for special collateral advantages possibly entering into that transaction, the price fixed here seems yet greatly excessive. If there had happened to be an active market for these lots in respondent's survey, even if at excessive prices as result of temporary speculation when appellant's plan of expropriation declared, there would have been more ground for accepting such sales as a guide.

If we estimate the whole survey as worth even only a hundred thousand, instead of four hundred thousand dollars, the interest and taxes would eat up all the proceeds of sales and shew it was monstrous folly to expect to realize a profit by holding at similar prices and awaiting the building of the future city that might, in half a century hence, warrant such prices.

On the evidence before us, I do not think respondents have supplied a foundation for claiming any sum beyond that tendered by the Crown.

I would allow the appeal with costs.

Duff, J.

DUFF, J.:—This appeal arises out of an information exhibited in the Exchequer Court under the Expropriation Act. The lands in question comprise about sixteen acres in LaTuque, which is now a small town, on the River St. Maurice in the Province of Quebec. The lands were required for the way of the National Transcontinental Railway and a plan and description having been filed on July 2nd, 1908, it is with reference to that date that the compensation and damages are to be ascertained. The defendants advanced a claim for compensation and damages at the rate of six cents per square foot, the Government having tendered the sum of $3,280.51. The learned trial Judge allowed the defendants for compensation and damages two and one-half cents per square foot—$18,203.72 in the aggregate. The Crown appeals.

I have come to the conclusion that the amount allowed by the learned trial Judge is excessive, but that the amount tendered by the Crown was insufficient. At the time in question—July, 1908—the terminus of the Quebec and Lake St. John Railway, which had been in operation for a year, was in the locality now the Town of LaTuque. The locality had also been for some time the centre of supply distribution in connection with the construction of the National Transcontinental Railway. There were, it appears, some twenty or thirty houses in the vicinity of the property in question, and there were some two thousand people—mostly living in tents—a transient population brought there largely, if not exclusively, in connection with the construction of the railway. There were no other industries then established. But there was a water-power on the River St. Maurice which had been acquired by the Quebec, St. Maurice and St. John Industrial Company,

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and arrangements had been made for the development of it, which subsequently took place, and for the establishment of a pulp-mill, which was afterwards erected and is now in operation. The locality had already attracted the attention of speculators as the probable site of a future town, and, in 1907, a syndicate (referred to throughout the evidence as "the syndicate") had purchased a considerable tract of land which lies immediately to the north of the defendants' property? The defendants' lands, which comprised parts of lots 26, 27, 28, 29 and 30 of the township of Mailhiot, were granted by the Crown at various times, between 1881 and 1903, the prices paid amounting in the aggregate to $274.20. The defendants acquired lots 29 and 30 in June, 1910, for $2,000, and lots 26, 27 and 28 in the following year for $1,211.25; the total areas comprised within the five lots amounted to 914 acres. The strip which has been taken for the purposes of the railway is worthless for agricultural purposes, and is capable of being used economically only as affording sites for building. In 1907 it had been surveyed and laid off in small building lots of about 50 by 200 feet. The learned Judge has held that these lots had a market value which he puts at 2½ cents per square foot, including in this, however, an allowance for the injurious affection of other parts of the defendants' lands not included in the part expropriated.

I think the learned Judge has fallen into some misapprehension in appreciating the evidence offered in support of the defendants' claim. The principle of compensation is, of course, well settled. It is stated very clearly in the following passage from the judgment of Moulton, L.J., in *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, at p. 29:—

> The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the land he gives up their equivalent, *i.e.*, that which they were worth to him in money. His property is, therefore, not diminished in amount, but, to that extent, it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser.

Where future advantages are in question, the principle to be applied is that expounded by Lord Dunedin in the *Cedar Rapids* case (16 D.L.R. 171). His Lordship says:—

> For the present purpose it was sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date

of the taking—not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

The point to be determined, therefore, in this case is:—How much was the property worth to its owners in July, 1908, taking into account the possibilities of future use, but estimating those possibilities at their value as of that date? In considering this question it may be observed one is not entitled to exclude any value arising from the advent of the National Transcontinental Railway in so far as that should be due to causes affecting lands in the locality generally and not these lands specially: sec. 198 of the Railway Act. Now, first, I think it is abundantly clear from the evidence that, in July, 1908, there was not a market for the property (as building lots), which the defendants had subdivided into lots and of which the strip in question formed a part. There is evidence of thirteen sales prior to that date. There is evidence also that the sum of $4,000 had been offered for twenty lots, situated a short distance from the line of the railway, but, on the other hand, there was available for building sites a large area of land owned by the "Syndicate," and various points yet remained to be settled to determine the comparative advantages of different localities. The expected population, as pointed out, would be largely an industrial population, and experience seems to shew that such a population usually establishes itself in the vicinity of the church, the school and the shops. Until these localities should be identified it was not to be expected that lots would be purchased in great numbers for building purposes. How is one, then, to ascertain what this land was worth in money to the owners of it at that time? One can only figure to one's self an imaginary purchaser in touch with all the circumstances and considering the investment of money in the purchase of land in LaTuque for the purpose of re-selling it. What, to the mind of such a purchaser, would have been a fair and reasonable price (*i.e.*, a price justifiable in the eyes of a prudent investor) to pay for this property? Now, the evidence offered on behalf of the defendants, with the exception of the evidence shewing actual sales and the offers to which I have referred, seems to be of very little value indeed, for the purpose of determining such a question. For the pre-supposition on which all this evidence

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appears to be based is the fallacious assumption expressed in the following passage in the testimony of the Reverend E. Corbeil:—

Q. Les terrains indiqués au plan?

R. En autant que dans une paroisse il y a une connaissance publique que telle terre vaut telle somme et que telle autre terre vaut telle autre somme, il y a un marché dans la paroisse, or, je sais d'après l'estimé public ce que les lots valent et je peux le dire.

The evidence of this witness and of witnesses of the same class as to value is given with reference to this loose conventional standard—if standard it can be called.

The witnesses, in a word, are not dealing with the question of what price this sixteen acres would bring or what this sixteen acres was actually worth to the owners in money; but the price which, according to the public talk in the locality, would be assigned to these lots upon a comparison with the supposed value of other lots. That is not of much assistance in view of the facts that the number of actual purchasers was so small, that the actual demand for lots for building purposes was so limited, and that the population was of the transient character that marked the population of LaTuque in July, 1908. Moreover, the prices actually paid by the defendants themselves, in 1910, afford a strong reason for thinking that this evidence does not afford any really trustworthy guide. On the other hand, there is some ground for thinking that the prices paid to the "Syndicate" by the Commissioners do not represent the full value of the land purchased, and there is evidence given by one of the witnesses, called and put forward by the Crown as a competent person to pass upon the value of the property, that this property could have been sold at a price of from $300 to $400 an acre. This evidence, taken together with the prices paid and offered to the defendants for particular lots or groups of lots, justifies one, I think, in holding that the defendants ought to be compensated at the rate of $400 per acre—this sum to include all damages.

Anglin, J.

ANGLIN, J.:—The disposition of this case is by no means free from difficulties. The parties are very far apart in their appreciation of the value of the expropriated property, and they differ radically as to the proper basis of valuation. They agree that it is the market value of the land taken at the date of the expropriation which is to be allowed; but there is the widest possible

divergence of views and opinions as to what that market value was and as to how it should be estimated.

It is common ground that as agricultural land the property is worth little or nothing. Its value is derived entirely from the proximity of two railways and the location of the works of the Quebec and St. Maurice Industrial Company. In July, 1908, when the expropriation took place, no railway had yet been constructed into LaTuque, but the Lake St. John Railway was in course of construction and the location of the right-of-way and the situation of its terminal station were known. The water-power now used by the Quebec and St. Maurice Industrial Company had already been acquired by it; the approximate location of its works was well understood; but no actual work of construction was done until October, 1909. The advent of the Transcontinental Railway itself was a practical certainty: *James v. Ontario and Quebec R. Co.*, 15 A.R. (Ont.) 1. These facts, no doubt, gave the defendants' land a substantial value; but it was a value wholly prospective. In considering what should be the amount of compensation, these potentialities must be taken into account as such, and, whatever market value they had then given to the lands expropriated must be allowed for. The owners are entitled to be treated as if bargaining with a purchaser in the market: *Cedar Rapids Manufacturing and Power Co. v. Lacoste et al.*, 30 Times L.R. 293, 16 D.L.R. 168. Of anything which a far-seeing purchaser would take into account in estimating what he should pay for the property (subject to the provisions of sec. 198 of the Railway Act) the owners are entitled to the benefit in fixing the value of the land for purposes of expropriation: 6 Hals. 36. No doubt, the possibilities to which I have referred were, at least to some extent, taken into account in fixing the price when the defendants bought their property; and what they paid for it, not very long before the date of the expropriation, is a material element for consideration in determining the compensation they should receive: *In re Fitzpatrick and New Liskeard*, 13 O.W.R. 806.

The Rev. Curé Corbeil says that, at one time, it was expected that the parish church would be built on the defendants' property. If that expectation had been realized, the probability of their being able to dispose of a large part of their lands as building lots would have been much greater. But the site for the church was

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changed, probably before July, 1908, although the precise date of the change is not made clear in the evidence.

For the defendants, five disinterested witnesses pledged their oaths that the defendants' land was salable in July, 1908, as building lots at four cents per square foot, corner lots being worth six cents per square foot.

For the Crown, four witnesses—of whom one had comparatively slight means of knowledge and another would appear to have been not wholly disinterested—deposed that the value of the lands should be estimated by the acre, and placed it at $150 per acre. Another Crown witness, Ritchie, declined to put a value on the land expropriated, and still another, Benjamin Bourgeois, city engineer of Three Rivers, when pressed by counsel for the Crown, valued it at $300 to $400 per acre. No doubt large areas almost in the immediate neighbourhood were sold to the Transcontinental Railway and to the Quebec and St. Maurice Industrial Company at $150 an acre, but special advantages resulting to other adjacent properties of the vendors probably influenced them in making these sales. Before July, 1908, other neighbouring proprietors had sold some building lots at $200 and $300 a piece. The defendants themselves had actually sold thirteen lots at similar figures, and they had refused an offer of $4,000, or four cents per square foot, for twenty lots, because corner lots were included for which they were asking six cents per square foot. But this was when it was expected that the church would be built on the defendants' property and there was much speculation as to the site of the station, shops, etc., of the Transcontinental Railway itself.

In 1908, the municipality of LaTuque did not exist. There were some fifteen houses on the lower level and ten or twelve on the upper level. The first municipal election was held in 1909.

Taking all these facts into account and weighing all the evidence, I am convinced that, at the time of the expropriation, it was not fairly to be expected that the defendants could dispose of the ninety-three lots, or of any considerable number of them, as lots for building or other purposes, within a reasonable period of time. There was not a market for them as lots, and they cannot properly be said to have had a market value as such. On the other hand, taking all the facts and potentialities into consideration, I am disposed to think that the figure named by Bourgeois,

a Crown witness, *viz.*, $400 per acre, approximately represents the value of this land on an acreage basis—and that, I think, is the true basis on which their value should be estimated. If anything, $400 an acre is, perhaps, a little beyond the actual value. I allow something for compulsory purchase.

Having regard to the provisions of sec. 198 of the Railway Act, I think that any damage occasioned to the adjacent lands of the defendants by the construction of the Transcontinental Railway has been offset by the special advantages which these lands have derived from the immediate proximity of it. This was the opinion of the Rev. Curé Corbeil, a chief witness for the defendants.

Although always loath to interfere with the assessment of compensation in such cases by the Judge of first instance, I feel compelled, for these reasons, to reduce the award in the present instance from $18,203.72 to $6,686.40 The Crown should have its costs of appeal.

Brodeur, J.

BRODEUR, J., agreed with the Chief Justice.

Appeal allowed with costs.

Alfred Désy, solicitor for the appellant.
Belcourt, Ritchie & Chevrier, solicitors for the respondents.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. March 23, 1914.

1. CHATTEL MORTGAGE (§ II A—7)—VALIDITY—CONSIDERATION—BILL OF SALE AS SECURITY—AFFIDAVIT OF BONA FIDES.

A chattel mortgage given for advances made and to secure against liability on indorsements of promissory notes is insufficient under the Bills of Sale Act, 1905, B.C., ch. 8, sec. 7, as against an assignment for creditors made before possession had been taken by the chattel mortgagee, where the affidavit of *bonâ fides* on the chattel mortgage stated that the same was made *bonâ fide* for the valuable consideration therein mentioned but did not state that the mortgagors were justly and truly indebted to the mortgagees in respect of the considerations recited in the mortgage.

[*Winter* v. *Gault*, 13 D.L.R. 176, 18 B.C.R. 487, affirmed.]

2. CHATTEL MORTGAGE (§ II C—16)—PRIORITIES—MORTGAGE ON MERCHANDISE—AFTER-ACQUIRED GOODS—SEGREGATION—ONUS.

Where a chattel mortgage purports to include after-acquired goods, the extent of the latter, even if not within the express terms of the Bills

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of Sale Act, 1905, B.C., would have to be proved by the claimant chattel mortgagee thereof as against an assignment for creditors made by the chattel mortgagor before possession had been taken by the chattel mortgagee; the latter's interest is a merely equitable one to after-acquired goods when they come under the operation of the mortgage, and the onus is upon the chattel mortgagee to establish his title to same.

[*Winter* v. *Gault*, 13 D.L.R. 176, 18 B.C.R. 487, affirmed; *Tailby* v. *Official Receiver*, 13 A.C. 523; *Traves* v. *Forrest*, 42 Can. S.C.R. 514, referred to; and note subsequent legislation of 1912, 2 Geo. V. (B.C.), ch. 2.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Winter* v. *Gault*, 13 D.L.R. 176, 18 B.C.R. 487, affirming the judgment of Clement, J., at the trial, maintaining the plaintiff's action with costs.

The appeal was dismissed.

Sir Charles Hibbert Tupper, K.C., for the appellants.

M. A. MacDonald, K.C., for the respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I would dismiss this appeal with costs.

Idington, J.

IDINGTON, J.:—Franklin & Nixon without any substantial means of any sort arranged with appellant, a wholesale merchant company, and one Horner, carrying on business in Vancouver, to buy that business and stock in trade therein, to be paid as to half by cash advanced by appellant and as to other half by their promissory notes indorsed by appellant.

It was the opportunity of selling goods that moved the appellant to entertain the proposal, and concurrent with its assenting thereto and carrying out the main purchase, a stock of new goods to the amount of $2,700 was selected and set aside in its warehouse ready to be shipped upon completion of the bill of sale now in question, which was to be the security for the repayment of said sum of $2,700 as well as for the repayment of the money advanced and for indemnity against the indorsement for the balance of purchase of Horner's stock in trade.

Besides this new goods purchase of $2,700 there was at the same time a pretty substantial item of goods ordered by Horner elsewhere and taken over by the new firm, for which appellant indorsed and looked to the bill of sale to indemnify it. Then there were goods to be supplied from time to time by the appellant to be secured by the same bill of sale.

Franklin & Nixon became insolvent, and on October 27, 1909,

made an assignment to respondent under the provisions of the Creditors' Trust Deed Act, 1901, and, when he went to take possession, he was met by someone who refused to give possession, claiming to represent appellant and hold the goods by virtue of said bill of sale.

It is stated in evidence and not denied that the taking possession by the appellant was after the execution of the assignment. The respondent then instituted this suit to have said bill of sale set aside and declared null and void (as against respondent as assignee representing the creditors) by reason of its infringing the provisions of the Bills of Sales Act of 1905, and being so declared in such cases as therein provided.

The respondent, amongst other grounds taken, sets up the following provision of sec. 7, sub-sec. 1, requiring that a bill of sale set forth the true consideration

> for which the bill of sale was given otherwise such bill of sale as against all assignees, receivers or trustees of the estate and effects of the person whose chattels, or any of them, are comprised in such bill of sale, or under any assignment for the benefit of the creditors of such person, etc., . . . shall be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of the execution by the debtor of such assignment for the benefit of his creditors, or of such purchase or mortgage as the case may be, and after the expiration of the time hereinafter prescribed shall be in the possession, or apparent possession, of the person making and giving such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be. . . .

I agree with the learned trial Judge that on the facts above outlined "the true consideration" has not been set forth as required by this bill of sale. Indeed, I find it difficult to see how it can be said otherwise.

I cannot agree with the view which the learned trial Judge has taken of the case of *Ex parte Popplewell; In re Storey*, 21 Ch.D. 73, as bearing upon the omission of the $2,700 purchase and sale of new goods or the Horner guarantee.

These transactions do not seem to me in any sense such collateral transactions as was the premium given in the *Storey* case to induce the mortgagee to refrain from registering the instrument. In this case the transactions in question were clearly part of what the bill of sale was made to secure, and by the terms

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thereof would be swept in under the general provisions for redemption.

The object of the legislation now in question was to enable creditors and others concerned to ascertain with reasonable accuracy, from a reading of the instrument, the extent and nature of the encumbrance.

This document failed sadly in executing such purpose of the Legislature. Those goods covered by these transactions were, on the facts shewn, comprised within the very terms of the description used in the document, but the facts were so hidden away from the observation of any one interested searching this instrument that he could never suspect such to be the case. Indeed, the recitals in the document and statements therein were calculated to mislead the closest observer. It seems to me that these omissions were serious offences against the clear policy and plain meaning of the statute, and render this bill of sale null and void as against the respondent,

> so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of the execution by the debtor of such assignment for the benefit of his creditors, or of such purchase or mortgage as the case may be, and after the expiration of the time hereinafter prescribed shall be in the possession or apparent possession, of the person making and giving such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given.

When we read this nullifying part of the clause attentively, it clearly destroys all pretension not only to those goods which formed part of the stock in trade bought from Horner and the omitted transactions, but also any "property in or right *to the possession of any chattels comprised in the bill of sale.*"

I think, therefore, the elaborate argument to bring the other goods resulting from later sales and deliveries to the mortgagors within the class of cases where a bill of sale or chattel mortgage is of such a nature as to render it impossible to conform with the statute and, therefore, outside the statute, falls to the ground.

I cannot say that, under the very comprehensive nature of the language used, these later deliveries are not comprised in the bill of sale and in the nullification of the statute.

Indeed, it is of the essence of the claim made to the possession of these goods that they are "comprised in the bill of sale," and

assuredly they were sold to the mortgagors and were found to be in their "possession, or apparent possession," at or after the execution of the assignment.

In short, under this statute, however much it may be possible to find cases of transactions which as a whole may be outside the statute and, therefore, not nullified by it, the doctrine thus involved will not help where there is a bill of sale which in its substantial parts is within the statute and a claim is made to a right of property or possession which by the express language of the nullifying part of the section we have to deal with is made null and void.

If the term "personal chattels" given by the Act a specific statutory interpretation, had been repeated in this nullifying part of the section or the general scope of the statute rendered it imperative to read the word "chattels" as if "personal chattels," then the argument put forward might have had some force. Note also the provision covers possession "at or after the" execution of the assignments.

Moreover, the facts in this case and the frame of the instrument in question shew just that kind of abuse which a careful draftsman seeking to promote the remedy adopted for the evil aimed at in the legislation in question should be expected to strike at in or by the comprehensive language I have quoted.

The appellant's factum quotes a number of cases decided on the English Acts relative to bills of sale. None of them meet or even touch upon the interpretation of sec. 8 of the English Bills of Sale Act of 1878, corresponding to sec. 7, sub-sec. 8. They are in fact chiefly upon the English Act, as amended by the Act of 1882, which repeals secs. 8 and 20, and possibly, by implication, some other sections of the Act of 1878. The amendments made in 1882 are in the direction of making the very abuse before us impossible by making the clauses substituted more direct and clearly operative. If, however, the interpretation and construction I adopt is to be adhered to, it would be pretty effective. It might be so severe as to be undesirable.

As the Act is amended this becomes, except in a few cases, purely academic. But even if my interpretation be not well founded, I agree in the view taken by Mr. Justice Clement as to the onus of proof resting upon the appellant in presenting any

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claim to enforce the possible equitable right the appellant might have on another view of its rights.

The possession which the insolvents had passed by operation of law to the respondent as assignee and the duty of appellant was to have prosecuted its claim accordingly, and that would in due order have involved the appellant proving its right to recover the goods. Of course, if appellant had got possession before the assignment, an entirely different state of things might have arisen to which different principles would have been so applicable.

Moreover, counsel who appeared for appellant before Mr. Justice Clement seemed to be quite willing at one stage to abide by his ruling whatever it might be in this regard of onus of proof if only granted a special reference enabling appellant to make good its claim as it had not. The referee was bound by the direction of the learned Judge, and appellant cannot complain of his reporting the fact that there was no evidence to support its claim. And, as it seems to be, under all the circumstances, nothing but a mere matter of procedure that is involved where no violence had been done to natural justice, I doubt if we are not bound by the jurisprudence of this Court to refrain from interfering even if so disposed as to this point.

See the collection of authorities in note to the R.S.C. 1906, ch. 139, p. 2328 (annotated edition).

I agree with the conclusion reached by the Court of Appeal relative to the affidavit. It may have been necessary to make affidavits to meet both branches of the section, but evidently it was necessary to have verified the indebtedness. I need not, however, pursue this inquiry further, for that which was most obviously needed was discarded. And as to the capacity of the appellant's officer to make the affidavit, I much doubt his right to make it.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The controversy on this appeal is between the appellants, Gault Bros., as mortgagees under a bill of sale by way of chattel mortgage, dated September 20, 1907, executed by Arthur Albert Franklin and Thos. W. H. Nixon, carrying on business in the firm name of Franklin & Nixon and George Ed. Winter, assignee for the benefit of creditors of Franklin & Nixon

under a general assignment executed on October 27, 1909. Gault Bros. are wholesale merchants in Montreal. Before the bill of sale just referred to was given, Franklin & Nixon conceived the idea of purchasing the business of one Horner, including his stock of goods, who had been for some years carrying on business in Vancouver. It was arranged between Gault Bros. and Franklin & Nixon that Gault Bros. should supply the necessary cash and financial support to enable Franklin & Nixon to carry out this purchase. Accordingly, Franklin & Nixon became the purchasers for a certain price, of which about $9,000 was to be paid in cash advanced by Gault Bros., and an equal sum was to be paid in deferred payments of four equal instalments for which promissory notes were to be given indorsed by Gault Bros. This transaction was carried out, and, as security for Gault Bros., the bill of sale above referred to was executed.

The dispute between the parties is whether certain goods which were in the possession of Franklin & Nixon at the time of the execution of the general assignment are validly charged by the instrumentality of the bill of sale with the mortgagors' obligation to Gault Bros., or whether on the contrary they belong to the unencumbered assets of the grantors and are at the disposition of the assignee for the discharge of the liabilities generally. There is no dispute that the property in controversy falls within the description of the mortgaged property in the bill of sale; or that as between the parties to the instrument prior to the execution of the assignment for the general benefit of the creditors the provisions of the bill of sale applied to this property or that all the powers of the bill of sale were exercisable in respect of it by the mortgagee. The assignee contends, and effect has been given to this contention in the Court below, that certain provisions of the Bills of Sale Act, 1905, essential to the valid registration of an instrument such as this were not complied with by the mortgagees and that the result of this want of legally effective registration is to invalidate the mortgage as against the assignee with respect, at all events, to all goods which were the property of the mortgagors at the time of the execution of the mortgage; and as regards after-acquired property if the mortgage be legally effective in respect of such property, the mortgagees must fail even as to that, because there is no evidence by which the Court can identify the after-acquired property and segregate it from the general mass.

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There are three statutory requirements the absence of which it is contended vitiates the registration of this mortgage; the first of the requirements being that bills of sale shall set forth the "true consideration" for which they are given as provided by sec. 7 (1), and the second and third of which are two of the requirements said to be exacted by sub-sec. 8 of sec. 7 of the Act referred to. As to two of these three requirements, I entertain no doubt that the provisions of the Act have been sufficiently observed. I postpone the discussion of them until I have dealt with another of the objections which appears to me to have been made good and to which I feel it my duty to give effect. That objection is founded on sub-sec. 8 of sec. 7, and, before stating it, it will be convenient to quote that sub-section in full and also two of the provisions of the bill of sale to which it will be necessary to give attention in order to make the point of the objection perfectly clear. Sub-section 8 of sec. 7 is as follows:—

(8) Every bill of sale shall further be accompanied by an affidavit by the grantee, or one of several grantees, his or their agent, that the assignment is *bonâ fide* for valuable consideration and that the consideration is duly set forth in the bill of sale, and that it is not for the purpose of enabling the grantor to hold the goods mentioned therein as against the creditors of the grantor; or in the case of security for a debt, that the grantor is justly and truly indebted to the grantee in the sum therein mentioned, and for the express purpose of securing the payment of money justly due or accruing due; and in all cases that the bill of sale is not given for the purpose of protecting the goods and chattels mentioned therein against the creditors of the grantor, or of preventing the creditors of said grantor from obtaining payment of any claim against him; and said affidavit shall be filed along with said bill of sale, otherwise the registration of the bill of sale shall be void. This sub-section shall not apply to the bills of sale mentioned in sec. 5.

The stipulations of the bill of sale which it is necessary to consider are as follows; the first being contained in the proviso for redemption following the habendum:—

Provided always and these presents are upon this express condition that if the said parties of the first part, their executors and administrators, do and shall well and truly pay or cause to be paid unto the parties of the second part or their assigns, the full sum of $9,483.86 with interest for the same at the rate of 7% per annum from the date hereof by periodical payments to the entire and uncontrolled satisfaction of the parties of the second part or in one sum at any time on demand of the parties of the second part, and do and shall pay or cause to be paid the aforesaid promissory notes at maturity or any and all renewal and renewals thereof and all interest in respect thereof and pay, indemnify and save harmless the said parties of the second part from all loss, costs, charges, damages, or expenses in respect of the said

notes or any renewal thereof and do and shall pay all sums of money which shall become payable by the parties of the first part to the parties of the second part for or in respect of all goods which shall be supplied by the parties of the second part to the parties of the first part during the continuance of this security punctually when the same shall become payable according to the terms of credit given by the parties of the second part to the parties of the first part, and do and shall repay on demand all advances of money made by the parties of the second part to the parties of the first part during the continuance of these presents.

* * * * * * *

And the said parties of the first part do hereby jointly and severally, for themselves, their executors and administrators, covenant, promise and agree to and with the said parties of the second part and their assigns that they the said parties of the first part, their executors or administrators or some one of them, shall and will well and truly pay or cause to be paid to their assigns the said several sums of money in the above proviso mentioned with interest for the same as aforesaid on the days and times and in the manner above limited for the payment thereof; and will pay or cause to be paid the said promissory notes or renewal or renewals thereof as aforesaid and all interest and incidental expenses to accrue thereon and indemnify the said parties of the second part from all costs, charges, damages and expenses in respect thereof and all other sums of money which may or shall be secured hereby at any time and from time to time.

In order to make the point quite clear, it is necessary also to quote the affidavit filed with the bill of sale, which is as follows:—

I, Charles T. McHattie, of Vancouver, British Columbia, Secretary-Treasurer of the grantee in the annexed bill of sale marked A named make oath and say:—

That I am the Secretary-Treasurer of the grantee company and am authorized to make this affidavit on their behalf.

That the assignment contained in the said bill of sale is *bonâ fide* for valuable consideration, namely, $9,483.86 and the other considerations set forth in the said bill of sale and that the consideration is duly set forth in the said bill of sale and that it is not for the purpose of enabling the grantors to hold the goods mentioned therein as against creditors of the said grantors.

That the said bill of sale is not given for the purpose of protecting the goods and chattels mentioned therein against the creditors of the grantors or of preventing the creditors of the said grantors from obtaining payment of any claim against them.

Sworn before me at Vancouver, British Columbia, this 21st day of September, A.D. 1907. H. W. C. BOAK. } C. T. McHATTIE.

The objection I am now considering is this: It is said that the bill of sale in question constitutes a "security for a debt" within the meaning of sub-sec. 8, and that the affidavit accompanying the bill of sale in intended or professed compliance with that sub-section does not contain the statement that the grantor is

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justly and truly indebted to the grantee in the sum therein mentioned; and it is contended that in the case of such a security the affidavit in order to comply with the sub-section must contain such a statement or the equivalent of it.

The points to be considered are first whether this bill of sale is a security for a debt within the meaning of this provision, and secondly, assuming that to be so, whether on the true construction of this enactment it is essential that the affidavit of *bonâ fides* should contain the statement that the grantor is "justly and truly indebted to the grantee" in the sum mentioned as the debt to be secured.

I confess that on the first point I do not entertain any doubt. I think that where a bill of sale is given as security for money which is owing, but payable at a future date (*debitum in præsenti, solvendum in futuro*), then it is to that extent a "security for a debt" within the meaning of this provision, and I think that is shewn by the words "securing payment of moneys justly due or accruing due," which follow. I think, moreover, where by a bill of sale property is assigned as security for a debt, in the sense just indicated, that it is none the less a security for a debt within this enactment because it contains additional provisions which in themselves would constitute a bill of sale, but would not constitute such a security.

The next point is a point with which I have had a great deal of difficulty, and the conclusion I have reached, in a sense adverse to the contention of the appellants, is one that I have come to with hesitation, and, I must say, with much regret in view of the fact that the result is to defeat a perfectly honest and legitimate business transaction.

The question is, as I have already said, whether in the case of a bill of sale given as a security for a debt this sub-section requires that the statement above quoted or its equivalent shall appear in the affidavit of *bonâ fides*. Now, the difficulties of construing this sub-section are not inconsiderable. But it seems clear enough that one admissible construction, if you regard only the verbal structure of it, is to treat the second branch as providing in one particular an alternative form of affidavit which, in the case of securities for debt, the mortgagee may at his election adopt in preference to the general form which is provided for in the earlier

part of the sub-section; and I am inclined to think that is the more natural way of reading the clause as it stands. On the other hand, the sub-section is capable of being read as requiring in the second branch a particular averment which is imperative in the case mentioned. After much reflection, I am convinced, however, that in construing this provision one must have regard to the legislation as it stood at the time of the passing of this Act, which is mainly a consolidating statute, and I find that under the law as it then stood in case of mortgages of this description an affidavit in the form indicated in the branch of the sub-section we are considering was essential and imperative. The rule requiring a specific averment under oath by the mortgagee of the indebtedness of the mortgagor in these cases was a rule adopted for the protection of the public; and if, in consequence of a change of policy, mortgagees in such cases were to be given the right to adopt the more general form of averment that the consideration had been truly stated (as sufficient for the protection of the public) one does not see why the more specific form should not have been altogether done away with. Reading the sub-section in light of the legislation then existing and the manifest object of it, I am forced to the conclusion that the appellants' construction must be rejected.

On this ground, with very great regret as I have said, I conclude that the appellant must fail in respect of all property which as being the personal chattels of the grantors at the time the mortgage was executed within the definition of the Bills of Sale Act would be affected by the provisions of that Act. We may perhaps venture to hope, however, that the case may be the subject of consideration elsewhere; and I think I ought to express my opinion upon the other points involved.

The two remaining objections directly based upon the Bills of Sale Act are, first, that the bill of sale does not, as required by sec. 7, sub-sec. 1, set forth the "true consideration" for which it was given, and secondly, that the affidavit accompanying the bill of sale was not made by the appellants or their agents as provided by sub-sec. 8 of sec. 7.

The second objection may be disposed of very shortly. Mr. McHattie, who made the affidavit, described himself as the "secretary" of the company. At the time the affidavit was made,

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and at the time the bill of sale was taken, he was in point of fact exercising the powers of manager of the company. He was, indeed, *de facto* manager of the company. There can be no doubt that the taking of the security was within the scope of his duty as acting manager. It follows that he was within the meaning of sec. 7 of the Act "manager . . . or other officers of the company authorized for" the purpose of making the affidavit.

As to the objection that the consideration for which the bill of sale was given is not truly set forth, this objection is grounded upon the contention that, in order to comply with the statutory direction, two transactions ought to have been recited which are omitted. The two transactions are these: 1. In the month of September, 1907, Mr. Campbell, a buyer for Franklin & Nixon, purchased $2,700 worth of goods from Gault Bros. on behalf of Franklin & Nixon. These goods were purchased in anticipation of the arrangement between Gault Bros. and Franklin & Nixon, which afterwards was carried to completion, including, of course, the bill of sale. In the ordinary course, the goods would not be delivered until after the time when it was anticipated that these arrangements would be completed, and the evidence is quite clear that if anything had happened to prevent these being carried out the goods would not have been sent forward, and this would have been quite in accordance with the intention of the parties. The purchase was unquestionably a conditional purchase which was not to become legally effective until after the contemplated arrangements were consummated. The other transaction was this:—Horner, whose business Franklin & Nixon were purchasing, had ordered goods which had not come into stock (with the exception of some that arrived on the very date, September 20) when the bill of sale was executed. Horner was, of course, under an obligation to take these goods and pay for them. These goods would, of course, according to the general intention of the parties, which was, that Horner's business was to be transferred to Franklin & Nixon, be received by the latter and paid for by them, but Horner evidently required some more satisfactory assurance, that his obligations to the sellers would be met; and the matter was arranged by Gault Bros. guaranteeing payment of the goods.

Neither of these transactions is specifically referred to in the bill of sale, and it is said that the failure to recite them makes the

description of the consideration so imperfect as to constitute a violation of the provision of sec. 7 (1). The trial Judge rejected this contention, which seems, however, to have been accepted and acted upon by Mr. Justice Irving in the Court of Appeal.

I think the contention involves a misapprehension of the effect of the word "consideration" in sub-sec. 1. That word might, according to context and subject-matter, be, of course, read in a very large sense embracing acts and motives leading up to and influencing more or less directly the transaction in relation to which it is employed. That, I think, is not the sense in which the term ought to be interpreted here. It is used, I think, in the strict legal sense; and construing it in the strict legal sense, the "true consideration" for which the bill of sale was given must, I think, be taken to mean that which passed to the grantor or that which was suffered by the grantee as the consideration in point of law for the assuring to the grantee of an interest, *in præsenti* or *in futuro*, in the property to which the bill of sale applies where that is the nature of the instrument or for the vesting in the grantee of some power or authority in respect of the property affected where the instrument is in the nature of a licence or power of attorney. Construing the word "consideration" in this way, it seems to me that this bill of sale presents no difficulty. The proviso for redemption above quoted shews that the property to which the document relates is charged with the payment of

> all sums of money which shall become payable by the parties of the first part to the parties of the second part for or in respect of all goods which shall be supplied by the parties of the second part to the parties of the first part during the continuation of this security.

If the goods purchased in September are to be regarded as "goods supplied during the continuance of this security," and I can see no reason why they should not be so regarded, I am unable to follow the argument that the consideration for the charge thereby created is not truly stated, the consideration being measured by the value as determined by the price of the goods supplied.

In view of some observations that have been made I think I ought to add this:—Nobody reading the recitals of this bill of sale could fail to observe that the general intention was to provide security, first for the repayment of the cash advanced by the mortgagees; next, in respect of the mortgagees' guarantees in connection with the purchase; and thirdly, for payment of the

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price of goods supplied by the mortgagees. I think that any business man being made acquainted with the fact that such was the general intention of the parties to the instrument would not be surprised to find that the instrument was to stand as security for the price of the goods included in what has been referred to as the September sale. On the contrary, he would be very much surprised indeed to find that it was not so. Whether you look at this instrument from the point of view of the practical man, not a lawyer, or from the point of view of the lawyer, there appears to be nothing in it, which as regards this transaction can fairly be described as misleading.

As to the other transaction. If the words quoted from the proviso for redemption, "goods supplied by the parties of the second part to the parties of the first part during the continuance of the security," do not embrace the goods which were the subject of this transaction, and I agree with the contention of the respondent that they do not, then the property affected by the bill of sale is not charged with the repayment of any moneys paid by Gault Bros. under their guarantee in respect of them and the obligation arising under the guaranty is not part of the consideration for the bill of sale within the meaning of sec. 7. The transaction is a collateral one which the parties were entitled to bring within the bill of sale or leave out of the bill of sale as they should choose. This objection for these reasons in my opinion fails. I do not discuss the decisions, none of which is inconsistent with, and one of which, at all events, *Ex parte Popplewell*, 21 Ch.D. 73, strongly supports the view I have expressed.

There is still another point upon which the appellants rely. It is argued that the provisions of the Bills of Sale Act, 1905, have no application to goods which were not property of Franklin & Nixon at the time the bill of sale was executed. I have no doubt that prior to the amendment of 1912, 2 Geo. V., ch. 2, sec. 5, the Bills of Sale Act of British Columbia did not apply to assurances of after-acquired goods. My reasons for that were given in *Traves* v. *Forrest*, 42 Can. S.C.R. 514. I there gave my reasons for thinking that the history of the British Columbia Bills of Sale Act, taken together with the course of judicial decision in England in relation to the definitions of "personal chattels" in the English Acts of 1854 and 1878, which have been closely followed in the

British Columbia legislation, led to the conclusion that the British Columbia Legislature had adopted the decision in *Brantom* v. *Griffits*, 1 C.P.D. 349, and that in construing the Act of 1905 one must be governed by that decision. In this view a majority of the Court concurred, and it may be noted that the parts of the Act then construed were re-enacted without relevant alteration in the consolidation which took place two years later. The law was changed by the amendment of 1912 above referred to. If that enactment is retroactive in its operation then the contention of the appellant on this point must fail; but that question need not, in the view I take of the point raised as to the onus of proof, be considered on this appeal.

I have come to the conclusion after carefully weighing the argument advanced by the appellants that the onus was on the appellants to identify the goods in respect of which they alleged the bill of sale was effective, and I have come to that conclusion for this reason:—The interest in after-acquired goods under a mortgage of them when they come under the operation of the mortgage is, as Lord Macnaghten pointed out, in *Tailby* v. *Official Receiver*, 13 App. Cas. 523, at 546, an equitable interest. The appellants' interest, if any, therefore, under this mortgage in the property in question was an equitable interest only. Now the effect of the assignment was to vest in the assignee the general property in the goods affected by the mortgage subject to this equitable interest of the mortgagee, if any; and such being the case it appears to me that, on general principles, the onus is upon the mortgagee who alleges this equitable interest to establish his title to it.

Since writing the above my attention has been called to the fact that a point raised by the counsel for the appellant has not been noticed in any of the judgments, and in view of the possibility of further proceedings and in order to avoid any dispute on the subject I think it is right to mention it. The point was, briefly, that on the construction of sub-sec. 8 of sec. 7 of the Bills of Sale Act, which I have adopted, it would be impossible to frame an affidavit of *bonâ fides* for the bill of sale in question which should at once be truthful and in conformity with the requirements of that enactment. I merely add, in a word, that having carefully considered the argument I have been unable to satisfy myself that there would be any real difficulty in framing such an affidavit.

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ANGLIN, J.:—With some regret, because the transaction appears to be free from the slightest taint of fraud or suspicion of fraudulent preference, I find myself obliged to concur in the dismissal of this appeal.

As to the goods which were in the possession of the mortgagors when the impeached instrument was executed, I agree that it was void as against the plaintiff because the affidavit of *bonâ fides* did not comply with the statutory requirements. It is also possible that the consideration for which the mortgage was given was not accurately or sufficiently stated.

As to the after-acquired goods, assuming that, notwithstanding the sweeping terms of sec. 7 of the British Columbia Bills of Sale Act of 1905, the mortgage was enforceable, I agree with Mr. Justice Clement and the Court of Appeal that the burden was on the mortgagees to have shewn that there were in fact such goods in the insolvents' stock, and to have segregated and identified them. That they have failed to do.

Brodeur, J.

BRODEUR, J.:—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Tupper, Kitto & Wightman, solicitors for the appellants.

Russell, Mowat, Hancox & Farris, solicitors for the respondent.

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Re RABINOVITCH AND BOOTH.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 9, 1914.

1. LANDLORD AND TENANT (§ II C—24)—LEASES—RENEWAL: HOLDING OVER—STIPULATION FOR TERMINATING, IMPLIED WHEN.

A stipulation in the original lease for one year that either party may terminate at the end of any month of the tenancy applies to the lease from year to year implied on a holding over and payment of the same rent following the one year term and may be taken advantage of by a person to whom the lessor had assigned the reversion during the original tenancy.

[*Re Threlfall*, 16 Ch.D. 274; *King* v. *Eversfield*, [1897] 2 Q.B. 475; *Dixon* v. *Bradford*, [1904] 1 K.B. 444; *Lewis* v. *Baker*, [1906] 2 K.B. 599, referred to.]

Statement

APPEAL by the tenants from an order of the Judge of the County Court of the County of Dufferin, under the provisions

of Part III. of the Landlord and Tenant Act, 1 Geo. V. ch. 37, relating to overholding tenants, directing the issue of a writ of possession to the Sheriff of the County of Dufferin commanding him forthwith to place the landlord (the respondent) in possession of the demised premises.

The appeal was dismissed.

W. M. Douglas, K.C., and *W. J. L. McKay*, for the appellants.

A. A. Hughson, and *H. H. Sharer*, for the respondent.

March 9. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the tenants from an order dated the 5th December, 1913, made by the Judge of the County Court of the County of Dufferin, under the overholding tenant provisions of the Landlord and Tenant Act. Meredith, C.J.O.

Fanny Gottesman was the owner of the property in question (an hotel in the town of Orangeville and the furniture in it), and she and her husband, on the 12th day of April, 1912, demised the property to the appellants by a lease dated on that day.

The lease is made under the Short Forms of Leases Act, is for a term of one year to be computed from the 12th April, 1912, and contains the provisions of the short form set out in the Act, and some other provisions, among which are the following: "And it is declared and agreed that either party shall have power to terminate this tenancy at the end of any one month by giving to the other one month's notice to that effect, and on such notice being given said tenancy shall be terminated in the same manner as if the original demise had ended at said date, and will at the end of the term give up and deliver to the lessors all the furniture, goods and chattels delivered by the lessors to the said lessees under this agreement and in good condition or equal to the present condition."

By deed dated the day of November, 1912, Fanny Gottesman conveyed to the respondent the hotel property; and on the 10th December, 1912, she and her husband gave to the appellant J. E. Booth written notice that they had sold the property and its contents to the respondent and requesting him to send the rent from the 12th instant to the respondent.

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Acting upon this notice, the appellants paid the rent which fell due after the date mentioned in it, except the rent for the first month, which was paid to Gottesman and by him to the respondent, to the respondent, and continued to pay rent to him at the rate stipulated up to the 12th November, 1913.

On the 7th October, 1913, the respondent gave to the appellants a written notice stating that the respondent, as owner of the Queen's Hotel property, leased by them from Nathan Gottesman and Fanny Gottesman, by lease dated the 12th April, 1912, gave them notice that he would require full and free possession of the property on the 12th November, 1913, and stating also that he gave them notice pursuant to the terms of the lease; and, the appellants having refused to give up possession as demanded, the proceedings which resulted in the order appealed from being made were taken.

Apart from the question as to an agreement alleged to have been made by the appellants with the respondent to give up possession of the property, as to which no evidence was given, because it was held by the learned Judge to be inadmissible, the facts are not in dispute.

That the appellants held over after the termination of the lease and continued to pay rent in accordance with the terms of it, is not disputed, nor is it disputed that the result of this was that the appellants became tenants from year to year of the respondent upon the terms of the lease so far as they are not inconsistent with the new tenancy.

That the provision of the lease for its termination is not inconsistent with the new tenancy was the view of the learned Judge; but it is contended by the appellants that his conclusion was erroneous.

I am of opinion that the learned Judge came to the right conclusion.

In *In re Threlfall* (1880), 16 Ch.D. 274, it was laid down (pp. 281-2) that the parties to a tenancy from year to year may agree that it "may be determined on whatever notice they like;" and in *King* v. *Eversfield*, [1897] 2 Q.B. 475, 481, it was said by Rigby, L.J. (p. 481), that *In re Threlfall* is "a clear

authority that a stipulation for a three months' notice to quit is not inconsistent with a yearly tenancy."

In *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society*, [1904] 1 K.B. 444, followed in *Lewis* v. *Baker*, [1905] 2 K.B. 576, [1906] 2 K.B. 599, the tenancies, though determinable on three months' notice, were held to be yearly tenancies.

In *Bridges* v. *Potts*, 17 C.B.N.S. 314, it was held that under the terms of the agreement the tenant might put an end to it on six months' notice to expire at any time, without regard to the ordinary rule for determining a tenancy from year to year at the expiration of the current year. Erle, C.J., in delivering judgment, pointed out (p. 330) that the interest of the tenants was in reality a tenancy from year to year, subject to the terms of the agreement so far as they were applicable to a tenancy from year to year; and, if Mr. Douglas's contention were well-founded, the provision as to the tenant putting an end to the tenancy at any time should not have been given effect to, because it was inconsistent with the term as to determining the tenancy which is implied in the case of yearly tenancies.

See also *Thomas* v. *Packer*, 1 H. & N. 669, in which it was held that a proviso in a lease for re-entry on payment of rent is a condition which attaches to the yearly tenancy created by the tenant holding over and paying rent after the expiration of the lease.

Tooker v. *Smith*, 1 H. & N. 732, is an illustration of a term inconsistent with a yearly tenancy. In that case an agreement for a lease of a farm contained a stipulation that the tenancy should continue until after two years' notice to quit had been given, and the tenant had occupied the farm and paid rent for some years, but no lease had been executed. It was held that it could not be implied that the stipulation as to the two years' notice to quit was one of the terms under which the tenant held. The notice provided for in this lease was manifestly not only inconsistent with but repugnant to a yearly tenancy.

Doe d. Warner v. *Browne* (1807), 8 East 165, is another illustration. In that case it was said that it is entirely repug-

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nant to the nature of a tenancy from year to year that the option of determining it should rest solely with the tenant.

It was also contended that the respondent, as assignee of the reversion, was not entitled to the benefit of the provision for determining the lease; but that contention is not, in my opinion, well-founded. Section 5 of the Landlord and Tenant Act is wide enough to embrace, and, in my opinion, does embrace, that provision of the lease, and the benefit of it was, in the language of the section, "annexed and incident to" and went "with the reversionary estate in the land . . . immediately expectant on the term granted by the lease."

In *Roe d. Bamford* v. *Hayley*, 12 East 464, the lease, which was for twenty-one years, contained a proviso that, if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, his executors or administrators, so to do upon twelve months' notice to the other of them, his heirs, executors or administrators, and it was held that the proviso extended by reasonable intendment to the devisee of the lessor who was entitled to the rent and reversion.

It was argued in that case that, as the proviso gave no power in terms but to the parties, their executors or administrators, it did not warrant a notice by the devisee, but Lord Ellenborough, C.J., said (pp. 468-9): "The object of such a proviso manifestly is that the inheritance should not be bound on the one hand against the will of the persons to whom the inheritance belongs; and that, on the other hand, the lessee and those claiming under him should not be bound against their will; but that in all instances the parties interested, whosoever they might be, should have power to give the necessary notice for this purpose. The intention was not to give a collateral power, to be exercised by a stranger, but to annex certain privileges to the term and to the reversion, to pass with such term and with such reversion respectively, and to be exercised by the persons, whosoever they might be, to whom such term or reversion should come. The right respects the interest demised; and, according to the rules which ascertain whether a covenant is to be deemed to run with the land or not, would be con-

sidered as annexed to the reversion on the one hand, and to the term on the other."

It was further contended on behalf of the appellants that the words "at the end of any one month" mean at the end of any calendar month, and not at the end of any month of the tenancy, but I am not of that opinion. The rent reserved by the lease is payable monthly in advance, and it is much more probable that the contracting parties intended that the lease might be terminated at the end of any month of the tenancy than that the intention was that it might be terminated at the end of any calendar month during the term, especially as the lease contains no provision for the apportionment of the rent, which, if the latter contention were adopted, would be necessary whenever the right to determine the tenancy was exercised.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

Appeal dismissed.

REX v. JOHNSON.

Yukon Territorial Court, Black, J. pro tem. May 27, 1914.

1. DISORDERLY HOUSE (§ I—15)—OFFENCE OF KEEPING.

A charge of keeping a bawdy house is cumulative, and evidence of particular acts and the particular time of doing them is admissible, although the charge is in general terms only.

[*R.* v. *St. Clair*, 3 Can. Cr. Cas. 551; *R.* v. *Mercier*, 13 Can. Cr. 475, referred to.]

Statement

APPEAL to the Judge of the Territorial Court of the Yukon Territory from a summary conviction made by Major J. D. Moodie, justice of the peace, and being a commissioned officer of the Royal North-West Mounted Police, having, possessing and exercising the powers of two justices of the peace within the Yukon Territory, on the 11th day of May, 1914, at Dawson, in the said Territory; whereby the said Jeannette Johnson was convicted of being the keeper of a bawdy house or house of ill fame at Dawson aforesaid, and being thereby a loose, idle or disorderly person or vagrant; contrary to section 238, sub-section "*j*," and section 239 of the Criminal Code of Canada.

The conviction was affirmed.

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F. T. Congdon, K.C., for appellant.

J. P. Smith, Crown prosecutor, for the Crown.

BLACK, J.:—The appellant Jeannette Johnson, a negress, was convicted before Major Moodie, as stated above, of keeping a bawdy house or house of ill fame in the city of Dawson, and was sentenced to be imprisoned in the common gaol at Dawson in the Yukon Territory for the term of two months with hard labour.

An appeal was taken from this conviction and pending the hearing of the appeal the appellant, having given security as required by law, was released on bail, the hearing of the appeal being had before me on Friday, the 22nd day of May, 1914.

No technical objections were raised on behalf of the appellant and the matter was proceeded with as a trial *de novo*.

The same witnesses, with the addition of one called on behalf of the appellant, as were heard in the Court below gave evidence before me.

In Roscoe's Criminal Evidence, 11th ed., 86, it is laid down in reference to the offence charged (that of keeping a bawdy house or house of ill fame) that "it is a cumulative offence. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment."

Evidence of the general reputation of the house, while perhaps not alone sufficient to convict, is held to be admissible, and in the case of *The Queen* v. *St. Clair*, 3 Can. Cr. Cas. 551, cited by the Crown prosecutor, Osler, J.A., who delivered the judgment of the Ontario Court of Appeal, said:—

> Such reputation is not acquired without acts or conduct capable of proof from which the character of the house may be inferred, such as the character of the women as being common prostitutes, and the facts of men visiting the house at all hours, and dissolute and disorderly behaviour there.

The charge may be general, yet at the trial evidence of particular acts and the particular time of doing them may be given.

In the case of *The King* v. *Mercier*, 13 Can. Cr. Cas. 475, tried before Mr. Justice Craig at Dawson in 1908, also cited by the Crown, it was held that under section 225 of the Criminal

Code a room in a hotel habitually resorted to by only one prostitute and her paramours for purposes of prostitution is a "common bawdy house," and the hotelkeeper who, with knowledge of the facts, permits the continuance of such use of the room is properly convicted as a keeper; and it is there held that sec. 225 of the Code means that a house occupied by even one person who receives men and prostitutes herself, is a bawdy house, and that one person resorting to a house for that purpose, to the knowledge of the owner of the house, constitutes an offence also.

In the case before me we have the evidence of the woman Vera Hall, a white woman, who frankly admits that she is and has been a prostitute; that she knew the appellant Jeannette Johnson at Nome, Alaska, in 1912-13, where, according to the evidence of the said Vera Hall, both women were living in a restricted district in houses about ten yards apart, and both following the life of prostitution. Then we have them both coming to Dawson during the past winter, the appellant Johnson advertising herself as a caterer and engaging to some extent in that business; evidently, as it would now appear, to cover up her real character; while Vera Hall, who makes no pretense of being other than a prostitute, immediately after her arrival in Dawson, seeks out the appellant and remains with her in the house for immoral purposes, and undoubtedly, from the evidence, with the knowledge and connivance of the appellant, who also received men there both day and night; one, a white man, being a frequent visitor, and referred to in the evidence as her sweetheart.

After remaining for a week in the Johnson woman's house the evidence shews that the said Vera Hall removed to Klondike City, a resort of prostitutes, and while living at the last-named place paid occasional visits at the house of the appellant, in Dawson, and we find the appellant in company with Vera Hall and another prostitute and a man going out at six in the morning on what she is pleased to call a "joy ride," and on this occasion visiting Vera Hall at her house in Klondike City.

We have the evidence of Sergeant Mapley, of the Royal North-West Mounted Police, that the reputation of the said house was that of a house of ill fame. The evidence of Harry McGuinness and Charles James Cameron, both

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men of good character and reputation living in houses in close proximity to the house complained of, is that the said house was, at and during the time mentioned, a resort of men at all hours; that the women living there, the appellant and Vera Hall, were seen drunk and indecently clad about the premises; that music and dancing would continue sometimes during the whole night, and that the place had become a nuisance in the neighbourhood.

The gist of the offence of keeping a bawdy house is that it is an offence to the public and dangerous to the morals of the community, and all of these things have been amply proven by the evidence in this case, to which, however, I shall not here make further reference.

Dawson is a comparatively small community, and conduct such as these women have been guilty of is very noticeable and soon becomes a public scandal. The public have a right to be protected from this sort of thing. We have, too, in Dawson, a number of women, some of them colored women, industrious and respectable citizens, who are making an honest and respectable living by catering and doing general service in private houses and elsewhere, and these women should not be prejudiced by women of the character of this appellant being permitted with brazen effrontery to flaunt themselves in the face of the law and of the community as this Johnson woman has done; and in the case of the appellant I may say further that she has added to the offence that of wilful perjury in almost every important point of her evidence given on the hearing of the appeal.

The order will be that the appeal will be dismissed with costs to be paid forthwith by the appellant, and the appellant Jeannette Johnson will complete the term of the sentence or punishment adjudged by the conviction in the Court below.

Conviction affirmed.

SHIPMAN v. PHINN.

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Ontario Supreme Court, Middleton, J. March 9, 1914.

1. COLLISION (§ I A—1)—ACTION FOR—TRIABLE BY WHICH COURTS—EXCHEQUER—ONTARIO SUPREME COURT.

An action for damages for a collision between two ships on the inland waters of the Province of Ontario may be brought either in the Exchequer Court of Canada or in the Supreme Court of Ontario.

[*Smart* v. *Wolff*, 3 T.R. 323, referred to.]

Statement

QUESTION of law set down for hearing by leave of LATCHFORD, J.

The action was brought by the owner of the schooner "Winnie Wing" against the owner of the steam-tug "Maggie R. King" to recover damages resulting from a collision in the Napanee river.

The question of law was, whether the Supreme Court of Ontario had jurisdiction to entertain the action.

Judgment was given for the plaintiff, jurisdiction being concurrent.

T. H. Peine, for the plaintiff.

H. A. Burbidge, for the defendant.

Middleton, J.

March 9. MIDDLETON, J.:—The defendant contends that this Court has no jurisdiction over the subject-matter of the action, and that the plaintiff's remedy must be sought in the Exchequer Court of Canada, which is a Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890. The plaintiff, on the other hand, contends that, although he undoubtedly might resort to the Exchequer Court, yet this Court has a concurrent jurisdiction in all cases of negligence resulting in collision in inland waters. It is thus sought to renew the ancient and at one time bitter controversy between the Admiralty and Common Law Courts.

In the Fourth Institute, ch. 22, will be found, under the head "*Articuli Admiralitatis,*" the complaint of the Lord Admiral of England to the King's most excellent Majesty against the Judges of the realm, concerning prohibitions granted to the Court of the Admiralty, and the answers of the Judges

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to such complaint. This complaint was made "11 *die Febr. penultimo die termini Hilarii, anno* 8 *Jac. regis.*" Lord Coke triumphantly vindicates the exclusive jurisdiction of the Common Law Courts in all such cases, and the right to prohibit the encroachments of the "Admirall;" and concludes his argument (addressed not to a Court but to Parliament) with this quaint passage:—

"To conclude, the King of England's navy doth excell the shipping of all other forain kings and princes; for if you respect beautiful statelinesse, or stately beauty, they are so many large and spacious kingly and princely palaces. If you regard strength and defence, they are so many moving impregnable castles, and barbicans, and were tearmed of old the wals of the realm. When our English navy is among the ships of other nations, it is like lions *inter pecora campi*, and like a falkon *inter phasianos, perdices, et alia volatilia timida coeli.*

"Besides, no part of the world have such timber for building and repairing of ships as our king hath."

Parliament evidently sympathised with the Common Law Courts, for in A.D. 1400, 2 Hen. IV. ch. 11, a statute had been passed for the enforcing a statute of King Richard (15 R. II. ch. 3) confining the jurisdiction of the Admiral to the limits "according as it hath been duly used in the time of the noble King Edward, grandfather to the said King Richard," by providing "that as touching a pain to be set upon the Admiral, or his Lieutenant, that the statute and the common law be holden against them; and that he that feeleth himself grieved against the form of the said statute, shall have his action by writ grounded upon the case against him that doth so pursue in the Admiral's Court; and recover his double damages against the pursuant; and the same pursuant shall incur the pain of ten pounds to the King for the pursuit so made, if he be attainted."

Story, in his judgment in the celebrated case of *De Lovio* v. *Boit* (1815), 2 Gallison 398, defends the jurisdiction of the Admiral.

Of this judgment it has been said: "This case is a very remarkable one, being in truth a learned and elaborate essay on

Admiralty jurisdiction, and one of the most elementary and luminous views on the subject extant. This great opinion ought to be thoroughly studied by those who aim at solid attainments in this department of the law."

Concerning the position taken by Lord Coke, Story says (p. 407): "There are many persons who are dismayed at the danger and difficulty of encountering any opinion supported by the authority of Lord Coke. To quiet the apprehensions of such persons, it may not be unfit to declare, in the language of Mr. Justice Buller, that 'with respect to what is said relative to the Admiralty jurisdiction in 4 Inst. 135 . . . that part of Lord Coke's work has always been received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy, but an enmity, against that jurisdiction' (*Smart* v. *Wolff* (1789), 3 T.R. 323, 348)."

It is important to note that Story claims no more for the Maritime Courts than concurrent jurisdiction with the Common Law Courts.

Story's judgment, though at first not universally accepted, is now generally regarded as an authoritative exposition of the law upon the whole subject. Twenty-seven years later, in *Hale* v. *Washington Insurance Co.* (1842), 2 Story 176, he reaffirms what is stated in the earlier case. The most learned and hostile criticism is probably to be found in the judgment of Mr. Justice Johnson in *Ramsay* v. *Allegre* (1827), 12 Wheaton 611; but the point there in controversy is far removed from that now before me.

Statutes were from time to time passed in England enlarging the Admiralty jurisdiction; but, throughout, the concurrent common law jurisdiction, save as to occurrences on the high seas, was always recognised. These statutes may be found collected in the preface to the 1st edition, reprinted in the 3rd edition, of Pritchard's Admiralty Digest, and in the introduction to Roscoe's Admiralty Law.

In Ontario the High Court was given all the jurisdiction possessed by the Courts of Common Law in England on the 5th day of December, 1859. See the Judicature Act, R.S.O. 1897,

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ch. 51, sec. 25. This jurisdiction has been now vested in the Supreme Court of Ontario: R.S.O. 1914, ch. 56, sec. 3.

Before the 5th December, 1859, the Admiralty jurisdiction in England had been greatly enlarged by the Acts of 1848 and 1854; but, so far as actions such as this are concerned, the jurisdiction was still entirely concurrent. Cases in the Common Law Courts for negligence in navigating a ship are found collected in the 2nd edition (1863) of Bullen and Leake, p. 319.

In 1873, in England, the Court of Admiralty became an integral portion of the Supreme Court of Judicature; and by the Judicature Act of 1875 provision was made for the hearing in the Admiralty Division of all actions of which it had hitherto taken cognizance concurrently with the Courts of Common Law. This change, having been made subsequent to 1859, would not in any way affect the jurisdiction of the Supreme Court of Ontario.

While the Exchequer Court is given very wide jurisdiction under the Colonial Courts of Admiralty Act, that jurisdiction is concurrent, and there is nothing to displace the jurisdiction of the ordinary Common Law Courts.

I, therefore, determine the point of law raised, in favour of the plaintiff; and, in pursuance of the arrangement made at the argument, this judgment will be embodied in the formal judgment disposing of the case upon the merits, so that the whole question may be open upon one appeal. Costs occasioned by the raising of this legal question will be paid to the plaintiff in any event.

Judgment for plaintiff.

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Ontario Supreme Court, Middleton, J. May 22, 1914.

1. MARRIAGE (§ IV A—45)—ANNULMENT—JURISDICTION—MARRIAGE ACT, R.S.O. 1914, CH. 148—RIGHT OF ATTORNEY-GENERAL TO INTERVENE.

Because of the right to intervene given to the Attorney-General of Ontario by the Marriage Act, R.S.O. 1914, ch. 148, in actions to annul certain irregular marriages, the Attorney-General has a status to make a preliminary application to dismiss or stay the action on the ground that the case disclosed by the plaintiff's pleading is not within the statutory provision for annulment and that the Court would therefore have no jurisdiction to entertain it.

[*Lawless* v. *Chamberlain*, 18 O.R. 296, referred to; see also *Reid* v. *Aull*, 16 D.L.R. 766, and its Annotation on Trials in camera, 16 D.L.R. 769.]

Statement

MOTION by the Attorney-General for Ontario for an order dismissing the action or staying all further proceedings, on the ground that the Court had no jurisdiction to entertain the action.

Order sustaining Attorney-General's right to intervene.

G. H. Watson, K.C., for the plaintiff, raised a preliminary objection as to the right of the Attorney-General to be heard.

Edward Bayly, K.C., and *Eric H. Armour*, for the Attorney-General.

No one appeared for the defendant, although notified.

Middleton, J.

MIDDLETON, J.:—The plaintiff, an infant, now past nineteen years of age, sues by her father, George P. Reid, alleging that a marriage ceremony which was performed on the 25th July, 1913, is void, because it was procured by deceit and fraud and through wrongful influences and misstatements of the defendant, who had procured mastery of the mind and will of the plaintiff so that she was incapable of exercising judgment and discretion; the ceremony, it is said, being performed while the plaintiff was under the influence of intoxicating drink which the defendant procured the plaintiff to take, by which she became and was incapable of reasonable thought and action. It is also alleged that the affidavit made for the purpose of obtaining the marriage license was untrue, and that the license was wrongfully and illegally issued, and the ceremony was, therefore, illegally performed. It is asked that the Court declare the marriage to be

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null and void, and that the marriage license be also declared illegal, fraudulent, and void. The defendant has filed a statement of defence to this claim, in which he denies all impropriety on his part, and alleges that the marriage was duly solemnized with the full and free consent of the plaintiff.

As no one appeared for the defendant on this motion, I am not aware whether the defendant has any intention of resisting the plaintiff's claim when the action actually comes to trial. Statements were made by the counsel for the plaintiff which indicate that no defence will be offered.

The Attorney-General has been served with notice of trial pursuant to the statute now forming part of the Ontario Marriage Act, R.S.O. 1914, ch. 148.

In *Lawless* v. *Chamberlain*, 18 O.R. 296, my Lord the Chancellor stated that the Courts of this Province have jurisdiction to declare a marriage null and void *ab initio* where it is shewn to be void *de jure* by reason of the absence of some essential preliminary. In that case it was held that there was no defect in the marriage, and the action was dismissed; and it has since been intimated in a series of reported decisions that this statement was a dictum only, and the contrary opinion has been more than once expressed.

The Attorney-General takes the view that our Courts have no jurisdiction to entertain an action brought for the purpose of declaring a marriage void which has been duly solemnized, unless the case can be brought under sec. 36 of the Marriage Act; and this motion is made for the purpose of having that question determined.

The Attorney-General rests his right to intervene upon the provisions found in sec. 37 of the Marriage Act. The plaintiff now contends that this statute does not give the right of intervention claimed by the Attorney-General, save in cases falling under sec. 36. That section provides that where a form of marriage has been gone through between persons either of whom is under the age of eighteen years, without the consent of the parent or guardian, the Supreme Court of Ontario shall have jurisdiction, in an action brought by the party, who was under the stipulated age, to declare and adjudge that a valid marriage

was not effected or entered into, provided that the parties had not after the ceremony lived together as man and wife.

This section had its origin in an Act passed in 1907. In 1909, the Act was amended by adding as sub-sections of the original of sec. 36 the provisions now found in sec. 37, in a slightly amended form. In their original form, the operation of these added sub-sections was, no doubt, confined to actions falling under the section itself; but, in 1911, the statute was recast, and the sub-sections in question are removed from the original section and given the dignity of an independent statutory enactment. As they stand now, the sub-sections commence by a wide provision, applicable not only to the statutory action provided for by sec. 36, but also to any case in which the intervention of the Court is sought for the purpose of declaring a marriage void. "No declaration or adjudication that a valid marriage was not effected or entered into shall in any case be made or pronounced upon consent of parties, admissions, or in default of appearance or of pleadings, or otherwise than at a trial."

I cannot narrow this, as contended by Mr. Watson, and make it applicable only to cases where one of the contracting parties was under age, leaving it open in all other cases to have the marriage declared to be invalid upon consent or upon default of defence. It follows that the sub-sections which are appended to this wide declaration are equally wide in their application, and confer upon the Attorney-General the right to intervene in all cases in which a declaration of the invalidity of a marriage is sought.

Nor can I yield to the alternative argument presened by Mr. Watson. Sub-section 4 provides that ten days' notice of trial shall be given to the Attorney-General; sub-sec. 5, that "the Attorney-General may intervene at the trial or at any stage of the proceedings, and may adduce evidence and examine and cross-examine witnesses in like manner as a party defendant." Mr. Watson's contention is, that this allows the Attorney-General to intervene only at the trial, and does not allow the making of such an application as this, to stay the action.

Two answers, I think, are apparent. In the first place, there is nothing to restrict in any way the meaning to be attributed

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to the word "intervene." Mr. Watson contends that this litigation is the mere private concern of the parties litigant. The Legislature has thought otherwise. The public are concerned; and the Attorney-General, as representing the public, is authorized to intervene, that is, according to the meaning given that word in the Oxford Dictionary, "come in as something extraneous . . . come between, interfere so as to prevent or modify a result." This makes it the duty of the Attorney-General to intervene so as to modify the result which would otherwise be obtained in this private litigation, if he thinks the public interest demands it. Moreover, the section itself provides that the intervention may be not only at the trial, but at "any stage of the proceedings."

If the Court has no jurisdiction, it seems to me that that fact should be ascertained at the earliest possible stage of the action. Upon an application to have this case heard in camera, made to my brother Latchford, it was stated under oath that the plaintiff's health and condition was such that a cross-examination in public might seriously affect her life or reason; and it is easy to conceive that the case made by the plaintiff in her pleadings is one which ought not to be paraded in open court if there is any real doubt of the jurisdiction of the tribunal to entertain the action. No Judge ought to be asked to pronounce an opinion upon such a matter, affecting as it must the whole future of this unfortunate young woman, unless it is plain that he has jurisdiction to deal with the action. If the finding should be adverse to the plaintiff, and it should afterwards be held that the Court had no jurisdiction, her position would be lamentable in the extreme. Scarcely better would be her situation if the finding upon the facts should be in her favour.

These considerations point to the propriety of separating the trial of the question of fact from the hearing upon the question of law. Speaking generally, the policy of our law of recent years has been entirely against the separation of the issues in law from the trial of the questions of fact; but the Rules still provide for this, leaving it to the Judge in each case to determine whether the questions should be so separated. It appears to me that this case is one of the few in which the interests of the

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parties will be best served by determining this much-debated legal question in the way suggested.

The fact that the latest reported decisions seem to be against the existence of the jurisdiction also points to the adoption of this course; because they render it probable that the Judge before whom the case would come for hearing, if the issues of fact and law should come down together, would investigate the legal aspect of the case in the first instance; and, if he considered himself bound by the reported cases, he would not express an opinion upon the question of fact if he was satisfied that he had no jurisdiction, and a new trial would almost inevitably follow, as an appellate Court would hesitate long before dealing with questions of fact of this nature, depending upon the weight to be given to the evidence of witnesses which it had no opportunity of seeing or appraising.

The merits of this legal question not having been discussed before me, I do nothing more now than determine that the preliminary objection must be overruled, and the motion must be heard upon its merits at some convenient date.

Objection overruled.

REX v. SHAJOO RAM.

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British Columbia Court of Appeal, Irving, Martin, Galliher, and McPhillips, JJ.A. November 9, 1914.

1. OATHS (§ I—2)—IN FORM CUSTOMARY WITH PERSONS OF WITNESS' RACE OR BELIEF.

When a witness without objection takes the oath in the form ordinarily administered to persons of his race or belief, he is under obligation to speak the truth under penalty of punishment for perjury, although there may not have been an invocation of a deity or any express admission by the witness that his conscience was bound.

[*R.* v. *Lai Ping*, 8 Can. Cr. Cas. 467, 11 B.C.R. 102, and *Curry* v. *The King*, 22 Can. Cr. Cas. 191, 48 Can. S.C.R. 532, 15 D.L.R. 347, applied.]

Statement

CROWN Case reserved on an indictment for perjury.

Judgment for the Crown, IRVING, J.A., dissenting.

R. M. Macdonald, for the prisoner.

A. Dunbar Taylor, K.C., for the Crown.

Irving, J.A. (dissenting)

IRVING, J.A. (dissenting):—In this case I have reached the conclusion that there was no proper oath administered. There is

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no indication whatsoever of a Deity being invoked. That invocation is essential to constitute an oath. Therefore the case in my opinion should be answered in favour of the prisoner.

It seems to me that this case shews a very loose and unsatisfactory way of doing business is permitted in the Police Court. It may take a little more time to do things properly and in order, but it is necessary that they should be done properly in order to be legal.

Martin, J.A.

MARTIN, J.A.:—In my opinion the learned Judge of Assize was right in deciding on the evidence that a proper oath was administered in the Police Court. It is conceded that the witness was competent to take an oath. I pause here to say that there is no doubt that the words "You take your oath" were used, as will be seen by reference to page 14, where Ricketts, the interpreter, says what he told him was, "The oath that you take," so this clears up the doubt that was expressed by counsel for the prisoner as to whether the language really used was not "You eat your oath" (which appears on p. 5 of the case), suggesting that it was used advisedly in accordance with some peculiar form of religious observance; it is clearly only an error of the stenographer.

I think in principle that this case is governed by the unanimous decision of the Full Court in *Rex* v. *Lai Ping*, 11 B.C.R. 102, 8 Can. Cr. Cas. 467, wherein all the four Judges agreed (including Mr. Justice Duff, now of the Supreme Court of Canada, my brother Irving and myself) that an oath administered to a non-Christian Chinaman was properly administered, though all he did after stating that he swore by burning paper after writing his name on it, was to write his name on a piece of paper and burn the same while being told "that he was to tell the truth, the whole truth, and nothing but the truth, or his soul would burn up as the paper had been burned." There was in this, be it noted, no invocation of a Deity or Supreme Power or statement that the witness's conscience was bound, yet the decision of the Court given at p. 106 in the language of the Chief Justice, with whom all agreed, is as follows:—

> "It seems to me that when a man without objection takes the oath in the form ordinarily administered to persons of his race or belief, as the case may be, he is then under a

legal obligation to speak the truth, and cannot be heard to say that he was not sworn. If we were to decide otherwise we would deprive the evidence given in a Court of Justice of the most powerful and necessary sanction which it is possible to give it, namely, the risk of a prosecution for perjury."

In the case at bar the prisoner said, through the interpreter (p. 5), "I take my oath to tell the truth and nothing but the truth," and also held up his hand at the time of so doing. It was not disputed that this is the "form of oath ordinarily administered to persons of his race or belief," and that fact further appears by the case before us containing part of the evidence on the trial in the Assize Court whereby it is shewn on p. 16 that the accused, and present appellant, himself was again sworn in the same way according to the "custom of his people" by putting up his hand and "affirming" as the interpreter loosely terms it, though he, of course, does not use that word in its real technical sense, as appears by his next remark: "He swears by putting his hand up. It is like affirming," and (p. 13) he says this is "the usual oath;" also in answer to the learned Judge the interpreter stated that he had put the oath to the witness in such a way that it "would compel him to tell the truth." I attach no importance to the fact that the witness was not explicitly asked "if the oath in the form in which he took it was recognized by him as binding upon his conscience," because it is clear from the recent decision of the Supreme Court of Canada in *Curry* v. *The King* (1913), 48 Can. S.C.R. 532, 15 D.L.R. 347, 22 Can. Cr. Cas. 191, 50 C.L.J. 190, that it is not necessary so to do; I refer particularly to the judgment of Mr. Justice Anglin at p. 540. And in the case at bar such a question in those exact words could not have been asked or answered because we are told by the two interpreters that there is no such word as "conscience" in the witness's language. See Ricketts, p. 14, and Gwyther, p. 12; the latter says:—

> "The word 'conscience,' well, I have never used it yet on a trial, and as far as I know, no one else knows how to put it to them. It is to be binding on them. It is to be binding on their conscience. It is one and the same thing. It is simply a translation of the one thing into the other."

In such circumstances all that it was possible to do would be to use such appropriate and equivalent terms as would bring home

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to the mind of the witness the fact that he was binding himself according to his moral sense to speak the truth. There are many words in many languages which cannot be directly or exactly expressed by those in other language, but the law does not allow justice to be defeated by requiring the performance of formal or technical linguistic impossibilities. Here the interpreter Ricketts says (p. 14), "I asked him the best way I could if that was binding upon his conscience," and again (p. 15), "I put it to him the strongest way I could," and as he speaks the language well what more could be expected? He said to the witness (p. 14), "The oath that you take is this binding on you?" and the witness replied that it was. Surely that can mean one thing and one thing only, that it was clearly brought home to the witness that he was bound by his moral sense, *i.e.*, his conscience (though that word could not be exactly employed) to tell the truth, and if he did not it would be wilful and corrupt falsehood. Accompanied as this statement was by the uplifting of the hand towards the heavens, a solemn and significant act inseparable in such circumstances from an intention to invoke a Deity supposedly therein dwelling, and one for a great length of time associated with "the more ancient of the two forms known in modern proceedings, 'the adjuratory invocation of the Deity with uplifted hand commonly called the Scotch oath,'" as the Chief Justice of Canada puts it in *Curry* v. *The King*, 15 D.L.R. 347, 22 Can. Cr. Cas. 191, I have no doubt whatever that the conscience, as we call it, of the witness was duly bound. As the Chief Justice went on to say:—

> "Having taken the oath in that form without objection, it is an admission that the witness regarded it as binding on his conscience."

It must be conceded that he was duly sworn according to the "form ordinarily administered to persons of his race or belief," because the evidence to that effect is uncontradicted, and therefore he could be convicted of perjury on this very oath which is here attacked if he were being tried in his own country, India, and yet it is said that he can escape that punishment on the same oath in this country! I confess I am unable to follow such reasoning. It is directly contrary to the decision in *Rex* v. *Lai Ping*, 11 B.C.R. 102, 8 Can. Cr. Cas. 467, which we are bound by and which has been followed for ten years and never questioned. The suggestion

that the valid oath of a witness somehow loses its efficiency to bind him because he happens to change his residence to some other part of the Empire places so great a premium on perjury that I feel it should receive no encouragement from this Court. In the judgment of Mr. Justice Idington in *Rex* v. *Curry*, *supra*, there is a paragraph, the last, which contains expressions peculiarly appropriate to this case:—

Martin, J.A.

> "It is extremely desirable that men appearing as witnesses in our Courts and in such capacity taking any form of oath or making any affirmation, should understand they are, when wilfully and corruptly speaking falsely under any such circumstances, liable to be convicted of perjury, whatever may be their peculiar religious, mental or moral conceptions of the binding effect of the form of oath or affirmation."

With regard to the precautions taken by the magistrate, it appears to me that he took unusual care to satisfy himself by putting questions through the interpreter, in the way pointed out, to see that the oath he administered himself was properly put and that the conscience of the witness had as a matter of fact been bound (see case, pp. 5, 6 and 15), and two interpreters were used, *viz.*, Ricketts and a check interpreter, Gwyther, who is a Government interpreter of Hindu languages in the Canadian Immigration Department.

GALLIHER, J.A.:—While I take the view that on the whole greater care should have been taken in this case in the administration of the oath, I am inclined to think that the oath was sufficiently administered.

Galliher, J.A.

McPHILLIPS, J.A.:—I agree with my brother Martin. I merely wish to add, in dealing with people who do not speak the English language, no matter what language it may be, there will always be difficulty perhaps in rightly conveying, in apt words of that foreign language, the true meaning of what is a first essential in a British Court of Justice, and that is, that all evidence should be preceded by an oath or failing an oath, an affirmation, which is provided by statute.

McPhillips, J.A.

Now, in this particular case upon the evidence I consider the stated case furnished to us shews that sufficient care was taken to properly convey and have portrayed to the mind of the witness

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what he was bound to do, and that was to take an oath under the law as we have it. I am the more impelled to come to this conclusion when I find that this witness when giving his evidence in the Assize Court also was sworn in the same manner, and, apparently was thought to have been sufficiently sworn there. It would seem to me that if we were to come to the conclusion that he was insufficiently sworn in the Police Court we would have to conclude that likewise he was insufficiently sworn in the Supreme Court. I think that that would hit very seriously at the administration of criminal justice, that there should be any requirement of a more strict nature than, apparently, followed out in the Supreme Court, and, I think, as well followed out in the Police Court. The whole question would be then: Did this witness come into the Court with the intention to take an oath which was binding upon him? And we have the natural response that would go with that, as it appears when he wished his evidence to be believed for the purpose of his exculpation, in the Supreme Court, he was sworn in like manner.

My conclusion, therefore, is that the question should be answered in favour of the Crown.

Judgment for the Crown.

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Nova Scotia Supreme Court, Ritchie, J. June 13, 1914.

1. CRIMINAL LAW (§ IV H—150)—REPRIEVE—DEATH SENTENCE—DISCRETION OF TRIAL JUDGE—PROPOSED APPEAL TO PRIVY COUNCIL FROM PROVINCIAL COURT OF APPEAL.

The right of the trial Judge in a capital case to grant a reprieve of the death sentence is discretionary; and where it is sought for the purpose of appealing to the Judicial Committee of the Privy Council on a point of a purely technical character, quite apart from the merits of the conviction, and after a decision by the provincial Court of Appeal against the prisoner, a reprieve will be refused if in the Judge's opinion the further appeal which could be had only by an application to the Privy Council for special leave would be a frivolous one.

Statement

THIS was an application for a respite of the sentence of death under sec. 1063 of Code. The prisoner was convicted of murder at the Halifax (March, 1914) criminal term and was sentenced to death. An application was made to Ritchie, J., the trial justice,

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to reserve certain questions of law, among them the following, "Is section 27, chapter 155, R.S.N.S., 1900, *ultra vires* of the Legislature of Nova Scotia," which application was refused. An appeal was unsuccessfully asserted from said refusal to the full Court: *R.* v. *Cook*, 23 Can. Cr. Cas. 50, 18 D.L.R. 706.

Statement

A petition to the Judicial Committee of the Privy Council asking special leave to appeal from the judgment of the Supreme Court of Nova Scotia in respect to the question set forth herein, was lodged and served on behalf of defendant.

The motion was refused.

Argument

W. J. O'Hearn, for the motion. Defendant is *bonâ fide* endeavouring to appeal on a constitutional question and has a certificate as to arguability of point involved. The Judicial Committee will entertain such an application where a constitutional question is involved. The application cannot be heard until July 6th. The sentence is to be carried out on June 30th.

Jenks, K.C.:—The order asked for is discretionary. The point raised is technical. Defendant has failed to account for his delay since sentence passed.

Ritchie, J.

RITCHIE, J.:—The prisoner is under sentence of death, having been convicted of the crime of murder. I am asked under section 1063 of the Code to grant a reprieve in order that his counsel may have an opportunity of applying to the Privy Council for leave to appeal. The question which the prisoner's counsel desires to raise is as to whether or not section 27 of the Judicature Act which fixes the times when Courts of Criminal jurisdiction are to sit is *ultra vires* or not.

Section 92 of the British North America Act gives to the Provincial Legislature exclusive jurisdiction in regard to "the administration of justice in the province including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction and including procedure in civil matters in those Courts."

Section 91 gives to the Parliament of Canada exclusive jurisdiction in regard to "the criminal law except the constitution of Courts of criminal jurisdiction, but including procedure in crim-

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inal matters." Is the fixing of the dates when the Courts shall sit part of the organization of the Courts or is it procedure? If the former, then the legislation is within the powers of the local legislature. I was so strongly of opinion that it came under the head of organization that I refused to reserve the point for consideration by the Supreme Court of Nova Scotia; an appeal was taken from my refusal, which was dismissed. I must follow the Court and not the opinion of Mr. Lefroy, particularly as I do not agree with the reasoning mentioned in his opinion.

The case of *R.* v. *Stewart*, 15 Can. Cr. Cas. 331, cited on behalf of the prisoner, has, in my opinion, no application. In that case the accused elected to be tried before the County Court Judge. The Judge fixed a day for the trial, but in consequence of illness was unable to attend. Subsequently he fixed another day for the trial. It was held that it was competent for him to take this course. The contention was that the Judge had lost jurisdiction because the trial did not take place on the day first mentioned. That contention was obviously unsound, the Judge being once seized with jurisdiction, had the inherent right to proceed with the trial when he deemed best and that right is one entirely apart from any question of constitution under the British North America Act.

I think an application to the Privy Council for special leave would be a frivolous application and, therefore, I will not grant a reprieve in order that it may be made.

I am by no means sure that I would grant a reprieve even if I thought there was something in the point sought to be raised. It is a point of a purely technical character and one in which the guilt or innocence of the prisoner is not involved. I have discretion to grant a reprieve under section 1063; I would hesitate a long time before I exercised that discretion in favour of this prisoner, who has been properly convicted of murder in cold blood in order to steal.

Reprieve refused.

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CASES REPORTED, VOL. XIX., PART 3.

REX v. McDERMOTT.

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Saskatchewan Supreme Court, Newlands, J. September 18, 1914.

1. APPEAL (§ III E—91)—FROM SUMMARY CONVICTION—SERVICE OF NOTICE OF APPEAL—CR. CODE SEC. 750.

The period of ten days limited by Code sec. 750 (as amended 1909 and 1913) for filing a notice of appeal from a summary conviction does not apply to the service of notice on the respondent and the justices; it is sufficient that the service was made in sufficient time to perfect the appeal.

[Criticized in Annotation to this case.]

2. APPEAL (§ III D—86)—RECOGNIZANCE—SUMMARY CONVICTION AND FINE —CR. CODE SEC. 750.

Where a summary conviction directs payment of a fine and, in default of distress, imprisonment, the defendant's recognizance on an appeal therefrom under Cr. Code 750 need not cover the fine and costs, the imprisonment fixed in default of payment being sufficient security for that; the basis on which the amount of the recognizance should be fixed in such case is what the probable costs of the appeal would be.

[Criticized in Annotation to this case.]

Statement

MOTION for a mandamus to justices of the peace to compel them to issue a distress warrant under a summary conviction on the ground that the defendant's attempted appeal had not been perfected.

The motion was refused.

D. B. McCurdy, for informant Dunnett.

A. Benson, for magistrates.

Newlands, J.

NEWLANDS, J.:—On July 30, last, James J. McDermott was convicted of a breach of sec. 43, ch. 110, R.S.S. 1909, and fined $50 and costs, $12.50 to be levied by distress of his goods and chattels, and in default of distress, 30 days in Regina gaol with hard labour.

From this conviction McDermott appealed. The informant now moves for a mandamus to compel the convicting justices to issue a distress warrant to collect the fine and costs imposed on the following grounds:—

(1) Because a notice of appeal was not served on the informant within ten days after the conviction order.

(2) Because McDermott did not enter into a recognizance in an amount to cover the fine and costs and an amount fixed by the justices to cover costs of an appeal.

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Upon these two grounds the informant contends that the appeal has not been perfected and that there is therefore no appeal, and that it is the duty of the justices to collect the fine and costs by distress. The statute providing for appeal in such cases is sec. 750 of the Criminal Code as amended by ch. 9 of 1909, and ch. 13 of 1913.

As to the first objection, sec. 750 of the Code, sub-sec. (*b*), as amended by ch. 9 of 1909, provided that the notice of appeal should be served on the respondent or justice "within ten days after the conviction," but this sub-section was further amended by sec. 26 of ch. 13 of 1913, that the notice of appeal must be filed in the office of the Clerk of the Court appealed to within ten days after the conviction, "and by serving the respondent and the justices who tried the case each with a copy of such notice." The ten days mentioned in the section is not the time, therefore, in which the notice is to be served on the respondent, and it is not necessary for the purposes of this case for me to decide within what time such notice must be served. All I need to decide is that the notice was served on McDermott in sufficient time to perfect the appeal, and this is my opinion.

As to the second objection, sub-sec. (*c*) of sec. 750, as amended by the Act of 1909, provides for three cases:—

(1) Where the punishment adjudged is imprisonment.

(2) Where a fine is imposed, and in default of payment imprisonment.

(3) Where imprisonment is not directed.

In the first case, the accused is either to remain in custody or enter into a recognizance in form 51; in the second case, to remain in custody, enter into a recognizance in form 51, or deposit with the justices an amount sufficient to cover the amount adjudged to be paid, together with such further amount as the justices deem sufficient to cover the costs of the appeal, and in the third case, to enter into a recognizance in form 51 or make the deposit of money.

This case comes under the second class, and the accused had, therefore, three alternatives: (1) to remain in prison; (2) enter into a recognizance in form 51; or (3) deposit a sum of money. He selected the second alternative and entered into the recog-

nizance in form 51. This recognizance is to be "conditioned personally to appear at the said Court and try such appeal and to abide the judgment of the Court thereupon and to pay such costs as are awarded by the Court."

As the recognizance in the second case is the same as in the first, it was apparently not the intention to make the recognizance cover the fine and costs, the imprisonment fixed in default of payment being sufficient security for that. The amount of money, therefore, for which the bond would be given would be a sum fixed by the justice to cover the costs of appeal, and as this was done in this case, the grounds upon which this application is made fail, and the application is therefore dismissed with costs.

Application dismissed with costs.

Annotation—Appeal (§ III E—91)—Service of notice of appeal—Recognizance. Annotation

The decision of Newlands, J., in *R. v. McDermott, supra*, is subject to adverse criticism on both points set out in the head-note. The motion for a mandamus seems not to have been the appropriate method of procedure and might have been dismissed on that ground which is not dealt with in the opinion handed down. The case dealt with the regularity of appeal proceedings on an appeal from a summary conviction. The notice of appeal had been duly filed and a recognizance taken by the convicting justices to an amount which they considered sufficient. The questions which were under discussion on the mandamus proceedings taken to compel the justices to ignore the attempted appeal as irregular were such as would ordinarily be raised by a motion to quash the appeal or by preliminary objection on the hearing of the appeal. A mandamus would lie only for error of the justices to whom it was to be directed and the first ground, viz., that copies of the filed notice of appeal had not been served in due time upon the informant and the justices, involved a question which belonged to the appellate tribunal to determine and not to the convicting magistrates. The motion for a mandamus could not be supported as a substitute for a motion to quash the appeal so far as service of the notice of appeal is concerned. It will be noted also that unless otherwise provided in any special Act the appeal in Saskatchewan under Code sec. 749 is to the nearest district Court, not to the provincial Supreme Court. As to the alleged insufficiency of the recognizance, the second ground taken in the attack upon the appeal proceedings, it would be an extraordinary procedure to anticipate the regular course of raising objection to the regularity of the appeal before the appellate tribunal itself, by such a collateral attack as a mandamus to the justices, whether the defendant is or is not made a party to the proceedings. The exercise of mandamus powers might

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Annotation

Annotation (*continued*)—**Appeal (§ III E—91)—Service of notice of appeal—Recognizance.**

be appropriate at a later stage if the appeal taken to a Court of inferior jurisdiction were improperly quashed upon an erroneous ruling as to the sufficiency of the notice of appeal: *R.* v. *Trottier*, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 25 W.L.R. 663, 6 A.L.R. 451.

Upon the substantive question of the time for service of a notice of appeal it is submitted that it is a more reasonable construction of Code sec. 750 as amended 1913 to apply to the ten days' period both to the filing of the notice of appeal and to the service of copies thereof. Paragraph (*b*) of section 750 as re-enacted in 1909 provided that the appellant give notice of his intention to appeal by filing, etc., "and serving the respondent *or* the justice, etc., within ten days after the conviction complained of." The intention of the amendment of 1913 seems to have been to make service necessary on both the respondent and the justice, where before that amendment it was sufficient to serve the one or the other at the option of the appellant. The transposition of the words "in ten days, etc.," is an improvement in the form of the paragraph and the ten-day limitation still attaches to the service of the respondent and the justice, with a copy of the notice of appeal.

As to the other question of the recognizance, paragraph (*c*) of sec. 750, as well as Code form 51, are explicit in including as the conditions of the bond not only that the appellant shall prosecute his appeal, but that he shall "abide the judgment of the Court thereupon," and pay costs awarded. The form is a general one so as to be applicable to the various circumstances of a summary conviction, and where the latter inflicts a fine, and after the appeal the fine still remains by virtue of the affirmance of the conviction, in terms of the justice's award or by the substitution of a new adjudication in the appellate Court, the words of the condition that the appellant "abide the judgment of the Court thereupon" seem particularly applicable to the payment of that fine. If more were needed to shew that the amount of the fine and costs as ordered in the justice's Court is to be covered by the recognizance and considered by the justice when he fixes the penal sum left blank in the statutory form, it is to be found in the alternative provision for a cash deposit. Whether or not imprisonment in default is directed, the defendant has the option, under paragraph (*c*) as re-enacted in 1909, to deposit with the justice "an amount sufficient to cover the sum so adjudged to be paid" (*i.e.*, the "penalty or sum of money adjudged to be paid" by the conviction or order appealed against) together with "such further amount as such justice deems sufficient to cover the costs of the appeal."

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Alberta Supreme Court, Ives, J. December 15, 1914.

1. LANDLORD AND TENANT (§ III A—44)—AS TO POSSESSION—LANDLORD'S FAILURE TO DELIVER—PRIOR TENANT FAILING TO VACATE—DAMAGES, HOW LIMITED.

The damages against the lessor for failure to deliver possession to the lessee may be limited to the advance rent paid if the lessee for a new term is shewn to have taken his lease subject to the present tenant vacating and to the new tenant arranging for possession.

Statement

ACTION by tenant for breach of covenant.

Judgment was given for the plaintiffs in the result, damages being limited to the advance rent paid.

H. A. Friedman, for plaintiff.

A. C. Grant, for defendant.

B. M. Goldman, for third parties.

Ives, J.

IVES, J.:—The defendant is the owner of a building and land enjoyed therewith, in the village of Lamont. In January, 1914, it was being used by one Maddex to provide a place of meeting for different fraternal orders in the village, Maddex having a written lease of the premises until November, 1914. One Alex. Cohen, well known to defendant and in fact living with him, was anxious to secure premises in Lamont in which to open a general store, and tried to secure the premises in question from defendant. Defendant told him they were under lease to Maddex, and handed him a duplicate copy of the lease which Cohen brought to Edmonton for the purpose of consulting a solicitor in order to ascertain if the unexpired term could be determined and possession of the premises secured. He evidently found that the lease could not be broken and returned to Lamont. The parties knew, however, that Maddex intended to erect premises of his own, and they (Cohen and Harris) saw him separately with the result apparently that the three of them expected the new Maddex building would be ready for occupancy on or before April 1st, 1914, and that Maddex would vacate the premises in question as soon as he had his own place in a habitable condition.

After this understanding had been arrived at the defendant, on February 4, 1914, executed a lease in favor of Cohen and one Tarnov, who had evidently joined Cohen in the proposed store

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business. The term of this lease was for 3 years from April 1, 1914.

These facts clearly shew that Cohen and Tarnov took the lease subject to the prior lease held by Maddex. Apparently the plaintiffs decided they would open a general store business in Lamont if opportunity offered, and they learned of the lease from defendant to Cohen and Tarnov, who were ready to sell it.

On March 6, Max Sanofosky, one of the plaintiffs, with Tarnov went to Lamont to see the defendant and ascertain if he would consent to a transfer of the lease to plaintiffs, and, as the plaintiffs must have known at this time of Maddex's existing lease, the journey in question, I think, had as a further object the matter of when possession could be secured.

Apparently at this time all parties were satisfied that Maddex would be able to get out on or reasonably near the 1st of April following. In any event Max Sanofosky had the opportunity of getting the same information as to the chances of vacating by Maddex as defendant possessed. Nothing, apparently, was concealed from him. Harris consented to a transfer of the lease to plaintiffs, who thereupon took it over on 7th March. The 1st of April arrived, but Maddex was not in a position to move, as his building was not ready, and on the 6th April plaintiffs apparently abandoned their intention of opening business in defendant's premises without trying to obtain any other premises in the village. It may be that none other were to be had, but in any event they made no attempt to secure any for their own business.

The plaintiffs assert that defendant on the 6th and 27th of March gave them positive assurances that possession would be delivered them on April 1 or before, that they relied on these assurances, and ordered goods on the strength of them, and that such assurances and defendant's conduct estops him from pleading any defence that he would have as against Cohen and Tarnov. Defendant says he gave no assurances other than he gave Cohen that plaintiffs well knew that possession depended, not on him but on Maddex, and that he was ready and willing to give them possession if they could arrange with Maddex.

In view of the circumstances, I think defendant's story much the more reasonable, nor do I think his assurances were as positive

and unqualified as plaintiffs would appear to believe. The plaintiffs could easily have saved themselves from the resultant trouble and expense by the exercise of ordinary care and inquiry. They had all sufficient notice and opportunity, yet they say they did not consult Maddex in the matter, when they knew he was the obstacle. The defendant, however, received two months' rent in advance, which amounts to $50, and which he must return.

Judgment for plaintiffs for $50 and costs of an action in the lower scale. Rest of plaintiffs' claim is dismissed.

Judgment for plaintiffs.

QUAKER OATS CO. v. DENIS.

Alberta Supreme Court, Beck, J. December 10, 1914.

1. LIMITATION OF ACTIONS (§ I A—1)—IN GENERAL; STATUTES—N.W.T. ORDINANCE—STATUTE OF JAMES—SUPERSEDED, HOW FAR.

The N.W.T. Ordinance C.O. 1898, ch. 31, is a substitution for the corresponding English enactment, 21 Jac. I. ch. 16, and, so far as the latter deals with the same class of actions, it is not part of the law of Alberta.

[*Rutledge* v. *U.S. Savings & Loan Co.*, 37 Can. S.C.R. 546, followed.]

2. LIMITATION OF ACTIONS (§ IV A—155)—INTERRUPTION OF STATUTE; REMOVAL OF BAR—"JUDICIAL DEMAND"—PART PAYMENT BY CURATOR IN QUEBEC—EFFECT IN ALBERTA.

Even if the collocation on the dividend sheet by the curator appointed under Quebec law in proceedings following a demand by another creditor for the debtor's abandonment of property to his creditors or the subsequent payment of the dividend operates to interrupt the period of limitation in Quebec, where the debt was incurred, an action in Alberta on the debt after the debtor's removal to that province will be barred in six years after the cause of action arose if based on a simple contract; the payment by the curator is not to be regarded under Alberta law as a payment by or on behalf of the debtor and does not stay the effect of the Ordinance.

[*Birkett* v. *Bisonette*, 15 O.L.R. 93, followed; *Hochelaga Bank* v. *Richard*, 5 E.L.R. 575, referred to.]

Statement

ACTION for goods sold and delivered in the province of Quebec, more than 6 years prior to action.

The action was dismissed.

A. H. Gibson, for plaintiff.

John Cormack, for defendants.

Beck, J.

BECK, J.:—The action was commenced on June 5, 1912. The claim is for the price of goods sold and delivered. The particulars,

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set out in the statement of claim, shew goods sold and delivered at dates beginning on January 19 (admitted to be the year 1906) and ending on March 3 of the same year. Then there are various credits in 1906, the last of which is on March 20. Finally, there is a credit on November 11, 1911: "By cash $217.36."

This last credit was introduced by way of amendment made on November 15, 1912, pursuant to leave granted by order of November 8, 1912, which also added "Hermenie Denis" as a defendant. The action was subsequently discontinued against Alfred Denis, the defendants remaining being Hermenie Denis and Bernard Racicot. By way of defence these two defendants separately set up: (1) Traverses. (2) That the alleged debt was contracted in the province of Quebec, and that by the law of that province the debt had become prescribed and no action lay upon it. (3) A denial of the payment of $217.36 on November 11, 1907, or of any sum on any date. (4) If any such payment was made it was not paid by or on behalf of the defendants or with their consent, and if paid by the other defendant, denying that the defendant paying was associated as a partner or otherwise with the other defendant. (5) The Statute of Limitations. (6) The Provincial Ordinance as to Limitation of Actions.

The reply: (1) Joined issue. (2) Alleged that the $217.36 "was made by the assignees of the defendants, who were at that time carrying on business as Alf. Denis & Co. on or about November 11, 1907, and the said payment was made on behalf of the said defendants and at their direction and with their consent."

A commission by way of interrogatories was issued to take the evidence of an advocate practising in the province of Quebec to prove the law of that province applicable to the issues, and it was agreed by counsel for both parties that I and any Court to which the case may be carried on appeal are at liberty to refer to the Civil Code of the province of Quebec and to any decisions or other authorities referred to by the witness to the same extent as could have been done had the witness been examined *viva voce* in Court and had then produced the Code and authorities to which he referred.

The term of prescription fixed by the Civil Code of the province of Quebec in respect of such claims as this is five years, and the effect of the provision is to extinguish the debt. This is admitted.

I have to decide whether the prescription has been interrupted or the operation of the Statute or Ordinance of Limitations been interfered with so as to have disentitled the defendants to the benefit of the prescription or limitation.

On or about March 5, 1906, a demand was made by a creditor upon Mrs. Denis and Racicot as partners under the name of Alfred Denis & Co. to make a "cession" of their property. Presumably this demand was duly served, for a firm became curators of the estate of the partnership and various creditors filed their claims, among others the plaintiff under their then name of "The American Cereal Co., Peterborough, Ont.," for $5,099.05, and they were paid a dividend by the curators of $217.36. There is no acknowledgment of debt in writing from the defendant Mrs. Denis.

On December 21, 1909, the defendant Racicot wrote the plaintiffs a letter in which he says (I translate from the French):—

I have received yours of the 9th December, and in reply, etc. What can I do to pay you, I ask you. There is no ill will on my part, and if you give me time, you will see later that I wish to settle my affairs, but for the present I much regret that I can do nothing. I have confidence that this place will be a good one later on, and if I can obtain an extension of time I will be able by my work to recover my position. I am living very economically and am doing so in order to recover my position and to pay later.

Again, on November 22, 1911, Racicot wrote the plaintiffs—in English—as follows:—

I have receive your letter dated 13th yesterday and in answer I will tell you that no body is more sorry than me to be unable to pay you. . . . But I am full of hope to make some money soon and if I succeed you will be paid my share. What I mean is this:—[then he tells of a piece of land in Manitoba which he expects to acquire and says:]—If I can have the land, I will be O.K. and in position to pay you my share of your account.

His scheme regarding the land fell through. Article 2183 of the Civil Code reads:—

Prescription is a means of acquiring, or of being discharged, by lapse of time and subject to conditions established by law.

In positive prescription, title is presumed or confirmed, and ownership is transferred to a possessor by the continuance of his possession.

Extinctive or negative prescription is a bar to, and in some cases precludes, any action for the fulfilment of an obligation or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law.

Article 2260 reads:—

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The following actions are prescribed by five years:— . . .

4. Upon inland or foreign bills of exchange, promissory notes, or notes for the delivery of grain or other things, whether negotiable or not, *or upon any claim of a commercial nature* reckoning from maturity; this prescription does not apply to bank notes.

5. Upon sales of moveable effects *between non-traders* or between traders and non-traders, these latter sales being in all cases held to be *commercial matters*.

Article 2222 reads:—

Prescription may be interrupted either naturally or civilly.

Article 2224:—

A judicial demand in proper form, served upon the person whose prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when a personal service is required, creates a civil interruption.

Seizures, set-offs, interventions and oppositions, are considered as judicial demands.

No extra-judicial demand, even when made by a notary or bailiff, and accompanied by the titles, or even signed by the party notified, is an interruption, if there be not an acknowledgment of the right.

Article 2227:—

Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs.

It is quite clear that the lapse of the prescriptive period, without interruption, extinguishes the right and not merely the remedy. It is equally clear that where interruption is sought to be established by reason of a payment on account, the payment must have been made under such circumstances as to amount to "an acknowledgment which . . . the debtor makes of the right of the person against whom the prescription runs," *i.e.*, under such circumstances as would justify a jury in inferring a promise to pay the balance. See a number of cases cited in Beauchamps' Annotated Civil Code, note 10 to art. 2227.

The Quebec counsel who gave evidence of the law of the province of Quebec gives it as his opinion that prescription is interrupted by an abandonment or cession by a debtor to a curator followed by the filing of a claim by the particular creditor against whom prescription is pleaded, and the preparation of a dividend sheet shewing the claim in question, or in other words, collocating the particular creditor and the payment of a dividend by the curator to the creditor.

I have no doubt he is entirely right in this opinion, but his reasoning and the authorities to which he refers do not satisfy me that more than the demand of cession, the cession and the filing of the claim of the creditor is necessary to establish an interruption. This interruption is effected by virtue of art. 2224, the filing of the claim with the curator, who has been constituted such in consequence of a judicial demand, namely, the demand of cession, being itself a judicial demand by the creditor filing the claim. I confess I am not satisfied that the collocation of the creditor upon the dividend sheet and the payment of a dividend add anything to the effectiveness of the interruption founded upon art. 2224, nor constitute an additional ground of interruption under art. 2227.

He refers to *Carter* v. *McLean* (1901), R.J.Q. 20 C.S. 395, a decision of Lemieux, J., who does, indeed, express the opinion that the payment of a dividend on a collocated claim with the knowledge and presumed consent of the debtor constitutes an additional ground of interruption, but it seems to me that the real ground of decision is that the cession and filing of the claim is a judicial demand, and that the opinion on the other point is *obiter dictum*.

The Quebec advocate explains the reason for this opinion to be that the curator is the agent of the debtor. No doubt he is, but to what extent? Surely only to realize the assets and distribute the proceeds among the creditors, incidentally agreeing upon or compromising the amount of claims and paying any net balance to the debtor, but not to the extent of creating any new liability which, on the hypothesis that a partial payment by the curator interrupts prescription, would be the result, for a partial payment interrupts prescription only when made under such circumstances that thereby a new promise to pay is to be inferred as a fact. If the curator could so conduct himself as to create a new obligation by implication, it would logically follow that he could create a new obligation by an express agreement; a proposition which surely could not be sustained. The view I have expressed is maintained by reason and authority in the Ontario case of *Birkett* v. *Bisonette*, 15 O.L.R. 93. However, I find that the opinion of the Quebec counsel is sustained by the decision of an Appellate Court of Quebec in the case of the *Hoche-*

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laga Bank v. *Richard*, 5 E.L.R. 575, and I must therefore take it as the law of Quebec that the payment of a dividend by a curator does effect an interruption of prescription. Yet I should think this conclusion is reached as an implication of law, not as an inference of fact.

I have no doubt that prescription against the plaintiff's claim, had it been sought to enforce it in the province of Quebec, would have been held to have been interrupted by reason of there having been a judicial demand respecting it on some date between March 5, 1906 (the date of the demand of cession), and October 10 (the date of the dividend sheet), for the plaintiff's claim, the date of the filing of which is not shewn, must have been filed between these dates. But if the claim was filed before June 12, 1907, as in all probability it was, the new period of prescription would have elapsed before the commencement of this action.

The burden of establishing the interruption, and therefore of shewing that the plaintiff's claim was filed with the curator subsequently to June 12, is on the plaintiff, and I must consequently hold that, as on the evidence before me the probabilities are against this, interruption by way of a judicial demand has not been established. In view, however, of what I have said, I think I am forced to hold that interruption by payment, *i.e.*, of the dividend, has been established. This, however, does not dispose of the action.

As to our own ordinance relating to limitations of actions, first, I think that ordinance (C.O. 1898, ch. 31) is a substitution for the corresponding English statutory provision (21 Jac. I., ch. 16), and that the latter, so far as it deals with the same class of actions, is not part of our law; with the result that, though the period of limitation is the same in the case of simple contracts the provisos of the statute of James and the statute of Anne (4 Anne, ch. 165, xix.) are not in force here. The Supreme Court of Canada has so held in *Rutledge* v. *U.S. Savings & L. Co.*, 37 Can. S.C.R. 546.

Under this ordinance the remedy on simple contract debts is barred by the lapse of six years after the cause of action arose.

As a result of judicial decisions applicable equally to our own ordinance as to the statute of James, a debt is taken out of the operation of the ordinance, (1) by an express unconditional promise to pay, or by an unconditional acknowledgment of the

debt from which a promise to pay is implied, or by a promise to pay on the fulfilment of a condition or the expiration of a specified time or the happening of a certain event, if the condition is fulfilled or the specified time has elapsed or the specified event has happened: Hals., vol. 19, tit. "Limitation of Actions," sec. 95; and by Lord Tenterden's Act (9 Geo. IV., ch. 14) such an acknowledgment must be in writing; or (2) by a partial payment, such that from it a promise to pay can be inferred in fact and not merely implied in law: *ib.* sec. 110.

The ordinance, therefore, is an answer to the claim unless there has been such an acknowledgment or such a partial payment.

I shall discuss presently the letters of the defendant Racicot.

As to the payment made through the curator, I adopt the decision in *Birkett* v. *Bisonette*, 15 O.L.R. 93, already referred to, and consequently hold that whatever may be the law of the province of Quebec with regard to such a payment, it is not such a payment as stays the effect of our ordinance. Even if the law of that province is that a new promise is to be implied from a partial payment so made, that, in my opinion, results only in that law raising an implication of law, and the question under our ordinance must be what is the inference of fact which this Court ought to draw. From such a payment I cannot draw the inference of fact that there was a new promise; and therefore no amendment—as was asked—to set up a new contract, which would necessitate the setting up of the original debt, the circumstances of the partial payment and the law applicable of the province of Quebec, can help the plaintiffs.

It is possible that the result of a judicial demand, cession, filing of a claim, and the collocation of the creditor on the dividend sheet, and the fact of no objection being made to the claim, may, according to the law of Quebec, be equivalent to a judgment in favour of the collocated creditor for the amount of his claim, and that the plaintiffs here might have sued as on a foreign judgment, in which case six years from the date of the judgment would be the period of limitation, but they have not done so; nor have they suggested that such is the law of that province; and even if I were satisfied on that point and an amendment on this view were asked—as it was not—I think it would not at this date be a proper case in which to permit an amendment. It remains for me to consider the letters of Racicot.

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A careful reading of them, in view of the decisions, leads me to the conclusion that neither contains an unconditional promise to pay. I doubt if either is even a conditional promise to pay, but if otherwise it is essential that proof be given of the fulfilment of the condition; in the first case, that he has "recovered his position" so as to be able to pay; in the second that he "succeeded" in the land transaction to which he referred, in which he says he in fact failed to succeed.

In my opinion, for the reasons I have given, the plaintiff's action should be dismissed with costs.

Action dismissed.

YUKON.

Y. T. C.

YUKON GOLD CO. v. BOYLE CONCESSIONS.

Yukon Territorial Court, Macaulay, J. July 8, 1914.

1. WRIT AND PROCESS (§ I—6)—AMENDMENT—FRESH CAUSE OF ACTION—DATE.

An amendment of the date of the writ of summons commencing an action cannot be made for the purpose of including a fresh cause of action arising *pendente lite*.

MOTION to amend.

The motion was dismissed.

F. T. Congdon, K.C., and *J. P. Smith*, for application.

C. W. C. Tabor, for defendant.

Macaulay, J.

MACAULAY, J.:—This is an application on behalf of the plaintiff for an order that the plaintiff be at liberty to amend the writ of summons and the amended statement of claim in this action by changing the date of the said writ of summons and the date of the said amended statement of claim from September 11, 1913, to June 24, 1914, and by changing the words "three months" to the words "eleven months" in the 10th paragraph of the amended statement of claim.

The affidavit filed in support of the motion shews that the amendment is sought in order to avoid a multiplicity of actions owing to the fact that the defendant has caused the plaintiff additional damages by reason of continuing acts of the same kind complained of by the plaintiff in his original statement of claim since the issue of the said writ of summons in this action.

Rule No. 305, Annual Practice of 1912, provides as follows:—

> The Court or a Judge may at any stage of the proceedings allow either party to amend or alter his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

See note at p. 894, vol. 2, Annual Practice, 1910, that it is the practice in amending writs of summons that the amended writ shall bear the date of the original writ, but is sealed with the date of the issue. Also marginal r. 10, p. 8, Annual Practice, 1910:—

> Every writ of summons shall bear date on the day in which the same is issued.

There is nothing in r. 305 which provides that the date of a writ of summons could be changed; and if such a practice were established an entirely new cause of action might be brought by such an amendment as suggested.

See *Campbell* v. *Smart*, 5 C.B. 196, where it was held that the Court could not allow the dates of writs of summons to be altered for the purpose of preventing the plaintiff's claim being barred by the Statute of Limitations.

See also *Culverwell* v. *Nugee*, M. & W. Exch. 558, where it was held that the Court would amend a writ but would endorse thereon the day of the date of the first writ of summons, and would not amend the writ to a later date.

On the application before me it is proposed to amend the date of the writ of summons from September 11, 1913, to June 24, 1914. This might mean an entire new cause of action, and if such an amendment were granted it would, in my opinion, be an abuse of the process of the Court.

The application will, therefore, be dismissed with costs.

Application dismissed.

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Yukon Territorial Court, Macaulay, J. November 21, 1914.

1. WATERS (§ II G—132) — "WATERCOURSE" DEFINED — SOURCE OF — "SLOUGHS."

A so-called "slough" will constitute a water-course if it has well-defined banks, channel, and bed, and its source of supply is permanent and does not depend upon the rains and melting snows in its vicinity for its water supply although they add to its volume.

[*Thames Conservators* v. *Smeed*, [1897] 2 Q.B. 334; *Williams* v. *Richards*, 23 O.R. 651; *Beer* v. *Stroud*, 19 O.R. 10; Farnham on Waters, 1559, referred to.]

2. TRESPASS (§ I C—15)—ENCROACHMENT—REMEDY—DAMAGES IN WILFUL TRESPASS—SCOPE OF.

On fixing the damages for a wilful trespass in mining operations no allowance will be made to the defendant for the working cost of dredging.

[*Lamb* v. *Kincaid*, 38 Can. S.C.R. 516, followed.]

3. BOUNDARIES (§ II C—15)—BY WATERS—CHANGE IN WATERS—SHIFTING OF BOUNDARIES, HOW LIMITED.

When boundary lines have once been fixed, a subsequent change in the status of the waters, whether by artificial means or through natural causes, will not have the effect of shifting the boundaries.

[5 Cyc. 898, referred to.]

4. MINES AND MINERALS (§ I—1)—ON PUBLIC LANDS—EXCEPTION OF "MINES" —RESERVATION OF "RIGHT TO GET MINERALS"—INTERPRETATION OF.

An exception of "mines" or of any mineral occupying a continuous space is an exception also of the space occupied; but a reservation of a right to get minerals does not operate as an exception of the minerals themselves unless the intention to that effect is clearly shewn.

Statement

ACTION in damages for alleged wilful trespass in mining operations, and counterclaim by the defendant.

Judgment was given for the plaintiff for $11,700.60 damages; the counterclaim was dismissed.

F. T. Congdon, K.C., *J. B. Pattullo*, K.C., and *J. [illegible]nith*, for plaintiff.

C. W. C. Tabor and *F. X. Gosselin*, for defendant.

Macaulay, J.

MACAULAY, J.:—In this action, after a view of the *locus in quo* had been taken at the request of all parties, the defendant company agreed with the plaintiff company with respect to certain matters in dispute between the parties in paragraphs 10 (c), (d) and (e); also paragraphs 11, 12, 15, 16, 17, 18 and 19 of the statement of claim; and upon the provisions of the agreement, which was reduced to writing and filed, being carried out by the defendant company the plaintiff company abandons its

claim to any damages by reason of the flood of the spring of 1914, and also agrees to abandon all claims to damages on account of the dredging of the Hunker and Bonanza roads by the defendant company, and upon further undertakings being entered into and carried out by the defendant company as provided in said agreement, the plaintiff company agrees to abandon its claim to damages as therein provided.

This leaves the following questions to be decided by the Court, *viz.*: The boundaries of lot No. 8 as mentioned in the pleadings; the boundaries of river claims 12 and 13; the boundaries of the lower half of claim No. 105 below discovery on Bonanza Creek; the trespasses, if any, committed by the defendant company on the property of the plaintiff company, and the question of damages if trespass found; also the question of damages as asked by the defendant company in its counterclaim for the depositing of tailings by the plaintiff company in the Klondike River from its hydraulic operations carried on upon the mining property known as the Acklen Farm.

For the purposes of this trial the following facts are admitted, subject to the qualifications or limitations, if any, thereunder specified, saving all just exceptions to the admissibility of such facts or any of them as evidence in this cause:—

1. That the plaintiff was at all material times mentioned in the amended statement of claim, and still is, the owner and in possession of lot 8, group 2, in the Yukon Territory, referred to in the amended statement of claim.

2. That the plaintiff was at all material times mentioned in the amended statement of claim, and is, the owner and in possession of river claims Nos. 12 and 13 above Maris Discovery, left limit Klondike River, referred to in par. 3 of the amended statement of claim.

3 (*a*). That said river claims Nos. 12 and 13 are within the boundaries of the said lot 8, group 2.

(*b*) That the said lot 8, group 2, and the said river claims 12 and 13 are within the boundaries of Klondike City, Yukon Territory, as defined by an Ordinance of the Commissioner in Council, being Ordinance 68 of the Consolidated Ordinances of the Yukon Territory, 1902.

(*c*) That grants for the said river claims 12 and 13 were issued to the plaintiff by the Gold Commissioner of the Yukon Territory on the 25th day of April, 1910, under and by virtue of an Order of the Governor-General in Council dated the 31st day of July, 1906.

(*d*) That on the 31st day of July, 1906, the Governor in Council approved by Order in Council regulations for the entry by and issue of grants to the plaintiff of the said river claims.

(*e*) That renewal grants of the said claims have been issued by the said

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Commissioner annually since the said 25th day of April, 1910, to the plaintiff, and the said claims are now in good standing.

4. (*a*) That one H. C. Gingg, applied to the Department of the Interior of Canada on the 25th day of July, 1897, for a grant of said lot 8, group 2.

(*b*) That such application was transferred to one Lee Pate by the said H. C. Gingg.

(*c*) That a patent from the Crown of the said lot, with a reservation of a portion, was granted to the said Lee Pate on December 5th, 1901.

(*d*) That a patent from the Crown of the said lot, without such reservation, was granted to the said Lee Pate on the 28th day of January, 1903.

(*e*) That the said Lee Pate transferred the said lot to one J. B. Foichet, by transfer dated the 9th day of January, 1905.

(*f*) That the said J. B. Foichet transferred the said lot to one Arthur Newton Christian Treadgold, by transfer dated March 1, 1906.

(*g*) That the said Treadgold transferred the said lot to the plaintiff by transfer dated the 18th of July, 1907.

(*h*) That the plaintiff is now, and has been since the 18th day of July, 1907, the holder of the certificate of title of the said lot.

5. (*a*) That the Klondike River is a non-tidal and non-navigable river, but boatable and floatable.

(*b*) That the said river runs past said lot on the northerly side.

6. (*a*) That the plaintiff was at the times it threw and caused to be thrown into the bed of the Klondike River, tailings and debris as set out in par. 12 of the counterclaim, the owner of hillside and bench claims in said paragraph referred to under the placer mining regulations and laws in force in the Yukon Territory.

(*b*) That the bodies of tailings and debris referred to in par. 12 of the counterclaim were tailings and debris from the placer mining operations of the owners of the said mining claims, and were run into the Klondike River from the said mining claims.

In the month of November, 1897, James Gibbon, D.L.S., made a survey of said lot 8 according to his field notes, a copy of which is filed as ex. "I" in this action, but the survey itself is dated August 7, 1900, and the plan bears the same date.

In the month of March, 1914, Mr. C. W. MacPherson, D.L.S., chief engineer for the plaintiff company, made a survey of said lot 8 for the purpose of re-establishing the said survey of said lot as made by the said Gibbon. He testifies that he correctly reproduced the said survey as shewn on plan filed in this action as ex. "R," and that he was assisted in such survey by Mr. C. S. W. Barwell, D.L.S., who also testifies that the said MacPherson, assisted by himself, correctly reproduced the said survey of the said lot. Both Mr. MacPherson and Mr. Barwell describe the manner in which they proceeded to perform the work of reproducing the said survey.

They first looked for posts of the Gibbon survey of said lot,

and being unable to find any they proceeded to examine the tie of his survey to lot No. 1, being the official survey of Dawson townsite. Not being able to reproduce the said survey from this tie, they looked for further evidence.

Mr. Barwell had made a survey of lot No. 90 in 1903, which said lot joined lot 8, and in their examination of lot 90 they found the slough, according to their evidence, to be practically the same as it was in 1903. Barwell says he recognizes on lot No. 90 one of his old posts of survey of 1903. They then, according to the evidence, looked to see if the lot could be tied to some other survey made from the Bonanza base line, and found that the survey of lot 7 was tied to the Bonanza base line. They then proceeded to look for evidence of the survey of lot No. 7, and upon examination of the south-west corner they found a survey post where the survey post of the south-west corner of lot 7 should be.

They then endeavoured to pick up another point on the westerly boundary of lot 7, and from the field notes of Gibbon's survey of the Bonanza base line they say they had no difficulty in finding the point at the intersection of the westerly boundary of lot 7 with the Bonanza base line at a distance of 982.1 feet from angle No. 8 along the Bonanza base line towards angle No. 9, this being the distance given by Gibbon in his survey of Bonanza base line at which the westerly boundary of lot 7, group 2, intersects the course of the base line.

Having these two points on westerly boundary of lot 7, they measured 2,640 ft. in a northerly direction along westerly boundary, which brought them to the north-west corner of lot No. 7. Having found the north-west corner of lot No. 7, which, according to the evidence, is a common point with station 10 of lot 8, they had no further difficulty to contend with, and had only to measure the distances around lot 8 as given in Gibbon's field notes to reproduce lot 8, and both MacPherson and Barwell swear that they correctly reproduced the survey of said lot 8 in the manner described.

Mr. Barwell says there is a slight variation between MacPherson's survey of lot 8 and Gibbon's survey, but that the limit of error is 2 6/10 ft. east or west at station 10, and nothing north or south; but that this is a permissible error in surveying. He

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also says the difference between Gibbon's plan and MacPherson's plan is error of Gibbon in connecting his plan with Dawson townsite in astronomical bearing.

On behalf of the defence, Mr. J. W. Boyle, Jr., chief engineer of the defendant company, Mr. Clinton Robert Lewis, Mr. Guy Johnson and Mr. F. H. Kitto, D.L.S., were called, and very lengthy and technical evidence was offered to shew the impossibility of re-establishing the said survey of said Gibbon of said lot 8.

Mr. Boyle, Mr. Lewis and Mr. Johnson are all bright young mining engineers, recent graduates, but none of them are Dominion land surveyors. They stated, however, that they were qualified to make surveys of the nature of the re-survey of said lot 8, and that they endeavoured to make a re-survey on the ground of said lot, and all gave it as their opinion that it was impossible to re-establish the said survey, and gave their reasons for arriving at such conclusion.

Mr. Kitto, who was Director of Surveys for Yukon Territory from the summer of 1911 to the summer of 1914, and who now describes himself as Assistant Chief of Division, Surveyor General's Office, at Ottawa, testifies that he went out with Mr. Boyle when he was endeavouring to reproduce Gibbon's survey of said lot 8, but was not assisting Mr. Boyle in his work—"but to look at Gibbon's measurements along Bonanza base line to westerly boundary of lot 7," to satisfy himself if Gibbon shewed a satisfactory tie between base line and lot 7. The result of his work was that he considered that no satisfactory tie could be made from Gibbon's notes. He further says that in his opinion lot 7 has nothing to do with lot 8, and a tie between them has nothing to do with lot 8.

He further says that in his opinion a reproduction of Gibbon's survey of lot 8 as shewn on ground would not be a correct survey of lot 8 to-day, as it is his opinion that the present shore line as it exists to-day is the correct boundary of said lot, and that no post or tie made any difference.

The post found at the south-west corner of lot 7 was a weather-beaten post, and charred, and all marks on it were obliterated. Mr. Boyle, Mr. Lewis and Mr. Johnson said they did not think it was a survey post, but a locator's post. Mr. Kitto says that he would not say that it was a regular survey post, or he would

not say otherwise, but that if it were a survey post the weight of evidence would be in favour of it being a survey post of lot 7; but that he would want clear evidence that it was in its original position before he accepted it.

Mr. MacPherson and Mr. Barwell both say that they are satisfied that the said post is a survey post, and that they recognize it from having a cottage top, which they describe, and say that a locator's post does not have a cottage top. They further say that there is no evidence of any claims having been staked in the vicinity of this post, or of any other survey having been made there, except the survey of lot 7, and they both say they have no doubt about the genuineness of the post.

The field notes of Mr. Gibbon of Bonanza base line, ex. "L," were produced to Mr. Kitto by counsel on cross-examination, and he was asked about the figures 7-27 and 8-27 which appear thereon, and he stated that as a surveyor he did not know what they meant and that he could draw no inferences from them. MacPherson and Barwell, on the other hand, state that as surveyors these figures are very plain to them, and that they understand very clearly what the figures mean, and gave their explanation of the meaning of those figures. Mr. Kitto agrees with Mr. MacPherson and Mr. Barwell that if any error occurred in Mr. Gibbon's survey of lot 8 it would be shewn at the south-west corner, as the notes indicate it was closed there. Mr. MacPherson has been a Dominion land surveyor since 1900. Was Director of Surveys for Yukon Territory from 1906 to 1911, when he resigned his position to accept his present position. Mr. Barwell has been a Dominion land surveyor since 1893, and has been in this territory following his profession since 1897, but at the present time he has no instructions from the Surveyor General to make surveys. Both these gentlemen have had a very large experience in their profession.

Their evidence and the evidence of Messrs. Boyle, Lewis and Johnson, is in direct conflict in regard to the reproduction of Gibbon's survey of lot 8. The evidence of Mr. Kitto corroborates, in some respects, the evidence of Messrs. MacPherson and Barwell, and in other respects differs from their evidence. He does not say, as do Messrs. Boyle, Lewis and Johnson, that Gibbon's survey of lot 8 could not be reproduced as Messrs. MacPherson

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and Barwell claim they have reproduced it; but he says, in his opinion even if reproduced it would not give the correct boundaries of lot 8 as it exists to-day. That, however, is a question of law, as I understand it, which the Court must decide.

With all this great conflict of evidence I do not see how I would be justified in holding that MacPherson and Barwell had failed in reproducing the said survey of said lot 8. They are Dominion land surveyors and men of great experience. The evidence offered to destroy their survey is evidence of men of less experience and of men who are not themselves Dominion land surveyors, and no matter how able they may be in their profession, they are pitted against men of greater experience who are as positive in their opinions for upholding the survey as they are in their opinions for destroying it; and the only other Dominion land surveyor, Mr. Kitto, who is called to support their views, will not go nearly so far as they do in opposing the survey. My only course, I think, in such a case is to accept the survey as reproduced by MacPherson and Barwell, and to declare that it has been successfully reproduced.

Counsel for defendant company referred me to ch. 20, sec. 4, sub-sec. 2, and also sec. 5 of the Dominion Lands Act, 1908. Also to sec. 55, sub-sec. (*d*); sec. 56, sub-sec. 3; sec. 58 and sec. 60 of the Dominion Lands Survey Act, ch. 21, 1908, and contended that these sections governed the manner in which a re-survey should be made and established.

All these sections refer to Dominion lands except secs. 58 and 60. The lands in question are not Dominion lands, and the owners of the land did not petition or request the Minister to make a re-survey of the said lands under secs. 57 and 58, as it contended it was able to re-establish a survey of the said lands itself without making such request to the Minister, and in my opinion it had the right to re-establish the survey in the manner it has adopted, and that it was not necessary, in order to re-establish the said survey, that it should be re-established under the provisions of said secs. 57 and 58 of said Act.

Sutton v. *Village of Port Carling*, 3 O.L.R. 445, was cited in support of the above contention. In that case the proceedings were taken under the provisions of sec. 39 of R.S.O. 1887, ch. 152, which refer solely to provincial lands in the Province of Ontario, and has no application to the case before me.

On December 5, 1901, letters patent, ex. "E," were granted by the Government of Canada to Lee Pate of Dawson, in the Yukon Territory, of lot numbered 8 in group numbered 2, in the Yukon Territory, which parcels or tracts of land are described as

> situate, lying and being in the Klondike River opposite the mouth of Bonanza Creek, as shewn on plan of survey of said lot by James Gibbon, Dominion Land Surveyor, dated August 7, 1900, and approved and confirmed at Ottawa on January 24, 1901, by Edward Deville, Surveyor General of Dominion Lands, and of record in the Department of the Interior as No. 8683;

with the exceptions mentioned therein, among others being the area comprised within a strip of land 100 ft. in width measured from the edge of the navigable waters surrounding the said lot at ordinary high water stage, the minerals under the said lands, and riparian rights; and, on January 28, 1903, further letters patent, ex. "F," were granted by the said Government of Canada to the said Lee Pate confirming the former said letters patent granted to the said Lee Pate, and further granting to the said Lee Pate the said strip of land 100 ft. in width measured from the edge of the navigable waters surrounding the said lot at ordinary high water stage, which had been reserved in the first patent, ex. "E."

The evidence shews that the said lot has been for many years locally described and known as "Lee Pate's Island." It is surrounded on its northerly side by the main branch of the Klondike River, and on the southerly side by what is locally known as a "slough" of the Klondike River, and the position is fairly shewn on Gibbon's plan, ex. "J," and also upon model ex. "U." The Klondike River is described in the evidence as a river of sloughs, there being many sloughs at different places along its course. The defendant contended that the waters which ran around the southerly side of said lot 8, and are described as "the slough," were of insufficient volume, and otherwise did not possess the necessary characteristics of a river or water-course to entitle said waters to be designated as such, and consequently that said lot 8 was not an island, but was in fact a part of the mainland, and that it had been improperly described as an island.

There was much evidence offered in this connection, and much conflict of evidence as to the volume of water the slough usually contained at different seasons of the year, some of the witnesses stating that in going up the Klondike River in the early days of

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this camp with small boats containing freight they had followed the course of the slough throughout its whole course, as there was much less current than was to be met with in the main river, and that they experienced no difficulty in navigating the said slough. Other witnesses stated that they had driven logs throughout the whole course of the slough in assisting in bringing drives of logs down the Klondike River; that some of the logs went down the main river and a portion of them entered the slough and were driven through to its mouth where it re-entered the Klondike River on the west side of said lot 8. Other witnesses stated that they had been familiar with the said slough for years, and that it was never possible to have so navigated the said slough with boats, or to have driven logs through the said slough, except at flood water in the spring time.

All witnesses agreed, however, that it had a definite channel and bed, with a well defined bank on the southerly side, and generally a sloping bank on the northerly side well defined in certain places, and that the waters that flowed through the said slough were waters from the Klondike River, and, in addition, some of the surface waters that drained the flat in the vicinity of the slough. All witnesses agreed that for a certain portion of each year Klondike waters flowed through the said slough, although the evidence was contradictory as to the length of time each year that the flow continued, but all agreed that the slough always contained some water although parts of it were dry at times, except, of course, in the winter time, when the water would be frozen into ice.

The waters of the Klondike entered the slough at two places on the easterly side of said lot 8, and the evidence shews that there have been for some years a dam at each of these heads, one known as the Government dam and the other known as the brush dam, and both shewn on model ex. "U." The dams were placed there to arrest the flow of water into the slough, and for some years wood for mining purposes has been taken through the gates of the Government dam and floated down to a place where it was sawn by a wood-saw, which said place is also marked on said model ex. "U." In order to float this wood it was necessary to scrape the slough on the main Klondike River side of said dam to allow the wood to float through the dam, and there was

evidence that some accumulations of debris formed on the main river side of the said dam on account of the dam stopping the natural flow of the water. I visited the *locus*, as previously stated, and had a view of the banks and bed of the slough, and found it had a channel, bed and banks as described in the evidence.

The Cyclopedia of Law and Procedure, vol. 36, p. 496, defines a slough as a term used in the western States in reference to rivers, meaning a channel diverging from the main channel and returning into it again at a lower point.

Gould on Waters, p. 98, defines a river as a running stream of water pent in on either side by banks, shores or walls. It consists of the bed, the water, the banks or shores, and it also has a current. It is a river or water-course from the point where the water comes to the surface and begins to flow in a channel until it mingles with the sea, the arms of the sea, lakes, etc. It may sometimes be dry, but in order to be within the above definition it must appear that the water usually flows in a particular direction, and has a regular channel, with bed, banks or sides.

Thames Conservators v. *Smeed* (C.A.), [1897] 2 Q.B. 334, 17 English Ruling Cases 578, defines the bed of a river to mean the soil between the ordinary high water mark on the one side and the ordinary high water mark on the other side.

American & English Encyc. of Law, 2nd ed., vol. 30, p. 347, defines a "water-course" as a natural stream of water usually flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The size or length of the stream is immaterial as regards its character as a water-course; and, at p. 349, says: "A definite channel, having a bed and sides or banks, is an essential requisite to a water-course"; and, at p. 350: "To constitute a water-course it must appear that there is usually a flow of water; but though such flow must have a well defined and substantial existence it need not be continual; the channel may be sometimes dry without depriving the stream of its character as a water-course, provided there is usually a flow of water therein. Swales, sloughs and ravines through which waters collected from the surrounding territory pass in times of freshets from rains and melting snows, but which at other times are dry, are not to be considered as water-courses. To constitute a water-course it

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is necessary that the water should have a permanent source of supply."

American & English Encyc. of Law, vol. 22, p. 984, defines a "river" as a natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and re-flows with the tide.

Williams v. *Richards*, 23 O.R. 651, in defining a channel or water-course, held as follows:—

> That cannot be called a defined channel or water-course which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbours' land the surface water from his own land not flowing in a defined channel.

In *Beer* v. *Stroud*, 19 O.R. 10, it was held that

> A water-course entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character.

Farnham on Water and Water Rights, at p. 1559, says:—

> The source of the water which flows in a channel claimed to be a water-course is a much more satisfactory test than is the presence or absence of channel. It has been said that to constitute a water-course there must be something more than surface water. This, however, is not strictly true, for the surface water may collect from so large an area of country, and be so continuous in its flow, that it takes upon itself the character of a water-course. But to constitute a water-course there must be a supply which is permanent in the sense that similar conditions will always produce a flow of water, and that the conditions recur with some degree of regularity, so that they establish and maintain for considerable periods of time a running stream. The stream need not flow continuously in order to constitute a water-course, but the water must have a current.

An examination of all the evidence offered describing the said slough shews that it fulfils all the requirements that are necessary in law to constitute a water-course.

It contains the well defined banks, the channel and bed, and its source of supply is permanent and does not depend upon the rains and melting snows in its vicinity for its water supply, although they add to its volume, but it has a steady source of supply from the main branch of the Klondike River, although at times it may be nearly dry. It also has a current varying in

velocity at different seasons, and accepting the above definitions given in the text books, and the decisions of the Courts as to what is required in law to constitute a water-course, I find as a fact that the said slough is a water-course as defined by law. According to the evidence, however, at the present time a considerable portion of the westerly part of the said slough has been dug up and entirely obliterated by the process of dredging. Having found the said slough to be a water-course, I also find as a fact that said lot 8 in said group 2 is an island in the Klondike River as described in the said patents to the said Lee Pate, and as shewn on the said plan ex. "J."

By the admission of facts filed in this case, it is admitted that the plaintiff was, and still is, the owner and in possession of said lot 8, group 2, and also was, and is, the owner and in possession of river claims Nos. 12 and 13 above Maris Discovery, left limit of Klondike River, at all times material to this action; that said river claims 12 and 13 are within the boundaries of said lot 8, group 2; that grants for said river claims were issued to the plaintiff by the Gold Commissioner of the Yukon Territory on April 25, 1910, under and by virtue of an Order of the Governor-General in Council dated July 31, 1906; that on July 31, 1906, the Governor in Council approved, by Order in Council, regulations for the entry by, and issue of grants to, the plaintiff of said river claims; and that renewal grants of the said claims have been issued by the said Gold Commissioner annually since the said April 25, 1910, to the plaintiff, and the said claims are now in good standing.

The Order in Council of July 31, 1906, provided that the plaintiff might stake and acquire the ground included in said lot 8 for placer mining purposes providing it complied fully with the provisions of the Placer Mining Regulations in so far as the same can be made to apply, and upon such compliance the Mining Recorder for the district be authorized to grant it entry for the mining rights under the lot in question. The evidence shews that the plaintiff first staked the said claims as creek claims, and the Gold Commissioner would not accept the staking. The said claims were then staked under the specific instructions of the Gold Commissioner by one George Morrison, who made a sketch which is filed with copy of application for grants of said claims as

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ex. "O," and the grants were then issued by the Mining Recorder, the Gold Commissioner having been satisfied with the second staking.

I therefore find on the evidence that the said claims as staked complied fully with the provisions of the Placer Mining Regulations in so far as the same could be made to apply; and in any event it is a matter solely between the Crown and the plaintiff unless some existing prior rights were affected, as under the provisions of the said Order in Council the plaintiff only was entitled to stake the said mining claims.

The evidence shews that in so staking the plaintiff claimed on the southerly boundary of said claims to Gibbon's traverse line of lot 8, and on the northerly boundary it also claimed Gibbon's traverse line of lot 8, in order to take in the ground surveyed by Gibbon as lot 8 according to his plan ex. "G," but the evidence shews that the shore line of lot 8 had receded for a considerable distance on the northerly boundary of said lot 8 since Gibbon's survey shewn on plan ex. "G." The evidence also shews that the defendant is the owner of, or otherwise entitled to, the lower half of creek claim No. 105 below discovery on Bonanza Creek, in the Yukon Territory, and a grant thereof was issued on January 11, 1899.

By a survey made by F. H. Kitto on September 7, 1913, of said creek claim, a plan of which survey is put in as ex. "Q-1," it claims as its northerly boundary of said creek claim a large portion of river claim 12 and a portion of river claim 13 extending beyond the Hunker road, as shewn on said plan ex. "Q-1." On Gibbon's plan of said claim, made with other claims in 1900 and put in as ex. "K," only the up and down stream boundaries of the said claims are defined, and the evidence shews that none of the side boundaries of any of the said claims have ever been extended beyond the said slough surrounding said lot 8.

The plaintiff has always been in active possession of said lot 8, and of river claims 12 and 13, since it staked said claims as aforesaid, and was in such active possession at the time of the alleged trespass.

Having found said lot 8 to be an island in the Klondike River then the northerly boundary of the defendant's said creek claim could not extend beyond the said slough on the southerly side

of said lot 8 and cover a portion of an island in the Klondike River, even though it was staked in priority of time to the said river claims.

The regulations in force at the time of the said staking of said lower half of creek claim No. 105 below discovery on Bonanza Creek were what were known as the "rim rock regulations." Even if said lot 8 had not been found to be an island in the Klondike River, in view of the judgments of this Court in *French* v. *Shade*, *Fleischmann* v. *Creese*, and other decided cases, and of my own views which I have expressed in a recent case of *Landreville* v. *Boulais*, 19 D.L.R. *post*, which need not be considered now, I am of opinion that the northerly boundary of said claim 105 could not have extended beyond the limits of the said slough, and could not have covered any of the ground contained within the limits of said lot 8. The fact that the Crown, by its Order in Council of July 31, 1906, granted the mining rights to the plaintiff under said lot 8, shews that it did not consider that the northerly boundary of said claim 105 extended beyond the limits of the said slough.

The evidence and the correspondence, ex. "P," shews that the plaintiff constructed a fence around river claims 12 and 13 to mark the boundaries thereof, and so notified the defendant, and cautioned it not to trespass upon the plaintiff's said mining property, but that the defendant ignored the protests of the plaintiff and proceeded to dig up a portion of the said fence around the southerly boundary of said claim 12 and trespassed thereon with its gold dredge and dug up a portion of the surface and gravels of the said claim and recovered the gold therefrom by means of its process of gold dredging. The plaintiff claims that the southerly side of the said island had been enlarged by accumulations of silt and debris being deposited along its southerly boundary, and that consequently it was entitled to extend the boundaries of said river claim No. 12 to the extended shore line of the said island.

The southerly boundary of river claim No. 12, however, was staked by it to reach the shore line as found by Gibbon in his said survey of said lot 8, and I am, therefore, of opinion that it could only claim for mining purposes the ground it actually staked as such, and that the southerly limit of said river claim 12 should be the shore line of said lot 8 as found by said Gibbon in his said

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survey of said lot. Confining the said southerly limit of said river claim 12 to the shore line as found by Gibbon, then the evidence shews that the extent of the trespass by the defendant on the said southerly boundary of said river claim 12 was 22,648 cubic yards.

The plaintiff claims that the proper values to be allowed for such trespass should be 31 cents per cubic yard, as that was the estimate of value placed upon the said ground by the defendant in its correspondence, ex. "P." The evidence, however, shews that the actual average value per yard recovered by the defendant in its gold dredging operations carried on upon said river claim 12, and from the ground dredged in its immediate vicinity, was 25 cents per cubic yard.

Of course an actual separate account was not kept of the values recovered from said river claim No. 12, and a separate account of the said values could not be kept when operations were carried on by the process of dredging, and only the average value of the ground in the vicinity can be ascertained. I am of opinion that it is fairer to accept the average value per yard actually obtained than the estimated value, and I therefore find that the value per cubic yard of the ground so dredged by the defendant was 25 cents.

The evidence, in my opinion, shews that the trespass was wilful. The defendant did not attempt to have a survey of the claim made until after the trespass. It knew the plaintiff was in possession and claimed the mining rights. The evidence does shew that defendant offered to submit a stated case to the Court under certain conditions, but the conditions were such that the plaintiff could not accede to them in justice to itself; and, under the authority of *Lamb* v. *Kincaid*, 38 Can. S.C.R. 516, I think the harsher rule should be applied in fixing the amount of damages and no allowance made for the working cost of dredging. Therefore the damages for this trespass will be assessed as follows: 22,648 cubic yards at 25 cents per cubic yard, or $5,662.

The evidence also shews a slight trespass to the surface along the westerly boundary of said river claim 12, from sloughing from the surface. The defendant, in its evidence, admits this slight trespass to the surface, but says it used every endeavour to avoid this trespass, and, in consequence, left a large portion of the bed rock of river claim No. 11 along the westerly boundary of said

river claim 12 untouched, and still some of the surface of said river claim 12 sloughed into the dredging pond. No damages are asked by plaintiff for this trespass and none will be assessed.

As regards the northerly boundary of said lot 8: The evidence shews that there was a gradual erosion of the northerly bank of said lot from the action of the waters of the Klondike River flowing past the said bank, and that the said erosion was perceptible during the period of high water in or about the month of June in each year, and that this erosion was accentuated to a considerable extent since the years 1907 and 1908 by a deposit of tailings in the said river along its right limit and opposite to said lot 8, as shewn on model ex. "U," from hydraulic operations carried on by the plaintiff company on what is known as the Aeklen Farm and shewn on said model ex. "U," by reason of the fact that the said deposit of tailings in the said river on its right bank forced the waters of the said river over towards its left bank, and consequently a greater erosion has taken place annually along the said northerly bank of said lot 8, and along the northerly boundary of said mining claims 12 and 13 since the deposit of the said tailings than had taken place annually prior thereto.

The defendant, in its dredging operations carried on in the Klondike River under the provisions of Dredging Lease No. 23, ex. "Z-1," dredged and mined and won the gold from that portion of the said river which had formerly formed a part of said lot 8, and over which river claims 12 and 13 had been staked by the plaintiff, and the plaintiff claims damages for what it alleges as a trespass and mining of a portion of its said mining claims Nos. 12 and 13, and also damages for other acts of trespass to said lot 8 on its said northerly side.

In its grant of lot 8 to Lee Pate, ex. "E," the Crown excepted from the said lot the area comprised within a strip of land 100 ft. in width measured from the edge of the navigable waters surrounding the said lot at ordinary high water stage.

The said grant contains also the following clause:—

Saving, excepting and *reserving* unto us, our successors and assigns, all navigable and other waters that now are, or may hereafter be found on, under, or adjoining, or flowing through, upon or alongside of the said parcel or tract of land, or any part thereof, and the land forming the bed or shore of such waters, together with the free uses, passages and enjoyment of, in, over and upon such waters, including the right to divert and use, and to

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grant to others the right to divert and use the same for any purpose at our and their pleasure, free from any claim of the said Lee Pate, his heirs and his assigns as riparian proprietor or otherwise howsoever.

It also excepted and reserved all mineral rights in said lot. In grant ex. "F," the Crown granted to the said Lee Pate the said strip of land 100 ft. in width which it had reserved in its former grant to said Pate, but repeating the other exceptions and reservations made in grant ex. "E."

The erosion that took place annually along the north bank of said lot 8 during the period of high water, even before the deposit of the Acklen tailings, was perceptible according to the evidence, and differs from the imperceptible erosion that is alluded to in so many of the authorities cited, and also differs from the sudden changes that occur by a violent effort of nature, that are also mentioned. The changes that have taken place in this instance are more of an intermediate nature owing to the nature of the soil forming the surface of the land being principally composed of muck, and the action of the waters caused by the melting of the snow in or about the month of June in each year.

It was contended on behalf of the plaintiff that notwithstanding the erosion of the surface as aforesaid, after it had obtained the mining rights to said river claims 12 and 13 by Order in Council of 1906, for which it made entry in 1910, its said mining rights were still preserved to it, as it had at all times thereafter maintained possession of the said rights under the provisions of the Placer Mining law; and on the question of erosion plaintiff's counsel cited *In re Hull & Selby R. Co.*, 5 M. & W. 327, 332, in support of contention that as erosion was perceptible grantee or owner did not lose estate. Also *Ford* v. *Lacey*, 30 L.J. Ex. 351; *Mayor of Carlisle* v. *Graham*, L.R., 4 Ex. 361; Hunt on Boundaries, 6th ed. 44; Farnham on Water-courses, 2492, 4, 7, 8; also 5 Cyc. 898:—

> When boundary lines have once been fixed a subsequent change in the status of the waters, whether by artificial means or through natural causes, will not have the effect of shifting the boundaries.

On the other hand, the defendant's counsel contended that the moment the erosion of the surface of the land took place and the waters of the Klondike River flowed over and covered the sub-soil, the Crown became repossessed of the mining rights of such submerged portion, and that the plaintiff's mining rights

receded with such erosion of the surface that took place from time to time, and were at all times confined to the out bank of the river wherever that out bank might be found to be from time to time. I am unable to find authority, however, to support that view.

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The plaintiff obtained the sole right to stake the said mining claims by the said Order in Council of 1906, but it did not stake or make entry until 1910, and I am of opinion, in any event, that not having staked or made entry until 1910, that the northern boundary of its said claims would be confined to the out bank of the Klondike River as it was on that date when Morrison did the said staking. The plaintiff had no riparian rights and could not go beyond the out bank and claim mining rights under what was then, and still is, a part of the Klondike River.

Counsel for plaintiff argued that even if mining rights reverted to Crown as surface receded, which it denied, the plaintiff was still in possession under its placer mining grants; that no investigation had been held at instance of Crown and no office found, and it could maintain an action of trespass against a wrong-doer, and that defendant was a wrong-doer, as it was, at most, a mere licensee under said dredging lease No. 23, without entry, in any event, for any portion of the said river bed that was not the submerged bed of the river when the said lease was granted, and was therefore liable in damages; and, in support of contention, cites *Bristow* v. *Cormican*, 3 App. Cas. 641, at 667.

In *Lynch* v. *Seymour*, 15 Can. S.C.R. 341, the Court was equally divided on the question as to whether a mining lease was a lease or a mere license only, as was the Court of Appeal of Ontario from which this appeal was taken, and consequently the decision of the Divisional Court of Ontario was upheld, which found that the document was a lease, and in *McLean* v. *The King*, 38 Can. S.C.R. 542, where a similar question arose on the construction of a dredging lease granted by the Crown in the Yukon Territory, the majority of the Court held it was a lease or grant and not a mere license only.

The Chief Justice, Sir Charles Fitzpatrick, in discussing the question, said, at p. 545:—

> What is the true effect of the document declared upon, whether it be called a lease, a grant, or a license? Considered in its entirety, it is in my opinion clearly an exclusive grant made for good and valid consideration of all the royal and base metals except coal which the grantee might extract

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during twenty years by *sub-aqueous* mining and dredging from the submerged beds or bars in the river below low water mark, with a license to go upon the premises for that purpose.

If the plaintiff's mining rights along the northerly bank of its said claims 12 and 13 reverted to the Crown as the surface of the banks eroded and receded, and the land became submerged under the waters of the Klondike River, then in my opinion it lost its possession at the same time, and could not recover damages for the gold won from the said ground by the defendant in its mining operations, as the defendant's extended right to dredge the river to the foot of the natural banks, under the provisions of the dredging regulations of May 14th, 1907, was a right given to it by law, and although no further consideration was required to be paid, therefore the plaintiff could not complain, as that would be a matter solely between the defendant and the Crown if the Crown had become repossessed of the said minerals by reason of said erosion, because in such event said rights must revert, if at all, under the exceptions and reservations contained in the original grant of said lot 8 to said Lee Pate.

Under said grant, ex. "E," to said Lee Pate, all the mining rights under said lot 8 were reserved to the Crown and excepted from said grant.

Defendant's counsel contended that grant to Lee Pate issued under provisions of sec. 48 of ch. 54, R.S.C. 1886, which provides that

> No grant from the Crown of lands in freehold, or for any less estate, shall be deemed to have conveyed or to convey the gold or silver mines therein, unless the same are expressly conveyed in such grant.

Halsbury's Laws of England, vol. 10, at 470, says:—

> An exception is always part of the thing granted, and only a thing *in esse* can be excepted. A reservation is of a thing not *in esse*, but newly created or reserved out of land or a tenement upon a grant thereof.

The rule for construing exceptions is, that what will pass by words in a grant will be excepted by the same or like words in an exception, and trees and minerals may be excepted. An exception of "mines" or of any mineral occupying a continuous space, is an exception also of the space occupied; but a reservation of a right to get minerals does not operate as an exception of the minerals themselves unless the intention to that effect is clearly shewn. An exception of trees or of minerals carries with it the right to do all things necessary for getting and disposing of them.

A reservation may in substance be an exception, as where there is a reservation of part of the thing granted; but a reservation will be void if it is repugnant to the grant as a reservation of part of the profits of what is granted.

Sheppard's Touchstone, at p. 77, says:—

> In every good exception these things must always concur: 1. This exception must be by apt words. 2. It must be of part of the thing granted and not of some other thing. 3. It must be of part of the thing only and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have and doth properly belong to him. 6. It must be of a particular thing out of a general, and not of a particular thing out of a particular thing, or of a part of a certainty. 7. It must be certainly described and set down.

See also McPherson & Clark, pp. 164, 165, 166, and cases therein cited.

Casselman v. *Hersey*, 32 U.C. Q.B. 333, p. 341, and the cases cited at that page, shew that when trees are excepted in a lease or grant the lessee or grantee is in possession of them as against a stranger and wrong-doer. The soil in which they grow is his. The lessee or grantee is then in possession of and owner of the soil according to the nature of his estate on which the trees are standing. That, as against a wrong-doer, is a sufficient possession. And also, that mere possession is sufficient as against a wrong-doer is an axiom in law, as *Armory* v. *Delamirie*, and the numerous cases referred to in 1 Smith L.C. 316, fully establish. The same rule applies to mines. Counsel for defendant submitted above authorities, and argued that the moment the erosion took place the Crown stepped in and recovered possession.

Whether the exception of the minerals in the grant to said Lee Pate was by statute or was contained in the grant itself, or whether the exception was both by statute and by grant, makes no difference in my opinion, as minerals form properly the subject of exception and undoubtedly were excepted in the said grant to the said Lee Pate.

Subsequently, by Order in Council of 1906, the right to stake the minerals under said lot was exclusively given to the plaintiff when it complied with the provisions of the said Order in Council, which it did when it staked through Morrison in 1910. It was a special Order in Council giving special rights to a special individual

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or corporation. It contained no exceptions, and the dredging regulations of May 14, 1907, could not interfere with the right given by said Order in Council after grants were made by virtue of its provisions, and it was not repealed by the general language of the regulations.

See *Rockett* v. *Clippingdale*, [1891] 2 Q.B.D. 293, 299, quoting the words of Lord Blackburn in *Garnett* v. *Bradley*, 3 App. Cas. 944:—

> Where only general words are used there is a strong presumption that the Legislature did not intend to take away a particular privilege, right, or property, of a particular class, unless they have done something to shew that.

See also *Att'y-Gen'l for B.C.* v. *Esquimalt* (1911), 19 W.L.R. 693; also Hardcastle, 525, and *Taylor* v. *Corp. of Oldham*, 4 Ch.D. 395. See p. 410.

It has maintained its mining right granted at that date according to the provisions of the Placer Mining law, and I am of opinion that notwithstanding the surface of the said island has eroded in part since the said mining rights were granted to the plaintiff, that it still retains its mining rights to said claims, as they were included in the general exceptions contained in said original grant and afterwards granted without any reservations.

The minerals were properly the subject of exception, and having been excepted in the grant to said Lee Pate the Crown had the right to grant them to whom it chose, and having so granted the said mining rights the fact that the surface eroded could not, in my opinion, destroy the grant to the minerals and cause the minerals to revert to the Crown, as the grant to the minerals was a separate grant from the grant to the surface; and the fact that the owner of the surface and the minerals happened to be one and the same person or corporation could make no difference whatever, or deprive the grantee of the minerals which were under the surface of his right to recover them.

The number of cubic yards removed by the defendant from the plaintiff's said claims, in its said dredging operations on said northerly boundary, taking the out bank of the river as it was when Morrison staked in 1910 as the northerly boundary of the said claims, would be, according to the evidence, 17,760 and 6/10 yards.

In this instance the boundary was by no means certain, and

was difficult to ascertain, and I am of opinion that under the above authorities of *Kincaid* v. *Lamb*, 38 Can. S.C.R. 516, the milder rule should be applied in assessing the damages.

The evidence shews that the average value of the ground in this vicinity was 40 cents per cubic yard. Deducting 6 cents per cubic yard for working cost, the damages should be assessed at 34 cents per yard, or $6,038.60. As regards the defendant's counterclaim for damages: The only evidence offered in support thereof was the evidence of the deposit of tailings by the plaintiff in the Klondike River from its hydraulic operations carried on at what was known as the Acklen Farm, shewn on model ex. "U," during the seasons of 1907 and 1908.

The evidence shews that in 1905 and 1906 hydraulic operations had been carried on at said Acklen Farm by the then owners of the said property, and a quantity of tailings deposited in said river at the said point marked on said ex. "U," and that in the seasons of 1907 and 1908 the plaintiff in its said hydraulic operations deposited a large quantity of tailings at said point in said river.

Mr. J. W. Boyle, Sr., the general manager of the defendant company, in estimating the amount of damage suffered by the defendant by the deposit of said tailings, stated that he had had the tailings measured and there would be 141,830 cubic yds. of tailings; that taking the average of the ground in that vicinity, there would be 141,830 cubic yds. of tailings to be removed, which it would take a dredge 14 days to remove; that the dredge which was operating in the vicinity earned per day over and above the working costs $2,000, and on that basis he estimated the damages at $28,000.

Mr. Charles MacPherson, the plaintiff's chief engineer, in his evidence stated that he had made measurements of the tailings in the month of September, 1913, and that the yardage outside of the old bank of the river was 118,784 cubic yds., and allowing for the bar of 175 ft. in width out from the foot of the hill towards the river would leave 7,680 sq. yds. outside of the bar, giving volume of 15,360 cubic yds., which at 6 cents per cubic yard, the working cost of the defendant's dredge, would amount to $921.60. He also stated that in making this measurement he made no allowance for tailings that were deposited by Mr. Acklen or his associates in his or their operations carried on before May, 1907.

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If damages are to be allowed I am of opinion that the proper method to employ in the assessment, in a case of this kind, according to all the authorities, would be the cost of removal, unless that would amount to more than the value of the ground, and there is no evidence that it would amount to more than the value of the ground.

See *McLaren* v. *Elliott* and *McLaren* v. *Jensen*, 3 W.L.R. 199; also the same case in 4 W.L.R. 162; Barringer & Adams, Mines and Mining, 631 and 698; Lindley on Mines, sec. 844; *Harvey* v. *Sides Silver Mining Co.*, 10 Morrison's Reports 539; also *Whitwham* v. *Westminster Brymbo Coal Co.*, [1896] 2 Ch.D. 538.

The cost of removal, according to the evidence, would be 6 cents per cubic yard, and would be the proper scale to allow, and not the profit per day that a dredge could make in working ground in the vicinity, which might be much more than $2,000 per day if the ground contained more gold, and it is quite plain that it would not be a proper basis on which to assess such damages.

The above is the only evidence that I remember that was offered as to the quantity of tailings deposited, but in the view I take of this claim it is not necessary to make a thorough examination or review of the evidence.

Section 9 of the dredging regulations of 1898 provides that

> any person who has received, or who may receive, entry under the Placer Mining Regulations, shall be entitled to run tailings into the river at any point thereon, etc.;

and sec. 15 of the dredging regulations of May 14, 1907, contains a similar provision; and the evidence shews that the plaintiff, when it carried on its said hydraulic operations, on said Acklen Farm in 1907 and 1908, had received entry to operate the said mining ground.

Neither in the agreement between the holders of said dredging lease No. 23, with Treadgold, of June 10, 1908, nor in the assignment of said agreement from Treadgold to the defendant on October 9, 1912, was any right of action, or chose in action, assigned to the defendant. Any damage that was caused by the deposit of the said tailings occurred before the date of either of said assignments. The said assignments were only made to enable the assignee to work the said mining ground, and no other rights were assigned.

Kirkpatrick v. *McNamee*, 36 Can. S.C.R. 152, was cited by counsel for defendant in support of his right to maintain his counterclaim for damages. I do not think that case applies to the present case.

The dredging regulations provide the right to dump tailings into the said river, and the lessees under said dredging lease No. 23 have made no objection to said dumping of tailings, nor have they assigned any rights that they might have in that respect to enable the defendant to maintain its said claim for damages.

I am of opinion that the defendant is unable in law to maintain its said claim for damages. The plaintiff will, therefore, be entitled to judgment for $11,700.60 damages and costs; and the defendant's counterclaim will be dismissed with costs.

Judgment for plaintiff.

REX v. HUCKLE.

Ontario Supreme Court, Middleton, J., in Chambers. June 30, 1914.

1. CRIMINAL LAW (§ IV H—153)—PARTIAL REMISSION OF SENTENCE FOR GOOD CONDUCT IN PRISON—POWER TO REVOKE OR FORFEIT.

A convict in a penitentiary may provisionally earn a remission of part of his sentence by good conduct duly certified in pursuance of the Penitentiary Regulations of November, 1898; but remissions so earned are subject to forfeiture under such Rules and this without any hearing in the nature of a trial or any right of the convict to be heard.

2. HABEAS CORPUS (§ I C—12)—PENITENTIARY REGULATIONS OF 1898—PARTIAL REMISSION OF SENTENCE FOR GOOD CONDUCT.

Primâ facie the warden and officers of a penitentiary are to determine questions of remission of part of sentence under the Penitentiary Regulations of November, 1898, for good conduct of the convict while in the prison, and also questions of the forfeiture of remissions earned, subject to review and sanction by the Minister of Justice under such Regulations; it is not open to the Court on *habeas corpus* to enquire into the validity of a direction contained in a report duly approved by the Minister forfeiting on the ground of misconduct the periods of remission previously earned by the convict.

Statement

MOTION, upon the return of a habeas corpus, to discharge a convict from custody.

The motion was dismissed.

G. Russell, for the applicant.

W. G. Thurston, K.C., for the Crown.

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MIDDLETON, J.:—Huckle was convicted before His Honour Judge Snider of extortion, and sentenced to seven years' impri-

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sonment, on the 12th December, 1908. His sentence will not expire by effluxion of time until the 12th December, 1915.

Under sec. 64 of the Penitentiaries Act, the Inspectors of Penitentiaries are empowered, subject to the approval of the Minister of Justice, to make regulations under which a record may be kept of the daily conduct of every convict, noting his industry and the strictness with which he observes the prison rules, with a view of permitting the convict to earn a remission of a portion of the time for which he is sentenced, not exceeding six days for every month during which he is exemplary in conduct and industry. When the convict is thus accorded seventy-two days of remission, he is allowed to earn ten days' remission for each subsequent month during which his conduct and industry continue satisfactory. Under the statute, for certain offences, such as attempting to escape, or assaulting officers, the whole remission earned may be forfeited.

Rules were prepared and approved by the Governor-General in Council on the 26th November, 1898. These Rules provide that the Warden may deprive a convict of not more than thirty days of remission for any offence against prison rules, and that there may be forfeiture of more than thirty days with the sanction of the Minister of Justice. Section 65 of the statute provides for the drawing up of a list of prison offences, a copy of which is to be placed in each cell in the penitentiary.

This motion is based upon a fundamental misconception of the provisions of the statute. It is assumed that the convict is entitled as of course to a remission of his sentence unless he is deprived of it for misconduct. A convict may so behave himself that he cannot be regarded as exemplary in conduct and industry, and yet not be guilty of any offence against the prison rules. In that case he would serve the full term of his sentence, for he would have earned no remission. A convict, on the other hand, may, by reason of exemplary conduct and industry, earn a shortening of his sentence, but he may by specific offences forfeit that which he has earned: e.g., this convict apparently had earned some remission, I do not know how much; but on the 18th October, 1910, the Minister of Justice approved of a re-

port of the Warden, dated the 8th September, 1910, by which all remission then accorded was forfeited.

Another fundamental misconception underlying this application is the assertion that the applicant is not bound by the penitentiary regulations; it is said that he has not been furnished with a copy of them, and that he ought not to be bound by any rules of which he has no knowledge. Apart from these rules, there is no right of remission, for the remission is, by the statute, to be under the regulations prescribed.

Then it is argued that the award of remission or the forfeiture of remission must be on some proceeding in the nature of a trial, so that the convict may be heard. This is clearly not what is contemplated by the Act. Some one must determine whether the conduct of the convict is exemplary. Primâ facie the Warden and officers of the prison must discharge this duty. Their conduct will be subject to review by the Minister; but the statute surely does not contemplate a controversy in the Courts over a question of prison discipline.

The Habeas Corpus Act probably has no application to this case, and I am not sure that the writ was not granted per incuriam. It does not apply to any person imprisoned by the judgment, conviction, or order of the Supreme Court or other Court of record. Where, as here, the accused is imprisoned under a conviction, he must seek redress by application to the Minister of Justice, who alone appears to have authority to review the action of the prison officials.

The application is, therefore, dismissed with costs, and the convict is remanded to custody.

Since the above was written I have been handed a statement shewing that, apart from cancelled remission, the accused has 87½ days to serve, and in addition 117 days forfeited—204½ days in all.

Motion dismissed.

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REX v. ROACH.

Ontario Supreme Court, Meredith, C.J.C.P., in Chambers. June 26, 1914.

1. CRIMINAL LAW (§ II•B—44)—RIGHTS OF ACCUSED—FORMAL PROCEEDINGS—ANSWER AND DEFENCE TO SPECIFIC CHARGE.

A person upon trial for a crime has a right to hear all the evidence adduced against him and to insist, as a matter of right, that the formalities of the law as to criminal trials are complied with; and when formal proceedings are in strict law required, *ex. gr.*, an arraignment upon a specific charge made known to the prisoner at the hearing before a magistrate, the absence of the required proceedings is a ground for setting aside the conviction without regard to the question whether or not any substantial injustice had resulted to the accused.

[*Martin* v. *Mackonachie*, 3 Q.B.D. 730, 770, applied.]

2. INDECENCY (§ I—5)—CRIMINAL PROCEEDINGS—SUMMARY CONVICTION—UNCERTAINTY AND MULTIPLICITY.

A summary conviction for that the accused did "at various times and in public places unlawfully commit acts of indecency" at a named city within a period of two months specified is invalid for uncertainty and as including several offences, and no amendment is permissible on certiorari, if the evidence at the hearing included several distinct offences within the period named in the conviction and the magistrate had neither indicated any particular occasion regarding which he found the accused guilty nor found him guilty in respect of all of such occasions.

3. SUMMARY CONVICTIONS (§ III—30)—LIMITATION OF CHARGE AND EVIDENCE TO ONE SPECIFIC OFFENCE.

The necessities of justice as well as the provision contained in sec. 710 of the Criminal Code require that a summary conviction must be for a single and certain charge; and where there is no need for giving evidence of other offences to prove intent, the charge and the evidence at any one trial should be confined to a single offence.

[*Rex* v. *Sutherland*, 2 O.W.N. 595, *Reg.* v. *Hazen*, 20 A.R. 633, and *R.* v. *Alward*, 21 O.R. 519, referred to.]

4. CERTIORARI (§ II—28)—PRACTICE AS TO COSTS—ALTERNATIVE PROCEDURE OF APPEAL AVAILABLE—SUMMARY CONVICTION UNDER CRIMINAL CODE.

It is a ground for refusing costs to the successful defendant on his conviction being quashed on certiorari that he might instead of taking certiorari proceedings have appealed to a local court from the summary conviction and that the local court would have had even wider powers upon the appeal than were available to the superior court in the certiorari proceedings.

Statement

MOTION by the defendant to quash a magistrate's conviction.

The conviction was quashed.

M. J. O'Reilly, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

Meredith, C.J.

MEREDITH, C.J.C.P.:—There was no real trial, in a legal sense, of the applicant, though he was found guilty of a crime

for which he might have been imprisoned with hard labour, for six months, and fined $50, on a summary conviction.

By the term "real trial" I mean that unprejudiced, full, and fair trial which every one charged with a crime is entitled to, and which the Criminal Code of Canada explicitly requires: see secs. 721, 714, 715, 942, 943, 944, 686, and 682; a trial none the less, but sometimes the more, necessary where preconceived notions of guilt exist, even though they may be well-founded. Such a trial does not necessarily involve any waste of time, nor need more be expended in it than is sometimes spent in trials which have to be gone over again because not real trials. Waste of time is often the result of superfluous words, and other things not pertinent.

No information was laid against the accused man; no specific charge was made against him; only a general one of indecent exposure. Neither the shorthand notes of the trial, nor the magistrate's full report of the case, shews that there was any arraignment of the prisoner; see sec. 721 of the Criminal Code; nor that he was otherwise informed, in any formal way, of the charge against him. The school-girl witnesses were not sworn, although there does not appear to have been good reason for not taking their testimony under oath. According to the testimony of a bystander, who is described as a clergyman, the testimony of the girl-witnesses was whispered into the magistrate's ear; and the prisoner's request for an adjournment of the trial so that he could procure counsel to conduct his defence was refused, the magistrate telling him that a lawyer could do him no good. The only reason suggested for the whispered evidence is modesty; but modesty, whether properly described or false or not, cannot justly be permitted to deprive any person upon trial for a crime of his right to hear all the evidence adduced against him.

And, after the prisoner was represented by counsel, he was not permitted—as the shorthand notes of the trial clearly shew—to make his full defence, as, whether strictly regular or not, he ought to have been; but was restricted to evidence of his good character.

It ought not to be, and it may not be, necessary, even if

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excusable, to repeat again the oft-quoted words of the Lord Chief Justice of England, upon this subject, so forcibly expressed in the case of *Martin* v. *Mackonachie* (1878), 3 Q.B.D. 730, 775, but I do so lest we Justices, whether of superior or inferior Courts, forget; and because that case is in point upon the main question involved in this case, as the first words I intend reading shew: "It seems to me, I must say, a strange argument in a court of justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a court of law such an argument à convenienti is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in *pœnam* are, it need scracely be observed, *strictissimi juris;* nor should it be forgotten that the formalities of the law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has a right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the Legislature to amend. The Judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself."

Amendments by the Legislature, from time to time, to the law have made escapes from substantial justice on mere technicality few and far between, if they ever need occur. And I may add that, as the provisions of the law exist for the purpose of making a case so plain that substantial justice can be done, how is it possible to assert that justice has been done when some of the

means the Legislature has deemed necessary in reaching that end have been disregarded?

But, apart from all such irregularities, the conviction, upon its face, is plainly invalid. It is: for that the accused man, within two months prior to the 20th day of May, 1914, did, in the city of Hamilton, "at various times and in public places unlawfully commit acts of indecency . . ." That the conviction is invalid because it includes several offences, and is uncertain, seems to me to be too obvious to require, or excuse, much argument: and, unfortunately, it is not reparable under any of the wide powers of amendment by the Criminal Code conferred upon this Court on motions such as this; because the evidence relates to a number of offences, entirely separate from one another, extending over two years, most of them within "two months prior to the 20th day of May, 1914;" and it is impossible to pick out any one of them as one upon which the prisoner was found guilty: he has not been found guilty on all the occasions testified to, nor has the magistrate in any way indicated any particular occasion regarding which he found the man guilty; indeed, it is hardly likely that he made any finding of that character; but is altogether likely that he merely found that, having regard to all the evidence, the man must have been, on some occasion or other, guilty. It is, therefore, quite impossible to change the generality of the conviction into a particular one out of all that were deposed to with more or less weight; which is enough to invalidate the conviction, without considering whether it would be proper to amend, in the circumstances of this case, were it possible.

The evidence should have been confined to one offence as also the charge should have been; there was no need for giving evidence of other offences to prove intent; and there was no such purpose or excuse in adducing it; the evidence in each case was given for the one and same purpose, namely, to prove the prisoner guilty of separate and distinct offences, in a trial upon all that might come out in the evidence.

Since the argument, Mr. Cartwright has referred me to the case of *Rex* v. *Sutherland* (1911), noted in 2 O.W.N. 595; but that case affords to me no assistance in this case. It was, doubt-

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less, intended to be decided under the special provisions of the liquor license laws of this Province, and not intended for citation in support of a similar ruling in a case such as this: as to the liquor license laws, the well-known cases of *Regina* v. *Hazen*, 20 A.R. 633, and *Regina* v. *Alward*, 21 O.R. 519, deal with the subject to some extent. But, if not, I must hold the law to be quite too plain, that convictions must be, generally speaking, single and certain, to hold the conviction in question, which offends so much in these respects, to be supportable upon any case. The necessities of justice, as well as the laws of the land, require that they be single and certain: see the Criminal Code, sec. 710, sub-sec. 3.

It is, of course, quite true to say that the gist of the charge is the crime or other offence, whether indecent exposure or murder or an illicit sale, but none of these offences can be committed except in an actual concrete case, and there can be no legal conviction or regular prosecution except upon such a case. It ought not to be necessary to say so.

The conviction must be quashed, but without costs; and the usual protective terms may be inserted in the order quashing it. There is special reason for not awarding the applicant any costs; he might have appealed to a local Court, which Court would have had wider power upon the appeal than this Court has on this motion; and he ought to have done so.

Conviction quashed without costs.

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Ontario Supreme Court, Meredith, C.J.C.P., in Chambers. May 5, 1914.

1. COURTS (§ II A 6—175)—CRIMINAL LAW—CROWN PRACTICE RULES (ONT.)—REORGANIZATION OF COURT WITH CHANGED NAME.

Rules of court regulating procedure in criminal matters and passed by the former Supreme Court of Judicature for Ontario under sec. 576 of the Criminal Code, 1906, remain in effect, so far as they are within the statutory authority, as regards proceedings which may be taken in the Supreme Court of Ontario which was constituted by the Judicature Act, 3-4 Geo. V. (Ont.) ch. 19, with the like powers as the former courts of superior jurisdiction in the province.

2. CERTIORARI (§ II—18)—SUBSTITUTING PROCEDURE BY NOTICE OF MOTION FOR PROCEDURE BY WRIT.

The effect of sec. 576 of the Criminal Code, 1906, is not to authorize the provincial courts to create a new practice as to certiorari nor to

change the practice altogether; it is limited to a "regulation" of the practice and it is to be doubted whether there is power thereunder to substitute a procedure by notice of motion to quash a conviction for the procedure by writ of certiorari (Ont. Crown Rules, 1908, rule 1279).

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Statement

MOTION by the defendant, *ex parte*, for a writ of *certiorari* to remove a criminal conviction into the Supreme Court of Ontario, with a view to having it quashed.

The motion was refused.

J. B. Mackenzie, for the applicant.

Meredith, C.J.

MEREDITH, C.J.C.P.:—Mr. Mackenzie's unflagging industry, in his searches for such purposes, has discovered two matters which, he contends, shew that there has been a serious flaw in the practice prevailing in this Province upon applications to quash convictions for crimes; and, as a consequence of his discoveries, he asks for a reversion to the older practice which prevailed for so many years before, and until, the adoption of the present practice, in the year 1908, under Rules of Court framed, in the first instance, by Mabee, J.

His points are: that no Court, such as that authorised, in sec. 576 of the Criminal Code, to make Rules respecting the practice in criminal matters, in this Province, now exists; and, therefore, that the Rules made, at the time I have mentioned, have ceased to have any effect; and that sec. 63 of the Judicature Act is not applicable to this case, because it deals with convictions made by a "magistrate" only, whilst the conviction in question was made by "Justices of the Peace;" and this point is persisted in, notwithstanding the meaning given to the word "magistrate" in the Interpretation Act, sec. 29 (m) and (r), and in the Interpretation Act, sec. 34 (15), because there is an interpretation of the word "Justice" contained in the Criminal Code, under which the conviction in question was made, and that interpretation, whilst it includes a "Police Magistrate," does not include "magistrates" generally: sec. 2 (18).

These contentions seemed and still seem to me to have no weight; but another point forced itself upon me during the argument, a point which seemed to me to be of sufficient weight to require further consideration before disposing of the application.

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Regarding the points made by Mr. Mackenzie, it may not be at all necessary, for any general purpose, to repeat that which was said respecting them during the argument; but, so that the applicant may be under no misapprehension respecting them, I shall do so.

If the Rules of 1908 were well made, why should they fall, even if there were no Court now competent to make any such Rules? There seem to be but two provisions contained in them that might be affected by such a state of affairs, if it really existed: the first is the Rule numbered 1284, which provides that the motion to quash shall be made to a Judge of the High Court of Justice for Ontario, sitting in Chambers; and the other—Rule numbered 1287—is that which gives a right of appeal, by leave, to a "Divisional Court."

There is no reason why the Rules, as far as they are applicable, should not be applied by any Court, in the Province, having power to quash convictions. Why should they cease to have force and effect any more than the Act itself should?

But it is quite erroneous to say that no such body, or that no such Court, now exists: the same body and the same Court exist, with the exception of the "Divisional Court," and they have existed all along, entitled to exercise and exercising the same powers, and performing the same duties: the name has been, in some respects, changed, and the manner of performing such duties, and exercising such powers, has been in some respects varied; but nothing more.

If, however, Mr. Mackenzie were quite right in his contentions, that quite a new Court had come into being, and that there are no Rules, or practice, applicable to it, why should not such Court adopt as its practice the procedure embodied in the Mabee Rules? Until some binding legislation, or Rules, should be enacted, the Court, having jurisdiction to quash, could, and would, necessarily, be obliged to lay down some mode of procedure. See *Robinson* v. *Bland*, 1 W. Bl. 264.

Upon the other point, there was no need of any deep study of the meaning of the word "magistrate;" nor of the exercise of any ingenuity in a vain endeavour to overcome the plain words of the interpretation enactments; because, obviously, the

provisions of the Judicature Act cannot apply to this case. Being a provincial enactment, it can have no effect on procedure in criminal matters; which a motion to quash a conviction of a crime must be; because such procedure comes within the exclusive legislative power of the Parliament of Canada, and is excluded from the legislative power of Provincial Legislatures: the British North America Act, 1867, sec. 91, sub-sec. 27; and sec. 92, sub-sec. 14.

So that Mr. Mackenzie's points seem to me to be, obviously, quite ineffectual.

But I still have some trouble with the question whether there was any power to make the Rules of 1908.

They were made, in so far as they were to be applicable to criminal matters, under the section of the Criminal Code, now numbered 576, which conferred all such power as was intended to be exercised in making the Rules in these words: " . . . may . . . make Rules of Court: . . . .—(6) for regulating in criminal matters the pleadings, practice and procedure in the Court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, bail, and costs . . . and (e) generally for regulating the duties of the officers of the Court and every other matter deemed expedient for the better attaining the ends of justice and carrying the provisions of the law into effect . . ."

The general words of the section are, I think, restricted by these words, covering the very subject in question; and, having regard especially to the words, "including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto," I find it difficult to get out of my mind the doubt whether there was power to do more than regulate the practice in certiorari proceedings—the doubt whether there was power to abolish the certiorari altogether, and substitute another proceeding for it.

Abolition, as well as prohibition, is quite incompatible with regulation: you cannot regulate that which you have destroyed, or even prohibited. This is obvious; the one question is: Do these Rules abolish "certiorari"?; and that depends upon the question: what is certiorari?

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What certiorari is, is not in any sense uncertain. Every one at all familiar with the practice of the Courts of Law knows that certiorari is, in such Courts, a writ; a writ issued out of a Court of law, having power to grant it, in the name of the Sovereign and tested by the Chief Justice, by virtue of that Court's superintending authority over all Courts of inferior criminal jurisdiction in the Province, for the purpose of a supervision of any of their proceedings which may be investigated in such Superior Court. Except in cases in which legislation has provided for an appeal, the writ of certiorari is the only mode by which a revision of proceedings on summary convictions can be had in a higher Court.

Therefore, to abolish the writ of certiorari is to abolish "certiorari;" and, having regard to the well-known, the unmistakable, meaning of the word, under a practice that has continued for hundreds of years, there can be no manner of doubt that Parliament, in making use of the word "certiorari," intended it to carry that plain meaning: that is made doubly certain by the use of the other technical words associated with it, "habeas corpus," "mandamus," "quo warranto."

No reasonable person, having a knowledge of the subject, would contend that power given to regulate the practice on the subject of writs of habeas corpus in criminal cases, conferred power to abolish the writ altogether; and yet, if there was power to do away with the writ of certiorari, there was, equally, power to abolish the writ of habeas corpus and the other writs named in the legislation; quite too great a power to be acted upon if there were, at the most, even only a doubt as to the power; quite too much power to assume on doubtful language. Though I am strongly in favour of abolishing all writs, and all other unnecessary proceedings, and have long advocated it, that cannot rightly be done, in such a case as this, without clear legislative authority.

Parliament has not said, unrestrictedly, that the Provincial Court may create a practice in all criminal matters, nor that it may change the practice altogether; its language is quite restrictive in dealing with this particular subject; the Court may only regulate the practice in "certiorari"; that is, the familiar,

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long-continued practice under the writ of certiorari; it may not expressly even regulate the practice on motion to quash convictions, but only in certiorari.

But the applicant has not relied upon this ground, and may not desire to do so, and as, ever since the making of the Rules, the Courts have acted upon them, the better way to deal with this motion is to dismiss it, and give leave, under these Rules, to the applicant, to appeal; an appeal which, if taken, will also answer the purpose of determining whether there is any Court to which an appeal can be made now.

I have delayed disposing of this application so as to learn whether the question I have last dealt with was discussed at the time of the making of the Rules; and am now informed that it was, and that the view then entertained was, that the Rules are intra vires; but, of course, that does not bind any one; the appellant is entitled, if he desires to do so, to have the point judicially determined.

The application is refused; and leave to appeal is given.

Application refused.

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Quebec Court of Review, Montreal, De Lorimier, Martineau and Greenshields, JJ. March 18, 1914.

1. MALICIOUS PROSECUTION (§ III—20)—TERMINATION—QUASHING ON TECHNICAL GROUNDS.

There must be a final termination of the prosecution in favour of the accused before he can maintain an action against the informant for malicious prosecution; such termination means a final judgment discharging the accused as innocent and not merely by the quashing of the indictment on account of a technicality or irregularity apart from the merits.

[Compare *Mortimer* v. *Fisher*, 11 D.L.R. 77; *Cockburn* v. *Kettle*, 12 D.L.R. 512; *Fancourt* v. *Heaven*, 18 O.L.R. 492; *Baxter* v. *Gordon*, 13 O.L.R. 598; *Pearce* v. *Street*, 3 B. & Ad. 397.]

2. CRIMINAL LAW (§ II F—65)—NOLLE PROSEQUI—EFFECT.

The entry of a "*nolle prosequi*" may be a termination of the prosecution in favour of the accused for the purposes of his action for malicious prosecution where not entered on account of an irregularity or technicality.

3. MALICIOUS PROSECUTION (§ II A—10)—REASONABLE AND PROBABLE CAUSE—ADVICE OF COUNSEL.

The fact that the informant who was afterwards sued for malicious prosecution had first consulted counsel and laid all the facts before him and had been advised by such counsel to lay the information is

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not in all cases a bar to the action being maintained, but is to be considered in determining the questions of malice and want of reasonable and probable cause.

[*Ravenga* v. *Macintosh*, 2 B. & C. 693, doubted.]

4. MALICIOUS PROSECUTION (§ III A—10)—TRUE BILL FOUND—EFFECT ON SUBSEQUENT ACTION FOR DAMAGES.

Where counsel's advice to the prosecutor upon the true facts fully laid before him to lay an information for a criminal offence is acted upon by the prosecutor and this is followed by a committal for trial and the finding of a true bill upon such facts, the prosecutor, against whom no express malice is shewn, is justified in his prosecution although a conviction is not secured; and a verdict for damages for false arrest and malicious prosecution will not under such circumstances be supported.

5. INDICTMENT, INFORMATION AND COMPLAINT (§ II F—55)—IRREGULARITY OR INSUFFICIENCY—AMENDMENT.

An indictment purporting to charge an offence under Cr. Code sec. 536, sub-sec. (*b*), in laying out poison, but which charged that the poison was wilfully placed in such a position as to be easily partaken of by "animals" instead of by "cattle" (Code sec. 536), should not have been quashed on defendant's motion, but should have been amended or a new indictment in due form preferred.

Statement

APPEAL from the judgment at trial before Dugas, J., whereby the action was maintained and damages in the sum of $200 awarded to the plaintiffs (husband and wife with community of property) in respect of alleged false arrest and imprisonment of the female plaintiff on a charge of wilfully placing poison in such a position as to be easily partaken of by animals in contravention of sec. 536 of the Criminal Code, 1906. Sub-section (*b*) of sec. 536 makes it an indictable offence wilfully to place poison in such a position as to be easily partaken of by "any such animal," *i.e.*, any "cattle or the young thereof," mentioned in sub-sec. (*a*).

The accused had been committed for trial by a magistrate on the information lodged by Goulet but had been admitted to bail and after numerous renewals of bail for lack of a session of the King's Bench in the district of Joliette, an indictment was found against her in the year 1910. That indictment was quashed on the ground that it disclosed no offence inasmuch as the word animals (*animaux*) was used instead of cattle (*bestiaux*) as having been endangered, and the prisoner discharged.

The defendant who had laid the information pleaded that the indictment had been quashed on a technicality because of an error by the Crown officer who had prepared it for which he was not responsible, and that there had been no termination of the prosecution in favour of the accused to entitle her to maintain the action. This plea had been overruled in the Court below.

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The appeal from that judgment was allowed by the Court of Review, and the action for damages dismissed.

The appeal was allowed.

Letellier and *Ladouceur*, for plaintiff.

L. Ducharme, for defendant.

The opinion of the Court was delivered by

GREENSHIELDS, J. Greenshields, J.

GREENSHIELDS, J.:—Before considering the evidence made before the learned trial Judge upon the issues as joined, there is a serious question to be decided.

In the afternoon of the 28th of August, 1904, the defendant saw a quantity, more or less, of Paris green on the property of the plaintiffs near the fence separating the respective properties of the parties: on the defendant's property were some domestic animals. Seeing this Paris green there, he consulted his lawyer. It should have been stated that some difficulty had arisen a few days before between the plaintiffs and the defendant, arising out of the fact that the hens belonging to the plaintiffs had wandered into the grain fields of the defendant. Seeing this Paris green there, as he says, mixed with grain and potatoes, he consulted his lawyer, and his lawyer advised him to take a witness and notify the male plaintiff to cause this Paris green to disappear. The defendant returned to his home, took his neighbour, one Gareau, and sought out the male plaintiff, and pointed out the presence of this Paris green to him, and told him he would have to cause it to disappear. The male plaintiff expressed some surprise at seeing it there, and stated he had no idea who had put it there, but then and there buried it in the earth and covered it up.

The female plaintiff was not present, but before the defendant and his witness, Gareau, left, the female plaintiff asked her husband what these men were doing there, and what he was doing. Apparently he told her, and she, I think it is clearly proven, said: "If I had been there it would not have been removed. I put it there, and I will put it there again."

If it be true she said this, she carried out her threat to some extent at least. This occurred on Sunday. The following morning the defendant again saw a platter or plate on top of a pile of wood supported by the separating fence, again containing a more or less quantity of Paris green. He again went to his lawyer,

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and his lawyer studying his Criminal Code, advised him to lodge a complaint under sec. 500 [Code of 1892, now sec. 536 of the 1906 Code]. Hence the complaint. The preliminary investigation was heard before Mr. H. Lanctot, who then occupied the position of District Magistrate for the District of Joliette, and who is now Magistrate in the City of Montreal. The complainant, the present defendant, was examined, and called witnesses in support of his complaint.

The female plaintiff (the then accused) made her voluntary statement, and elected to examine witnesses, and did examine witnesses before the Magistrate, without hearing all the proof offered on both sides, came to the conclusion that a *primâ facie* case had been made out, and committed the female plaintiff (then accused) for trial before the Court of King's Bench; at the same time accepting bail, which bail was from year to year renewed, there being for six years, at least, apparently, a dearth of criminals in the District of Joliette, and owing to that dearth of criminals no Court of King's Bench convened.

In the month of September, 1910, apparently there had been gathered together a sufficient number of criminals to warrant the summoning of Grand jurors, and a panel of Grand jurors was summoned and empannelled, and, among other indictments, the indictment against the then accused, now the female plaintiff, was preferred.

The complaint upon which the committal intervened was in the terms of the statute. The learned Crown prosecutor, however, in uttering the indictment, for some reason best known to himself used the word "*animaux*" instead of "*bestiaux*," as used in the Code, and in that form the indictment went before the Grand Jury, and upon that indictment they found a true bill.

A motion was made to quash, and the motion was granted. The motion was opposed by the counsel for the Crown. It does not appear whether it occurred to the counsel for the Crown, or to the learned trial Judge, that an amendment could have been made to the indictment, if any amendment, indeed, was necessary.

That the indictment could have been amended, if necessary, and should have been amended if, indeed, it was necessary, there is no doubt. The irregularity if there was any, did not make to the substance of the offence, in the sense of precluding the

possibility or the legality of ordering an amendment. However, none was made, and the indictment was quashed for the time being, at least; the person charged was liberated, and her sureties or bondsmen discharged.

Now it is clear that there was not a final termination of the prosecution. It would have been quite within the powers of the Court to order another and proper indictment to be preferred before the Grand Jury. The accused had never pleaded over the indictment, and of course had never been put upon her trial. However, neither the Crown, nor the defendant, the private prosecutor, if he can be so called, suggested the preferment of a new indictment, and so the matter rested until the 15th of March, 1911, when the present action was brought.

Now, the serious preliminary question is: The magistrate having committed the accused for trial after a full hearing, and after the accused had seen fit to call witnesses, and a true bill having been duly found upon the indictment, what proof is necessary on the plaintiffs' part to maintain the present action?

The answer, I take it, may be found either in the French or the English law. I do not think that much difference will be found in the practical application of either systems of law. It is said in English law that an essential ground of this action is, that a legal prosecution was initiated and carried on without probable cause (*Sutton* v. *Johnson*, 1 T.R. 493 and 510 (in Error)); secondly, it was stated that from want of probable cause, malice may be implied; but it was added, that from the most express malice want of probable cause cannot be implied; in other words, a man may have a spite or hatred against another, and may wait for an opportunity to vent his spite or hatred against the other, but if the other by his acts gives reasonable and probable cause, then, even the malicious prosecutor will be protected.

In *Sutton* v. *Johnson*, 1 T.R. 493 and 510, the defendant was the plaintiff's superior naval officer. The plaintiff was in command of a ship of war, actually engaged in war. The plaintiff received an order from his superior officer to advance his ship; the ship was disabled; it was physically impossible to obey the order, and it was disobeyed. He was placed under arrest, and was kept in confinement for three years, and was finally discharged by proper authority, on the ground of the impossibility of obeying

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the order. An action in damages followed. The defendant was condemned in a large amount of money. On a writ of error the Appellate Court reversed the judgment, and dismissed the action. The Court said that the plaintiff had been prosecuted for not obeying an order. This amounted to a probable cause for the prosecution, and the fact that the plaintiff had a perfectly good reason for not obeying the order was absolutely immaterial.

Lord Campbell, in the case of *Broughton* v. *Dickson*, 21 L.J. Q.B. 256, said: "The defendant in an action for malicious prosecution should prove facts which would create a reasonable suspicion in the mind of a reasonable man."

Again, it was said: "Reasonable cause depends on the state of the defendant's mind and the information which is present to it at the time he institutes an action or starts a prosecution": *Delegal* v. *Highley* (1837), B. & C. 950.

Now, as to the effect of a true bill. In *Saville* v. *Roberts*, it was stated: "4. If a bill of indictment has been backed by a true bill, the defendant in an action for malicious prosecution shall not be obliged to prove a probable cause, but the plaintiff must shew malice express."

In the present case, where the magistrate committed after contradictory proof was given, the accused having examined witnesses, and after a true bill was found upon a bill of indictment, it does seem to me that meagre proof of reasonable and probable cause, in the absence of proof of express malice, is a complete bar to the action. In this case twice the defendant consulted his counsel before instituting the prosecution, and laid all the facts before him and followed his advice.

In the case of *Ravenga* v. *Macintosh*, 2 B. & C. 693, 1824, Bailey, J., said: "If a party lays all the facts before his counsel, he is not liable to prosecution."

I should not perhaps be inclined to go to the full extent of this holding. If a person did consult his counsel, and he laid all the facts before him, but the magistrate refused to commit, I would hesitate to deny an action; but where the counsel's advice upon the facts is followed by the magistrate committing, after the facts are proven under oath, and the Grand Jury find a true bill, the defendant was justified in his prosecution.

The fact that the defendant did consult counsel is an important

element in considering the state of mind that a reasonable person would have in the presence of the facts as presented to his counsel before the information was laid.

It is not suggested that the magistrate was actuated by improper motives; it is not suggested that he was not a reasonable man; and if the facts were sufficient to induce him to take the serious step of putting the plaintiff upon trial for a serious offence, can it be said that the knowledge of the same facts existing in the mind of the defendant was not a reasonable and probable cause sufficient to induce any reasonable and prudent man to take the steps which the defendant did.

Now, further, there has never been, in my opinion, a termination of this prosecution. In the case reported it was stated that the plaintiff in an action of this kind must prove he was innocent, and that his innocence was pronounced by a tribunal before which he came, and he must shew want of a reasonable and probable cause.

Under the English jurisprudence, and under our jurisprudence, I should say that there must be a final termination of the prosecution before an action of this kind can be maintained. What is a termination of the prosecution? It is a final judgment discharging the accused, and declaring the accused innocent, and I should say that a liberation of the accused for the time being, without a declaration of his innocence, is not a termination. It has been held that an entry of "*nolle prosequi*" is a good termination, if the *nolle prosequi* is not entered on account of an irregularity or technicality. In like manner it has been held that an arrest of judgment after conviction is not a termination which would open the door to an action in damages.

In this case, by no judgment or verdict was the innocence of the female plaintiff declared; all that was declared was that the indictment was defective in form, and the accused was liberated from further answering to the said indictment. But an indictment in regular form could have been laid before that grand jury, or before any other grand jury.

The female plaintiff has not shewed that she has been declared innocent of the offence by any tribunal, and in the absence of that proof I do not believe her action can be maintained.

Appeal allowed.

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WAH KIE v. CUDDY AND CITY OF CALGARY.

Alberta Supreme Court, Harvey, C.J. May 14, 1914.

1. GAMING (§ I—6)—MEANS OF RESISTING POLICE SEARCH—COMMON GAMING HOUSE—CR. CODE SEC. 641.—

Where windows are barred and special efforts made to hide what is going on in a building used by Chinamen as a club-house in which it was rumoured gambling was being carried on, such cause of suspicion may be shewn in justification of a warrant of search under Cr. Code sec. 641 in a civil action against the chief constable; it is not a sufficient ground for removing the suspicion or for shewing the grounds of suspicion unreasonable, to prove that only members of the club had access to the premises, and this apart from any necessity for finding that there had been any infraction of the law in the manner of conducting the club.

[*R.* v. *Hung Gee*, 21 Can. Cr. Cas. 404, 13 D.L.R. 44, cited; and see *R.* v. *Jung Lee*, 22 Can. Cr. Cas. 63, 13 D.L.R. 896, 5 O.W.N. 80.]

Statement

ACTION against a municipality and its chief constable for damages for trespass in respect of the execution by the latter of a warrant to search an alleged gaming house. See *R.* v. *Hung Gee*, 21 Can. Cr. Cas. 404, 13 D.L.R. 44, where convictions in respect of the same matter were set aside. An injunction was also asked to restrain further trespass.

The action was dismissed.

A. A. McGillivray, for the plaintiffs.

C. J. Ford, for the defendants.

Harvey, C.J.

HARVEY, C.J., said, after reviewing the facts: We all know that certain classes of crime are difficult to obtain evidence in respect of, and artificial rules have been adopted by parliament and the legislature, to furnish evidence so as to practically throw the burden on those doing certain things to prove that they are doing what they have a right to do. This is one of the sections of that character, the power given for a search warrant is another extraordinary provision given in respect to this same class of crime, and it is given for the same reason. It must be exercised with discretion, but the power is there to exercise it, and the Court has to enforce it. The Court must enforce the laws as they are declared by the proper legislature. It appears that there was plenty of evidence here which was before the Chief of Police from his own visit to this place, and other reports which he received, which would have been sufficient, if

brought before the police magistrate, on a charge to justify a conviction under the Act, and therefore quite amply sufficient to warrant the belief that the place was a common gaming house. I do not find that it was; that is not necessary for me in this case. It may have been that the gambling here was perfectly innocent. The Code only prohibits gambling under certain conditions, and if people want to gamble under other conditions they may do so. If people are doing what is lawful there seems to be no reason why they should hide it, or attempt to prevent observation by those who ought to be able to see everything that is going on in order to enforce the law. The bars on the windows in this case, and the other means of keeping people out, are suspicious; and the attempt made to justify part of that on the ground that only members have a right in there does not appear to me to be a sufficient explanation, nor sufficient ground for removing the suspicion which would naturally be attached to such a case. If the people who frequent this place are doing nothing but what they have a right to do under the law, then they should do it openly, and not attempt to do it secretly. That always tends to create suspicion, and if people do acts that cause suspicion to fall upon them they must naturally expect to suffer for them.

We come then simply to the manner of the execution of the warrant, and in that respect I think there is no ground for complaint. It might be taken almost as an axiom, that if you want to detect people in the commission of crime you must take them unawares. The evidence is that the police knocked on the door, and I should think that would be an unwise thing to do. I should think, under those circumstances that they would be well advised not to make any unnecessary noise, but when they found the place locked, would break in, using such force as would be reasonably necessary for that purpose. The evidence does not satisfy me that there was any force used that was unnecessary here, and I think there is no ground for the action in that respect. The action will be dismissed with costs.

Action dismissed.

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SMITH v. NORTHERN CONSTRUCTION CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Lennox, J. January 26, 1914.

1. FISHERIES (§ II—10)—LICENCE TO SET NETS — FISHERIES ACT—OBSTRUCTING CHANNEL—TEST.

Where a navigable river has two channels, nets and fishing apparatus may, under the Fisheries Act R.S.C. 1906, ch. 45, sec. 47, be set across the one of them which is not the main channel, if they do not obstruct the latter, and if one-third of the course of the river (not being a tidal stream) is always left open and no fishing apparatus or material is used or placed in that one-third of the stream.

2. FISHERIES (§ II—10)—PRIVATE RIGHTS—DESTROYING FISHING NETS—WILFUL NEGLIGENCE IN NAVIGATING.

Due care and skill must be used in navigating so as not wilfully to destroy fishing nets, whether lawfully set or not, of the position of which those in charge of the boat had notice.

[*Mayor of Colchester* v. *Brooke*, 7 Q.B. 339, and *The Swift*, [1901] P. 168, referred to.]

3. APPEAL (§ VIII B—670)—RENDERING MODIFIED JUDGMENT — SUPPLEMENTING THE FINDINGS OF JURY—TO AVOID COSTS OF NEW TRIAL.

The power conferred by sub-sec. 2 of sec. 27 of the Judicature Act (1913 Ont. ch. 19) upon the appellate court to supplement the findings of the jury as to negligence where the answers of the jury do not dispose of the case, may be exercised where only a small amount is in question and the costs of a new trial would make the costs of the litigation out of proportion to the amount involved and where the proposed supplementary finding of the appellate court is such that the jury probably intended so to find and consistent with the jury's answers.

Statement

APPEAL by the defendant company from the judgment of the Judge of the District Court of the District of Rainy River, in favour of the plaintiff, upon the findings of a jury, in an action for damages for the destruction of the plaintiff's fishing nets by the negligence of the defendant company, as the plaintiff alleged.

The appeal was dismissed in the result, amending the findings of the jury to support judgment for the respondent.

C. A. Masten, K.C., for the appellant company.

G. H. Watson, K.C., for the plaintiff, the respondent.

Meredith, C.J.O.

January 26. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the District Court of the District of Rainy River, dated the 8th October, 1913, which was directed to be entered by the Judge of that Court, upon the findings of the jury at the trial, which took place before him on that day.

The respondent is a fisherman having a license from the Provincial Government to fish with gill-nets in the waters of Red

Gut Bay, in the district of Rainy River, and he brings the action to recover damages for the loss sustained by him owing to his nets having been destroyed, as he alleges, by the negligence of the appellant.

The appellant was engaged in towing "a large boom of logs or saw timber and ties" upon the waters of the bay, and was using for that purpose "a tug or steam vessel known as an alligator, and in the process of towing and warping, "in addition to the usual methods of propulsion," a large steel cable and anchor were attached to a tree or other solid object upon the land, and the cable was wound up by steam power upon a drum on the alligator, and in that way the alligator and her tow were hauled along.

It is alleged in the statement of claim that "this method of propulsion is in itself much more dangerous to other craft of other persons using navigable waters than are the ordinary methods," and that the "cable and drum method of navigation and towing is illegal and improper," but there is no finding of the jury to support the allegation. It is also alleged and was proved that the respondent's nets were set out and properly buoyed and marked in accordance with the regulations of the Game and Fisheries Branch of the Public Works Department of Ontario.

The negligence charged is, that "the alligator and tow of logs . . . were so carelessly and negligently and unskilfully navigated or handled . . . as to cut and completely destroy" the respondent's nets, "together with all buoys, floats, leads, and tackle belonging" to them. There is also an allegation that the alligator was not in charge of competent and properly licensed officers at the time the injury was done; but, as there is no finding as to this, it need not be considered.

According to the undisputed evidence, the appellant was engaged in towing a boom or raft of logs and ties by the means mentioned in the statement of claim. The operation, at the time the injury was done to the nets, was in charge of an employee of the appellant named Edward Inwood, and he was assisted by two others, named Edward Butts and Thomas Quinn. The tow was being taken into the southerly end of Red Gut Bay through

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narrows called Pine Narrows. There is an island called Pine Island lying almost directly in front of the narrows and about half a mile south-west of it, and there are two channels into the bay, one to the east and the other to the west of the island.

The westerly channel is that which is used after passing from the narrows, but the easterly one was taken by Inwood, because, as he testified, owing to a north-west wind, he could not take the raft through the westerly channel. The width of the westerly channel is three-quarters of a mile, and that of the easterly about 675 yards, and it was in the easterly channel that the respondent's nets were set, and they extended practically the whole way across the channel.

The injury to the nets was done between 6 p.m. and midnight of the 22nd July, 1913, but at what hour the witnesses were unable to say, and it was done when the raft was coming into the narrows. As I understand the evidence, an anchor was put out in the water in front of the alligator; and, upon an attempt being made to wind the cable to which the anchor was attached, it was found that the anchor did not hold. The cable was then let go, and either then or in taking it to the shore of the island to attach it to a tree, it caught the nets and destroyed them.

The proper conclusion upon the whole evidence is, I think, that the westerly channel was invariably used in the towing of rafts. That was sworn to by the respondent and Peter Foster, and there was no evidence to the contrary but that of John Murray, who said that what channel would be taken depended upon the direction of the wind, and that he had passed up on the east side of the island with a boat, but whether a steamboat, a row-boat, or a canoe, he was not asked and did not say, nor did he say that he had himself, or that he knew of any one else having, taken a raft drawn either by a tug or an alligator or otherwise, through the easterly channel.

According to the testimony of Murray, he gave instructions to the men to be careful of nets, and the fair inference from his evidence is, I think, that he and the men in charge of the towing knew that nets were or might be set in the waters they were navigating, that it would be necessary to take precautions to prevent injuring them, and that, owing to the character of the

easterly channel, which is shewn to have shoals in it, it would be a place where nets would probably be set.

There is no pretence that any look-out for nets was kept or that any care was taken to avoid injuring any that might be come across in the course of the journey. The letting go of the cable after the failure of the anchor to hold must have resulted in the cable sinking, and probably reaching the bottom. That was the direct cause of the nets being taken up by the cable and destroyed, and the letting go of the cable appears to have been wholly unnecesssary and a negligent act on the part of the appellant's servants.

There was, I think, ample evidence to warrant a finding in favour of the respondent entitling him to recover, unless, as was contended by counsel for the appellant, the nets were placed where they were set in contravention of the law; and, even if they were unlawfully there, there was evidence to warrant a finding in favour of the respondent.

That they were set in contravention of the law was contended by counsel for the appellant, and in support of his contention, sub-secs. 2 and 4 of sec. 47 of the Fisheries Act, R.S.C. 1906, ch. 45, were referred to. The provisions of these sub-sections are as follows:—

"2. Seines, nets or other fishing apparatus shall not be set in such a manner or in such places as to obstruct the navigation with boats and vessels, and no boats or vessels shall be permitted to destroy or wantonly injure in any way seines, nets or other fishing apparatus lawfully set."

"4. The main channel or course of any stream shall not be obstructed by any nets or other fishing apparatus; and one-third of the course of any river or stream, and not less than two-thirds of the main channel at low tide, in every tidal stream, shall be always left open, and no kind of fishing apparatus or material shall be used or placed therein; Provided that the use of weirs for catching eels exclusively, and the use of mill-dams for catching eels, shall be prevented only in cases where and at times when they injure other fisheries, or, by completely barring any passage, they deprive other weirs of a share in the run of eels;

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and such place, time and circumstances may be determined by any fishery officer."

Sub-section 2 and sub-sec. 4 must be read together, and, so reading them, it is plain, I think, that it is lawful to place nets or other fishing apparatus in a river or stream if they do not obstruct the main channel, and if one-third of the course of the river or stream, not being a tidal stream, is always left open, and "no kind of fishing apparatus or material is used or placed therein."

The place where the respondent's nets were set was in a river or stream, and they were not so placed as to contravene the provisions of sub-sec. 4. They were not placed in the westerly channel, which is the main channel, and more than one-third of the course of the river or stream was unobstructed.

It is probable, I think, that the first part of the sub-section was intended to apply to a river or stream which has more channels than one, and what follows, down to the proviso, to a river or stream that has but one channel. However that may be, there was clearly no contravention of sub-sec. 4. But, even if the nets were unlawfully set, the appellant was not justified in wilfully impinging upon or destroying them, and was "bound to use due care and skill in the navigation of his vessel, so as not to do it unwittingly by want of these:" *Mayor of Colchester* v. *Brooke*, 7 Q.B. 339, 377. And in the case of *The Swift*, [1901] P. 168, grounding a vessel at a place in which the master knew or ought to have known was an area within which oysters were or were likely to be placed, the grounding not having taken place in the ordinary and proper course of navigation, but being unintentional on the part of the master, was held to be negligence for the consequences of which the owner of the vessel was responsible.

As I have already said, the man in charge of the tow knew or ought to have known that there were or were likely to be nets set out in the eastern channel; he had been instructed to be careful to avoid injuring nets, and yet no precaution whatever to that end was taken. There was, as I have said, no reason

why the cable which caught the nets and destroyed them should have been let go and permitted to ground. The channel which was taken was not the one used in such an operation as that in which the appellant was engaged, and there was no necessity for taking the eastern channel. If the wind was such that the alligator could not take the western channel, there was nothing to prevent it being anchored or fastened to a tree on the shore; but, in spite of the fact that the wind would not permit of the westerly channel being taken, and was so strong that the alligator was unable to keep to its course, those navigating it deliberately proceeded by the easterly channel, with which they were little acquainted, and that, too, upon a dark night.

It is clear, I think, that the destruction of the respondent's nets was due to the acts and omissions I have enumerated and that they were such as to warrant a finding of negligence entitling the respondent to recover, even if his nets were unlawfully set.

I agree, however, with the contention of Mr. Masten that the answers of the jury are not sufficient to warrant a judgment in favour of the respondent. Apart from those relating to the assessment of damages, the answers were:—

1. That the nets of the plaintiff were destroyed by the defendant's alligator July 22 or 23, 1913.

3. That there was negligence on the part of the defendants or their servants.

4. That the negligence was due to company's foreman leaving narrows at night with side wind blowing so that he would be driven from the regular channel into a strange channel.

Reading the answers to questions 3 and 4 literally, there is no finding that the destruction of the nets was caused by the negligence mentioned in the answers to those questions; and it by no means follows that the negligence found was the cause of the destruction of the respondent's nets.

A new trial must, therefore, be directed, unless the case is one in which the powers conferred upon the Court by sub-sec. 2

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of sec. 27 of the Judicature Act (statutes of 1913, ch. 19*) may properly be exercised.

The Court has before it all the materials necessary for finally determining the matter in controversy. The amount of the respondent's claim is comparatively small, the costs which would be occasioned by the new trial and possibly another appeal would add greatly to the costs of the litigation, with the result that they would be altogether out of proportion to the amount involved; and it is quite probable that the jury, although they have not said so, intended to find the appellant guilty of the negligence with which, in my opinion, it is chargeable. The case is, therefore, one in which it is proper that the powers conferred by sub-sec. 2 of sec. 27 should be exercised.

I would, therefore, set aside the finding of the jury in answer to the 4th question, and find the facts as I have indicated, and give judgment for the respondent for the amount of the damages assessed by the jury, with costs, and there should be no costs of the appeal to either party.

Appeal dismissed in the result.

*27.—(1) The Court upon an appeal may give any judgment which ought to have been pronounced and may make such further or other order as may be deemed just.

(2) The Court shall have power to draw inferences of fact not inconsistent with any finding of the jury which is not set aside, and if satisfied that there are before the Court all the materials necessary for finally determining the matters in controversy, or any of them, or for awarding any relief sought, the Court may give judgment accordingly, but if the Court is of opinion that there are not sufficient materials before it to enable it to give judgment the Court may direct the appeal to stand over for further consideration and may direct that such issues or questions of fact be tried and determined and such accounts be taken and such inquiries be made as may be deemed necessary to enable the Court on such further consideration finally to dispose of the matters in controversy.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. BROKERS (§ III B—35)—COMMISSION—STIPULATION FOR "WHEN MONEYS OR CORPORATE STOCK RECEIVED"—RIGHT OF ACTION ACCRUES, WHEN.

Under a contract to pay an agent a commission on a sale of a secret process, as and when the moneys or considerations in corporate stock or otherwise are received, a judgment in favour of the agent will be limited to an award of the commission on the amount actually received by the defendant, leaving it open to the plaintiff to bring action from time to time as further sums might accrue due in respect of the defendant's receipts under a contingent contract of sale; it is improper to order by a present judgment an inquiry by a referee from time to time as to the future rights.

[*Bright* v. *Tyndall*, 4 Ch. D. 189; *Kevan* v. *Crawford*, 6 Ch. D. 29; *Honour* v. *Equitable Life*, [1900] 1 Ch. 852, referred to.]

Statement

APPEAL by the defendant from the judgment of LATCHFORD, J., at the Toronto non-jury sittings, on the 22nd May, 1913, in favour of the plaintiff.

The action was brought to recover a commission upon the sale to Sir William Mackenzie of the defendant's secret process for the manufacture of steel, known as the Henderson process.

The retainer of the plaintiff by the defendant was not a general one to find a purchaser for the defendant's process; the arrangement was, that the plaintiff should endeavour to bring the process to the notice of Sir Donald Mann and to interest him in it in the hope that in that way a sale might be brought about; but the sale which the plaintiff and defendant had in view was not a sale to Sir Donald Mann only, but to "Sir Donald Mann or his associates."

On the 29th July, 1911, Sir Donald Mann took an option for the purchase of the process, and paid $5,000 to the defendant on account of it.

An agreement of the 2nd August, 1911, made between the defendant, the plaintiff, and one Gordon, provided for the payment by the defendant to the plaintiff of a commission of 15 per cent. and to Gordon of a commission of 7½ per cent. of all moneys paid or to be paid or of all stock or securities received or to be received by the defendant or his assigns from Mann or his assigns, and that "this contract cancels all former contracts and is to be the only commission payable."

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Sir Donald Mann's option was never exercised; but in the spring of 1912 there were further negotiations with him; and on the 10th April, 1912, a new commission agreement was made by a letter from the defendant to the plaintiff, in part reading: "If I close a contract for the sale of my process for the manufacture of tool steel for Canada and the world with Sir Donald Mann, I will pay you a commission of 10 per cent. as and when the moneys or considerations in stock or otherwise are received by me. It is understood that you settle with Mr. Gordon any claim he may have to commission for his introduction. . . . This absolutely cancels any and all former commission contracts to you."

Sir Donald Mann dropped the negotiations and went to England; and shortly afterwards communications began between the defendant and Sir William Mackenzie, which resulted in the sale of the process to him for $5,000,000.

The plaintiff claimed a commission of 10 per cent. upon that sum, and his claim was allowed by the trial Judge.

The appeal was allowed in part, varying the judgment below; Maclaren, J.A., dissenting would dismiss the action.

N. W. Rowell, K.C., and *J. M. Langstaff*, for the defendant, the appellant.

G. H. Watson, K.C., and *E. Coyne*, for the plaintiff, the respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 22nd May, 1913, which was directed to be entered by Latchford, J., at the close of the trial, which took place before him sitting without a jury at Toronto on that and the previous day.

It is difficult to discover from his pleadings the exact ground on which the respondent bases his claim to recover the commission for which he sues; but, as far as I am able to gather, he rests it upon two grounds: (1) his retainer by the appellant to find a purchaser for the latter's secret process for the manufacture of steel known as the "Henderson process" and his having found a purchaser; (2) upon the agreement of the 10th April, 1912, set out in the statement of claim, his contention being that

a sale to Sir William Mackenzie was made, and that it was in fact a sale to Sir Donald Mann, within the meaning of that agreement.

It is not open to question, and indeed is admitted by the respondent (p. 49), that his retainer by the appellant was not a general one—that is to say, to find a purchaser for the appellant's process. His connection with the appellant came about in this way. The appellant had, as early as January, 1911, employed a firm of brokers—Whyte & Gordon—to find a purchaser. They appear not to have made much progress, and in the following June Mr. Gordon, knowing that the respondent had had some large dealings with Sir Donald Mann, saw the respondent with the view of interesting him in the matter, and an interview then took place between Gordon, the respondent, and the appellant, at which an arrangement was come to that the respondent should endeavour to bring the process to the notice of Sir Donald Mann and to interest him in it, in the hope that in that way a sale of the process might be brought about. There is a conflict of testimony as to what took place at this interview and as to what the arrangement as to commission was, but it was admitted by the respondent in his examination at the trial that the letter of the appellant to him dated the 19th July, 1911, correctly stated the arrangement that was made. It is apparent from the terms of this letter that it was in the contemplation of the parties that the sale which the parties had in view was not a sale to Sir Donald Mann only, for the commission is to be payable if a sale should be made to "Sir Donald Mann or his associates."

The respondent appears to have entered promptly upon his work, for on the 29th July he had succeeded in so far interesting Sir Donald Mann in the process that he had taken an option for the purchase of the process and had paid $5,000 to the appellant on account of it.

Following closely on the giving of the option, a change was made in the arrangement as to the commission, by an agreement dated the 2nd August, 1911, made between the appellant, of the first part, the respondent, of the second part, and Gordon, of

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the third part. This agreement recites that the appellant was desirous of selling his process, that he had instructed and engaged the respondent and Gordon to sell it "on a certain commission agreed upon by the parties hereto," and that they were instrumental in disposing of it to Sir Donald Mann under an agreement dated the 29th July, 1911, "for a certain consideration," and that the parties had agreed upon an amount of commission to be paid to the respondent and Gordon for the sale, "differing in amount from the original agreement made in regard to the payment of the same;" and the agreement provides for the payment to the respondent of a commission of 15 per cent. and to Gordon of a commission of 7½ per cent. of all moneys paid or to be paid or of all stock or securities received or to be received by the appellant or his assigns from Mann or his assigns, and it also contains a provision in these words: "This contract cancels all former contracts and is to be the only commission payable."

The agreement of the 29th July, 1911, contrary as I apprehend to the expectation of the parties to the commission agreement, fell through, and the option for which it provided was never exercised.

The reasons for the agreement having fallen through appear to have been the unsatisfactory result of the tests of the process that had been made, and an illness of Sir Donald Mann which necessitated his absence from Canada for several months. He returned to Canada in the following February, and the matter was again taken up with him by the appellant and the respondent, with the result that early in the following April he had apparently made up his mind to make a conditional agreement for the purchase of the exclusive right to use the process in Canada and for an option for the purchase of the exclusive right for the rest of the world, and had gone so far as to have prepared and engrossed an agreement with the appellant providing for the purchase and option.

On the 10th April, 1912, a new commission agreement was made between the appellant and the respondent. It was doubtless entered into under the belief that the new arrangement with Sir Donald Mann which was in contemplation would be

completed. It is in the form of a letter from the appellant to the respondent and reads as follows:—

"Toronto, Can., April 10, 1912.

"M. I. Stewart, Esq., Hotel Mossop, Toronto.

"Dear Sir:—If I close a contract for the sale of my process for the manufacture of tool steel for Canada and the world with Sir Donald Mann I will pay you a commission of 10 per cent. as and when the moneys or considerations in stock or otherwise are received by me.

"It is understood that you settle with Mr. Gordon any claim he may have to commission for his introduction.

"It is also understood that you file a copy of this letter with the National Trust Company Limited, Toronto, and they will be instructed to pay to you your commission as above set out as and when the moneys are received by them, as the National Trust Company Limited are and will be our trustees in connection with any sale of the above described process. This absolutely cancels any and all former commission contracts to you.

"Yours truly, R. J. Henderson."

Owing to illness, and the advice of Mr. Phippen, Sir Donald Mann decided to go no further with the matter, and the appellant was thereupon notified of his decision, and that the negotiations were at an end. Shortly after Sir Donald Mann's decision to drop the matter was come to, he left for England, and within a few days communications took place between the appellant and Sir William Mackenzie looking to the matter being taken up by Sir William Mackenzie. Just how they came together is not very clear. The appellant testified that on the 20th or 21st April he went to the office of Mr. Francis Annesley, who occupied the position of secretary to Sir William Mackenzie, and sometimes acted in that capacity for Sir Donald Mann, in consequence of having received a telephone message from Annesley asking him to come there; that, when there, he was asked by him, "Now are you free to deal for your steel production?" to which he replied in the affirmative; that Annesley then asked "Perfectly free?" to which he replied in the affirmative; that Annesley then asked Mr. Main, who had accompanied

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the appellant to the office, "Now do you think that this is absolutely free to be dealt with?" to which Main replied, "Yes;" and that Annesley then said, "Now I want you men to give me your oath that you are absolutely free to deal on this matter and that Sir Donald Mann had given it up," and that they both told him that Sir Donald Mann had absolutely given it up; that Annesley telephoned him again on the 24th April that Sir William Mackenzie would like to see him, and that Annesley would like him (the appellant) to come down to his office.

Annesley's testimony was that he had no recollection of having telephoned to the appellant, but that his recollection was that the appellant and Main came to his office and stated that they wished to put their steel process before Sir William Mackenzie; that he told them that he "understood that Sir Donald Mann had this matter," and that till "he was quite sure of his having distinctly dropped it and having no further interest in it" he "personally could not put it before Sir William;" that "they assured" him "that Sir Donald had dropped it, but if" he "wished to make doubly sure" he "could see A. J. Mitchell—he had a good deal to do with Sir Donald's tests, and so on;" that he saw Mitchell, and, in consequence of what he said, promised to lay the matter before Sir William Mackenzie; and that he afterwards arranged with him that he would meet them, and that he probably communicated that information to the appellant by telephone.

Sir William Mackenzie was unable to say whether Annesley had arranged with him for the interview with the appellant or how it came about.

The result of the interview between the appellant and Sir William Mackenzie—however it was brought about—was, that an agreement was come to between them on the 26th April, 1912, which was modified by an agreement made on the following day. These agreements were reduced to writing, but were not executed until some time later. They are somewhat on the same lines as the agreement which was prepared in April to carry out the arrangement that was intended to have been entered into between the appellant and Sir Donald Mann, though they differ from it in important respects. By the Mann agreement the pur-

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chase-price for the exclusive use of the process for Canada was to be $200,000, and no provision was made for the incorporation of a company to take it over, but the purchase-price, less the $5,000 which Sir Donald Mann had paid under the agreement of the 29th July, 1911, was to be paid out of the profits arising from the use in Canada of the process after first paying to Sir Donald Mann out of the profits certain advances which he was to make in connection with the buildings, machinery, and plant required for testing the process, two-thirds of these profits being payable to the appellant until the whole of the purchase-price should be received by him; while under the Mackenzie agreement the purchase-price was to be $600,000, and a company was to be organised with a capital of that amount, two-thirds of which was to be issued in the name of the appellant and one-third in the name of Mackenzie, and all of the capital stock except $50,000, which the appellant was to be entitled to retain for his own use, and the amounts required to provide share qualifications for the directors, was to be endorsed to and deposited with the National Trust Company, or some other trust company to be agreed on, upon trust to pay all dividends and cash distribution of profits which should be declared by the company on $350,000 of the capital stock to the appellant or his nominees until the total sum paid should amount to $175,000, to pay all dividends and cash distribution of profits which should be declared by the company on $199,700 of the capital stock to Mackenzie or his nominees, and so soon as the appellant or his nominees should have received the $175,000, either out of the dividends and cash distribution of profits or from Mackenzie, to transfer the whole of the capital stock to Mackenzie or his nominees. By the Mann agreement, Sir Donald Mann was given an option to purchase, at any time within one year, the exclusive right to use the process for all parts of the world other than Canada for $5,000,000, and in the event of his exercising the option, a company was to be organised with a capital stock of that amount, which was to be fully paid-up, by the transfer of the option to the company, and $1,250,000 of the capital stock was to be deposited with the National Trust Company until $3,750,000 of the purchase-money should be paid to the appel-

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lant by appropriating all dividends and distribution of profits on the whole of the capital stock, whereupon the $1,250,000 of stock was to be transferred to the appellant, and the payment of the $3,750,000 and the $1,250,000 of stock were to "represent the $5,000,000" to be paid for the rights.

By the Mackenzie agreement, Sir William Mackenzie was given an option at any time before the 1st day of January, 1914 (with a provision for an extension of six months on certain conditions), to "purchase the exclusive right to use the process in the world other than the Dominion of Canada, and to acquire all patents and patent rights to the process issued" for certain named countries "and for any additional countries in which" he should "request patents to be obtained under the terms mentioned in the agreement," for $5,000,000 payable in cash.

There are also differences as to the amounts to be advanced for the purpose of testing the process.

It was argued by counsel for the respondent that the proper conclusion upon the evidence is that the agreement with Sir William Mackenzie was the result of a continuation of the negotiations which were pending between the appellant and Sir Donald Mann when the latter left for England in April, 1912; that Sir Donald Mann had not definitely abandoned the negotiations, and that they were taken up and continued with Sir William Mackenzie and resulted in the agreements with him of the 26th and 27th April, 1912.

The evidence does not, in my opinion, warrant any such conclusion, but shews clearly that before leaving for England Sir Donald Mann had definitely abandoned all further negotiations, and that the matter was not taken up by Sir William Mackenzie until he was satisfied of this, and that when it was taken up by him it was for himself alone and solely on his account, and it is clear also that the negotiations which Sir Donald Mann carried on were carried on for himself alone and solely on his own account.

If I am right in this view, the respondent cannot succeed upon the letter of the 10th April, 1912, as the event on the happening of which he was to be entitled to the commission of 10 per cent.—a sale to Sir Donald Mann being made—has not

occurred. Nor can the respondent succeed upon the alleged verbal understanding that he and the witness Kitching deposed to. According to Kitching's testimony, he was present when the letter of the 10th April, 1912, was signed; he read it and called the appellant's attention to what he (Kitching) thought was an error in it "leaving out the full name of the firm, that the firm name Mackenzie & Mann ought to have been there instead of Sir Donald;" and the appellant said "it was not necessary, Stewart understood that," that "Stewart and he understood each other," and that "that is immaterial or something to that effect," that the respondent said 'that is all right,' and they signed the document."

That evidence was not, in my opinion, admissible, as it was evidence of a contemporaneous oral agreement inconsistent with the signed document, and was not admissible as dealing with a matter collateral to what is dealt with by the document, nor can it be treated as an independent parol agreement to pay the commission in the event of a contract for the sale of the process being closed with Mackenzie & Mann; and, even if it were, such a contract has not been closed.

No case is made on the pleadings for reformation of the document; and, if the respondent desires leave to amend by setting up such case, the amendment could only be given on the terms that the appellant should have leave also to answer the new case, and have the new issue dealt with upon a new trial.

I am, however, of opinion that, if the respondent has made out that his retainer was to bring about a sale to Sir Donald Mann or his associates, and the agreement with Sir William Mackenzie was brought about by his introduction of the matter to Sir Donald Mann, the respondent is entitled to recover as upon a *quantum meruit*.

For the reasons I have already given, I am of opinion that the retainer was to bring about a sale to Sir Donald Mann or his associates, and that Sir William Mackenzie was such an associate. The use of the disjunctive "or" indicates, I think, that it was not intended that it should be necessary that Sir Donald Mann should himself become the purchaser, or even one of the

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purchasers, and having regard to the nature of the process and the businesses in which both Sir Donald Mann and Sir William Mackenzie were interested, what was in the contemplation of the parties was a sale either to Sir Donald Mann or to such an associate in business as was Sir William Mackenzie, or perhaps any of the persons connected with the Canadian Northern Railway Company or the Mackenzie & Mann Company, and indeed the recital in the agreement of the 2nd August, 1911, that the appellant had instructed and engaged the respondent and Gordon to sell the process on a certain commission agreed upon by the parties to the agreement would point to a retainer of an even wider character.

It was contended by counsel for the appellant that the effect of the concluding sentence of the letter of the 10th April, 1912, "This absolutely cancels any and all former commission contracts to you," was to put an end to all agreements between the parties, not only as to the rate of commission, but also as to the right to commission resulting from the employment of the respondent to find a purchaser; but I am not of that opinion. The purpose and the effect of the provision are, I think, merely to substitute for the *quantum* of commission provided for by the earlier agreements that for which the letter provides. By the then existing contract, if the respondent had been able to put through "a sale of the process for the world" to Sir Donald Mann or his associates, he would have been entitled to a commission of 20 per cent., and the purpose of the arrangement evidenced by the letter was to reduce the commission to 10 per cent., and not, I think, to exclude all right to commission if the sale to Sir Donald Mann should fall through, and yet the respondent should succeed in effecting a sale to one of his associates.

There is more difficulty as to the other question—whether the sale to Mackenzie was the direct result of the respondent's introduction of the appellant and his process to Sir Donald Mann. It was argued by Mr. Rowell that it was not, and that the negotiations with Sir William Mackenzie were brought about, not by anything that had been done by the respondent, but by the matter being brought to Sir William Mackenzie's attention by

Mr. Annesley after the efforts of the respondent had come to naught by the abandonment by Sir Donald Mann of negotiations.

It was, I think, unfortunate that evidence as to the exact nature of Mr. Keamish's connection with the matter was not allowed to be brought out. It was said that he had been employed by the appellant to endeavour to effect a sale to Sir William Mackenzie, and that Annesley had, at the request of Keamish, brought the matter to Sir William Mackenzie's attention prior to the employment of Whyte and Gordon; and that, after the abandonment of negotiations by Sir Donald Mann, it had occurred to Annesley, acting in the interest if not behalf of Keamish, again to endeavour to interest Sir William Mackenzie in the process with a view to his becoming a purchaser of it.

Annesley's account of the way in which the matter was for the second time brought to Sir William Mackenzie's attention differs, as I have said, from that of the appellant, but it does not support Mr. Rowell's contention, and it leads to the conclusion that the appellant himself made the first move towards having the matter brought to Sir William Mackenzie's attention; and it is, I think, very probable that the appellant, finding that Sir Donald Mann had abandoned the idea of purchasing, and attributing his having done so to his illness, thought it would be well to take the matter up with his associate, Sir William Mackenzie, and, with a view to doing this, communicated with Annesley in order to obtain an interview with Sir William Mackenzie.

However that may be, there was, I think, evidence to support the conclusion of the trial Judge that the agreement with Sir William Mackenzie was the direct result of the respondent's efforts; and, that being the case, in the view I take as to the nature and scope of the respondent's employment by the appellant, he is entitled to remuneration for his services, and I see no reason why his remuneration should not be at the same rate as that provided for by the agreement of the 10th April, 1912. Ten per cent. was thought to be a proper remuneration in case of a sale to Sir Donald Mann, and there is no reason why

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the remuneration should be less in the case of the sale to Sir William Mackenzie.

I do not understand what the scope of the declaration in the second paragraph of the judgment is intended to be. It declares that "the plaintiff is entitled to receive and to recover from and against the defendant a commission of 10 per cent. of all moneys and of all shares of stock and other considerations which the defendant has received and is entitled to receive and recover from Sir William Mackenzie upon the sale and purchase of a so-called secret process known as and called 'the Henderson process,' described in agreement for sale and purchase between the said parties, dated the 26th and 27th April, 1912."

Is it intended that the declaration shall apply to money which may be received from Sir William Mackenzie on account of the purchase-money of the right to use the process in all parts of the world except Canada, in the event of Sir William Mackenzie electing to purchase that right, or is its application confined to the purchase which has been made of the right to use the process in Canada?

Apart from this difficulty, I do not think that the case is one for a declaratory judgment; and I think that all that the respondent is at present entitled to recover is 10 per cent. on the $3,000 which has been paid on account of the purchase-money of the Canadian rights, and 10 per cent. of the $50,000 of shares that have been issued to the appellant: *Bright* v. *Tyndall* (1876), 4 Ch.D. 189; *Kevan* v. *Crawford* (1877), 6 Ch.D. 29; *Honour* v. *Equitable Life Assurance Society of the United States*, [1900] 1 Ch. 852.

What the judgment in effect does is to send to the Master for inquiry and report questions that may hereafter arise as to whether the appellant has received money or shares or other considerations in respect of which the respondent is entitled to commission. The appellant has the right to have such questions, as they arise, tried according to the ordinary course of the Court, and I know of no precedent for such a judgment as has been pronounced, and it cannot surely be that, if a question hereafter arises as to whether Sir William Mackenzie has exer-

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cised the option which has been given to him, it is proper to direct that it shall be tried before the Master. I would, therefore, vary the judgment by confining it to a recovery of $300, and the delivery of 10 per cent. of the $50,000 of the capital stock of the company referred to in the agreements of the 26th and 27th April, 1913, which has been issued to the appellant, and directing that the appellant pay the costs of the action.

The respondent will not be prejudiced by eliminating the other provisions of the judgment, because the question as to his right to commission on the Mackenzie purchase is established, and that matter would be *res adjudicata* in any action which the respondent may hereafter bring for the recovery of any commission which may become payable to him.

There should, I think, be no costs of the appeal to either party.

Magee, J.A.
Hodgins, J.A.

MAGEE and HODGINS, JJ.A., concurred.

Maclaren, J.A.

MACLAREN, J.A.:—In this matter I entirely agree with the opinion of the trial Judge that the plaintiff must recover, if at all, upon his agreement with the defendant of the 10th April, 1912. He came to this conclusion upon the evidence brought before him by the plaintiff; that the previous agreements between them had been completely superseded—"wholly cancelled," as he puts it. I can find nothing in the evidence that would justify us in setting aside this finding. In my opinion, it is the proper conclusion upon the evidence. This was the position taken by the plaintiff in his statement of claim and by his counsel in the opening of the case, and also by the plaintiff in his testimony at the trial.

The plaintiff sought to prove at the trial that the writing did not contain the whole agreement, but the testimony given for this purpose was, in my opinion, quite inadmissible, as it contradicted the written document which both parties had signed. No reformation of the instrument was asked for, and, if it had been, I am of opinion that there was no evidence to support it. It is worthy of remark throughout this whole matter extending over such a long period, how completely everything

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was put down in writing, even down to the minutest details in the various successive agreements that were entered into.

The agreement upon which the plaintiff brought his action is in the form of a letter addressed to the plaintiff and signed by the defendant, dated the 10th April, 1912, which reads: "If I close a contract for the sale of my process for the manufacture of tool steel for Canada and the world with Sir Donald Mann, I will pay you a commission of 10 per cent. as and when the moneys or considerations in stock or otherwise are received by me." Then follow matters that do not affect the question now in issue. The body of the letter is type-written, but at the foot and above the signature of the defendant, there is prominently added in the handwriting of the defendant these words: "This absolutely cancels any and all commission contracts to you." Underneath this the plaintiff wrote, "I hereby approve of the above," and signed it, "M. I. Stewart," and delivered it to the defendant.

As no such contract was ever made with Sir Donald Mann, I cannot see how the commission named, or indeed any commission, could become payable under this agreement. The plaintiff sought to prove that the subsequent sale to Sir William Mackenzie was in reality a sale to Sir Donald Mann, but in this he, in my opinion, entirely failed.

There is no doubt but that the defendant did all in his power to have a sale to Sir Donald Mann carried out. The testimony of Sir Donald Mann, who was one of the plaintiff's witnesses and friendly to him, is explicit on this point, and is fully corroborated by that of the plaintiff himself, who is asked: "Wasn't he (defendant) doing everything, as far as you could see, to try and effect a sale with Sir Donald? A. Yes. Q. And you have no ground of complaint, from the first to the last, about Mr. Henderson putting forth every effort he could to effect a sale to Sir Donald? A. No, he certainly did all he could."

The first contract between the parties is contained in the letter of the defendant to the plaintiff of the 19th July, 1911, which reads: "I hereby agree to pay you a commission of twenty per cent. (20%) as and when the moneys are received by

me, provided you put through the sale of my process for the manufacture of steel for the world to Sir Donald Mann or his associates, on the terms and conditions as already outlined," etc.

This contract was expressly cancelled by the new agreement dated the 2nd August, 1911, and executed by the plaintiff and defendant and one Gordon, as found by the trial Judge, and frankly admitted by the plaintiff in his cross-examination at the trial. After admitting that this agreement cancelled all former contracts between the defendant and himself, he is asked: "And you accepted that and signed it and so did Gordon? A. Yes. Q. And you surrendered the agreement or letter of July 19th? A. Yes. Q. Handed it back to Henderson, and it came absolutely to an end? A. Yes." As has already been seen, the subsequent agreement of the 10th April, 1912, between the plaintiff and defendant expressly declared that it also cancelled any and all commission contracts between the parties. But, even if the contract contained in the letter of the 19th July had not been thus cancelled, I am unable to see how the plaintiff could recover under it. The commission mentioned was to be paid "provided you (Stewart) put through the sale of my (Henderson's) process for the manufacture of steel for the world to Sir Donald Mann or his associates," etc. It is admitted that no such sale to Sir Donald Mann was ever put through by the plaintiff or anybody else. Was it put through to his associates? The only sale alleged or proved was to Sir William Mackenzie. Was he an "associate" of Sir Donald Mann within the meaning of this letter? It is true that he was an associate of Sir Donald in the Canadian Northern Railway Company, in Mackenzie and Mann Limited, and in other enterprises. It is also true that they were each in other important commercial undertakings in which the other had no interest. This point, however, is completely set at rest by the plaintiff himself, in answer to his own counsel, when he was asked, "This letter" (of the 19th July, 1911) "refers to Sir Donald Mann or his associates?" His answer is: "Yes; I did not know at that time who would come in with Sir Donald, whether it would be Sir William or some of the other associates in the office. I

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thought perhaps Sir Donald would take some of them in, and that is the reason we put the 'associates' in." As Sir Donald never spoke to Sir William on the subject, and did not go in himself or ask any other person to go in, the use of the word "associates" has no possible application to the matter as it developed, and neither the plaintiff nor Sir Donald had anything to do with the sale that actually did take place.

The learned trial Judge bases his conclusions largely upon the identity of the *personnel* and of the interests in the dealings of the defendant first with Sir Donald and afterwards with Sir William. In this he seems to have misapprehended the evidence. He suggests that Sir William was interested in the dealings with Sir Donald, on the supposition that the $5,000 which Sir Donald advanced to the defendant for the experiments was the money either of Mackenzie and Mann or of the Canadian Northern Railway Company. In this surmise he was quite mistaken. Sir Donald swore that it was purely a private venture of his own. The cheque is produced and is the private cheque of Sir Donald. In the reasons for judgment it is also stated that Mr. Phippen, who subsequently acquired an interest with Sir William, had consented to look after Sir Donald's interest after the latter left for England, and that he represented Sir Donald in ways outside his professional duties as counsel, and had acquired a small interest under the original option agreement. In this he is entirely mistaken. There is no evidence to this effect. According to the evidence on both sides, Mr. Phippen only became aware of the matter when he was consulted professionally by Sir Donald on or about the 13th or 14th April, 1912, about the draft agreement submitted to him by Henderson, which Mr. Phippen revised, and which is stamped the 15th April, the day on which Sir Donald finally decided not to proceed further with the matter. None of the parties interested with Sir Donald in the negotiations or the experiments or assisting him in any way in the matter—neither Davidson, nor McCrae, nor the Mitchells, nor Ruel—had any connection whatever with Sir William Mackenzie's subsequent negotiations or proceedings, nor did any of them ever subsequently acquire any interest in the venture or any share in the company which was organised by Sir William after he became the purchaser.

The learned trial Judge is also mistaken as to the matter being only deferred by Sir Donald on the 15th April, and as to the reason given by Mr. Phippen for the advice he gave to Sir Donald on that occasion, when he was asked for it. The evidence on both sides is that it was absolutely abandoned, and that Mr. Phippen's advice was not based on the state of Sir Donald's health, as suggested, but that he had read the adverse report of Mr. Waterhouse, and that "it looked to me like a fake; that they were claiming more than they could do. That was my opinion."

As to how the matter came to be taken up by Sir William Mackenzie after Sir Donald had left for Europe, the two parties to the proceedings, the defendant and Annesley, the private secretary of Sir William, are not entirely agreed; each thinking that the first step was taken by the other. The trial Judge has not made any finding as to which he thought was right; but, in my opinion, it is quite immaterial. From the admitted fact that Annesley would not bring the matter before Sir William until he was quite sure that Sir Donald had absolutely abandoned it, and that he had this corroborated by Mitchell, Sir Donald's representative in the experiments, it is probable that the recollection of Annesley on this point is the correct one.

The evidence shews that Henderson had previously endeavoured to enlist the interest of Sir William in his discovery, as early as December, 1910, through one Keamish, who had, through Annesley, brought it to Sir William's attention, and had furnished sample tools of the steel, which lay in Sir William's office until the following April. Sir William not having taken the matter up, Henderson then withdrew the matter and took his tools away. Evidence as to this was objected to by the plaintiff's counsel, and the objection maintained by the trial Judge, as I think, improperly; but enough came out to shew that, when Annesley brought it before Sir William after Sir Donald's departure, he was merely resuming his previous efforts. This time he was more successful, and the agreement with Sir William resulted.

I cannot find any evidence that what had taken place with Sir Donald contributed in any way to the subsequent dealings

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with Sir William, either with their inception or their result. With the single exception named (Mr. Phippen), none of them even appear to have had any knowledge of the introduction of the matter to Sir William or of his proceedings. In like manner, Annesley was quite ignorant of the proceedings of Sir Donald in the matter. In a smaller establishment it might be difficult to believe that this could have been the fact; but the evidence of Sir Donald and Sir William, both of them witnesses for the plaintiff, shews how distinct their private ventures were kept, and how very careful each was not to intermeddle in any way with the private affairs of the other.

The change of attitude of Mr. Phippen, the only person common to the two transactions, is fully explained by the subsequent experiments under Sir William, and he had no part in the initiation of the matter, and in no way contributed to the result.

In my opinion, the appeal should be allowed, and the action dismissed.

Judgment below varied; MACLAREN, J.A., *dissenting.*

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REX v. GEORGET.

Saskatchewan District Court, Prince Albert, Doak, J. December 22, 1914.

1. APPEAL (§ III E—91)—FROM SUMMARY CONVICTION—"NEXT SITTINGS" UNDER CR. CODE SEC. 749.

Where, as in Saskatchewan, the regular sittings of the district court to which an appeal may be taken from a summary conviction, are fixed by provincial order-in-council and others known as special sittings are fixed by the judge by virtue of a provincial statute, a notice of appeal is valid if served for the special sittings being the first sittings following the expiration of fourteen days from the conviction; and *semble*, it would be competent for an appellant to give notice of appeal either to the next special sittings or the next regular sittings, either being the "next sittings" within a liberal interpretation of Cr. Code sec. 749.

2. APPEAL (§ III E—91)—FROM SUMMARY CONVICTION—NEAREST PLACE OF SITTINGS—DISTRICT COURT (SASK.).

The sittings of a district court which shall be held "nearest" to the place where the cause of the information or complaint arose and to which in Saskatchewan an appeal from a summary conviction is to be taken, means, *primâ facie* the nearest, measured in a straight line on a horizontal plane, but if it be shewn that another place for which a session of the court is fixed is more convenient of access, having regard to the recognized means of travel, the appellant will be deemed to have complied with Cr. Code sec. 749, if he brings his appeal either there or at the place which is nearest, when measured in a straight line.

[*R.* v. *Surrey*, 6 Q.B.D. 100; *R.* v. *Norfolk*, 99 L.T. 936, applied.]

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APPEAL from the decision of a justice of the peace whereby the appellant (defendant) was convicted of having on the first of August, 1914, at the post office of Domremy, Sask., assaulted the respondent.

The conviction was quashed.

Jas. McKay, K.C., for appellant.

F. W. Halliday, for respondent.

Judge Doak.

JUDGE DOAK:—When the matter came up before me certain objections were raised by the respondent's solicitor as to the sufficiency of the preliminary steps taken by the appellant to perfect his appeal, and as these questions seemed to me to be of some importance I reserved my decision upon them, and allowed the case to proceed upon the merits.

At the close of the case I intimated that I did not consider the justice of the peace to have been justified in finding the appellant guilty of the offence wherewith he had been charged, but that my decision in this respect must be subject to my findings upon the preliminary objections as, unless the appellant were properly before the Court, the appeal could not be heard upon the merits.

The two objections raised by the respondent are as follows:—

(1) That the notice of appeal was not made to a sittings of the Court, authorized by order-in-council, but to one fixed by myself as Judge of the District and was therefore irregular.

(2) That the appeal must be taken to the sittings of the Court nearest the place where the alleged offence took place; that the appeal should therefore have been to the next sittings at Duck Lake, instead of Prince Albert, and that the appeal could therefore not be heard at Prince Albert.

The respondent's first objection is based upon sec. 749, sub-sec. 1 (*f*) of the Criminal Code which provides that the appeal shall be to the District Court at the sittings thereof nearest the place where the cause of complaint arose; and upon sec. 750, sub-sec. (*a*) which provides that the appeal shall be to the next sittings of such Court, unless the conviction was made within fourteen days of such sittings.

Sec. 24 of the District Courts Act, R.S.S. ch. 53, provides

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that the Lieut.-Governor-in-Council shall have power to fix the times and places for the sittings of the Court. By virtue of this authority an order-in-council was passed on December 24, 1913, fixing the sittings of the District Court throughout the province including those for the Prince Albert District.

Now, the conviction in this case was made on the 23rd of September, 1914, and by the order-in-council above referred to the then next sittings at Prince Albert were fixed for the 5th of October, less than 14 days from the date of the conviction. The notice of appeal then, if given for the sittings at Prince Albert, would according to sec. 750, sub-sec. (*a*), have to be given for the next ensuing sittings which by the order-in-council were fixed for December 1st.

Section 25 of the District Courts Act, however, gives authority to the Judge of the District to appoint special sittings at any time and place within the District. By virtue of this authority I did, on the 2nd of February, 1914, appoint certain special sittings to be held during 1914, at Prince Albert, and one of the dates so fixed by me was November 5th. The appellant's notice of appeal was taken to the last-mentioned sittings instead of the one fixed by order-in-council.

Neither sec. 749 or 750 defines the meaning of the words "the next sittings," but the sittings fixed by me under the authority vested in me by the District Courts Act are just as much sittings of the Court as are those fixed by order-in-council. The provision of the Criminal Code which give the right of appeal should, I think, be given a liberal construction within the limits to which they apply, because these sections while forming part of a penal statute are essentially remedial in their nature.

I am of the opinion that where, as in the present case, a special sittings previously fixed by a Judge intervenes between the date of the conviction and the next sittings fixed by order-in-council, it would be competent for an appellant to give notice of appeal for either sittings, because both are "next sittings" according to a liberal interpretation of the meaning of these words, one being the next special sittings and the other the next regular sittings.

The respondent's second objection is based upon sec. 749 of

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the Criminal Code, which provides that the appeal shall be to the sittings nearest the place where the cause of complaint arose.

The cause of complaint in this instance arose at Domremy post office. This particular place is shewn to be twenty and one-half miles, following the township lines, from Duck Lake where a sittings is appointed by order-in-council to be held on the fourth Tuesday in April of each year, and twenty-seven and one-half miles from Prince Albert following township lines. It is apparent, therefore, that Duck Lake is nearer in a straight line from the place where the cause of complaint arose, than Prince Albert is.

Following the ordinary travelled waggon trail the distance, though greater than by the township lines, is approximately the same to both places, although the road to Prince Albert is probably a more travelled and somewhat better route. A third method of transportation, and the one usually adopted, is to go by the road to Fenton a distance of some ten or twelve miles and there take the railway direct to Prince Albert.

This, although greater than any of the others in point of actual distance traversed, is by far the most accessible and convenient route, both because of the shorter distance by road, and because it does not involve the crossing of the South Saskatchewan river, a proceeding which is necessary in both other cases, and which, during certain seasons of the year, is impracticable.

The question before me then is, must I construe the word "nearest" as meaning the nearest point in a straight line, or as meaning the nearest point, having regard to its accessibility and the usual methods of travel?

In favour of the former view may be urged the fact that it fixes a definite and invariable rule to go by, while to adopt the latter construction would lead to doubts and uncertainty.

On the other hand, to adopt the former view would often lead, not only to inconvenience, but to positive hardship.

Thus, the sittings in Duck Lake take place at the last of April, a period when the Saskatchewan river is frequently impassible owing to the unsafe condition of the ice. The appellant would then be compelled to travel to Fenton by road and thence

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by railway through Prince Albert to Duck Lake, making a journey of nearly forty miles further than he would to Prince Albert.

Again, supposing the railway which is now in course of construction between Domremy and Prince Albert were completed, it would certainly be a hardship upon litigants to compel them to drive overland for twenty-five or thirty miles to Duck Lake when they could reach Prince Albert by a railway journey of a few miles more.

I have been unable to find any decision in the Courts of our own or any other Province of Canada which would be a guide in determining which interpretation should be adopted, but a somewhat similar question has been the subject of a number of decisions in England. The earlier cases of *Woods* v. *Dennett*, 2 Starkie 89, and *Leigh* v. *Hind*, 9 B. & C. 774, 7 L.J.K.B. 313, adopt the rule that the measurement should be according to the nearest available mode of access, but, in the later decisions of *Reg.* v. *Saffron Walden*, 15 L.J.M.C. 115, *Lake* v. *Butler*, 24 L.J. Q.B. 273, and a number of others, a contrary view is adopted. This later view was applied to the interpretation of statutes as well as contract in *Mouflet* v. *Cole*, 42 L.J.Ex. 8, and it is now settled law in England that where a statute is silent as to the method of measuring a given distance that measurement is to be in a straight line upon a horizontal plane.

The reasons which are assigned for adopting this rule are, that it affords a certain method, whereas any other would lead to doubt and confusion. Thus Lord Campbell, C.J., in *Lake* v. *Butler*, *supra*, says, "We may consider the legislature as implying that the most convenient and certain method of measurement should be adopted. If we are to take the nearest practicable mode of access what uncertainty will arise, but if we adopt the straight line no uncertainty can possibly arise." In the same case Coleridge, J., while expressing some doubts, admits that the rule proposed on the other side is the most convenient and tends to obviate difficulties which would arise, according to any other method, as to the kind of road intended.

In *Reg.* v. *Saffron Walden*, *supra*, Lord Denman, C.J., says, "We are left much at large in the matter, for there are really

no materials for us on which to form our judgment. Under these circumstances, it is best to adopt a fixed and arbitrary rule, and the most reasonable seems to be that suggested by my brother Parke." The rule referred to by Lord Denman in this case is the suggestion made by Parke, J., in *Leigh* v. *Hind, supra,* that distances should be measured "as the crow flies."

It must be borne in mind, however, that all of the English decisions which I have mentioned have reference to the measurement of an ascertained and fixed distance, and there appears to be no case where the Courts have been called upon to apply the rule to a question like the present one.

If the question which I have to determine were one of the jurisdiction of the Court within certain defined limits, say twenty-five miles from some common centre, then I think I would undoubtedly be bound to adopt the rule of construction above laid down as being the most certain and convenient.

Here, however, is no question involving the jurisdiction of the Court, for that jurisdiction exists equally in both places. It seems to me that in interpreting the clause in question we must not only look at the words in their literal sense, but must also consider the object which the legislature had in view in placing those words in the statute. This principle is concisely put by Channell, J., in *Reigate* v. *Sutton*, 99 L.T.R. 168, at p. 170, where he says, "Where the meaning of the words is absolutely clear beyond any doubt, the Court has no right to go beyond them. But when words are capable of one meaning and at the same time of a more extended meaning, whether they are to have the one meaning or the more extended meaning is to be dealt with according to what the Court sees to be the object and policy of the Act."

In *Stokes* v. *Grissell*, 23 L.J.C.P. 141, which is a case involving the measurement of distances, Maule, J., at p. 143, uses the following language: "The words are quite unambiguous and to be construed in one sense only. That rule of interpretation is subject to this, that if that one sense would lead to some manifest inconvenience, then some other sense must be looked for because we are to presume that what is manifest would have been seen by those who drew the enactment."

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The Courts in England, moreover, have not scrupled to extend the words of an enactment beyond their literal meaning where injustice would be occasioned by refusing to do so. Thus, by 13 & 14 Car. 2 ch. IV., an appeal was given in poor law removals to the next quarter sessions.

By a series of decisions which are all reviewed in *R.* v. *Surrey*, 6 Q.B.D. 100, 43 L.T. 500, the words, "next quarter sessions," were not given their literal meaning, but were interpreted as meaning the next practicable sessions."

This principle was reaffirmed as lately as 1908 by Lord Alverstone in *Rex* v. *Norfolk*, 99 L.T.R. 936.

The only decided case in England where the interpretation of the word "nearest" has been in question is in *Bathard* v. *London Sewers Commissioners*, 54 J.P. 135. In this case it is held that the words, "nearest sewer," are not to be taken in their literal sense, but as meaning the nearest sewer which a person, by exercising only his proprietary rights, can reach.

The object and intention of the legislature in enacting sec. 749 of the Criminal Code was, I believe, to prevent litigants from dragging their adversaries to a remote and unconvenient corner of the Judicial District, and I cannot think that it ever was intended to exact anything more than reasonable compliance with its provisions.

If, for instance, in a case where two places at which Courts had been appointed to be held, were nearly equi-distant and each equally convenient, an appellant who had just cause to complain of a conviction adjudging imprisonment were by inadvertence, or lack of means of knowledge, to take his appeal to the further place, it would, in my opinion, be monstrous to refuse to do justice and to thereby deprive the appellant of his liberty solely because the appeal should have been heard at a place which turned out to be a few yards nearer the point where the cause of action arose.

In the present case I am of the opinion that, having regard to the usual travelled route, Prince Albert is a more convenient and accessible point than Duck Lake and that the appellant in bringing his appeal to Prince Albert has reasonably complied with the statute.

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In view of the fact that this question is likely to arise from time to time, I think it would be as well to lay down some general rules with regard to what I consider would constitute a compliance with the provisions of this section, and these rules, I think, should be as follows:—

First, the word "nearest" in sec. 749, sub-sec. 3, means, *primâ facie*, the nearest, measured in a straight line on a horizontal plane.

Second, if it can be shewn that another place, although more distant according to the first rule, is more convenient of access, having regard to the recognized means of travel, the appellant will be deemed to have complied with the Act if he brings his appeal either there or at the place which is nearest, according to the first rule.

I have already dealt with the present case on its merits and having now decided that the respondent's objections to the sufficiency of the appeal cannot be sustained, I must find in favour of the appellant and order the conviction to be quashed.

The deposit made by the appellant, together with the fine and costs paid by him will be restored. The respondent must pay the costs of the appeal, such costs to be paid to the Clerk of the Court within twenty days after taxation.

Conviction quashed.

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Alberta Supreme Court, Scott, Stuart, Beck and Simmons, JJ. October 21, 1914.

1. PROCURING (§ I—5)—PROSTITUTION—CR. CODE 216.

The word "prostitution" in Cr. Code sec. 216 (amendment of 1913) means promiscuous sexual intercourse with men, and is negatived where the magistrate finds that the intent of the accused man was only that the woman should become his mistress and not to bring about sexual connection between the woman and other men.

Statement

CASE reserved in respect of a conviction for procuring under Cr. Code sec. 216.

A. H. Clarke, K.C., and *P. J. Bergeron*, for the appellant.

James Short, K.C., for the Crown, respondent.

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The judgment of the Court was delivered by

STUART, J.:—In convicting the accused the police magistrate made the following definite finding of fact: "Your whole purpose throughout the whole thing was for her to act as your mistress." In view of this finding of fact it is impossible for the Court to consider the question whether there was any evidence to shew an intent on the part of the accused to bring about sexual connection between the woman and other men. The words quoted expressly negative that suggestion and the Court cannot go behind that.

We were referred to no authority which decides that the word "prostitution" in the Code includes sexual intercourse between a woman and one man exclusively. It is for parliament and not the Courts to extend the prohibition and penalty to fornication or adultery. The word "prostitution" in the section evidently means promiscuous sexual intercourse with men.

The Court is unanimous in this opinion and it is, therefore, unnecessary to consider or discuss the other grounds of appeal. The appeal will, therefore, be allowed, the conviction quashed and the prisoner discharged.

Conviction quashed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. March 30, 1914.

1. MASTER AND SERVANT (§ I C—10)—COMPENSATION—EMPLOYEE SHARING "NET PROFITS"—MEANING OF—GOODWILL; ITS RELEVANCY.

A right of an employee to a stated share in the "net profits" of the business under the terms of his contract of employment does not entitle him to share in what his employer received on selling out for the goodwill of the business.

[*Sims* v. *Harris*, 1 O.L.R. 445, applied.]

2. MASTER AND SERVANT (§ I C—10)—COMPENSATION—EMPLOYEE SHARING "NET PROFITS,"—EMPLOYER'S STATEMENT OF PROFITS, WHEN IMPEACHABLE—FRAUD—MASTER AND SERVANT ACT.

The "fraud" which in the terms of the Master and Servant Act, 10 Edw. VII. ch. 73, sec. 3, must be shewn in order to impeach a statement or return made by an employer of the net profits a share in which he had contracted to give his employee by way of remuneration for his services, must involve dishonesty; mere mistake is not enough.

[*Ex p. Watson*, 21 Q.B.D. 301, applied.]

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3. MASTER AND SERVANT (§ I C—10)—EMPLOYEE SHARING "NET PROFITS"—MONTHLY ACCOUNTING—SCOPE OF—MONTHLY "NET LOSS," HOW BORNE—PARTNERSHIP.

Under a contract of employment whereby the employee was to have one half of the "net profits of the business after deducting all rents, advertisements and other expenses" with an accounting each month, the cost of getting the goods in and of repairs and alterations of the store premises, may, in the absence of any intention shewn to the contrary, be charged against the month in which they were incurred, although their main advantage was to follow in later months; and, *semble*, under such an agreement each month's business must stand by itself and only net profits for the month divided, the employer alone standing the losses in months in which no profit was made.

Statement

APPEAL by the defendant from the judgment of Lennox, J., dated December 15, 1913, in an action for an accounting in an alleged partnership between the deceased husband of the plaintiff and the defendant, involving the rights of the deceased as an employee managing a business for the defendant upon a percentage of the "net profits."

The appeal was allowed.

R. McKay, K.C., for the appellant.

R. R. McKessock, K.C., for the plaintiff, the respondent.

March 30. The judgment of the Court was delivered by

Riddell, J.

RIDDELL, J.:—Benjamin Washburn had for a number of years carried on business in Sudbury as a merchant tailor, and he had the agency of the Semi-ready Tailoring Company. He was hampered by lack of capital, and it may be, as suggested on this appeal, by other causes.

The Semi-ready Company give exclusive "selling rights" to one "agent" only, in each town, but sell the goods out-and-out to the agent. Washburn they considered to be without "financial responsibility;" and they made an arrangement with the defendant Wright to become their agent in Sudbury, advising him to have Washburn act as manager. An agreement was entered into by and between Washburn and Wright, whereby Wright employed Washburn as manager of Wright's business, and he agreed "to pay the employee one-half of the net profits of the said business after deducting all rents, advertisements, and other expenses, the same to be divided monthly, but not to be on any outstanding accounts, should there be such." Either party was to have the right to terminate the agreement

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upon three months' notice in writing, and "the employer shall have the right to terminate same at any time without notice on account of any misconduct of the employee." Washburn accordingly conducted the business as manager till his last illness, which terminated in his death on the 8th March, 1913. Thereafter the defendant conducted the business himself until May, 1913, when he sold out.

The plaintiff is the widow and administratrix of Washburn, and she, on the 2nd August, 1913, began this action, in which she claims an account of the partnership dealings between Wright and Washburn, and a winding-up of the partnership under the direction of the Court; that for these purposes all proper directions be given and accounts taken; and she adds a prayer for general relief. The defendant pleads that the terms of the agreement have been complied with, sets out, *in extenso*, a statement of the account between him and Washburn, says he furnished this to the plaintiff before action, and counterclaims for $585.41. The plaintiff joins issue.

The action came on for trial before Mr. Justice Lennox, at Sudbury, on the 27th November, 1913; judgment, being reserved, was delivered on the 15th December, in favour of the plaintiff. The defendant now appeals.

Though the formal judgment, through some negligence or misapprehension, directs an account of the "partnership dealings between Benjamin Washburn and the defendant," the learned Judge expressly finds that there was no partnership. In this he is undoubtedly right: the statute (1910), 10 Edw. VII. ch. 73, sec. 3 (1) (*a*), is perfectly plain.

That being so, sec. 3 (2) admittedly applies, and the statement by the employer is final and conclusive, and unimpeachable upon any ground whatever except fraud. The learned Judge has found fraud, in my opinion wrongly. No fraud is charged; the itemised statement is set up by the statement of defence as a defence, and this is not met by a plea of fraud. We have recently said: "It is not too much to require any one who intends to charge another with fraud . . . to take the responsibility of making that charge in plain terms:" *Caldwell* v.

Cockshutt Plow Co. (1913), 18 D.L.R. 722 at 737, citing *Low* v. *Guthrie*, [1909] A.C. 278, and *Badenach* v. *Inglis* (1913), 14 D.L.R. 109; and the person making the charge is confined to the particular fraud charged: *Medcalf* v. *Oshawa Lands* (1914), 15 D.L.R. 745, 5 O.W.N. 797, *per* Boyd, C., with whom Middleton, J., agreed. In the case *Caldwell* v. *Cockshutt Plow Co.* we granted a new trial in order that fraud might be specifically set up, the jury having found facts which would constitute fraud.

Even if the plaintiff should get over this difficulty, we find that during the trial, when the statute was read, the following took place:—

HIS LORDSHIP: I might be forced to find fraud in this case.

MR. MCKAY: I do not assume your Lordship is going to find anything of that kind, and there is no pleading of fraud.

HIS LORDSHIP: There is different construction placed by two parties.

MR. MCKAY: Yes, and what their rights are.

Nothing further is said about fraud during the trial, and it is obvious, I think, that the question of fraud was not gone into at all.

Notwithstanding all this, if the facts proved established fraud, we might now allow an amendment, and, if all the facts were before the Court, permit the finding of fraud to stand, or, if all the facts were not or might not be before the Court, direct a new trial.

But here, the facts, in my view, do not even indicate or suggest, much less establish, fraud. What the learned trial Judge relies upon as establishing fraud may be conveniently formulated thus:—

(1) Omission to credit Washburn with the amount received for the goodwill of the business (on sale by Wright after Washburn's death) and for the proceeds of book-debts.

(2) Charging up freight and express charges.

(3) Also repairs and alterations, fixtures, etc.

A fourth will be mentioned later, in its proper place.

(1) What, with great respect, I think the error of the judgment appealed from, arises from a misapprehension of what

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the deceased bargained for. He got no interest in the premises or the goods or in the "business." What he got was a right to receive from and be paid by the defendant "one-half of the net profits of the . . . business." There is much difference between the profits made by selling out a business and thus ceasing to carry it on and the profits of a business. A business may not make a profit at all, but be sold out at a profit by reason of a desire to get rid of competition, or other reason. There is no justification for the proposition that the amount paid for goodwill to Wright when ceasing business is "net profits of the business." *Sims* v. *Harris*, 1 O.L.R. 445, is conclusive authority upon that point, in the Court of Appeal. Even if otherwise to be considered part of the "net profits," this amount was not made during the employment of Washburn. The book-debts are expressly excluded.

(2) Remembering that the amount of which Washburn was to have one-half—"the net profits of the said business after deducting all rents, advertisements, and other expenses"—the second ground of complaint is seen to be without solid foundation. Amongst the "other expenses" must necessarily be the cost of getting the goods in and out, however large these expenses may be. And I cannot see that charges for getting goods into the shop are any less to be charged against the month in which they are made because they may not realise a profit during the month, and the main advantage to be derived from them will come later, than the cost of advertisement would be, for the same reasons.

(3) The same reasoning applies to repairs and alterations as well as fixtures. These are all to help the business, and they are none the less expenses that their full advantage is not realised immediately; while any profit made by the sale of the fixtures was not made till after the death of Washburn.

Some discussion took place on the hearing as to allowing interest to the defendant before the net profits should be ascertained; of course this would be improper in the absence of some special stipulation to that effect: *Rushton* v. *Grissell*, L.R. 5 Eq. 326, at p. 331, *per* Page Wood, V.-C.; but, as no interest has been charged, no further attention need be paid to that question.

(4) An objection which seems not to have been made at the trial (at all events it is not mentioned by the trial Judge) is that a small amount, $31.60 in all, being the losses in January and August, 1912, was deducted from the profits in other months, and thereby Washburn's share was improperly diminished by $15.80. This may well be. It would seem that each month's business must stand by itself, and only net profits for the month be taken into consideration, the defendant being obliged to stand all the losses.

But, suppose the defendant was wrong in this or in any other respect, there is absolutely no evidence of fraud. Fraud is not mistake, error in interpreting a contract; fraud is "something dishonest and morally wrong, and much mischief is . . . done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions:" *Ex p. Watson* (1888), 21 Q.B.D. 301, *per* Wills, J., at p. 309.

Except in the case of (4), which is trivial and is not even mentioned by the trial Judge, while the learned trial Judge thinks the defendant wrong, another of His Majesty's Justices, who is presumed to know some law (the presumption is of course not *juris et de jure*), thinks he is perfectly right, and, had he been consulted when and as a solicitor, would have so advised. How can it be said that it is any evidence of fraud for the defendant to render a statement in accordance with the latter view, even if it were wrong? And a mistake of $31.60 in an account of nearly $4,000 is no evidence of fraud.

The finding at the trial, of fraud, cannot stand.

The statement is said by the learned Judge not to be a statement under the statute because of what he considers to be errors in charging expenses, etc., and not crediting money received for goodwill, etc. These objections have been dealt with, and I can see no reason why the statement is not "a statement . . . by the employer of the net profits of the . . . business . . . on which he declares and appropriates the share of profits payable . . . ;" and this, by the statute, sec. 3 (2), is unimpeachable except for fraud, which does not here exist.

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Much was attempted to be made of the alleged fact that the defendant had no need actually to "pay his own money," but raised all required by the business by notes in the bank. This is of not the slightest importance; it was his money wherever and however he got it. In the case already mentioned, *Rushton* v. *Grissell*, L.R. 5 Eq. 326, at p. 331, a case not wholly dissimilar to the present, Page Wood, V.-C., says (p. 331): "What is his right as respects the employer's capital? . . . He has a right to expect that the employer will carry on the business with his own capital, but he has no right to inquire whether the employer has borrowed the capital, or how he has acquired it. . . ."

I think the appeal should be allowed.

The defendant counterclaims for $558.41, being money received by the deceased in excess of the amount to which he was entitled. This was the money of the defendant, money had and received by the deceased, and I can see no reason why the defendant should not have judgment for this sum if he desires. From what was said on the argument, I assume that he will reduce the amount by $15.80.

The defendant is entitled to his costs on the claim and counterclaim, and of this appeal, if he demands them.

Appeal allowed.

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McDONALD v. McKENZIE.

Alberta Supreme Court, Stuart, J. November 14, 1914.

1. MECHANICS' LIENS (§ VIII—63)—ENFORCEMENT; PROCEDURE—SUFFICIENCY OF NOTICE OR STATEMENT OF LIEN—FILING AGAINST WRONG PROPERTY—RIGHT TO AMEND, HOW LIMITED.

The Mechanics' Lien Act, Alta., does not enable the Court to give leave to amend a lien where it has been registered entirely against the wrong property because of an error in the description of the lands to be charged, so as to substitute the description of the proper lands, if the time for filing a lien against the latter has already expired.

[*Refuse* v. *Hunter*, 12 B.C.R. 126, referred to.]

Statement

APPLICATION to discharge the *ex parte* order of McCarthy, J., allowing a mechanics' lien claimant, who had inadvertently filed his claim for lien against the wrong property, to amend the claim so as to correct the error.

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The application was granted, discharging the order.

Tweedie & McGillivray, for plaintiff.

G. H. Ross, K.C., for defendant.

STUART, J.:—It is alleged by McDonald that, under the provisions of the Mechanics' Lien Act, he was entitled to a lien upon lots 5 and 6 in block 51, plan—A, Calgary, belonging to McKenzie; that, by an oversight, his claim of lien was prepared so as to cover lots 5 and 6, in block 50, plan —A, Calgary, and it was registered against the latter lot. Then, on October 15, 1914, upon an *ex parte* application by McDonald, my brother McCarthy made an order giving McDonald leave to amend his claim of lien so as to correct the error and to register it in the Land Titles Office against the proper lot.

McKenzie now applies, under rule 9, to discharge this order. In my opinion, the order must be discharged for two reasons. In the first place, it will be observed that sec. 14 of the Mechanics' Lien Act (ch. 21, Statutes of Alberta, 1906) provides that . . .

> no lien shall be invalidated by reason of failure to comply with any of the requisites thereof (that is, of sec. 13) unless, in the opinion of the Court or Judge adjudicating upon the lien under this Act, the owner, etc., . . . is prejudiced thereby.

It is clear that in any case such an order as was made by my brother McCarthy can only be made by the Court or Judge adjudicating upon the lien; that is to say, by the Court or Judge before whom the lien holder is applying to enforce his lien. It seems to me that this does not give an authority to the Court or Judge to make an *ex parte* order before action brought with a view to correcting such an error as was made here.

In the next place sec. 13 says that

> Every lien . . . shall absolutely cease to exist after the expiration of thirty-one days . . . unless in the meantime the person claiming the lien shall file in the Land Titles Office . . . in which the land lies, an affidavit . . . stating in substance (among other things)
>
> (c) The description of the property to be charged; which affidavit shall be received and filed as a lien against the property, interest or estate.

Now, it is admitted that this was not done. It might very well be that if the claim of lien had been filed against the proper land, although some misdescription of it was made in the claim, the Court or Judge at the trial of the action to enforce the lien

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might, in a proper case, overlook the error, if no prejudice had been caused thereby; but it seems to me that where other property entirely is described in the claim of lien, and that claim is filed against that other property, sec. 13 must be taken to declare that the lien had ceased to exist. The order of my brother McCarthy was not made until after the expiration of the 31 days. I am unable to see how the Court or Judge can have any authority to re-create a lien which has ceased to exist under the statute: see *Rafuse* v. *Hunter*, 12 B.C.R. 126. For these reasons I think the application must be allowed with costs and the order discharged. Of course, the *ex parte* order was made merely to preserve McDonald's possible rights until the matter could be argued.

Order discharged.

MAN.

K. B.

KILGOUR v. ZASLAVSKY.

Manitoba King's Bench, Mathers, C.J.K.B. November 9, 1914.

1. FRAUDULENT CONVEYANCES (§II—8)—CONSIDERATION—VOLUNTARY CONVEYANCE—BY INSOLVENT TO WIFE.

A purely voluntary promise by the husband to transfer his property to the wife at a future time in default of his re-paying money borrowed from her, cannot be relied upon to support as against his creditors, a subsequent conveyance of the property to her at a time when he is insolvent.

[*Harris* v. *Rankin*, 4 Man. L.R. 115, followed.]

2. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES—SUSPICIOUS CIRCUMSTANCES—ONUS SHIFTED, WHEN.

If the circumstances are suspicious in transactions between relatives which have the effect of defeating the claims of creditors, the onus is shifted to the purchaser to establish the *bona fides* of the transaction by clear and satisfactory evidence, and for this purpose the uncorroborated testimony of the parties to the transaction is, in general, not sufficient.

[*Langley* v. *Beardsley*, 18 O.L.R. 67; *Harris* v. *Rankin*, 4 Man. L.R. 115; *Osborne* v. *Carey*, 5 Man. L.R. 237; *Ripstein* v. *British Canadian*, 7 Man. L.R. 119; *Ady* v. *Harris*, 9 Man. L.R. 127; *Goggin* v. *Kidd*, 10 Man. L.R. 448, referred to.]

Statement

ACTION to set aside as voluntary and fraudulent against creditors, certain conveyances of lands made by an insolvent to his wife.

Judgment was given for the plaintiffs.

Hoskin, K.C., and *Grundy*, for the plaintiffs.

Kennedy & Kennedy, for the defendants.

MATHERS, C.J.K.B.:—This is an action brought by the plaintiffs, who are wholesale boot and shoe merchants, against Zalman Zaslavsky and Gertie Zaslavsky, his wife, to set aside five transfers of land made by the former to the latter, as being fraudulent as against creditors.

The male defendant commenced business as a retail boot and shoe dealer in November, 1912. At that time he was the registered owner of five separate house properties in this city, subject to certain mortgages, and of three parcels of vacant city property, free from encumbrances.

On June 9 following, his total assets consisted of the above-mentioned real estate and a stock of boots and shoes which he says was worth $4,500, but which was probably worth very much less.

The house property was valued at about $16,000, subject to mortgages of $7,900, leaving an equity of $8,100. The vacant lots were worth $900. He therefore had real estate standing in his name of the net value of about $9,000. Accepting his own estimate of the value of his stock-in-trade, his total assets amounted to $13,500. On that date he owed trade creditors upwards of $4,200, and non-trade creditors (not including the claim of his wife hereafter referred to) $2,600, making a total liability of $6,800. It is quite manifest that without the real estate he was hopelessly insolvent.

On June 2, 1913, one of his trade creditors sued him for a trade debt of upwards of $500. On June 9, he, by transfers under the Real Property Act, transferred all the house properties, subject to the mortgages against them, to his co-defendant Gertie Zaslavsky, and subsequently certificates under the Real Property Act were issued to her, and these properties now stand in her name.

On November 22, 1913, he, by further transfers under the Real Property Act, transferred the vacant lots also to his wife, and on December 15 following she transferred these lots to her sister, Bertha Rosenfelt. This latter property now stands in Bertha Rosenfelt's name.

On December 27, 1913, Zalman Zaslavsky made an assignment for the general benefit of his creditors of his personal property, credits and effects, but not of his real estate. The assignee

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made an inventory of the property assigned, and found that it amounted to $1,156.48. His liabilities notified to the assignee amounted to $3,800. The plaintiffs recovered a judgment against the defendant Zalman Zaslavsky for $1,699.10, and this judgment is still unpaid.

It is admitted that no consideration passed from the wife to the husband upon the making of the transfers; but it is claimed that the transfers were made pursuant to an agreement entered into on February 21, 1909, by which it was agreed that in consideration of $1,200 then loaned by the wife to her husband he agreed to repay the sum and in default to transfer all his property to her for the benefit of herself and children. The agreement is in the Russian language, and is as follows:—

[TRANSLATION.]

21st February, 1909.

I, the undersigned, do hereby consent that my wife, G. Zaslavsky, for the sum of money which she lends me for a term no longer than three years, which sum of money amounts to one thousand and two hundred dollars ($1,200) at ten (10%) per cent. of interest per year could after three years and in the case the money is not paid before or on time stated above, insist on the payment of the full amount at any time through the bank or otherwise as she wants and finds it convenient.

I do also consent if she wishes so that in case I am not able to pay all amount in full in one year after the term stated for the payment all my property and real estate to be transferred in her name and that by our mutual consent it belong to her for her and our children benefit forever, and that my rights to the property shall cease to exist for the benefit of my wife and children.

I also consent and insist that my wife has no rights to sell any part or all of my real estate until our children become of full age in case I renounce and waive my rights to the above-mentioned estate when not being able to meet payment of one thousand and two hundred dollars with interest.

(Sgd.) Z. ZASLAVSKY.

Witnesses:

J. BROWN.

A. BROWN.

In transactions between relatives having the effect of defeating the claims of creditors, if the circumstances are suspicious the onus is shifted to the purchaser of establishing judicially the *bona fides* of the transaction: *Langley* v. *Beardsley*, 18 O.L.R. 67, at 72, and *Harris* v. *Rankin*, 4 Man. L.R. 115. The evidence to that effect must be clear and satisfactory evidence. For this purpose the uncorroborated evidence of the parties to the transaction is in general not sufficient: *Merchants Bank* v. *Clarke*, 18

Gr. 594; *Osborne* v. *Carey*, 5 Man. L.R. 237; *Ripstein* v. *British Canadian Loan and Investment Co.*, 7 Man. L.R. 119; *Ady* v. *Harris*, 9 Man. L.R. 127; *Goggin* v. *Kidd*, 10 Man. L.R. 448.

Once the defendants have established that the agreement was *bonâ fide* made, and that the consideration was actually paid, the onus is shifted back to the plaintiffs to prove an express intent to defraud to which the wife was a party: 15 Hals. 84.

The circumstances surrounding the execution of the transfers in question are not free from suspicion. They were executed a few days after the male defendant had been sued by a trade creditor for a considerable sum. The instructions for their preparation and registration were given by the husband, and he continued thereafter to collect the rents, pay taxes and interest, and look after the repairs just as he had done before. He said at the trial that after the transfer of the property he gave the rents when collected to his wife; but in his examination for discovery he told a different story. He there said he put the rents with his other money. No reference is made in the transfers to the agreement now set up, but each purports to be made for a money consideration now admitted to be fictitious. After the transfers, the wife, at the husband's request, gave a second mortgage on two of the houses to secure a debt of her husband's and for a fresh advance of $400 then made to the husband. After the transfer of the vacant lots, the wife re-transferred them to her sister in payment for his debt. He told two of the plaintiff's officers, when they asked him about the transfer of this property to his wife, that it had been made to his wife to defeat the creditor who had sued.

When about to commence business in November, 1912, he gave the plaintiffs, as a basis for credit, a statement of assets and liabilities. Amongst his assets he includes all the properties transferred, but says nothing about any money owing to his wife, although the form of statement had a space for such an entry.

On February 1, 1913, he also signed a statement of his affairs for the Union Bank. In this statement he also includes both the house and vacant property amongst his assets. In the list of his liabilities he mentions the mortgages on the improved property, his wholesale debts and his debts to the Union Bank,

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but nothing is said about any debt to his wife. This statement asserts that "he is the registered and actual owner of the lands and goods mentioned, which are not encumbered by mortgage or otherwise except as stated therein." The agreement provides for the conveyance to the wife of all the husband's "property and real estate," amounting in value then to probably $10,000 in default in payment of an alleged debt of $1,200. In view of these circumstances of suspicion, I hold the onus of shewing the transfers were not voluntary, but for valuable consideration, is upon the defendants.

The fact that the wife had money of her own is supported by the evidence of the husband and wife alone. Their story is that she had 2,400 rubles, equivalent to $1,200 Canadian currency, when they were married in Russia, fifteen years ago. Two thousand rubles she had inherited from her mother, and the balance she had earned as a dressmaker. After marriage both say she kept this money intact in a small bag suspended around her neck. Ten years ago they came to Winnipeg, and it is said for the purpose of defraying their travelling expenses she loaned her husband 800 rubles. The balance she brought with her. Both say that until February 21, 1909, when the agreement in question was entered into, a period of about 5 years, she kept this money in the sack which was suspended around her neck night and day. Upon arrival in Winnipeg the male defendant went to work at his trade of a journeyman tailor, and sometimes earned as much as $125 a month. When he received his wages he gave them to his wife, and received from her the equivalent in Russian paper money, and in this way the whole of the wife's 1,600 rubles became changed into Canadian currency.

Shortly after his arrival in Winnipeg the husband bought the vacant lots in question in his own name, using for that purpose money which he had saved out of the 800 rubles given him to pay travelling expenses. The wife says that she wanted him to put this property in her name, but that he put her off. About two years after arrival in Winnipeg he bought a lot on the corner of Jarvis and Parr streets, and erected a house upon it. About 6 months later he bought the Lisgar St. property from his brothers-in-law, A. Brown and J. Brown. The price of this latter property was $1,900, but it was subject to a mortgage for $1,000 and to an

agreement of sale for $400, leaving the vendors' equity at $500. This was paid by two promissory notes for $250 each. On February 21, 1909, he still owed on one note held by J. Brown $110, and to A. Brown $150.

During all these years he says he frequently tried to borrow from his wife the $800 which she had in the sack, but she always parried such requests by asking for the payment of the 800 rubles, or $400, which she had loaned to him in Russia. She says, however, that she induced her sister to, from time to time, lend him money. In February, 1909, he says J. Brown was pressing for payment of his $110 and he had no money to pay. He told J. Brown that if he could induce his sister to lend him the $800 in the sack he would pay him his money, and that J. Brown induced her to agree to do this by promising to get security not only for the $800 but also for the $400 previously borrowed in Russia. This arrangement, it is said, was arrived at several days before the document was signed.

On February 21, he says, there was a party at his house to celebrate the birth of his fourth child, born a few days before. His wife was still in bed. While the party was in progress the agreement was written, it is said, by a young Russian who was invited to the party by J. Brown, but who was not known to any of those present and who has not since been seen by any of the parties. The document was signed, and witnessed by the wife's two brothers. It was then handed by J. Brown to the wife in bed, and she took the $800 out of the sack about her neck and gave it to her husband. He did not that night pay his brothers-in-law the amount owing them, but says he did so a few days afterwards.

The two Browns who witnessed the document say that they saw her take money out of the sack on the night in question and give it to her husband. They did not count it and do not know how much it was. They, of course, are utterly unable to say that that money was her own property and had not previously been given to her by her husband. Admittedly the husband did give her his wages from time to time as they were paid to him and she put the money in the sack.

The husband and wife are, therefore, the only witnesses to the fact that she possessed money of her own. Under the cir-

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cumstances I cannot accept their evidence as establishing that fact. It may be that the agreement in question did come into existence on the occasion mentioned. In the view I take of the case it is not necessary for me to make any finding one way or the other. If it were executed, I have no hesitation in holding that it was purely voluntary. It was at most a voluntary promise to transfer his property to her at a future time. The case of *Harris* v. *Rankin*, 4 Man. L.R. 115, shews that such a voluntary agreement cannot be relied upon to support, as against his creditors, a subsequent conveyance of the property at a time when he is insolvent. In my opinion the transfers were fraudulent and void as against the plaintiffs.

The objection was taken that as the trust was for the benefit of the children as well as of the wife the former were necessary parties. It would seem that under Rule 204 the wife, who is trustee and also a beneficiary, sufficiently represents the infant children. I have read the cases cited by counsel for the defendants in support of this objection, but they all are quite distinguishable from this case.

It was also objected that Zalman Zaslavsky, the male defendant, was neither a necessary nor a proper party to the action. For the purposes of attacking the agreement set up in the statements of defence as having been made pursuant to a fraudulent conspiracy, the male defendant was, in my opinion, a necessary party, whatever may be said as to the propriety of making him a party at the commencement of the action. This objection also, therefore, fails.

There will be judgment declaring that the five transfers executed by Zalman Zaslavsky to his wife Gertie Zaslavsky on June 9, 1913, were and are fraudulent and void as against the plaintiffs, and that she is a trustee of the property for him; that the plaintiffs' judgment forms a lien and charge upon the land, and that it be sold, according to the ordinary practice, for the purpose of satisfying the charge.

The plaintiffs are entitled to the costs of the action.

Judgment for plaintiffs.

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Manitoba King's Bench, Mathers, C.J. November 9, 1914.

1. FRAUDULENT CONVEYANCES (§ VIII—40)—VOLUNTARY ASSIGNMENT BY INSOLVENT TO WIFE—FURTHER TRANSFER PREFERRING CERTAIN CREDITOR—REMEDY—ASSIGNMENTS ACT (MAN.).

Where the husband conveys property to the wife under circumstances which would make the transfer void as against creditors and she conveys the property to a creditor having a claim of equal value therewith, the two conveyances may be attacked under secs. 39 and 40 of the Assignments Act (Man.) as made with intent to prefer such creditor over the other creditors of the husband; that statute applies, not only to a conveyance by the debtor himself, but to a conveyance by another in whose name the title was held for the debtor, in case it was so treated by the preferred creditor as well as by the debtor and his wife.

[*Smith* v. *Sugarman* (Alta.), 13 W.L.R. 671, distinguished; and see *Smith* v. *Sugarman*, 47 Can. S.C.R. 392.]

Statement

ACTION to set aside, as made with intent to prefer a certain creditor, a conveyance of lands made voluntarily by an insolvent to his wife and by her transferred over to such creditor, and involving the right under secs. 39 and 40 of the Assignments Act (Man.) to attack both conveyances.

Judgment was given for the plaintiffs.

Hoskin, K.C., and *Grundy*, for the plaintiffs.

Kennedy & Kennedy, for the defendants.

Mathers, C.J.

MATHERS, C.J.K.B.:—This is an action to set aside the conveyance of the vacant property referred to in *Kilgour* v. *Zaslavsky* D.L.R. 420, from Zalman Zaslavsky to his wife, and by the latter to to her sister, the defendant Rosenfeld. The two actions were tried at the same time under an agreement by which the evidence given would apply to each action in so far as relevant. The vacant lots were not, it is stated, transferred to the wife at the time the improved property was conveyed, because Zalman Zaslavsky thought he might in a short time sell them. Gertie Zaslavsky says when he failed to effect a sale she asked him to transfer them to her pursuant to the agreement, and he did so.

I hold, for the reasons given in the other case, that the transfer of the vacant property by the male defendant to his wife was voluntary and was made with the intent to defraud the plaintiffs and his other creditors.

It is admitted that the defendant Rosenfeld was a creditor

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of the male defendant at the time the property was transferred to her to an amount about equal to the value of the lots conveyed, but it is claimed that these latter conveyances are void, under secs. 39 and 40 of the Assignments Act, because made with intent to prefer the grantee over his other creditors.

The defendant's counsel contends that these sections in terms only apply to conveyances or transfers made by the insolvent himself, and cannot be extended to conveyances executed by a third person to a creditor. In support of this contention, *Smith* v. *Sugarman*, 13 W.L.R. 671, a decision by the full Court of Alberta, is referred to. In that case it was found as a fact that the conveyance from the debtor to his wife was *bonâ fide*, and that all parties regarded the property conveyed as the wife's. The property was, therefore, hers, to do as she pleased with, unless the conveyance was avoided by the provisions of sec. 42 of the Alberta Assignments Act, which is exactly the same as sec. 40 of the Manitoba Act. The Court held the conveyance by her to her husband's creditor did not come within the terms of the section. The present case, however, is very different. Here the transfer was merely a colourable device to get the property out of reach of his creditors. Both parties, I am satisfied, regarded the lots as still his, and dealt with them as such. The reason given for not transferring these lots at the same time as the improved property was transferred is that the husband withheld them in order that he might effect a sale of them, not for the purpose of turning the proceeds over to his wife, but to keep and use for his own purposes.

The instructions to prepare the transfers to the defendant Rosenfeld were given by the husband. At that time the certificate of title for these lots was held by the bank as security for his account. He got them from the bank for the purpose of registering the transfers, and the new certificates in the name of Bertha Rosenfeld were returned to, and are now held by the bank for the same purpose. This was done on instructions from the male defendant, without any request from the bank.

It would, in my opinion, be too narrow a construction to put on the Act to hold that a conveyance of land belonging to the debtor, but standing in the name of another, by whom the conveyance was executed, was not covered by the statute. If such

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were the case every debtor could prefer any of his creditors at will by the simple expedient of first transferring the property to his wife or some third person, who would in turn convey to the favoured creditor. A debtor would thus be able to accomplish indirectly what the statute prevents him doing directly.

In my opinion the transfers to the defendant Rosenfeld, though not executed by the hand of the debtor, were made by him within the meaning of the statute. As these transfers were executed within 60 days prior to the commencement of the suit, they are utterly void as against the plaintiffs. The same objection as to the want of parties and as to improper joinder of parties was taken in this case also, and are for the same reason overruled.

There will be judgment declaring the transfers of the property in question from Zalman Zaslavsky to Gertie Zaslavsky fraudulent and void as against the plaintiffs, that the transfers of the said property from Gertie Zaslavsky to the defendant Bertha Rosenfeld were made with intent to give said Rosenfeld a preference over the other creditors and are therefore utterly void; that the plaintiffs' judgment forms a lien and charge upon the said lands, and that the same be sold according to the usual practice to satisfy such charge.

The plaintiffs are entitled to the costs of the action.

Judgment for plaintiffs.

Re ONTARIO and MINNESOTA POWER CO. and TOWN OF FORT FRANCES.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. COURTS (§ I A—1)—JURISDICTION—INHERENT POWERS—RAILWAY BOARD—TAX APPEAL—RE-OPENING OF.

Where the assessment for school purposes of a power company was fixed on the company's appeal to the Ontario Railway and Municipal Board on the consent of the company and the municipality in an unorganized district of Ontario, that Board had no jurisdiction after the passing and entry of such order, to re-open the appeal on the application of the town school board and a ratepayer, and to substitute a higher assessment for its previous order; the effect of sub-sec. 5 of sec. 4 of the Ontario Railway and Municipal Board Act, 6 Edw. VII. ch. 31, providing that the board shall have all the powers of a court of record, gave it such jurisdiction as is inherent in a court of record but not powers which are conferred on particular courts by statute or by rules of court passed under statutory authority.

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RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT FRANCES.

Statement

APPEAL by the company from an order of the Ontario Railway and Municipal Board of the 14th July, 1913, affirming the decision of the Court of Revision of the Town of Fort Frances whereby the assessment for school purposes of the appellant company's property at $600,000 was confirmed.

The appeal was allowed.

Glyn Osler, for the appellant company.

G. H. Watson, K.C., and *E. Coyne*, for the town corporation, the respondent.

Meredith, C.J.O.

January 12, 1914. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the Ontario and Minnesota Power Company from an order of the Ontario Railway and Municipal Board, dated the 14th July, 1913, affirming the decision of the Court of Revision of the Town of Fort Frances as to the assessment for school purposes of the property of the appellant.

Upon the opening of the appeal it was objected by counsel for the respondent that the appeal was not set down for hearing within the prescribed period, and that it did not lie without the leave of the Court, which had not been obtained.

The appeal was argued both on the preliminary objection and on the merits, upon the understanding that, if the Court should be of opinion that leave to appeal should be given, and the time extended for appealing, the case might be disposed of on the merits without the necessity of fresh proceedings being taken by the appellant, or further argument.

We are of opinion that leave to appeal should be given and the time for appealing extended. The question which the appellant has raised is an important one, and there was some room for doubt as to leave to appeal being necessary, although we are of opinion that it was necessary.

In considering the case on the merits, it appeared to us that a point not raised upon the argument is fatal to the respondent's case, viz., the jurisdiction of the Board to make the order complained of, and the attention of counsel was called to the point, and written arguments as to it have been put in.

The matter in question is as to the assessment for the year

1911, and the appellant appealed to the Board against its assessment as confirmed by the Court of Revision, and on the 12th February, 1913, an order was made by the Board, on the consent of the appellant and the corporation of the town, allowing the appeal and fixing the assessment of the appellant's lands and buildings for school purposes at $100,000. The public school board of the town, and a ratepayer, subsequently applied to the Board to reopen the appeal and grant a hearing on the merits; and, after argument, the Board, on the 5th March, 1913, made an order setting aside its previous order, and proceeded to hear the appeal, and, on the 14th July, 1913, made the order complained of, confirming the assessment for school purposes of the appellant's property at $600,000.

The jurisdiction of the Board to hear assessment appeals, at the time when the appeal to it was launched, and the order reopening the appeal was made, was conferred by sub-sec. 1 of sec. 52 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31.

By that sub-section it is provided that, instead of the appeal provided for by sub-sec. 1 of sec. 48*a* of the Act respecting the Establishment of Municipal Institutions in Territorial Districts, R.S.O. 1897, ch. 225, being to a Judge of the High Court in Chambers at Toronto, it shall be to the Board.

Section 48*a* was enacted by sec. 3 of 5 Edw. VII. ch. 24, and the provisions of the 1st sub-section are: "48*a*.—(1) Where there is an appeal from any municipal council or Court of Revision under section 45 of this Act, to the district judge, and a person desiring to appeal has been assessed upon one or more properties to an amount aggregating $10,000, such person may, if he so desires, appeal to a Judge of the High Court in Chambers at Toronto instead of to the said district judge, and such appeal to the said Judge in Chambers shall be upon the like notice and otherwise as in the case of an appeal to the district judge under this Act, and the said Judge of the High Court in Chambers shall have the like powers, and shall perform the like duties in respect of such appeal as are performed by the county judge in like cases in other municipalities."

The powers and duties of County Court Judges on appeals

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from assessments are prescribed by the Assessment Act, 4 Edw. VII. ch. 23, secs. 68 to 75 inclusive; and, by sec. 69, the assessment roll is to be altered and amended in accordance with the decision of the Judge upon the appeal, and, by sub-sec. 7 of sec. 68, power is given to the Judge to adjourn the hearing of the appeal, and he may defer judgment, but so that (subject to the provisions of secs. 53 to 56 and to the provisions of the Act respecting the Establishment of Municipal Institutions in Territorial Districts, and to the provisions of special Acts relating to particular municipalities) all the appeals may be determined before the 1st August.

It is clear that when the decision upon the appeal is given by the County Court Judge he is *functus officio*, and has no jurisdiction afterwards to reopen the appeal. His decision is "final and conclusive in every case adjudicated upon" (sec. 75); and, besides this, his duties are purely statutory, and, in the absence of express authority to reopen an adjudged case—and there is none—he has not that power.

When, by the Act of 1905, jurisdiction was conferred upon a Judge of the High Court in Chambers at Toronto, the like powers were conferred and the like duties were imposed upon him as were conferred and imposed upon County Court Judges in the like cases in other municipalities, *i.e.*, in municipalities not in unorganized districts; and it follows that, when the jurisdiction conferred by the statute of 1905 was transferred to the Board by the statute of 1906, the powers and duties of the Board were the same as those which had been possessed by and imposed upon County Court Judges by the statute of 1904.

It is, I think, highly improbable that a legislature which, recognising the importance of the prompt disposal of appeals, had provided, by an enactment which, as interpreted by the Court of Appeal, was imperative in its terms, had made it necessary that appeals should be finally disposed of not later than the 1st August, would have conferred upon the Board jurisdiction at any time to reopen an appeal which had been disposed of.

It is argued that that jurisdiction is conferred on the Board by sub-sec. 4 of sec. 19 of the statute of 1906, which provides

that "the Board may review, rescind, change, alter or vary any rule, regulation, order or decision made by it, whether previously published or not."

It is plain, however, that the sub-section refers only to the matters dealt with in the preceding sub-sections of sec. 19—which are matters relating only to railways.

That what, as I have said, is, in my opinion, the effect of the enactment in force when the Board assumed to reopen the appeal, is made still clearer by the legislation of 1913.

The provisions as to appeals from assessments are dropped from the Ontario Railway and Municipal Board Act of 1913, and now form part of the Assessment Act, statutes of 1913, ch. 46, sec. 13, and, by sub-sec. 4 of the amended section 76 of the Assessment Act, enacted by sec. 13, it is provided that secs. 68 to 75, and secs. 77 and 78 (*i.e.*, of the Assessment Act of 1904), shall apply to all appeals taken under sub-sec. 1 or sub-sec. 2, and the Board shall possess the powers and duties which by those sections are assigned to a Judge of the County Court.

The provision of sub-sec. 5 of sec. 4 of the statute of 1906, that the Board shall have all the powers of a Court of record, did not give to it jurisdiction to reopen the appeal after it had been finally dealt with on the 12th February, 1913. An order of the Board was then made and entered allowing the appeal and fixing the assessment at $100,000 for school purposes; and, if the order had been a judgment of a Court of record, after it had been passed and entered, it could not have been set aside by the Court by which it was made.

The effect of this provision is to vest in the Board such jurisdiction as is inherent in a Court of record, but not powers which are conferred on particular Courts by statutes or by Rules of Court passed under the authority of a statute.

For these reasons, the appeal must be allowed, leaving the order of the Board of the 12th February, 1913, to stand unaffected by the order of the 5th March, 1913, which was made without jurisdiction; and, under all the circumstances, there should be no costs of the appeal to either party.

Appeal allowed.

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STEINACKER v. SQUIRE.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. December 23, 1913.

1. SALE (§ II C—37)—WARRANTY—PEDIGREE — FITNESS FOR BREEDING — DAMAGE—QUANTUM.

That a mare was sold as standard-bred with a pedigree but no pedigree was furnished by the seller as agreed, is ground for awarding damages to the buyer for the diminished value because of the absence of the pedigree; but notice to the seller is not to be implied from such circumstance that the buyer was purchasing for breeding purposes; nor can damage be awarded in respect of lost profits because of the buyer's inability to register the mare's colts, where the buyer had not informed the seller that he was buying for breeding purposes.

[*Sapwell* v. *Bass*, [1910] 2 K.B. 486, and *Hadley* v. *Baxendale*, 9 Ex. 341, applied.]

Statement

APPEAL by the defendant from the judgment of BARRON, Co.C.J., in favour of the plaintiff, in an action in the County Court of the County of Perth, for damages for breach of a warranty upon the sale of a mare, and breach of a contract to furnish a pedigree.

The appeal was allowed.

Glyn Osler, for the appellant.

J. C. Makins, K.C., for the plaintiff, the respondent.

Mulock, C.J.Ex.

December 23. MULOCK, C.J.EX.:—This action arises out of the sale by the defendant to the plaintiff of a mare at public auction. The statement of claim alleges that at the sale "the defendant warranted that the said mare was standard-bred, and that he was in possession of her pedigree shewing that she was standard-bred, and agreed that the said pedigree would be furnished forthwith to the purchaser of the said mare at the sale."

The plaintiff, being the highest bidder, became the purchaser at the price of $178, but the defendant refused to furnish the promised pedigree. Hence this action.

The case was tried without a jury, and the plaintiff sought to shew that the mare was not standard-bred, but failed on that issue; and his only ground of complaint is the non-delivery of the pedigree, the absence of which prevents the registration of the animal's colts in the registry for standard horses.

The learned trial Judge disallowed any claim for damages because of the non-delivery of the pedigree, but allowed damages

in these words: "But I do think that the plaintiff is entitled to damages for the failure to provide the pedigree, using it in this enlarged sense, so far as the foals are concerned." That is, he holds the plaintiff entitled to damages because of the loss of profits from the mare's colts.

With respect, I am unable to agree with either of the conclusions of the learned trial Judge. He has found as a fact that what was sold and bought was a standard-bred mare with a pedigree, but what the defendant got was a standard-bred mare without a pedigree. For this breach of contract the plaintiff is entitled to recover as damages a sum equal to the difference in value of the mare with and without a pedigree. Her value with a pedigree was established at the auction sale as being $178; without a pedigree, the evidence, I think, shews the value to be about $78, and the plaintiff is entitled to judgment for the difference, namely, $100.

The general principle on which damages are awarded for breach of contract is, that the plaintiff is entitled only to such damages as may reasonably be supposed to have been in the contemplation of the parties when they made the contract as the probable result of a breach of it: *Hadley* v. *Baxendale*, 9 Ex. 341; Halsbury's Laws of England, vol. 10, p. 313; *Thoms* v. *Dingley* (1879), 70 Me. 100.

If the plaintiff seeks to enlarge the defendant's liability by reason of special circumstances existing at the time of the making of the contract, as, for example, the plaintiff's intention to breed from the mare registerable stock, he must shew that such special circumstances were brought to the defendant's knowledge at the time of the contract, and were accepted by him as the basis on which the contract was made. If such a case had been shewn here, then damages because of the non-production of the pedigree might, under such special circumstances, be said to have been in the contemplation of the parties in the event of a breach of the contract, and therefore recoverable: *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79; *Randall* v. *Raper* (1858), E.B. & E. 84.

But no such case was made. The parties were strangers to each other, and no communication had passed between them as

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to the purpose for which the plaintiff was purchasing the animal. It is true that she was offered for sale as standard-bred with a pedigree, but that circumstance does not, with reasonable certainty, imply that she was being bought for breeding purposes; and, therefore, it would not justify imputing to the defendant knowledge of the plaintiff's object.

I think that damages because of inability to register the mare's progeny were not within the contemplation of the parties at the time of the contract, and, therefore, were not the reasonable and natural result of the defendant's breach of contract: *Sapwell* v. *Bass*, [1910] 2 K.B. 486.

For these reasons, the only damages recoverable by the plaintiff are the $100, being the mare's diminished value because of the absence of the pedigree. The judgment, therefore, should be reduced to $100, with costs on the County Court scale up to the time of payment into Court of $100 by the defendant, with set-off of the defendant's subsequent costs; no costs of this appeal to either party.

Sutherland, J. Leitch, J.

SUTHERLAND and LEITCH, JJ., concurred.

Riddell, J.

RIDDELL, J.:—The statement of claim in this action alleges that the defendant, at an auction sale of horses, warranted that a certain mare was "standard-bred, and that he was in possession of her pedigree shewing that she was standard-bred, and agreed that the pedigree would be furnished forthwith to the purchaser of the said mare at the said sale;" that the plaintiff, wanting a mare for breeding purposes, attended the sale, and, relying on the warranty and agreement, bought the mare; that he has frequently demanded the pedigree, but the defendant has neglected and refused to furnish the same, and by reason of this neglect and refusal the plaintiff has suffered loss "on the value and sale of the said mare and her offspring." The defendant, denying all liability, paid $100 into Court, and the case went to trial before His Honour Judge Barron without a jury, resulting in a judgment for the plaintiff for $100 in excess of the amount paid into Court. The defendant now appeals.

At the beginning of the trial, counsel for the plaintiff stated specifically that the action was both for breach of warranty and

breach of contract in not supplying the pedigree, adding, "The warranty is mostly in the failure to furnish papers." The evidence proceeded on that basis, no small part of it being directed to the loss of the plaintiff by reason of his inability to register the entire colts of the mare, on account of the absence of the pedigree which had been promised.

The learned County Court Judge found the warranty and promise as alleged, upon evidence which entirely supports the finding, and then proceeded to assess damages. He finds that the mare, sold with the warranty and agreement, would not be worth more than the sale-price if the warranty were true (as in substance he finds it was), and the agreement carried into effect by delivery of pedigree papers. I do not see that we can interfere with this finding.

Then the trial Judge, saying, "No damages for the breach of contract in failing to provide the pedigree so far as this mare is concerned," adds: "But I do think that the plaintiff is entitled to damages for the failure to provide the pedigree . . . so far as the foals are concerned."

I am of opinion that such damages are too remote. *Hadley* v. *Baxendale*, 9 Ex. 341, of which that part of Mayne on Damages which deals with contracts is an extended commentary, laid down the law as it has been consistently followed ever since: "The damages in respect of a breach of contract should be either such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The damage arising naturally from such breach of contract to deliver papers would be a diminution in value in the mare herself; and no other damage could reasonably be supposed to have been in the contemplation of both parties: *Sapwell* v. *Bass*, [1910] 2 K.B. 486. If the plaintiff had, before buying, informed the defendant that he was buying the mare for brood purposes, the case might be different; but this he did only after the contract had been entered into.

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There is evidence upon which the Court can assess the damages, *i.e.*, the diminution in value of the mare herself from not having the papers furnished which were promised. The auctioneer says (p. 26) that a pedigree would add to her value—most decidedly. The plaintiff (p. 8): "She is not worth more than $100. . . . I would not have bought her for $70 or $75." (I entirely disregard his extravagant statement that, with a pedigree, she would be worth $1,000—the Judge's finding disposes of this). The plaintiff (p. 13) says that he told the defendant that he would not begrudge $50 out of his own pocket if he had the papers. William Steinacker says (p. 30), "Without the pedigree . . . I would not figure her worth more than $100." Aikenville (p. 33) makes the difference $700 or $800, which we may disregard in view of the finding of the trial Judge. Eckhert says (p. 38): "I would not give more than $100 . . . the way she is . . . following the market of the Toronto Horse Exchange she would be worth $75."

The defendant and one of his witnesses think that the absence of pedigree papers makes no difference in the value. Charles Pearce thinks (p. 58) that without papers she would have brought $140 to $160, and says that with a pedigree $25 more is all that is given for a good individual.

Taking all the evidence together, the plaintiff could not complain if we should take $100 as the value of the mare without papers; his damages on this head then would be $78.

Payment of money into Court is not in our practice an admission of the cause of action: former Con. Rule 420; and, if there is nothing more in the case, the plaintiff should have judgment for $78 and costs on the appropriate scale up to the payment into Court, with a set-off of all subsequent costs, including the costs of appeal.

Powell v. *Vickers Sons & Maxim Limited*, [1907] 1 K.B. 71, has settled the practice in that satisfactory way; *Gretton* v. *Mees* (1878), 7 Ch. D. 839, *Buckton* v. *Higgs* (1879), 4 Ex. D. 174, and other cases, had laid down this principle; such cases as *Wheeler* v. *United Telephone Co.* (1884), 13 Q.B.D. 597, had apparently indicated that the defendant would be entitled to his costs, throughout.

But it is argued that the defendant was guilty of fraud in making the promise he did to "furnish papers." I do not find evidence of fraud; the defendant seems to have thought that the papers on which the mare was brought into the country were a pedigree; and, even if he made the promise when he was not in a position to carry it out, this would not be such a fraud as would increase the damages.

Mullett v. *Mason*, L.R. 1 C.P. 559, is of course the case relied upon. A cattle dealer sold the plaintiff a cow, fraudulently representing her as sound. The plaintiff put her in the stable with other cows, which caught the disease from her and died. The Court held that the plaintiff could recover the value of the cows. Erle, C.J., said (p. 563): "It is clear that if a seller makes a fraudulent representation to a buyer to induce him to buy, the buyer has a right to act upon it as if it were true, and if he does so the seller must compensate him for all the direct consequences that naturally follow from it. In the present case, the defendant is liable for all the direct consequences of the plaintiff treating the cow as if it were free from any infectious disease, and placing it, as he naturally would, with other cattle, and the death of the other cows was a direct consequence of his doing that." Willes, J. (p. 564): "The defendant induced the plaintiff to buy the cow by representing that it was sound when he knew that it was not so, and that it might communicate the disease to any other cattle with which it might be placed. Was it not necessarily within the contemplation of the parties that it might be placed with other cows? The plaintiff was induced by the defendant's misrepresentation to treat it in the ordinary way, and the illness and death of the other cows was the direct and natural consequence of his doing so." Keating and Montague Smith, JJ., concurred.

To the same effect is *Sherrod* v. *Langdon* (1866), 21 Iowa 518, where it is said: "Plaintiffs were entitled to recover all the damages of which the act complained of was the efficient cause. . . . Defendants sold the sheep with the knowledge the plaintiffs had a right to and probably would place them upon their farm. . . . The ground of the recovery is, that the loss actually happened while defendants' wrongful act was in operation . . ."

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What such cases mean is, that, if one by fraud represents what he sells as different from what it actually is, the vendee is entitled to use it as though it were as represented, and, if damage accrue as the natural and direct result of so using it, the vendee is responsible for such damage. The result is the same as though the vendor at the time, not being guilty of fraud, knew that the vendee intended to or might use it in that way: *Smith* v. *Green* (1875), 1 C.P.D. 92.

If in the present instance the defect was such as to do damage to other horses the case would be parallel; but the most that can be said is, that the plaintiff might breed her; if he did, no direct damage would ensue.

Then it is said that the case was misconceived by the learned County Court Judge; that the real cause of action was a promise made by the defendant, not at the time of the sale, but subsequently, when he had full notice of the purpose for which the papers were required and that the mare was intended for a brood mare. No such case is made on the pleadings; and, when evidence was given of such a transaction, His Honour (p. 7) said: "No cause of action in the statement of claim for that;" and the matter was not further pursued, the evidence being considered simply on the question of the original agreement. It would be impossible for us to give full effect now to the evidence as establishing a new contract. The plaintiff might have leave, if so advised, to bring an action based upon the subsequent contract.

But it may well be thought that there has been sufficient litigation about this matter. The defendant is willing, if there be no more litigation, that the plaintiff should have the $100 paid into Court, and I think that judgment should go for that sum, without reserving leave to bring another action.

The judgment should be set aside and judgment entered for $100, with costs upon the County Court scale up to the time of payment into Court, with a set-off of costs subsequent to that time to the defendant.

The defendant would have been entitled to the costs of the appeal, in my view, but that, in his notice of appeal, he claimed an order dismissing the action. It is true that, when challenged by the Court, counsel stated that he was content to abide by his

payment into Court and to allow the plaintiff to have that sum, but the claim to have the action dismissed was not abandoned till that time. While, under our practice, the written pleadings and other proceedings have lost much of their importance, they are not always wholly to be disregarded, and no appellant can justly complain if, having claimed in his notice more than he is entitled to, he is not given the costs of the appeal, even though he should on the argument abandon what had in the notice of appeal been improperly claimed. Parties (and solicitors) will be well advised in all papers to say just what they mean and claim just what they are rightly entitled to.

Appeal allowed.

PEDLAR v. TORONTO POWER CO.

Ontario Supreme Court, Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 18, 1914.

[*Pedlar* v. *Toronto Power Co.*, 15 D.L.R. 684, 29 O.L.R. 527, affirmed.]

DEATH (§ IV—27)—*Contributory negligence—Fatal Accidents Act (Ont.)—Expectation of pecuniary benefit—Juvenile's surviving parents.*]—Appeal by the plaintiffs from the judgment of Middleton, J., 15 D.L.R. 684, 29 O.L.R. 527.

Appeal dismissed.

W. M. McClemont, for the appellants, referred to *McKeown* v. *Toronto R.W. Co.* (1909), 19 O.L.R. 361; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; *Latham* v. *R. Johnson & Nephew Limited*, [1913] 1 K.B. 398; and contended that the appellants' case, under these authorities, was made out, and that they were entitled to recover damages for the death of their child, under the Fatal Accidents Act. The facts were not in dispute, and the Court had power to draw a different inference from that of the trial Judge.

D. L. McCarthy, K.C., for the defendants, the respondents, was not called upon.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:—We find that we cannot disturb the judgment of the learned trial Judge, who was in a much better position to decide as to the facts of the case than we are.

The appeal will be dismissed with costs to the defendants, if they ask for them.

Appeal dismissed.

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VOLCANIC OIL AND GAS CO. v. CHAPLIN.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. May 12, 1914.

[*Volcanic Oil and Gas Co. v. Chaplin*, 10 D.L.R. 200, reversed upon the facts.]

1. WATERS (§ II A—65)—*Riparian or littoral rights—Basis for—Private as distinct from public injury.*]—Appeal by the defendants from the order of a Divisional Court of the High Court of Justice, 10 D.L.R. 200, 27 O.L.R. 484, affirming the judgment of FALCONBRIDGE, C.J.K.B., 6 D.L.R. 284, 27 O.L.R. 34.

James Bicknell, K.C., *J. W. Bain*, K.C., and *Christopher C. Robinson*, for the appellants.

G. F. Shepley, K.C., and *J. G. Kerr*, for the plaintiffs, the respondents.

THE COURT gave judgment allowing the appeal and dismissing the action with costs.

MAGEE, J.A., wrote an elaborate opinion in which he examined the evidence in detail. His conclusions are expressed as follows:—

In my view, the plaintiffs have not proved either that the defendants' works are north of the site of the old Talbot road, or that the waters of the lake have reached so far; and hence they are not riparian proprietors.

They do not shew any inconvenience or injury from the defendants' works beyond others of the public, and hence have established no right to relief.

As a consequence, it is unnecessary to express any opinion as to the very interesting questions of law so fully discussed here and in the Courts below.

The appeal should, in my opinion, be allowed, and the action dismissed, with costs of the action and of the appeal to the Divisional Court and of this appeal to the defendants.

MEREDITH, C.J.O., and MACLAREN, J.A., concurred.

HODGINS, J.A., also concurred, for reasons briefly stated in writing.

Appeal allowed.

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Alberta Supreme Court, Scott, Stuart, Simmons and Hyndman, JJ.
December 18, 1914.

1. PLEADING (§ V—351)—REPLY—CHANGING NATURE OF ACTION—CONFESSION AND AVOIDANCE—STATEMENT OF CLAIM; ITS FUNCTIONS.

Facts by way of confession and avoidance are properly included in the plaintiff's reply and not by way of amendment to the statement of claim.

2. PLEADING (§ V—351)—REPLY—SCOPE OF, TO TRAVERSE AND AVOID.

A plaintiff may both traverse and avoid by his reply following the statement of defence.

3. EVIDENCE (§ II K—311)—ONUS OF PROOF—AS TO CONTRACTS—LIABILITY PRESUMED FOR USE OF ANOTHER'S CHATTEL, WHEN.

The onus is on the party setting up a specific agreement for car rental in railway construction work, to prove it; but if both parties had pleaded that there was no express agreement to pay, and the claimant had relied upon the presumption of a promise to pay the fair value of the use of another's chattels, the onus would be upon the party who used them to establish his contention that he was to have them free of charge.

Statement

APPEAL by defendant from verdict at trial.

The appeal was allowed in part, judgment below being varied.

L. T. Barclay, for the plaintiffs, respondents.

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

The judgment of the Court was delivered by

Simmons, J

SIMMONS, J.:—The plaintiffs were workmen who contracted with the defendants to do certain rock cutting on the Canadian Northern Alberta Railway. The defendant supplied the plaintiffs with goods during the course of said work, and the defendant paid into Court the sum of $325 in satisfaction of the balance due the plaintiffs. The action was tried by Mr. Justice Beck and a jury, and the sum of $1,492.98 was awarded to the plaintiffs and costs of the action. From this judgment the defendant appeals.

The plaintiffs alleged an oral contract to do the rock cutting and removal at ninety cents (90c.) per cubic yard. The defendant alleges that the contract was in writing and provided that the estimates of the engineer of the railway company were final and binding upon the parties.

The plaintiffs, in reply, allege that the agreement in writing was of such a character that the plaintiffs, who were men of foreign birth and slight knowledge of the English language, could not understand it, and believed that it incorporated only the

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terms of the oral contract. The defendants contend that, as a matter of pleading, the plaintiffs should have amended their claim by admitting the existence of the agreement in writing while denying the validity of the sale.

Hall v. *Eve*, 46 L.J. Ch. 145, is a case in point, and the Court of Appeal, consisting of Bramwell, Baggally and James, JJ., arrived at the conclusion that the reply was the proper place for the plaintiff to state facts by way of confession and avoidance, and not by way of amendment to his statement of claim, and that a plaintiff may both traverse and avoid in his reply.

As to whether the oral agreement alleged by the plaintiffs or the agreement in writing executed by the parties was the actual agreement was properly left to the jury. The plaintiffs were, according to their evidence, incapable of understanding the agreement in writing, and, having in view all the circumstances, it is not at all unlikely that they might have believed that the written document went no further than incorporating what they allege was the oral agreement previously made.

If the jury came to the conclusion that the oral agreement governed, the result would be that the estimates of the railway engineer were not final and binding upon the parties, and the actual amount of excavation was a question for the jury to determine upon the evidence. The findings of the jury indicate that they accepted the estimate of the engineer Smith, and in so far as this is supported by evidence it is conclusive. Smith had to make his measurements of the cut after it was completed, and had therefore to calculate upon the basis of a hypothetical surface. He did not have access to the profile or specifications when he made his measurements. Subsequently he had access to the profile in the office of defendant's solicitors, and he said he found the elevations approximately the same as his.

Mr. Smith says he estimated the overbreak at 5,280 yards, and that he might be out as much as 25 per cent. in this estimate. The overbreak is the juttings or uneven surface beyond the hypothetical cut. Smith says he had great difficulty in estimating the overbreak on account of the irregularity of the contour.

Smith's evidence in regard to another item, namely, 670 yards of sub-grade, is as follows:—

Q. Then over and above that, there is the finished grade. A. Yes, 1 foot or 12 inches above the cut or 670 cubic yards, what is termed the

sub-grade, that is in the cut as taken out, it is filled at 12 inches, *it was there that I took my height*. Sub-grade is the excavation below the theoretical base in order to provide a better road-bed in the way of freedom from rock projections on the surface of the road-bed.

Mr. Shaw says: "Some companies allow sub-grade; they take the grade at a foot below the surface of the track." In answer to the question, "Why should you not allow for that?" he replied, "Our specifications do not allow it." And further, quoting from Mr. Shaw's cross-examination:—

Q. Can you tell me what the sub-grade would amount to on the contract if you had allowed it? A. It does not amount to very much. Mr. Smith has 670 yards here.—Q. Will he likely be right, is there some guesswork about it? A. No, that ought to be it.—Q. If he be allowed it, it would be that amount at 90c.? A. There would be that amount at 90c. if it were allowed.

Now, Mr. Smith described his method of calculation of the sub-grade by saying that "it is filled at 12 inches, and it was there that I took my height." I conclude that Mr. Smith took his measurements after the base had been filled and on the assumption that the sub-grade excavation actually had been made. Mr. Shaw neither admits, nor does he specifically deny, that such sub-grade had been excavated.

The re-examination by Mr. Biggar of Mr. Shaw on this point is as follows:—

Q. You were speaking about sub-grades, that on some roads sometimes an allowance is made for excavation below one foot from the ultimate base of the rail? A. That is correct.—Q. Down to a point two feet below the ultimate base of the rail? A. Correct.—Q. That is under what circumstances? A. It is generally done in rock work in order to have no points sticking up to the track, the ties; of course, the ties have to be laid first, on this plan, it is one foot below the base of the rail; if there were any hard points that the cars were travelling over, it's going to break the ties.—Q. When an allowance is made below the base, is it required to be excavated below the base? A. Everything is supposed to be loosened to a point two feet or more below the base of the rail.—Q. You produced your specifications? A. Yes.—Q. My friend has referred to them, I will ask to have them marked. What do you say with regard to there being any requirements here as to excavating below the base? A. I think it is better.

(Specifications referred to, put in; marked exhibit 12.)

Q. Is it or is it not required by the specifications? A. It states plainly there that no payment will be made for any excavation below our base.—Q. Suppose the excavation is made properly down to your base, are you insisting upon its being excavated below that? A. No.—Q. So that your arrangement with your contractors, the basis of these specifications, is that there shall be no excavation below one foot below the ultimate base of the rail? A. Yes.—Q. You call that your base? A. Yes.

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Mr. Smith apparently based his conclusion in regard to the sub-grade excavation upon the basis that a sub-grade was actually required by the specifications and was actually made. The railroad track had apparently been completed and ballasted when he made his measurements, and he could not verify his estimate of the sub-grade. I conclude, therefore, that this item should not have been submitted to the jury, as there was an absence of evidence to support it.

In regard to the items of $480 for car rental and $50 for freight, counsel for the defendant took objection to the direction of the trial Judge that the onus was on the defendant.

I am of the opinion that since the defendant alleged an agreement to pay the rental and claimed a set-off for this amount, he is in the same position as a party who asserts a contract as the basis of his claim. The plaintiff, however, denied the existence of the contract, and alleged that he was to have the use of these chattels free of any claim for rental or otherwise. In view of the assertion of the defendant of an agreement to pay a specific rental, the trial Judge's direction to the jury that the onus was on him to prove it was quite correct. If the defendant and the plaintiffs had each said that there was no agreement, then it would be the duty of the trial Judge to tell the jury that in the absence of evidence the use by one person of the chattel of another was intended to be gratuitous: the law implies a promise to pay the fair value of such use. See Abbott's Trial Evidence, ch. 18. In this latter case the onus would be upon the plaintiff to establish he was to have them free of charge. But this is not the situation. The defendant sets up an agreement to pay specific rental, and the onus was upon him to establish it.

Judgment should be reduced by $603, being the amount improperly credited to the plaintiff for the excavation of sub-grade. The defendant having partially succeeded upon his appeal, there should be no costs of appeal to either party.

Judgment below varied.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. June 15, 1914.

1. LANDLORD AND TENANT (§ II D—30)—LEASES—FORFEITURE—AGREEMENT TO ASSIGN AS DISTINCT FROM ASSIGNMENT.

A valid assignment of the term is necessary to work a forfeiture under a condition of the lease that the lessee would not assign without leave; an agreement to assign is not enough.

[*Friary, etc. (Ld.)* v. *Singleton*, [1899] 2 Ch. 261, applied.]

2. LANDLORD AND TENANT (§ II E—35)—LEASES—ASSIGNMENT; SUBLETTING—PROVISO FOR LEAVE — LEAVE ARBITRARILY WITHHELD — EFFECT.

Under a condition in a lease that the lessee will not "assign or sublet without leave but such leave shall not be wilfully or arbitrarily withheld," the lessee is at liberty to assign without the lessor's consent if, before assigning, he had made application for the consent and the lessor arbitrarily refused in violation of the agreement.

[*Goodwin* v. *Saturley*, 16 Times L.R. 437, applied.]

Statement

APPEAL from the judgment of FALCONBRIDGE, C.J.K.B., in the plaintiffs' favour.

On the 15th January, 1912, the defendant leased land to the plaintiff McNeil for three years from the 1st February, at $13 per month, with an option to purchase. McNeil entered into possession, and towards the end of January or early in February, 1913, entered into negotiations with the plaintiff Cornish, which resulted in an agreement, dated the 3rd February, 1913, to assign the lease. The defendant, as the plaintiffs alleged, refused to give his consent; and McNeil, on the 8th February, 1913, made a formal assignment to Cornish. On the 8th March, 1913, Cornish entered into an agreement with the Allen Edwards Speirs Realty Company Limited for an assignment to them. The plaintiffs alleged that the defendant was asked and refused to consent to this transfer also. McNeil, having remained in possession under an agreement with Cornish, vacated the premises in May, and then or shortly afterwards the defendant took possession of the land and rented it to a tenant. The Allen company, in October, 1913, rescinded their agreement to purchase. On the 19th April, 1913, Cornish and McNeil brought this action, claiming an order that the defendant should sign all proper consents to the transfers from McNeil to Cornish and from Cornish to the Allen company; a declaration that McNeil

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and Cornish had the right to assign without leave; and damages for the refusal.

The appeal was in the main dismissed; judgment varied.

H. M. Mowat, K.C., for the appellant.

R. R. Waddell, for the plaintiffs, the respondents.

SUTHERLAND, J.:—This action arises out of a lease, in writing and under seal, dated the 15th January, 1912, for a term to run for three years from the 1st February, in that year. It contains, among other covenants, the following: "That the lessee will not assign or sublet without leave, but such leave shall not be wilfully or arbitrarily withheld." "It is understood and agreed that the said lessee, his executors, administrators, assigns or nominees, shall have the right to purchase the said lands and premises hereby demised at any time during the said term of three years, at the rate of twenty-eight dollars ($28) per foot frontage on Murray street, payable in cash on closing. Should the lessee decide to purchase the said property, he shall give to the lessor a written notice of his intention to purchase, addressed to the lessor at 60 Garnett avenue, Toronto, or delivered to him personally. . . . This agreement shall be binding upon the heirs, executors, administrators, and assigns of the parties hereto."

The tenant, one of the plaintiffs, William McNeil, entered into possession towards the end of January, 1912, and regularly paid the rent in advance during that year and for January, 1913. A real estate agent, named White, brought McNeil and his co-plaintiff Cornish in touch, and on the 3rd February, 1913, the former gave to the latter a written option, not under seal, of "my lease of part of lot 26, plan 423, composed of the 2 south acres and dwelling, in the said township of York, in the county of York" (the property in question) "for the sum of $8,000, the said option to expire at twelve o'clock midnight on Monday February 10th inst."

On or before the 7th February, Cornish had apparently agreed with McNeil to take up the option, and the matter of closing the transaction was entrusted to a solicitor, Mr. Wad-

dell. McNeil testified that he requested White to see the defendant to ask his consent to the arangement. Waddell was also acting for Cornish, and White went to the defendant for both parties. McNeil says he was himself ill at the time. There can be no doubt, upon the evidence, that White saw the defendant on the 7th February, and asked him to sign a written consent in the following terms: "I, Charles Boles, of the city of Toronto, the lessor named in a certain lease to one William McNeil, dated the 15th January, 1912, of the south half of lot 26, plan 423, on Lauder avenue, in the county of York, hereby consent to the assignment of the said lease to J. W. Cornish, of the said city of Toronto." The defendant refused to sign the consent, and in fact denies that it was shewn to him by White. One can well understand from a perusal of his evidence why the trial Judge preferred to credit the testimony of the plaintiffs and their witnesses.

The defendant had heard of the sale to Cornish. No satisfactory reason is disclosed in his evidence for withholding his consent. I think he "wilfully and arbitrarily" withheld it, as the trial Judge found. It appears that, even when advised by a competent solicitor to consent, he continued obdurate.

In this action he takes the position that, in consequence of the plaintiff McNeil making an assignment of the lease without his consent, a forfeiture was created. The lease is one required to be in writing and under seal, as also any assignment thereof: R.S.O. 1897, ch. 119, sec. 7; ch. 338, sec. 3.

There was, up to the time the consent of the defendant to the assignment from McNeil to Cornish was sought, no valid assignment, but merely an agreement to assign.

A valid assignment was necessary to work a forfeiture: *Friary Holroyd and Healey's Breweries Limited* v. *Singleton*, [1899] 2 Ch. 261, at p. 263.

The defendant having on the 7th February withheld his consent, in violation of the agreement, McNeil was thereafter at liberty to assign his lease and option without the lessor's consent: Woodfall's Landlord and Tenant, 19th ed. (1912), p. 776; *Goodwin* v. *Saturley* (1900), 16 Times L.R. 437.

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On the 8th February, 1913, a formal assignment of the lease and option under seal was executed by him in favour of Cornish. Even if the result of what McNeil had done prior to the 8th February, 1913, had been to enable the defendant to declare the lease forfeited, the latter's subsequent conduct in receiving rent from him amounted to a waiver: Woodfall, p. 376, and cases there cited. His receipt is in evidence, dated the 1st March, 1913, acknowledging that he had been paid by McNeil $26 for the rent for the months of March and April of that year.

The agreement between the plaintiffs of the 8th February, by which the lease and option were assigned by McNeil to Cornish, was carried out by the latter paying to the former the consideration therein named. The plaintiffs Cornish and McNeil had at the time some talk about the latter continuing as tenant of the former, though no actual agreement had been come to.

McNeil continued in possession and at first paid the rent to Cornish. When, however, the latter offered it to the defendant, he would not receive it. Thereupon McNeil and Cornish went to him and endeavoured to persuade him to do so. On his still declining, and stating that he would receive it from nobody but McNeil, Cornish handed $26 to McNeil, who in turn paid it to the defendant, from whom he received the receipt already mentioned. Cornish, having thus found that the defendant was not disposed to recognise the assignment of the lease from McNeil to him, did not complete any arrangement with the latter about renting the property.

On the 8th March, 1913, an agreement for sale of the lease and option was entered into between the plaintiff Cornish and the Allen Edwards Speirs Realty Company Limited, and thereafter the plaintiff Cornish and one Edwards, representing that company, on several occasions sought to induce the defendant to recognise the assignment to Cornish and the further assignment from Cornish to the company, but without effect.

On the 19th April, 1913, the writ herein was issued. The plaintiffs in their statement of claim asked for an order directing the defendant to execute such instrument or instruments in writing as were necessary to give the proper consents of the de-

fendant to the assignment of the lease and option from the plaintiff McNeil to the plaintiff Cornish and from the latter to the said realty company, and also a declaration that, in the circumstances, the plaintiff McNeil was entitled to assign to Cornish and Cornish to the realty company, each without the written consent of the defendant. They also asked for damages for the refusal or neglect of the defendant to give the consents.

Subsequent to the commencement of this action, the realty company, owing to the failure of the plaintiff Cornish to obtain the defendant's consent to the assignment of the option from him to it, abandoned its contract to purchase.

The plaintiff McNeil went out of possession on or soon after the 1st May, 1913, and thereupon the defendant assumed to retake possession of the property and to rent it.

Before trial, the plaintiffs gave notice of an application to be made before the presiding Judge thereat to amend their statement of claim so as to set up that the defendant had, forcibly and wrongfully and without having given any notice of forfeiture and without colour of right, entered into possession of the premises, thus depriving the plaintiffs and each of them of their rightful possession thereof, and that he had rerented the premises to other tenants, and by adding also a claim for damages in consequence of the rescinding of the agreement to purchase by the realty company and for possession of the premises. The amendment was allowed, and there is a finding of the trial Judge to the effect that the defendant did enter and take possession without colour of right. His judgment also declares that the plaintiff McNeil was entitled to assign the lease and option to the plaintiff Cornish, and that the plaintiff Cornish was entitled to assign the same to the Allen Edwards Speirs Realty Company Limited, without the consent, written or otherwise, of the defendant. The note of judgment endorsed on the record includes a declaration that the plaintiffs are entitled to possession, though this is not carried into the formal judgment as settled.

There can, I think, be no doubt that the plaintiffs were entitled, as found by the trial Judge, to a declaration that McNeil was justified in assigning the lease to the plaintiff Cornish with-

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out the consent of the defendant. This is perhaps all he would have been entitled to but for the defence set up by the latter. At the date of the issue of the writ, no question of possession was involved, so far as the plaintiffs were then concerned. They had possession. At that time, there was, however, also in question the refusal on the part of the defendant to recognise the assignment from McNeil to Cornish and from Cornish to the realty company.

It was apparently not brought to the attention of the trial Judge, when considering the question of the amendment already referred to, that the abandonment of the contract by the realty company was subsequent to the date of the issue of the writ; and, therefore, no claim for damages with respect thereto could properly be dealt with in this action. The remedy, if any, of the plaintiff Cornish must be sought in another action. The defendant further sets up in his statement of defence that the plaintiff McNeil committed a breach of the covenants contained in the lease by not repairing the premises and not leaving the premises in good repair and by abandoning the premises and assigning the lease without the written consent of the defendant, whereby the lease became and was void, and the defendant had re-entered the said premises as of his former right.

The defendant pretended to lay much stress upon a tenant occupying the premises, but such evidence as there was indicates plainly that the house on the property was not in good repair and that he could not have been much concerned about this. The trial Judge says: "The pretention that there could be any personal element in the choice of a tenant, or that the tenant should live on the property, is, having regard to the nature and condition of the land and the dilapidated building thereon, utterly untenable and absurd."

At the time the defendant took possession of the property, early in May, no rent was in arrear, and the lease was still a valid and subsisting one. The defendant was not justified in taking possession; and, having set up the claim he did in his statement of defence as an answer to the plaintiffs' action, the plaintiffs are entitled to a declaration that the lease is still a

subsisting one and to an order for the possession of the property. They were, in any event, entitled to bring their action for a declaration that, under the circumstances, they were relieved from obtaining the consent of the defendant to the assignment of the lease, and for costs: *West* v. *Gwynne*, [1911] 2 Ch. 1.

The defendant seeks to attack the judgment appealed from on the ground that no request was made for his consent to the assignment before it was made on the 8th February, 1913; and that, even if such request was proved to have been made, he was entitled, without being unreasonable or arbitrary, to refuse such consent, because the plaintiff Cornish was not such a person as he need accept as a tenant, and indeed had no intention to occupy the house on the property; also on the further ground that the assignment from Cornish to the realty company was made without his consent, and that the plaintiff McNeil abandoned the premises, surrendering the lease, and thus justified the defendant in re-entering.

I am of opinion that he has failed upon all grounds. The judgment, however, should be varied so as simply to declare that the plaintiff McNeil was justified in assigning the lease to the plaintiff Cornish; that the lease is a valid and subsisting one; and that the plaintiffs are entitled to the possession of the property in question.

The plaintiffs should also have the costs of this appeal. They have succeeded in holding the judgment on the matters of real importance and about which there was the chief contest at the trial.

Mulock, C.J.Ex.
Clute, J.
Leitch, J.

MULOCK, C.J.Ex., and CLUTE and LEITCH, JJ., concurred.

Riddell, J.

RIDDELL, J.:—The defendant was the owner of the south half of lot 26 on the west side of Murray street, near Toronto, on which were some buildings of no great value. McNeil, one of the plaintiffs, offered him $12 a month without an option to purchase, and $13 a month with an option to purchase. The latter offer was closed with, and a lease made on the 15th January, 1913, for three years from the 1st February at $13 per

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month, payable in advance, with an option to purchase, which will be set out later on. McNeil entered into possession, and towards the end of January or early in February entered into negotiations with the plaintiff Cornish, which resulted in an agreement of the 3rd February, 1913, to assign the lease. The defendant was seen as to consenting to the assignment, and, as the plaintiffs allege, he refused to give his consent. McNeil thereupon, on the 28th February, made a formal assignment to Cornish.

Cornish, on the 8th March, 1913, entered into an agreement with the Allen Edwards Speirs Realty Company Limited for an assignment to them; it is said that Cornish went to the defendant and asked him to consent to this transfer and he refused.

McNeil, having remained in under an agreement with Cornish, vacated the premises in May, and, either then or shortly thereafter, the defendant took possession of the property and rented it to a tenant. The Allen company in October, not being able to get possession, rescinded their agreement to purchase, and Cornish took no means to compel them to carry out their agreement.

Cornish and McNeil brought this action on the 19th April, 1913, claiming an order that the defendant should sign all proper consents to the transfers from McNeil to Cornish and from Cornish to the Allen company; a declaration that McNeil and Cornish had the right to assign without leave; damages for the refusal; costs and general relief. At the trial, on the 11th November, 1913, a claim was allowed to be set up based upon the wrongful entry and the consequent refusal of the Allen company to carry out their agreement.

The learned trial Judge, Sir Glenholme Falconbridge, found in favour of the plaintiffs, and directed judgment to be entered for the plaintiffs declaring that they had the right to assign; damages for the defendant's refusal and neglect to give his consent; damages under the added count; and a reference as to damages—with costs.

The formal judgment taken out declares the right of McNeil and Cornish to assign without consent; orders a reference "to

the Master in Ordinary of this Court to inquire and state what damages the plaintiffs or either of them have sustained by reason of the defendant's refusal to give his consent to the assignment of the said lease and agreement for option as set out in the plaintiffs' amended statement of claim, and also to inquire and state what damages the plaintiffs have sustained by reason of the defendant's having wrongfully taken possession of the said lands as set out in the plaintiffs' amended statement of claim.

"4. And this Court doth further order and adjudge that the defendant do forthwith deliver to the plaintiff John W. Cornish, or to whom he may appoint, possession of the above-described lands."

The appeal is based upon the allegations that McNeil, on the 3rd February, assigned without leave, and thereby committed a breach of covenant and forfeited his lease; that no request was made for consent before actual assignment to Cornish; that, in any event, consent was lawfully withheld; and that McNeil abandoned the premises and surrendered the lease.

The lease is dated and admittedly was made on the 15th January, for three years from the 1st February, 1912, and contains the covenant by the lessee, for himself, his heirs, executors, administrators, and assigns, "that the lessee will not assign or sublet without leave, but such leave shall not be wilfully or arbitrarily withheld."

The transaction of the 3rd February took the form of a document, not under seal, signed by McNeil, giving an option to Cornish of "my lease . . . for the sum of $8,000, the said option to expire at twelve o'clock midnight on Monday February 10th inst." This was on Monday the 3rd February; on Wednesday, McNeil saw the solicitor, Mr. Waddell, who was acting for both himself and Mr. Cornish, and put the matter of obtaining Boles' consent into his hands; (p. 13) "to put the whole thing through." On Friday the 7th February, Mr. Waddell sent White to the defendant to get his consent, giving him a form (a duplicate of which is produced) for the defendant to sign: "I, Charles Boles . . . the lessor named in a certain lease to one William McNeil dated the 15th January,

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1912 . . . hereby consent to the assignment of the said lease to J. W. Cornish. . . .'' White saw the defendant at his house; there was some argument before us that the defendant did not know that White was acting for McNeil, but Mrs. Boles herself says that White ''asked Mr. Boles if he would sign a paper, and Mr. Boles said 'no;' and he asked him what it was for, and . . . he said 'for McNeil' '' (p. 80). It is quite plain from the evidence that Boles knew perfectly well that White was asking him on behalf of McNeil to consent to the assignment of his lease to Cornish, and it is equally clear that the refusal was wilful, arbitrary, and unreasonable. The defendant throughout insisted that Mr. McNeil, and Mr. McNeil only, should remain his tenant. No doubt, he would have had the right, if he doubted White's authority, to give a conditional refusal for a time sufficient to enable him to make certain of White's authority; but there was nothing of that kind, the refusal was absolute and peremptory, and would have been the same, beyond question, had McNeil asked for it in person. White telephoned Mr. Waddell and was instructed to make another attempt, which he did with the same result.

Apparently the option had been accepted before the interview (although this does not seem to be quite clear), the acceptance not being under seal. It was argued that this was an assignment of the lease without consent, which voided the lease; but this is clearly not so.

The lease, being for a term more than three years beyond the ''time of making thereof,'' could not be by parol, but must be in writing under the Statute of Frauds, R.S.O. 1914, ch. 102, and is not protected by sec. 4 (R.S.O. 1897, ch. 338, sec. 3): *Rawlins* v. *Turner* (1699), 1 Ld. Raym. 736; and *cf. Ryley* v. *Hicks* (1723), 1 Str. 651.

An assignment of such a lease must be by deed: Conveyancing and Law of Property Act, R.S.O. 1897, ch. 119, sec. 7; R.S.O. 1914, ch. 109, sec. 9; otherwise it is ''void at law,'' operating in law as a mere agreement: *Parker* v. *Taswell* (1858), 2 DeG. & J. 559; *Cowen* v. *Phillips* (1863), 33 Beav. 18. Even had the transaction been an assignment not under seal, the assignment would not have been an assignment at law. It is

well settled that an assignment, to violate such a covenant as we are now considering, must be valid and effective in point of law; there must be an assignment at law, and an equitable assignment or document operating only in equity is not enough: *Gentle* v. *Faulkner*, [1900] 2 Q.B. 267, especially pp. 274, 276; *cf. Friary Holroyd and Healey's Breweries Limited* v. *Singleton*, [1899] 2 Ch. 261, at p. 263. The option with its acceptance, then, cannot effect a forfeiture.

On the 8th February, 1913, a formal assignment was executed of the lease and "the said option therein contained." This was certainly after the unreasonable, wilful, and arbitrary refusal by the defendant to consent. But, even if this could have effected and did effect a forfeiture, such forfeiture was clearly waived by the subsequent conduct of the defendant. On the 27th February, there was rent coming due under the lease. Cornish offered the defendant two months' rent in advance, which he refused to accept. Cornish then and there had a long discussion with him with reference to the lease and option he had purchased from McNeil (p. 47). Next day he employed White to arrange with McNeil to meet at the defendant's, and White did so; and Cornish and McNeil met at the defendant's on that day, the 28th February. "They discussed the proposition from beginning to end" (p. 48); and the defendant persisted in refusing to recognise any one as his tenant except McNeil, and to accept rent from any hand but McNeil's; to put an end to the controversy, which lasted past midnight, Cornish handed $26 for the coming two months' rent to McNeil, and McNeil handed it to the defendant and took a receipt for "$26, being two months' rent for the months of March and April." Knowing that McNeil had "sold" his lease, the landlord deliberately accepted rent accruing due after the forfeiture alleged. This is a waiver: *Doe d. Gatehouse* v. *Rees*, 4 Bing. N.C. 384; *Doe d. Griffith* v. *Pritchard* (1833), 5 B. & Ad. 765; *Croft* v. *Lumley* (1855), 5 E. & B. 648, in Dom. Proc. (1858), 6 H.L.C. 672; *Davenport* v. *The Queen*, 3 App. Cas. 115.

The subsequent transactions before the teste of the writ are now to be considered.

On the 8th March, 1913, Cornish and the Allen company

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entered into a contract in writing, but not under seal, headed "Agreement of Sale and Option," the operative part being "I, the vendor, agree to sell and Allen Edwards Speirs Realty Co. Ltd. agrees to buy said lease and option from the said vendor, for the sum of $3,460, payable within five days from the date above . . ." This is signed by both parties.

Two days after, *i.e.*, on the 10th March (p. 68), Edwards, of the Allen company, went to see the defendant and asked him if he were willing to consent to the transfer (apparently to Cornish), and he said he was not (p. 68). Edwards went over Boles' lease with him, and still the refusal was persisted in. "He seemed quite satisfied that he did not need to give his consent" (p. 69). Edwards told him that he would pay any lawyer in the city that he would wish to go to for advice on the matter, and the defendant agreed to go down town the next day with Edwards and see a lawyer. They went to see Mr. Jones, a solicitor of high standing, and, on the facts being explained, Mr. Jones advised the defendant that he should give his consent. The defendant still seemed decided that he would not, and Edwards called up Cornish, and they arranged to meet that evening at the defendant's. "We told him," says Cornish, "that we were there with the full purpose of trying to get his consent to the transfer of this property, first from Mr. McNeil to myself and then from myself to the Allen Edwards Speirs Company Limited, and Mr. Boles refused." Another proposition was then made which eventually came to nothing.

The writ was issued on the 19th April, 1913. It is as of that date the rights of the plaintiffs in this action are to be determined; subsequent events may be evidence of the state of affairs at the teste of the writ, but can themselves give no cause of action. This was laid down in *Northern Electric and Manufacturing Co. Limited* v. *Cordova Mines Limited*, in this Division, a few days ago, and I do not add anything to what is there said. The amendment to the statement of claim should not have been allowed, and of course (as I am authorised by him to say) would not have been had the date of the writ been brought to the attention of the learned Chief Justice.

Taking the state of affairs as of the teste of the writ: Corn-

ish had an assignment of the lease, and that, if valid, made him an "assign" entitled to take advantage of the option: *Friary Holroyd and Healey's Breweries Limited* v. *Singleton*, [1899] 1 Ch. 86 (reversed on other grounds in [1899] 2 Ch. 261)—so far, however, he has not exercised his right to take the land under the option nor expressed an intention so to do.

The position of Cornish after the assignment of the 8th February, 1913, was that of tenant to the defendant, if that assignment was valid. The cases make it perfectly clear that the assignment was valid if the prior refusal was wilful or arbitrary. The sole reason expressed by the defendant was that McNeil and no one else should be his tenant. At the trial, his evidence was deplorably shifty and unreliable; no one reading it can fail to understand why the learned Chief Justice disbelieved him. I have read it more than once to find precisely what reason he now desires to give. He says he thought McNeil should have come personally and let him know, that is, that he could not employ an agent to do the work (p. 89). Later, he would take no money as rent except from the hand of McNeil (p. 90). "I let McNeil have it, and I did not let any one else have it" (p. 93); and suggests that he wanted a tenant to be actually resident on the premises (p. 94). "The way I understood that that the man could not sublet nor do nothing with that land without letting me know what he was going to do before he did it" (p. 96). He thought it underhanded for McNeil to have any dealings with the land without consulting him first (p. 109), etc., etc. It is perfectly obvious that he was determined not to consent to any transfer without being paid for it, and the reasons given are only excuses. No landlord can ask a tenant to do all his transactions in person, see him before he makes any dealings about the land, insist on personal residence, etc. It requires no authority to enable us to decide that the conduct of the defendant was wilful and arbitrary.

If authority be asked for, the following will suffice:—

A "wilful refusal" is a refusal without any reason or if the objection is merely capricious: *In re Windsor Staines and South Western Railway Act* (1850), 12 Beav. 522, at p. 524. "A refusal arising from an exercise of mere will or caprice:" *Ex p.*

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Bradshaw (1848), 16 Sim. 174, at p. 175; *Re Commissioners of Ryde* (1856), 26 L.J. N.S. Ch. 299, at p. 300. "Arbitrary" is "where the reason given was capricious, uncertain, or unreasonable:" *Governors of Bridewell Hospital* v. *Fawkner* (1892), 8 Times L.R. 637; not a "fair and reasonable ground:" *Treloar* v. *Bigge* (1874), L.R. 9 Ex. 151, at p. 155; "without any reasonable ground:" *Quinion* v. *Horne*, [1906] 1 Ch. 596, at p. 602.

Many cases were cited by Mr. Mowat, some of them under the Conveyancing Act of 1892, and consequently to be read with discrimination. None of these cases indicate that conduct of the character just referred to is not wilful and arbitrary.

This being so, the lessee, McNeil, was at liberty to assign without the defendant's consent, and—the tenancy of Cornish being denied by the defendant—both plaintiffs were then entitled to a declaration of the right to assign without leave. It is unnecessary to add to the citation of authorities given by the trial Judge.

The defendant, however, pleads that the premises were abandoned and he has re-entered; that the rent was unpaid; and that the Allen company are not fit and proper persons to whom to assign.

The alleged abandonment and non-payment of rent resulting in re-entry were after the issue of the writ, but there is no objection to a defence being based thereon: Rules 159-164. The old practice of plea *puis darrein continuance* has been enlarged, and our present practice (not substantially different from that in force at the time of these pleadings) has been brought into accord with simplicity and the demands of justice.

If the new tenant has by his subsequent conduct put himself into such a position that a declaration of right would be of no service, such a declaration would be refused; the Court does not send out a mere *brutum fulmen*. The advantages sought to be obtained are two-fold: (1) damages for refusal to assign; and (2) a removal of the cloud upon Cornish's title. As to the first, it is thoroughly settled that an action does not lie in damages for the refusal. *Treloar* v. *Bigge*, L.R. 9 Ex. 151, *Evans* v. *Levy*, [1910] 1 Ch. 452, and other cases, may be referred to. Indeed so far

was the doctrine carried that it was thought in the case last mentioned and *Jenkins* v. *Price*, [1908] 1 Ch. 10, that no costs could be given the plaintiff in such a case; this is now settled to the contrary by *West* v. *Gwynne*, [1911] 2 Ch. 1.

If by any means the lease has become void in the hands of Cornish, a declaration of the right of McNeil to assign to him would be nugatory, and the Court would not make such a declaratory decree: *Earl of Dysart* v. *Hammerton and Co.* (1914), 30 Times L.R. 379.

The defendant's claim that the transaction between Cornish and the Allen company gave him a right to declare the lease void, is not well-founded. All that was made was an agreement, not an assignment good at law. His other claims are equally baseless; there is no covenant to repair, and, if there were, it was not broken; there is no covenant for personal occupation or any occupation, and the rent was duly tendered for the subsequent months, not being in arrears when possession was taken.

The claim of both plaintiffs for a declaratory judgment of the right to assign from McNeil to Cornish is well-founded and should be allowed.

The claim of Cornish for a declaratory judgment that he is entitled to assign to the Allen company could not be allowed if asked for simply. The Allen company, since the beginning of the action, but before trial, repudiated the agreement, and that repudiation was acquiesced in by the plaintiff Cornish. This would be a perfect answer to the claim now under consideration, were it not that the declaration is sought in order to found a claim for damages by Cornish against the defendant. At the time the writ issued, there could be no such claim, for reasons already stated; the only ground for such damages must be the act of the defendant after writ, and that cannot be disposed of in this action.

The latest case in the Court of Appeal in England, *Earl of Dysart* v. *Hammerton and Co.*, 30 Times L.R. 379, lays down the rule thus: "The rule enabling the Court to make a declaratory decree ought not to be applied where a declaration is merely asked as a foundation for substantive relief which fails." See p. 381.

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Here the objects of the declaration at the teste of the writ were two: first, to enable Cornish to carry out his sale to the Allen company; that now fails on the facts; second, to give him damages for the refusal to consent to his proposed assignment to the company; that also fails, for legal reasons.

Following, therefore, the rule above referred to, Cornish should have no declaration as to his right to assign to the Allen company, the only possible advantage to him being to enable him to prosecute an action against the defendant and for damages for wrongful entry, which damages cannot be given in this action.

But the defendant himself has raised the question of Cornish's tenancy continuing in existence; accordingly Cornish is entitled to a judgment that he is still lawfully tenant under the lease, if he so desires, and also to any relief based on such declaration. And, indeed, as has been already said by implication, it is necessary so to decide to enable us to give the declaration previously spoken of.

The substantive relief which can be granted is a judgment declaring the validity of the assignment from McNeil to Cornish and Cornish's tenancy, with an order for possession.

The counterclaim was rightly dismissed.

As to costs, it is now settled that costs can be awarded the tenant suing in such a case. The plaintiffs should have the general costs of the action. As to the costs of the amended statement of claim, the defendant should have had them, had he drawn the attention of the trial Judge to the dates; but the amendment was made *sub silentio;* and, while the plaintiffs should have no costs of a wholly nugatory proceeding, the defendant should have none either; nor should the plaintiffs have the costs of taking out a judgment almost wholly wrong.

As to the costs of the appeal, counsel did not call the attention of the Court to the dates on the question of damage: it was left to the Court to discover the facts from an examination of the papers. The notice of appeal does not suggest the point, the reasons being only the alleged improper assignment from McNeil to Cornish, and that the refusal, if any, was not arbitrary; the improper assignment by Cornish to the Allen company, and the abandonment of the premises and re-entry.

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The ground upon which I think we cannot give Cornish a decree declaring his right to assign to the Allen company was not taken either in notice or in argument, but both notice and argument were upon the right in March of Cornish to assign to the company.

The real and substantial matters involved in the appeal have been adjudged against the defendant; and, although the judgment is wrong in form and in substance and must be amended, the defendant should pay the costs of the appeal.

Of course this adjudication will be wholly without prejudice to any action Cornish may be advised to bring for damages, etc., for anything since the teste of the writ.

Judgment varied.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 6, 1914.

1. ADVERSE POSSESSION (§ I A—2) — WHAT CONSTITUTES — "POSSESSIO PEDIS"—SQUATTER TRESPASSING ON LAND—STATUTE OF LIMITATIONS.

A "squatter" trespassing upon land and holding same cannot invoke the Statute of Limitations to bar the right of the true owner except as to the land of which there has been "pedal possession" as by fencing or cultivating for the statutory period.

[*Harris* v. *Mudie*, 7 A.R. (Ont.) 414, followed; *Coffin* v. *N. A. Land Co.*, 21 O.R. 80; *Piper* v. *Stevenson*, 12 D.L.R. 820, 28 O.L.R. 379, referred to; and see *McConaghy* v. *Denmark*, 4 Can. S.C.R. 609.]

2. ADVERSE POSSESSION (§ I A—2)—"PEDAL POSSESSION" — SQUATTER — ACKNOWLEDGMENT OF TITLE—LIMITATIONS ACT.

An acknowledgment of title by the squatter in possession for the statutory period must be in writing under the Limitations Act, but his oral agreement to act as caretaker of the rightful owner will nevertheless be effective as to portions of the land in question upon which there was no pedal possession sufficient to bar the rightful owner's claim.

[*Ryan* v. *Ryan*, 5 Can. S.C.R. 387; *Greenshields* v. *Bradford*, 28 Gr. 299, referred to.]

3. EVIDENCE (§ XII A—920)—SUFFICIENCY—CORROBORATION — AGAINST ESTATE OF DECEASED—TEST.

The corroboration required under sec. 12 of the Evidence Act, Ont., against the estate of a deceased person is that the evidence of the claimant be corroborated by other material evidence sufficient to lead to the conclusion that the testimony of such claimant is true or probably true.

Statement

APPEAL from the order of Middleton, J., affirming the report of a County Judge under a reference of the action for trial made by Boyd, C.

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The appeal was dismissed with variation of judgment.

J. E. Thompson, for the appellants.

W. J. Code, for the plaintiffs, the respondents.

MEREDITH, C.J.O.:—This is an appeal by the defendants from an order of Middleton, J., dated the 27th January, 1914, affirming the report of the Junior Judge of the County Court of the County of Carleton, dated the 30th September, 1913, under a reference of the action for trial made by the Chancellor when the action came on for trial before him at Ottawa on the 10th June, 1913.

The action is brought by the respondents, who claim to be the owners of lot lettered "F" in the front on the Ottawa river, butting on the 6th and 7th concessions of the township of Fitzroy, in the county of Carleton, for a declaration that they are the owners in fee simple of the lot, except the "Lavan house" and land actually covered thereby; and that a deed dated the 24th November, 1908, from the appellant Campbell to the appellant Simpson purporting to convey the lot, except a part of it of two acres, upon which the Lavan house is erected, is a cloud on the respondents' title, and for an order that it be delivered up to be cancelled, "and removing the same" from the respondents' title to the lot, and an injunction restraining the appellants from entering upon or otherwise dealing with the lot, and damages for trespass.

The appellants, by their statement of defence, deny the title of the respondents, and plead the Limitations Act in bar of their claim.

The paper title of the respondents is not disputed, and the sole question for decision is as to whether the Limitations Act bars their claim.

The learned Junior Judge found in favour of the respondents, and on appeal his finding was affirmed by my brother Middleton.

Lot "F" and lots Nos. 25, 26, and 27 in the 5th concession, and the south-west half of lot number 25 and lots numbers 26 and 27 in the 6th concession, of the township of Fitzroy, belonged at one time to the "Morris family," and were purchased from them in 1873 by the respondent Murphy and Daniel Cowley; lot "F"

is a promontory jutting out into the Ottawa river, surrounded by water on all sides except the south, on which side it adjoins lot number 27 in the 6th and 7th concessions.

Some time about the year 1858, Francis Lavan "squatted" on lot "F." His occupation appears to have been to attend to the lighting of a lamp on the shore for the purpose of navigation, the illicit sale of liquor, and the making of "lashing poles, picks, and things like that," which he sold to the lumber men who drove lumber down the river. He had made a small clearing, on which he built a house, a barn and a stable, which were, judging from the evidence and the price at which the lot was sold to a man named Campbell, of small account. The clearing, it is said, was farmed by Lavan, but the farming must have been also of not much account, as lot "F" was "mostly rock." There was also a small clearing near a light-house which was subsequently built on the lot by the Government.

There was evidence that Lavan built a fence across the lot from water to water near the line between lot 5 and lot 27. According to one of the witnesses, this fence was "not very much;" and, if it existed, it was doubtless, as the Junior Judge found, intended to keep the cattle and a horse of Lavan from straying. The evidence of the existence and location of this fence was not very satisfactory, and there was evidence that pointed to the conclusion that, if it existed, it did not run the whole way across the lot.

Lavan continued to live on the lot, except in the winter of 1873-4, when he and his wife lived in Arnprior, until his death, which occurred in the year 1891. His wife predeceased him in the previous year. An adopted daughter, Lucinda Bruyère, and her two daughters, lived with Lavan and continued to reside in the house on the lot until 1898, when she died. After her death, her two daughters continued to live in the house until the appellant Campbell bought the lot for $150 on the 30th September, 1908, from Mary Frances, one of the daughters, to whom her mother had devised it by her will.

No change in the conditions I have mentioned appears to have occurred during all these years, except that the house was burned and rebuilt and an addition was made to it.

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According to Murphy's testimony, it appeared that it was from Lavan that he got the information that the Morris land was for sale; that, after the purchase, he asked Lavan if he wished to go back on the land in the spring, and Lavan replied that he had been there long enough; that in the fall of the same year Lavan came back to him and said: "I think I will go, if you are willing to let me go; it will pay you well to let me go. In winter the farmers from Fitzroy take a short cut down the ice, and they generally load up their sleighs with cedar and other stuff off this property. . . . If you will permit me to go there I will be your guardian;" and that this was assented to by Murphy, and that during Lavan's lifetime he was in such occupation of the lot as he had as guardian or caretaker for Murphy and Cowley.

Apart from the question as to whether Lavan's occupation was that of caretaker, and assuming that it was not, I am of opinion that, except of the two small clearings I have spoken of, there was no possession of the lot by Lavan or those claiming under him sufficient to bar the right of the owners of the lot. Lavan, if he was not caretaker, was admittedly a trespasser, and he and those who claim under him cannot claim the benefit of the Limitations Act except as to the land of which they have been in actual occupation.

The latest case bearing upon the question of the nature and extent of the possession by a trespasser which will bar the right of the owner is *Piper* v. *Stevenson* (1913), 12 D.L.R. 820. It had been held in *Coffin* v. *North American Land Co.* (1891), 21 O.R. 80, that in the case of a trespasser who had enclosed the land by a fence, cropped it in the summer, but during the winter did nothing but draw some loads of manure upon it, his possession during the winter was not actual, constant, nor visible, and that "the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken in the spring again by the plaintiff."

This view was dissented from in *Piper* v. *Stevenson*, and it was held that in such a case the true owner is excluded from possession by the act of the trespasser, whose acts did not amount to

an abandonment of possession, but, on the contrary, the possession was all along open, obvious, exclusive, and continuous.

Nothing was decided in that case which is opposed to the well-recognised rule that a trespasser cannot invoke the Statute of Limitations to bar the right of the true owner except as to the land of which there has been pedal possession for the statutory period.

In *Harris* v. *Mudie*, 7 A.R. 414, this rule was applied, and it was held that the doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the Statute of Limitations only to such land as he has had actual and visible possession of by fencing or cultivating for the requisite period.

Applying this test to the possession of Lavan and those claiming under him, the evidence falls far short of establishing such a possession of any part of the lot except of the two parcels which were cleared and fenced, as bars the right of the respondents.

I am of opinion also that it has been satisfactorily established that Lavan's occupation from 1873 was in the character of caretaker.

Murphy's testimony as to the arrangement made with Lavan after the purchase of the lot from the Morris family was believed by the Junior Judge and by my brother Middleton, and it is sufficiently corroborated to satisfy the provisions of sec. 12 of the Evidence Act, by the testimony of Sheriff. All that the statute requires is, that the evidence of the party claiming be corroborated by other material evidence, and, as the cases establish, what this means is, that there shall be other material evidence sufficient to lead to the conclusion that the testimony of the party is true or probably true. It is, I think, clear from Sheriff's testimony that Lavan, in telling him that he was on Cowley's and Murphy's land, referred to lot "F," and that he thought either that Sheriff was on the lot itself or that the island on which Sheriff actually was formed part of lot "F," and Lavan's statement that he would report indicates that he was acting in the discharge of his duties as caretaker.

It is immaterial whether or not, when the arrangement was made, Lavan had abandoned possession of the lot. In *Greenshields* v. *Bradford* (1881), 28 Gr. 299, 302, the Chancellor

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(Spragge), dealing with a similar question, said: "It is true that in the case before me Bradford was not *put into possession* as caretaker by the plaintiff, or his agent; but, being found in possession of a small parcel, he by agreement became caretaker of the whole lot. It was not a mere acknowledgment of title (which under the statute must be in writing), but a change of the relative positions of the parties, by an agreement which it was perfectly competent to them to make. By that agreement Bradford became, *quoad* that land, the servant of the plaintiff; and his possession in that character was the possession of the plaintiff, and this would be so whether he discharged the duties of caretaker or not; for he could not set up his own neglect of duty to vary the position which his relation to his employer imposed; and it would be immaterial where, in what locality, this agreement and the new relation of the parties was made."

See also *Ryan* v. *Ryan* (1880-1), 4 A.R. 563, 5 S.C.R. 387.

In their notice of motion by way of appeal from the report of the Junior Judge, the appellants ask for a new trial, on the ground that they were taken by surprise by the evidence of Murphy, and they gave notice that they would read in support of the motion the affidavits of David Craig, John Lyon, and Joseph Gaudette.

These affidavits are directed to contradicting the testimony of Murphy that at the time of the purchase Lavan was living in Arnprior. They were answered by the affidavit of Joseph Desormier, who was cross-examined upon it. His testimony corroborated that of Murphy as to Lavan and his wife living in Arnprior at that time. My brother Middleton accepted Desormier's affirmative testimony in preference to the negative evidence of the other three deponents, and I see no reason for differing from the conclusion of my learned brother. I may remark that there is no mention of these affidavits or of the cross-examination of Desormier having been read on the motion, but it is clear from the reasons for judgment that they were.

The result of these findings of my learned brother and of the Junior Judge is, that it is established that, when the arrangement as to Lavan becoming caretaker was made, he and his wife were living in Arnprior, but the findings are, for the reason I have already given, as to an immaterial matter.

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Upon the whole, I am of opinion that the defence fails except as to the two small clearings, and that they should be excepted in the declaration of the respondents' right, and, if necessary, there should be a reference to delimit them, and I would vary the judgment accordingly, and, with that variation, affirm it; and the appellants should pay the costs of the appeal, as they have failed as to their contention, and the modification of the judgment which I would make was not asked for.

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

MACLAREN and MAGEE, JJ.A., concurred.

Hodgins, J.A.

HODGINS, J.A.:—The corroborative evidence of Sheriff, standing by itself, is indefinite and weak. But I do not think it stands quite alone. The Rowans speak of a contract to build the wharf on lot "F" in 1883, and Nathaniel Rowan, called for the appellants, says that Lavan gave them the wood to build it "off the place and all round." Lavan's objection to their taking wood off the lot was in 1884, when in cutting on lot 26 adjoining they crossed the line. Murphy says the objection was that Lavan did not want them round his house, and that he agreed to stop them because he supposed he had cut all the wood off lot "F," having been cutting and putting wood on the wharf for years. There had been a wharf built by Lavan in 1871 for the Steamboat Navigation Company, from which he forwarded wood cut for the company. This probably explains Murphy's evidence that he put a wharf there and had wood there for twenty years, and why he thought there was no wood left on lot "F" in 1884. Murphy bought in 1873, and says that Lavan came to him some years after that, when he had most of the stuff taken out, and agreed to pay the taxes on two lots. This he did, according to the collector's evidence, from 1881 to 1890. Allowing for the uncertainty of human memory, this makes the statement of Sheriff as to the conversation in 1888, when Lavan said he was agent for Murphy and Cowley, seem probable, and corroborates the statement of Murphy that he was there as caretaker, paying the taxes as the equivalent for his occupation.

I, therefore, agree with the judgment of my Lord the Chief Justice that the appeal should be dismissed.

Judgment below affirmed, with a variation.

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Ontario Supreme Court (Appellate Division), Sir William R. Meredith, C.J.O., Maclaren, and Magee, JJ.A., Lennox, and Leitch, JJ. February 23, 1914.

1. APPEAL (§ I C—25)—CRIMINAL CASES—INDICTMENT—STATUS OF PRIVATE PROSECUTOR.

The right of the "prosecutor" to appeal on a question of law by case reserved under Cr. Code 1014(3) or by leave under Cr. Code 1015 on an acquittal of the accused, is limited to the Crown when the proceedings on the indictment are conducted by the Crown counsel; and where the Crown counsel was refused a reserved case at the trial, whereupon the informant, who had been bound over to prefer the indictment and had done so, also applied and was refused, the latter has no *locus standi* to make a subsequent application under Code sec. 1015 for leave to appeal where the Crown makes no application.

[*R.* v. *Gilmore*, 7 Can. Cr. Cas. 219, 6 O.L.R. 286, and *R.* v. *Patteson*, 36 U.C.Q.B. 129, referred to.]

2. CRIMINAL LAW (§ II A—33)—RECOGNIZANCE TO PREFER INDICTMENT—PROSECUTION ASSUMED BY CROWN—PRIVATE PROSECUTOR.

Where a private prosecutor institutes the proceedings on a criminal charge and has himself bound over to prefer an indictment at the Court of General Sessions, the Crown Attorney for the county has the statutory right in Ontario under the Crown Attorney's Act, R.S.O. 1914, ch. 91, sec. 8, to "assume wholly the conduct of the case where justice towards the accused seems to demand his interposition," and upon his taking charge of the prosecution after a true bill has been found, the private prosecutor has no right to take part in the proceedings at the trial, at least where the case does not present more of the features of a private injury than of a public offence. (Crown Attorney's Act, R.S.O. 1914, ch. 91, sec. 8(*c*).)

Statement

APPLICATION by John Scully, the informant, under sec. 1015 of the Criminal Code, R.S.C. 1906, ch. 146, for leave to appeal to a Divisional Court of the Appellate Division from the ruling of MORGAN, Jun. Co. C.J., at the York General Sessions, and for an order directing him to state a case for the opinion of the Court, which he had refused to do. The Judge ruled that the Crown had not made out a case, and the jury, under his direction, found the defendants "not guilty" of the offence charged, being an offence against sec. 236 of the Code, dealing with lotteries.

Gordon Waldron, for the applicant.

C. H. Ritchie, K.C., for the defendants, the respondents, objected that the applicant had no status.

The preliminary question thus raised was argued, and judgment was reserved thereon.

The motion was dismissed.

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February 23. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an application by John Scully, under sec. 1015 of the Criminal Code (R.S.C. 1906, ch. 146), for leave to appeal to a Divisional Court.

An information was laid by the applicant before the Police Magistrate for the City of Toronto against the respondents, charging them with a contravention of sec. 236 of the Criminal Code, and the respondents were committed for trial, and the applicant was bound over to prosecute.

An indictment was preferred at the General Sessions of the Peace for the County of York against the respondents for the offence charged in the information, and it was preferred by the Crown Attorney. A true bill having been found, the trial proceeded before His Honour Judge Morgan, presiding at the General Sessions on the 7th October, 1913, and the Crown Attorney conducted the prosecution at the trial.

At the close of the case for the prosecution, the presiding Judge ruled that no case had been made, and directed the jury to acquit, whereupon a verdict of "not guilty" was rendered.

After this ruling the Crown Attorney applied for a reserved case, which was refused, whereupon Mr. Waldron intervened on behalf of the present applicant and submitted that the reserved case should be granted, but without success.

Upon the opening of the motion, a question was raised as to the right of the applicant to apply; and, after argument, judgment was reserved upon this preliminary question.

No case was cited by either counsel bearing upon the question to be determined, and the only case which bears upon it that I have been able to find is *Rex* v. *Gilmore* (1903), 7 Can. Cr. Cas. 219, 6 O.L.R. 286, in which it was decided by the present Chief Justice of the Common Pleas that a private prosecutor was "no party to" a "prosecution" in the County Court Judge's Criminal Court for perjury, "nor indeed bound by any judgment that may be made in it," and that, though "he may, with the consent of the proper authorities, proceed in the name of the Sovereign," he has "against the will of both parties" (*i.e.*, the Crown and the accused) "no power over, or voice in, the prosecution."

Sub-section 3 of sec. 1014 of the Criminal Code provides that:

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"Either the prosecutor or the accused may during the trial, either orally or in writing, apply to the Court to reserve any such question as aforesaid" (*i.e.*, "any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge") "and the Court, if it refuses so to reserve it, shall nevertheless take a note of such objection."

By sub-sec. 1 of sec. 1015 it is provided: "If the Court refuses to reserve the question, the party applying may move the Court of Appeal as hereinafter provided."

And sub-sec. 2 provides that: "The Attorney-General or party so applying may, on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal."

It is clear that the applicant, having been bound over to prosecute, was entitled to prefer a bill of indictment for the charge on which the respondents had been committed or in respect of which he was so bound over, or for any charge founded on the facts or evidence disclosed in the depositions taken before the Police Magistrate: sec. 871.

By the Crown Attorneys Act (Ontario), 9 Edw. VII. ch. 55, sec. 8, clause (*b*), it is made the duty of the Crown Attorney to "institute and conduct on the part of the Crown prosecutions for crimes and misdemeanours at the Court of General Sessions of the Peace . . . in the same manner as the law officers of the Crown institute and conduct similar prosecutions at the sittings of the High Court, and with like rights and privileges, except as to the right of entering a *nolle prosequi.*"

That, at all events after a true bill has been found, unless the case is one to which clause (*c*), to which I shall afterwards refer, applies, the person by whom the information was laid, or who, where he may do so, has preferred the bill of indictment, has no right to take part in the proceedings at the trial, seems reasonably clear; for, if it were not so, the duty imposed upon the Crown Attorney of conducting on the part of the Crown the prosecution could not be discharged.

This is made more clear by the provisions of clause (*c*), which

requires the Crown Attorney to "watch over the conduct at the Court of General Sessions of the Peace of cases wherein it is questionable whether the conduct complained of is punishable by law or where the particular act or omission presents more of the features of a private injury than of a public offence; and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his interposition."

The prosecution of the respondents does not come within the exception mentioned in clause (*c*); and, therefore, the conduct of it on the part of the Crown devolved upon the Crown Attorney, by whom it was in fact conducted for the Crown.

If the contention of counsel for the applicant were well-founded, it would have been the right of the applicant or his counsel, as was contended in *Rex* v. *Gilmore*, 7 Can. Cr. Cas. 219, 6 O.L.R. 286, to intervene at any stage of the proceedings at the trial; and that cannot be, because the exercise of the right to do so would render it impossible for the Crown Attorney to discharge the duty imposed upon him by the statute of conducting the prosecution for the Crown; and, if the applicant's counsel is right in his contention, what would happen if counsel representing the Crown acquiesced in the ruling of the Court and consented to the acquittal of the accused, and counsel for the private prosecutor took the opposite view?

The application of Mr. Waldron at the Sessions was made before the jury were directed to render a verdict of "not guilty;" and, in my opinion, the applicant had no *locus standi* to make the application, which was a part of the proceedings in the prosecution, the conduct of which was committed to the Crown Attorney.

The practice of allowing an appeal where the accused has been acquitted is a novel one, and the right to appeal should, in my opinion, be strictly limited to cases coming plainly within the provisions of the statute. It cannot, I think, have been intended that where the Crown, representing the people of the Province, does not deem the case one in which the right of appeal should

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be invoked, the person by whom the charge was originally laid should have the right to invoke it. What was intended by the legislation in question was, I think, to confer that right upon the Crown where there has been an acquittal, at all events where the prosecution has been conducted on the part of the Crown by its law officers or by the Crown Attorney, and upon the accused where he has been convicted.

The Crown, and not the person by whom the proceedings were instituted, is, I think, the prosecutor in all cases of prosecutions for indictable offences, at all events after a bill has been found, unless the case comes within clause (*c*). The person who institutes the proceedings is called in sec. 1045 of the Code, which deals with the costs of a prosecution for the publication of a defamatory libel, where judgment is given for the defendant, "the private prosecutor," not "the prosecutor."

None of the sections referred to by Mr. Waldron as shewing that the word "prosecutor," as used in secs. 1014 and 1015, has a wider meaning than I would give to it, applies to proceedings upon an indictment, except sec. 871, to which I have already referred, and secs. 872 and 944. They all relate to proceedings before a bill is found, and it may well be that as to such proceedings the complainant is the prosecutor.

If by "prosecutor," as used in sub-sec. 3 of sec. 1014, the person who instituted the proceedings is meant, there would be no right in the Crown to apply, because, *ex hypothesi*, the Crown is not the prosecutor.

Section 872 does not affect the question, as it deals only with the preferring of a bill of indictment by the counsel acting on behalf of the Crown, nor does sec. 944 help the applicant. The expression there used is "counsel for the prosecution," and it is not open to question that in this case the counsel for the prosecution was the Crown Attorney. If it were otherwise, and the person who laid the complaint were the prosecutor, his counsel, not the counsel for the Crown, would have the right of addressing the jury, as the section provides, even in such a case as this, in which the prosecution was required by law to be and was conducted by the Crown Attorney; which is *reductio ad absurdum*.

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It was argued that, if it had been intended that only the Crown should have the right to apply, different language would have been used; but there are, I think, two answers to the argument: (1) there are, as has been seen, cases in which in this Province the private prosecutor may prosecute at the trial; and (2) the Act applies to the whole of Canada, and, no doubt, in some of the Provinces, as is the case in England, a private prosecutor may prosecute at the trial for an indictable offence, and the wide term "prosecutor" was used so as to meet whatever might be the conditions in this respect in any part of Canada.

In short, I am of opinion that, as applied to this Province, the expression "prosecutor" means the Crown where the prosecution is conducted at the trial by the law officers of the Crown or by the Crown Attorney, and means private prosecutor where the prosecution is conducted by or on his behalf.

For these reasons, I am of opinion that the preliminary objection was well taken, and that the motion must be dismissed; and, as the point is a new one, it is proper, I think, that the dismissal should be without costs.

Since the foregoing was written, my attention has been called to *Regina* v. *Patteson* (1875), 36 U.C.R. 129, in which will be found an interesting discussion as to the conduct of criminal prosecutions and the position of the private prosecutor on the trial of an indictment for the publication of a defamatory libel.

Motion dismissed.

REX v. DAVIS; Ex parte MIRANDA.

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New Brunswick Supreme Court, Sir Frederic Barker, C.J., McLeod, White, Barry, and McKeown, JJ. November 21, 1913.

1. CERTIORARI (§ I A—9)—JURISDICTION—WANT OR INSUFFICIENCY OF EVIDENCE—LIQUOR LAW TAKING AWAY CERTIORARI.

Where a magistrate has jurisdiction to enter upon the inquiry as to an offence under a liquor law, he is not ousted from that jurisdiction by any want or insufficiency of the evidence to support the charge, at least where there was relevant evidence and it was not palpably inadequate, and a certiorari application must be dismissed if the right to certiorari has been taken away by statute as to offences of that class.

[*Ex parte Daley*, 27 N.B.R. 129, considered.]

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2. CERTIORARI (§ II—24) — SUMMARY CONVICTION UNDER LIQUOR LAW — WEIGHT OF EVIDENCE.

The rule in civil cases as to supervision of the findings of a jury on the ground that they are against the weight of evidence does not apply to a certiorari application for review of the findings of a magistrate in respect of an offence as to which the right of certiorari of convictions thereunder has been taken away by statute; certiorari can only be granted in such cases in the event of the magistrate acting without jurisdiction.

[*Solomon* v. *Bitton*, 8 Q.B.D. 176, and *Phillips* v. *Martin*, 15 A.C. 193, distinguished.]

Statement

APPLICATION on the return of a rule nisi to quash a conviction for selling liquor in violation of the Liquor License Act, C.S.N.B. 1903, c. 22.

The conviction was sustained.

R. B. Hanson showed cause.

J. D. Phinney, K.C., in support of the rule.

The judgment of the Court was delivered by

Barker, C.J.

BARKER, C.J.:—This is a motion to make absolute a rule nisi to quash a conviction, (removed into this Court by certiorari) against Miranda for having sold intoxicating liquors without a license. The information which was laid before R. H. Davis, a Justice of the Peace and Stipendiary Magistrate for Kent County, alleges a sale between June 1st and July 30th, 1913. Five witnesses were examined, the applicant was put upon his defence; he declined to give any evidence and the Justice imposed a fine of $50 and costs. The rule was obtained on the sole ground that there was no evidence whatever upon which the magistrate could legally convict, and this is the only question to be considered. It is contended that the facts take the case out of the class of *Ex parte Daley* (1888), 27 N.B.R. 129, and the numerous other cases in which that case has been followed.

It is admitted that this application can only succeed on shewing that the justice acted without jurisdiction. No question arises as to the regularity of the proceedings, and the magistrate's jurisdiction over the person and offence is not disputed. He therefore had jurisdiction to enter upon the inquiry and having done so, it is I think impossible for him to be ousted from that jurisdiction by any want or insufficiency of the evidence to support the charge. The determination to be reached as a result of that evidence has been given to the justice; there is no appeal on

that ground to this Court and the right to remove such convictions by *certiorari* on that ground has been taken away.

It does however exist where there has been a want or excess of jurisdiction in the magistrate and the applicant must bring his case within that limit in order to succeed. In order to do so his counsel has advanced the proposition that the justice's jurisdiction is a jurisdiction to hear and determine upon evidence, and if he determines without any evidence at all or upon evidence altogether irrelevant to the inquiry or so palpably insufficient and inadequate for the purpose as to be valueless, he assumed a jurisdiction never conferred upon him or acts in excess of one which has been conferred upon him. When a case of that nature arises it will be time enough to consider it. A perusal of the evidence returned here has convinced me that the facts in evidence and upon which the justice acted, fall far short of filling the conditions under which it is contended the conviction would be quashed for want of jurisdiction in the magistrate. It appears by this evidence that the applicant Miranda is a farmer in a small way, living at or near Richibucto village. On Sunday, the 20th July last, these men were at Miranda's drinking what they called beer or lemon beer. Some of them, at all events, remained there for the afternoon. Their object in going there does not appear unless it was to get something to drink. Miranda kept no shop—his house was distant from one to four miles away from the houses of these witnesses—they bought from Miranda drinks and bottles of this so-called beer and paid him for them. They drank the beer freely and three of them came to John Richards' house that night between 11 and 12 o'clock, about a mile from Miranda's, "all fairly well drunk," as Richard says, or "pretty drunk" as Thibideau describes them. They give no explanation of their doings in answer to the natural inference to be drawn from these undisputed facts. I think the conviction is quite right, and that the justice in drawing the inferences which he did and in making the conviction not only had ample jurisdiction but exercised it in a very sensible way. If I thought differently I should still think the conclusion of the justice not open to review by this Court.

Mr. Phinney seemed to attach importance to the rule governing Courts in disposing of motions for a new trial on the ground

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that the verdict is against the weight of evidence and sought to make it applicable to a case like the present. That rule as laid down in *Solomon* v. *Bitton* (1881), 8 Q.B.D. 176, *Phillips* v. *Martin* (1890), 15 A.C. 193, and many other cases, is simply a rule of law of modern date to govern Courts of law in the case I have mentioned. It has, I think, no bearing whatever on a proceeding like the present. The finding of a jury upon facts is subject to the supervision of the Court and is in no sense final, while, as I have pointed out, the jurisdiction of the justice as to the facts is conclusive.

Conviction sustained.

MAN.
K. B.

Re KILDONAN AND ST. ANDREWS ELECTION; GUNN v. MONTAGUE.

Manitoba King's Bench, Prendergast, J. October 20, 1914.

1. ELECTIONS (§ IV—90)—CONTESTS—PETITION—SUBSTITUTIONAL SERVICE—MOTION TO SET ASIDE—GROUNDS FOR.

A motion to set aside an order for substitutional service of an election petition and the service thereunder cannot be allowed where based on an objection which is in the nature of an appeal from the former order, as where it was contended that the order was invalid for insufficient reference to identify the election in question.

2. ELECTIONS (§ IV—91*a*)—CONTESTS—PETITION—SUBSTITUTIONAL SERVICE—TIME.

An order for substitutional service of notice of an election petition having been presented is not invalid where it does not limit any time within which the service shall be made, but service is to be effected within a reasonable time.

[*McLeod* v. *Gibson*, 35 N.B.R. 376, followed.]

Statement

MOTION to set aside orders for substitutional service, and service of notice of petition.

Application dismissed.

J. E. Adamson, for the petitioner.

A. J. Andrews, K.C., and *M. G. Macneil*, for respondent.

Prendergast, J.

PRENDERGAST, J.:—This is an application on behalf of the respondent to have set aside two orders for service of notice of presentation of the petition as well as the service itself, and to have the petition removed from the files of the Court. The petition was filed on July 30, and an order taken out on August 7 extending the time for service of notice of the same until August 18 inclusive. Then an order for substitutional service was obtained on August 18 and entered on the 19th, and substitutional service

was effected the same day. This last order merely provides that service of the notice may be effected substitutionally, but does not state within what time.

The first ground of objection is that the two orders, while properly entitled in the Manitoba Controverted Elections Act, and setting forth the names of the petitioners and respondent, do not state, either by date or designation of the electoral division, the election to which the matter refers. It was contended in this respect that, as the petitioners and respondent herein may possibly also be parties as such in the matter of other elections, there is nothing to shew on the face of the orders that they were made in the matter of this petition, and that they are null and void for that reason.

I would observe that our own Act does not prescribe any form, and that the form of the Parliamentary Elections Act, 1868 (Imp.), as found in McPherson's Election Law of Canada, at p. 1064, to which I was referred, is for the petition itself, and that the Act merely provides that that form shall be sufficient. I would also say that it seems to me that after a petition containing the necessary reference to the particular election is filed, the fact that orders and other documents and subsequent proceedings are entitled as the two orders here, purporting to be in the Manitoba Controverted Elections Act, and giving the names of the same petitioners and respondent, connects them sufficiently with the petition to avoid any real doubt or misunderstanding. At most the omission would make the order only irregular.

I will, however, dispose of the objection simply on the ground that it is in the nature of an appeal which, of course, I have no jurisdiction to entertain as such. I cannot appreciate the distinction that this is not an appeal but only an application to have it declared that the orders are not orders in the matter of this petition. If the orders are null and void in the matter of this petition, they are equally null and void with respect to the other petition or petitions to which it is argued that they may possibly refer; in either aspect, the learned Judge would then have erred in making the same, which is a question that I have no power to deal with.

The other objection, which is to the last order, is that inasmuch as it does not state within what time substitutional service is to

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be made, and as it was taken on the last day of the time allowed by the first order, it should have been entered and acted upon on the same day, while, as stated, it was entered and service thereunder was effected on the following day.

As far as the present application is concerned, sec. 23 of our present Controverted Elections Act seems to me to be to the same effect as secs. 33, 34 and 35 of the preceding Act (R.S.M. ch. 34, 1892), and our Court of Appeal has dealt with the latter at length in *Re Gimli Election*, 14 D.L.R. 414, 23 Man. L.R. 678. It was there held that an order for substitutional service may be made either before or after the expiration of the time provided by the Act for personal service, or as extended by special order. The order in question here was made on the last day of the extended time.

The question of the validity of an order for substitutional service which does not provide any time within which to effect the same was considered in *McLeod* v. *Gibson*, 35 N.B.R. 376, where it was held that such an order is valid, and that service may be effected thereunder, provided it be within a reasonable time. Mr. Justice Gregory there said, in his judgment, at 384:—

> I felt no difficulty from the argument that was raised by counsel that, as there was no time limit, it might at any length of time be acted upon by the petitioner, because that question would be subject, as indeed are all such questions, to the opinion of the Court or Judge, as to the reasonable promptness with which the petitioner carried out his permission obtained.

I understand that decision to mean that such an order carries with it an implication that reasonable time is allowed to carry it out.

Now, the facts are that the order was made by my brother Macdonald during vacation, shortly after noon, at an hour when the Court offices were closed. The very next day it was entered and substitutional service was at once effected. Surely the petitioners acted with promptness. I do not see that there is any ground for holding that this implication of an allowance of reasonable time ceased to exist, simply because the order was made on the last day of the extended time. If the same order had been made on the following day, or perhaps even several days later, it could then, under the above authority, have been served within a reasonable time; how can it be held that this reasonable time should be cut down to a half day because the petitioners,

being satisfied on the last day allowed for personal service that they could not effect the same within the time, moved at once instead of waiting until the morrow? Were I to hold that the order and service in question should be set aside, this would still clearly, in my opinion, be a case where the petitioners, who have acted with the greatest diligence, should be given an opportunity to take out another order, as our Court of Appeal has held that they can do even after the expiration of the time for personal service.

It has well been said that our Act contains wholly its own code of procedure. I must take it for granted that the rules which it lays down are meant to facilitate and not to impede or defeat the attainment of its main object. The application will be dismissed with costs to the petitioners in the cause.

Application dismissed.

Re LAIDLAW AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R. CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 6, 1914.

1. ARBITRATION (§ I—1)—WHAT CONSTITUTES—DIVIDING LINE—"VALUATION" DISTINCT FROM "ARBITRATION"—TEST.

It is indicative that a valuation and not an arbitration was intended by the written submission to three persons that they are therein termed "valuers," and that the submitting parties offered no evidence.

2. ARBITRATION (§ III—17)—AWARD—CONCLUSIVENESS; REVIEW — MISTAKE.

To justify the setting aside of an award by a single arbitrator on the ground of mistake not appearing on the face of the award or in papers incorporated therewith, the arbitrator's admission of the mistake is necessary; so where there were three arbitrators, two of whom published an award, both must concur in certifying the mistake not apparent upon the award which the court is to rectify and no relief can be granted where one of them denies that there is any mistake although the other asserts there was and desires the assistance of the court.

[*McRae* v. *Lemay*, 18 Can. S.C.R. 280; *Dinn* v. *Blake*, L.R. 10 C.P. 388; *Flynn* v. *Robertson*, L.R. 4 C.P. 324, referred to.]

3. EMINENT DOMAIN (§ III C—135)—OWNER'S RIGHT TO COMPENSATION—AMOUNT UNDER "VALUATION" AS DISTINCT FROM "ARBITRATION"—RAILWAY ACT.

The "amount of compensation payable under the Railway Act" (R.S.C. 1906, ch. 37) may refer as well to money payable under a valuation as to money payable under an arbitration both methods being recognized by the Act. (*Per* Hodgins, J.A.).

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Statement

APPEAL from the order of Boyd, C., dismissing an application by the railway company to set aside an award or decision of valuers appointed under an agreement between Laidlaw and the railway company to ascertain the amount to be paid by the company for compensation to Laidlaw for land taken and damages for injury to land not taken for the railway.

The appeal was dismissed.

Angus MacMurchy, K.C., for the appellant company.

W. N. Tilley, and *A. M. Stewart*, on the same side.

M. K. Cowan, K.C., and *E. G. Long*, for Laidlaw, the respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the Campbellford Lake Ontario and Western Railway Company from an order of the Chancellor, dated the 18th December, 1913, dismissing an application by the appellant to set aside an award or valuation dated the 22nd August, 1913, made by His Honour Judge Morgan and Nicholas Garland, two of the persons who, by an agreement made between the parties and dated the 12th July, 1913, were appointed valuers, to whose determination the question of the amount of compensation payable under the Railway Act by the appellant "for the taking" of certain lands "for its railway, and for damages sustained by the" respondent "by the taking of said lands, and construction, operation, and maintenance of the said railway," was referred.

Two questions were argued: first, whether what the agreement provides for is an arbitration or a mere valuation; and, second, whether, if it is an arbitration, a case has been made for setting aside the award on the ground of the misconduct of the arbitrators or of an admitted mistake by them in awarding compensation on an erroneous view as to the nature of the crossing by the appellant's railway of the Whitby Port Perry and Lindsay branch of the Grand Trunk Railway.

I do not think that, even if what is provided for by the agreement is an arbitration, a case has been made for setting aside the award. It was argued that what took place at the meeting of the arbitrators on the land was in substance the giving of evidence by the respondent and his wife as to the matters to be

determined, and that the arbitrators were guilty of legal misconduct in taking the evidence without the witnesses being sworn as required by the Arbitration Act.

In my opinion, what was said by Laidlaw and his wife as to the value or cost to them of the land, the damage that would be done to it by the construction, operation, and maintenance of the railway, and the effect of the crossing by the appellant's railway of the branch of the Grand Trunk Railway, was not at all in the nature of evidence in support of the respondent's claim, but was rather a statement made to the arbitrators as to the basis and nature of their claim, no different from such a statement by counsel acting upon his behalf of the nature of the claim and the case he intended to make before the arbitrators.

Notice of the meeting of the arbitrators had been given to the appellant, and it is expressly provided by the agreement that "either party shall have the right to have one representative present, if desired, at any meeting of the valuators, but failure of such representative to attend, whether through lack of notice or otherwise, shall not affect the validity of the decision."

There was, therefore, no impropriety in the respondent stating his case or the arbitrators receiving his statement, notwithstanding the absence of the appellant or its representatives from the meeting.

Nor is the case brought within the authorities as to setting aside an award on the ground of an admitted mistake of the arbitrators in making their award.

As was said by Strong, J., in *McRae* v. *Lemay* (1890), 18 S.C.R. 280, at p. 284: "Nothing in the law relating to arbitrations and awards is better established than the rule that the Court will not set aside or otherwise interfere with an award on the ground of mistake in the arbitrator either as regards the law or the fact, except in certain well defined cases. These exceptions are, first, where the mistake appears on the face of the award, or in some paper which forms part of the award and is by reference incorporated with it. Secondly, where the arbitrator himself stated: 'that in his opinion he had made a mistake of

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law or fact, and was desirous of the assistance of the Court, and willing to review his decision on the point on which he believed himself to have gone wrong.' ''

This statement of the law is supported by the cases cited by the learned Judge, and the quotation by him is from the judgment of Brett, J., in *Dinn* v. *Blake* (1875), L.R. 10 C.P. 388, 390; and in the same case the exception was thus stated by Denman, J.: ''But the Court will not, in case of a mistake, send back the award without an assurance from the arbitrator himself that he is conscious of the mistake and desires the assistance of the Court to rectify it.''

There is no such assurance by Judge Morgan and none by Mr. Garland, the other arbitrator who joined in the award, nor any admission by the latter that any mistake was made.

It is clear, I think, that, in order to bring the case within the exception in the case of an award made by two or more arbitrators, all of them must admit the mistake and state their willingness to review their decision on the point on which they believe themselves to have gone wrong. The principle upon which the exception rests is, that the tribunal has gone wrong, that it admits its mistake, and expresses its readiness to review its decision on the point on which it has gone wrong. It would be anomalous indeed if the exception were to be applied where one of two arbitrators admitted the mistake, and the other denied having made it, and the requirement that the arbitrator must state that he is desirous of the assistance of the Court and willing to review his decision, plainly indicates, I think, that the arbitrator or all the arbitrators who joined in the award must make the required statement.

This view is supported by the high authority of Lord Chancellor Eldon in *Anderson* v. *Darcy* (1812), 18 Ves. 447, 449. He there says: ''The rule, as to mistake, is, that where there is clear and distinct evidence of mistake, the nature of it, and that it was made out to the satisfaction of the arbitrators, as to which Lord Thurlow insisted on having their affidavits, Courts both of Law and Equity will interpose; the one by setting aside the award, the other by refusing to make it a rule of Court:

but this expression, used by a single arbitrator, does not fall within reach of that rule, that the Court will disturb an award upon mistake admitted."

See also Story's Equity Jurisprudence, 2nd ed., par. 1456.

For these reasons, I am of opinion that this ground of objection to the award fails; and it is, therefore, unnecessary to determine the first question, though as at present advised I incline to the view of the Chancellor, that what the agreement provided for is a valuation and not an arbitration. The language which the parties have chosen to express their agreement strongly supports that view. The reference is stated to be to the determination of the three persons named in the agreement as valuers, and throughout the agreement they are referred to as valuers. The agreement was evidently prepared by a solicitor who knew the difference between a valuation and an arbitration, and was apparently desirous of emphasizing the fact that it was a valuation that was being provided for; the question for determination was one well fitted to be decided by a valuation; the valuer appointed by the appellant was a farmer; and there is no reason for thinking that the other two persons appointed were not chosen because they possessed qualifications which fitted them to decide such a question as was being submitted to them.

The provision as to each party being entitled to have a representative present at any meeting of the valuers was quite unnecessary if an arbitration had been intended, and the further provision that the failure of the representative to attend, through lack of notice or otherwise, should not affect the validity of the decision, would be an unlikely one if a judicial inquiry and the examination of witnesses had been intended.

It is also significant, as pointing to the same conclusion, that witnesses were not called by either of the parties.

I would dismiss the appeal with costs.

MACLAREN, J.A.:—I agree. Maclaren, J.A.

MAGEE, J.A.:—If Judge Morgan could fairly be said to have admitted his mistake and expressed a desire to rectify it, it Magee, J.A.

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might be necessary to consider whether that would not be sufficient to induce this Court to interfere, he being one of the two by whom the result was arrived at, and without whom it could not have been arrived at; but, as he has not done so, it is unnecessary to deal with such a case. I agree in dismissing the appeal.

HODGINS, J.A.:—In *Dinn* v. *Blake*, L.R. 10 C.P. at p. 391, Archibald, J., says: "In this case the arbitrator has stated that he decided on certain grounds, and the plaintiff's counsel states that they are erroneous, but there is nothing to shew that the arbitrator admits that he has decided erroneously. The case does not, therefore, come within the exception to the general rule."

Here the two arbitrators or valuers have not stated definitely that they decided on certain grounds, nor do they admit that they have decided erroneously. This is true of the passages quoted from the evidence of the third arbitrator or valuer. He qualifies what he does say by stating that he cannot tell whether the amount of the award would have been diminished by reason of a more correct apprehension of the situation, because he did not consider it from that standpoint, and in another place says he did not consider it at all. Notwithstanding this, it was argued that the third arbitrator or valuer had admitted enough to shew that he was mistaken in his view of certain facts, and that, the award being made by himself and another, it could not stand.

Even if he had admitted the mistake and asked the Court to enable him to correct it, I do not see how that would bring this application within the rule. The cases which deal with an admitted mistake all proceed upon the theory that the tribunal making the award admits its error and is willing to rectify it: *Flynn* v. *Robertson* (1869), L.R. 4 C.P. 324. How is that assurance to be had in this case unless the two who join in the award join also in the request to remit?

I think there are two things wanting here: request by the tribunal and certainty that a definite error can and will be corrected. The first is obviously wanting. The second arbi-

trator or valuer does not admit any mistake. As to the second point, as the error is only that of one, then, if the award be remitted, and the third arbitrator or valuer corrects his error and arrives at a higher or lower figure, the other may combine either with him or with the other party's arbitrator or valuer in an award. In either case the corrected value may never enter into the calculation at all or become an element in the compromise verdict. Absence of a definite sum to be deducted by reason of the mistake was treated as decisive in *Allan* v. *Greenslade* (1875), 33 L.T.R. 567. The evidence here is that the figures were agreed upon in the spirit of compromise and not by the elimination of any definite factor.

The cases cited by my Lord the Chief Justice discuss most of the earlier decisions, and I can find nothing to indicate that this matter comes within any one of the exceptions stated by Esher, M.R., in *In re Keighley Maxsted & Co. and Durant & Co.*, [1893] 1 Q.B. 405. Indeed, in that case, Lopes, L.J., says, upon the authority of *Dinn* v. *Blake*, L.R. 10 C.P. 388, that, "if the point . . . were that the arbitrator had made a mistake in law or fact, but there was no craving of assistance on his part, we could not send the award back." It rather falls within the language of Lord Denman, C.J., in *Lancaster* v. *Hemmington* (1835), 4 A. & E. 345: "If there has been any mistake, it is one which we cannot arrive at without going into the merits;" and of Parke, B., in *Phillips* v. *Evans* (1843), 12 M. & W. 309.

The general rule is, that parties take the arbitrators for better and for worse, both as to decisions of fact and decisions of law; and Kay, L.J., in the *Keighley* case, [1893] 1 Q.B. at p. 414, says: "A mistake of law or fact is not, *per se*, a ground for sending back the award of such a tribunal."

I think, however, the case may be decided upon the ground that the parties have chosen to deal with the matter under sec. 191 of the Dominion Railway Act, R.S.C. 1906, ch. 37.

That enables them to contract touching the lands or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained. The parties have chosen valuation and not arbitration. Valuation

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by agreement is just as much within the Railway Act as arbitration, if the parties choose to agree to leave the question of compensation under that Act to be ascertained by valuation as a mode of settling it. I think they have so expressed themselves here; and this disposes of the argument of Mr. Tilley that the expression "the amount of compensation payable under the Railway Act" points only to an arbitration under that Act.

The expression "valuer," the provision that there is no appeal, the arrangement for crossings, and other matters, all point to an agreement other than an arbitration under the Railway Act.

The appeal should be dismissed.

Appeal dismissed.

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BELLAMY v. TIMBERS.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Hodgins, J.A., Riddell, and Leitch, JJ. June 15, 1914.

1. USURY (§ II—25)—RECOVERY OF EXCESS—MONEY LENDERS ACT.

There may be an infraction of sec. 6 of the Money Lenders Act, R.S.C. 1906, ch. 122, which is not an offence within sec. 11, which makes it a criminal offence to "lend" money where the amount is under $500 at a higher interest rate than 12 per cent.; and where the transaction does not involve the criminal offence, but there has been merely an exaction of more than 12 per cent. in respect of a loan made prior to the Act, sec. 11 does not apply, but under sec. 6 the rate is compulsorily reduced to 12 per cent. from the date when the statute became effective; and if the lender illegally stipulates for or exacts more, it is invalid only as to the excess and a renewal note which included the excess charge is not wholly invalidated.

[*Bellamy* v. *Porter*, 13 D.L.R. 278, 28 O.L.R. 572, distinguished, and dictum of Clute, J., disapproved.]

2. USURY (§ II—20)—EFFECT; REMEDIES—PENALTY—MONEY LENDERS ACT—SCOPE OF.

If a money lender lent money to an amount less than $500 at 11 per cent. and thereafter threatened to sue the borrower, who, to avoid action, gives him a promissory note bearing a higher rate than 12 per cent., the note would be in contravention of sec. 6 of the Money Lenders Act, R.S.C. 1906, ch. 122, but would not render the money lender liable to the penalty provided for "lending" money at a greater rate than 12 per cent. (Dictum *per* Hodgins, J.A.)

Statement

APPEAL by the plaintiff from the judgment of Taylor, Jun. Co. C.J., dismissing an action upon a promissory note, brought in the Fourth Division Court in the County of Lambton.

The appeal was allowed.

J. G. Kerr, for the appellant.

A. Weir, for the defendant, the respondent.

June 15. HODGINS, J.A.:—Under the Interest Act, R.S.C. 1906, ch. 120, sec. 2, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon. This is subject to the provisions of that Act and any other Act of the Parliament of Canada.

Under sec. 6 of the Money-Lenders Act, R.S.C. 1906, ch. 122, notwithstanding the above provision, no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under $500, a rate of interest or discount greater than 12 per cent. per annum.

It is argued that the negotiable instrument sued on in this case is vitiated by the inclusion in it of a sum of money, being interest during its currency at the rate of 24 per cent. From the circumstances leading up to this security it appears that the appellant had from the respondent a security which was due and payable before the date at which the Money-Lenders Act came into force, and under sec. 9 the principal of that debt ceased to bear more than 12 per cent. interest per annum. The two notes taken after that date include interest at 24 per cent. a year, amounting to $61.04, while the proper charge was only $30.52 and it is clear that the note sued on includes that amount, and not merely the $22.35 credited as a rebate, because the two payments of $6.55 and $5 must be applied on the interest which the debt could properly bear.

It is also beyond question that the voluntary abandonment of the excess does not purge the note of the vice inherent in it. It none the less includes that interest, and the very credit admits it. Until judgment there is no release: *Winger* v. *Sibbald* (1878), 2 A.R. 610.

The general rule is stated in *Herman* v. *Jeuchner* (1885), 15 Q.B.D. 561, where Brett, M.R., points out that the consideration and the promise determine and constitute a contract not under seal, and taken together they form the whole of the contract, and that, where the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced.

This principle applies where either the promise or the con-

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sideration is itself illegal; and, where the consideration is in part illegal, the whole contract is illegal, and the part which is legal cannot be recovered in an action upon the contract: *Browne* v. *Bailey* (1908), 24 Times L.R. 644.

In *Victorian Daylesford Syndicate Limited* v. *Dott*, [1905] 2 Ch. 624, Buckley, J., says (p. 629): "There is no question that a contract which is prohibited, whether expressly or by implication, by a statute, is illegal and cannot be enforced." That decision was under the English Money-Lenders Act of 1900, and both it and other cases, notably *Bonnard* v. *Dott*, [1906] 1 Ch. 740, and *Whiteman* v. *Sadler*, [1910] A.C. 514, depend upon the view that that Act absolutely prohibits any contract for a loan by a money-lender who has not observed its provisions. The want of registration or the non-observance of the other conditions of the statute produces a situation which results in a complete incapacity in the money-lender to enforce the bargain he has made.

The prohibition in that statute is that the money-lender shall not "enter into any agreement . . . or take any security for money . . . otherwise than in his registered name," and any breach of the statute is made penal. It therefore controls and strikes at the whole contract, including principal, interest, and charges.

Section 6 of our Money-Lenders Act prohibits the stipulation, allowance, or exaction "on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under $500," of a rate of interest or discount greater than 12 per cent. per annum.

This stipulation or exaction is not made penal, but merely the lending of money at a rate of interest greater than that authorised by the Act.

If a money-lender lent money at 11 per cent., and thereafter threatened to sue the borrower, who, to avoid action, gives him a promissory note bearing 24 per cent., the note would be in contravention of sec. 6, but would not render the money-lender liable to the penalty provided for lending money at a greater rate than 12 per cent. Hence it is clear that there may be an infraction of sec. 6, which is not an offence within sec. 11. Consequently the statute, in prohibiting not only the lending of money at a greater rate of interest than 12 per cent., but its stipulation or exaction

in any transaction concerning a loan, is dealing with two different things, or rather is extending the prohibition to something other than the original loan of money. In this case the original loan was made at a time when the interest charged upon it was legal, and the prohibition affects the appellant only so far as he has stipulated or exacted in the note in question a greater rate of interest than is allowed. In determining, therefore, whether the general law regarding illegality in the consideration is to be applied so as to render the whole security void, care must be taken to see whether the statute can have intended to render the whole transaction, represented by the note, void, or merely to vitiate it so far as it contravenes sec. 6 with regard to interest. It may be noted that where there is a contract to pay interest it may be recovered in an action brought for interest alone: *Ex p. Furber, In re King* (1881), 17 Ch. D. 191; and our Division Courts Act, R.S.O. 1914, ch. 63, contains in sec. 67 (2) a provision allowing the recovery of interest alone.

In the *Whiteman* v. *Sadler* case (*ante*) Lord Dunedin, treating of the prohibition contained in statutes as involving the invalidity of contracts, says ([1910] A.C. at p. 527): "The upshot of the matter seems to me that each statute must be judged of by itself;" and Lord Macnaghten in the same case observes (p. 521): "The application of the principle, however, in any particular case must depend on the provisions of the Act of Parliament under consideration, and the circumstances of that case."

Dealing with the statute in that way, it may be observed that under sec. 9 the principal of any sum of money due and payable before the date at which the Act came into force, in virtue of any negotiable instrument or of any contract or agreement, shall not from and after that date bear a rate of interest greater than 12 per cent. per annum; and under sec. 10, in case of any negotiable instrument made before but maturing after the Act came into force, or of any such contract or agreement made before but to be performed thereafter, the provisions of the Act shall apply only from the date of maturity or performance.

These two sections recognise the validity of the loan, and the force of negotiable instruments, contracts or agreements relating thereto made prior to the Act. Section 6 strikes at the allowance or exaction of illegal interest on those, as well as the stipulation,

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allowance, or exaction of illegal interest on subsequent instruments, contracts or agreements, and prohibits it.

The question is, whether, in so doing, it renders the security, contract or agreement wholly void if in respect to the interest the statute is disregarded.

Section 7 seems to give the key-note to the construction of the whole statute and indicates the measure of relief which Parliament intended to give to borrowers at usurious interest. It is modelled upon the remedial sections of the English Money-Lenders Act of 1900, where, however, the power of the Court extends to opening up the whole transaction from the beginning and ascertaining what amount is "fairly due" for principal, interest, and charges, having regard to the risk and attendant circumstances. It seems to me that if all loans in respect of which more than 12 per centum per annum is exacted or stipulated for are void, then sec. 7 can have no application, because, to make it operative, it must be alleged in any action concerning a loan "that the amount of interest paid or claimed exceeds the rate of 12 per cent. per annum." If that allegation, when proved, makes the transaction void, there is no object in re-opening it, and no possibility of relieving the person under obligation to pay "from payment of any sum in excess of the said rate of interest." It puts the case in the same position as in *Victorian Daylesford Syndicate Limited* v. *Dott* (*ante*), where Buckley, J., observes ([1905] 2 Ch. at p. 631): "I have held that the contract is void. I cannot then set myself to see whether under the Act of Parliament I ought to set it aside, because there is nothing to set aside, and I cannot say how its terms ought to be reduced, because there are no terms to reduce."

Section 7 applies to any suit, action, or proceeding concerning a loan of money by a money-lender, the principal of which was originally under $500; and, therefore, would seem fairly to comprehend an action such as this upon a note, the rate of interest on which may be made up of "renewals or any other charges." Further, it is provided that, if any such excess has been "allowed on account by the debtor," the Court may order repayment. The section does not extend to relieving from part of the principal nor from charges, except under the heading of interest. However inadequate this relaxation of the burden may appear, it is all that

is given, and it seems to emphasise the fact that this statute is dealing with excessive interest alone, and leaving bargains, harsh and unconscionable in other respects, to the ordinary jurisdiction of the Courts: *Wilton & Co.* v. *Osborn*, [1901] 2 K.B. 110; *Samuel* v. *Newbold*, [1906] A.C. 461.

Under sec. 8, when a security, discounted at a rate in excess of the statute, held by a *bonâ fide* holder before maturity, is discharged, the person discharging it may recover the excess of interest over 12 per cent. If, but for the *bonâ fide* holder before maturity, the security is void because of the excessive interest, why should not the person liable, on discharging it, recover the whole amount?

If sec. 6, taken in connection with the other provisions of the statute, is limited to making void the provision as to interest, thus rendering the money-lender incapable of receiving any excess interest, where he has stipulated for or exacted more than 12 per cent., the whole of the provisions of the statute can be harmonised and the end attained without treating the exaction of illegal interest as paramount to the extent of justifying the risk of borrowers being dishonest enough, to use the language of Lord Mersey in *Whiteman* v. *Sadler* (*ante*), to refuse to pay back the money they had had.

I am free to admit that the construction of this Act presents much difficulty. But I think that two Judges of this Divisional Court, my Lord the Chief Justice and Mr. Justice Sutherland, must have viewed the matter in the same light as I do; and, for that reason, I feel more confident that this conclusion is correct. Mr. Justice Clute's judgment must, however, be taken to be contrary to it, as his opinion is that the whole security is bad; and, although the greater includes the less, his reading of the whole statute and the effect he gives to it is opposed to the result here arrived at as to its meaning, and is destructive of it.

Section 7 enables the Court, in an action such as this is, i.e., one concerning a loan of money by a money-lender, "wherein it is alleged that the amount of interest . . . claimed exceeds the rate of 12 per cent. per annum," to reopen the transaction and take an account between the parties.

The relief that can be given seems limited to relieving the person under obligation from payment of any sum in excess of

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12 per cent. per annum, and ordering repayment of that excess if it has been paid, and to setting aside, either wholly or in part, revising or altering, any security given in respect of the transaction.

The English Act is wider, as I have pointed out, and there is no limit to the discretion of the Court in arriving at the amount fairly due.

In the case in hand I am afraid that all that can be done is to relieve the respondent from the payment of the excess of interest, and this would seem to apply to interest only after the Act came into force (see sec. 9*).

The judgment in appeal should be reversed, and the present security should be reduced to $113.70 and interest at 24 per cent. from the 10th September, 1905, to the 13th July, 1906, and thereafter at 12 per cent. per annum, less the payment of $6.55 and $5 already mentioned.

The appellant therefore succeeds but partially upon his appeal, and should have no costs of it.

Mulock, C.J.Ex. Leitch, J.

MULOCK, C.J. EX., and LEITCH, J., agreed.

Riddell, J.

RIDDELL, J.:—An appeal from the judgment in favour of the defendant by the Junior Judge of the County Court of the County of Lambton.

All the material facts are fully, clearly, and accurately set out in the admirable reasons for judgment of His Honour Judge Taylor.

The action is brought upon a promissory note dated the 10th May, 1907, due the 10th September, 1907, for $162.71 and interest at 12 per cent. per annum after maturity; but the dealings between the plaintiff, who is a money-lender, and the defendant, an illiterate, began as far back as 1901.

In that year the plaintiff lent the defendant $50—adding to the $50 lent interest at 24 per cent. per annum; he obtained a note for the sum, and interest thereon after maturity at 2 per

*9. The principal of any sum of money, originally under $500, due and payable before the 13th day of July, 1906, in virtue of any negotiable instrument given to a money-lender, or of any contract or agreement entered into with such money-lender in respect of money lent by him, shall not, from and after the said date, bear a rate of interest greater than 12 per centum per annum. . . .

centum per month. This was of course perfectly legal: the law of Canada did not forbid to grind the faces of the poor.

Certain payments, small in amount, were made from time to time; the custom was, whenever a payment was made, to calculate the amount of the note, principal and interest, deduct from the sum the payment, calculate at 24 per cent. per annum the interest for a stated time upon the balance, and take a note due at the stated time for the whole amount, with a provision for interest after maturity at the rate of 2 per cent. per month.

The last of these notes before the passing of the Money-Lenders Act of 1906, 6 Edw. VII. ch. 32, came due on the 10th September, 1905; it was for $113.70 and interest after maturity at 2 per cent. per month.

The defendant had paid $6.55 on the 10th November, 1906, and a computation was made:—

Principal	$113.70
Interest at 2 per cent. per month Sept. 10, 1905, to Nov. 10, 1906	31.84
	$145.54
Less paid	6.55
Amount due	$138.99
Interest in advance for three months at 24 per cent. per annum	8.34
	$147.33

The plaintiff, in ignorance of the Money-Lenders Act, took a note for $146.85 at three months, due on the 10th February, 1907, with interest after maturity at 2 per cent. per month; the small difference, 48 cents, was no doubt due to an error in computation; the learned County Court Judge acquits the plaintiff of any philanthropic motive, and I heartily concur in that view.

In April, 1907, the plaintiff learned of the statute, and thereafter, when any objection was made to the interest, he would reduce it to 12 per cent. This sneak-thief practice of taking advantage of the ignorance of his customers, he followed with the defendant. When the defendant on the 10th May, 1907, paid $5 on account, the following computation was made:—

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Principal due Feb. 10	$146.85
Interest at 2 per cent. per month to May 10	8.81
	$155.66
Less paid	5.00
	$150.66
Four months' interest at 2 per cent. per month	12.05
	$162.71

(The learned Judge makes the interest before the 10th May, $8.79, but the usurer is in this instance the better arithmetician.)

The plaintiff took a note for $162.71 due on the 10th September, 1907, with interest after maturity at 12 per cent. per annum.

We are asked by the defendant on this appeal to find that the plaintiff, having taken the note with interest at 2 per cent. per month, changed the interest clause after the defendant signed it, to 12 per cent. per annum. But the trial Judge finds otherwise, and we cannot on mere suspicion, however strong, reverse such a finding of fact. The plaintiff seems on this occasion to have drawn the line at forgery, and we cannot find perjury without evidence.

He brought his action on this note of the 10th May, 1907, and served particulars as follows:—

Sept. 10, 1907.	To principal due	$162.71
	By rebate overcharge in interest	22.36
		$140.35
June 10, 1913.	To interest on $140.35 at 12 per cent. per annum from Sept. 10, '07	96.84
	Balance due	$237.19

At the trial it appeared that the rebate allowed was made by reason of the fact that 24 per cent. per annum had been charged instead of the maximum allowed by the statute, 12 per cent. after the passing of the Act.

The learned County Court Judge considered himself bound by the judgment of my brother Clute in the case of *Bellamy* v. *Porter*, 13 D.L.R. 278, to hold the note void, and accordingly dismissed the action with costs.

The plaintiff now appeals.

The case of *Bellamy* v. *Porter* was one in which the stipulation for interest had been two per cent. per month, but after the note was delivered to the plaintiff he had altered it to 12 per cent. per annum without the maker's consent. This plaintiff was the plaintiff in that case, and there it was found by the County Court Judge, in a judgment in which we concurred, that he did not stick at forgery. My Lord and Mr. Justice Sutherland held that the original stipulation for interest was void, and that "the note even if not rendered void by such alteration, must be construed as containing no contract for interest; and its alteration so as to make it bear interest at the rate of 12 per cent. per annum was a material alteration. . ." (p. 575). My brother Leitch and myself expressed no opinion "whether the note as originally drawn was wholly void—or whether the provision for interest was wholly nugatory"—but, assuming that neither was the fact, we thought that even then the note was voided by the change (pp. 583, 584.)

My brother Clute held *simpliciter* that the note as originally drawn was void. It will be seen that one member of the Court held that the whole note was void, two that the provision for interest was void, without expressing any opinion as to the note, and two, without expressing an opinion on either point, that the note as changed was void in any case.

A County Court Judge is wholly right in following the opinion of one Judge of the Appellate Division where the other Judges express no contrary opinion, but it now becomes our duty definitely to decide the point.

Bellamy v. *Porter* was on a different set of facts. On the negotiable instrument there, the money-lender had stipulated for a rate of interest greater than 12 per cent. per annum—a transaction expressly prohibited by the statute. Here what was done was this. A sum of money being due upon a promissory note, the money-lender added interest at the rate of 24 per cent. to this sum until maturity, and took a note for the amount with interest at 12 per cent. per annum after maturity; there was no stipulating for interest on the note greater than the statute allows. Does this come within the prohibition of the statute? I am not able to derive much advantage from the Imperial Act of 1900, 63 & 64

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Vict. ch. 51. Leaving aside for the moment the provisions of sec. 1, the Act prescribes the registration of money-lenders; sec. 2 (1) (*c*), prohibits them from entering into any agreement as a money-lender otherwise than in the registered name, on penalty of fine and imprisonment if the conviction be a second or subsequent one. It was under this statutory prohibition to enter into any contract, etc., except under the registered name, that the cases cited by my brother were decided: e.g., *Victorian Daylesford Syndicate Limited* v. *Dott*, [1905] 2 Ch. 624; *Bonnard* v. *Dott*, [1906] 1 Ch. 740; *Re A Debtor, Ex p. Carden* (1908), 52 Sol. J. 209. Section 2 (1) (*c*) obliges the money-lender to carry on his business at his registered address under the same penalty; and *Gadd* v. *Provincial Union Bank*, [1909] 2 K.B. 353, *S.C.*, *sub nom. Kirkwood* v. *Gadd*, [1910] A.C. 422, was decided accordingly.

I entirely concur in the statement of the law that where the statute means to prohibit the contract, "where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect:" *Cope* v. *Rowlands* (1836), 2 M. & W. 149, 157; *Whiteman* v. *Sadler*, [1910] A.C. 514, 525. None of these cases takes the law any further or assists in the present inquiry.

Section 6 of the Act (R.S.C. 1906, ch. 122) says: "No money-lender shall

A. (1) stipulate for
(2) allow
or (3) exact
on any
B. (1) negotiable instrument
(2) contract
or (3) agreement

concerning a loan of money, the principal of which is under $500, a rate of

C. (1) interest
or (2) discount

greater than 12 per cent. per annum."

Bellamy v. *Porter* was a case of A. (1); B. (1); C. (1), the interest after maturity.

The present case is a contract or agreement wherein a greater

rate of interest than 12 per cent. is exacted by the money-lender: A. (3); B. (2) or (3); C. (1), the interest before maturity. The transaction would be void unless there is something in the statute indicating the contrary. That is to be sought, if anywhere, in sec. 7.

It was urged that in approaching the consideration of this section we are compelled by the opinion of the majority of this Court in *Bellamy* v. *Porter* to hold that the stipulating for—and by parity of reasoning the exaction of—an illegal rate of interest is void. The argument based on that hypothesis is as follows: the provision that the Court may relieve the person under obligation to pay from payment of any sum in excess of 12 per cent., to be found in sec. 7 of the Act, would be wholly meaningless if the defendant were not under obligation to pay at all by reason of the provision for interest being void at law. The section, then, can have no application to the case of an action upon the vitiated security.

The application of this section may be this: it always has been open to debtor and creditor to state an account, make a settlement, give and receive a promissory note, in which are included charges not legally enforceable; or the debtor may, if he pleases, pay a sum in excess of what he should pay. At the common law such transactions were not, in the absence of fraud, etc., impeachable upon the ground that too much was paid or allowed in the settlement, etc., etc. One who pays money, etc., with his eyes open, or even under a mistake as to the general law, can obtain no relief.

The argument proceeds: the whole of sec. 7 may well be applicable to an action based upon some such transaction, an account stated, a note given in settlement, an overpayment. For example, had the present note been impeccable, the section would apply to prevent the plaintiff having the full advantage of it; but, the judgment of the majority of the Court in *Bellamy* v. *Porter* being considered binding, the section cannot apply to the present case.

The result would be that the whole note must be held void.

If the judgment in *Bellamy* v. *Porter* of my Lord and Mr. Justice Sutherland is to be taken literally and without qualification, I do not see any escape from this argument. But the language

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of the learned Judges must be read in connection with the facts of the case: *Quinn* v. *Leathem*, [1901] A.C. 495. What was decided by them was that such a stipulation was void as far as giving full effect to it is concerned, and not absolutely void for all purposes and to the fullest extent. My brother Clute's judgment is that the whole note is void; but that was not the judgment of the Court. We are free then to consider this case freed from binding authority.

In the present case there is an exaction of interest greater than 12 per cent. per annum, and it is quite immaterial that this is interest before maturity. The transaction, then, would be void, unless there is something in the statute indicating the reverse.

I am, however, quite unable to read sec. 7 as not requiring us to hold that the note is not void for all purposes.

The object of that section seems to be two-fold: (1) where the action is brought upon a note or other contract by the creditor, he is deprived of all advantage he might otherwise derive from a statement of account or voluntary payment on account, so that the debtor is relieved from paying any sum in excess of the legal rate; and (2) if the debtor has paid too much, then in any action, at whosesoever instance, he may be repaid it, and any security he may have given may be set aside or rectified. It seems to me to be to limit the scope of the section, to say that it applies only to some relief to be sought by the debtor as plaintiff. In ordinary parlance one can be relieved from payment only if it is sought from him.

The trend of modern legislative and legal thought is against punishing a wrongdoer by taking from him what is rightly his own. A thief caught with stolen goods is not punished by taking from him what he honestly owns, though he may be punished for his wrongdoing. Parliament may well have thought that one who exacts interest in excess of 12 per cent. is sufficiently punished by a penalty of $1,000 or imprisonment for one year, without being deprived of what was legally his own with interest at the rate he might legally charge.

I think that the provisions of sec 7 prevent the operation of the ordinary rule, and that the note is not void. The result will be that the plaintiff should have judgment; and it remains to calculate the amount.

The state of affairs on the 13th July, 1906, the critical date fixed by sec. 9 of the Act in the Revised Statutes of Canada (6 Edw. VII. ch. 32, sec. 6), was that a note was outstanding for $113.70 due on the 10th September, 1905, with interest at 2 per cent. per month after maturity. As of the 13th July, 1906, the account stands:—

Principal due		$113.70
Interest for 306 days at 24 per cent. per annum	$22.88	
Less paid on account	6.55	
	$16.33	

Since that time the plaintiff should have 12 per cent. per annum.

Interest on $113.70 at 12 per cent. per annum from July 13, 1906, to, say, May 13, 1914, 7 years, 10 mos.	$106.88	
Total interest	$123.21	
		123.21
Grand total		$236.91

As to the method of computing interest, see *McGregor* v. *Gaulin* (1848), 4 U.C.R. 378; *Barnum* v. *Turnbull* (1857), 13 U.C.R. 277; *Bettes* v. *Farewell* (1865), 15 U.C.C.P. 450.

To the above amount the plaintiff is entitled by the law, and we have no power to deprive him of a judgment accordingly.

But costs are in our discretion. The plaintiff is, on his own shewing, a swindler, taking money he has no right to, when his unfortunate customer does not know the law. His conduct is so shamefully dishonest as well as criminal that we should shew our disapprobation by denying him costs either here or below.

The attention of the Attorney-General and of the County Attorney of the County of Kent should be drawn to this open, avowed, wilful and persistent violator of the statutes of Canada.

Apparently he has escaped punishment for the forgery which he was held to have committed in the *Porter* case.

Appeal allowed.

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LLOYD v. LLOYD.

Alberta Supreme Court, Harvey, C.J., Stuart, and Simmons, JJ. June 25, 1914.

1. DIVORCE AND SEPARATION (§ VII—78)—CUSTODY OF CHILDREN—CHANGE OF DECREE AS TO—EVIDENCE OF HUSBAND'S CHARACTER — RELEVANCY.

Where the claims made by the wife in an alimony action include one for the custody of the children, evidence of the defendant husband's character becomes admissible in respect of such claim.

2. APPEAL (§ VIII A—680)—JUDGMENT—COSTS—WRONG PRINCIPLE—CORRECTED BY APPELLATE COURT, WHEN.

Where the trial court has dealt with the question of costs upon a wrong principle, the appellate court will correct the judgment in that respect although it would not disturb a discretionary order as to costs.

[*Metropolitan* v. *Hill*, 5 A.C. 582, applied.]

3. DIVORCE AND SEPARATION (§ V A—52)—SUIT MONEY—COUNSEL FEES—COSTS—JUST CAUSE.

In actions for alimony the general rule is that the plaintiff although unsuccessful is entitled to her costs unless in the opinion of the trial judge her solicitor had not reasonable and probable ground for believing that he was prosecuting a just cause.

[*Ash* v. *Ash*, 62 L.J.P. 97, applied; *Keizer* v. *Keizer*, 2 A.L.R. 354, referred to.]

4. DIVORCE AND SEPARATION (§ III A—15)—CRUELTY—ALIMONY ACTION.

Actual violence of such a character as to endanger personal health or safety, or the reasonable apprehension of such violence, is necessary to sustain a wife's alimony action based on cruelty.

[*Milford* v. *Milford*, L.R. 1 P. & D. 295, 15 L.T. 392, followed.]

Statement

APPEAL from the judgment of Scott, J., *Lloyd* v. *Lloyd*, 15 D.L.R. 892, in defendant's favour.

The appeal was allowed in part.

A. H. Clarke, K.C., for plaintiff, appellant.

Charles F. Adams, for defendant, respondent.

The judgment of the Court was delivered by

Simmons, J.

SIMMONS, J.:—The plaintiff, who is the wife of the defendant, claimed alimony, interim alimony, and the custody of two children, issue of the marriage of plaintiff and defendant. At the date of the trial the plaintiff was living with her brother in Coleman, Alberta, and had the custody of the two children.

The husband, the defendant, owned a comfortable home in Coleman and was willing to receive her in this home and live with her, but she refused, alleging she was in fear of her life.

The learned trial Judge postponed judgment at the end of the trial in the hope that the plaintiff and defendant would come

together and amicably arrange their difficulties. This they failed to do and judgment was given dismissing the plaintiff's claim with costs.

The plaintiff claimed that in 1909 and 1910 the defendant would not come home till 12 or one o'clock at night, that he swore at her and that he habitually spent his time at a pool room at night and that he struck her in the face. In February, 1910, she left him, but returned the following night and they lived together until the 12th of February, 1912, when she left him, taking the children with her and took up her residence with her brother. The defendant was charged before a magistrate with having assaulted her on this occasion and was fined $2 and costs, and was bound over by the magistrate to keep the peace for one year.

The trial Judge rejected to a large extent the story of the plaintiff in regard to the occurrence of the 12th of February, 1912, and also in regard to the antecedent troubles. He refused to believe her statement that she was afraid of bodily injury if she returned to the defendant's house. He also concluded that if it had not been for the interference of the plaintiff's sister that the plaintiff and defendant would have reconciled their difficulties. The evidence of the defendant and that of other witnesses quite support the view which he adopted. He had the advantage of seeing and hearing the witnesses. He had much better opportunity to weigh the conflicting evidence than a Court of Appeal, and I am unable to say that he reached a wrong conclusion.

In *Milford* v. *Milford*, L.R. 1 P. & D. 295, 715, 36 L.J.P. & M. 30, 38 L.J.P. & M. 63, 15 L.T. 392, 21 L.T. 155, the principle to be applied is laid down by Lord Penzance (at p. 299, L.R. 1 P. & D.), as follows: "There must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it."

See also *Plowden* v. *Plowden*, 23 L.T. 266, 18 W.R. 902, and *Rodman* v. *Rodman*, 20 Gr. Ch. 428. I conclude, therefore, that the judgment of the trial Judge and the principles of law applied by him on this part of the case should not be disturbed.

Having come to this conclusion upon the facts I am of the

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opinion that the refusal of the trial Judge to make an order giving the plaintiff the custody of the children should not be disturbed.

In regard to costs, however, it does not appear that any consideration was given to the rule applied in such cases. The learned trial Judge apparently gave the defendant costs on the principle that costs follow the event. Order XLII., Rule 517. The general rule, however, in actions for alimony is that the unsuccessful plaintiff is entitled to the costs unless in the opinion of the Judge the solicitor had not reasonable and probable ground for believing that he was prosecuting a just cause.

In *Ash* v. *Ash* (1893), P. 222, 62 L.J.P. 97, 68 L.T. 500; 1 R. 524, Barnes, J., discusses fully the principle and the reasons for it and refers to *Robertson* v. *Robertson*, 6 P.D. 119, 51 L.J.P. 5, 45 L.T. 237, 29 W.R. 880, and *Flower* v. *Flower*, L.R. 3 P. & D. 132, 42 L.J.P. & M. 45, 29 L.T. 253, 21 W.R. 776.

In the later cases of *Kay* v. *Kay* (1904), P. 382, 73 L.J.P. 108, 91 L.T. 360, 20 T.L.R. 521; *Huntley Gordon* v. *Huntley Gordon* (1908), 24 T.L.R. 806, and *Thompson* v. *Thompson* (1886), 57 L.T. 374, costs were refused on the same principle.

See also *Keizer* v. *Keizer*, 2 Alberta L.R. 354, 12 W.L.R. 89.

In *Huntley Gordon* v. *Huntley Gordon*, *supra*, the judgment says "the case of a wife making charges as a petitioner had to be much more carefully gone into than that of a wife merely making allegations by way of defence."

The foundation of the principle is that the wronged wife without any means of her own is not for that reason to be deprived of bringing an action against her husband, but in the application of this principle a serious duty is laid upon the solicitor undertaking her case and if he had not discharged that duty by making proper inquiries and acting reasonably therein, the benefit of the rule will not accrue to him. In the present case the trial Judge has found that the husband was jointly with his wife at fault. A magistrate had fined the husband for assault and bound him over to keep the peace for one year, and, in view of all the circumstances, I am of the opinion that the solicitor who undertook the plaintiff's case had discharged the duty put upon him and that the rule should be applied in favour of the plaintiff and

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she should be allowed costs of the trial below against her husband.

The appellant in her notice of appeal did not raise this ground, but it was argued at some length before this Court and, I am of the opinion, we are entitled to deal with it, when the Court below has awarded costs upon an incorrect principle: *Metropolitan Asylum District* v. *Hill* (1880), 5 A.C. 582, 49 L.J.Q.B. 745, 43 L.T. 225, 38 W.R. 663.

The appellant has objected to the admissibility of evidence at the trial as to the character of the defendant. Since she claimed in her statement of claim not only relief by way of alimony, but a declaration that she was entitled to the custody of the children, it would be very material evidence under the latter claim. The formal judgment provided that the defendant have the custody of the infant children. This is manifestly an error as it is not authorized by reasons for the judgment and was not consented to by the plaintiff and should be corrected. Neither by way of defence nor counterclaim did the defendant ask for this declaration

The judgment below, therefore, should be varied as to costs, the plaintiff to have costs of trial and the formal judgment is to be rectified by striking out that part which adjudges that the defendant have the custody of the infant children. The plaintiff having succeeded to this extent upon the appeal should have the costs of this appeal.

Appeal allowed in part.

VANSICKLER v. McKNIGHT CONSTRUCTION CO.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Maclaren, J.A., Clute, and Leitch, JJ. June 15, 1914.

1. CORPORATIONS AND COMPANIES (§ IV D—76)—POWER TO CONTRACT—SALES GENERALLY—CORPORATE PURPOSES.

A trading corporation making a sale of land with the view of enabling it to purchase other lands to carry on its business is bound by its contract of sale although not under the corporate seal, as the circumstances shewed that the contract was in furtherance of the objects of the corporation.

[*Beer* v. *London & Paris Hotel Co.*, L.R. 20 Eq. 412, referred to.]

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2. CORPORATIONS AND COMPANIES (§ IV D—85)—CONTRACTS—FORMAL REQUISITES—SPECIFIC ENFORCEMENT OF LAND CONTRACT.

Where the by-laws of a trading company authorized the president and the secretary-treasurer, who had the management of the company, to make all contracts and engagements on its behalf and both concurred in an agreement of sale of the company's lands, but it was signed by the secretary-treasurer only, the contract is binding on the company and may be ordered to be specifically performed.

3. FORFEITURE (§ I—4)—REMISSION OF — CONTINGENT DAMAGE—"VERY GREAT OR VERY SMALL."

Where there is a stipulation that if on a certain day an agreement remains either in whole or in part unperformed (in which case the damage may be either very large or very trifling) there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty.

[*Kilmer* v. *B.C. Orchard Lands*, 10 D.L.R. 172, [1913] A.C. 319, and *Boyd* v. *Richards*, 13 D.L.R. 865, 29 O.L.R. 172, considered.]

Statement

APPEAL by the defendants from the judgment of RIDDELL, J., at the trial, in favour of the plaintiffs, the purchasers, in an action for specific performance of an agreement for the sale and purchase of land. The defendant company, the vendor, was an incorporated trading company, and the written agreement upon which the plaintiffs relied was not under the company's corporate seal.

The appeal was dismissed.

R. S. Robertson, for the appellants.

R. McKay, K.C., for the plaintiffs, the respondents.

Clute, J.

The judgment of the Court was delivered by CLUTE, J.:—Appeal from the judgment of the trial Judge, Riddell, J., ordering specific performance with a reference as to title. The agreement in question was prepared by the defendant Douglas, secretary-treasurer of the defendant company, and was enclosed in a letter sent by him to the plaintiffs dated the 21st February, 1913. The agreement provides that the offer is to be accepted on the following day, otherwise void; $100 is to be paid in cash as a deposit and "$1,400 on the completion of the sale," and the balance to be secured by mortgage payable by instalments, and "sale to be completed on or before the 10th March, 1913. Possession of the said premises April 16th, 1913." The letter draws attention to the clause as to possession, and mentions that, "as I told you, Mr. McKnight is out of town, and will not be back till late in April, so that we will not be able to get his signature until then, but that need not make any difference in the transfer as

far as you are concerned. It can go ahead, and he can sign the necessary papers when he returns."

Upon a conflict of testimony, the trial Judge expressly accepts the evidence of the plaintiffs, without imputing ill intent to the defendants, upon whose recollection he cannot rely.

The agreement was duly executed on the day named, and the $100 paid. The $1,400 was deposited by the plaintiffs in the hands of their solicitor prior to the 10th March, and on that day the plaintiffs' solicitor wrote to the defendants' solicitor advising him that they had the money and desired to close the matter as soon as possible. On the 17th, Douglas, secretary-treasurer of the defendant company, replied, stating that McKnight would not be back, probably, before the end of May, and the plaintiffs' solicitor then suggested that the deeds might be sent to McKnight for execution. On the 19th March, the defendants' solicitor suggests that his clients are willing to withdraw from the sale and allow the matter to drop. The result of the correspondence was, that the defendants insisted that the $1,400 should be paid in cash and the deeds might be signed when McKnight returned. The plaintiffs denied any arrangement by which the money was to be paid before the transaction was completed. On the 20th May, the defendants enclosed a cheque for $100 and declared the contract cancelled. On the 21st, this was returned; and, while insisting that the payment was not to be made until the transaction was closed, the plaintiffs' solicitors offered as a matter of convenience to make the cash payment on receiving an undertaking that the deed would come when McKnight returned. In the meantime the mortgage had been approved and executed on the 10th March.

On the 22nd May, the defendants' solicitor writes a further letter stating that there is no binding contract, and that they are under no obligation to complete the transaction, and so return the $100 deposit. Subsequently the $1,400 was tendered with the mortgage, and a deed demanded, which was refused.

The trial Judge finds that McKnight and Douglas had the management of the company and had power to deal for the company in this transaction, and Mr. Douglas was authorised to enter into a contract of this kind by the general methods of busi-

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ness pursued by the company, and finds that the document which he drew was precisely what had been arranged between the parties; and, upon the evidence, holds that there was no misunderstanding; that the plaintiffs dealt with the company in good faith; that they signed the offer carrying out the terms which they had made with McKnight previously; that they received the letter enclosing the offer and asking for a cheque for $100, and signed the document; that the company accepted the $100 which they had no right to unless this acceptance of the offer for the company by Douglas had been justified; that they kept that money a long time even after the dispute arose; that the sale was to be completed on the 10th March, 1913; and that, on completion of the sale, the $1,400 was to be paid, and the balance was to remain on mortgage.

A careful perusal of the evidence satisfies me, having regard to the credit given by the trial Judge to the plaintiffs and their witnesses, that these findings are fully supported by the evidence.

The two points argued by Mr. Robertson were: (1) that parol evidence was admissible to shew that the written document did not contain the true agreement of the parties, and that this was evidenced further by the letter of the 21st February; (2) that the agreement was invalid, not having the corporate seal.

The first point, having regard to the findings of the trial Judge, is, I think, wholly untenable. The oral evidence relied on is in respect of what took place before the agreement was signed; and, according to the plaintiffs' evidence, the agreement conforms to that understanding, and the trial Judge so finds. The letter from Douglas of the 21st February, although received by Vansickler after the execution of the agreement, does not add any new term. It simply draws attention to the fact that they are not to give up possession until the 16th April, and that McKnight will be back late in April. It does not state that the $1,400 is to be paid before the completion of the sale as provided by the agreement; so that, as to the merits, the plaintiffs were always ready and willing and offered to complete the contract on their part and to pay the $1,400 on the day named. It was owing to the defendants' inability to perform their part of the contract that

the whole trouble arose. I find it impossible in reading the evidence to come to any other conclusion than this: that both parties intended to carry out the sale, and that the delay was owing to the absence of McKnight; that it was an afterthought on the part of the defendants to repudiate the company's liability under the contract.

According to the true construction of the agreement and of its terms, the $1,400 was to be paid on the completion of the sale. This the plaintiffs were always ready to do.

I do not think that any forfeiture took place under the clause in the contract providing that time should be of its essence; but, if it did, the condition of forfeiture was in the nature of a penalty from which the plaintiffs were entitled to be relieved, on payment of the purchase-money due: *Kilmer* v. *British Columbia Orchard Lands Limited*, 10 D.L.R. 172, [1913] A.C. 319; *Boyd* v. *Richards*, 13 D.L.R. 865, 29 O.L.R. 119.

In the *Kilmer* case, the language of Mellish, L.J., in *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022, is referred to by Lord Moulton as follows: "'I have always understood that when there is a stipulation that if on a certain day an agreement remains either in whole or in part unperformed—in which case the damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty' That was a case like this of forfeiture claimed under the letter of an agreement, and a cross-action for specific performance. James, L.J., seems to have been of the same opinion. 'In my opinion,' he says, 'this is an extremely clear case of a mere penalty for non-payment of the purchase-money.'" In the *Kilmer* case, the first instalment had been paid, and default was made in the second instalment. The Court was of opinion that the circumstances of the case brought it entirely within the ruling of the *Dagenham* case. It is unnecessary here to decide whether the *Kilmer* case would apply if express provision was made for a return of the deposit.

In the present case nothing is said as to return of the deposit; and in such case "the Court will decline to order the deposit to be returned to a defaulting purchaser:" Fry on Specific Per-

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formance, 5th ed. (Canadian Notes), p. 579; *Dunn* v. *Vere* (1870), 19 W.R. 151; *Howe* v. *Smith* (1884), 27 Ch. D. 89, at pp. 97-101; and it can make no difference, I think, to the parties' rights that in the present case the defendants offered to return the deposit. The agreement provides that, in case of failure to make a good title, the agreement shall be null and void and the deposit-money returned to the purchaser. There is no provision for a return of the deposit-money in case the plaintiffs make default. The defendants were not obliged to return the deposit, and, having done so, they could have claimed the forfeiture if the plaintiffs had made default, which brings the case within the principle laid down in the *Kilmer* case.

I am unable to give effect to the contention of Mr. Robertson that the contract is void for want of a seal. The by-laws provide that the president and secretary-treasurer may make all contracts and engagements on behalf of the company. McKnight, the president, and Douglas, the secretary-treasurer, appear from the evidence to have had the entire management of the business, and both concurred in the agreement to sell the property, and it was left for Douglas, as secretary-treasurer, to sign the contract.

The rule that a contract by a corporation must generally be under the common seal is subject to important exceptions, one of which is that the rule does not apply to contracts of a trading corporation having regard to the trade which they are constituted to carry on; and in *Holmes* v. *Trench*, [1898] 1 I.R. 319, it is said by Chatterton, V.-C., at p. 333, that, in the absence of any special restriction, "a corporation may contract without seal for the purchase or sale of property necessary for the purpose of carrying on the business for which the corporation was created:" Fry on Specific Performance, 5th ed. (Canadian Notes), p. 319.

It was admitted in the present case at bar that the defendant corporation is a trading corporation, but the contention was that the contract was not one which the company was incorporated to carry on. It appears, however, from the evidence, that the sale of the land in question was with the view of enabling the company to purchase other lands to carry on their business, so that the contract was in furtherance of the objects of the corpora-

tion. See, also, Lindley's Law of Companies, 6th ed., p. 277; *Wilson* v. *West Hartlepool Harbour and R.W. Co.*, 34 Beav. 187, and 2 DeG. J. & S. 475; *Beer* v. *London and Paris Hotel Co.*, L.R. 20 Eq. 412.

Independently of statutory provision, a corporation constituted for the purpose of trading may for such purpose enter into a contract which is not under seal: *South of Ireland Colliery Co.* v. *Waddle* (1869), L.R. 4 C.P. 617 (Ex. Ch.) A director's signature to a resolution referring to a draft agreement may be sufficient to satisfy the Statute of Frauds: *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q.B.D. 314 (C.A.); Halsbury's Laws of England, vol. 5, para. 491.

Apart from the general rule of law as above indicated, the present case, having regard to the by-laws giving authority to the president and secretary-treasurer to make contracts and engagements on behalf of the company, falls within sec. 139 of the Ontario Companies Act, 2 Geo. V. ch. 31, which provides that a document or proceeding requiring authentication by a corporation may be signed by any director, manager or other authorised officer of the corporation, and need not be under its seal. I do not think it can be doubted that in the present case the secretary-treasurer had authority to sign the agreement in question. See *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; *Premier Industrial Bank* v. *Carlton Manufacturing Co.*, [1909] 1 K.B. 106, at p. 114.

Both under the statute and independently of the statute, I entertain no doubt that the agreement in question was sufficiently signed without the corporate seal, so as to bind the company.

The appeal should be dismissed with costs.

Appeal dismissed.

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Re ONTARIO BANK PENSION FUND.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. BANKS (§ III B—28)—"PENSION FUND"—BASIS FOR—DIRECTORS' AUTHORITY, HOW LIMITED—INSOLVENT BANK.

Where a by-law passed by bank shareholders at an annual meeting authorized the directors to establish a pension fund for the officers and employees, and empowered the directors to contribute thereto, the opening of an account in the bank's books under the name of "Officers' Pension Fund" and the transfer to its credit from profit and loss account of various sums annually, will not, on the bank's failure, constitute a trust for the amounts in favour of the proposed beneficiaries, where the same by-law further authorized the directors to pass rules for the organization and regulation of a pension fund, the contributions thereto by officers and employees and the settling of the scheme of benefits, where in fact no such rules were formulated nor were any contributions made by officers or employees.

[*Sinnett* v. *Herbert*, L.R. 12 Eq. 201; *Re Gassiot*, 30 L.J. Ch. 242, and *Re Gosling*, [1900] W.N. 15, 48 W.R. 300, referred to.]

Statement

APPEAL by Richard Norman King and others from an order of Boyd, C., affirming the dismissal by Mr. Kappelle, Official Referee, of a petition of the appellants presented to him as Referee in the proceeding for the winding-up of the Ontario Bank under the Dominion Winding-up Act.

The appeal was dismissed.

Wallace Nesbitt, K.C., and *J. A. Worrell*, K.C., for the appellants.

J. A. Paterson, K.C., and *A. McLean Macdonell*, K.C., for the liquidator and the shareholders.

Meredith, C.J.O.

January 12, 1914. The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appellants presented a petition in the winding-up praying that it should be declared that they were entitled to have the amount at the credit of the "officers' pension fund" of the bank, as shewn by the books of the bank, paid over to the Pension Fund Society of the Bank of Montreal, in consideration of the petitioners and the other officers of the Ontario Bank having been admitted to membership in the Pension Fund Society of the Bank of Montreal as of the date on which they entered the service of the Ontario Bank.

The claim was disallowed by the Official Referee on the 10th September, 1913, and his decision was affirmed by the Chancel-

lor on the 16th October, 1913; and from the order of the Chancellor this appeal is brought.

The facts are fully set out in the reasons for judgment of the Referee, supplemented by his certificate of the 20th November, 1913, that, in making his order for a call upon the shareholders, "the pension fund amount was neither brought to" his "attention or considered by" him "in any way" and that "the pension fund amount did not appear in the estimated statement of assets and liabilities, no doubt for the reason that on the 30th November, 1907, the amount had been transferred on the books of the bank to deficit account."

It was argued before the Official Referee that the $30,000 placed in the books of the Ontario Bank to the credit of an account called "Officers' Pension Fund of the Ontario Bank" was impressed with a trust in the nature of a charitable trust in favour of the officers and employees of the Ontario Bank and their families, and that, as the officers and employees of the bank went over practically as a body to the Bank of Montreal and became members of the Pension Fund Society of that bank, the trust fund should be administered on the principle of *cy-près* and paid over to the president of that society.

The Official Referee did not give effect to that contention, being of opinion that the scheme of forming a pension fund for the officers and employees of the Ontario Bank and their families which the bank had in contemplation was "only in the making and was never consummated." and that, therefore, no trust in favour of the appellants was created in respect of the amount at the credit of the "Officers' Pension Fund of the Ontario Bank" in the books of the bank; and with that opinion the Chancellor agrees.

Upon the argument before us it was contended on behalf of the appellants:—

(1) That what was done had resulted in the $30,000 being impressed with a trust for the benefit of the officers and employees of the Ontario Bank and their families.

(2) That what was done evidenced a clear charitable intention, and that where that is the case it is never allowed to

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fail on account of the uncertainty or impracticability of the object, but the particular mode of application will be directed *cy-près;* and that, therefore, the failure of the bank to formulate a scheme for the administration of the fund had no other result than that the fund must be applied *cy-près* as directed by the Court.

We are of opinion that that contention is not well-founded, and that the order of the Chancellor must be affirmed. The by-law passed on the 18th June, 1901, does not establish a pension fund, but only authorises the directors to establish one; and the grant of $5,000 to the fund, which moreover is qualified by the provision that "the directors are empowered to contribute the same out of the funds of the bank," coupled with the subsequent opening of the account in question and the placing of that sum at the credit of it, was no more than setting aside money to become part of the pension fund if and when it should be established; and the grants made in the subsequent years 1902, 1903, 1904, 1905, and 1906, and the placing of the sum granted at the credit of the account, stand on the same footing, and they were but additions to a fund which had been set apart to become, as I have said, part of a pension fund if and when the directors should deem it expedient to establish such a fund.

If the appellants are right in their contention, notwithstanding that nothing had been done by the directors towards formulating a pension scheme, had the failure of the bank not occurred, and it was now a going concern, it would be open to any of its officers to bring an action to have it declared that the amount at the credit of the account is impressed with a trust for the benefit of the officers and employees of the bank and their families, and to have a scheme for the administration and application of the fund settled by the Court. Such a result would be manifestly unjust to the bank, as it would take from it the power of determining in what cases and under what condition officers and employees of the bank and their families should be entitled to an allowance from the fund, as well as the amount to be allowed. These matters were of the very es-

sence of the pension fund scheme that was proposed, and the fact that nothing had been determined as to them leads, I think, irresistibly to the conclusion to which I have come, that no trust was intended to be created and no pension fund to be established until the directors should have determined to establish the fund, when, no doubt, these matters would be considered and dealt with in a pension scheme regularly formulated.

There was no communication made to the officers and employees of the bank as to the action which had been taken with reference to the establishment of a pension fund, and during the whole of the period that elapsed between the passing of the by-law and the suspension of the bank—a period of upwards of five years—no one appears to have supposed that any pension fund existed. No pensions out of it were applied for or granted or paid, and beyond the annual sums placed at the credit of the account nothing was contributed to the fund by any officer or employee of the bank, but on the contrary the two pensions or retiring allowances which appear to have been granted to officers of the bank were granted and paid without any reference to the fund and out of the other money of the bank.

Even if the purpose to which the fund was to be applied was such a charitable purpose as the appellants contend it was, the case at bar is one to which the observations of Bacon, V.-C., in *Sinnett* v. *Herbert* (1871), L.R. 12 Eq. 201, 206, are peculiarly apposite. In that case a sum of money was standing in the name of the testatrix in a savings bank "to the account of Miss Morice of Carrog, as trustee for charitable purposes," and one of the questions in the case was whether it formed part of the personal estate of the testatrix or was subject to any, and if any what, trusts; and the Vice-Chancellor held that it formed part of the personal estate, and in doing so said: "The most that could be said of it was, that she set apart this sum and put it into the savings bank, reserving to herself the right of disposing of it for such charitable purposes as she might think fit, owing no obligation to anybody, having made no communication to any *cestui que trust*, having raised no expectations, but reserving to herself full power to give it or not, as she thought fit. Her

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right of property in the fund was never interfered with in the slightest degree, and having died without having carried any intentions she might have into effect, it is impossible to distinguish that money from any other money that was hers."

I am also of opinion that, assuming that the fund existed and was impressed with a trust for the "officers and employees of the Ontario Bank and their families," the trust was not a charitable one. There is nothing to indicate that the benefit of the fund was to be available only to worn-out or aged or poor officers or employees, or that any element of charity was to enter into the scheme.

In re Gosling, 48 W.R. 300, [1900] W.N. 15, was referred to by counsel for the appellants as supporting their contention, but I do not think that it does. In that case a testator, who was a partner in a firm, by a codicil to his will directed that a sum of money standing in the name of himself and his brother should be "invested" in trustees' names, to be fixed upon by the partners at the time of his death, and should be invested in order to form a fund to be called the "superannuation fund," for the purpose of pensioning off old and worn-out clerks of the firm; and the question was as to a fund made up of that money and additional gifts and accumulations of dividends on the investments; and Byrne, J., held that the bequest was a good charitable gift. In his opinion, the use of the word "aged" was sufficient to create a good charitable bequest, and he thought "worn-out" and "aged" clerks came also within the description "impotent," and that, having regard to the phrase "pensioning off" and the frame of the gift, poor clerks of the firm and those unable to provide properly for themselves and their families were intended to be benefited.

It may well be that the circumstances on which reliance was placed for the conclusion that the bequest was a good charitable gift warranted that conclusion; but there are in the case at bar no such *indicia* of intention as existed in that case, which is, therefore, I think, quite distinguishable. The fund in question here is, no doubt, called a "pension" fund, but the use of the word "pension" in itself is quite insufficient to indicate

a charitable intention, and I apprehend that, if the words "pensioning off" had not been associated with the other expressions mentioned by Byrne, J., he would have reached a different conclusion.

In re Gassiot, 70 L.J. Ch. 242, referred to by the Chancellor, is more like the case at bar. In that case the testator directed that the surplus income of a fund which he bequeathed should "be applied by the Master and Wardens for the time being of the" Vintners' Company of the City of London, to which he had bequeathed the fund, "to the best of their discretion for the benefit of individuals who had been engaged in the Oporto Red or Port St. Mary's White Sherry Wine Trade," and if applied by way of annuity that an annuity should not exceed £50 per annum, and should be held only during the pleasure of the Master and Wardens for the time being of the company; and it was held by Cozens-Hardy, J., that this was not a charitable gift. After pointing out that the trust was bad unless it could be supported as a charitable gift, he went on to say: "Now there is no reference to age or to poverty in the description of the recipients of the bounty, and, having regard to the authorities, I do not think I am justified in saying that there is on the face of this will any sufficient indication of a charitable intent to enable me to support the gift. I cannot see my way to limit the trust to retired wine merchants who are in poverty or aged."

Being, therefore, as I am, of opinion that no trust was created, and that, if there had been, it was not a charitable one, and it being conceded, and properly so, that the appellants' case must fail unless a charitable trust had been created, it follows that the appellants are not entitled to the relief claimed by them, and that the appeal fails and should be dismissed with costs.

If I had come to the conclusion that a charitable trust was created in respect of the $30,000, it would have been necessary to consider whether the relief which the appellants seek could have been obtained by the proceedings then taken. Apart from the difficulty due to the fact that the assets of the bank have

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been realised and distributed among its creditors, and that it has been necessary to make a call upon the shareholders in respect of their double liability to meet the debts of the bank which its assets were insufficient to pay, and that there is no fund in existence, I very much doubt the jurisdiction of the Official Referee to make such an order as the appellants seek to obtain. At most he may have had power under sec. 133 of the Winding-up Act to determine whether or not a trust was created, and, if created, the nature of it. But it is, I think, clear that he had no jurisdiction over the *cy-près* application of the fund, and I incline to the opinion that the petitioners should have proceeded by action, to which the Attorney-General would be a necessary party, and for the bringing of which the leave of the Court should be necessary: sec. 22.

The Attorney-General was a necessary party to the proceedings which the appellants have taken, and up to the time of the argument of the appeal he had not been notified of them, but since the argument he has been communicated with, and has intimated that he is satisfied that judgment should be given without further argument.

Appeal dismissed.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Leitch, J. November 27, 1914.

1. CROWN (§ I—1)—CROWN GRANTS OF WATER LOTS—CONDITION PRECEDENT—GRANTEE AS OWNER OF ADJOINING LAND — STATUS OF LIFE TENANT.

While the practice of the Crown Lands Department is to sell a water lot to the owner of the adjoining land, a Crown grant thereof applied for by the life tenant under the belief that he had been devised the fee will not necessarily be held by him as trustee for his children entitled to the remainder in fee of such adjoining lands.

Statement

APPEAL by the defendant from the judgment of LENNOX, J., at the trial.

The judgment of LENNOX, J., and that of the First Divisional Court of the Appellate Division are reported in 29 O.L.R. 534, 12 D.L.R. 223, 15 D.L.R. 703.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—This case was heard before us on the 7th November,

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1913, and we gave judgment, on the main points, on the 17th November, 1913 (15 D.L.R. 703), but we left open two questions: the one as to costs, and the other as to whether the appellant should be ordered to convey to the respondent the water lot which he contended was held by him as trustee for his children, although it stands in his own name.

The Court suggested to the parties that "the proper course to be taken in the circumstances is, either to direct an inquiry into the title of the water lot, or to retain the action for six months in order to enable the remaindermen, if so advised, to take steps to establish their right."

The parties do not desire to do anything, apparently wishing that judgment be given, when they will shape their course as they may be advised.

We think that the judgment must order the conveyance of the water lot. It is true that the appellant sets up that he is a trustee for his children. Of course, if the action were between him and his children, that would be conclusive, but in this action it has not that effect.

I should have mentioned that the number of the lot is 97, and the water lot is in front of it, on the Detroit river.

The appellant, believing himself to be the owner of the land, under the will of his father, made a lease to the respondent, for a term of years, giving the respondent an option to buy at the expiration of the term. The respondent exercised the option; and, in litigation which subsequently took place, it was determined that the appellant was not owner in fee of the land, but that under the will he was only tenant for life, and on his death the property went to the children.

Judgment has gone for specific performance, with compensation in respect of the interest which the appellant is not in a position to convey.

With regard to the water lot, the facts appear to be that the practice of the Crown Lands Department is to sell the water lot to the owner of the adjoining land; that the appellant, believing himself to be, under his father's will, the owner in fee of lot 97, applied for a patent of the water lot in front of it; that he laid before the Department of Crown Lands an abstract of title,

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and subsequently furnished to the Department an extract from the will, containing the devise under which it was assumed that he took, and that the Crown, evidently under the same impression that the appellant was under, that he was the owner in fee of the land, granted the water lot to him.

We think that, under these circumstances, especially as nothing has been done by the children to assert any title to the water lot, and advantage has not been taken of the delay (now nearly a year) since our former judgment was given, to do so, we must hold that the Crown intended to grant the water lot to the appellant, and that he is, therefore, not a trustee for the remaindermen of the remainder in fee after his life estate for his children. Of course, this decision will in no way bind the children in the event of their seeking hereafter to establish their right to it, but between the parties we determine that it has not been established that the appellant is a trustee of the remainder in fee for his children; and, therefore, specific performance in respect of the water lot will be adjudged.

As to costs, we will not disturb the disposition made by the learned trial Judge of the costs of the action, but there should be no costs of the appeal to either party.

Judgment accordingly.

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LANDES v. KUSCH.

Saskatchewan Supreme Court, Elwood, J. June 30, 1914.

1. VENDOR AND PURCHASER (§ I—1)—AGREEMENT FOR SALE—REMEDIES OF VENDOR—PERSONAL JUDGMENT AND FORECLOSURE—ELECTION BETWEEN.

A vendor suing in enforcement of an agreement of sale made on deferred payments is not entitled to a personal judgment operative during the period fixed for redemption and cancellation and forfeiture at its expiration in the terms of the contract of the purchaser's interest in the land for the deficiency, but must elect when taking judgment which remedy it shall be for.

[*Tytler* v. *Genung*, 12 D.L.R. 426, 16 D.L.R. 581; *Goodacre* v. *Potter*, 18 D.L.R. 352, referred to; *Jackson* v. *Scott*, 1 O.L.R. 488, distinguished.]

Statement

APPEAL from the order of the Local Master allowing foreclosure as well as personal judgment.

The appeal was allowed, limiting the plaintiff to personal judgment.

F. W. Turnbull, for the defendant (appellant).

H. V. Bigelow, K.C., for plaintiff.

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ELWOOD, J.:—In this matter the plaintiff, in his statement of claim, alleges that on or about February 10, 1913, he and the defendant entered into a certain agreement in writing whereby the plaintiff agreed to sell to the defendant and the defendant agreed to purchase from the plaintiff the land therein mentioned on the terms therein set forth; that in default of payment being made of the principal or interest the whole of the purchase money should become due and payable, and further, that on default being made in any of the payments the vendor should be at liberty to determine and put an end to the agreement, and should be at liberty to retain for his own use any moneys paid thereunder, and the lands sold should revert to and revest in the plaintiff; and that the defendant had made default in payment. The plaintiff claims (1) the whole of the principal due and to accrue due under the agreement; (2) judgment for the amount found due; (3) in default thereof, foreclosure and delivery up of possession of said land.

The defendant filed a defence admitting the various allegations in the statement of claim, and alleged a readiness and willingness that the agreement be cancelled and to deliver up the land. The plaintiff, on April 2, 1914, served a notice of motion for an order

> that the plaintiff be at liberty to sign judgment against the defendant for the amount claimed in the plaintiff's statement of claim on admissions of facts in the defendant's statement of defence, or in the alternative for an order to strike out the defendant's statement of defence, on the ground that the same is false, frivolous and vexatious and discloses no reasonable cause of action or answer and that the plaintiff may be at liberty to enter up judgment against the defendant for the amount stated in the plaintiff's statement of claim, and for such other and further order as to this honourable Court shall deem just and expedient.

On the return of the notice of motion the defendant did not deny the right of the plaintiff to foreclosure, but he did object to a personal judgment. The Local Master made an order for personal judgment, and in default of payment thereof within 6 months, foreclosure. From this judgment the defendant appeals on the following grounds, namely: (1) That on the pleadings there could not be a personal judgment; (2) that in any event there could not be both a personal judgment and an order for foreclosure.

As far as the first objection is concerned, it was contended

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that before the plaintiff is entitled to a personal judgment he must in his pleadings aver that he has a good title to the land, and that he has caused to be executed or is ready and willing to execute a conveyance according to the terms of the contract. In support of this contention, an unreported judgment of the Chief Justice on another application in this case was cited, and the cases of *Laird* v. *Pim*, 7 M. & W. 474; *Moor* v. *Roberts*, 4 C.B.N.S. 830; *East London Union* v. *Metropolitan Railway*, L.R. 4 Ex. 309; *Schurman* v. *Ewing*, 7 W.L.R. 610; Dart on Vendors and Purchasers, 7th ed., p. 1002; Williams on Vendors, 2nd ed., p. 30. At the argument I was much impressed by the objection of the defendant that the plaintiff, not having averred in his pleadings a readiness and willingness to perform his part of the agreement by executing a conveyance, he was not entitled to a personal judgment. Since the argument, however, my attention has been called to our r. 154 and the corresponding English rule 210 and the notes thereto in the Annual Practice of 1913, at p. 333. It seems to me that in view of that rule the averment that the plaintiff has a good title and is ready and willing to convey is a condition precedent which would be implied. It was not contended that the plaintiff did not have a good title and had not offered to execute a conveyance. *Laird* v. *Pim*, *supra*, *Moor* v. *Roberts*, *supra*, and *East London Union* v. *Metropolitan R. Co.*, *supra*, were decided before 1875, and prior to that date the plaintiff could not properly draw his statement of claim without making reference to and averring due performance of all conditions precedent: see Annual Practice, 1913, notes to r. 210.

So far as the second objection is concerned, the plaintiff, on the return of the notice of motion before me, filed a notice of abandonment of that portion of the judgment ordering foreclosure and elected to proceed only on the personal judgment, but his counsel on the argument cited cases, and has since the argument given authorities, in support of the contention that the plaintiff was entitled to both a personal judgment and foreclosure. The case of *Goodacre* v. *Potter*, 18 D.L.R. 352, although it decides that the plaintiff under an agreement of sale is entitled to foreclosure as well as a personal judgment, I am of opinion was decided on a misapprehension of law, and it is worthy of note that the defendant appears not to have been represented. The case

of *Tytler* v. *Genung*, 12 D.L.R. 426 (see 16 D.L.R. 581), was cited by Gregory, J., in *Goodacre* v. *Potter*, *supra*, as authority for the proposition that the plaintiff under an agreement of sale was entitled to personal judgment as well as foreclosure. *Tytler* v. *Genung*, however, merely decides that the vendor under an agreement of sale is entitled to bring an action for specific performance and for cancellation, and the order in *Tytler* v. *Genung* was one directing payment of the purchase money within a certain date and in default thereof cancellation.

Mr. Justice Beck, in *Schurman* v. *Ewing*, above mentioned, states distinctly that in his opinion the plaintiff is not entitled to personal judgment as well as cancellation, and he states that by taking personal judgment the vendor would be in a position to continually demand payment due under the agreement of sale on the basis of its continuing in force. The remedies of the vendor are fully set out in McCaul on Vendors and Purchasers, at. p. 150, and these remedies, according to the opinion of the author, do not appear to cover cancellation and a personal judgment as concurrent remedies, but as alternative remedies. Upon a breach of the contract the vendor is entitled at his election either to rescind the contract or to affirm it and sue upon it for damages for breach: Williams on Vendors and Purchasers, vol. 2, p. 948. Ordinarily, and in the absence of a stipulation in the contract, a vendor in an action for rescission would not be entitled to retain any of the payments made under the contract other than the deposit, and the question whether the deposit is to be forfeited on the purchaser's default is one of the parties' intention to be gathered from the whole argument. So if the contract contained any clause inconsistent with such an intention it will be excluded: Williams, pp. 951, 952 and 953.

In the case at bar the agreement contains a stipulation that, in case the purchaser should at any time make default in payment of any of the payments thereinbefore agreed to be paid or any part thereof, the vendor shall be at liberty to retain any sum or sums paid thereunder as and by way of liquidated damages. Of the money sued for, the sum of $15,000 was money which falls due on November 10 in the years 1914, 1915 and 1916, in sums of $5,000 each, and it surely was never contemplated by the parties at the time they entered into this agreement that in case

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a default were made and the vendor sought to recover the money under the acceleration clause that he should be entitled to issue execution therefor and recover practically the whole amount under the execution, and in case there should be a small sum not recovered under the execution then the vendor should be entitled to rescind and retain all the moneys so recovered under the execution. Yet, if the judgment of the Local Master allowing foreclosure as well as a personal judgment were to stand, that might be the effect of the judgment. In a number of cases the analogy of the remedies under an agreement of sale to those under a mortgage is referred to, but, except in *Goodacre* v. *Potter*, 18 D.L.R. 352, above cited, I cannot in any case find it held that the vendor is at the same time entitled to both a personal judgment and an order for rescission. The only case approaching it that I can find is *Jackson* v. *Scott*, 1 O.L.R. 488. In that case there was an order for a personal judgment, which also provided that in the event of the defendant not paying within a reasonable time the plaintiffs might apply for such further relief as they might be advised. There were subsequent proceedings and applications to the Court, but, as was pointed out by Maclennan, J.A., no appeal was taken from the original judgment. From a perusal of the judgment it would appear that the Court approved of the form of the judgment, and intimated that under that judgment a subsequent order might be made for rescission; they, however, expressed no opinion as to whether or not the order was a proper one to make. It must be apparent that it was a very different order from the one in this case. The order in that case merely gave the plaintiff the right to apply for further relief, and it was quite conceivable that if nothing were realized under the judgment the Court might grant a rescission, or might order a sale of the land under the vendor's lien. That is quite different, however, from the present case. In the case at bar the six months for redemption is fixed. During the whole of that period the plaintiff has the right to issue execution, and it might be that on the very last day of the period he might make under the execution the whole of his claim with the exception of $1. Under the terms of the judgment he would then be entitled to obtain the rescission and would be entitled, I apprehend, to retain the moneys realized under the execution.

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I am therefore of the opinion that the Local Master was incorrect in ordering foreclosure as well as personal judgment. The result will be that the order and judgment of the Local Master will be set aside in so far as it declares the plaintiff entitled to foreclosure in default of payment of the judgment, and the remedy of the plaintiff will be for personal judgment. The defendant will be entitled to the costs of and incidental to this appeal.

Appeal allowed.

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New Brunswick Supreme Court, McLeod, C.J. September 4, 1914.

1. INJUNCTION (§ III—147)—PROCEDURE—DECREE—FORMAL REQUIREMENTS—TIME LIMIT—ENDORSEMENT—ISSUING SOLICITOR'S NAME.

Rule 5, Order 41, of the New Brunswick Judicature Rules of Practice does not apply to merely negative orders and it is no objection on a motion to commit for breach of an injunction prohibiting a trespass that the injunction decree was not endorsed with a memorandum and the name of the issuing solicitor under that rule, nor is it an objection that no time was limited for compliance; a time limit is essential only where the judgment or order is to do an act as distinguished from a merely prohibitive order.

[*Selous* v. *Croydon*, 53 L.T. 209; *Hearn* v. *Tennant*, 14 Ves. 136; and *In re Davis*, 21 Q.B.D. 236, referred to.]

Statement

MOTION to commit for disobedience of an injunction. In this case an action was brought by the plaintiff company in 1910 against the defendants, asking that the plaintiff company be declared the owner in fee simple of a certain tract of land containing about 60 acres, situate in Stanley ward, in the city of St. John, and an interim injunction was obtained against the defendant, John A. Segee, to restrain him from trespassing on the said tract of land. The case was tried in July, 1911, and a decree was made declaring that the plaintiff was owner in fee simple of the lands in question. A certain deed of a portion of it which had been given by the defendant, John A. Segee, to the defendant, Mabel M. Ward, was set aside and declared void, and by the decree an injunction was granted as follows:—

That the said defendants, John A. Segee and Mabel M. Ward, and each of them, the workmen, servants and agents of them and each of them, are and each of them is and be perpetually restrained and enjoined from entering upon or trespassing upon the said hereinbefore described lands and premises or any part thereof, and from committing any waste or spoil thereunder, or upon continuing or repeating any trespass thereupon or upon any part thereof, and from conveying mortgaging, leasing or disposing of or dealing with, and from attempting to convey mortgage, lease or dispose or deal with the same or any part thereof in any way whatsoever.

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Copies of this decree were served on both the defendants in the month of November, 1911, and the plaintiff company on the thirtieth of that month was put in possession of the premises, and continued in possession until some time in May last past, when the defendant, John A. Segee, trespassed on the said land and erected a building thereon, and had posted up upon the said lands and premises printed notices signed by him warning all persons from trespassing on the said lands and premises. On May 21 last the plaintiff company caused to be served on the said defendant, John A. Segee, the following notice:—

St. John, N.B., 20th May, 1914.

MR. JOHN A. SEGEE,
City.

Dear Sir,—It has just come to our notice that you are committing a breach of the injunction issued against you on the 31st day of July, 1911, restraining you, your workmen and servants, from entering upon or trespassing upon our lands and premises in the city of St. John, where we understand you are now proceeding to build a house. We beg to notify you that unless you desist at once, and remove any materials from the premises in question by Saturday, the 23rd instant, we shall make an application to the Chancery Court to have you committed for contempt of Court by reason of your breach of this injunction order. We might also point out to you that, if we obtain this order, as we undoubtedly will, you can be imprisoned, and we would therefore suggest that you at once desist from any further trespass upon our property.

Yours, etc.,
(Sgd.) TURNBULL REAL ESTATE CO.,
By F. P. STARR, President.

When the said defendant, John A. Segee, was served with the said notice, he simply replied that he was ready for them. On June 25 last past, the plaintiff company again served the defendant, John A. Segee, with a copy of the decree made in the action on July 31, 1911, on which was endorsed the following:—

If you, the within named John A. Segee, neglect to obey this judgment or order or decree by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment or order or decree.

The notice that this motion would be made was, together with the affidavits, served on the defendant on July 31, and was for August 11. The defendant, Segee, appeared by his counsel, but made no affidavits in reply to the affidavits served. This motion is to commit him to the common gaol of the city and county of St. John for contempt in not obeying the decree of this Court made on July 31, 1911. Upon the return of the summons on

August 11, the defendant, Segee, appeared by counsel, and objected to an order for commitment being made. He read no affidavits in reply to the affidavits served, and did not deny that the defendant had committed a breach of the injunction.

Order accordingly.

William A. Ewing, K.C., for plaintiff.

Herbert J. Smith, for defendant.

McLEOD, C.J.:—I do not think there is anything in any of the objections taken. I will only refer particularly to one. He claimed that the decree as served was endorsed on the back under O. 41, r. 5, but the name of the solicitor was not endorsed on it. Second, he claimed that the order of commitment could not be made because there was no time limited in which the act was to be done. Rule 5 does not apply to such a case as this. It only applies to a judgment or order to do an act, but does not apply to a prohibitive order. In this case the defendant is not required to do an act, but is prohibited from doing something; that is, he is prohibited from trespassing on the plaintiff's land and from continuing or repeating any trespass thereon. In Annual Practice 1914 p. 698, it is said, referring to this rule: "The rule only applies to a judgment or order to do an act; it does not apply to merely prohibitive orders."

In *Selous* v. *Croydon, etc.*, 53 L.T. 209, the Court had granted an injunction restraining the defendants from polluting with sewerage a pool belonging to the plaintiff, but suspended the order for three months to allow them to comply with it. The defendant company moved for further time, which was refused, and as they failed to obey the order the motion was made for sequestration. Among other objections taken, it was objected that no memorandum had been endorsed upon the copy of the judgment served upon them, as required by r. 5, O. 41, which is the same as r. 5, O. 41, of the Judicature Act. Chitty, J., held that that rule did not apply to what he termed a negative order. He says:—

> No actual service of an injunction is necessary, but any notice is sufficient; if that were not so, the moment a judgment is pronounced to restrain any act a man might immediately go and commit the very act he was restrained from doing, and then say, "I have not been served with any writ restraining me." The result is that I have no doubt that r. 5 of O. 41 does not apply to a negative order, but refers to quite a different class of order from that made by the judgment of Denman, J., in the present case.

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See also *Hudson* v. *Walker*, 64 L.J. Ch. 204, and *In re Deakin, ex parte Cathcart*, [1900] 2 Q.B. 478. Other cases may be cited shewing that where a party is simply prohibited from doing an act the rule does not apply. In this case the defendant was simply restrained from trespassing on this portion of the plaintiff's land, or continuing to trespass on it, and when he had actual notice of that order he was obliged to obey it.

The plain facts of the case are that in 1911 an injunction was granted against the defendant, Segee, restraining him perpetually from trespassing upon this land, or continuing to trespass upon it. He was put out of possession of the land in November, 1911, and remained out of possession, and obeyed the injunction until May of this year. Then in May of this year, in defiance of the order of the Court, he again trespassed on the land, and continues to trespass on it. He was served with the injunction in November, 1911. That fact appears by affidavits that are on file with this Court, and to those affidavits I have a right to refer. He was also served a second time with the injunction on June 25 last past, but, notwithstanding that, he continues to trespass upon the land. A party is obliged to obey an injunction if it comes to his knowledge that the injunction has been granted, although it has not actually been served: see *United Telephone Co.* v. *Dale*, 25 Ch.D. 778. In *Hearn* v. *Tennant*, 14 Ves. 136, it was held that a party was liable for contempt for breach of an injunction if he were present in Court during the motion, though absent when the order was pronounced. The Lord Chancellor says:—

> If these parties by their attendance in Court were apprised that there was an order, that is sufficient, and I cannot attend to a distinction so thin as that persons standing here until the moment the Lord Chancellor is about to pronounce the order, which from all that passed they must know will be pronounced, can by going out of the hall at this instance avoid all the consequences.

That case appears to have been always followed. In the present case, however, there is no question about the service of the order of the injunction. There is no question but that the defendant knew that he was enjoined from trespassing or continuing or repeating any trespass on this portion of land. His act is simply an open, wilful, flagrant and impudent disobedience of an order of this Court. The Court has power to enforce its orders, and

will do so, if need be, by commitment. The Court will go further, and will commit a man who although not bound by the injunction has aided and abetted a defendant in a breach of an injunction: see *Seaward* v. *Paterson*, [1897] 1 Ch. 545; see also *Avery* v. *Andrews*, 30 W.R. 564.

It is unnecessary to cite authorities as to the right of the Court to commit for a breach of an injunction as it is well known that the Court has that power and will exercise it, and more, particularly will it exercise it in the case of a wilful, flagrant breach of the injunction. Whilst Courts are jealous of the liberty of the subject, they are also jealous to see that the orders made by the Court are obeyed, and when a party to a case openly and wilfully disobeys the order of the Court it always deals with him and deals with him strongly. I agree entirely with what is said by Lord Coleridge, C.J., in *In re Davies*, 21 Q.B.D. 236. In that case, in 1885, an injunction was obtained by the plaintiff restraining the defendant and her agents from further molesting the owner and tenants of an estate, but she continued to molest them, and endeavoured to take possession of the estate, and in December, 1886, was imprisoned for contempt of Court; and she refused to give an undertaking to desist from molesting the plaintiffs, and she remained in custody until June, 1888; then an order was made discharging her on certain terms which had been assented to by the counsel for the plaintiff. Lord Coleridge, C.J., at p. 240, says:—

> Where the Court has given its decision, and the person against whom the Court has decided defies the Court, ignores its decision and persists in persecuting the person in whose favour the Court has decided with groundless claims and vexatious actions, however reluctant the Court may be to do so, it has, in my opinion, no choice but to enforce its judgments by the imprisonment of the contumacious person.

That applies with great force to the present case. I will therefore make an order to commit the defendant, John A. Segee, to the common gaol of the city and county of St. John for contempt in disobeying the order of the Court, and he must also pay the costs of this motion.

Order accordingly.

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PAGE AND JACQUES v. CLARK.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 9, 1914.

1. VENDOR AND PURCHASER (§ I E—27)—CONCEALMENT AS TO REAL PURCHASER—BAR TO SPECIFIC ENFORCEMENT, WHEN.

Where negotiations for the purchase of land are carried on with the knowledge by the party on whose behalf the purchase is really being made, that the vendor would not sell to him at the price, the concealment or misrepresentation of the identity of the real purchaser acting in the name of another is ground for refusing specific performance asked jointly by the nominal purchaser and the real purchaser to whom the former had assigned his interest.

[*Gordon* v. *Street*, [1899] 2 Q.B. and *Archer* v. *Stone* (1898), 78 L.T.R. 34; *Smith* v. *Wheatcroft*, 9 Ch. 223, applied.]

2. CONTRACTS (§ VI B—415)—ACTIONS—DEFENCES — CONSIDERATION — REAL PARTY CONTRACTED WITH—ESSENTIAL ELEMENT.

Whenever the consideration of the person with whom one is willing to contract enters as an element into the contract he is willing to make, error with regard to the person destroys the consent and is ground for annulment of the contract.

[*Smith* v. *Wheatcroft*, 9 Ch. D. 223; *Smith* v. *Kay*, 7 H.L.C. 750; *Pulsford* v. *Richards*, 22 L.J. Ch. 559, referred to.]

3. APPEAL (§ VII L—470)—REVIEW OF FACTS—FINDING BY TRIAL JUDGE WITHOUT JURY—INADMISSIBLE EVIDENCE BASING FINDING—EFFECT ON APPEAL.

The rule by which ordinarily an appellate court will not reverse a finding of fact by the trial judge hearing a case without a jury where such finding is based on the credit to be given to the witnesses, is displaced if the trial judge wrongly admitted testimony on matters not material to the issue in contradiction of the answers given on cross-examination of one of the witnesses whose testimony he discredits because of the wrongly admitted evidence.

Statement

APPEAL by the plaintiffs from the judgment of LENNOX, J., in an action for specific performance.

The appeal was dismissed, except as to counterclaim.

E. D. Armour, K.C., and *F. D. Davis*, for the appellants.

E. S. Wigle, K.C., for the defendant, the respondent.

Meredith, C.J.O.

March 9. MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment dated the 13th October, 1913, which was directed to be entered by Lennox, J., after the trial before him, sitting without a jury, at Sandwich, on the 28th May, 1913.

The appellants sue for specific performance of an agreement dated the 28th October, 1912, by which the respondent agreed to sell to the appellant Jacques a farm in the township of Sandwich West for $13,300, and which was assigned by Jacques to the appellant Page, by deed dated the 6th January, 1913.

By his statement of defence the respondent alleges that it was

represented to him by A. F. Healy, a solicitor, that the United States Steel Company intended to establish a plant in the township of Sandwich West, in the vicinity of the respondent's farm, and that the respondent was induced to enter into an agreement dated the 9th September, 1909, which is afterwards referred to as "the syndicate agreement," with Jules Robinet, William Parker, and Healy, by which it was agreed that the respondent's farm should be subdivided into lots and placed upon the market for sale, and that the appellants had knowledge of the agreement (para. 3); that nothing was done under it, except that a survey of the farm was made and stakes were planted; that the plan was not registered; that no sales were made; that the respondent had been deprived of the use of the farm; that Healy, pretending to be acting in the interest of the respondent, but in reality acting on behalf of the appellant Page and himself, on or about the 23rd October, 1912, "falsely represented to the" respondent "that the said steel plant (*sic*) had abandoned all thought of establishing its plant in the township of Sandwich West;" and that he "was anxious to obtain what money he had spent in the subdivision of the said farm, and that also Jules Robinet, who was associated with him, was anxious to obtain his money, and that he had obtained a purchaser for the farm in the person of the plaintiff A. Jacques, who wanted the farm for his son for farming and gardening purposes, and that he was willing to give $13,300 for the same, urging that it was all it was worth for farming purposes" (para. 4); that on or about the 24th October, 1912, Healy, accompanied by Jacques, went to the farm, and again represented to the respondent that Jacques was purchasing the farm "for himself, and intended to place his sons thereon, and that no one else was interested in the said purchase;" and that Healy again represented that "the steel plant was not coming to Sandwich," and that the respondent "had better sell for the price mentioned, as it could only be valued at farming prices;" and that the respondent, "relying upon these representations, entered into the contract" sued on (para. 5); that Jacques had conspired with the appellant Page to obtain the agreement, and they were acting on the latter's behalf when the agreement was made, and the money paid to the respondent on

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the execution of the agreement was the money of Page, and Jacques never intended to purchase for himself, but was acting solely for Page, "in pursuance of an agreement previously made" (para. 6); that the appellants and Healy knew that the respondent would not sell to Page, as he had before refused to let him have any interest in the syndicate agreement, and that "Jacques and his agent Healy, knowing this fact, entered into a conspiracy with Page, intending to misrepresent the facts to the" respondent, "and obtain the contract of sale . . . well knowing that, if the name of Page was mentioned to the" respondent, "no contract could be made with him" (para. 7); that the syndicate agreement was registered, and that the appellants knew of its registration, "but it was represented to the" respondent "that a release would be obtained from Robinet and Parker," and "Healy would release all his interest in the said lease (*sic*), on receipt of the amount mentioned in the agreement of the 24th October, 1912, but Healy had not obtained the release of Parker, and Robinet, who joined" in that agreement, had already on that date assigned his interest in the syndicate agreement to the appellant Page, without the knowledge of the respondent; and that this was brought about by Page, "for the purpose and with the intent of obtaining the property of the defendant, well knowing that he could not otherwise obtain it if it were known that he were the purchaser" (para. 8); that the syndicate agreement, the assignment of it, and the agreement sued on, had all been registered, and that the respondent "has been deprived of the use and benefit of his farm, and has suffered damage by reason of the wrongful acts of the plaintiffs as alleged herein" (para. 9); that the appellants, through the misrepresentation and fraud alleged, "well knowing that the facts as represented to the defendants (*sic*) were untrue, but made with the intention of inducing him to enter into the contract sued upon, and by conspiracy, intending to obtain the property of the defendant, did obtain said contract, and the defendant has suffered damage by reason thereof;" and the respondent counterclaimed for damages for the misrepresentations, fraud, and conspiracy alleged, and to retain the money received by him on account of the purchase-price as damages (paras. 10 and 11).

The syndicate agreement, besides providing for the survey into lots of the respondent's farm, provides that Parker, Robinet, and Healy shall advance all money necessary for procuring the plan of the property and other preliminary expenses, and that the proceeds of the sales, after expending what was necessary to release lots from the mortgage on the farm, shall be paid to the respondent "up to the amount of $10,000, less any amount needed for expenses, and less any amounts that may have been advanced to him by the other members of the syndicate," and that each member of the syndicate shall receive one-quarter of the proceeds of the sales in excess of $10,000 "after all expenses paid." The agreement also provides that all the members of the syndicate shall do everything possible to "help sell all the property and to be paid nothing for services;" that the respondent was to assist the engineer in surveying the property; and that Healy should act as secretary without pay except the ordinary charges for drawing deeds as solicitor for the syndicate.

The syndicate agreement contains other provisions to which it is not necessary to refer, and it excepts from it a lot to be reserved by the respondent, where his house stands, having a frontage on the Malden road of 270 feet by a depth of 500 feet.

The agreement sued on, besides providing for the sale of the farm to Jacques, contains a provision in these words: "And we, Jules Robinet, A. F. Healy, and William Parker, having an agreement with David Clarke registered against the lands hereinafter described, hereby agree to sign a release of the same at any time on being paid the following amounts: Jules Robinet, $47; A. F. Healy, $404; and William Parker, $404."

The agreement is under seal, and is signed by the respondent and Robinet and Healy, but not by Parker.

This action was begun on the 2nd May, 1913, and on the 3rd day of the previous February an action was commenced by the respondent against Robinet and Healy to compel them to release their rights under the syndicate agreement.

The two actions came on for trial at the May sittings at Sandwich; and, according to the stenographer's notes, this action was tried on the 28th and the other action on the 28th and 29th, although from what is noted of the proceedings it would appear that the other action was tried first.

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By his statement of claim in the other action, the respondent alleges the making of the syndicate agreement, which is set out in full; that the farm was never placed upon the market for sale; that the defendants "claim to have expended some money under and by authority of" the agreement; and that on or about the 14th October, 1912, they agreed with the respondent to release their claims, "for the consideration as follows, to the said Jules Robinet $47, and to the said A. F. Healy $404;" that the respondent had tendered these amounts and a formal release for execution, but they had refused to execute the release; that neither of them had expended the amount agreed to be paid to him, but that the respondent was willing to pay the agreed amounts; and the claim of the respondent is for judgment declaring his lands free from the claim of the defendants.

The learned trial Judge gave judgment for the respondent in this action "upon the broad ground that the plaintiffs are not entitled to any assistance from the Court, because the so-called contract was induced by fraudulent representations of the plaintiffs and their agent, knowingly made to the defendant, and in pursuance of a fraudulent scheme;" and he found that "the representations were material and were ignorantly accepted and acted upon by the defendants as true;" he speaks of Healy as the "confidential friend and business associate" of the respondent, and expresses regret that Healy allowed himself "to become solicitor for and agent of the plaintiff Page in a transaction which he knew was not what it appeared to be, and this without divulging his change of attitude" to the respondent.

The learned trial Judge accepted the respondent's evidence as substantially true, and says that he felt compelled to give credit to it where it conflicted with the evidence of Healy, and that "all the main statements of fact in paragraphs 4, 5, 6, and 7 of the statement of defence" were, in his opinion, "well borne out by the evidence at the trial." And he gave judgment dismissing the action with costs and for the respondent on his counterclaim for the retention of the money paid on account of the purchase-money as damages, holding that the respondent, "by the delay, the tying up of his property, and the disorganisation of his plans," had sustained damages to that amount or

more; and he set aside the agreement of sale and ordered it to be delivered up to be cancelled and the registration of it to be vacated.

In the other action he gave judgment directing that the plaintiffs' costs should be taxed against the defendants, and the amount of them set off "against $451 agreed to be paid to the defendants;" that the balance, if any, should be paid into Court subject to further order; and that, upon payment of the balance into Court, judgment should be entered declaring "that the land in question is released and discharged from the syndicate agreement and all claims arising out of or connected with it except the interest or claim, if any, of William Parker, and for the balance of the taxed costs, if they exceed the said sum of $451."

It is somewhat singular that the statement of claim in this action contains no direct allegation that the representations alleged to have been made by Healy as to the intention of the United States Steel Company were not what it is alleged they were represented by Healy to have been.

There is a direct conflict between the testimony of the respondent and that of Healy as to the alleged representation with regard to the intentions of the steel company having been made. As I have said, the learned Judge accepted the testimony of the respondent in preference to that of Healy. Ordinarily, where a finding of fact is based upon the credit given to the witnesses, an appellate Court is not justified in reversing it, but there are circumstances in this case which, in my opinion, warrant us in not applying this rule. In the other action the learned trial Judge permitted evidence to be given to contradict the testimony that had been given by Healy on cross-examination, when asked whether, after the interview with the respondent on his farm, where it is alleged the representations were made, he had not gone directly to the farm of Mrs. Boyd and told her that the steel plant was not coming. After the close of the defence and against the protest of counsel for the defendants, the learned trial Judge allowed Mrs. Boyd and her husband to be called to contradict this testimony of Healy, which they did; Mrs. Boyd testifying that Healy told her that he did

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not think the steel plant was coming, that he did not know whether the steel plant was coming; and her husband, that Healy said the steel plant would never come.

Apart from any difficulty arising from the omission to lay a proper foundation for calling a witness to contradict Healy, and the nature and form of the questions which counsel was permitted to put to Mrs. Boyd and her husband, the evidence was not admissible under any circumstances or conditions. The matters as to which it was sought to contradict Healy were matters not material to the issue, and his answers as to them were conclusive.

It is clear, from the observations of the learned Judge in ruling that the evidence was admissible, that he deemed that it would be material as to the credibility of Healy. He there said, "They will be material as to whether I can accept Mr. Healy's evidence or not;" and again, "On a question of credibility they might, if time and place and circumstances are called to their attention;" and there can be little doubt that because of this evidence the learned Judge was led to give credit to the respondent rather than to Healy; but it is enough to displace the rule, that it was admitted; and, if the action had been tried by a jury, it would have been enough to entitle the defendants to a new trial if the evidence wrongly admitted might have influenced them in coming to their conclusion.

I am unable to agree with the conclusion of the learned Judge as to alleged misrepresentation with regard to the attitude or intentions of the steel company. The only evidence to support the allegation that the misrepresentations mentioned in the statement of defence were made by Healy is the testimony of the respondent, which is met by the positive testimony of Healy to the contrary.

The probabilities are, I think, in favour of the view that the testimony of Healy is in accordance with the fact. It seems impossible to reconcile with the respondent's testimony his admissions on his examination for discovery and again at the trial.

Upon his examination for discovery he gave the following answers:—

"Q. 90. You did not tell Jacques that the steel plant was

coming and that he was going to make quite a bit out of it? A. No, sir.

"Q. 91. The steel trust was not mentioned? A. Yes, it was.

"Q. 92. Who mentioned the steel trust? A. I did.

"Q. 93. What were you saying about it? A. I told him, 'If you once buy the farm, and the steel trust comes, your sons won't lose anything on the farm if they can't raise vegetables.' "

Upon his cross-examination at the trial he confirmed these answers, and in answer to the question, "When you said that, you must have had information that the steel trust might come there?" his reply was, "I said if it did come;" and again, in answer to the question, "You must have had information that it was coming, you said to Jacques, 'Your sons will never lose anything?' " his reply was, "I said if the steel trust came they would not lose anything." And, further, in reply to the question, "Did you mention anything about the steel plant yourself?" his answer was, "Down at the house;" and to the further question, "Yes?" he replied, "I said, 'If the steel plant comes here your sons won't lose any money;' that was what I said to Mr. Jacques and Mr. Healy both."

These statements made by the respondent are quite inconsistent with the fact being that Healy had told him that the steel plant was not coming, but are consistent with what Healy testified was said by him, which he detailed as follows: "Mr. Clark asked me—he made a speech to Jacques and told him that he would make $100,000 profit if they came, and he expected that they would come next spring, and he turned to me and asked me, 'Do you think they are coming?' and I said, 'I do,' and he asked me when, and I said I did not know, and he said, 'I have talked to Mr. McMeath and sold him my land, and know they are coming.' "

Besides all this, it is difficult to see what motive Healy could have had for misleading the respondent as to the intentions of the steel company. There is nothing to indicate that Healy was to have any interest in the purchase or to benefit in any way by it; but, on the contrary, under the syndicate agreement he was entitled to one-fourth of all that the farm sold for in excess of $10,000; and he was, therefore, interested in its being sold for as much as it was possible to get for it.

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It is very doubtful whether anything that passed between the parties as to the intentions of the steel company was more than an expression of opinion with regard to a matter as to which none of them had any knowledge and about which opinions differed, as the respondent admits they did. There is no reason to think that the respondent supposed that Healy was possessed of information that others had not; the reason put forward by the respondent upon his cross-examination at the trial (p. 17) for thinking that Healy had such information was not such as would lead a man of the intelligence of the respondent to come to that conclusion; and it is difficult, if not impossible, to accept his testimony on this point.

For these reasons, I am of opinion that, so far as these alleged misrepresentations are concerned, the defence failed. I am, however, of opinion that the respondent was entitled to succeed upon the other ground of misrepresentation set up by him.

That Jacques was sent by Page to buy for him, and that he untruly stated to the respondent that he was buying for himself, and intended that his sons should use the land for farming and gardening purposes, is not denied, nor is it open to question upon the evidence that the respondent would not have sold to Page upon any terms, and that this was known to the appellants and to Healy. Admittedly, the sending of Jacques as the ostensible purchaser, and doubtless the story he told as to his buying for himself and the use to which he intended to put the land, were part of a plan to which the three of them were parties, designed to conceal from the respondent the fact that the prospective buyer was Page; and it was quite immaterial, I think, for the purpose of the application of the principle of the cases to which I shall refer, whether this plan was adopted and carried out because it was known that the respondent would not sell to Page on any terms, or because, as testified by Healy, if the respondent had known that Page was the intending purchaser, he would have demanded a larger price.

The rule of the civil law as to error with regard to the person with whom another contracts is thus stated in Pothier's Law of Obligations, para. 19: "Does error in regard to the person with

whom I contract destroy my consent and annul the agreement? I think this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

The common law of England in this respect is the same as the civil law, and was so treated by Fry, J., in *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223, 230, which, upon the facts as found by the learned Judge, fell within the second branch of the statement of Pothier, and by A. L. Smith, L.J., in *Gordon* v. *Street*, [1899] 2 Q.B. 641, 647.

This is the rule of law applicable to error, apart from any question of fraudulent misrepresentation as to the person with whom the contract is about to be entered into; and the rule as to this is, that where there is fraud material to the inducement which brought about the contract, the person defrauded may set up to an action on the contract the defence that he was induced by fraud to enter into it.

Such a case was *Gordon* v. *Street*. The action was brought on a promissory note, and the defence was that the defendant was induced to borrow the money and to give the promissory note by the fraudulent representation of the plaintiff that he was one Addison, and that the defendant would not have done so if he had known that Addison was in fact the well-known money-lender Isaac Gordon; and that he had repudiated the contract within a reasonable time after he discovered that Addison was Gordon. The case was tried before Bucknill, J., with a jury, and questions were left to the jury. The following were the questions and the answers to them: "Q. (1) Did the plaintiff intentionally conceal from the defendant that he was Isaac Gordon to induce him (the defendant) to borrow money from him as if from another, and, if so, was the defendant so induced?

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A. Yes. (2) Did he, Isaac Gordon, do so fraudulently? A. Yes. Q. (3) Did the defendant contract with Addison believing him to be a money-lender of that name? A. Yes. Q. (4) Did the defendant repudiate the contract as soon as, or within a reasonable time after, he discovered that Addison was really Gordon? A. The defendant repudiated the contract within a reasonable time after he knew he could do so." In his reasons for judgment the Lord Justice pointed out that the question was not whether the fraud was material to the contract entered into, but whether it was material to the inducement which brought about the contract; and, after stating that, this being the case, and the jury having found the fact of fraud, he could not doubt that "the fraudulent concealing of the plaintiff's name was that which induced the defendant to enter into the contract . . . and was, therefore, material to the inducement," later on the Lord Justice said (p. 646): "I am by no means prepared to say that the fraud in this case was not material to the contract itself. But, whether it be so or not, I will refer to a passage in the judgment of the Lord Chancellor (Lord Chelmsford) in the House of Lords in *Smith* v. *Kay* (1859), 7 H.L.C. 750, at p. 759, when dealing with the contention of the materiality of a representation, which passage is very much in point. He says: 'But can it be permitted to a party who has practised deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?' I apply this to the present case. There is also a passage in the judgment of the Master of the Rolls (Sir John Romilly) in *Pulsford* v. *Richards* (1853), 22 L.J. Ch. 559, at p. 562, pertinent to this question, but I need not cite it at length."

It may be said that the object of the concealment of the real lender in this case was dictated by much worse motives than was the deception practised upon the respondent in the case at bar, but that is, in my opinion, only a question of degree and is immaterial.

Archer v. *Stone* (1898), 78 L.T.R. 34, decided by North, J., is in its facts not unlike the case at bar. The action was one for specific performance of an agreement for the sale of a leasehold

shop by the defendant to the plaintiff Archer. The shop was occupied by a Mrs. Smith and her sister, who held under an under-lease from the defendant, and the business carried on in it was managed by the husband of Mrs. Smith. The defendant also owned another near-by leasehold shop, which was occupied by Archer as tenant of the defendant. Archer purchased from the defendant the leasehold shop occupied by him; and, after his purchase, Smith said to him that he wished to purchase the other shop, and asked Archer to find out for what price the defendant would sell it. The defendant had had a quarrel with Smith, and it was known to Archer and Smith that the defendant would not willingly sell either to Smith or to his wife and sister-in-law. Archer saw the defendant and asked him what price he would take for the shop, and he ultimately agreed to sell it for £900 if Archer could find a purchaser at that price. Archer then went to Smith and told him he could get the property; and, after consultation with his wife and sister-in-law, Smith verbally agreed with Archer that, if he could get it at £1,000 or under, Smith or the two ladies would take it and pay Archer a commission of five per cent. Smith then gave Archer a cheque for £50 to pay the deposit, which Archer cashed, and he then went to the defendant and told him he had sold the property, and offered him as deposit £50 in notes and gold. The defendant then wrote out a receipt for the £50, stating that it was received from Archer "being a deposit on account of the purchase of my interest in the leasehold premises . . ." and the price, £900, and the terms of sale, and the defendant signed the receipt and handed it to Archer. As found by the learned Judge, once before he began to write the receipt and again before he handed it over, the defendant said to Archer, "Look here, Mr. Archer; you are not purchasing on behalf of Mr. Smith or his nominees?" to which on each occasion Archer answered "No." The next day Mr. and Mrs. Smith signed an agreement to purchase the premises from Archer for £970. Five days afterwards, the defendant, having heard that Archer had really bought for Smith, wrote asking for a written contradiction and refusing to proceed without it. On the following day an agreement was signed by Archer and Mrs. Smith and the sister-in-law, embodying the

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terms of the previous agreement signed by Mr. Smith and his wife. Before action, Archer formally assigned by deed his contract with the defendant to Mrs. Smith and the sister-in-law; and the action, to which Archer, Mrs. Smith, and the sister-in-law were parties plaintiff, was brought. At the trial the defendant testified that if he had known that the property was to be bought by Smith or any of his party he would not have sold.

In delivering his judgment dismissing the action with costs, the learned Judge, after finding what I have just mentioned, said: "It is clear to my mind that the statement that, if Stone had known the property was to be bought by Smith or any of his party, he would not have sold, is true, and I am satisfied that all the parties concerned knew this, and put their heads together to outwit Stone. Under these circumstances I think the law is clear. It is true that a man may with impunity tell a lie in gross in the course of negotiations for a contract. But he cannot, in my opinion, tell a lie appurtenant. That is to say, if he tells a lie relating to any part of the contract or its subject-matter, which induces another person to deal with his property in a way in which he would not do if he knew the truth, the man who tells the lie cannot enforce the contract."

The view of Mr. Justice North is supported by the opinions of eminent Judges, and of these I may refer to the following:—

In *Bonnett* v. *Sadler* (1808), 14 Ves. 526, 528, Lord Eldon said: "I do not enter into the question in the case of *Phillips* v. *Duke of Buckingham* (1683), 1 Vern. 227; but, with reference to such a transaction as was the subject of that case, though certainly Lord Thurlow (*Lord Irnham* v. *Child* (1781), 1 Bro. C.C. 92, 95) intimated a doubt whether a man treating with a third person, in trust for a second, whom he had refused to deal with, could therefore set it aside, I cannot possibly admit that it may not under some circumstances be a decisive answer to a bill for the specific performance of an agreement."

In a note to *Phillips* v. *Duke of Buckingham* (note 1, p. 227), a case of *Harding* v. *Cox*, Hill, 21 Geo. II., is mentioned, the facts of which, as stated, were that Harding treated with Cox for the lease of a house, and pretended he took it for one Evans, a barber, and articles were entered into. Harding brought a

bill for specific performance of the articles, and Cox by his answer alleged that it was not taken for Evans, but for a coffee-house man who lived at the back of the house, and who proposed throwing it into his coffee-room, and suggested that the name of Evans was only used as a blind. At the hearing, the defendants failed in their proof, but Lord Hardwicke said that if they had been able to prove the fraud he would have dismissed the bill with costs, on the authority of *Phillips* v. *Duke of Buckingham*.

In *Nelthorpe* v. *Holgate* (1844), 1 Coll. 203, which was a suit for specific performance of an agreement entered into between one Holmes and the defendant for the sale of a manor, Holmes acting in the transaction for Sir John Nelthorpe, but not disclosing the fact that he was doing so, the Vice-Chancellor came to the conclusion, upon the evidence, that Sir John Nelthorpe, Mr. Grantham, his agent, and Holmes, "all, from the beginning and throughout, believed Mr. Holgate to be less likely to treat with Sir John Nelthorpe for the purchase than with any other person, and, if treating with him, to be likely to ask from him a price larger than Mr. Holgate would ask for any other person . . ;" but, as it was not shewn that any misrepresentation was made to the defendant or his solicitor, unless "so far, if at all, as it was a tacit misrepresentation in Mr. Holmes to deal as he did, without disclosing the circumstances that I have mentioned. Subject only to this qualification, if it is a qualification, the contract of March, 1841, must be viewed as one in all respects perfectly fair on the purchaser's part. The price may, upon the evidence, be considered as not only sufficient, but high."

After saying this, the Vice-Chancellor pointed out that there was neither allegation nor proof nor reason "to suspect that Mr. Holmes, or Sir John Nelthorpe, or Mr. Grantham, or any solicitor or agent of Sir John Nelthorpe, in answer to any question put to either of them or otherwise, has, at any time or upon any occasion, before or since the contract of March, asserted that Mr. Holmes was concerned or engaged in the treaty or contract of March, not as an agent, or not as a trustee . . ;" and later on said that he had looked in vain through the answers for an assertion or a suggestion on the part of the defendant "that he had ever refused, or declined, or expressed or felt any disin-

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clination to treat or contract with Sir John Nelthorpe, or to sell to him; or that Mr. Holgate, if he had known or suspected Sir John Nelthorpe to have, or to be intended to have, the benefit of the purchase, or an interest in the purchase, would not have entered into the contract; or that there was any ground of objection to dealing with Sir John Nelthorpe; or that Mr. Holgate would or might have obtained better terms from Sir John Nelthorpe than from any other person, or a better price if he had known the real circumstances; or that he acted on the faith that Holmes was a principal and not an agent in the matter, or anything to any such effect." And again: "Why, then, it may be asked,—if Mr. Holgate deemed the question for whom Holmes was contracting with him, one of any importance,—if he thought it a matter of consequence whether the estate that he proposed to alienate was to be enjoyed by this or that man,—if it was an interesting point to be satisfied from what purse the money to be paid to him was to proceed,—or if he considered one man likely to be more malleable or flexible, more liable to pressure, or less cool in the operation of a bargain than another, and that this might be fairly made a source of gain,—was not a question asked by him or Mr. Owston of Mr. Holmes or his solicitor, the answer to which, if false, might possibly have given a defence against the contract; if true, or evasive, might possibly have stopped the progress of the transaction?"

In the case at bar the representation made by Jacques as to the purchase being for himself and as to the use to which he intended to put the farm was, using the language of North, J., a lie appurtenant, that is to say, a lie relating to part of the contract or the subject-matter which induced the respondent to deal with his property in a way he would not have done if he knew the truth.

The representation was designed to conceal from the respondent, or to prevent him from suspecting, that Page was the real purchaser, and was in effect the same as if the respondent had asked Jacques whether he was buying for Page, and Jacques had answered that he was not. As was said by Lord Romilly, Master of the Rolls, in *Pulsford* v. *Richards*, 22 L.J. Ch. 559, at pp. 562-3, a misrepresentation "may be positive or negative," and "it

may consist as much in the suppression of what is true, as in the assertion of what is false."

It is unnecessary to express an opinion as to whether, if Jacques had been silent, and had not made any representation, the respondent would have been entitled to refuse to perform the contract. The lie he told may have been a gratuitous one, but it was, nevertheless, also, in the language of North, J., a lie appurtenant, relating to the contract or its subject-matter, by which the respondent was induced to deal with his property in a way in which he would not have done if he knew the truth, and disentitles the appellant to enforce the contract.

If it be necessary to entitle the respondent to succeed that it should be shewn that the representation was made fraudulently, according to the finding of the trial Judge that has been shewn, and I see no reason for differing from his conclusion. That it was also material to the inducement to the respondent to enter into the contract I have no doubt; and it is not open to the appellants, having prastised deception with a view to inducing the respondent to enter into the contract, and having succeeded in doing so, "to speculate upon what might have been the result if there had been a full communication of the truth."

There remains to be considered the question whether the respondent, by bringing the action against Robinet and Healy, has elected to affirm the agreement with the appellant Jacques. That action, according to the statement of claim, was not based upon the agreement of the 24th October, 1912, but upon an agreement made on that day between the respondent and Robinet and Healy, and the agreement of the 24th October, 1912, was used at the trial only as evidence of the agreement upon which the action was based. Viewing what was done by the respondent in the light of this, I do not think that by bringing the action against Robinet and Healy the respondent elected to affirm the agreement.

I am inclined to think that the stipulation in the agreement of the 24th October, 1912, was not made with the respondent, but with the appellant Jacques; and, if that be the correct view, it was not one which the respondent could enforce; and I do not see how, even if the action against Robinet and Healy had been

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an action to enforce the stipulation, the respondent can be said, by bringing it, to have elected to affirm the agreement with Jacques. If the stipulation were to be treated as made by Robinet and Healy with the respondent, the agreement of the 24th October, 1912, constituted two separate and independent agreements, one by the respondent with the appellant Jacques and the other by Robinet and Healy with the respondent; and, if that be the case, I cannot see how suing on the latter can be treated as an election by the respondent to affirm the former. If the agreement had been contained in separate documents, that would be clear, and I cannot see why the result should be different merely because the two agreements were embodied in one document.

Upon the whole, I am of opinion that the action was properly dismissed, and that the appeal from the judgment, in so far as it dismissed the action, should be dismissed without costs.

The counterclaim should also, in my opinion, have been dismissed. There was no proof of any damages having been sustained by the respondent, owing to the misrepresentations by which he was induced to enter into the agreement with Jacques; and I doubt whether, if there had been, the respondent, having elected to repudiate the agreement, would have been entitled also to damages; and it is clear that there was no ground for forfeiting the deposit which had been paid by Jacques.

I would, therefore, allow the appeal as to the counterclaim, without costs, and substitute for the judgment directed to be entered upon it, a judgment dismissing the counterclaim with costs.

Maclaren, J.A.
Hodgins, J.A.

MACLAREN and HODGINS, JJ.A., agreed.

Magee, J.A.

MAGEE, J.A., agreed in the result.

Appeal dismissed, except as to counterclaim.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands and Lamont, JJ. November 28, 1914.

1. SALE (§ I—1)—BULK SALES ACT—"LIQUOR LICENSE AND STOCK-IN-TRADE"—COMES WITHIN ACT, WHEN.

The sale of a liquor license and stock-in-trade is within the Bulk Sales Act, 1910-11, ch. 38, but it is a condition precedent to setting aside the sale that the purchaser must have paid some part of the purchase money or have delivered some security therefor to the vendor, without taking the steps provided in the Act for the protection of the creditors; the attacking party fails if the purchase money remained still available for the creditors.

2. SALE (§ I—1)—BULK SALES ACT—"HOTEL FURNITURE"—NOT WITHIN ACT, WHEN.

The furniture of an hotel cannot be considered goods, wares or merchandise ordinarily the subject of trade and commerce so as to come within the Bulk Sales Act, Sask., 1910-11, ch. 38.

Statement

APPEAL from a district Court, involving the validity of a sale as affected by the Bulk Sales Act.

The appeal was dismissed.

T. P. Morton, for appellant.

Newcombe, for respondents Strathcona Brewing Co. and Green & Co.

Stewart, for respondent A. Goyette.

Haultain, C.J.

HAULTAIN, C.J., concurred with LAMONT, J.

Newlands, J.

NEWLANDS, J.:—This is an action to set aside a sale as contrary to the Bulk Sales Act. The facts are, briefly, that the defendant Sloane owned an hotel situate on lots 1, 2 and 3, block 3, plan E.Q., Vonda, which had a liquor license. The defendants, Strathcona Brewing and Malting Co. and Green & Co. Ltd., had mortgages on this hotel. These mortgages were subsequent to a mortgage to the Hoeschen-Wentzler Brewing Co. Ltd., for $10,800, which that company was foreclosing, and in order to protect their own security these two defendants agreed to buy the hotel from defendant Sloane. The agreement by which this sale was carried through recites the consideration as one dollar and other valuable considerations, these other valuable considerations being the above-mentioned mortgages. It also provides that Sloane is to remain in possession until March 3, 1913, the agreement being executed on February 14 previously, and that on that date he is to give up peaceable possession of the premises, and transfer the license to them or such parties as they

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shall appoint, and further provides for the payment to Sloane of $500 for giving up possession and transferring the license. Sloane covenants that the property is free from liens, etc., excepting a chattel mortgage to the Strathcona Brewing and Malting Co. Ltd. This property was afterwards sold by the two defendant companies to the defendant Goyette, and the liquor license was transferred direct from Sloane to Goyette. The $500 was never paid to Sloane, because there were other liens on the property.

The Bulk Sales Act, ch. 38 of the Acts of 1910-11, applies to sales in bulk of "any stock of goods, wares and merchandise." It does not, therefore, apply to the sale of the hotel premises, nor to the fixtures and furniture therein, as the furniture of an hotel cannot be considered "goods, wares or merchandise ordinarily the subject of trade and commerce," as provided by sec. 6. The part of the property affected by the Bulk Sales Act would, therefore, be confined to the stock of goods for sale in the bar, the liquor license (sec. 6), and probably the provisions, etc., used for sale to the guests at their meals; and therefore the only amount of money that could be in question is the $500 mentioned in the agreement.

Now, the evidence shews that the defendant companies did not purchase the stock of goods which were for sale in the bar and dining room, as they gave Sloane permission to retain the hotel for over two weeks and to sell these goods without accounting to them, neither did they wish to buy the license, but they made provision in the agreement by which Sloane was to receive $500 for the transfer of this license. The defendant companies sold the hotel property to defendant Goyette and transferred the license direct from Sloane to him, but they did not pay Sloane the $500 agreed because of liens on the premises.

I am of the opinion that this sale is not, therefore, a sale under the Bulk Sales Act. That Act does not apply to the sale of the real estate or to the furniture used in the hotel, and there were no goods, wares or merchandise contained in the sale from Sloane other than the license, and the license by itself is not ordinarily the subject of trade and commerce as provided by sec. 7 of the Act.

I think the appeal should be dismissed with costs.

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LAMONT, J.:—The learned Judge of the District Court who heard this case set out the facts as follows:—

The defendant George Sloane was the owner of lots 1, 2 and 3, in block 3, plan "E.Q.," in the village of Vonda, in the province of Saskatchewan. Upon these lots there was a hotel, in which this defendant carried on business. The property was subject to a first mortgage to the Hoeschen-Wentzler Co. This defendant subsequently mortgaged the lands and the chattels to the defendants the Strathcona Brewing & Malting Co., of Edmonton, and Green & Co., of Winnipeg, to secure certain indebtedness to them. The first mortgagees had taken proceedings under their security and the lands were about to be sold. Before the sale these two defendants entered into an agreement with Sloane, dated February 14, 1913. That agreement is expressed to be in consideration of $1 "and other valuable consideration." Under it, Sloane agreed that he would, on March 3, 1913, transfer to the Strathcona Brewing & Malting Co., and Green & Co., possession of the hotel property above described, and that he would assign, transfer and deliver over to them all his right, title and interest in the hotel furniture, fixtures, stock-in-trade, goods, chattels and effects "now upon the said property which are the property of the party of the second part." Sloane also agreed to transfer the liquor license to such persons as these two should require and to do everything to enable them to obtain the license. These parties further agreed, in consideration of Sloane's giving up possession of the premises, property, stock and contents and making the transfer of the license, to pay to him the sum of $500. Sloane was, under this agreement, to have the right to occupy the premises and carry on the hotel business until March 3, 1913. In pursuance of this agreement, and on the same day it was executed, Sloane also executed a transfer of the lots and of the license. The name of the transferees in these documents was left blank. Sloane knew that the documents were blank to this extent when he signed them and that they were so left with the intention that the Strathcona company and Green & Co. should be able, upon finding a purchaser, themselves to make these documents effective by filling in the name of such purchaser. Subsequently the hotel and business were sold by the Strathcona Co. and Green & Co. to the defendant Goyette. Goyette, at the time of the purchase by him, knew nothing of the transaction as between Sloane and the Strathcona company and Green & Co. At the time Sloane executed these documents he was indebted to the plaintiff and to a number of other creditors as well. In taking the transfers of the property and business, the Strathcona company and Green & Co. did not ask for the statement provided for by the Bulk Sales Act, nor did Sloane give to them any statement whatever regarding his liabilities.

On these facts the plaintiffs contend that the sale from Sloane to the defendant companies was one to which the Bulk Sales Act, ch. 38 of the Acts of 1910-11, applied, and as the provisions of that Act had not been observed the sale was void as against Sloane's creditors. On the other hand, the defendants contend that this is simply a case of mortgagees taking possession, and that therefore the Bulk Sales Act has no application.

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The Bulk Sales Act applies to sales in bulk of any stock of goods, wares or merchandise ordinarily the subject of trade and commerce. It does not include furniture or fixtures, but by sec. 6 it does expressly include an hotel license. By the agreement of February 14, Sloane agreed to transfer to the defendant companies his hotel property and the stock of goods he would have on hand on March 3, and the hotel license. The consideration for the hotel property and the stock was the satisfaction of a mortgage of the Hoeschen-Wentzler Brewing Company amounting to $10,800 and two mortgages covering the property itself and the fixtures, stock-in-trade and furniture. The consideration for the transfer of the license was expressed to be $500. The defendant companies resold to Goyette, and he took possession March 4. The stock-in-trade of liquors, etc., amounted only to one or two hundred dollars, and it was not disputed that the chattel mortgages held by the defendant companies amounted to far more than the value of the fixtures, furniture and stock-in-trade included in them. The defendant companies, therefore, had a right to the stock under their mortgages, and they gave no consideration therefor except the satisfaction of these securities, which were a first claim on the stock. There was nothing coming to Sloane from the taking over of the stock by the defendant companies, and therefore nothing coming to Sloane's unsecured creditors.

The $500 to be paid for the license stands in a different position. It was the purchase price of that which the statute has expressly declared to be included in the term "stock" within the meaning of the Act. The sale was a sale in bulk of all stock which Sloane had on hand on May 3rd, including the license. What the defendant companies in effect did was to purchase the stock-in-trade, including the license, for $500, they assuming the chattel mortgages registered against it. The validity of these mortgages is not in question. The purchase money in which Sloane's creditors can be interested is only this $500. This $500, according to the evidence, has not been paid. Sloane says he never got it, and did not know what became of it. The agent of the defendant companies who gave evidence at the trial was not asked about it. So far as the evidence shews, it has still to be paid over. There was some suggestion that the defendants kept it and applied it on liens on the property which Sloane had agreed to pay off, or

that they applied it on other claims which they had against Sloane. Had either of these facts been established I am of opinion the sale would have to be set aside as being in contravention of the Act, but there is no evidence I can find that any part of that $500 had been paid to the vendor or anyone on his account. The whole purchase money is still available for the creditors. By sec. 3, one of the conditions precedent to setting aside the sale is that the purchaser must pay some part of the purchase money, or deliver some security therefor, to the vendor or some other person for his use, without taking the steps provided in the Act for the protection of the creditors. The reason for this is that if the purchaser pays any part of the purchase money to the vendor the amount available for the satisfaction of the creditors is decreased by that amount. In this case the plaintiffs have failed to shew that any part of the $500 has been paid to the vendor or anyone on his behalf, or that the whole purchase money is not still available for Sloane's creditors. That being so, the appeal should be dismissed, but I think it should be without prejudice to the right of the plaintiffs to bring another action to set aside the sale if they can shew that the $500 or any part thereof has been paid to the vendor or to some other person for his use or on his account. The defendant companies, in my opinion, would not be entitled to appropriate it to other indebtedness of their own, nor to liens against the property which Sloane had agreed with them to pay off. They should pay the purchase money into the hands of the official assignee to be distributed *pro rata*, in which case they can claim their share for their other indebtedness.

Appeal dismissed.

GEORGESON & CO. v. DeLONG.

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Alberta Supreme Court, Stuart, J. October 31, 1914.

1. PARTNERSHIP (§ VI—28*a*)—DISSOLUTION—DEBTS OF OLD FIRM—LIABILITY OF RETIRING PARTNER—CREDITOR WITH KNOWLEDGE CONTINUING ACCOUNT WITH NEW FIRM—EFFECT.

Where creditors of the old firm, knowing of the change of partnership and that the new partners had taken over all the assets and had agreed to be subject to all the liabilities of the former firm, continued their dealings with the new firm as with the old and treated the new firm as their debtors in respect of the debt owing to them at the time of the creation of the new firm, the retiring partner will be discharged.

[*Rolfe* v. *Flower*, L.R. 1 P.C. 27, followed.]

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TRIAL of action on promissory notes.

Judgment accordingly.

McLean & Ford, for the plaintiff and third party.

Aitkin, Gilchrist & O'Rourke, for defendant.

STUART, J.:—The plaintiffs sue the defendants as makers of three promissory notes for $500 all dated January 14, 1910, and payable to G. W. Wickens who endorsed them to the plaintiffs. The amount sued for was $1,769.88, but at the trial the plaintiffs reduced their claim to $937.10 and interest since March 31, 1912.

The plaintiffs were wholesale grocers carrying on business in Calgary. Wickens, the third party, had been carrying on a retail store at Cayley and was indebted to the plaintiffs. On January 14, 1910, Wickens sold out his business to the defendants, DeLong and Nablo, for the sum of $4,535. A written agreement for this purchase had been made at an earlier date according to which the defendants agreed to buy his stock from Wickens at 100 cents on the dollar and to pay him $400 on January 15, 1910, and $400 on the 1st and 15th of each succeeding month with interest at 8 per cent. until the whole price was paid. It was also agreed that the purchasers should give Wickens a mortgage for $1,000 on certain lots in Calgary and a mortgage for $1,000 on certain lots in Lethbridge to secure payment of the money, "said mortgage to become due on or before May 1, 1910." The agreement then went on to provide that stock should be taken as of January 1, 1910, and that notes should be given covering the cost of the stock the notes to be for $500 each at 8 per cent. interest payable on the 1st and 15th of every month. Thus the agreement was inconsistent with itself in regard to the amount of the semi-monthly instalments. However, the course adopted was to give the notes for $500 each. The purchasers took possession on January 14, 1910, and ten notes were signed by them in favour of Wickens, nine for $500 each and one for $35.

The first note for $500 was due February 1. The second for $500 due February 15; the third for $500 due March 1; the fourth for $500 due March 15; the fifth for $500 due April 1;

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the sixth for $35.82 due April 15. The seventh for $500 fell due on June 1; the eighth for $500 on July 1; the ninth for $500 on August 1; and the tenth for $500 on September 1, 1910. The action was brought upon the seventh, ninth and tenth notes.

On March 5, 1910, Wickens, who then owed the plaintiffs on his original indebtedness for goods bought for the store, the sum of $2,503.40, endorsed to the plaintiffs five of the five hundred dollar notes as collateral security for his indebtedness to them. Of these, the two not now sued upon, were the two falling due on April 1 and August 1, 1910, respectively. In fact on March 5, 1910, Wickens endorsed to the plaintiffs those of the original notes which had not yet fallen due, except the small one for $35.82.

It may be as well to state what had happened to the earlier notes so far as the undisputed documentary evidence shews. The first note was paid on February 7, by a cheque to the Bank of Hamilton, where it had evidently been left by Wickens for collection. The second was paid on February 16, by a cheque in favour of Wickens himself. The third note falling due on March 1, was renewed by a note of the defendants payable October 1, 1910. By that time DeLong, as will be seen and as is a very material point in the case, had retired from the business and had been succeeded by one Caspell, who continued as partner with Nablo. Caspell and Nablo gave a renewal of this note for three months more. What happened to it then is somewhat obscure. It was apparently paid at some time or other as it was produced by the defendants.

On the fourth note falling due March 15, $100 was apparently paid and a renewal was given for the balance of $400 for one month. It was apparently also paid as it was produced by the defendants. The fifth note falling due April 1st, or 4th, was paid by a cheque of Caspell and Nablo, Caspell having by that time entered the firm replacing DeLong. This is the first note in which the plaintiffs were interested. The sixth note for $35.82 seems to have been paid as it was produced by the defendants, but when or by whom does not appear. The eighth note due August 1, was probably paid as it is not produced and is not sued upon.

It appears probable that it was between January 1, and 14,

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that DeLong and Nablo took possession of the store. Probably during that period stock was being taken. They opened an account with the plaintiffs of which the first item is dated January 4. The account continued under the name of DeLong and Nablo until March 31, but the date upon which DeLong sold out to Caspell is fixed as March 29, by memorandum on the account. There is a very grave conflict of testimony between DeLong and Nablo on the one part and Wickens on the other, as to the facts concerning the last four notes and the mortgages which were agreed to be given.

DeLong and Nablo both stated that mortgages had in fact been given; one by DeLong on some Calgary property for $1,000; and one by Nablo on some Lethbridge property for $1,000 and that the mortgages were given in lieu of a cash payment which Wickens had wanted. The agreement itself stated that the mortgages were to secure the payments which fell due on or before May 1, 1910. It will be observed that the notes falling due by that time amounted to $2,535.82. In any case there never was any mortgage registered by Wickens. Wickens declared there had never been any mortgage or mortgages signed at all. He stated that at first only six notes were signed; five for $500 and the small one, that it was expected that the defendants would give him mortgages for the $2,000 balance, but that when they were not given, he, later, perhaps about a month later, took the four notes falling due last instead.

There is also a grave conflict of testimony with regard to the facts connected with certain receipts which were put in evidence. These receipts are all in the handwriting of DeLong and signed by Wickens and read as follows:—

(1)

$500.00 Cayley, February 1st, 1910.

Received from A. E. Nablo, five hundred dollars on mortgage as per agreement with interest to date.

(Sgd.) G. W. WICKENS.

(2)

$500.00 Cayley, February 15th, 1910.

Received from A. M. DeLong five hundred dollars on payment of mort gage as per agreement with interest to date.

(Sgd.) G. W. WICKENS.

(3)

$500.00 Cayley, February 24th, 1910.

Received from A. E. Nablo five hundred dollars in full payment of mortgage due May 5th, 1910, as per agreement.

(Sgd.) G. W. WICKENS.

(4)

$500.00 Cayley, February 24th, 1910.

Received from A. M. DeLong five hundred dollars in full payment of mortgage due May 5th, 1910, as per agreement.

(Sgd.) G. W. WICKENS.

It will be observed that a note, the first one, for $500 had fallen due on February 1, and that DeLong and Nablo had paid it by a cheque dated February 7, and that the second note for $500 had fallen due on February 15, and that DeLong and Nablo had paid it by a cheque dated February 16. On February 24, the date of the third and fourth receipts no further note had fallen due. Nablo told a peculiar story about these receipts. He stated that they represented payments actually made by himself and DeLong to Wickens, quite distinct from the cheques of February 7 and 16; that it was the agreement that the payments should apply on the last four notes although really in payment of the mortgages; that is, I suppose, in effect that the mortgages should be treated as having been security for the last four notes; that he thought that Wickens had given up the last four notes at the time, and that certainly they had asked for them. His suggestion was that Wickens had surreptitiously got possession of the notes again in the store and had endorsed them to the plaintiffs afterwards.

DeLong said that he had given a mortgage to Wickens for $1,000 on some Calgary lots in which he was interested, that he himself drew up the receipts, that apart from the receipts themselves he had no recollection of the transaction except that with regard to the last two receipts he remembered that when he got these, Wickens tore up the mortgage saying he had never registered it. He said that he had sold his Calgary property about February 1, but that his interest only amounted to some $200, although his mother and sister allowed him to use some of their money "to put in the business." He also stated that the original understanding was that, when the lots were sold, they

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were to pay off the last notes. He made no reference to, or explanation of, the fact of their not having got possession of the last four notes.

Wickens told a story about the receipts, to say the least, not less remarkable than that of Nablo. He said he never received one dollar of the money represented by the receipts, that DeLong had asked him to sign them so as to shew there was nothing against the Lethbridge lots, "to wipe out any trace of a mortgage and they gave me notes instead." It will be seen then that Wickens' story is this, that at first he got only six notes for $2,535, although he had delivered property sold for $4,535. That he had got neither notes nor mortgages at first, that, merely to shew there was no mortgage and "to wipe out all trace of it," he had signed four receipts dated February 1, 16, and 24, respectively; the first two referring to partial payments on mortgages, and the last two of February 24, referring to payment in full and that then and then only had he got the last four notes. If the purpose of the receipts was merely such as he said, it is extremely difficult for me to understand why the first two needed to be given, or, if they referred to the payments of February 7 and 16, then why the last two were not for $1,000 each to correspond with the total of the two suggested mortgages and of the last four notes. This consideration leads me to treat the evidence of Wickens, at any rate on this point, as somewhat untrustworthy. There was a good deal of evidence as to the possible source from which the payments suggested by the receipts could have been made, but for the moment I pass it by.

At all events the plaintiffs did, about March 5, receive the last four notes, as well as one due April 1, from Wickens, as collateral security for his debt to them. On March 29, DeLong sold out his interest in the business to Caspell, and Caspell agreed with DeLong to assume his liabilities in connection with the business which would include the indebtedness to Wickens. Caspell and Nablo continued the business and continued dealing with the plaintiffs.

By September 1, the plaintiffs had received upon the indebtedness of Wickens over $600 and there was then due them roughly $1,900 making allowance for accrued interest. On that date, being the date when the last of the DeLong and Nablo

$500 notes fell due, the firm of Caspell and Nablo signed two notes in favour of Wickens, one for $1,400 and another for $500, both at one month, and these were endorsed by Wickens to the plaintiffs. When these notes fell due Caspell and Nablo gave another note this time directly to the plaintiffs for $1,900 which fell due in one month. There is no further note produced to shew how this indebtedness was carried along. But in the plaintiffs' ledger account against Wickens it would appear to have been renewed from month to month until September, 1911, when considerable payments were made. Whether there had been in fact such renewals does not very clearly appear. No entry of any of the notes was ever made by the plaintiffs in their ledger account with DeLong and Nablo, and Caspell and Nablo, although I notice that there is an entry of May 4, 1911, in the Caspell and Nablo account which has nothing but the date and a reference to folio "900" and the memo "see Wickens account" and on that date in the Wickens account there is a reference to the same folio and a debit of $1,913.75, evidently the amount of the note and interest, is entered.

DeLong testified that he had never been spoken to about these renewal notes, that he had not heard of the matter until suit was threatened in 1913, that when he sold out to Caspell in March, 1910, he informed some official in the plaintiffs' office that he was selling out, that Caspell was assuming all his liabilities, and that he was told that this was satisfactory. This evidence, if it stood alone, might not have been sufficient to justify me in finding an agreement to release him, but the fact that in September, 1910, the indebtedness was placed in two notes one for $1,400 and the other for $500, that renewals were taken from Caspell and Nablo without reference to DeLong, that these two sums were then placed in one note for $1,900 signed by Caspell and Nablo, and payable directly to the plaintiffs again without reference to DeLong; that the plaintiffs kept on dealing with the firm Caspell and Nablo as successors of the firm of DeLong and Nablo and dealt with the indebtedness of the old firm in the way I have set forth, seem to me quite sufficient to justify me in finding that the new firm of Caspell and Nablo was accepted both by Wickens and the plaintiffs in the place of the old firm, and that they intended to release the old

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firm. I think the case of *Rolfe* v. *Flower*, L.R. 1 P.C. 27, covers the point. In giving the judgment of the Judicial Committee, in that case Lord Chelmsford said:—

> Here the creditors of the old firm knowing of the change of partnership and that the new partners had taken over all the assets and had agreed to be subject to all the liabilities of the former firm not only continued their dealings with the new firm upon the same footing as with the old and received payment of a portion of their debt out of the blended assets of the old and new firms, but themselves proved that from the time when they understood that the new partners took over all the assets and became subject to all the liabilities of the preceding firm they henceforth treated the partners in that firm as their debtors in respect of the debt owing to them at the time of the creation of that firm or so much thereof as for the time being remained due. If Flower Salting & Co. had, under these circumstances, endeavoured to force the payment of their debt from the partners in the old firm of W. Rutledge & Co. there would have been ample evidence to satisfy a jury that they had discharged the old firm and had accepted the new one as their debtor.

These words are, I think, quite applicable to the present case. Caspell was not originally a debtor of either Wickens or the plaintiff, and yet they both take his notes instead of DeLong's when the time for renewal comes.

I find, therefore, as a fact, that the old firm of which DeLong was a member was discharged both by Wickens and by the plaintiffs. The fact that the original debt is evidenced by promissory notes can certainly make no difference in view of the subsequent dealing. The action will, therefore, be dismissed as against DeLong. The case stands in a different position with regard to the defendant Nablo. Of course the receipts of February 1, 15, and 24, 1910, present a peculiarity which it is hard to explain. Wickens' story, as I have said, is remarkable. But on the other hand Nablo's evidence is scarcely less so. Certainly I think the signature of these receipts by Wickens is sufficient to throw the burden of proof upon him and the plaintiffs who claim through him. On the other hand Nablo did sign subsequent notes which he surely, as a business man, would not have done unless he owed the money. On September 1, 1910, he signed two notes, one for $500 and another for $1,400. Again, on October 1, these were renewed by a single note for $1,900. It is impossible that, if Nablo and DeLong had made all the payments Nablo claimed they had made, he would have signed these later notes. The execution of these, it seems to me, turns the

burden of proof back upon Nablo. His evidence as to payments was very uncertain. I think, therefore, I shall have to accept the evidence of the books of the plaintiff and of Wickens as shewing that the amount claimed is still unpaid.

With reference to the note for $1,000 which Caspell and his father signed on May 17, 1912, I think this must be taken to have been a new indebtedness incurred by Caspell himself and not a continuation of the old account. The elder Caspell did indeed state that he was told that he was settling up all his son's indebtedness, but this admission, if it was made, is not, in my opinion, strong enough to overcome the evidence of the plaintiff's books, the accuracy of which I have no reason to doubt. It might very well be that the old indebtedness was overlooked at the time.

With regard to the question of presentment, I think there is nothing in this defence. Payments were made on each of the three notes on or about the date they fell due. At that time Nablo and Caspell were the members of the firm. Then Nablo signed the two renewals. In such a case I think a proper presentment must be presumed. I think, therefore, there must be judgment against Nablo for $937.10 and interest at 7% (per cent.) since March 31, 1912, to judgment.

There is, of course, a difficulty as to costs. DeLong is entitled to his costs against the plaintiffs while the plaintiffs are entitled to their costs against Nablo. Wickens is also entitled to his costs against Nablo. DeLong and Nablo severed in their defences, but were represented by the same solicitors and by the same counsel at the trial.

DeLong will have the costs of his own examination for discovery and of his appearance pleadings, and witness fees for himself personally.

The trial lasted four days. I think DeLong may be taxed a counsel fee for 1½ days against the plaintiffs and the plaintiffs a counsel fee of 2½ days against Nablo. Wickens appeared by the same counsel as the plaintiffs and I think he should have no separate counsel fee.

The plaintiffs and Wickens should have the costs of all examinations for discovery other than DeLong's against Nablo.

Judgment accordingly.

N. S.

S. C.

DYAS v. HENDERSON.

Nova Scotia Supreme Court, Russell, J. October 21, 1914.

1. MORTGAGE (§ I C—10)—WHAT PROPERTY COVERED—FIXTURES—LIABILITY OF STRANGER FOR CONVERTING.

A person who, with knowledge of the land mortgage, purchased and removed from the lands an engine and boiler so placed as to become a fixture, may be joined as a defendant in the mortgagee's action for foreclosure and sale, so that he may be held liable for any deficiency in the mortgage security to the extent of the value of the engine and boiler.

[*Holland* v. *Hodgson*, L.R. 7 C.P. 328, and *Meux* v. *Jacobs*, L.R. 7 H.L. 481, 32 L.T. 171, cited.]

Statement

ACTION by the plaintiff mortgagee to recover from the defendants the value of an engine and boiler removed by them from the mortgaged premises. Verdict for plaintiff. The plaintiff held a mortgage covering some land upon which was a building, and subsequent to the making of the mortgage an engine and boiler were installed in the building. The engine was placed on a heavy timber and bolted securely to cross-pieces underneath the floor joists. The boiler was set in brick work, and a steam pipe connected the boiler with the engine, and a hood extended from the boiler into the brick flue, which was built from the ground. The defendants, with knowledge of the existence of the mortgage, purchased the engine and boiler from the mortgagor for $250, and removed them from the mortgaged premises, whereupon the plaintiff commenced an action claiming foreclosure of the mortgagor's equity of redemption and sale, and, in the event of the sale not producing sufficient to pay off the mortgage and costs, damages against the defendants for the removal of the engine and boiler, on the ground that they were fixtures as between mortgagor and mortgagee. The defence denied that the engine and boiler were fixtures, and claimed that the defendants were improperly joined in the action. The plaintiff claimed that the boiler and engine were fixtures, and relied on *Holland* v. *Hodgson*, L.R. 7 C.P. 328, and that they were bound by the mortgage, although not on the premises when the mortgage was made, and relied on *Meux* v. *Jacobs*, L.R. 7 H.L. 481, 32 L.T. 171.

F. L. Milner, K.C., and *L. E. Ormond*, for the plaintiff.

Varley B. Fullerton, for the defendant.

Russell, J.

RUSSELL, J., overruled the objection that the defendants were improperly added, and decided that the engine and boiler were fixtures and were bound by the mortgage, and assessed the plaintiff's damages at $250.

Order accordingly.

WESTERN FOUNDRY CO. v. EDMONTON INTERURBAN R. CO.

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Alberta Supreme Court, Scott, Stuart, Beck, and Simmons, JJ.
December 18, 1914.

1. CONTRACTS (§ II D—185)—CONSTRUCTION—FOR SERVICES—QUANTUM MERUIT—IMPLIED TERMS.

In defence of an alleged excessive charge for machine-shop work done for which the ordering party was to pay all reasonable time expenses as for job work, he may adduce evidence of what others in the same line of business as the plaintiff would charge for similar work and the time it would take to do the work.

Statement

APPEAL by the plaintiff from the judgment of Walsh, J., involving the interpretation of a contract for services and materials in the construction of gears.

The appeal was dismissed.

E. B. Edwards, K.C., for plaintiffs, appellants.

G. B. Henwood, for defendants, respondents.

The judgment of the Court was delivered by

Scott, J.

SCOTT, J.:—The plaintiffs' claim is for work done and materials supplied in the construction of certain gears for the defendant company, the amount claimed being $968.83. The defendants before action tendered $600 in satisfaction of the claim, and paid that amount into Court. The trial Judge held that the amount paid in was sufficient to satisfy the plaintiffs' claim, and gave judgment in its favour for that amount, directing that the defendants' costs should be paid out of the amount so paid in. In his reasons for judgment he expressed the view that the amount tendered was a liberal allowance for everything the plaintiffs could charge for, and that, but for the tender, he would probably have fixed the amount at a smaller sum.

There does not appear to be any dispute between the parties as to the value of the material used in construction, and it is admitted that, in view of the fact that defendants required the work to be done in as short a time as possible, the plaintiffs were entitled to charge extra for overtime.

The plaintiffs contend that the evidence shews that by the terms of the contract the defendants were to pay for the time actually expended upon the work and all reasonable time expenses.

The evidence relied upon as supporting this contention is that of one Warner, the defendants' engineer, who gave the order for the work, his evidence being as follows:—

Q. You were to pay for the time actually spent upon the work? A. Yes.
Q. For overtime? A. Yes. My understanding, when I gave the order,

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was it was not a contract and no prices put in, that the ordinary trade custom would apply, that is, it would be job work and job work would necessarily involve payment of all charges and money reasonably paid. . . . that when I gave the order as it was not a contract that the ordinary trade custom would apply, that is, it would be job work prices which would mean that all time expenses, all reasonable time expenses on that work would be paid by us.

In my view the reasonable construction to be placed upon these words is that plaintiffs would be entitled to be paid for the time reasonably taken in doing the work, and, such being the case, the contract, except as to the undertaking to pay extra for overtime, does not differ materially from that which would have been implied if the defendants had merely given an order for the work without any stipulation as to the basis of remuneration. Even if the time which plaintiffs claim to have expended on the work were shewn to have been expended, the question whether it was reasonably expended would still be open, and would be a question of fact which the trial Judge would be bound to consider. It, therefore, is an issue which practically is one of *quantum meruit*.

The evidence of Warner, the engineer, as to what defendants paid for similar work in Winnipeg, and that of the proprietors of two other machine shops in Edmonton as to what they would charge for similar work in their shops and as to the time it would take to perform the work, is to the effect that the amount paid into Court is in excess of the amount to which the plaintiffs are entitled for the work done. There is, therefore, ample evidence to support the conclusion the trial Judge reached.

The appeal should be dismissed with costs.

Appeal dismissed.

B. C.

S. C.

TRIMBLE v. COWAN.

British Columbia Supreme Court, Gregory, J. September 16, 1914.

1. COSTS (§ I—14)—SECURITY FOR—"SUBSTANTIAL PROPERTY" WITHIN THE PROVINCE—AS EXCUSING THE SECURITY—SHARES IN FOREIGN CORPORATION—SUFFICIENCY OF.

Shares in a foreign corporation owning mining property within British Columbia and which corporation is registered under the B.C. Companies Act are not substantial property within the province, the proof of owning which on the part of a non-resident plaintiff would excuse him from giving security for costs when suing in a British Columbia Court.

2. COSTS (§ I—14)—SECURITY FOR BY NON-RESIDENT—SUFFICIENCY OF INTEREST IN MINING CLAIMS AS EXCUSING BOND—TEST.

Registered ownership of a three-eighths interest in a group of mining claims in British Columbia will not be accepted as dispensing with the usual security for costs by a non-resident plaintiff, if the value of such claims upon which certain development work has been done is found by the Court to still be speculative and problematic.

APPLICATION by the defendant for security for costs.

Application granted.

Moresby, for plaintiff.

D. S. Tait, for defendant.

GREGORY, J.:—It is admitted that the plaintiff resides out of the jurisdiction. He seeks to avoid giving security on the ground that he has substantial property within the jurisdiction, and the affidavits disclose that the property consists of:—

(a) Shares in a foreign corporation owning mining property within the jurisdiction, and which corporation is registered under the Companies Act. Such registration does not, it appears to me, go any further than authorize corporations to do business within the province, and the attorney, in fact, who represents the company has no authority to transfer shares unless such shares are issued within the province, and so it seems to me that the shares in this company are not in any way available for execution, and if not, they are not substantial property within the province.

(b) That he is the registered owner of a group of mining claims within the province; that said claims are being developed, and that $8,000 was expended on the same last year; and that he is the owner of a three-eighths interest in the said group, which he says in his affidavit "I value at $50,000."

Mr. W. P. Pemberton makes an affidavit in which he states that he is one of the owners of said group of mining claims, and that he verily believes that the same "are worth over and above the sum of $8,000."

It is clear from the defendant's affidavits that these claims are simply prospects; that a certain amount of development work was done thereon; no ore has yet been shipped, and their value is purely speculative and problematic, and it does not appear to me at all clear that in case the plaintiff fails his interest therein would be available to answer the costs or any part thereof which the defendant was entitled to recover against him.

The plaintiff will therefore have to give security for costs, but as to the amount I will hear further argument, as Mr. Moresby did not discuss that feature of the case.

Application granted.

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TRIMBLE v. COWAN.

British Columbia Supreme Court, Gregory, J. September 16, 1914.

1. JURY (§ I A—1)—RIGHT TO TRIAL BY—ACTION TO SET ASIDE LEASE—POSTPONEMENT OF TRIAL PENDING PROPOSED APPEAL, WHEN REFUSED.

Where it seems clear that an order directing the trial of an action to set aside a lease be had without a jury was rightly made, the Court will exercise its discretion by refusing an application to postpone the trial pending a proposed appeal from such order.

[*Pearson* v. *Dublin*, [1907] A.C. 351, distinguished.]

Statement

MOTION to postpone the trial.

Motion refused.

Moresby, for plaintiff.

D. S. Tait, for defendant.

Gregory, J.

GREGORY, J.:—This is an application by the plaintiff to postpone the trial to enable him to appeal from an order made by myself directing that the trial be had by a Judge without a jury. I regret exceedingly that I am unable to grant this application, as I am very loth to prevent any decision of mine coming before the Court of Appeal, but the case seems to me so clear that I have no alternative. The action is one to set aside a lease (the other relief asked for is merely incidental), and Order 36, rule 3, says that such a case *shall* be tried by a Judge without a jury.

In support of the plaintiff's application is his affidavit, in which he says counsel has advised an appeal from the above order. I asked him to have this affidavit supplemented by a statement shewing that counsel believed such an appeal would be successful. This supplementary affidavit he admits he is unable to make. It, therefore, seems to me that the case is so clear I would be doing wrong in granting any stay to further an appeal which would be fruitless, except, possibly, for the purpose of securing delay.

I have been referred to the language of Earl Halsbury, in *Pearson* v. *Dublin Corporation*, [1907] A.C. 351, 356, where he says:—

> The action is based on the allegation of fraud, and no subtlety of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury.

That language does not appear to me to apply to the present

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case, although the plaintiff makes allegations of fraud against the defendant. That case (*Pearson* v. *Dublin*) was an action of deceit for damages for fraudulent representations, which is a very different action from the present one; in addition to which there is no rule in the English practice similar to rule 3, Order 36, B.C. Rules.

The application will therefore be dismissed with costs.

Application dismissed.

DOUGLAS BROTHERS v. ACADIA FIRE INS. CO.

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Judicial Committee of the Privy Council, The Lord Chancellor (Viscount Haldane), Lord Moulton, Lord Sumner, Sir Charles Fitzpatrick, and Sir Arthur Channell. July 14, 1914.

1. PRINCIPAL AND AGENT (§ III—36)—COMPENSATION—INSURANCE AGENCY—BASIS FOR COMPUTING COMMISSION.

A stipulation in a contract for a fire insurance agency that the agent shall receive in addition to a regular commission a stated percentage on the "annual net profits" from business in his territory, arrived at by deducting from the gross premiums all return premiums, rebate, losses, and loss expenses paid and commissions paid, is to be construed as a mode by which the net profits for the year were to be adjusted; the words "losses and loss expenses paid" as used in relation to such annual net profits mean losses actually paid during the year and deduction is not to be made of other losses and expenses paid afterwards in respect of that year's business.

[*Douglas Bros.* v. *Acadia Fire Ins. Co.*, 15 D.L.R. 883, reversed and judgment at the trial, 12 D.L.R. 419, restored.]

Statement

APPEAL by the plaintiffs from the judgment in appeal of Nova Scotia Supreme Court, *Douglas Bros* v. *Acadia Fire Ins. Co.*, 15 D.L.R. 883, reversing that of Russell, J., at the trial, *Douglas Bros.* v. *Acadia Fire Ins. Co.*, 12 D.L.R. 419.

The appeal was allowed restoring the trial judgment.

The judgment of the Board was delivered by

Haldane, L.C.

HALDANE, L.C.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia which by a majority of three to two, reversed the judgment of Russell, J., *Douglas Bros.* v. *Acadia Fire Ins. Co.*, 12 D.L.R. 419, the trial Judge. The question relates to the construction of a written agreement. The appellants are insurance brokers, and the respondents are an insurance company. In 1908 the respondents appointed the appellants their sole agents for the United States and territories, excluding San Francisco, with authority to accept, within certain

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limits, proposals for insurance against fire and lightning. The terms of the appointment were embodied in the written agreement, dated July 18, 1908, which their Lordships have to construe. Under this agreement the appellants were to open and maintain an office in the city of New York, and report daily all policies issued and renewals. They were also to send in monthly reports of business done, and to remit the balances of their monthly accounts within 90 days. They had authority to pay losses of $500 or less on receipt of proof, and to issue drafts on the respondents for losses above that amount, provided the respondents had passed the proofs. The clause as to remuneration was in these terms:—

> Said Douglas Bros. shall receive as compensation 25 per cent. of the gross premiums received by them, less return premiums and rebates, and an additional 15 per cent. on the annual net profits arrived at by deducting from the gross premiums all return premiums, rebates, losses, and loss expenses paid, and all commission (including profit commission), and any other allowances made said Douglas Bros. Such compensations shall be in full for services rendered, it being the mutual understanding that the cost of all printing and stationery (except policies and agency expenses), shall be borne by said Douglas Bros. Loss expenses (or adjustment expenses), to be treated as losses.

The agreement was to continue in force until determined by six months' notice, which might be given by either of the parties.

The contention for the appellants was that on the proper interpretation of the remuneration clause, the 15 per cent. additional on the annual net profits, was to be ascertained at the end of each year by deducting from the gross premiums received during that year all losses actually paid during the year, and the other items mentioned. The contention for the respondents was that the commission applied only to profits, and that in order to ascertain these profits deductions must be made not only of losses and expenses actually paid within the year, but of those payable in respect of the business done during the year, and eventually paid afterwards, apart from which the true profits of the year could not be ascertained.

It may or may not be true that the contract contended for by the respondents would have been a more sensible one to enter into than that contained in the clause as interpreted by the appellants. It is possible that an over sanguine view of the

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prospects of the business may have led the respondents to enter into an unduly rash agreement. But their Lordship's duty is simply to construe the words as they stand. So read their meaning does not appear ambiguous. The intention expressed is "to provide," in the words of Ritchie, J.,

> a mode by which the net profits for the year were to be adjusted, so as to make a basis for arriving at the amount of the plaintiffs' commission in each year.

Their Lordships are unable to come to any other conclusion than that this interpretation is the true one. The expression "losses and loss expenses paid" is not ambiguous used as it is here in relation to annual net profits, arrived at by deducting from the gross premiums these losses and expenses. The language employed does not, in their Lordships' opinion, admit of the construction put on it by the majority of the Supreme Court. They will, therefore, humbly advise His Majesty that the judgment appealed against should be reversed, and that of the trial Judge restored. The respondents must pay the costs here and in the Supreme Court.

Appeal allowed.

RILEY v. CITY OF WINNIPEG.

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K. B.

Manitoba King's Bench, Metcalfe, J. December 8, 1914.

1. PLEADING (§ I J—65)—PARTICULARS—STATEMENT OF CLAIM.

In an action for damages against a municipality for having notified the plaintiff, a contractor for city works, not to proceed and for having refused to furnish cars under the contract and for removing the plaintiff's plant, the plaintiff may be ordered to furnish the best particulars he can of the manner in which, the time when and the place where the defendant notified the plaintiff not to proceed, and the manner in which, the time and place where the defendant refused to furnish cars.

[*Cousins* v. *C.N.R.*, 18 Man. L.R. 320, followed.]

Statement

APPEAL from the Referee.

Order below varied.

Preudhomme, for defendant.

Symington, for plaintiff.

Metcalfe, J.

METCALFE, J.:—The plaintiff alleges that he entered into a contract to load gravel for ballasting the city's tramway between Lac du Bonnet and Point du Bois, for which he was to be paid by the city the sum of 22 cents per cubic yard. He further alleges that the corporation was to supply the cars upon which the

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gravel was to be loaded. Paragraph 4 of the statement of claim is as follows:—

> In pursuance of said contract, the plaintiff proceeded to have the said work done, let sub-contracts therefor at the rate of 10 cents per cubic yard, and had loaded 1,643 yards of gravel in accordance with the terms thereof, when the defendant notified the plaintiff not to proceed with the work, refused to furnish cars and removed the plaintiff's plant from the said work.

The defendant demanded particulars, as follows:—

(1) The manner in which, the time when and the place where the defendant notified the plaintiff not to proceed with the work mentioned in par. 2 of the statement of claim; (b) the manner in which, the time when and the place where the defendant refused to furnish cars; (c) and the manner in which, and the time when the defendant removed the plaintiff's plant from the said work, all of which is alleged in par. 4 of the statement of claim.

The plaintiff not having furnished particulars, the defendant filed the affidavit of Mr. Glassco, the general manager of the light and power department of the city, in which, amongst other things, he says as follows:—

> In view of the variety of circumstances relating to the alleged contract and the work to have been done thereunder, it will be impossible for the defendant to prepare its defence herein, and to proceed with the trial in this action without being furnished with particulars as contained in the demand made by the defendant as aforesaid.

and moved for particulars.

The Referee dismissed the application. The matter now comes before me by way of appeal from the order of the Referee.

The plaintiff's action is based upon the breach of the contract as alleged in par. 4. I think it is reasonable that the plaintiff should give some particulars as to the time and manner of notification not to proceed with the work and the refusal to furnish cars. Such notification and refusal may have been either in writing or verbal. The defendant's manager has made an affidavit that particulars are required. The plaintiff has not given any particulars nor explained why such should not be given. I think, under the circumstances, I should follow the rule laid down in *Cousins* v. *C.N.R.*, 18 Man. L.R. 320, 321.

I would, therefore, vary the order of the Referee, and direct that the plaintiff do furnish the best particulars he can give of the manner in which, the time when, and the place where the de-

fendant notified the plaintiff not to proceed, and the manner in which, the time and place where the defendant refused to furnish cars.

The plaintiff can examine the defendant's officers and compel production by them, and thus secure further information as to the facts he must establish if he is to succeed. The defendant is to have 10 days within which to plead after delivery of the particulars, and the plaintiff is to be at liberty to supplement his particulars not later than 10 days before the trial of the action. The costs of this appeal and of the order appealed from to be costs in the cause to the defendant.

Order below varied.

LEONARD v. CUSHING.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. February 25, 1914.

1. WRIT AND PROCESS (§ II A—13)—SERVICE—PLACE—SALE OF GOODS—PLACE OF PAYMENT.

The fact that it is stipulated in a contract between a manufacturer in Ontario and his customer in Alberta that delivery should be f.o.b. in Alberta does not imply that the *locus* of the contract is Alberta nor fix that province as the place of payment where the contract is silent on that point; and the debtor must seek out his creditor, and is liable to be sued in Ontario for the default in payment occurring in Ontario under Rule 25 (*e*) of the Judicature Rules (Ont.).

[*Blackley* v. *Elite Costume Co.*, 9 O.L.R. 382, followed; *Comber* v. *Leyland*, [1898] A.C. 524, and *Bell* v. *Antwerp*, [1891] 1 Q.B. 103, referred to.]

Statement

APPEAL from the judgment of LENNOX, J., setting aside a Master's order reversing a local Judge's order for service out of the jurisdiction. This was an action for a balance of the purchase-price of an engine and boilers. The plaintiffs carried on business at London, Ontario, from which place the engine and boilers were shipped to the defendants at Edmonton, Alberta. There was a written agreement of sale and purchase, but no arrangement between the parties as to the place of payment of the price.

On the 12th September, 1913, one of the Local Judges at London made an order authorising the plaintiffs to issue a writ of summons for service upon the defendants out of the jurisdiction; and the writ of summons commencing this action was thereupon issued, and service was affected upon the defendants at Edmonton.

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Meredith, C.J.O.

The appeal was dismissed.

Glyn Osler, for the appellants.

Featherston Aylesworth, for the plaintiffs, the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—We think it is not necessary to hear the respondents' counsel.

Mr. Osler has presented his case with ability and said everything that can be said in support of it. I do not understand him to contend that the legal effect of the agreement was not that the subsequent payments were to be made at the place of business of the respondents in London.

It is conceded, although Mr. Osler says the rule works injustice, that it is an implied term of a contract such as this, that the debtor is to seek his creditor; but it is said that the authorities shew that the implication of such a term may be displaced by the course of dealing between the contracting parties.

I am unable to agree with the contention of Mr. Osler as to the force which he would attach to the various terms of the agreement, which he says indicate that the *locus* of the contract was fixed in the Province of Alberta. And I do not think that the course of dealing displaces the implication which I have mentioned.

The first proposal was that the delivery of the machinery was to be f.o.b., London. That was objected to by the appellants, and the delivery was then arranged to be f.o.b. Edmonton: that, I think, only indicates that the appellants were unwilling to take the risk of any loss happening to the machinery, which was being manufactured for them in London, in the course of its transportation to them at Edmonton.

In order to shew that the course of dealing was inconsistent with its having been intended that the payments should be made at London, reliance was placed on the fact that a draft for $1,000, on account of the purchase-price, was drawn by the respondents at London, on the appellants, and accepted payable at Edmonton: and the fact that another payment was made by cheque of the appellants drawn on their bankers in Alberta, and sent by them by mail to the respondents at London.

It is probably not open to question that the respondents could not have sued on the draft in an Ontario Court; but, as far as the cheque is concerned, the course of dealing makes against the contention of Mr. Osler. The cheque was sent by the appellants by mail to the respondents at London, and was received by them there. We cannot shut our eyes to what the ordinary course of business in such cases is. The cheque was accepted by the respondents, and was then forwarded to the bank upon which it was drawn, for payment.

There can be no doubt that, if the respondents had delayed the presentation of the cheque, and the bank had failed, the loss would have been theirs.

It seems to me it is just the same as if the appellants had taken the money in their own hands to the respondents at London.

Mr. Osler also attacked the soundness of the distinction drawn in *Blackley* v. *Elite Costume Co.*, 9 O.L.R. 382, founded on the difference between the wording of our Rule and the corresponding English Rule, and invited us to overrule that case.

Even if this contention were entitled to prevail, it would have no bearing upon this case, because, so far, I have treated the obligation of the appellants as if the Rule were the same as the English Rule, and the English cases were applicable to the full extent. But I desire to say that that decision was come to by a Divisional Court several years ago; it has been accepted as settling the practice in this Province ever since and has been followed in numerous cases; and it would be wrong, even if we doubted the correctness of the decision, to disturb the settled practice. One of the most unfortunate things is to have an unstable practice; better a settled practice, even though, in some cases, it may result in hardship.

I think the appeal must be dismissed. Costs in the cause to the respondents.

The time for appearance will be extended for thirty days.

Appeal dismissed.

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ROBINSON v. FORD.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont and Elwood, JJ. November 28, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ V—50)—CERTIFICATE—OBTAINED BY FRAUD ON COURT—EFFECT ON VALIDITY.

For the holder of a mortgage to refrain from giving notice of his foreclosure proceedings to a person of whose unregistered claim as a purchaser through the mortgagor he had notice, as well as of the fact that such person believed, on information furnished by a former holder of the mortgage, that it had been paid off, and the taking of a foreclosure order by failure to disclose such unregistered interest to the Court is a fraud on the Court for which the certificate of title issued to a party to such fraud may be cancelled under the Land Titles Act, R.S.S. 1909, ch. 41.

[*Robinson* v. *Ford*, 14 D.L.R. 360, varied; *Williams* v. *Box*, 44 Can. S.C.R. 1; *Independent Lumber* v. *Gardiner*, 3 S.L.R. 140; *Annable* v. *Coventry*, 5 D.L.R. 661, 46 Can. S.C.R. 573, referred to.]

2. LAND TITLES (TORRENS SYSTEM) (§ V—50)—CERTIFICATES—APPLICATION FOR—OMISSION TO NOTIFY ALL PARTIES IN INTEREST—FRAUD.

Where the mortgagee knows that his mortgagor's title under Court proceedings was gotten by the omission to bring in as a party a person known to claim the lands under an unregistered transfer free from the mortgage in question, the Land Titles Act, R.S.S. 1909, ch. 41, does not afford protection to the mortgagee for any advances made by him subsequently to getting notice of such facts, although the mortgage had been registered before the notice; making any further advances after the receipt of the notice is committing a fraud on the purchaser with the unregistered title and to the extent of such advances the mortgagee is not a *bonâ fide* mortgagee.

[*Robinson* v. *Ford*, 14 D.L.R. 360, varied; *West* v. *Williams*, [1899] 1 Ch. 132; *Pierce* v. *Canada Permanent*, 25 Ont. R. 671; *Assets Co.* v. *Mere Roihi*, [1905] A.C. 176, referred to.]

Statement

APPEAL from Brown, J., 14 D.L.R. 360.

Judgment varied.

H. V. Bigelow, K.C., for appellants, defendants.

J. F. Frame, K.C., for respondent, plaintiff.

Elwood, J.

ELWOOD, J.:—The learned trial Judge was, in my opinion, justified from the evidence in finding that the defendants Ford and Lynn had, prior to the commencement of the foreclosure proceedings, notice of the plaintiff's claim to the land in question, and this finding should not be disturbed. These defendants having had notice of this claim, it was, in my opinion, a fraud on the Court not to have given the plaintiff notice of the cancellation proceedings, and the learned trial Judge was correct under these circumstances in ordering that the certificate of title issued to the defendant Florence Ford be cancelled and a new one delivered to the plaintiff: *Williams* v. *Box*, 44 Can. S.C.R. 1; *Independent*

Lumber v. *Gardiner*, 3 S.L.R. 140; *Annable* v. *Coventry*, 46 Can. S.C.R. 573, 5 D.L.R. 661.

In view of what took place at the trial, it does not seem necessary for me to express any opinion on the question of whether or not the learned trial Judge was in error in holding that the mortgage from Hagen to the Nelson-Ford Lumber Co. Ltd. was merged or discharged, because I find during the trial the following took place, namely:—

Mr. Ross submitted that at the time the defendants were not required to go into whether or not the mortgage was a debt security, because it was not pleaded, and that evidence directed to that question should be struck from the record as irrelevant.

HIS LORDSHIP: It is only as it would bear on the question of fraud.

Mr. Ross: That is, your Lordship would not in this action make an order declaring the mortgage null and void?

HIS LORDSHIP: Oh, no. It is only on the question of fraud that it is brought in, I presume.

Mr. Frame: Yes, the state of the accounts; whether there is anything owing on it or not.

HIS LORDSHIP: Whether a foreclosure proceeding taken under such a mortgage does not on the face of it more or less declare fraud? I presume that is the idea.

Mr. Frame: Yes, my Lord. That is our statement. That is the idea we are introducing this testimony for.

HIS LORDSHIP: That is the impression I got on the evidence; that is the idea.

Mr. Frame: As to whether there is anything owing on that mortgage, I think, will be a matter of subsequent inquiry, as Mr. Ross says.

HIS LORDSHIP: Oh, decidedly.

The respondent's counsel, in his factum, states as follows:—

The plaintiff is satisfied if it is declared that he is not by the said judgment precluded from contending and proving in subsequent proceedings that the Hagen mortgage was paid in full and should have been discharged.

It seems to me, therefore, that it is quite open to the respondent to shew, in proceedings brought under the Hagen mortgage, that the mortgage in fact has been paid in full, and should have been discharged.

So far as par. (b) of the application to vary is concerned, I understand that there was an issue directed to be tried at the same sittings as the trial of this action, but that, by agreement of the parties made before the learned trial Judge, the trial of that issue was let stand until after the trial of this action, and that the portion of the judgment of the learned trial Judge referring to

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the trial of that issue was merely an intimation of the learned trial Judge that he would try the issue when an application should be made before him to have it tried. There is no evidence before us as to what that issue was, and I cannot see that the portion of the judgment of the learned trial Judge referring to the trial of that issue should be disturbed.

As to the cross-appeal: It was agreed on the argument before us that the only items with respect to which the plaintiff contended that the Crown Life Insurance Co. were not entitled under their mortgage were the following items in ex. V: "To paid A. E. Vrooman for deposit in Court, $1,822.87; commission for above cheque payable par Arcola, $2.30; to balance in our hands, $15.90," making a total of $1,841.07. The evidence shews that before any money was advanced under the mortgage to the Crown Life Insurance Co. that company, through its solicitors and registered attorney, had received the following notice, namely:—

Regina, Canada, Apr. 23/12.

The Crown Life Insurance Company,
and Messrs. Ross & Bigelow,
their Solicitors,
Regina, Sask.

Gentlemen,—Take notice that Grant Robinson, of Excelsior, in the State of Minnesota, claims an interest in the north half and south-west quarter of section 21, township 5, range 7, west of the 2nd meridian, in the province of Saskatchewan, and

Further take notice that the said Grant Robinson claims that the said land was obtained from him by fraud and that the said Grant Robinson intends to bring an action against the present owner of the said lands to establish his claim thereto, and

Further take notice that if you advance moneys to the owner of the said lands upon the security thereof that the said Grant Robinson intends to join you as a party to the action on the ground that any advance of money so made by you is made with notice of the said fraud.

Dated at Regina, in the Province of Saskatchewan, this 23rd day of April, A.D. 1912.

G. ROBINSON,
By Frame, Secord, Turnbull & Co.,
his solicitors.

In *West* v. *Williams*, 68 L.J. Ch. 127, [1899] 1 Ch. 132, it was held that a prior mortgagee whose mortgage is taken to cover further advances cannot claim priority in respect of advances made after notice of a second mortgage, even where the prior mortgagee has covenanted to make the further advances. In *Pierce* v. *Canada Permanent*, 25 O.R. 671, it was held that the

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mere registering of a second mortgage did not give the second mortgagee priority over the first mortgagee as to advances made subsequently to the registering of the second mortgage, but the decision is made expressly on the ground that the first mortgagee had not actual notice of the second mortgage. At p. 676, Boyd, C., says:—

> In the absence of notice, that is, notice which gives him real and actual knowledge, and so affects his conscience, the mortgagee is entitled to assume and act on the assumption that the state of the title has not changed. That protection is given him by virtue of the Registry Act, as well as by the doctrine enunciated in *Hopkinson* v. *Rolt*, until he is made aware of a change, not by the hypothetical operation of an instrument registered subsequent to his, but by a reasonable communication of the fact by the one who comes in under the subsequent instrument.

But it is contended that under our Land Titles Act the effect of registering the prior mortgage was to give the mortgagee the right to advance all of the money notwithstanding the above notice. After the receipt of this notice, the defendant company, in making any further advances, would, in my opinion, practically be acting in collusion with the mortgagor, and would be committing a fraud upon the plaintiff, and to the extent of such subsequent advance would not be a *bonâ fide* mortgagee. In *Assets Co. Ltd.* v. *Mere Roihi*, [1905] A.C. 176, 210, Lord Lindley said:—

> Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.

And, further down:—

> But if it be shewn that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.

The learned trial Judge has held, and I think properly so, that the title to the property was gotten fraudulently, and, in my opinion, the defendant company having had notice of this, the Land Titles Act does not afford any protection to the mortgagee for any advances made subsequently to such notice.

In view of the above conclusions I have come to, I am of the opinion that the judgment of the learned trial Judge should be varied by providing that the certificate of title ordered to be issued to the plaintiff should be subject to the mortgage from Hagen to the Nelson Ford Lumber Co. Ltd., and that, notwithstanding that judgment, the foreclosure proceedings should be opened up and the plaintiff in this action added as a party de-

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fendant to that action, and be at liberty to contend and to prove that the Hagen mortgage was paid in full and should have been discharged; and that the judgment of the learned trial Judge should be further varied by declaring that the Crown Life Insurance Co. is only entitled to hold its mortgage as security for the repayment of the sum of $5,490.90 less the above sums totalling $1,841.07, leaving a balance of $3,649.83, which, of course, will bear interest as provided for by that mortgage. The respondent should have his costs of this appeal against the appellant. In view of the result of the cross-appeal, there should be no costs of the cross-appeal.

The money in Court should be paid out to the Crown Life Insurance Company.

Judgment varied.

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BANK OF B.N.A. v. HASLIP.
BANK OF B.N.A. v. ELLIOTT.

Ontario Supreme Court, Middleton, J. January 9, 1914.

1. BILLS AND NOTES (§ IV—80)—CHEQUES—PRESENTMENT — DEMAND — NOTICE—PROTEST—CLEARING HOUSE—ITS EFFECT, HOW LIMITED.

The time for presentment of cheques on branch banks in the same city is not modified or extended by reason of the establishment of a clearing house system between the banks and of a clearing house rule of the Canadian Bankers' Association purporting to authorize the holding over of cheques at the bank, where presented through the clearing house, until the day after their receipt by such bank; rule 12 of the clearing house regulations is not included in the regulations submitted to and approved by the Treasury Board under the Act incorporating the Canadian Bankers Association 63-64 Vict. (Can.) ch. 93, and consequently can have no statutory effect in variance of the Bills of Exchange Act, R.S.C. 1906, ch. 119.

Statement

ACTIONS to recover the amounts for which two cheques were drawn upon the Standard Bank of Canada by Maybee & Wilson, who had an account at a branch of the bank, in favour of the two defendants respectively, endorsed by the defendants, cashed by the plaintiff bank, and subsequently dishonoured. The actions were tried together by Middleton, J., without a jury at Toronto.

The actions were dismissed.

G. L. Smith, for the plaintiffs.

E. G. Porter, K.C., and *Eric N. Armour*, for the defendants.

Middleton, J.

MIDDLETON, J.:—Messrs. Maybee & Wilson were cattle-dealers, carrying on business in the city of Toronto. They pur-

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chased cattle from the defendants Elliott and Haslip; and on the 30th September, 1913, gave to Haslip a cheque drawn upon the Standard Bank at its branch, King and West Market streets Toronto, for $1,864.49. On the 1st October, they gave to Elliott a cheque drawn upon the same branch of the Standard Bank for $1,041.03.

On the morning of the 1st October, Elliott and Haslip, who were friends, met at the Western Cattle Market at West Toronto, and went into the office of the branch of the Bank of British North America at the cattle market, this branch being a sub-branch of the West Toronto branch, opened at the market for the convenience of drovers there. They asked the manager in charge if he would cash the cheques. As Messrs. Maybee & Wilson were then regarded as a firm of substance, and their credit was perfectly good, he replied: "Certainly; the cheques are perfectly good."

It was not convenient for the bank at the time to give currency for the cheques, as they had not much currency in this sub-branch office. The manager suggested that he would issue to them what is described as "a drover's cheque," that is to say, he allowed the defendants to deposit Maybee & Wilson's cheques and to draw against this deposit cheques for identically the same amount, which he accepted and marked as good and payable at par at any branch of the Bank of British North America. The defendants, of course, endorsed the respective cheques which they deposited. No account was opened for them individually; but the deposit of the cheques and the cross-entry representing the issue of the drover's cheques appeared in a special account kept for that purpose.

Having received these drover's cheques, the defendants left for home, Haslip living in Belleville and Elliott at a village a few miles from Belleville. The drover's cheques were in due course deposited in their respective bank accounts and honoured.

The Maybee & Wilson cheques were taken from the sub-branch at the market to the West Toronto branch of the Bank of British North America. The manager of the West Toronto branch put these cheques, with others drawn upon the Standard

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Bank, in an envelope, summing up the total of the cheques so enclosed, upon the envelope, and transmitting it to the head office of the Bank of British North America at Toronto.

At ten o'clock on the 2nd October, this bundle was taken by the representative of the Bank of British North America to the clearing house, and formed part of the claim there presented by the Bank of British North America against the Standard Bank, and thus entered into the clearing that then took place; the balance due from one bank to the other being paid in legal tender.

The officer of the Standard Bank took these cheques to his own head office, and in due course transmitted them, with any other cheques drawn upon the market branch of the Standard Bank, to that branch office. They were received at the branch office during the forenoon of the 2nd October. The manager of that branch office conceived that his course of action was to be governed by rule 12 of the clearing house regulations, and that it became his duty to present the cheque at his own bank "not later than the following banking-day."

It is not clear what was done by way of formal presentment, but Maybee & Wilson's account was not in a position to permit payment of the cheques. Maybee & Wilson were notified, and it was expected that a deposit would be made which would protect the cheques. The manager says that the cheques were then presented and dishonoured. This was on the 3rd.

Under the same regulation, the next day being Saturday, the cheque "must be returned to the depositing bank not later than . . . twelve o'clock noon." The manager, still expecting Maybee & Wilson to make a deposit, held the cheques, and only returned them on the 4th at eleven forty-five, when he sent them to the Toronto office of the Bank of British North America. On that day, the bank handed the cheques to its notary, who again presented them, and, there not being sufficient funds, he protested them. The notice of protest was not signed until the following Monday, the 6th; and, owing to some bungling on the part of the notary, it was not properly addressed and was insufficient as a notice

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of protest. The cheques were dated at Toronto, no address was given by the endorsers, the notice of protest was sent to the endorsers, "care Bank of B.N.A., Union Stock Yards, West Toronto"—an address which was manifestly entirely improper under the circumstances.

When the protest notice reached the manager of the Bank of British North America on the 6th, he ascertained the probable residences of the defendants from the endorsements upon the drover's cheques. Haslip had deposited his cheque with the Merchants Bank at Belleville, and Elliott had deposited his with the Standard Bank at Belleville. The manager had the notices re-addressed and forwarded to the defendants, care of their respective banks at Belleville. Communications took place by wire, and every endeavour was made to get in touch with the defendants; but they did not learn of the dishonour of the cheques until the 8th. Actions are now brought against Haslip and Elliott upon their endorsements of the cheques.

It is admitted that the protest and notice of protest are of no avail to the bank. The bank present their case thus: "The cheques were dishonoured on the 4th. Notice of dishonour was then given in sufficient time." The defendants resist payment, putting their contentions in alternative ways. They first say that the cheques were in fact dishonoured on the 3rd, and, if so, clearly there was insufficient notice of dishonour; in the second place, they say that even if the dishonour was on the 4th, the notice of dishonour was not adequate; and, lastly, if the cheques were not presented until the 4th, they were not presented within reasonable time, and the defendants are discharged.

In the result, I think, the plaintiffs fail. I do not think that I am called upon to criticise the circumlocution incident to the clearing house. It is an institution created for the benefit of the bankers, and its rules and regulations cannot modify the provisions of the Bills of Exchange Act. I am, therefore, compelled to face the problem apart from the regulations in question and to ascertain first whether a presentation on the 4th

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is a presentment "within a reasonable time" (sec. 86*) of a cheque endorsed to the bank on the 1st.

I think it is not. Bear in mind the situation. On the morning of the 1st, early in the forenoon, these cheques were cashed at West Toronto. They were not presented at the branch bank upon which they were drawn until the 4th. These two branch banks are both in the city of Toronto, a few miles apart. I can see no reason why the presentment should not have been made either the same day or the next day. It seems to me altogether too lax to hold that a presentment on the 4th was sufficient.

Moreover, I think that, when the cheques were presented on the 3rd, they were dishonoured, and that notice of dishonour should have been given in time reckoned from that date.† I do not think that the bank could extend the time for giving notice of dishonour by holding the cheques until the next day and again presenting them. They were dishonoured on the first presentment.

It would be a great hardship to hold these men liable on their endorsement of these cheques, when they cashed them on the morning of the 1st, and until the 8th heard nothing to indicate that the cheques had not been paid. That the change of position which may have taken place in the interval probably did take place is demonstrated by the fact that, even after the 8th, such proceedings were taken as resulted in intercepting a great portion of the amount of the smaller cheque, so that fortunately the amount involved in the litigation, so far as this is concerned, is now less than $100.

This case was argued by both counsel upon the assumption

*Section 86 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, is as follows:—

86. A bill is duly presented for payment which is presented,—

(*a*) when the bill is not payable on demand, on the day it falls due;

(*b*) when the bill is payable on demand, within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its endorsement, in order to render the endorser liable.

2. In determining what is a reasonable time within the meaning of this section regard shall be had to the nature of the bill, the usage of trade with regard to similar bills and the facts of the particular case.

†By sec. 97 of the Bills of Exchange Act, notice of dishonour to be valid and effectual must be given not later than the juridical or business day next following the dishonour of the bill.

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that the by-laws, rules, and regulations of the Toronto Clearing House had some effect other than as an agreement between the banks.

The Canadian Bankers' Association, by its Act of incorporation, 63 & 64 Vict. ch. 93 (D.), assented to on the 7th July, 1900, is given power from time to time to establish a clearing house for banks and to make rules and regulations for the operations of the clearing house (sec. 7); but no such rule or regulation is to have any force or effect unless and until approved by the Treasury Board (sub-sec. 2). Pursuant to this power, certain rules and regulations were passed and approved. These are set forth in the pamphlet, commencing at p. 7. Rule 12, above-mentioned, forms no part of these regulations, but appears to be a mere domestic rule of the Canadian Bankers' Association, not having any validity save as forming part of the conventional agreement between the bankers.

The action fails, and must be dismissed with costs.

Actions dismissed.

CANADA STEEL & WIRE CO. v. FERGUSON BROS.

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Manitoba King's Bench, Galt, J. November 14, 1914.

1. WAREHOUSEMEN (§ II—6)—RIGHTS AND LIABILITIES OF—INTEREST IN AND TITLE TO PROPERTY STORED—GENERAL LIEN.

A warehouseman has a general lien upon the stored goods as against his bailor.

[*Hill* v. *London Central*, 102 L.T. 715; *Somes* v. *British Empire Shipping Co.*, 8 H.L.C. 338; and *Leuckart* v. *Cooper*, 3 Bing. N.C. 99, distinguished.]

ACTION for a return of certain goods stored with the defendants, who counterclaim for storage, setting up a "general lien," and for other charges.

Statement

The action was dismissed; counterclaim was allowed.

T. J. Murray, for plaintiffs.

E. B. Fisher, for defendants.

GALT, J.:—The plaintiffs are an incorporated company doing business in Winnipeg as merchants in the province of Manitoba. The defendants are warehousemen doing business in Winnipeg, and they also claim to be public carriers.

Galt, J.

Under an agreement made in November, 1909, between Wise-

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man & Co., of the first part, and the Canada Steel & Wire Co. Ltd., of the second part, Wiseman & Co. agreed, for a term of one year, to handle and store the products of the Canada Steel & Wire Co. Ltd., and to assume all risk of loss, etc., upon the terms that the Canada Steel & Wire Co. were to pay Wiseman & Co. at the rate of 2½ cents for each 100 lbs. at the time it is placed in the warehouse, and also 2½ cents per 100 lbs. at the time of re-shipment from the warehouse. It was also agreed that accounts covering the handling and storage were to be paid monthly not later than the 8th day of the month following that which the account covers, and that the Canada Steel & Wire Co. were to pay to Wiseman & Co., in addition to the rates specified, their proportion of the business tax as levied by the city of Winnipeg.

The defendants succeeded to the position of Wiseman & Co. as warehousemen for the plaintiffs; but their services apparently were not satisfactory to the plaintiffs, so, in January, 1911, a new agreement was arranged, whereby the defendants agreed to store the plaintiffs' goods to the extent of 150 tons for $100 per month and $1 per ton over the 150 tons, and 2½ cents per 100 lbs. for loading and 2½ cents per 100 lbs. for unloading. The new arrangement was carried out for some few months, and the plaintiffs duly paid the defendants' charges monthly for January, February and March. But the plaintiffs were still not satisfied with the defendants' services.

On May 31, 1911, the plaintiffs wrote to the defendants as follows:—

> We beg to advise you that after June 30th we will not require any space in your warehouse for the storing of our products.

No instructions as to re-shipping the goods were given. On June 30 the plaintiffs wrote to the defendants:—

> Referring to our conversation of last evening, this will be your authority to load in cars all wire fencing, gates, etc., in the warehouse belonging to us.

At the date of this letter the plaintiffs were indebted to the defendants for storage accounts for April, May and June.

In order to ship the goods, the defendants had to make arrangements with the C.N.R. Co. for cars, and the evidence shews that such arrangements required, often, several days, so that the first carload shipped, in accordance with the plaintiffs' instructions,

was on July 18. Other shipments were made on July 25 and 31, after which the defendants refused to deliver any more goods until their outstanding charges should be paid.

It has been agreed between the parties that the goods set forth in ex. 10 represent the goods retained by the defendants in their possession by way of security for plaintiffs' indebtedness to them, the total value being stated to be $1,109.89. At the end of July, when the last shipment was made by the defendants to the nominee of the plaintiffs, there was due to the defendants at least the sum of $110.23 for storage during June, and for loading 72,920 lbs. of goods for re-shipment to the plaintiffs. No tender of these charges was made by the plaintiffs.

In July, 1911, the plaintiffs paid defendants' charges for April and May, but did not pay the charges for June, 1911, until January, 1912, and in the meantime made no offer. By that time the defendants had charged the plaintiffs with storage on the goods which they were holding for security, amounting to about 10 tons, but the plaintiffs repudiated any liability for such charges. No steps were taken by the plaintiffs from January, 1912, until June, 1914, when they commenced this action. They now sue for a return of the goods set forth in ex. 10, or, in the alternative, for the value of the same.

The defendants counterclaim for storage of the plaintiffs' goods from and including July, 1911, to date, and for re-shipping a portion of the goods aforesaid, and for plaintiffs' proportion of the business tax for the years 1911, 1912, 1913 and 1914.

It is argued on behalf of the plaintiffs that so soon as they gave instructions to the defendants on June 30, 1911, to load their goods in cars, they were no longer responsible for any storage charges. The letter in which these instructions were contained did not reach the defendants until July 3, and arrangements had to be made with the railway company, which necessarily took several days. I think the defendants were entitled to their charges for storage so long as the goods remained in their warehouse without their default. And besides this, the defendants' charges for April and May were not paid until some later period in July, and their charges for June were not paid at all until January of the following year.

Mr. Murray contends that the plaintiffs were entitled to

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immediate delivery of their goods whether they were indebted or not to the defendants, upon the ground that a warehouseman, as such, is not entitled to any lien upon his customer's goods. He further argues that if any such lien existed down to June 30, when the plaintiffs instructed the defendants to re-ship the goods to them, no charges whatever could be made by the defendants while they were holding the goods as security for their existing debt.

Mr. E. Bailey Fisher, on the other hand, points out that no definite instructions to load and re-ship the plaintiffs' goods were given by the plaintiffs to the defendants until, at the very earliest, June 29; that the written instructions were not received until July 3, and it would necessarily take some days, if not weeks, to procure the cars and re-ship the goods, and that the defendants, during this period in July, had not been paid their storage charges for April, May or June, and never received their charges for June until January, 1912.

There is a singular dearth of authority respecting a warehouseman's lien. It is said in Halsbury's Laws of England, vol. 19, sec. 8, that

> A general lien entitles a person in possession of chattels to retain them until all claims or accounts of the person in possession against the owner of the chattel are satisfied. It can only exist: (1) By virtue of the course of dealing between the parties in a particular case; (2) as a common law right arising from continuous and well-recognized usage; or (3) by express agreement. General liens are discouraged, but, where the usage has been frequently recognized, the right of lien becomes part of the common law and is accepted by the Courts without further evidence. Such a general lien has been established in the case of solicitors, bankers, factors, stock-brokers, warehousekeepers and insurance brokers.

In the note applicable to "warehousekeepers" the learned editor refers to *Hill & Sons* v. *London Central Cold Storage Co.* (1910), 102 L.T. 715, and adds, "but see *Leuckart* v. *Cooper* (1836), 3 Bing. N.C. 99."

In the latter case, Tindal, C.J., said, in delivering judgment:—

> The custom set up in the plea, if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehousekeeper for safe custody, liable to a private debt of the factor, for expenses incurred in respect of other goods of third persons which had been in his hands at former times for charges contracted upon said goods during any antecedent period of time, and that to an unlimited extent. It appears to us, that such a custom is at once unreasonable and unjust, and, therefore, bad in law.

In the other case of *Hill & Sons*, 102 L.T. 715, the arrangement made by the bailors was that goods deposited in the warehouse were to be delivered to the order of the bailors' agent, all charges to his account. The bailee delivered certain goods on the order of the bailors' representative without collecting the charges therefor, and it was held that the plaintiffs (the bailors) were entitled to delivery of the remaining goods free from any lien for the unpaid charges on the goods previously delivered.

In this case Messrs. Bankes, K.C., and Holman Gregory (counsel of great eminence) acted respectively for the plaintiffs and defendants, and it was admitted that the defendants had a general lien on goods stored with them. I am inclined to think that the dearth of authorities upon the subject is owing to the fact that it is recognized, both in England and in Canada, that a warehouseman has a general lien as against the bailor, and the only difficulty which arises in the reported cases is where the bailee is endeavouring to assert his lien as against the rights of third parties.

The main case relied upon by Mr. Murray in respect of the defendants' charges for storage subsequently to July 1, 1911, is *Somes v. British Empire Shipping Co.*, 8 H.L.C. (Clark) 338. That, however, was a case dealing with a lien asserted by a shipwright for repairs performed upon a ship. This is a different class of lien from the general lien possessed by a warehouseman, and the law applicable to it is inapplicable to the present case.

For these reasons I am of opinion that the plaintiffs' action must be dismissed with costs, and the defendants' counterclaim allowed with costs.

Action dismissed; counterclaim allowed.

MERRITT v. CORBOULD.

Judicial Committee of the Privy Council, Lord Dunedin, Lord Moulton, Lord Parker, of Waddington, Lord Sumner, and Sir George Farwell, May 25, 1914.

1. BROKERS (§ III A—30)—AUTHORITY—PRINCIPAL AND AGENT.

Authority to an agent to effect a sale of certain company bonds, shares and assets at a stated price does not involve an authority to include as a stipulation in the agreement of purchase obtained from the purchasers that the latter should be liable to no damages over and above the deposit or other sum which they may have paid, in the event of the purchaser's default.

[*Merritt v. Corbould*, 11 D.L.R. 143, affirmed.]

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2. BROKERS (§ II B—10)—COMPENSATION—SALE ON UNAUTHORIZED TERMS.

Where an agent authorized to sell company shares and assets negotiates a sale at the price but upon terms not authorized by his principal as to the limit of liability of the purchasers in case of their default and the terms are not acquiesced in by the principal, the agent is not entitled to the stipulated commission.

[*Merritt* v. *Corbould*, 11 D.L.R. 143, affirmed.]

Statement

APPEAL by plaintiff to restore the judgment in his favour at the trial which had been reversed by the Supreme Court of British Columbia, *Merritt* v. *Corbould*, 11 D.L.R. 143.

The appeal was dismissed.

The judgment of the Board was delivered by

Lord Sumner.

LORD SUMNER:—The appellant, the plaintiff in the action, sued for commission due to him as the defendants' agent for procuring a purchaser at their price and on their terms of certain shares in and assets belonging to the Canadian Pacific Lumber Co., Limited, in which the respondents were interested. At the trial he was successful. His evidence was accepted and his claim was allowed. The Court of Appeal of the Province of British Columbia (*Merritt* v. *Corbould*, 11 D.L.R. 143) reversed the decision of the trial Judge, and the plaintiff brings this appeal by leave of that Court.

The appellant and the respondents among them held all the common stock of the above-named company. It was not prosperous, and they wished to sell their shares and the company's undertaking. The defendants instructed the plaintiff to try, when in England, to find persons there who would come forward with the requisite money in accordance with various alternative schemes, but before he had concluded anything a contract (called "the Meredith agreement") was concluded in British Columbia to effect the common object. This, it is agreed, put an end to such authority as the plaintiff had prior to its date, namely, January 6, 1910.

The plaintiff, however, had been negotiating with a firm of Johnson, McConnell & Allison, of Montreal, two of whose members were in Europe at this time, and had reached a point at which things promised well. Accordingly he cabled to the defendants such an account as induced them to suspend the operation of the "Meredith agreement" to give him time to come to terms with this firm. The plaintiff's authority is to be collected

from a cable sent to him on January 11, 1910, which has to be read in connection with the surrounding circumstances, and particularly with the plaintiff's own cable of January 10, to which it was the answer. Those cables ran as follows:—

Jan. 10, 1.30 p.m.

Johnson wants refusal possibly fourteen days with lumber fixed assets three twenty thousand cash provided lumber stock value $100,000.00 if not purchase price reduced *pro rata*. Shareholder assume lawsuit retain book debts capital stock transfer with agreement vendors repurchase limits $150,000 think can sell at this price.

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Will sell all shares two hundred forty thousand and market price for lumber shareholders assume lawsuits retaining book debts Tees agreement and limits Meredith finally consents if closed fourteen days, you may sell limits not less one hundred and thirty if mill sold.

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By a separate cable the plaintiff was at the same time promised a commission of 5 per cent. The cable signed "Tupper" was sent on behalf of all the defendants.

Armed with this authority the plaintiff proceeded with his negotiations and concluded a bargain with Messrs. Johnson, McConnell & Allison for the purchase by them of the common stock and bonds of the company for $240,000, and of the lumber at the mills for a sum equal to its value on January 18. He consulted an eminent London solicitor, who drafted a formal agreement, and this was actually executed on the purchaser's behalf on January 18. It was never executed on behalf of the vendors, the defendants, as the owners of shares and the company, as owner of the lumber, because the defendants, or some of them, thought that on a rising lumber market they could do better elsewhere and cried off. In that state of the market Messrs. Johnson, McConnell & Allison were eager to buy, and would have paid $240,000 down, waiving the stipulations of the formal agreement, if they could have got the respondents to recognize the bargain, but in fact the matter came to nothing, and no attempt was made to enforce any bargain on their part.

The plaintiff claimed that he had earned his commission and that he was none the less entitled to be paid for his work though the defendants had refused to conclude or to carry out the bargain with the purchasers whom he had found. The defence

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was that he was employed to find purchasers on the terms of the cable of January 11, 1910; that he found purchasers only on terms which went beyond the limits of that authority, and that accordingly nothing was due. This is the whole question, viz., did the terms of the formal agreement conform to or depart from the mandate contained in the cable? There is no question of law involved, and when reduced to what is essential the case is simple.

The plaintiff's claim, as pleaded, was that he earned his commission not by effecting an introduction simply but by carrying through a negotiation. He rested his case on his having brought about an agreement of purchase, expressed in the document prepared by the solicitor, Mr. Russell, and signed on behalf of the purchasers. That claim was never amended. It is true that some attempt was made at the trial to prove that on January 25 the purchasers offered to pay the whole $240,000 out of hand, and this evidence the trial Judge believed, finding also that "the plaintiff did everything which it was possible for an agent to do; he found a purchaser able and willing to buy." The plaintiff, however, must be held to his pleaded case, all due objections having been taken by the defendants' counsel at the trial, nor is there any evidence that the plaintiff was to be paid merely for finding a buyer possessed of $240,000, and willing to pay it if the respondents could come to terms with him. His employment clearly was to effect a sale and to carry through the negotiations outlined in his cable of January 10, with the parties named therein, provided he did so on the terms and within the authority contained in the cable of January 11.

The Court of Appeal held that the plaintiff had not satisfied this proviso, and with this conclusion their Lordships agree. The actual bargain contained two terms of special importance here; it made the price payable by three instalments, the first of £2,000 payable on January 18 "by way of deposit forfeitable as thereinafter mentioned," and it provided that "if the purchasers fail to comply with this agreement their deposit or any other sum they may have paid shall be absolutely forfeited, but the vendors shall have no further claim against them for damages."

The $240,000 mentioned in the cable of January 11, is no doubt to be taken in connection with the words "three twenty thousand cash" in that of January 10. It is not necessary to decide whether "cash" here actually meant "cash down and not by instalments" or meant "money only and not money's worth, that is all cash and no shares," but, as the sale was a sale of shares and goods, there was neither reason for the purchase price to take the form of shares in the same company nor any suggestion of the formation of any other. Be this as it may, it is clear that if the contract had not provided for payment by instalments there would have been no question of any forfeitable deposit, and if there had been no forfeitable deposit, there would have been no stipulation that damages *ultra* should not be recoverable. The plaintiff received no possible authority under the cable of January 10, or otherwise, to bargain away his principal's right to recover damages to the full in case of breach of the contract, and this was an integral and material part of the only contract that he procured. He made a contract which he was not authorized to make. That could not entitle him to his commission.

It is said that the £2,000 might have been adequate as damages, and is at any rate a substantial sum. So it is, but it might not have been enough, and the vendors ought to have been entitled to claim such damages in full as they could prove, until they agreed to the contrary. It is said that the vendors could have got specific performance. However that may be and without deciding that question, it is plain that they were entitled to their remedy by way of damages, if they chose. The plaintiff cannot excuse the fact that he bargained this away without authority by pleading that he did not leave his principals without any remedy at all. Finally it is said that the draft was prepared by Mr. Russell, in what he considered to be a proper form, and that it is in a usual form. It may or may not be usual, and certainly nobody blames the solicitor, but certainly also, the defendants had not delegated to him any power to amplify the plaintiff's authority. They had recommended the plaintiff to

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consult him, but even if they could be treated as his clients, they did not authorize him to do anything beyond the terms of their cable. Mr. Russell could not invest the plaintiff with an authority which he himself did not possess, and was not authorized to give.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

B. C.
S. C.

Re BANKERS TRUST CO. AND BARNSLEY.

British Columbia Supreme Court, Gregory, J. September 21, 1914.

1. CORPORATIONS AND COMPANIES (§ V A—169)—PREFERRED STOCK—ISSUE OF—BASIS FOR CERTIFICATE.

Where a company's articles of association enable it to issue new shares under the authority of a special resolution and to divide them into classes and make some preferential with the like authority, a certificate issued as for preference shares issued without any such resolution and therefore without the requisite authority by the secretary or president has not the effect of creating or allotting preference shares.

[*Koffyfontein Mines* v. *Mosely*, [1911] A.C. 409; *Re Pakenham Pork Packing Co.*, 12 O.L.R. 100, applied.

Statement

APPLICATION in a winding-up to settle the list of contributories.

Judgment accordingly.

H. B. Robertson and *Mayers*, for plaintiff.

H. A. Maclean, K.C., and *Twigg*, for defendant.

Gregory, J.

GREGORY, J.:—This is an application to settle the list of contributories in winding-up proceedings. The liquidator seeks to place on the list, as holders of 10 per cent. preference shares, a large number of persons who made application therefor, and to some of whom certificates were actually issued. On behalf of these persons it has been objected that the company never legally created, issued or allotted any such shares. For the purpose of simplifying future proceedings, it has been agreed that this question should first be settled, leaving it open to the liquidator hereafter to shew that any particular individual is estopped on the ground of acquiescence, delay or otherwise from setting up this defence.

As originally incorporated, the capital stock of the company, then called the "Prince Rupert Savings & Trust Co. Ltd.," consisted of 60,000 ordinary shares of $5 each = $300,000

This capital was re-organized (by special resolution passed on August 9, 1910, and confirmed on August 24, 1910) as follows:—

8000 preference shares (10%) of $25.00 each	$200,000
3,400 ordinary shares of $25.00 each	85,000
15,000 ordinary shares of $1.00 each	15,000
26,400	$300,000

When this re-organization took place, 13,247 of the original 85 shares had, according to the recital in the special resolution, been subscribed for and issued, and were then fully paid up; but the holders thereof, apparently in order to perfect the re-organization of the capital, surrendered them (receiving new shares in lieu thereof).

Subsequently an attempt was made to increase the capital of the company from $300,000 to $2,000,000, by the following resolutions, and no others:—

1. 24th July, 1912. Resolution of the directors—That the capital stock of the company be increased to two million dollars by the creation of sixty-eight thousand (68,000) new shares of $25.00 each, and that the directors be authorized to take such steps as may be necessary for the purpose of giving effect to this resolution, and that the secretary call an extraordinary general meeting of the shareholders on Monday, the 12th day of August, 1912, at 3 p.m. . . .

2. 12th August, 1912. Special resolution by the shareholders in identically the same terms as that of the directors passed on the 24th July, 1912, but omitting the directions to the secretary.

3. 27th August, 1912. Shareholders confirmed the special resolution.

It is in connection with shares issued under the authority of these resolutions that the present question has arisen. It is to be noted that none of these resolutions purport to create any "*preference*" shares in so many words, and it is also to be noted that there is no resolution authorizing the shares to be issued or allotting the same. The creation and issue of new shares is regulated by the following articles of association:—

Art. 5. The directors may *with the sanction* of a special resolution of the company in general meeting *first had and obtained*, divide, create and issue any part of the share capital, as well initial as increased, into and in several classes, and may attach thereto respectively any preferential, deferred qualified or special rights, privileges or conditions.

The directors have taken no such steps, nor have they been authorized to do so by any special resolution.

Art. 45. The *company* may in general meeting by special resolution increase the capital by the creation of new shares of such amount as may be deemed expedient.

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This the company has done by its special resolution of August 12, 1912—the previous resolution of July 24, 1912, by the directors was valueless—the directors having no initial authority to increase capital.

Art. 26. The new shares shall be issued upon such terms and with such rights and privileges annexed thereto as by the special resolution creating the same shall be directed and in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of the assets of the company, and with a special or without any right of voting, and *if no directions be given by such special resolution* or subsequently *they shall be dealt with by the directors* as if they were part of the original capital.

It is argued that the shares in question were issued by the directors as preference shares under the authority of art. 46. But the answer to this contention is that the special resolution creating the new shares made no reference to their being preference shares—and the *directors* never issued, allotted or dealt with them in any way whatever; there is absolutely no resolution of the directors on the subject. It is true that certificates have been actually handed out, but that was the act of the secretary, authorized, presumably, only by the president, who had no such authority. The certificates indicate that the shares were to be paid for by instalments, but it is impossible to find any authority for this in the records of the company or its directors.

As the special resolution creating the shares gave no directions, etc., the shares were, under art. 46, to be dealt with by the directors "as if they were part of the original capital." In the original capital there were no preference shares, and if it is claimed that the capital as re-organized by the special resolution of August 9, 1910, is now to be treated as the original capital, we receive no help, for by that resolution both ordinary and preferred shares of $25 each were created. It seems to me quite clear that no new preference shares have been duly created, issued or allotted, and that the case falls within the principles enunciated in *Koffyfontein Mines Ltd.* v. *Mosely*, [1911] A.C. 409; *Re Pakenham Pork Packing Co.* (1904), 12 O.L.R. 100.

Since writing this judgment it had been agreed by all parties that it shall be delivered in the matter of the application to place the name of John Barnsley on the list of contributories.

Judgment accordingly.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. June 15, 1914.

1. MORTGAGE (§ VI C—80)—WHO MAY FORECLOSE — PARTIES—INFANT—SALE OF INFANTS' ESTATES.

A proviso in a mortgage given for purchase money that the mortgagor may retain the sum of $1,000 out of the last instalment until the vendor-mortgagee shall obtain a certain confirmation deed in pursuance of his bond given on closing the purchase so as to complete the title when the party from whom the confirmation deed was to be obtained, had attained his majority will not prevent a foreclosure in the meantime if the mortgagor defaults in his payments; the proviso for such retention is qualified by the proviso that on default of payment of interest the whole and every part of the principal shall become due (Short Forms of Mortgages Act), and the right of retention ceased on the condition being broken.

[*Burrows* v. *Malloy*, 2 Jo. & Lat. 521, distinguished.]

Statement

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P.

The appeal was dismissed.

S. H. Bradford, K.C., and *T. Hislop*, for the appellants.

H. E. Choppin, for the respondent.

Mulock, C.J.Ex.

The judgment of the Court was delivered by MULOCK, C.J.Ex.:—This is an action by a mortgagee for foreclosure of a mortgage because of default by the mortgagor in payment of interest and part of the principal moneys secured by the mortgage. By order of Chief Justice R. M. Meredith, the usual mortgage judgment was entered, and from that judgment the defendants appeal.

The ground of appeal is that, by the terms of the mortgage, $1,000, being part of the principal money secured by the mortgage, is not payable until after the mortgagor shall have received from one U. E. Willson a deed of his interest in the mortgaged lands; that such deed the mortgagor has not yet received; and he contends that, because the mortgagee is not now entitled to payment of the $1,000 in question, she is not entitled to foreclosure, although default has been made by the mortgagor in payment of interest and of an instalment of principal.

When the action was begun, there was owing to the plaintiff for overdue interest $460.95, and for overdue principal money $1,500. These amounts are still unpaid. The history of the mortgage transaction is as follows:—

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By agreement in writing, bearing date the 27th June, 1912, the plaintiff agreed to sell to the defendant and he agreed to purchase from her the lands therein mentioned for the sum of $10,000, payable as follows: $500 on execution of the contract, $2,000 on the 1st October, 1912, and the balance, namely, $7,500, in three equal annual instalments of $2,500 each, on the 1st days of October in the years 1913, 1914, and 1915, with interest at 6 per cent. payable annually, "the last three payments to be secured by mortgage of the said lands dated 1st of October, 1912, from which the interest is to be computed."

In the investigation of the title it appeared that one U. E. Willson had some interest in the property, that he was then under age, and would not attain his majority until the 17th September, 1915. Questions of title, including U. E. Willson's interest, doubtless delayed the completion of the sale, but the parties ultimately arrived at a basis for its being carried out, and set forth the same in a written agreement, bearing date the 30th January, 1913, under the hands and seals of the plaintiff, her husband, and the defendant. This agreement recites that it has been agreed that the defendant "shall be entitled to retain out of the last-mentioned instalment" (namely, the $2,500 due on the 1st October, 1915) "the sum of $1,000 until such time as the party of the first part" (the plaintiff) "shall obtain a proper and sufficient deed of confirmation, duly executed by the party thereto of the third part" (U. E. Willson) "and conveying to the defendant all the estate, etc., of him" (U. E. Willson) "in the said lands, as evidenced by a clause to that effect inserted in the said mortgage."

This agreement also provided for the plaintiff and her husband giving the defendant their bond, and it also provided that, on execution of the agreement and delivery of the bond, the defendant would accept a conveyance, and, upon receipt of the confirmation deed by U. E. Willson, would pay to the plaintiff the $1,000.

This arrangement in regard to the $1,000 was incorporated in the mortgage in question immediately after the proviso setting forth the terms of payment of the mortgage-moneys, and is as follows: "Provided always, and it is hereby agreed by and be-

tween the parties that, notwithstanding the time, dates, and manners herein fixed for payment of the principal money hereby secured, the mortgagor, his heirs, etc., may retain to his or their use the sum of $1,000 out of the last instalment of $2,500 payable on the 1st day of October, 1915, until such time as the said mortgagee, her heirs, etc., shall have performed the terms and conditions of a certain agreement between the parties hereto, which agreement bears date the 30th day of January, 1913, entitling her or them to the due payment of said $1,000 under such agreement."

Then follow the usual statutory conditions and provisoes, including the proviso "that in default of the payment of the interest hereby secured the principal hereby secured shall become payable." The mortgage is made in pursuance of the Short Forms of Mortgages Act, and in accordance with a term contained in the agreement of the 27th June, 1912, it bears date as of the 1st October, 1912; but, as it speaks of the agreement of the 30th January, 1913, as then having been entered into, it is clear that up to the 30th January, 1913, the mortgage had not been made, and that, as between the parties, it is to be treated as entered into after the making of the agreement.

By sec. 3 of the Short Forms of Mortgages Act, 10 Edw. VII. ch. 55, the proviso is to be construed as if worded as follows: "Provided that . . . if any default shall at any time happen to be made of or in the payment of interest money hereby secured or mentioned or intended so to be or in part thereof, then and in such case the principal money hereby secured or mentioned or intended so to be and every part thereof shall forthwith become due and payable in like manner, and with the like consequences and effects to all intents and purposes whatsoever as if the time herein mentioned for payment of such principal money had fully come and expired," etc.

Reading together the two provisoes, one that the defendant may retain the $1,000 until a certain time, namely, until after he shall have received a conveyance from U. E. Willson, and the other that, on default of payment of interest, the whole and every part of the principal shall become due, it is clear that the latter proviso qualifies the former; that the right of retainer of

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the $1,000 is not absolute, but conditional on there being no default in payment of interest; and that, on that condition being broken, the right to retain it ceased.

The defendants' counsel relies on *Burrowes* v. *Molloy*, 2 Jo. & Lat. 521. In that case the mortgage provided that the mortgage-debt should be paid on the 1st May, 1842. This was a mistake, as the parties to the mortgage had intended that the principal money should not be payable until after the mortgagor's death. The mistake was corrected by a deed of covenant between the mortgagor and the mortgagee, which recited the mistake in the mortgage, and in which deed of covenant the mortgagee covenanted with the mortgagor that the principal or any part thereof should not be called in until after the death of the mortgagor, "anything in the deed of mortgage or bond collateral therewith to the contrary in anywise notwithstanding." Thus in that case all the terms in the mortgage were made subject to the covenant that the mortgagee would not call in the principal during the mortgagor's life. This unqualified covenant formed no part of the mortgage, but was subsequent thereto and controlled its terms. In effect it says that, even if the mortgagor shall make default in payment of interest or in observing any of the other terms of the mortgage, nevertheless the mortgagee will not call in the principal money, and Lord Chancellor Sugden held that the mortgagee was bound by his covenant.

In the present case, however, the facts are different. Here the agreement not to call in the $1,000 does not override the terms of the mortgage, but is made subject to the proviso in the mortgage that, if the mortgagor makes default in payment of interest, then the whole principal money and every part thereof shall forthwith be due and payable. Default having been made in payment of interest, the mortgagee is thus, by the express agreement between the parties, entitled to call in the whole principal, which includes the $1,000 in question.

I, therefore, think that the learned Judge rightly disposed of the case, and that this appeal should be dismissed with costs.

Appeal dismissed.

HENEY v. KERR.

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Ontario Supreme Court, Boyd, C. February 3, 1914.

1. RECORDS AND REGISTRY LAWS (§ III C—24)—NOTICE DE HORS RECORD—PRIORITIES—MORTGAGES.

The time of "actual notice" to be regarded under the Registry Act, Ont., 10 Edw. VII. ch. 60, sec. 71, as displacing priority of registration, is the time at which and before which an interest in the land is being acquired; actual notice of two prior mortgages at the time of taking an assignment of a mortgage third in point of time will prevent the assignee acquiring priority over the second mortgage registered after the registration of the third mortgage so assigned, where the original mortgagee under the third mortgage also had notice of the second mortgage when he took the third.

[*Mackecknie* v. *Mackecknie*, 7 Gr. 23, applied.]

2. COSTS (§ I—7)—ON FORECLOSURE—MORTGAGES—PRIORITY.

An unsuccessful mortgagee upon a dispute with other mortgagees as to priority of encumbrances is not entitled to add his costs to the mortgage debt so as to charge the land where the priority of registration of the mortgage under which he claims is displaced by proof of notice of the other mortgage within the exception contained in the Registry Act (Ont.).

Statement

APPEAL by the defendant Mitchell from the report of the Local Master at Ottawa in a mortgage action for foreclosure, settling the priority of subsequent incumbrancers; and motion by the defendant Olive Kerr to stay proceedings upon payment by her to the plaintiff of the amount due upon the mortgage.

The plaintiff sued as executor of the will of John Heney, deceased; the original defendants were Olive Kerr, William Jonathan Kerr, and William Hughes; Olive Kerr and Charles W. Mitchell were added as defendants in the Master's office.

Judgment accordingly.

W. C. McCarthy, for the defendant Mitchell.

H. Fisher, for the plaintiff.

J. E. Caldwell, for the defendant Olive Kerr.

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BOYD, C.:—Foreclosure action, with subsequent incumbrancers: appeal from the Master at Ottawa on settlement of priorities.

The registrar's abstract shews this state of title. The owner, Olive Kerr, mortgages to Heney, the plaintiff, for $2.500 (first mortgage). Kerr sells equity of redemption to Amey 16th July, 1912, registered 25th July. Amey mortgages to Kerr 17th July, registered 2nd August, 1912. Amey sells to Roche and Hughes

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20th July, registered 25th July, 1912. Roche and Hughes mortgage to Amey 20th July, registered 25th July, 1912. Amey assigns Roche and Hughes's mortgage to Mitchell 14th August, registered 15th August, 1912. Amey sold to Roche and Hughes subject, as expressed in the conveyance, to the two mortgages, that to the plaintiff and that to his vendor, Kerr. Mitchell, assignee of the third mortgage, in point of time, from Roche and Hughes to Amey, claims by priority of registration over the mortgage, second in point of time, from Amey to Kerr.

It is well proved that Mitchell had actual notice at and before the time he took the assignment that he was dealing in respect of a third mortgage. The witness Armour says: "I told Mitchell it was a third mortgage, that there were two others ahead of it. I think I told him the amounts; am positive I told him about two other mortgages and who held them." Another witness, Dunlevie, says the same, and it is not contradicted by Mitchell.

The claim for priority is rested on the statute, the Registry Act, 1910, 10 Edw. VII. ch. 60, sec. 71, which reads: "Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration."

It is urged that Mitchell is the person claiming under the prior registration (*i.e.*, of the Roche-Hughes mortgage on 25th July), and that actual notice of the prior mortgage (*i.e.*, of the Amey mortgage to Kerr dated 17th July) has not been proved against Mitchell.

That is a plausible reading of the Act, which is contributed to by the revised language of the section. But it is in every aspect untenable. When first enacted in 1865 (29 Viet. ch. 24, sec. 65), the provision was that "priority of registration shall in all cases prevail unless before such prior registration there shall have been actual notice of the prior instrument by *the party* claiming under the prior registration." The word "party" has an individualising referential touch, which is lost when it is changed to "person." "Party" is not here synonymous with "person;" it means one who is "party" to the instrument which is being registered, by the registration of which he will, by virtue

of the Act, obtain priority over the instrument earlier in date which has not been registered at the time of his registration.

Mitchell in this case may be said to claim under the original patent, and that is as much to the purpose as to say he claims under the mortgage registered by Amey on the 25th July. Amey, of course, had actual notice that it was a third mortgage, because he himself had given the second to Mrs. Kerr, and had bought subject to the first mortgage to Heney. The status of the mortgage from Amey to Kerr was not affected by and was not made fraudulent and void as against the subsequent mortgage taken by Amey from Roche and Hughes (sec. 70 of the Act of 1910); and it remained a perfectly valid mortgage prior to Mitchell's, because he not only took his assignment with actual notice, but he took subsequent to the Kerr mortgage, which was duly registered on the 2nd August, before he purchased the other mortgage on the 14th August. The time of notice to be regarded is the time at which and before which an interest in the land is being acquired; actual notice at that time affects the status, as it formerly did the conscience, of the purchaser; and, if he goes on, it is at his peril: *Mackechnie* v. *Mackechnie* (1858), 7 Gr. 23.

The Master's conclusion in giving priority to the mortgage prior in date, though not registered prior to the mortgage later in date, is well-founded, and should be affirmed with costs. The unsuccessful disputant as to priority in the Master's office should also pay personally forthwith the costs occasioned by his contest, which have been taxed at $95.46. These should not be put as a burden on the land; these are not the sort of costs which an unsuccessful mortgagee is entitled to add to his security. The mortgagor is not responsible for this collateral struggle for priority, and the contestants must fare as other litigants. This is not expenditure arising from a proper attempt to protect and preserve his security as against the mortgagor, but a frustrated attempt to get ahead of a more deserving incumbrancer.

There has also been brought on a substantive motion, referred to me by the Master, on behalf of the mortgagor, the original defendant, Kerr, to pay to the first incumbrancer, the plaintiff,

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what is now due, and stop proceedings in the action till further default is made.

It is according to the practice of the Court, as recognised by the Legislature in explaining the meaning of the acceleration clause in mortgages, to grant this relief after judgment and before the final order, upon payment of what is due, to be ascertained by the Master. The delay in moving has led to the bringing in of subsequent incumbrancers; the costs of proving the claims of these, as well as the costs of the plaintiff, should be paid as a condition of staying proceedings. If the Master finds that there was a sufficient tender to the plaintiff of what is due, this motion will be without costs—if insufficient, the applicant will have to pay the costs also of this application. See, on this question, *Hazeltine* v. *Consolidated Mines Limited* (1909), 13 O.W.R. 271, 994; and Con. Rule 389 of 1897 (now Rule 485).

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COOK v. GRAND TRUNK R. CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. April 6, 1914.

1. NEGLIGENCE (§ II A—76)—CONTRIBUTORY NEGLIGENCE—EFFICIENT CAUSE —DEFENCE.

In an action for negligence causing death in which a defence of contributory negligence is raised, if a negligent act on the part of the deceased is established which was the efficient cause of the fatal injury the question of the deceased's view of the possibilities of his act is immaterial, and whether the possibility of injury was or was not foreseen by him all the consequences which are the direct and natural outcome of his negligent act are attributable to same in bar of the action.

[*Lake Erie & Western R. Co.* v. *Craig*, 73 Fed. Rep. 642, criticized.]

2. NEGLIGENCE (§ II A—76)—WHEN CONTRIBUTORY NEGLIGENCE A DEFENCE.

Negligence or want of ordinary care or caution on the plaintiff's part as constituting contributory negligence may disentitle him to recover where it is such that otherwise the injury could not have happened.

[*Smith* v. *London & S.W. R. Co.*, L.R. 6 C.P. 14, referred to; and see *Jones* v *C.P.R.*, 13 D.L.R. 900, and *Grand Trunk R. Co.* v. *McAlpine*, 13 D.L.R. 618.]

Statement

APPEAL from the judgment of Middleton, J., dismissing an action by the widow and administratrix of the estate of John R. Cook, deceased, on behalf of herself and an adopted child of the deceased, to recover, under the Fatal Accidents Act, damages for the loss sustained by them by the deceased having been killed,

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by reason, as the plaintiff alleged, of the negligence of the defendant company.

The appeal was dismissed.

G. S. Gibbons, for the appellant.

D. L. McCarthy, K.C., for the defendant company, the respondent.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 17th November, 1913, pronounced by Middleton, J., after the trial of the action before him, sitting with a jury, at Hamiuton, on the 27th October, 1913. Meredith, C.J.O.

The action is brought by the widow and administratrix of John R. Cook, deceased, on behalf of herself and an adopted child of the deceased, to recover, under the Fatal Accidents Act, damages for the loss sustained by them by the deceased having been killed, owing, as is alleged, to the negligence of the respondent.

The deceased was a brakeman in the employment of the respondent, and was killed while engaged in uncoupling cars which were being shunted for the purpose of dropping one of them at Stoney Creek; the part of the train which was being shunted consisted of 7 cars, and the 7th was the one intended to be dropped. The deceased, after turning the switch-points for the purpose of enabling the train to be backed on to another line, proceeded in the same direction as that in which the train was moving, and, while it was still moving, though at a slow rate, said to have been 2 or 3 miles an hour, entered between the 6th and 7th cars for the purpose of uncoupling them, an operation which involved the turning of a stop-cock to "cut off the air" and pulling out a pin which passed through the draw-bar; and the rear car was about 15 feet away from a car standing on the line to which it was intended that the 7th car should be coupled. Just how the accident happened is not at all clear. When the deceased was found immediately after the accident, he was lying with his left arm across the draw-bar and his hand on the angle-cock, which had been turned. His injuries consisted of a bruise on the left side of his head, of considerable area and "jammed in as though he had got some rap against the side

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of the head," and were caused, as the appellant contends, by his head having come into contact with the jagged end of a log which projected about a foot or more beyond the end of the 6th car, which was laden with logs. The deceased's height was about 5 feet 6 inches, and the log was about 7 feet above the ground level, and at some point between the place of shipment and Stoney Creek had shifted, owing to one of the stakes having been broken off and the wires which were tied around the logs for the purpose of keeping them in position having also been broken. The evidence establishes that the car was properly laden, and that the logs were properly secured by the wiring when they were shipped at Haliburton, and there is no direct evidence as to when or how the breaks had occurred. It was contended by the appellant that nothing had occurred after the train left Hamilton to cause the breaks, and that, therefore, the proper inference was that they occurred on the journey of the train from the place of shipment to Hamilton or at Hamilton.

One of the operating rules of the respondent, approved by the Board of Railway Commissioners for Canada, and well-known to the deceased, is the following: "254. Every employee is required to exercise the utmost caution to avoid injury to himself or to his fellows, and especially in switching or other movement of trains. Jumping on or off trains or engine in motion, entering between cars in motion to couple or uncouple them, and all similar recklessness, is forbidden. Train-masters, yard-masters, conductors, station-agents, foremen, and all others in authority, are instructed to enforce this rule and to punish all violations of it. No person who is careless of others or of himself will be continued in the service of the company."

The following are the questions which the jury were directed to answer, and the answers to them:—

"Q. 1. Was Cook's death the result of his going between the cars while in motion to uncouple them? A. Yes.

"Q. 2. Were the logs at that time projecting beyond the ends of the cars? A. Yes.

"Q. 3. Were the logs properly loaded in the first place? A. Yes.

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"Q. 4. Was Cook killed by being crushed by the logs while between the cars in motion? A. Yes.

"Q. 5. Did the defendants permit Cook to engage in the operation of trains without first requiring him to pass an examination on train rules? A. No.

"Q. 6. Were the defendants guilty of any negligence which caused the death of Cook? If so, what? A. Yes. By allowing the logs to project over the end of the car.

"Q. 7. Quite apart from any rules or regulations of the company, was Cook guilty of negligence in going between the cars while in motion? A. No.

"Q. 8. Damages? A. $3,500."

After the jury returned their answers, according to the stenographer's notes the trial Judge addressed the jury as follows: "Gentlemen: I do not know that I quite understand what you mean by number 6, that is: 'Were the company guilty of any negligence which caused the death of Cook? If so, what?' You have answered: 'Yes. By allowing the logs to project over the end of the car.' Is that by not finding out they had broken loose and reloaded them? Is that your meaning or what is your meaning? I do not want some other Court to say it is something other than what you intend." To which the foreman of the jury is reported to have replied: "We thought, your Lordship, the company should have had a man to inspect these logs and make them right, that is what we thought, before they came to the accident." The trial Judge is reported to have then said, "You think they ought to have had some oversight of the cars so as to see that the logs did not break loose," and the foreman to have replied in the affirmative.

In my opinion, the judgment was properly entered on these findings for the respondent.

Reading the answers to the 1st and 6th questions together, the effect of the findings, viewing them most favourably to the appellant, is, that the deceased's injuries were caused by the negligence attributed to the respondent by the answer to the 6th question, and the violation by the deceased of the rule which prohibited his entering between moving cars, and, assuming that the violation of the rule was but a negligent act on the part of

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the deceased, is a finding that the injuries were caused by the joint negligence of the respondent and the deceased, and that finding is conclusive against the right of the appellant to recover.

I am inclined to think, however, that the finding is not so favourable to the appellant as I have assumed, and that the answers of the jury mean that, though the respondent was negligent, the efficient cause of the accident was the deceased's own act of entering between the moving cars in violation of the rule which forbade him to do so.

It was argued by counsel for the appellant that the jury have not found that the violation of the rule was the *causa causans* of the accident, and that, in the absence of such a finding, the judgment should not have been entered for the respondent. I am unable to agree with that contention; but, if it were well-founded, there was, in my opinion, no evidence upon which the jury could reasonably have found that there was the interposition between the act of the deceased and the happening of the accident of anything which severed the causal connection between his act and the injury which he met with.

As is said by Mr. Beven in his work on Negligence, 3rd ed., p. 88, the decision in *Smith* v. *London and South Western R.W. Co.* (1870), L.R. 6 C.P. 14, establishes that, "when negligence is once shewn to exist, it carries a liability for the consequences arising from it whether they be greater or less until the intervention of some diverting force or until the force put in motion by the negligence has itself become exhausted."

Again, at p. 89 (note 2): "There are two inquiries in the application of the test of what is a natural and reasonable consequence: first, an inquiry whether the act causing injury was wrongful; that being established, then, second, what are the actual continuous consequences of the wrongful act? The liability is determined by looking *à post* not *ab ante*. The defendant's view of the possibilities of his act is very material to determine whether his act is negligence or not; it is utterly immaterial to limit liability when once negligence has been established."

Applying these rules to the act of the deceased, *ex concessis*

his entering between the moving cars was a negligent act, and it is immaterial, therefore, what his view of the possibilities of it was.

The same writer, after discussing the cases, says (p. 155): "The peculiarity, in the case of contributory negligence, is that it proceeds on the assumption that both plaintiff and defendant have been guilty of some breach of duty; and the inquiry is limited to which of the two, by exercising ordinary care, had the last opportunity of preventing the occurrence. In a case of ordinary negligence, the inquiry is, whether the defendant is guilty of want of ordinary care, and, if so, whether, after his neglect, any other agency whatever has or might have diverted the course of the operations. The conclusion is, that contributory negligence is no more than a case of negligence, not dependent on any different rule of law, though presupposing the limitation of the issue of negligence to an inquiry as to which of two persons its final impulsion should be imputed."

Mere negligence or want of ordinary care or caution will not disentitle a plaintiff to recover, unless it is such that, but for that negligence or want of ordinary care or caution, the misfortune *could* not have happened: Beven, p. 152.

Counsel for the appellant cited and relied on *Lake Erie and Western R.W. Co.* v. *Craig*, 73 Fed. Repr. 642, as authority for the proposition that, unless it is found that the injury which the deceased met with was one that he ought reasonably to have contemplated as a possible result of his entering between the moving cars, his negligence in so entering could not be said to be the proximate cause of his injury and, therefore, contributory negligence disentitling the appellant to recover.

That proposition is supported by the case cited, but is not in accordance with our law. As I have pointed out, when once negligence is established, the question of the deceased's view of the possibilities of his act is immaterial, and to his negligent act all the consequences which are the direct and natural outcome of it are to be attributed, whether the injury is a consequence that was foreseen or not: Halsbury's Laws of England, vol. 21, para. 648.

Thus far I have dealt with the case as if the deceased's act of

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entering between the moving cars was but a negligent act; and, as I am of opinion that upon that hypothesis the appellant's case fails, it is unnecessary to consider whether his so entering, in contravention of the rule, and bringing himself into a situation where he had no right to be and the respondent had no right to expect him to be, was not the proximate cause of the accident, as to which see *Grand Trunk R.W. Co.* v. *Birkett* (1904), 35 S.C.R. 296.

I would dismiss the appeal with costs.

Maclaren, J.A.
Hodgins, J.A.

MACLAREN and HODGINS, JJ.A., agreed.

Magee, J.A.

MAGEE, J.A., agreed in the result.

Appeal dismissed.

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LEWIS v. GRAND TRUNK PACIFIC R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 12, 1914.

1. NEGLIGENCE (§ I A—4*a*)—RAILWAYS—BREACH OF STATUTORY DUTY—FAILURE TO PROVE—CONTRIBUTORY NEGLIGENCE BY DECEASED EMPLOYEE.

A railway company is not necessarily liable for personal injuries received by trainmen because of a derailment at a depression or "sink hole" on a new piece of road due to an inherent weakness in the ground underneath the roadbed and not to negligent construction of the road; and it is properly absolved from liability for the death of the engineer of a heavy freight train if the derailment was caused by his running the engine at a rate of speed much in excess of that to which his orders limited him, and if the railway company, in addition to restricting the speed limit, took all reasonable precautions to ballast with gravel, from time to time, the depressions varying from two to four inches occurring at the spot.

2. MASTER AND SERVANT (§ II E—225)—NEGLIGENCE CAUSING DEATH—LIMITATION TO INJURIES WITHIN PROVINCE—EMPLOYERS' LIABILITY ACT (MAN.).

The Employers' Liability Act, R.S.M. 1913, ch. 61 was intended to be confined in its operation to injuries occurring in the province of Manitoba, and is not available in an action against a railway company for negligence causing death brought in Manitoba by a Manitoba administratrix in respect of a fatal accident occurring on a part of the railway in Ontario; nor will an action in Manitoba be available under the corresponding Ontario statute unless the plaintiff has given the notice of injury which the latter requires.

[*Simonson* v. *Can. Northern R. Co.*, 17 D.L.R. 516, 24 Man. L.R. 267; *Johnson* v. *Can. Northern R. Co.*, 19 Man. L.R. 179, followed; *Giovinazzo* v. *C.P.R.*, 19 O.L.R. 325, referred to.]

Statement

APPEAL to set aside the verdict of the jury in an action brought by the plaintiff as administratrix on the death of her husband, a locomotive engineer in the defendant's employ.

The appeal was allowed directing a nonsuit, HOWELL, C.J.M., and CAMERON, J.A., dissenting.

W. M. Crichton and *E. A. Cohen*, for plaintiff, respondent.

H. J. Symington, for defendant, appellant.

HOWELL, C.J.M. (dissenting):—The facts in this case are set forth in full in the other judgments delivered in this cause, and need not be repeated.

The accident did take place at this dangerous place in the road, and the different employees of the defendants who reported the accident were unable to state the cause of it. The train did slow up on approaching it, and was going at a slow rate of speed. The jury found as a fact that the deceased could not, by the exercise of ordinary care, have avoided the injury.

The question which involved this answer was not objected to, and I gather from remarks of counsel and the Judge that it had been agreed to, and I construe the question and answer as a finding by the jury that the deceased was running the train at the rate of speed required by his orders. The cross-examination of the witnesses as to the rate of speed shewed that they were merely guessing. No one seemed to think of it until the train had stopped and an accident had to be accounted for.

The first report of the accident, ex. 11, is made by Tisdale, who then was the superintendent of that division, and his information was procured from the conductor of the train, who, upon the happening of the accident, went back and reported to Tisdale in the performance of his duty. This report gives the rate of speed at the spot "about 6 miles per hour." It also states that "while passing over sink-hole one-half mile east of Farlane engine left track, headed down dump, and turned over."

There were other reports of the accident subsequently made by the train crew, and different guesses as to speed were given. The conductor, in ex. 14, says: "Approaching Cache Lake sink-hole engineer slowed train down to about 8 miles. I was down in the caboose sitting at the desk." This is not a statement that the train at the sink-hole was going more than 5 miles per hour, and I am curious to know how he could judge the rate of speed while sitting at the desk. Upon the evidence I do not think I can disturb the finding of the jury by holding that the deceased was disobeying orders.

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The defendants' officers were fully aware that this spot, called by some a "sink-hole," and by others a "slide," was a dangerous place, and often sank or moved laterally and downward 2 to 4 inches; to remedy which gravel was being frequently used to elevate and straighten the track. There was some evidence by which it might be inferred that at the time of the accident piles of gravel were there, one of the stones of which might have caused the pony trucks of the engine to leave the rails.

So well known and dangerous was this spot that a signal board was fixed on the right-of-way to warn engineers to slow down before this point was reached. I assume that the only danger feared at this spot was the chance of sinking or sliding, with the possibility or probability of an engine or cars leaving the track with all the consequences naturally following upon this. That which was feared might happen at this spot did happen, and the jury found that this defect or weakness in the roadbed caused the trucks to leave the track, and thus the engine was overturned and the engineer killed.

The jury found that the thing which the company feared might happen did happen, but the defendants claim that something else might have caused the accident. There was some evidence given that after the accident the rails appeared in proper alignment, but I cannot say that the evidence was satisfactory. In the various reports by the train crew no one states the cause of the accident. As above stated, the first report states that the engine left the track "while passing over the sink-hole." In ex. 17, the conductor states: "Lewis held slow order not to exceed 5 miles per hour at point of derailment, and knew this sink-hole was liable to be in bad condition at any time, as this piece of track has been sinking ever since we started operating the line." These two reports shew that the engine left the rails at the sink-hole, and the latter report shews, in addition to the evidence, the danger and risk at this spot.

The jury have found that the defect in the roadbed caused the accident, and I assume that they meant by this that the defect caused the engine to leave the rails and, as an ordinary consequence, the engine, after running a short distance, overturned. I think, upon the evidence, the jury might infer that the roadbed at this spot sank or slipped and caused the accident.

There are reasons to support this finding of fact to be found in *Schwartz* v. *Winnipeg*, 16 D.L.R. 681, 49 Can. S.C.R. 80, and *Grand Trunk R. Co.* v. *Hainer*, 36 Can. S.C.R. 180.

On the question of negligence, the case requires consideration. This point of the road required and received constant attention to keep it fit for traffic. Gravel was constantly used to level up the road because of the sinking and sliding. It appears that there were several other such places in this division, and I gather from the evidence that in some places there is a watchman kept. At all events, the order given to the deceased, ex. 16, put in by the defendant, shews the number of sink-holes on this division, the precautions to be taken by the engineer, and a statement that in one of the places a derailment had previously occurred. At some places, the document shews, the speed must be reduced to 3 miles per hour, and at another the train must stop and the engineer must examine the sink-hole before crossing. From this exhibit I would infer that the line was in this division quite unfinished and in a precarious state for operation. Perhaps the jury thought that at this point the train should have been stopped and the track examined as required at another sink-hole, and they found that the defendants should at least have had a watchman there to warn approaching trains. I do not think that the finding of the jury as to negligence is unreasonable and almost perverse: *Cox* v. *English*, [1905] A.C. 168, at 169, 170.

Statutory relief is given alike in Manitoba and in Ontario for an accident of this kind, and although a majority of this Court held that if the relief was under the Workmen's Compensation Act there would be no remedy here—see *Simonson* v. *C.N.R.*, 17 D.L.R. 516, 24 Man. L.R. 267—the remedy in this case, to my mind, does not arise under that Act. At common law the employer must provide a reasonably safe place for his workman to perform his duties, and so, if the deceased had been merely injured, he would have had a remedy at common law.

For the reasons given by me in *Couture* v. *Dominion Fish Co.*, 19 Man. L.R. 65, I think the action may be brought in this province, and I need not repeat them. The majority of the Court in that case took the opposite view, but, as I read the judgments, solely because administration was not taken out by

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the plaintiff in the province where the accident happened. In this case the plaintiff is administratrix both in Ontario, where the accident happened, and in this province.

The appeal must be dismissed with costs.

Richards, J.A.

RICHARDS, J.A.:—I concur in the judgment of my brother Perdue. In regard to the question of the notice that the Ontario Workmen's Compensation for Injuries Act requires to be given within twelve weeks from the occurrence of the accident that caused the injury (which notice was not so given in this case), I would add to what he has said that it does not seem to me that, if an action would otherwise be maintainable in the Courts of Manitoba, the Manitoba trial Judge could excuse the want of notice. Section 9 of the Act first provides that an action shall not be maintainable unless notice is given within the twelve weeks. Then it makes an exception to that rule in these words:—

> Provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the Judge shall be of opinion that there was reasonable excuse for such want of notice.

That exception depends on the opinion of the "Judge." Surely in an Ontario statute this can only mean a Judge of an Ontario Court competent to try the action. It cannot be supposed that there was any intention of the Ontario Legislature to give that power to a Judge of some other province or state.

If I am right in the above, then, even if our Courts have jurisdiction to try an action under the Ontario Act, the presiding Judge in such a case had no right to assume the power of an Ontario Judge to remove the bar.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff sues as administratrix of the estate of her deceased husband, and also on her own behalf, to recover damages against the defendants for having, as it is alleged, by their negligence caused the accident which resulted in his death. The deceased was a locomotive engineer in the employ of the defendants. On the day of the accident he was in charge of an engine drawing a freight train westerly between Graham and Redditt stations in the province of Ontario. There was what is called in the evidence a "sink-hole" at a point in the roadbed between these two stations. When the engine on which deceased was working at the time of the accident was approaching this spot, the front or "pony" trucks of the engine left the rails.

The engine continued on the roadbed until it had passed over the depression, and then fell over on the side of the embankment. The deceased was pinned between the engine and tender and killed.

The plaintiff alleges two acts of negligence as the cause of the accident: first, in not providing a railway track that could be safely used for the purpose of operating a locomotive thereon; secondly, in not providing a locomotive suitably constructed so as to be safely used on the track. The second of these grounds failed completely and was not urged.

The facts upon which the plaintiff rested her case were briefly as follows: The existence of the depression or "sink-hole" in the road; the fact that the front trucks of the engine ran off the rails, not on the depression, but when it was approaching and was near the depression; that the engine continued on the embankment and had passed over the depression when it went down the embankment and fell over, leaving the rest of the train standing on the tracks. The plaintiff called only one person who was present at and saw the accident—Jeanes, the brakeman. This witness said he could not state what was the cause of the derailment, but admitted that he had stated in his report to the defendants that the derailment "possibly might have been caused by engine running a little too fast and not curving freely on sharp curve."

The "sink-hole" in question was a depression in the road about 50 or 60 feet from end to end, the lowest part being in the centre and measuring about 20 feet in length. This sinking had manifested itself from the time of the completion of the road, and was caused by the yielding nature of the ground on which the railway dump rested at that particular point. As a train passed over it the roadbed would sink, the sinking being greatest on the north side, where there was a small lake alongside the dump. The bottom of the lake was mud, and the railway embankment sank in this as heavy trains passed over it. On some days the track sank a couple of inches, on others 3 or 4 inches. This depression was well known to the deceased, who had been operating over this part of the road for over 6 months. A section gang of men, with a foreman, was employed in looking after this portion of the road. A quantity of gravel was kept at the spot, and the men were instructed to keep up the track by working gravel

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underneath the ties. There was a curve in the track approaching the depression from the east. A daily order was issued to engine drivers and conductors operating trains over this part of the road directing them to reduce the speed to five miles an hour when passing over the sink-hole in question. The deceased had received an order to that effect immediately before commencing the trip on the day of the accident. There was also a "slow" sign placed close to the track at a point about 2,000 feet distant from the depression, so as to give the engineer warning to immediately reduce the speed. There was no evidence to shew that any danger might be apprehended if the speed across the depression were confined to 5 miles an hour. Whatever evidence there is supports the contrary. After crossing the depression without leaving the roadbed, the engine went down the dump on the "high side," that is, the one farthest from the lake.

The plaintiff's witness above referred to, Jeanes, the brakeman, gave the following answers to questions put to him by plaintiff's counsel:—

Q. Do you remember being in the caboose of that freight train? A. I was, sir.—Q. What first called your attention to anything being wrong? A. The shaking up of the cars and the sudden stopping.—Q. You say that the shaking up of the cars and the sudden stopping of the train first called your attention to the fact of there being anything wrong? A. Yes.—Q. Prior to that how was the speed of the train? A. We were running about 12 miles an hour.—Q. You say that prior to that you were running about 12 miles an hour? A. Yes.

Later on the same counsel asked him the following questions and received the following answers:—

Q. Before you came to this spot where the engine got derailed, did the engine slow down? A. It did.—Q. When you say that the engine was going at twelve miles an hour was that before it slowed down or after? A. Before.

The reasonable way of regarding these two statements, so as to make them consistent, is to take the expression "got derailed" as referring to the point where the engine completely left the tracks and went down the embankment. The statement that "it slowed down" would then refer to the effect that followed the putting on of the brakes just before the accident occurred. Further on in his evidence he was asked by plaintiff's counsel: "Do you know the speed that this train was travelling at over that sink-hole?" His reply to this was: "We were going slow;

I can't say the actual mileage." But the brakes had been applied, as his evidence shews, as soon as the truck of the engine ran off the rail, before it reached the sink-hole, and, no doubt, the train was slowing down as it crossed that spot. The important point is, was the engine running too fast around the curve and approaching the depression?

The reports of the train hands made to the defendants immediately after the accident were put in. These reports contained estimates of the speed at which the train was travelling when it left the track. The lowest was six to eight miles an hour. Two others, the conductor, and one brakeman, say 8 miles an hour. The other brakeman, Jeanes, gave the evidence to which I have already referred, and stated in his report to the company that the derailment "possibly might have been caused by engine running a little too fast and not curving freely on sharp curve." At the trial the conductor gave the speed at 12 miles an hour. The experts who were examined, and who based their conclusion on the distance the train ran from the place where the first wheels left the track to where the engine was lying, estimated that the speed must have been 12 or more miles an hour. No witness gives the speed as low as 5 miles an hour. Much reliance was placed by the plaintiff upon the report of Tisdale, the superintendent of the division, who stated that the train was running at about 6 miles an hour. But he knew nothing of the matter except by hearsay, and even his statement goes to shew that the prescribed speed was exceeded. One of the defendants' witnesses, Steeper, the trainmaster, gave what appears to me to have been a reasonable theory as to what caused the accident. He arrived on the scene about 2 hours after the occurrence and while everything remained as it was immediately after the happening of the event. He made a minute examination so as to ascertain the cause of the derailment. The following extract from his evidence gives the result at which he arrived:—

> What I claim is that the engineer did not shut this engine down when it approached that sink hole, but came running on that curve; the engineer was running at too high a rate of speed, and he kinked the rail right at the sink hole, right at the point, and that is why the engine went off the track; understand those rails we have ballasted; we have ballast and it had been put under the track day after day where soft with sand and gravel, and as they drive on, the engine coming around with force like that would throw it out, and that was the reason that the slow rate of speed order

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was given there, so that that force would not be there, to throw those rails out of line, and it was the sink hole that caused the derailment. That is what I am trying to get at, but the derailment took place just immediately east of it, caused by that engine going there at too high a rate of speed, and anybody will tell you that, and any railroad man will tell you that.

The meaning of this evidence is, that although the derailment would not have taken place had it not been for the existence of the sink-hole, yet the real cause of the accident was too high a rate of speed in approaching the spot. For that rate of speed the unfortunate man who lost his life was responsible.

The evidence appears to me to clearly establish that the front trucks of the engine ran off the tracks before actually reaching the depression and while the engine was on the curve. It might, therefore, be quite as reasonable to say that the curve had caused the accident as to say that the depression had caused it.

The jury answered in the affirmative a question as to whether the death of the deceased was caused by the negligence of the defendant company. When asked, "In what did such negligence consist?" the answer was: "A defective roadbed, and not having provided a watchman for same." The latter part of this answer does not require much consideration. The evidence shews that at the time of the accident there was nothing unusual in the condition of the road at that point which would have attracted the attention of a watchman if he had been there. A watchman, in such circumstances, could only have signalled to the deceased to slow up, and this, in view of the order and the "slow" sign, would have been superfluous.

The remaining portion of the answer given by the jury, that there was a defective roadbed, does not appear to me to contain a definite statement of an act of negligence on the part of the defendants. The answer does not give any specific cause of the accident. A railway roadbed may be quite safe for a speed of 5 miles an hour, but be dangerous, and consequently defective, for a speed of 12 miles an hour. The evidence did not shew that the depression in question was dangerous where the speed was confined to 5 miles an hour. That part of the road had, in fact, been used with safety for some time. But it was shewn conclusively that the commencement of the accident, where the front wheels of the engine first left the tracks, took place before the engine reached the depression, and that it had completely passed

over the depression before it left the roadbed and fell down the embankment. There must have been some cause for the derailment happening as it did, other than the existence of the depression. The only reasonable suggestion that is offered to account for the derailment is that the deceased was disobeying orders and running his engine at too high a rate of speed.

The railway in question was a new one. It was not to be expected that it would from the outset be free from defects. Some defects would be certain to shew themselves when the road had been put in operation. We must assume that the provisions of the Railway Act were followed, that it had been inspected as required by law and found to be reasonably fit for operation, and that leave to operate it for traffic had been granted by the Board of Railway Commissioners: Railway Act, sec. 261. The depression or sink-hole which, as it is claimed, constituted the defect in the present case, was not one of negligent construction of the road, but arose from an inherent weakness in the ground underneath it, which sank as heavy trains passed over the road. It was impossible to completely remedy this at once. The defendants did all that could be expected of them in such a case. They kept a supply of gravel immediately available at the spot and employed men to constantly keep the tracks built up, until the sinking would cease. They issued orders to their conductors and engine drivers and put up signs warning them to slow down to 5 miles an hour while passing over the spot. The evidence shews that the section gang had gone over this depression at least once, if not twice, on the day of the accident and before its occurrence. After the accident an examination shewed nothing wrong with the road, or the alignment of the rails, except the damage caused where the engine went down the embankment. None of the cars appear to have been derailed, and they remained standing for a considerable time upon the depression without affecting it.

The jury was asked: "Could the said Edwin R. Lewis, by the exercise of ordinary care, have avoided the injury which resulted in his death?" To this question the jury answered, "No." It is argued that this answer implies a finding that the deceased was not running his engine at an excessive speed. But the answer, in order to support the plaintiff's case, must go

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further than that. It is not so much a question of excessive speed as it is a question was he obeying his orders at the time and keeping the speed down to 5 miles an hour. If the answer of the jury implies a finding on this last question in favour of the plaintiff, what, then, was the negligence on the part of the defendants which caused the front trucks of the engine to run off the rails before they actually came upon the depression? It is for the plaintiff to prove that negligence, if any such existed.

In my opinion there was not evidence to prove against the defendants a common law liability for the accident complained of such as would have entitled the injured party to maintain an action therefor if death had not ensued, so as to bring the case within R.S.M. 1913, ch. 36. I have assumed that this Act applies where the fatal accident has occurred in the province of Ontario, and the Manitoba administratrix, who is also administratrix in Ontario, sues in this province.

The plaintiff also claims under the Employers' Liability Act, R.S.M. 1913, ch. 61. It has been held by this Court, in *Simonson v. Canadian Northern R. Co.*, 17 D.L.R. 516, 24 Man. L.R. 267, and *Johnson v. Canadian Northern R. Co.*, 19 Man. L.R. 179, that the above Act was intended to be confined in its operation to the province of Manitoba, and did not apply to an injury that took place outside this province. The plaintiff, who has obtained administration to the estate of the deceased in Ontario, claims also under the corresponding Act in force in that province. I am not prepared to say that such an action by the Ontario administratrix, who has also obtained administration here, suing in a Court of this province to enforce a liability under the Ontario Act, would not be maintainable. The plaintiff, however, failed to give the notice required by the Ontario Act until long after the statutory period for so doing had expired, and she has given no reasonable excuse for her failure to give the notice within the time. Upon this point I would refer to *Giovinazzo v. Can. Pac. R. Co.*, 19 O.L.R. 325.

I would allow the appeal and direct a nonsuit to be entered.

Cameron, J.A. (dissenting)

CAMERON, J.A. (dissenting):—This action is brought by the administratrix (in Ontario and in Manitoba) of the estate of Edwin E. Lewis, deceased, to recover damages for his death, caused, it is alleged, by the negligence of the defendant company

in not providing a railway track that could be safely used in operating a locomotive by the deceased, who was employed by the company as a locomotive engineer. The accident occurred between two stations, Redditt and Graham, on the defendant's line of railway in Ontario. The deceased resided at Graham with his family.

It is objected that this case is not within the jurisdiction of the Courts of this province, and *Simonson* v. *C.N.R.*, 17 D.L.R. 516, 24 Man. L.R. 267, is cited in support of this contention. That decision was confined to the question whether an action under the Workmen's Compensation Act of Saskatchewan was maintainable in this province. With the majority of the Court, I then took the view that the wording of our Employers' Liability Act must be taken as restricting its remedies to personal injuries caused to workmen in this province and not elsewhere. That seemed to me to be in accordance with the judgments of the Master of the Rolls and Moulton and Farwell, L.JJ., in *Tomalin* v. *Pearson*, [1909] 2 K.B. 61, followed in *Schwartz* v. *India Rubber Co.*, [1912] 2 K.B. 299. *Tomalin* v. *Pearson* was cited and the decision approved by the Privy Council in *Krzus* v. *Crow's Nest Pass Coal Co. Ltd.*, 8 D.L.R. 264, [1912] A.C. 590, Butterworth, Workmen's Compensation Cases, VI., 271.

> The principle embodied in the passage (from Maxwell on Statutes, p. 213, cited in *Simonson* v. *C.N.R.*, *supra*, p. 526) was directly applicable to the case in which it was cited, because there it was sought to apply a statute of the United Kingdom to an accident happening in Malta, arising out of an employment carried on at Malta. So to apply the statute would, indeed, amount to making it operate beyond the territorial limits of the United Kingdom. And the Court of Appeal held, quite rightly in their Lordships' view, that this statute did not apply to such an employment: p. 276-7.

It therefore seems to me in that case (as in this) that each of the two Compensation Acts is self-contained and intra-territorial, and that actions arising out of an employment in the one jurisdiction cannot be maintained in the other. In this view, the provisions of the Ontario Act, as to rights, procedure and practice, are wholly inapplicable when sought to be availed of in this jurisdiction.

But the provisions of legislation similar to the Fatal Accidents Acts, 1846 and 1864, give rise to different and broader considerations.

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It appears to me, under all the circumstances and looking at the subject matter, that parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects, and that certainly as against an English wrong-doer, the foreigner has a right to maintain his action under the statutes in question.

(*i.e.*, the Fatal Accidents Acts): per Kennedy, J., at p. 615, in *Davidsson* v. *Hill*, [1901] 2 K.B. 606, where the action was brought by a widow (there being no executor or administrator) for damages for the death of her husband, a Norwegian seaman on a Norwegian vessel, killed by a collision with the defendant's steamship. In this last-mentioned case the decision of Darling, J., in *Adam* v. *British and Foreign Steamship Co.*, [1898] 2 Q.B. 430, was overruled, and the opinion was put forward that the statute really only enlarged the scope and benefits of the remedies already provided by the common law. As to this question of jurisdiction, therefore, which, it must be said, involves a matter of law by no means absolutely clear, in my humble opinion, the plaintiff is entitled to maintain her action in the Courts of this province.

At the trial before Mr. Justice Galt and a jury, questions were submitted to the jury, in answer to which it was stated that the death of Lewis was caused by the negligence of the defendant company, that such negligence consisted in "a defective roadbed and not having provided a watchman," and fixed the damages at $5,000. The jury also negative contributory negligence on the part of Lewis.

Counsel for the defendant company contended that there was no evidence on which the jury could base its finding of negligence as against the company, that the whole evidence on the question as to the rate of speed at which the train was going was in excess of that fixed by the company's order, and that, therefore, the plaintiff cannot recover.

Jeanes, the brakeman on the train (a freight train of 23 cars), at the time of the accident was in the caboose. He noticed a shaking up of the cars and the sudden stopping of the train, which had been going at about 12 miles an hour. This was, he says, before the train slowed down, an important statement. The witness described the place at or near which the accident took place as a "sink-hole." He got out of the caboose, found the engine turned over and the engineer pinned between the engine and tender. The cars, he says, were bunched, and there were

two or three or four rail-lengths of the track torn up. He says the train was going at 12 miles an hour before it slowed down, but he did not know the speed the train was travelling at over the sink-hole. "We were going slow; I can't say the actual mileage per hour." Upon cross-examination the witness speaks of the existence of a depression, recognizable on the engine when crossing it.

Mr. Symington: Q. Did you ever notice a depression of any more than a few inches at any one time? A. We could feel it in a minute, in the engine.

. . . .

Q. Extending over what place—what space? A. Probably a car-length or two car-lengths.

When asked as to the cause of the derailment, he said, "I cannot say." He admits he stated in his report that the engine might have been going too fast. The evidence of Ian A. McPherson, assistant to the General Superintendent of the company, taken on examination for discovery, was read at trial. He gives the length of the depression as about 50 ft.—a rail length and a half: p. 32. The dump on which the track is laid slides, and the dump is built on mud: p. 33. The effect of a train going over it would be to cause a depression to the extent of three or four inches, and gravel was being put in all the time to keep the roadbed in order. Coming from the east (as this train did) there was a medium descending grade, the maximum being four-tenths of a foot in 100 ft.: p. 35.

Two witnesses, locomotive engineers on the C.P.R. Co., gave evidence of an expert character as to what might happen, in the case of a sink-hole, where the tracks might, or one of the tracks, might slide, to a locomotive passing over. It was admitted that there would not be much danger to a train passing over a depression of from 2 to 4 inches extending for 60 ft. at a speed of 5 miles an hour. These witnesses mention the fact that watchmen are sometimes placed at places such as this sink-hole was. The evidence of these witnesses was adversely commented on by defendant's counsel, as, it was claimed, they were not shewn to be conversant with track construction or conditions. The evidence of the foregoing witnesses is all that there was put before the jury bearing upon the cause of the death of the unfortunate engineer. A motion for nonsuit was refused.

For the defence, John Read, an employee of the Canadian

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Westinghouse Co., gave evidence as an expert in the operation of air-brakes. Briefly, his evidence is to the effect that, figuring from a chart prepared from numerous experiments, a train such as that in question, going at 8 miles an hour, would stop in approximately 75 or 80 ft. after the application of the "emergency"; that a train that would run 200 ft. would be going at 13 miles an hour, and so on.

The evidence of Steeper, the train master in charge of the Graham-Redditt division, is lengthy and important. He describes the so-called "sink-hole." The hole itself does not extend more than about 20 ft. "Some days it will come down a couple of inches; other days it will come down 3 or 4 inches." "Some days we don't have to touch it at all:" p. 163. He it was who issued the "slow order" which the conductor, Berry, gave to Lewis, restricting him to 5 miles an hour when going over the sink-hole. Steeper came to the scene of the derailment about two hours after the occurrence, and describes what he found there with particularity. He was asked:—

Q. Did you examine the road bed? A. Yes.—Q. What did you find out about that? A. I didn't find anything wrong with it whatever.—Q. Did you find any depression there? A. No noticeable depression at all: p. 174.

The only thing he could see that would cause the pony trucks to leave the rail was the rate of speed at which the train was going: p. 176. The engine didn't go off where there was any sinking in the track: p. 179. The witness also describes the "slow" sign, about 2,000 ft. from the sink-hole. As to the place where the truck left the track he says the mark of the flange of the wheel on the rail was "just immediately east of this 'slide'": p. 186.

Q. Just before coming to the depression? A. Yes.

From that mark to the place where the engine left the track was between 275 and 300 ft. It is on this the witness bases his opinion that the train was going 12 to 15 miles an hour.

Official reports were put in on the examination of this witness containing important and varying statements as to the speed of the train, to the admission of which objection was strongly taken.

That of A. A. Tisdale, superintendent of the division, states train was running "about 6 miles per hour" at the time of accident: p. 201. Watt, fireman of the engine, states the speed of train at the time of accident was "six to eight miles per hour," and that "the engine was properly handled": ex. 11, p. 207; and in ex. 13, that "about ¾ mile before reaching sink-hole engineer shut off steam, and just before reaching sink-hole brought

train down to a speed of about eight miles an hour": p. 210; and that he cannot state cause of derailment. Berry, the conductor, states in his report: "engineer slowed train down to about eight miles," and could not give the cause of the accident. Belyea, forward brakeman on the train, says that about a mile from the "sink-hole" engineer shut off steam, then going about 20 miles an hour; "first reduction made as we struck the slow board; we were then travelling about twenty miles an hour."

The witness further explains as to the "sink-hole" that while it was itself about 20 ft. in width there were to be considered approaches on either side, making it 50 ft. or thereabouts.

At p. 233 he says: "He (Lewis) kinked the rail right at the sink-hole, right at the point." At p. 239:—

> Q. And that (point on plan shewn) is where the engine ran off? A. Yes. —Q. Just as it came to the approach? A. Yes.—Q. And that would be soft ground? A. Yes, that is all soft ground, because this is a run off. We have to keep repairing that part on account of the settlement.

Berry, the conductor of the train in question, speaks of the "sink-hole," with which he was familiar. He was writing in the caboose at the time of the accident, and says the train was going at the rate of 12 miles an hour. This is in conflict with the report made by him at the time, when he stated the rate as 8 miles. This admission had probably a damaging effect with the jury upon his testimony.

Martin, locomotive fireman at Redditt, reached the scene about 40 minutes after the derailment. Speaking as to the condition of the track, he said:—

> The track appeared to be all right. It was in gauge, in line, up to where the engine had pulled it out when it left the track. The track was in line possibly 6½ or 7 car-lengths from where the flange went first off of the rail to where the engine turned over, from the point where it started to move the rails to where it turned over, the track was in good condition: pp. 280, 281.

These are amongst the salient points of the evidence relied upon by counsel on the argument before us. As to the finding of the jury on the question of contributory negligence: In view of the charge it must be taken that the jury has negatived the proposition that the deceased was running at an excessive speed. There is and can be no exact evidence on the subject. It varies from that of Jeanes, that, having been going at 12 miles an hour, the train was going "very slow," and "about 6 miles an hour,"

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mentioned in Tisdale's report, to the various conflicting statements and reports made by the other witnesses. The jury has elected to believe that the deceased was not going at an excessive speed.

As to the finding of the defective roadbed, there is certainly evidence that there was at the point where the accident occurred a soft and dangerous spot on the defendant's roadbed. This is shewn by the evidence of the various witnesses as to its character, by the constant work "picking up," by the issue of the "slow order," and the existence of the "slow sign." It is also in evidence that the trucks left the track at a point at, or close to, this dangerous spot, the menace of which consisted in its liability to disarrange the rails by depressing them or by putting them out of proper alignment or by doing both. If the track were in absolutely good order before the occurrence (as some of the defence witnesses declared it was after), it is not easy to understand why the engine, going at 5 or 10 or even 15 miles an hour, could leave the track. In this, as in the finding on contributory negligence, it was surely open to the jury to reject such evidence of the defence as might appear to contradict what appeared to them plain facts. The jury felt justified in drawing the inference, as a reasonable conclusion, that the defective state of the roadbed was the real cause of the accident. I take it that a jury are at liberty to consider the whole evidence, including the facts of the case, and that they can reject verbal evidence, even if that be not expressly contradicted, which in their judgment is not in accordance with the facts as they see them in the exercise of their best judgment. The fact of the dangerous spot, coupled with the fact of the trucks leaving the track at that spot or in its immediate vicinity, was sufficient, in the minds of the jury, to connect the two as cause and effect and to cause them to decline to accept the evidence for the defence, inviting them to the conclusion that the track was in good order at the precise moment of the accident.

That the jury were fairly justified in taking this view and in arriving at the inference they did can, it seems to me, be upheld by reference to recent decisions, in cases not absolutely on all-fours, of course; for these cases are infinitely diversified, but so closely are they allied to that before us that the principles laid down appear applicable.

In *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, a

verdict of a jury that an explosion took place through the defendant's negligence was upheld where there was no exact proof of the fault that caused the injury. Yet it was held that, though proof may be required in particular cases, it is not so where the accident is the work of a moment and its origin and course incapable of being detected. In reaching his conclusion on this point, Lord Macnaghten said:—

> There was no other explanation of the mishap, when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator. Then too the jury may have reasonably thought that the explosion would or might have been comparatively harmless if the powder box on the outside had been properly constructed.

Following this decision, we have *G. T. R. Co.* v. *Hainer*, 36 Can. S.C.R. 180.

> Though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved and their finding was justified.

I might refer also to *Smith* v. *Baker*, [1891] A.C. 325; also to *King* v. *Northern Navigation Co.*, 24 O.L.R. 643, a singular case, and to *Toronto R. Co.* v. *King*, [1908] A.C. 260, at p. 264. In *G.T.R. Co.* v. *Griffith*, 45 Can. S.C.R. 380, the jury were held justified in considering the balance of probabilities and in drawing the inference that the death of the deceased was due rather to the absence of the statutory signals than to the failure of the deceased to take the precautions which ordinary prudence suggested. In *Cottingham* v. *Longman*, 15 D.L.R. 296, at 297, 48 Can. S.C.R. 542, at 545, Mr. Justice Duff holds that

> the burden (in an action of tort) resting upon the plaintiff is, of course, to establish facts from which the jury may reasonably draw the inferences necessary to sustain the plaintiff's case.

The statement of the jury as to the neglect to provide a watchman I take merely as one method pointed out of avoiding the danger due to the dangerous spot. That danger could also be avoided by bridging, and in other ways, no doubt. But it is the dangerous condition of the roadbed, due to the soft or dangerous spot, that is the origin of the difficulty, and, in the opinion of the jury, of the consequent disaster.

That there is a common law liability in this case appears to me to follow from decisions such as *Brooks* v. *Fakkema*, 44 Can. S.C.R. 412. There has been found a failure of the defendant

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company to provide a safe and proper place or roadbed on which the employee could perform his duties. See also MacMurchy & Denison, Railway Law of Canada, 2nd ed., 1911, p. 393, *et seq.*, and cases there referred to.

It is the positive duty of a master to furnish his servant with reasonably safe instrumentalities to work with and places wherein to do his work, and, in the performance of these obligations imposed by law, it is essential that regard should be had not only to the character of the work to be performed, but also to the ordinary hazards of the employment: Cyc. XXVI., 1097.

This duty cannot be delegated. "A railroad company, as between itself and its servants, must exercise reasonable and ordinary care and diligence to make its road safe." The finding of the jury, indicating that additional precautions might and should have been taken, shews that, in their opinion, reasonable care had not been taken. They were certainly justified in so expressing themselves on the authority of *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72, where the jury found there was neglect to supply suitable machinery, and Lord Macnaghten saw evidence of this because there was "fault or defect of the machine."

This case presents many difficulties, and it is not without some degree of hesitation that I have arrived at the conclusion not to disturb the verdict.

Haggart, J.A.

HAGGART, J.A., concurred with PERDUE, J.A.

Appeal allowed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. June 15, 1914.

1. WILLS (§ III E—108)—DESCRIPTION—WHAT PROPERTY PASSES—LANDS "NAMED" AS DISTINCT FROM LANDS "REFERRED TO" — WHICH GOVERNS.

The specification in a will of particular lands following immediately in a continuous description upon the general words "the balance of the lands and premises described in the aforesaid deed" will control; it is a qualifying and defining statement substituted for the antecedent generality and a third parcel included in the deed referred to and which was not specifically mentioned in the will does not pass along with the second parcel specifically described.

[*West* v. *Lawday*, 11 H.L.C. 375; *Re Brocket*, [1908] 1 Ch. 185, followed; *Re Clement*, 22 O.L.R. 121, and *Smith* v. *Smith*, 22 O.L.R. 127, distinguished.]

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Statement

APPEAL from the judgment of MIDDLETON, J., on a motion by the executors of the will of Daniel T. Fletcher, who died on the 17th July, 1913, for an order determining certain questions arising upon the will.

The appeal was dismissed. RIDDELL, J., dissenting.

G. Lynch-Staunton, K.C., for the appellant.

S. F. Washington, K.C., for the adult residuary legatees.

S. F. Lazier, K.C., for the executors.

J. R. Meredith, for the infants.

Sutherland, J.

SUTHERLAND, J.:—An appeal from a judgment of Middleton, J., determining that "the devise to Elsie Dawn Cowell in the sixth clause of the will of Daniel T. Fletcher, deceased, is a devise to her of only that part of lot three in the fourth block and second concession of the township of Binbrook, in the county of Wentworth, described in the deed from Richard Quance and John Leslie Cline, executors of Elizabeth Hildreth, deceased, to him the said Daniel T. Fletcher, bearing date the 29th October 1892, and does not include that part of lot two in the fourth block and first concession of said township described in said deed."

The description in the deed covers three parcels: firstly, the north-easterly part of lot 3, block 4, in the second concession; secondly, the south east part of lot 3, block 4, in the 1st concession; and thirdly, the south-westerly part of lot 2, block 4, concession 1.

By clause 4 of the said will, "all of the lands deeded by one Richard Quance as executor as aforesaid contained in said lot three, block four, concession one," which is the parcel above secondly described, were devised to the testator's son John M. Fletcher.

Clause 6 of the will is as follows: "To my daughter Elsie Dawn Cowell I give devise and bequeath the balance of the lands and premises described in the aforesaid deed from Richard Quance, executor, to me, said lands being composed of part of lot three in the fourth block and second concession of the township of Binbrook," etc.

The contention of the appellant, Elsie Dawn Cowell, is, that the parcel of land in the said deed thirdly described, namely,

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the south-west part of lot 2, block 4, concession 1, is included in the devise to her under the said sixth paragraph. The appellant cites and relies in part upon *Smith* v. *Smith*, 22 O.L.R. 127, at p. 129, and *Re Clement*, 22 O.L.R. 121, but these cases seem to me to have no application, as they have reference to wills which devised by particular descriptions lands never owned by the testator. In the first it was held that, "as the testator had used, in the beginning of the will, words efficient to pass the land which he owned if the wrong description were deleted, the devise was effective and the wrong description *falsa demonstratio* —the presence of the residuary clause making no difference." In the second, that the testator, "without using general words shewing an intention to devise all his lands, or any words of that kind, but evidently with the intention of devising land which he owned," specifically devised part of a lot he did not own, though owning another part, and thus died intestate as to the part he did own.

The contention of the appellant is two-fold: (1) that the first part of the sixth clause of the will, namely, "I give devise and bequeath the balance of the lands and premises described in the aforesaid deed from Richard Quance, executor, to me," is the controlling part of the clause, and under it would pass to the appellant not only the parcel firstly described in the deed, which it is admitted she is entitled to thereunder, but the parcel thirdly described, which is the subject of the dispute herein. This would be so unless the general words used in the early part of this section are restricted by those following, which are, "said lands being composed of part of lot three in the fourth block and second concession," as to which the appellant contends that they really are of no effect, as they do not in themselves describe any definite part of the lot.

Dealing with this last view first. When clause 6 is read, it is necessary, in either view, then to refer to the deed to ascertain what is meant. If this is done, the appellant then contends that it shews two parcels remaining undisposed of, which comprise "the balance," each one of which is specifically described therein, the piece in question as the south-west part of lot No. 3 in block 4 in the 1st concession, followed by metes and bounds. The respondents, on the other hand, admit that in the same way they too are driven to the deed for a specific description, since

in the clause in the will, after mentioning a "balance" of lands described in the deed, the will goes on to qualify and designate what the *said lands* are, namely, "being composed of part of *lot three* in the fourth block and *second concession*."

On looking to the deed, one finds that there is a part of the said lot and only one part therein mentioned, and it is described by metes and bounds, and thus made definite and exact.

I am unable to see that there is anything in the appellant's contention in this respect.

We come back to the other and main contention that the general and exclusive description contained in the words "the balance of the lands and premises described in the aforesaid deed from Richard Quance, executor, to me," covers all the lands in the deed except that portion which is previously, under clause 4, given to John W. Fletcher, and so includes not only the piece firstly described in the deed, but the piece thirdly described.

The appellant cites *West* v. *Lawday*, 11 H.L.C. 375; the headnote of which is as follows: "Where some subject-matter is devised as a whole, and then words of description are added which do not completely exhaust all the particulars included in the general devise, but seem to limit and restrict it, the entirety, expressly and definitely given, shall not be prejudiced by the imperfect enumeration of particulars; nor shall a clear enumeration of particulars be overruled by an apparently general devise. A person was possessed under one and the same lease for lives renewable forever, of lands denominated, B., C., F., and G., all situated in the county of Kerry. He granted out the lands of G. for lives with a covenant for perpetual renewal, reserving thereout a perpetual fee-farm rent. Some years after this grant he made his will, which recited that he was possessed of a lease for lives, renewable forever, of certain lands in the county of Kerry, 'which said lands are denominated B., C., and F., all situated in the parish of, etc., in the county of Kerry.' He directed that 'the aforesaid lands' should be sold, and after payment of his debts be equally divided between J. W. and S. L. After giving several legacies, he made J. W. 'residuary legatee of all my real and personal estate and effects:' Held, reversing the decision of the Master of the Rolls and the Lords Justices of Appeal in Ireland, that the estate of G. did not pass under the general devise, but went to the residuary legatee."

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The Lord Chancellor, Lord Westbury, says (p. 382)): "The testator tells us, in the first place, that 'being possessed of a lease for lives renewable forever of certain lands in the county of Kerry, etc.' Those words certainly are not descriptive of any lands. He says 'certain lands,' that is, some lands in the county of Kerry, 'which said lands are denominated.' Now, my Lords, I cannot understand where can be the difficulty. '*Which said lands* are'—what lands? Why, they are 'certain lands'—which words are merely words of reference to a thing unknown and not described; but the generality and the want of precision in that form of expression are supplied by the words that follow, and which plainly mean to substitute a definite and precise statement for an antecedent generality."

At p. 384 he says: "It is altogether a mistake to suppose that the language of this will is capable of being brought within the range of that maxim" (referring to the maxim *falsa demonstratio*). "That maxim to which I refer is applicable to a case where some subject-matter is devised as a whole under a denomination which is applicable to the entire land, and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent, universal, or generic denomination. Then the ordinary principle and rule of law, which is perfectly consistent with common sense and reason, is this: that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift. And, therefore, to bring the case at the Bar in all its bearings at all within the rule which has been applied in the cases to which I have referred, your Lordships ought to have had something like these expressions, 'being possessed of certain leasehold lands,' or, 'being possessed of a lease in the county of Kerry, consisting of' so and so, 'I devise the said lease.' And if there had been a devise of the lease as an entirety, it is possible that the generality of that description might not have been derogated from by an imperfect enumeration of the particulars included in the lease, and falling under that generality."

And Lord Wensleydale, at p. 388, says: "And if we do look at the will fairly, I do not think there is any difficulty in construing it to be, not a devise of all the lands included in the first lease, but a devise of particular lands, which he correctly says are included in that lease."

That case is somewhat the reverse of this, and in it a claim was made that a general devise following a specific did not include more than the lands previously and particularly set out, and so did not include another parcel of a similar leasehold character, which had by an earlier provision been otherwise dealt with, and which fell in and came under the operation of a residuary clause.

A later case and the one on which Middleton, J., relied as laying down the principles which he thought should govern him with reference to the proper construction of the will in question, is *In re Brocket*, [1908] 1 Ch. 185, wherein Joyce, J., discusses the *West* v. *Lawday* case. I am unable to see that any case cited to us or which I have been able to find appears to be so much in point. Its head-note is as follows: "The testatrix, by her will dated in 1888, devised the real estate to which she became entitled under a codicil to her father's will, 'namely, the residence known as Orford House, in the parish of Oakley, in the county of Essex, and lands and hereditaments' (in certain parishes) 'in the same county' to her sister for life, with remainder over, and she then disposed of her residue. In addition to the real estate specifically named by the testatrix as passing to her under the father's codicil, there was, in fact, a freehold in London, to which she was also thus entitled. There was no evidence whether she knew that it formed part of the property passing under the codicil: Held, that the specification by name and locality introduced by the word 'namely' was not merely an imperfect enumeration of the properties intended to be devised, but formed the leading description, and consequently that the freehold in London did not pass by the specific devise, but fell into residue."

At p. 193, Joyce, J., says: "But it was principally upon a passage from the judgment of Lord Westbury in *West* v. *Lawday* that reliance was placed by counsel arguing in favour of the persons claiming under the specific devise." And he proceeds

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to say, with reference to the first clause in the head-note of that case: "But I am bound to say that I cannot find in the judgment of any of the learned Lords any statement to that effect. However it is in the marginal note, and it is no doubt true. I have not been able to find any other report of the case. Lord Wensleydale interrupted the argument saying: 'The lands are not merely referred to, but *named*. Can any other pass but those which are so named?' And the Lord Chancellor said: 'Suppose I had one lease of six houses, three in Grosvenor Square and three in Belgrave Square, and I devised 'all my houses in such lease,' and then named the three houses in Berkeley Square, would all the six pass?' In the judgment of Lord Westbury, however, we find the following passage: 'That being the state of the case, and that being the plain and obvious meaning of the words, it is by the ingenuity of counsel that we have been involved in this kind of difficulty; that these words 'which said lands are denominated' so and so, are altogether erroneous, and that the testator used them under a mistake.'" And at p. 194: "Now the maxim referred to, fully stated, is, of course, '*Falsa demonstratio non nocet cum de corpore constat*,' the last four words being, of course, very important. Another version of the maxim is '*Nil facit error nominis cum de corpore vel persona constat*.' Lord Esher used to say that he detested any attempt to fetter the law by maxims, for, as he said, they are almost invariably misleading, being for the most part so large and general in their language that they always include something which really is not intended to be included in them. And no doubt they are not to be treated as articles of a code, or as enactments contained in a statute. But the maxims I have mentioned really, I think, only come to this, that a false description of a person or thing will not vitiate a gift in a deed or will if it be sufficiently clear what person or thing was really meant. This cannot be determined without reading and considering all the terms of the will." And at p. 195: "I think I may say that there is certainly no rule that in a will where there are two complete descriptions the former shall prevail over the latter; and I cannot think that Lord Westbury meant to lay down positively that in a will where you have once got a complete description of a subject-matter in general and collective terms every or any subsequent enumeration of particulars must necessarily be rejected if it do not in-

clude each and every item of the particulars which would be included in the first or general designation standing by itself. Obviously, I think, much must or may depend upon the terms in which the enumeration of the particulars is introduced. It may be introduced in such a way as to shew that what the testator was doing was, in Lord Westbury's own words, to use words plainly meant to substitute a definite and precise statement for an antecedent generality. Supposing in the present case the testatrix instead of the word 'namely' had made use of the expression 'what I mean is,' the enumeration following by name and locality must then, I think, necessarily have been read as explanatory, and if required as restrictive, of the prior general description." And at p. 196: "Upon the whole I have come to the conclusion that the specification here by name and locality introduced by the word 'namely' is analogous and equivalent to a specification in a conveyance by schedule, or schedule and plan, and is not merely an imperfect enumeration of the properties intended to be devised. In other words, I think that the specification by name and locality, which is free from all ambiguity, forms the leading description, and that No. 1, Hare Court did not pass by the specific devise in question; and I think that is what the testatrix really intended."

Applying this reasoning to the language in the will in question, it seems to me that the words "said lands being composed of," following immediately in a continuous description upon the general words, "the balance of the lands and premises described in the aforesaid deed," mean, in effect, the particular lands I am referring to and devising, "part of lot three, block four, second concession," which part is, on reference to the deed, made clear and definite, and no more; and that, therefore, the devise in the 6th clause does not pass to the appellant the south-west part of lot 2 in the 1st concession. It is the case of the substitution of "a definite and precise statement" for "an antecedent generality." It is not the case of an "imperfect and inaccurate enumeration of particulars," but a qualifying and defining statement.

Middleton, J., further says: "There is a residuary clause which purports to deal with the residuary realty as well as the residuary personalty; and it is shewn that, if this piece of land is included in the devise to the daughter, there is no real estate

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to pass under the residuary clause. I do not regard this as affording any assistance, and it appears to me that the clause in question must be dealt with, and the gift to the daughter interpreted, quite apart from any consideration based upon the residuary clause. It is only important as indicating that in any event there will not be an intestacy."

I agree that, apart altogether from the residuary clause, the judgment appealed from rightly interprets the will in question but the very fact that the residuary clause, which reads as follows, "All the rest, residue and remainder of my real and personal estate," etc., makes a reference to real estate, when the fact appears to have been that at the time the will was made the testator had devised all the lands he owned with the exception of the south-west part of lot 2 in the 1st concession, and that the reference to real estate would be useless unless it referred to it, would, on consideration of the whole will, lend colour and weight to the view that this parcel did not pass, under the words "the balance of the lands" in clause 6, to the appellant, but was intended to pass under the word "real" in the said residuary clause.

I would dismiss the appeal with costs.

Mulock, C.J.Ex.

MULOCK, C.J.EX.:—I agree with the judgment of my brother Sutherland. The clause in the testator's will which is the subject of interpretation by the Court, reads as follows: "To my daughter Elsie Dawn Cowell I give devise and bequeath the balance of the lands and premises described in the aforesaid deed from Richard Quance, executor, to me, said lands being composed of lot three in the fourth block and second concession."

Putting oneself in the place of the testator when using those words, it seems to me that the lands which he had then in his mind, and which he intended to devise to his daughter, consisted of a specific property, namely, part of lot 3, etc., his intention being to devise to her, not the "balance," whatever it might consist of, but only out of the balance, part of lot 3, etc.

The words "said lands being composed of part of lot 3," etc., are a definition of the word "balance," and must control it.

Leitch, J.

LEITCH, J., also concurred in the judgment of SUTHERLAND, J.

Riddell, J.

RIDDELL, J., dissenting, would allow the appeal.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ. June 15, 1914.

1. NEGLIGENCE (§ I C—50)—CONTRACTOR'S LIABILITY TO LICENSEE OF ANOTHER—DEFECTIVE PLANK—ABSENCE OF CONTRACTUAL RELATIONSHIP—ABSENCE OF ALLUREMENT.

The contractor for the carpenter work of a building who erects scaffolding for his own purposes in the work is not liable for injuries occurring to the employee of the contractor for the outside painting work under contract with the same proprietor through the breaking of a board in the inside scaffolding by which the painter was proceeding to reach his work, where the defect was not known to the carpenter contractor or his workmen nor had the painter been invited by the latter to use the scaffolding to reach a window frame he was about to paint, where in the ordinary course of the work the outside painting would be done from the outside by means of ladders, which had been supplied to the painters for that purpose.

[*Indermaur* v. *Dames*, L.R. 1 C.P. 274; *Corby* v. *Hill*, 4 C.B.N.S. 556, distinguished; *Maguire* v. *Magee*, 13 Atl. Rep. 551, 6 Cyc. 61, referred to.]

Statement

APPEAL from the judgment of Britton, J., dismissing an action by the widow of James W. Bilton, on behalf of herself and her two children, to recover damages for his death, caused, as she alleged, by the negligence of the defendant.

The appeal was dismissed.

H. C. Macdonald, for the appellant.

Shirley Denison, K.C., for the respondent, the defendant.

Clute, J.

CLUTE, J.:—Appeal from the judgment of Britton, J., who dismissed the plaintiff's action.

The plaintiff is the widow of James W. Bilton, who came to his death by a fall from the second storey of a building being erected for the Metallic Roofing Company. The deceased was employed by one Egles, who had the contract for the painting of the building. The defendant had the contract for the carpenter work.

One Hope, in the employ of the defendant, put down two planks across from one steel girder to another, being a distance of about ten feet from centre to centre.

There was no duty arising from the defendant to the deceased owing to any contractual relation, for none existed between them. The jury found: (1) that the plank which broke when the deceased walked upon it, and which caused his death,

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was weak and defective and entirely insufficient for the purpose; (2) that Hope was guilty of negligence in using the plank for the purpose for which it was used, but that such negligence was not intentional; (3) that it was, or ought to have been, within the reasonable contemplation of Hope that painters or others having work to do on the building might use the passageway made by the planks so placed on the girders by Hope; and (4) that the deceased was rightfully on the second storey of the building and rightfully from the inside of the building doing work on the outside window sashes or frames.

I understand from the note that the suggestion of the trial Judge was accepted that "if there are questions of fact outside the questions put to the jury the Judge may dispose of them."

The trial Judge agrees with the findings of the jury as to all the answers except the answer to the third question. The first question, therefore, is, can the answer to the third question be supported upon the evidence? For, if Hope knew, or ought to have known, that other workmen upon the building might use the passageway made by the defective plank, then there would be evidence of the defendant's negligence, the plank having been laid by Hope in the course of his employment by the defendant and to further his work in that behalf. It is, therefore, necessary to examine the evidence upon this point.

In the ordinary course of the work, the outside painting would be done from the outside by means of ladders. The deceased and another painter were furnished with ladders for that purpose, and the coloured paint they had on the day in question was suitable for outside painting, but not for inside. The weather was rainy and disagreeable to work from the outside, and the deceased and his companions, in compliance with a request from their employer, brought the ladders into the basement and gave them a coat of paint on the day in question, as they thought it unfit for them to work outside. They were not ordered to do the outside painting from the inside; and, observing that it might be so done, the deceased and his companion went up to the second storey; and, the floor there not being fully laid, the deceased attempted to pass along the gir-

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der, but desisted and started to go across the planks laid by Hope, instead, which led to a window frame which it was intended to paint on the outside of the window. When he was part of the way across, the plank broke; he fell to the floor, and was killed.

The circumstances under which this particular plank was used were these. The second floor had been fully laid, but, the roof having not at the time been completed, the floor was so damaged with rain that the architect, fearing dry rot, ordered the floor to be taken up and re-kiln-dried. This was done and the floor returned. Among the flooring planks were a number which had been cut in order to fit the girders. This cutting greatly reduced their strength. Hope did not notice this defect in one of the two planks he laid down, and, it being upon the under side, it was not observable by the deceased. Hope laid it down, not as a general way for other people to cross, but solely for his own work, to enable him to reach the windows on that side in order to put in the weights. For this purpose he had put down two planks upon which he had passed over, carrying a weight of some 30 pounds, before the accident. He did not examine the planks before putting them down; as he expressed it himself, "I just picked them up and threw them over there." Had he noticed the defect, he says, he would not have used it. He did not see the deceased approaching the work, and there was nobody working upon the floor where he was hanging the sash. It apparently did not occur to him one way or another that the painters might use the same way to get to the windows. The building was ready for painting on the inside, but on the day in question it is quite clear that the painters were not there for that purpose, as they had not the right coloured paint for the inside.

I think that there was evidence to support the jury's finding that the deceased was rightfully on the second storey of the building, and had a right from the inside of the building to do the painting on the outside of the window sashes. He was not a trespasser. I think that there was an implied permission under the circumstances, to do the painting on the outside from

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the inside, if he thought best. There was no prohibition; and, under the circumstances, and having regard to the weather, it was not unreasonable that he should desire to do so.

In answer to the question, "Besides yourself, was there anybody working overhead where you were working?" Hope said, "None working overhead, there were other men laying flooring." I presume he meant flooring on the second storey.

Hope had not been ordered to put down these planks, nor was there anything in the specifications calling upon the defendant to provide scaffolding for the painters.

The term "invitee" applies to persons who go upon premises on business which concerns the occupier and upon his invitation, either express or implied. "An invitee differs from a bare licensee in that the latter has merely permission to be on the premises and is not there by invitation or on lawful business of interest to both parties:" Halsbury's Laws of England, vol. 21, para. 654. Among the classes of persons held to be invitees are persons mentioned having business at the premises: *ib.*, para. 655. "The duty of the occupier of premises on which the invitee comes, is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware, or, in other words, to have his premises reasonably safe for the use that is to be made of them:" *ib.*, para 656; *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274. In that case it was held that, as the plaintiff was upon the premises on lawful business, in the course of fulfilling a contract in which he (or his employer) and the defendant both had an interest, and the hole or shoot was from its nature unreasonably dangerous to persons not usually employed upon the premises, but having a right to go there, the defendant was guilty of a breach of duty towards him in suffering the hole to be unfenced. It will be noticed in this case that both the plaintiff and the defendant had an interest in the same contract which called the plaintiff upon the premises.

Here the deceased had no interest in the defendant's contract, and the defendant had no interest in the deceased's con-

tract. It cannot be said, therefore, that the deceased was an invitee of the defendant. He was there at the instance of Egles, the contractor for the painting. In the doing of Egles' work he had the permission, no doubt, of the owner; but the defendant, as an independent contractor, had no authority either to grant or refuse permission.

The *Indermaur* case was heard in appeal in the Exchequer Chamber, L.R. 2 C.P. 311, and the judgment was affirmed. Kelly, C.B., approves of the grounds of decision stated by Willes, J., in which he says: "We think that argument (that the plaintiff was a bare licensee) fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract, in which both the plaintiff and defendant had an interest, and not upon bare permission."

Corby v. *Hill*, 4 C.B.N.S. 556, relied on by counsel for the plaintiff, is distinguishable from the present case. In that case the owner of land, having a private road for the use of persons going to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage. It was held that A. was liable to an action. It was pointed out in that case by Cockburn, C.J. (pp. 563, 564), that "the proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. . . . It was not competent to them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they had held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission." Willes, J., said (p. 567): "It is not suggested that the defendant did not know the road was likely to be used in the way I have mentioned, or that he gave any notice or warning to the persons, including the plaintiff, who were ac-

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customed and likely to use the road. . . . The defendant had no right to set a trap for the plaintiff. One who goes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it."

It will be seen that in that case what was done was knowingly done, and was done with the knowledge that the road would be used, and, therefore, the person who placed the obstruction there, making the road dangerous, was held liable.

Here there was neither knowledge that the plank was dangerous, nor that it would be used by the deceased.

In *Spence* v. *Grand Trunk R.W. Co.*, 27 O.R. 303, also referred to by the plaintiff's counsel, the plaintiff, who was about to post a letter on a train to which was attached a postal car with an opening for posting letters provided by the direction of the Post Office Department for the use of the public, while following the moving car, tripped on a stick some inches out of the ground, which had been planted by the defendants for furtherance of alterations being made in the station, and fell and was injured. It was held that he was a bare licensee of the defendants, who, under the circumstances, were not liable. On appeal from the judgment of Meredith, C.J., dismissing the action, the judgment of the Court was delivered by Armour, C.J., in which he said (p. 308): "I do not think that the plaintiff going upon the premises of the defendant companies for the sole purpose of posting a letter in the postal car of the train by which he was injured, can be said to have gone there upon business which concerned the defendant companies, and upon their invitation, express or implied, but he must be held to have gone there as a bare licensee." He then refers to the duty owed by the occupiers of premises to a bare licensee as laid down by Chief Baron Pigot in *Sullivan* v. *Waters* (1864), 14 Ir. C.L. R. 460. "'A mere license, given by the owner, to enter and use premises which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and

in which any existing source of danger is apparent, creates no obligation in the owner to guard the licensee against danger' (at p. 475.)"

In *Gautret* v. *Egerton*, L.R. 2 C.P. 371, referred to in the *Spence* case, Willes, J., at p. 375, says: "To bring the case within the category of actionable negligence, some wrongful act must be shewn, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the license. Every man is bound not wilfully to deceive others, or do any act which may place them in danger."

In *Keeble* v. *East and West India Dock Co.* (1889), 5 Times L.R. 312, in appeal, the Master of the Rolls said that he did not desire to express any opinion as to the limits of negligence in the case of licensees. He did not by that mean to throw any doubt upon the decision in *Gautret* v. *Egerton*.

In *Batchelor* v. *Fortescue* (1883), 11 Q.B.D. 474, the deceased was employed by a builder to watch and protect certain unfinished buildings. Workmen were employed by the defendant, a contractor, on the land near to where the deceased was on duty, to excavate the earth for the foundations of other buildings. In the performance of this operation they employed a steam-crane and winch to which were attached a chain and iron bucket by means of which earth was raised from the excavation and thence to the carts which were to carry it away. The deceased had nothing to do with the excavations, but was standing where he need not have been, watching the defendant's men at work, and allowing the bucket to pass some three feet over his head, when the chain broke and the bucket and its contents falling upon him so injured him that he subsequently died. It was held that there was no evidence of negligence in the defendant's workmen; that the deceased was at the most a bare licensee; and that he stood where he did subject to all the risks incident to the position in which he had placed himself.

Coffee v. *McEvoy*, [1912] 2 I.R. 95, affirmed *ib.* 290, referred to by the defendant's counsel, turned upon the fact that the

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plaintiff was a trespasser, and does not throw much light upon the present case.

King v. *Northern Navigation Co.*, 24 O.L.R. 643, in appeal 6 D.L.R. 69, is a case that in some respects is applicable to the present case. In that case the plaintiff's husband had been employed during the previous season and had been engaged for the next season as engineer on another steamer, which laid up alongside the one in which his body was found, which he would have to cross to reach the other. He had apparently, in attempting to cross, fallen from the main deck through the hatch, which had been left open and unprotected. It was held in the Divisional Court that the deceased was not upon the steamer in the course of his employment, nor was he to be regarded as a licensee; he was, therefore, a trespasser, and the defendants owed him no duty, and were not liable to the plaintiff for negligence in leaving the hatch open and unprotected. It was also held in the Divisional Court that the deceased was not upon the steamer in the course of his employment, nor was he to be regarded as a licensee; he was, therefore, a trespasser, and the defendants owed him no duty, and were not liable to the plaintiff for negligence in leaving the hatch open and unprotected. In the Court of Appeal, Garrow, J.A., took the view that the deceased's position was not that of an invitee, nor any position higher than that of a bare licensee; and the only duty which the defendants owed him was, not to deceive him by means of a trap, or to be guilty of any act of active negligence, of which on the occasion in question there was no reasonable evidence; the licensee must otherwise take the premises as he finds them. Meredith, J.A., held that the deceased was a trespasser; and, in any view, had not proved a good cause of action against the defendants. The other members of the Court agreed in dismissing the appeal.

I have not been able to find any case where the facts were at all similar to the present. Had the deceased been intending to paint within the building, his business there would have made him, I think, an invitee, but not of the defendant, and it is doubtful even in such case if the law in regard to an in-

vitee would have applied. In the present action, while it may be said that he was lawfully there in the sense that he was not a trespasser, yet, I think, his right there was implied, not as an invitee, because in the ordinary course the work that he was about to do did not call him within the building, and the invitation even then would not be from the defendant. He, at most, is a licensee, and "a bare licensee is entitled to no more than permission to use the subject of the license as he finds it. He must accept the permission with its concomitant conditions and perils:" Halsbury's Laws of England, vol. 21, para. 660. See *Hounsell* v. *Smyth* (1860), 7 C.B. N.S. 731.

In *Gautret* v. *Egerton*, L.R. 2 C.P. 371, Willes, J., says (p. 375): "The dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damages resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver."

Corby v. *Hill*, above referred to, is distinguished in *Bolch* v. *Smith*, 7 H. & N. 736, where it was in effect said that were a peril masked by apparent security liability might follow.

The cases are summed up in Halsbury, para. 660, above referred to, and the law stated to be that "the grantor of the license is in a position similar to that of the donor of a gift, and is not responsible for the safety of the licensee, unless acceptance of the grant involves a hidden peril, wilful suppression of the knowledge of which amounts to a deceit practised on the donee. The licensee has, however, the right to expect that the natural perils incident to the subject of the license shall not be increased without warning by the negligent behaviour of the grantor, and, if they are so increased, he can recover for injuries sustained in consequence thereof."

A number of authorities are cited for this proposition: *Gallagher* v. *Humphrey* (1862), 6 L.T.N.S. 684, *per* Cockburn, C.J., at p. 685, as explained in *Marley Brothers* v. *Grove* (1882), 46 J.P. 360; *McFeat* v. *Rankin's Trustees* (1879), 16 Sc. L.R. 614; *Lowery* v. *Walker*, [1910] 1 K.B. 173, *per* Kennedy, L.J., at p. 197, reversed on the particular facts, [1911] A.C. 10.

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In *Gallagher* v. *Humphrey, supra*, it was held that the owner of a private way passing by his warehouses is liable for injury to persons lawfully using the way if caused by negligence of his servants, *e.g.*, by negligently lowering goods from the warehouses. Cockburn, C.J., said in part: "I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way pass along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger. . . . The plaintiff was . . . passing along on a perfectly legitimate purpose, and the evidence is that the defendant permitted the way to be used by persons having legitimate business upon the premises."

In the present case there is no evidence that the plank in question had ever been used by any other person except Hope; in fact it is the other way, that it had not been used by any other person, so that in that respect it differs from the *Gallagher* case.

In *Lowery* v. *Walker*, [1909] 2 K.B. 433, in appeal [1910] 1 K.B. 173, and reversed [1911] A.C. 10, the question is much discussed. In that case the defendant put into his field a horse which, to his knowledge, would bite human beings. Members of the public had for many years, to the defendant's knowledge, habitually trespassed on the field. While so trespassing, the plaintiff was bitten by the defendant's horse. The County Court Judge who tried the case held that the defendant, in putting a horse which he knew to be dangerous in a field which,

to his knowledge, was frequently used by the public, was guilty of negligence, and he gave judgment for the plaintiff. Darling, J., referred with approval to the judgment of Gibbs, C.J., in *Deane* v. *Clayton* (1817), 7 Taunt. 489, where he says: "'We must ask in each case whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt.'" The case was carried to the Court of Appeal, where it was held by Vaughan Williams and Kennedy, L.JJ. (Buckley, L.J., dissenting), that the fact that the defendant knew that the public habitually crossed the field without leave as above mentioned did not, under the circumstances, impose upon him towards persons so crossing any duty not to keep an animal such as the horse in question in the field, or to take any care for their protection from risk of being injured by it, and that the defendant was, consequently, not liable to the plaintiff in respect of the injuries sustained by him. The case then went to the House of Lords, where it was held that, the effect of the learned trial Judge's finding being that the appellant was in the field without express leave but with the permission of the respondent, the appellant was entitled to recover. Lord Loreburn, L.C., says, in part: "I think this case should be determined upon the actual findings of the learned County Court Judge. . . . He has found certain facts. . . . He has presented to us a view of the facts; . . . what that view amounts to is this: he will not find whether there was a right of way or not; therefore the plaintiff did not establish that he was in the field according to a right to be in the field. Again the learned Judge, I think, found that there was no express leave given to the plaintiff to be in that field; but I think that the effect of his finding is that the plaintiff was there with the permission of the defendant, because he finds that the field had been habitually used by the public as a short cut, and he says that the defendant was guilty of negligence in putting a horse which he knew to be dangerous into a field which he knew to be used by the public. . . . I think, in substance, it amounts to this: that the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the

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defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal." It will be seen here, that, although the right of the plaintiff to cross the field was in some sense a question and not fully decided, yet the ground of liability was placed upon the knowledge which the defendant had that the horse was vicious and that he knew the public were in the habit of crossing the field.

In *Breen* v. *City of Toronto* (1910-11), 2 O.W.N. 87, 690, the decision in *Lowery* v. *Walker* was applied.

In *Bondy* v. *Sandwich Windsor and Amherstburg R.W. Co.*, 24 O.L.R. 409, *Deane* v. *Clayton* and *Lowery* v. *Walker* were referred to. That case turned upon the question of whether or not the defendant was a trespasser, and followed *Grand Trunk R.W. Co.* v. *Barnett*, [1911] A.C. 361. This last case was also that of a trespasser, and it was held that, under the circumstances, there was no liability, for there was no breach of duty shewn.

Many of the above cases and others are reviewed in Beven on Negligence, 3rd ed., pp. 442 to 447, and the learned author refers to the law as being succinctly stated by Pigot, C.B., in *Sullivan* v. *Waters*, 14 Ir. C.L. R. 460, already quoted in this judgment.

Even admitting that there was evidence to support the finding of the jury to the third quesion (of which I have grave doubt), it does not go far enough, under the peculiar facts of this case, to entitle the plaintiff to succeed.

In none of the cases that I have been able to find in England or Canada as between strangers where there was no duty arising from contractual or other relations has there been held to be any liability unless the thing complained of was in the nature of a trap or hidden defect known to the defendant or suggesting fraud on his part.

An American case in point is that of *Maguire* v. *Magee*

(1888), 13 Atl. Repr. 551, in the Supreme Court of Pennsylvania, Appellate Division. The defendant, a sub-contractor in the erection of a building, erected certain scaffolds for his own and his employees' use. The plaintiff's husband, a labourer employed by the general superintendent of the work, but in nowise connected with the defendant, attempted to cross the scaffold for his own convenience, when it gave way, and he was killed. The Court below entered a nonsuit on the ground that deceased was not in the employ of the defendant, and that, therefore, the defendant owed him no duty. In affirming this decision, it was held, *per Curiam*: "It is too clear for argument that Magee (defendant) cannot be held for the accident which befell John Maguire (the husband of plaintiff). The scaffolding was necessarily of a temporary character, erected by the defendant's employees for their own purposes; and, had one of them been injured by it, he could not have recovered from his employer. Much less, therefore, can he be held for an injury to a stranger, to whom he owed no duty whatever. The judgment is affirmed."

This case is referred to in 6 Cyc. 61, as supporting the proposition that "the builder is not liable for injuries . . . occurring to the employees of other contractors where they without request or invitation go upon a scaffold erected by him and such scaffold gives way, thereby injuring the employees."

The difficulty in the plaintiff's way which, I think, is fatal to her right to recover, is this. The implied license which the husband had to be in the building came from the owner through the contractor for the painting, whose servant the deceased was, and not from the defendant. The deceased had the right to be where his work called him, and it was not unreasonable, under the circumstances, that he should paint the outside of the building from the inside. The defendant did not invite him, nor was he there by his license. The plank was put down for his own use, and, although it was defective, that was unknown to the defendant or his servant Hope. There was no trap or defect known to the defendant, nor was there any suggestion of fraud or allurement.

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I think the appeal should be dismissed, and with costs if asked for.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed.

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RIDDELL, J., agreed in the result.

Appeal dismissed.

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WESTON v. COUNTY OF MIDDLESEX.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. March 30, 1914.

1. HIGHWAYS (§ IV A—150)—REPAIR—DEFECTS IN—MUNICIPAL LIABILITY—PUBLIC HIGHWAYS IMPROVEMENT ACT—SCOPE OF.

The obligation to keep its highways "in repair" while traffic is permitted thereon is incumbent upon a municipality (Municipal Act 1913 (Ont.) sec. 460, and R.S.O. 1914, ch. 192, sec. 460), although work was being done thereon by way of rebuilding the road under the Public Highways Improvement Act, 7 Edw. VII. (Ont.) ch. 16.

[*Weston v. Middlesex County*, 16 D.L.R. 325, 30 O.L.R. 21, affirmed.]

Statement

APPEAL by the defendants, the Municipal Corporation of the County of Middlesex, and cross-appeal by the plaintiff, from the judgment of MEREDITH, C.J.C.P., 30 O.L.R. 21, 16 D.L.R. 325.

The appeal was dismissed.

J. C. Elliott, for the appellants.

T. G. Meredith, K.C., for the plaintiff.

Leitch, J.

The judgment of the Court was delivered by LEITCH, J.:—Appeal from the judgment of Chief Justice R. M. Meredith, delivered on the 12th December, 1913, awarding the plaintiff $1,000 damages and costs of suit. The action was brought by the plaintiff, George Weston, against the Corporation of the County of Middlesex, to recover damages from the defendants for injury caused to the plaintiff by reason of the defendants' negligence in not keeping in repair a highway in the township of East Nissouri, assumed by the Corporation of the County of Middlesex, by by-law passed in pursuance of the Act for the Improvement of Public Highways, 7 Edw. VII. ch. 16. The findings of fact by the learned trial Judge and his conclusions as to the law are set forth in a very lucid written judgment, a perusal of which is all that is necessary for an understanding of the case.

On the argument of the appeal Mr. Elliott urged very strongly that, as the road in question upon which the accident happened was assumed by the County of Middlesex under the above-mentioned Act for the purpose of construction and rebuilding, and as the work had to be done according to the regulations of the Public Works Department, sec. 606 of the Municipal Act of 1903 did not apply. Section 606: "Every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation, besides being subject to any punishment provided by law, shall be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained."

This was the language of this section at the time of the happening of this accident. In 1913 this section was re-drafted and appears in the Municipal Act of that year as sec. 460 and is included in R.S.O. 1914, ch. 192, sec. 460: "Every highway and every bridge shall be kept in repair by the corporation, the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default."

I think it was the intention of the Legislature that, no matter what the work was that was undertaken and being done under the Act for the Improvement of Public Highways, 7 Edw. VII. ch. 16, the corporation were under an obligation under sec. 606, and still are under the same obligation under sec. 460 of R.S.O. 1914, ch. 192, to keep the road in "repair," that is, reasonably fit, suitable, and convenient for the travelling public. This duty and obligation is incumbent upon the corporation even while the work under 7 Edw. VII. ch. 16 is in progress. The word "repair" in the statutes that I have cited is in full force and effect, and carries with it the same obligations and duties and gives the same rights of protection to the ratepayers that it always did, as has been expounded in a long line of decisions covering many years. No statute has been enacted which has changed the force or effect of the word "re-

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pair." Even after the completion of the work, though it may be done according to the regulations of the Public Works Department, the duty and liability of the corporation subsists. Repair is a question of fact. It is local; it is relative. What may be good repair in one locality may be positive nonrepair in another.

The accident by which the plaintiff received his injuries was caused by the defendants, during the winter months, placing in the centre of the road in question a large quantity of gravel in heaps or mounds about twelve or fifteen inches high, without levelling it down or rolling it, and leaving it in such a condition as to render the highway unsafe for traffic, in consequence of which people travelling in sleighs were forced to the side of the road, which was slippery and inclining to such an extent as to cause vehicles to skid and in some cases upset. The gravel was placed on the road in defiance of sec. 558 of the Municipal Act of 1903: "558. No stone, gravel or other material shall be put upon the roads for repairs during the winter months so as to interfere with sleighing."

This section was re-drafted in 1913 and appears in R.S.O. 1914, ch. 192, as sec. 495: "Stone, gravel or other material shall not be put on any highway for the purpose of rebuilding or repairing it during the winter months so as to interfere with the use of sleighs, unless another convenient highway is provided while the rebuilding or repairing is being done."

It will be observed that the word "rebuilding" does not appear in sec. 558, which was in force when the accident happened, but does in sec. 495 of ch. 192 of the Revised Statutes of 1914.

No matter what the defendants call the work on which they were engaged—they may call it "construction" or "rebuilding" or "repair" if they please—it was certainly an act of misfeasance or negligence to place heaps of gravel from twelve to fifteen inches high in the centre of the road, in the winter, at a time the highway was being used or likely to be used for sleighing. The defendants were warned of the dangerous con-

dition of the highway, but took no step to obviate it or protect the travelling public.

The appeal should be dismissed with costs.

The plaintiff cross-appealed to increase the damages. While we think that the learned trial Judge assessed the damages on a moderate scale, his discretion should not be interfered with. The cross-appeal should be dismissed without costs.

Appeal dismissed.

VANVALKENBURG v. NORTHERN NAVIGATION CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Latchford, Sutherland, and Leitch, JJ. December 23, 1913.

1. DEATH (§ II A—5)—RIGHT OF ACTION FOR—LIABILITY OF OWNERS OF SHIP—DECEASED FALLING OVERBOARD—DEFENCE.

Under Ontario law there is no duty on shipowners in navigating their ships to use all reasonable means to rescue a sailor on their ship who had fallen into the water because of his own negligence in voluntarily putting himself in a position of danger while off duty, upon which an action could be brought under Lord Campbell's Act for his death.

[*Melhado* v. *Poughkeepsie Trans. Co.*, 27 Hun. (N.Y.) 99, and *Connolly* v. *Grenier*, 42 Can. S.C.R. 242, distinguished; *Loader* v. *London & India*, 65 L.T. 674, referred to.]

Statement

APPEAL by the plaintiffs, the parents of Charles Vanvalkenburg, deceased, from the judgment of LENNOX, J., at the trial, withdrawing the case from the jury and dismissing the action, which was brought to recover damages for the death of Charles, while in the employment of the defendants, by reason of their negligence, as alleged.

The deceased was a seaman on a steamboat owned and operated by the defendants; he fell overboard, and was drowned.

The negligence alleged consisted in the defendants having a defective ladder, in their electric bell system being out of order, and in their failure to adopt proper means to rescue the deceased.

The appeal was dismissed.

J. R. Logan, for the appellants.

R. I. Towers, for the defendants, the respondents.

Mulock, C.J.

The judgment of the Court was delivered by MULOCK, C.J. EX.:—This is an appeal from the judgment of Lennox, J., nonsuiting the plaintiffs.

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This action is brought by the parents of Charles Vanvalkenburg for damages because of his death by drowning, whilst in the service of the defendant company.

The circumstances of the case are as follows. The deceased was a seaman on board the passenger steamer "Hamonic," which was owned and operated by the defendants. On the 21st May, 1913, the vessel was proceeding southerly on Lake Huron. The deceased, and the rest of his watch, were off duty below. Then they went up to the spar deck, and for a while amused themselves with singing, dancing, shoving, and chasing each other around the deck. Then the deceased ran up to the hurricane deck, followed by the others, but Ray Dale, one of the crew, discontinued the pursuit, returning to the spar deck, and, in order to catch the deceased, took his stand near the ladder that led down from the upper or promenade deck to the spar deck, expecting the deceased to descend by that ladder, which he did.

The lower end of the ladder terminated at the top of the rail around the spar deck, and on reaching the lowest rung of the ladder, the deceased stepped off the ladder upon this rail, the top of which consisted of round iron, which at the time was wet and slippery. He was then entirely free from and in front of the ladder, was facing inward, and holding on with his hands on a beam of the deck overhead. He saw Dale standing near him on the spar deck, and was looking up for his pursuers. Dale called to him to be careful or he might fall. At this time it was raining; a stiff wind was blowing; the sea was choppy, and the vessel rolling. The deceased, however, continued to stand there for a minute or two, when Dale gave him, but without effect, a second warning. It may be that the deceased did not hear him, for he made no response, but continued standing on the rail, looking up, which evidently caused him to lean backward over the water. Suddenly, he slipped, one of his feet coming down on the inside of the rail, which caught him behind the knee, when he fell backward into the water.

The vessel was going at the rate of about seventeen miles an hour, and Dale watched the deceased in the water until he was behind the vessel. He was then swimming. Dale then at once

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went to the electric bell button, which was in the hallway, and pressed it three times, which was the signal for the alarm of "man overboard." This electric system communicates with the captain's, the engineer's, and the engine room. Dale stood at the button for a minute or two, but the vessel continued on her way with unreduced speed. He again pushed the button, and then returned to the spar deck, and looked aft, when he again saw the deceased in the ship's wake still swimming. He was just able to see his head. Dale then hurried up to the pilot-house, three decks above the spar deck, and reported the occurrence to Joe Bruce, who was then on watch, and to Withers, the wheelsman. Bruce and Dale then reported the occurrence to the captain, who at the time was lying down in his room. The captain promptly ordered the boat hard-a-starboard, and the evidence would indicate that the boat, without changing speed, described a circle of three-eighths of a mile radius and then continued on her voyage.

An interval of from five to ten minutes had elapsed between the time of the deceased falling overboard and the captain giving the order changing the boat's course, so that the deceased was then between one and two miles astern, a distance which was increased during a portion of the time when the vessel circled round. There were life-buoys on board, and one of them was on the spar deck, within thirteen or fourteen feet of where the accident happened, and was available for Dale if it had occurred to him to throw it into the water to the drowning man. For some reason, however, he omitted to do so.

The acts of negligence causing the accident, as charged by the plaintiffs, are a defective ladder and failure to adopt proper means to rescue the deceased when in the water. Even admitting that the ladder was defective, I fail to see that it played any part in causing the deceased to fall into the water. After safely descending by it from the promenade to the spar deck, he left the ladder and stood on the rail There was nothing to prevent him stepping down upon the deck, where he would have been perfectly safe, but he remained on the rail; thus there was a new starting-point unconnected with the ladder for the subsequent occurrence; and I concur in the view of the learned

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trial Judge that the condition of the ladder did not cause the accident.

The evidence shews that the deceased was not on duty at the time of the accident, and had recklessly put himself in a position of great peril, and that his own want of care caused the accident. Thus the defendant company are not responsible for his having fallen into the water.

The question then arises whether the defendants were guilty of any actionable negligence in not using all reasonable means in order to rescue the drowning man. Undoubtedly such is one's moral duty, but what legal duty did the defendants owe to the deceased to rescue him, if possible, from his position of danger, brought about, not by their, but his own, negligence?

At the conclusion of the argument, counsel were requested to hand in any authorities dealing with this point, but failed to do so. After careful search, I can find but one case, *Melhado* v. *Poughkeepsie Transportation Co.* (1882), 27 Hun (N.Y.) 99, which affirms such a duty. That case does declare that a common carrier is liable for the death of a passenger which was due to failure to stop the boat in order to rescue him after he had fallen overboard.

The plaintiffs' counsel cited *Grenier* v. *Connolly*, Q.R. 34 S.C. 405, affirmed in *Connolly* v. *Grenier*, 42 S.C.R. 242, in support of the proposition. In that case the wreck of the vessel, with its attendant loss of life of seamen, was caused by the negligence of those in charge. Where one by negligence puts another in danger, it is manifestly his duty, if possible, to undo such negligence by preventing injury therefrom. But in the present case the deceased's position of danger was caused by his own negligence, and not that of the defendants. And, further, the Civil Code of Quebec applied to *Connolly* v. *Grenier* art. 1054, which, in the circumstances of that case, made the vessel-owners liable for the negligence of fellow-servants. The doctrine of common employment, however, obtains in Ontario, except when otherwise provided by the Workmen's Compensation for Injuries Act; and the facts of this case do not bring it within any of the exceptions of that Act; thus *Connolly* v. *Grenier*, *ante*, is not an authority in this case.

It is further argued that the vessel was unseaworthy, in that the electric bell system was out of order, thereby causing a fatal loss of time in attempting the rescue.

The evidence, I think, warrants the finding that the bells were out of order, and that in this respect the vessel was unseaworthy, contrary to the provisions of sec. 342 of the Canada Shipping Act. The evidence also shews that the seamen were never instructed in regard to the use of life-buoys, and it may be inferred from Ray Dale's failure to throw the life-buoy overboard at once that he was an incompetent and inefficient seaman, and that such inefficiency also constituted unseaworthiness. It is not the case of negligence by a competent seaman, in which case the doctrine of common employment would apply, and the owner of the ship not be liable: *Hedley* v. *Pinkney and Sons Steamship Co.*, [1892] 1 Q.B. 58.

There was evidence, further, upon which the jury might have found that, if Dale had promptly thrown the life-buoy to the deceased on his falling into the water, and if the vessel had reversed immediately on Dale touching the electric button, the deceased would, in all reasonable probability, have been saved; and, if the defendants owed to the deceased the legal duty of using all reasonable means to rescue him, then they were guilty of negligence in not having done so; but, notwithstanding *Melhado* v. *Poughkeepsie Transportation Co.*, *ante*, I am unable to see wherein they owed such legal duty to the deceased. He fell overboard solely because of his own negligence. His voluntary act in thus putting himself in a position of danger, from the fatal consequences of which, unfortunately, there was no escape except through the defendants' intervention, could not create a legal obligation on the defendants' part to stop the ship or adopt other means to save the deceased. It was no term, express or implied, of the contract of hiring, that they should protect him from the consequences of his own negligence. To do so would be a voluntary act on their part: *Loader* v. *London and India Docks Joint Committee* (1891), 65 L.T.R. 674.

In *Eckert* v. *Long Island Railroad Co.* (1871), 43 N.Y. 502, a child was on the track in front of an approaching train, and the deceased in saving the child's life lost his own. In an action

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by his representatives against the railroad company for damages because of his death, Allen, J., says (p. 508): "The act of the intestate in attempting to save the child was lawful as well as meritorious . . . but it was not in the performance of any duty imposed by law, or growing out of his relation to the child, or the result of any necessity. There is nothing to relieve it from the character of a voluntary act."

I, therefore, am of opinion that the learned trial Judge's disposition of the case cannot be interfered with, and that this appeal must be dismissed with costs.

Appeal dismissed.

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PEEBLES v. HYSLOP.

Ontario Supreme Court (Appellate Division), Boyd, C., Riddell, Middleton, and Leitch, JJ. February 5, 1914.

1. RECORDS AND REGISTRY LAWS (§ III C—24)—NOTICE DEHORS RECORD—VENDOR AND PURCHASER—NOTICE OF UNREGISTERED INSTRUMENT—TIME.

A purchaser without notice of a prior unregistered instrument affecting the lands will take title free from the unregistered instrument although he received notice thereof between the date on which he completed the purchase and the date on which he registered the conveyance to himself under the Registry Act (Ont.) 1910, 10 Edw. VII. ch. 60.

[*Millar* v. *Smith*, 23 U.C.C.P. 47, distinguished; *Bondy* v. *Fox*, 29 U.C.Q.B. 64; *Sanderson* v. *Burdett*, 16 Gr. 119; *Clergue* v. *Preston*, 8 O.L.R. 84, referred to.]

Statement

APPEAL by the plaintiff and cross-appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Wentworth dismissing with costs the plaintiff's action in that Court for trespass to land by cutting timber thereon, and dismissing without costs the defendants' counterclaim for damages.

The appeal was allowed.

J. G. Farmer, K.C., for the plaintiff.

W. E. S. Knowles, for the defendants.

Boyd, C.

BOYD, C.:—Having read over all the evidence, I see no reason to disagree with the learned Judge in his conclusion of fact that no actual notice was given of the instrument relating to the timber sold to the defendants in August, 1910, for $500, with six years to remove it, until after the plaintiff had

bought the land for $4,000, paid his money in full, and received the conveyance therefor on the 26th March, 1912.

He did get such notice in May, and some days before his deed was registered, which was on the 7th May, 1912.

The agreement with Hyslop for the sale of timber was a registrable instrument, but it was not registered till after this action had passed into judgment, which is dated the 1st November, 1913, and the registration was on the 6th November.

The learned County Court Judge has given judgment dismissing the action, because actual notice came to the plaintiff before his deed was registered. He thought the case was governed by *Millar* v. *Smith* (1873), 23 U.C.C.P. 47. The section of the Registry Act referred to in that decision (sec. 67) is the one now in force (with some words omitted), and reads, as expressed in the Act of 1910, sec. 71: "Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration."

Some *dicta* in *Millar* v. *Smith* point as the Judge below has decided, but the judgment of the Court does not so declare the law. The case is authority for no more than this. Where a subsequent purchaser has actual notice of a prior unregistered instrument before the execution of the subsequent deed, and the subsequent deed is obtained for the very purpose of being registered in order that by the terms of the Act the unregistered instrument may be avoided, it is competent for the Court of law to give equitable relief by virtue of the statute, and declare that the Act shall not be used fraudulently in aid of a person with such actual notice.

In *Millar* v. *Smith*, the plaintiff relied on the 64th section of the Act 31 Vict. ch. 20, which, as then expressed, read: "Every instrument . . . shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration unless such instrument is registered . . . before the registering of the instrument under which such subsequent purchaser or mortgagee may claim." That *per se* meant, priority of registration shall prevail. But the Court read together secs. 64 and 67 and educed the meaning that priority of registration

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shall in all cases prevail except as against actual notice. Therefore, the decision was, that the effect of actual notice could be dealt with in a Court of law, and not, as was thought by Richards, C.J., in *Bondy* v. *Fox* (1869), 29 U.C.R. 64, that the suitor defeated at law must resort to equity for the protection extended to a purchaser for value without notice.

No doubt both Judges, Hagarty and Gwynne, commented on the literal effect of sec. 67, pointing in terms to the date of registration as the essential time when there should be a lack of actual notice, instead of to the true period when the purchase was completed and the money paid and deed contemporaneously executed. Hagarty, C.J., says (p. 54): "The section is worded so as to refer the notice to the time of registration, instead of the time of purchasing or paying his money." Gwynne, J., expressed his moral conviction that the section, literally construed, does not express the intention of the Legislature (p. 58). Both Judges agree that "no doubt the mistake has only to be pointed out to the Legislature to be rectified" (pp. 54 and 58). That was in 1873, but the blemish yet remains on the statute-book.

The Legislature, however, did in that year 1873 (by 36 Vict. ch. 17, sec. 7), amend the Act as to sec. 64 by inserting the words "without actual notice" after "consideration," thus giving legislative effect to the Judges' reading of the section in *Millar* v. *Smith*, and, so amended, the section is now extant, and is applicable precisely to the appeal in hand.

Read critically, I would say that sec. 71 applies when the registration of *both* instruments is in question, which is not this case.

After judgment had been given and entered up, Hyslop had his written license registered, but, in the litigation and before us, there is but one registration, *i.e.*, that of the plaintiff. His claim as pleaded and proved fits in exactly with the provisions of sec. 70, *i.e.*; "Every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser . . . for valuable consideration without actual notice, unless such instrument is registered before the registration of the instrument under which the subsequent purchaser . . . claims."

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Were we driven to consider sec. 71 as applicable, I do not think that it speaks the last word. If the Legislature does not elucidate the meaning, the Courts will have to struggle to avoid injustice. It would still be open, in my opinion, to consider and give such redress to Peebles as can be claimed by a purchaser who has paid his money and obtained his conveyance and entered into possession without actual notice of the prior unregistered instrument. Registration is a supplementary thing created by statute, but it is not a pre-requisite for relief, nor an obstacle to relief in the case of one who has paid his money and got his deed without notice. This has been referred to by Mowat, V.-C., in *Sanderson* v. *Burdett* (1869), 16 Gr. 119, 127, and approved by Osler, J.A., in *Clergue* v. *McKay* (1903), 6 O.L.R. 51, 58, affirmed in *Clergue* v. *Preston* (1904), 8 O.L.R. 84.

But this aspect of the appeal need not be pursued. I am content to rest on the section quoted, and would, therefore, reverse the judgment below and enter it for the plaintiff with costs throughout.

RIDDELL and MIDDLETON, JJ., concurred.

Riddell, J. Middleton, J

LEITCH, J.:—The Registry Act, 10 Edw. VII. ch. 60, sec. 70, reads as follows: "After the grant from the Crown of land, and letters patent issued therefor, every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered before the registration of the instrument under which the subsequent purchaser or mortgagee claims."

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Section 71: "Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration."

Section 72: "No equitable lien, charge or interest affecting land shall be valid, as against a registered instrument executed by the same person, his heirs or assigns."

On the 14th February, 1912, Arthur Peebles agreed to sell to Charles Peebles his farm then occupied by him, containing about

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125 acres more or less, being parts of lots 6 and 7 in the 7th concession of West Flamborough, for $4,000, free from all incumbrance. On the 26th March, 1912, Arthur Peebles conveyed to Charles Peebles the said land free from all incumbrances, and on the same day Charles Peebles paid $4,000, the purchase-money.

On the 7th May, Charles Peebles registered the deed in the registry office of the county of Wentworth.

In the deed from Arthur Peebles to Charles Peebles a part of lot number 6, about 8 acres, theretofore sold and conveyed to William Henderson, was excepted, and also part of lot number 6 theretofore sold to Matthew Peebles. On the 2nd August, 1910, Arthur Peebles sold to Hyslop Brothers the timber on that part of lot number 6 in the 7th concession of Flamborough up to an elm tree and along a blazed line from east to west, together with the right of ingress and egress from the rest of the farm, for the purpose of taking off the timber. There was no reservation of the timber either in the agreement of the 12th February, 1912, or in the deed of the 24th March, 1912. Hyslop Brothers, on the 6th November, 1913, registered their agreement.

Hyslop Brothers did not give Charles Peebles any notice of their agreement until the 4th May, 1912, three days before Charles Peebles registered his deed. At the time Charles Peebles paid his purchase-money he had no notice or knowledge of the sale of the timber to Hyslop Brothers. I do not think that Hyslop Brothers gave, or ever intended to give, Charles Peebles actual notice of their agreement for the purchase of the timber, or that they intended to hold him responsible for it.

The means that he had of protecting himself, by a retainer of part of the purchase-money, was gone. There was no reason why Hyslop Brothers should not have registered their agreement. There was no reason why they should not have given Charles Peebles notice of their agreement earlier than the 4th May, 1912. As early as February, 1912, Hyslop Brothers knew that Charles Peebles was going to buy Arthur Peebles's farm. At that time they could have registered their agreement, they could have given Charles Peebles notice of their right. They did neither.

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Charles Peebles acted in good faith throughout. He got his deed on the 26th March, 1912; he paid his money on the same day; he registered the deed on the 7th May, 1912; the Hyslops did not register their agreement until the 6th November, 1913.

I think that Charles Peebles, having acted throughout in perfect good faith, had a right to register his deed on the 7th May, and is entitled to the priority which, I think, registration gives him.

I think the appeal should be allowed and the defendants, the Hyslops, enjoined from removing timber from off the said land.

I would not disturb the disposition of the costs made by the trial Judge.

The defendants should pay the costs of this appeal.

Appeal allowed.

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Re LLOYD.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Hodgins, J.A., Riddell, and Leitch, JJ. June 15, 1914.

1. EXECUTORS AND ADMINISTRATORS (§ III A—68)—SUITS AFFECTING ESTATE—FOREIGN GUARDIAN—PAYMENT OVER OF INFANTS' MONEYS—"WELFARE OF CHILDREN" AS TEST.

A foreign guardian of the property of infants entitled to moneys derived from the estate of a person domiciled in Ontario is not entitled as of right to an order against the administrator of the estate for payment over of the fund; the court will refuse to direct payment over unless satisfied that such course is for the benefit of the infants.

[*Re Chatard*, [1899] 1 Ch. 712; *Stileman* v. *Campbell*, 13 Gr. (Ont.) 454; *Mitchell* v. *Richey*, 13 Gr. 445; *Flanders* v. *D'Evelyn*, 4 Ont. R. 704, applied; *Hanrahan* v. *Hanrahan*, 19 Ont. R. 396, distinguished.]

Statement

APPEAL from the order of Latchford, J., dismissing the application of Hattie E. Lloyd, of Norton, Runnels County, Texas, widow, the guardian of her four infant children, aged respectively 11, 15, 17, and 19, appointed by the County Court of Runnels County, for an order that the London and Western Trusts Company, the administrators with the will annexed of the estate of one Robert E. Lloyd, deceased, should pay over to the applicant, as such guardian, all moneys in the hands of the said company to which such infant children were entitled under the will of Robert E. Lloyd; or for an allowance for maintenance.

The appeal was dismissed.

R. U. McPherson, for the appellant.

J. R. Meredith, for the Official Guardian.

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The judgment of the Court was delivered by LEITCH, J.:—This is an appeal from the order of Latchford, J., made in this matter on the 28th February, 1914. The fund to which the four infant children of Hattie E. Lloyd, of Norton, Runnels County, Texas, are entitled, amounts to about $5,500, and is invested in mortgages in Ontario, and realises about five and a half per cent. per annum. William Lloyd, the husband of Hattie E. Lloyd, and father of the infant children, died in 1904, leaving property in Texas worth not more than $350. Hattie E. Lloyd, since her husband's death, has supported the children by her own labour at a cost of about $10 a month each, up to the death of one who died in May, 1910, and at a like monthly amount since for the four surviving children.

Mr. Justice Latchford was asked to direct as a matter of right the payment over to a guardian, domiciled in the State of Texas, of money not derived from the foreign state, but realised and invested and held by a trust company in Ontario in trust for the infants entitled. The learned Judge declined to do so; hence this appeal.

There was no question raised as to the safety of the fund in the hands of the trust company in Ontario, and that it would be forthcoming for the infants when they attained their majority. Mr. Meredith, who appeared for the Official Guardian, representing the infants, opposed the application. It appeared to the Court that the application was not so much for the benefit of the infants as for that of the mother. Her claim for past maintenance exceeds by $900 the whole fund in the hands of the trust company. The learned Judge held that the good faith of the applicant was open to question by reason of the exaggerated amount of her claim. Her sureties in the State of Texas made no affidavits of justification. I think the language of Kekewich, J., in *In re Chatard's Settlement*, [1899] 1 Ch. 712, is applicable: "I ought to consider whether when the fund is handed over to the guardian it will be properly applied for the benefit of the infants, and whether it is not better that it should remain here and be paid to them when they attain their majorities."

The welfare and interest of the infants is the paramount consideration which weighs with the Court.

In *Mitchell* v. *Richey* (1867), 13 Gr. 445, the Court refused to make an order for the payment of the infant's money. The rule is, that money belonging to an infant is not in equity ordered to be paid to the guardian, whether appointed by the Surrogate Court or otherwise, but is secured for the benefit of the infant under the authority of the Court.

Mowat, V.-C., in *Stileman* v. *Campbell* (1867), 13 Gr. 454, following *Mitchell* v. *Richey*, said that where the infants, as here, were out of the jurisdiction, the money ought to be secured in Court.

In *Flanders* v. *D'Evelyn* (1883), 4 O.R. 704, the plaintiff was the foreign guardian of infants residing in Minnesota, and the action was against the executors under a will containing a bequest in favour of the infants. The learned Judge ordered the money to be paid into Court and not to the foreign guardian.

In *Mitchell* v. *Richey* it is said (13 Gr. at p. 453) that the rule may be subject to modification "where the fund is small, and the whole or nearly the whole may be required for the infants' education and maintenance or other immediate use."

In *Re Mathers*, 18 P.R. 13, Meredith, J., said that *Huggins* v. *Law*, 14 A.R. 383, "goes a long way towards supporting the guardian's claim; but there are these differences: this case is one of an express trust created by the testatrix, and in this case the infant is opposing the application; and that case was one where the money had been paid over to the guardian; and it does not seem to overrule such cases as *Mitchell* v. *Richey* . . . in which it is said that the rule is not to direct payment over to the guardian, but into Court: see *Campbell* v. *Dunn* (1892), 22 O.R. 98, at p. 106."

The applicant relied upon and cited *Hanrahan* v. *Hanrahan*, 19 O.R. 396. In that case tutors were duly appointed in the Province of Quebec of an infant domiciled and residing in Quebec. Quebec had also been, in his lifetime and at the time of his death, the domicile of the father. The Ontario administrator had collected money in Ontario belonging to the infant. There were no creditors. The law of Quebec empowered the tutor to receive and give valid receipts. It was held that the Court would be justified in transferring the fund in Court belonging to the in-

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fant, and that any one in Quebec having moneys belonging to the infant might safely pay over such money to the tutor and receive a valid discharge therefor.

I do not think that *Hanrahan* v. *Hanrahan* is an authority that supports the applicant's contention that the money in Court should be handed over to the applicant.

I do not think a case has been made which will justify this Court in handing over the funds that are now safe, and permitting them to be administered beyond the jurisdiction of this Court, without security or any guarantee that they will be wisely and well expended. It is open to Mrs. Lloyd to make an application for an order for future maintenance, and she can supplement her case by such further and other evidence as she may be able to adduce.

The order is refused and the appeal dismissed. The costs of the trust company and the Official Guardian should be paid out of the fund.

Appeal dismissed.

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ST. CATHARINES IMPROVEMENT CO. v. RUTHERFORD

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. June 15, 1914.

1. DAMAGES (§ III A—97)—LIQUIDATED DAMAGES—FOR DELAY IN COMPLETING CONTRACT—AMOUNT STIPULATED OWING TO "DIFFICULTY OF PROVING SPECIAL DAMAGE."

An agreement by the contractor to pay a fixed sum per diem as liquidated damages for delay in completion beyond the stipulated date may be enforceable although special damages were not proved, if the fixing of the amount can be taken as due to the difficulty of proving special damage foreseen as incident to the circumstances when the contract was made.

2. DAMAGES (§ III A—95)—LIQUIDATED DAMAGES — TESTED BY THE PURPOSES CONTEMPLATED IN THE CONTRACT.

Where a sum is stipulated to be paid as liquidated damages and is payable not on one single event but on a number of events some of which might result in inconsiderable damages, the court may decline to construe the words according to their ordinary effect and may treat the sum as a penalty, but *aliter* when it is made payable upon only one event; and the clearing away of a number of old buildings from land in furtherance of a suburban subdivision scheme involving the landscape appearance for purposes of sale and contemplated by both parties to the contract may be a single event so as to justify the enforcement of the clause where the buildings were only partly pulled down within the time.

Statement

APPEAL by the plaintiff from the judgment of Falconbridge, C.J.K.B., allowing the plaintiff $5 damages with Division Court

costs in an action to recover $1,200 as liquidated damages for delay and default of the defendant in removing certain structures from the plaintiffs' land, under an agreement between the plaintiffs and defendants, in which action the defendant brought in one Riley as a third party, and claimed relief over against him.

The appeal was allowed.

H. H. Collier, K.C., for the appellants.

G. F. Peterson, for the defendant, the respondent.

M. Brennan, for the third party.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—The plaintiffs, the St. Catharines Improvement Company, bought some 250 acres in the city of St. Catharines for the purpose of cutting it up into building lots to form a residential district. Included in this land was the Merritt farm, on which there were a farm-house and other buildings, a large barn, a smaller barn, a pig-pen, a chicken-house, a silo, etc.

The defendant is a surveyor, and the plaintiffs employed him to lay out their land into building lots and streets. As they were opening streets and offering the land for sale for residential purposes, it was necessary to have the lots all staked out and everything ready for intending purchasers by the 1st May.

The Merritt land had been known for generations as a farm, and the company naturally wished to get rid of all appearance of a farm—"to get away from the farm effect;" all the fences had to be taken down; the lots were to be staked out, and purchasers were to be invited to buy. The staking out of some of the lots, indeed, could not be properly done without the removal of some of the buildings. The defendant knew that "time was an essential point," that "the design was to have the whole place laid out as an attractive resort so that intending purchasers would be . . . disposed to purchase lots," and that the company wished to get the buildings out of the way as quickly as they could; if they had not wished this, they might have utilised the materials on the ground. The whole scheme, of which he was partly director, was "to get those buildings out so as to make a beautiful plan like that produced."

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The buildings were worth a considerable sum and could have been sold if time had not been of importance; but the company "gave them away for nothing to Mr. Rutherford for the material to have them removed by the 1st May." Accordingly, a contract was entered into by the company and Rutherford in the following terms:—

"The St. Catharines Improvement Co. Ltd.,

St. Catharines, Ont.

"I hereby agree to remove the barn, sheds, silo, pig-pen and all other structures, except the dwelling-house, on the Merritt farm now belonging to your company, in consideration of the material therein; and I hereby agree to have the same, including all foundations, entirely removed from the said premises on or before the 1st day of May, 1913, and in default of my so doing I hereby agree to pay the sum of $25 for each day that any of said material remains on the said premises after the said 1st day of May as liquidated damages and not as a penalty.

"Dated this 16 April, 1913. F. H. RUTHERFORD."

"I accept the above.

"JAS. W. BAILLIE.

"President St. Catharines Improvement Co. Limited."

The defendant did not remove the buildings, but the very next day sold out to Riley. He told Riley that he had the buildings, and asked $400. After some dickering, Riley agreed to pay $225 "for everything but the pig-pen and the chicken-house," the defendant saying that the chicken-house was convenient to the house and might be sold with the house. He contracted with Riley for the removal before the 1st May, 1913, and also for $50 a day penalty, but he says this "was simply a matter of security entirely."

The third party proceeded to tear down and remove the buildings, but did not get the work done quickly enough to satisfy the plaintiffs. He began about the 20th April, and made good progress till he got the buildings laid down on the ground; he had difficulty in getting teams to remove the material. The plaintiffs were anxious to have all the material off, that the land might be graded, levelled up, and seeded down, for the effect upon intending buyers.

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On the 24th May there was a celebration on the premises, brass band, foot-races, etc., to bring purchasers to the property —and, indeed, the company sold some lots by that means.

But even then the large buildings, barn, etc., were not levelled; and it was not till about the 4th June that the contractor for grading, seeding, etc., was able to get to work. Even then the hen-house was not removed, and the plaintiffs' solicitor wrote (on the 4th June) to the defendant saying that the penalty of $25 per day would be enforced "until you get everything removed."

During May the company more than once informed the defendant that they would hold him on his contract for the $25 a day, and as often he wrote the third party: *e.g.*, on the 19th May, he demanded 14 days' penalty, $700—"Please let me have your cheque for the amount;" on the 30th May, he notified Riley that the hen-house still remained, and that the company insisted that it should be removed; and on the 7th June, he sent him a copy of the company's letter relating to the hen-house. Riley never did remove the hen-house because, as he says, Rutherford reserved that.

Early in June, Rutherford was able to lay out the property where the buildings had been, and the contractor to get on with his grading, levelling up, and seeding, to take away all appearance of farm lands, that intending purchasers might be influenced favourably.

This action was brought on the 17th June, claiming default till that day and asking $1,200 damages. The defendant says that all the buildings were removed according to agreement except the hen-house, which was allowed to remain at the request of the plaintiffs, and in any event the plaintiffs have suffered no damage. He also claimed over against Riley. Riley says he removed all except the building reserved, and contends that the amount named in the contract is not liquidated damages.

The action was tried before Sir Glenholme Falconbridge, Chief Justice of the King's Bench, at St. Catharines, on the 10th March, 1914. Judgment was given on the 14th March, allowing the plaintiffs $5 and costs on the appropriate scale, and

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giving the defendant certain relief in respect of costs against the third party.

The plaintiffs now appeal.

In view of the defendant's statement of defence, and the very positive evidence of the third party, I would come to the conclusion that the hen-house was in fact reserved from the sale by the defendant to the third party. No great stress was laid upon the continuance of the hen-house; the company's manager swears that it was not by reason of this building being there that the action was brought, although he would rather it had not been left. There is no evidence given by the defendant in support of his plea that the building was left at the request of the plaintiffs; and the evidence of the third party does not establish such a state of facts, but only a desire on the part of the plaintiffs that, if he did remove it, he would be careful not to injure the grass.

Even if we consider that the plaintiffs waived the removal of the hen-house, there is ample evidence that not till June was the material removed, so that the land could be used as both the plaintiffs and defendant contemplated it should be used, at latest, immediately after the 1st May.

The learned Chief Justice proceeds on the ground that the contract is for the removal of several different structures of different degrees of importance. That the structures are of different sizes is true; but, in view of the object of the removal, *i.e.*, the laying out as though the land had never been farm land, making it look like a new "subdivision," I can find no evidence to support the statement as to relative importance. The contract is one entire contract—"remove all the buildings, and we will give you the materials in the buildings"—the defendant could not claim the materials of the barn for removing the barn, etc. Then the "liquidated damages" clause is separate: "I hereby agree to have the same, including all foundations, entirely removed from the said premises on or before the 1st day of May, 1913, and in default of my so doing I hereby agree to pay the sum of $25 for each day that any of said material remains on the said premises. . . ."

The scheme of the contract is obvious. All the material into which the buildings must be reduced before they could be removed was to be away by the 1st May, so that the lots could be laid out, the land graded and levelled up and seeded down, to look like a new suburb and not an old farm. There was one and only one thing provided for: the clearing away of all material, foundations, etc., to leave the land clear for what all parties contemplated. No doubt, a trifling amount left could not be considered a breach of the agreement—*De minimis non curat lex*—what is called for is a substantial compliance with the agreement; *e.g.*, no one would say that a barrowful of rubbish which might be burnt, buried, or otherwise disposed of at a merely trifling expense, would bring about the consequences of a breach of contract.

The rules for determining whether a provision of this kind is a penalty or liquidated damages are laid down from textbooks of authority and with ample quotation of cases in *Townsend* v. *Rumball*, 19 O.L.R. 433, and *McManus* v. *Rothschild* (1911), 25 O.L.R. 138. In deciding this question, the Judge must take into consideration the intention of the parties, as evidenced by their language, and the circumstances of the case taken as a whole and viewed as at the time the contract was made.

The language being looked at, the words "as liquidated damages and not as a penalty" are not "to be left out of account altogether . . . they go somewhat to shew that the parties intended that these sums should be liquidated damages and not penalties:" Lord Esher, M.R., in *Law* v. *Local Board of Redditch*, [1892] 1 Q.B. 127, at p. 131. And it is "no doubt a very serious interference with the terms of a contract to say that, though the parties had expressly stipulated that a sum was to be paid as liquidated damages, the Court would not construe the words to have their ordinary effect, but would treat the sum as a penalty:" *per* Kay, L.J., *S.C.*, at p. 135. Lord Justice Kay in that case adds: "That has never been done, so far as I am aware, except in cases like *Kemble* v. *Farren* (1829), 6 Bing. 141, where the damages are made payable, not on one

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single event, but on a number of events, some of which might result in inconsiderable damages, . . . We have to consider within which class of cases the present comes—whether this is a case where a sum is made payable upon several events, some of which are of small importance, or whether it is a case in which it is made payable upon only one event." In that case the contract was for sewerage works for a municipality. The contract read: "The works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30, 1889. . . . In default of such completion, the contractor shall forfeit and pay . . . the sum of £100 and £5 for every seven days during which the works shall be incomplete after the said time. . . . as and for liquidated damages." The Court thought that there was one event and only one, viz., the non-completion by the day fixed. Had that been the only decision, the case might not be conclusive of the present, but two of the Lords Justices added that, if the true meaning of the contract was that the works were not only to be completed but also cleared of the impediments, etc., the same result would follow: Esher, M.R., pp. 131, 132; Kay, L.J., pp. 135, 136.

Most of the argument before us was the same as that before the Lords Justices: *e.g.*, there were two events (p. 128); if a single wheelbarrow were left on the premises the £100 would be payable; non-completion covers a great many breaches of contract, some important, some very minute, etc.

Kay, L.J., deals with these arguments at p. 136: "I cannot agree with the ingenious argument that, because there may be many matters, some very small, which would constitute non-completion, these sums may be regarded as payable on several events. According to that argument, there must be considered to be several different non-completions of the works. There may be different causes of non-completion; but non-completion is only one single event."

Lord FitzGerald, in *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Cas. 332, at p. 347, cites with approval an Irish case, *Huband* v. *Grattan*, Alcock & Napier 389.

The grantee covenanted with his grantor to prostrate and remove a lime kiln before a certain day, and if he did not he would pay the grantor £100 for every year the lime kiln remained, or a ratable sum for a shorter period. This was held to be liquidated damages and not a penalty. Lord FitzGerald adds that the use by the parties of the words "liquidated damages" is not to be disregarded, though by no means conclusive.

The case of *Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda*, [1905] A.C. 6, shews that often liquidated damages are provided for from the difficulty of proving damage, though actual damage may accrue: "It is obvious on the face of it that the very thing intended to be provided against by this pactional amount of damages is to avoid that kind of minute and somewhat difficult and complex system of examination which would be necessary if you were to attempt to prove the damage" (p. 11).

It seems to me that that has some bearing on the present case. The learned Chief Justice finds that no damage has yet accrued. I do not think the evidence warrants that conclusion. The manager says: "I suffered damage which it is difficult to put an amount to, by having them there after the 1st May, when we started selling the property." "It would have a sentimental effect on anybody going over there and looking at the property." Special damages was not indeed proved; but it is just because of the difficulty of proving special damages that liquidated damages often are stipulated for; and the present is peculiarly the case for such a stipulation.

The plaintiffs have proved a continuance until the 1st June; all after that is indefinite, except as to the hen-house, which seems not to be made much of. I would accordingly reverse the judgment and give the plaintiffs $775 (31 x $25), damages, and costs here and below.

The defendant did not appeal against the third party (even conditionally). We allowed him to appeal *nunc pro tunc*, but only to the extent of indemnity against the claim of the plaintiffs and the results of such a claim. He is, therefore, in the same position as though he had brought an action against the

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third party for an indemnity. He would then be entitled to recover from the third party the amount he should be obliged to pay the plaintiffs, with such costs as a reasonable man would incur. The learned Chief Justice having found that there was a defence to practically all the claim, it cannot be said that defending the action was not reasonable.

I think, therefore, that the third party should be ordered to pay, not only the amount of the plaintiffs' judgment and costs, but also the costs of the defendant which he must pay his solicitor. Had anything turned on the hen-house only not being removed, the case would be different—the non-removal is admitted by the defendant and justified by him.

Appeal allowed.

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Ontario Supreme Court (Appellate Division), Boyd, C., Riddell, Middleton, and Leitch, JJ. January 23, 1914.

1. WILLS (§ I D—38)—UNDUE INFLUENCE—COMPETENCY—FREE AND CAPABLE—ONUS, WHEN SHIFTED.

The *onus probandi* lies upon the party propounding a will to satisfy the court that it is the last will of a free and capable testator, and this being fulfilled the onus is shifted.

[*Barry* v. *Butlin*, 1 Curt. 637; *Fulton* v. *Andrew*, L.R. 7 H.L. 448, and *Connell* v. *Connell*, 37 Can. S.C.R. 404, referred to.]

2. WILLS (§ I D—38)—UNDUE INFLUENCE—BENEFICIARY PREPARING WILL—EFFECT.

If a party writes or prepares a will under which he takes a substantial benefit, that is a circumstance creating suspicion which he must displace when he propounds the will for probate if contested.

[*Barry* v. *Butlin*, 1 Curt. 637; *Tyrrell* v. *Painton*, [1894] P. 151, and *Connell* v. *Connell*, 37 Can. S.C.R. 404, applied.]

Statement

APPEAL by the plaintiff from the judgment of the Judge of the Surrogate Court of the County of York upon a contestation by the defendant of the will of Finella F. Harris, the deceased wife of the defendant, propounded by the plaintiff as executor.

The plaintiff had been the solicitor and adviser of the testatrix, and took the principal benefit under the will, which was drawn by another solicitor. A former will had been made in favour of the defendant. By the judgment appealed from, probate of the will was decreed except as to the devises and bequests to the plaintiff for his own benefit.

The appeal was allowed.

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E. E. A. DuVernet, K.C., for the appellant.
W. D. McPherson, K.C., for the defendant.

The judgment of the Court was delivered by BOYD, C.:—By will dated the 16th October, 1910, the testatrix gives all her estate, worth about $6,000, to the plaintiff, a barrister, absolutely, save as to a bequest of personal effects to Rosie White, and $300 to be allowed to John Watkins in discharge of a debt. The will is on a form with special disposition, which is short and simple, filled in.

This will was drawn up from directions of the testatrix by Mr. Lewis, K.C., who is one of the witnesses.

The testatrix derived her property from a former husband, and in February, 1906, she married the present defendant, who was then a widower. She made a will in his favour on the 23rd December, 1907, which was drawn by Mr. Loftus, who had acted as her solicitor before this, as well as after. Being dissatisfied with her domestic life, she revoked this, and made a will on the 6th January, 1908, in favour of Charles Merton, who had befriended her, and this was also prepared by Mr. Loftus.

It is plainly apparent from all the evidence that she had fully resolved not to give any of her property to her husband, and this for reasons fully explained by her in writing at a later date.

I see no reason for supposing that this will to Merton was not a valid instrument made by one competent and acting as a free agent. Married women can dispose of their property as freely and fully as married men.

The learned Surrogate Court Judge detects undue influence in some amounts given to Roman Catholic charities in this will, larger than those given to Protestant charities—she being a Presbyterian and Loftus a Roman Catholic. But surely this *per se* is not enough.

In *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462, before a strong Court composed of Lord Penzance, Pigott, B., and Brett, J., the Court refused to extend the rules adopted by Courts of Equity in relation to gifts *inter vivos* to the making of wills. Lord Penzance also said that "the natural influence of the . . . attorney over the client may lawfully be exerted to obtain a will

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or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent."

That I take to be specially applicable to a case which is one of benefit to a person other than the solicitor.

Then in 1910 the impeached will was made. As stated by the learned Judge below. "She told Mr. Loftus that Mr. Merton would not fight for her will against her husband in case of her death, and wanted to leave it to Mr. Loftus, who would fight for it."

Mr. Loftus put her off several times, but at last he saw Mr. Lewis and asked him to draw a will as Mrs. Harris wished to leave her property, and he introduced her to Mr. Lewis.

I quote again from the judgment below: "Mr. Lewis says that she did instruct him as to the will in favour of Mr. Loftus, the manner in which it was to be drawn, but she told him she had no relations, and that she was not going to leave anything to her husband nor to any one who would not fight for the will . . . I think she came next day and signed the will"—as drawn by Mr. Lewis.

Resting at that point, and on the facts stated, there appears to be enough to shew a good will by a competent testator. There was no weaknes of mind and no undue influence exerted. She had a strong feeling of resentment against her husband—believing that he had married her for her property, and being in possession of letters affecting his manner of life, which would explain her determined course. The learned Judge, it is true, belittles these things, as "imaginations" and "imaginary troubles," but there was no hallucination in her mind—there was a substantial foundation for her attitude, and we have only the husband's side of the case in the oral evidence, but we have the wife's written declaration shewing a very different picture of the domestic relations.

However, we do not stop at this point. The wife did not die till June, 1913. The will of 1910 was left with Mr. Loftus, accompanied by the wife's declaration, written out by a friend, Mr. Watkins, at her dictation, in which she sets forth her reasons for disposing of her estate otherwise than to her husband. The reasons she gives are lucidly expressed, and to her appeared

sufficient to justify her position; and, whatever opinions may be entertained as to her manifestation of feeling, it cannot be said that her conduct was without sense or without reason.

Over two years afterwards, she fell sick of the ailment of which she died, and when at the hospital sent for Mr. Lewis and asked about the will. He obtained it from Mr. Loftus and brought it to the hospital. I will quote again from the judgment below: "He handed it to her, and she read it over, and then asked if her husband would get anything out of that, and asked if by reason of his having put labour and material that belonged to her into the building he was entitled to anything, and subsequently said, 'Now I want you also to be put in with Mr. Loftus.'" Mr. Lewis refused to change the will.

This again appears to be sufficient evidence to sustain the will. After an interval of two years and over, she calls for her will, reads it over, asks intelligent questions about it, and recognises that Mr. Loftus is sole beneficiary. The act is that of an intelligent person, considering the frame of the will made two years before, and affirming it to be the proper expression of her will as to the disposal of her property after her death.

The learned Judge applied the equitable and proper doctrine that all dealings between solicitor and client are to be viewed with suspicion and are void if obtained by undue influence, and he concludes, without finding that there has been such influence, that the solicitor is not to benefit at the expense of those to whom she ought in all justice to give her property, and that she should justly have given it to her husband. There is the error.

It is not a question of what is just to be done as between husband and wife. It is a question of what the wife thought just; she thought it just to give it away from her husband; and the Judge, without any warrantable evidence, gives it to the husband and frustrates the wife's last will.

In matters of testamentary proof in contested cases two rules are well settled. These are set forth in a notable case, on appeal from the Prerogative Court of Canterbury to the Privy Council, reported in 2 Moore P.C. 480, and on account of its importance specially reproduced in the Ecclesiastical Reports as *Barry* v.

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Butlin (1838), 1 Curt. 637. The judgment was by Parke, B. (Lord Wensleydale). These rules of law, he says, are two in number:—

(1) "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."

(2) "If a party writes or prepares a will under which he takes a benefit, that is a circumstance which 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 it is judicially satisfied that the paper propounded does express the true will of the deceased."

Then he touches on the particular application to this case, and goes on (p. 640): "All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance of more or less weight, according to the facts of each particular case; in some of no weight at all . . . varying according to circumstances; for instance, the quantity of the legacy, and the proportion it bears to the property disposed of, and numerous other circumstances: but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased."

These rules of law are quoted and adopted in the House of Lords by Lord Chancellor Cairns in *Fulton* v. *Andrew*, L.R 7 H.L. 448. They are applicable to all cases where substantial benefit has accrued to the person who draws the will: *Connell* v. *Connell* (1906), 37 S.C.R. 404, 408; and more than this, the second rule in *Barry* v. *Butlin* is not confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one case of suspicion; but the principle is, that whenever a will is prepared under circumstances which raise a well-founded suspicion that it does not express the

mind of the testator, the Court ought not to presume in favour of it unless the suspicion is removed: Davey, L.J., in *Tyrrell* v. *Painton*, [1894] P. 151, at p. 159.

Lord Macnaghten in *Farrelly* v. *Corrigan*, [1899] A.C. 563, at p. 569, said: "Their Lordships . . . think that the propositions of law laid down by Parke, B., and approved by Lord Cairns, are sufficient for all cases in which a person who has prepared a will is found to take a substantial benefit under it, and they do not think that the additional rule proposed (by the Judge below) would be a judicious amendment or an improvement in any case."

These rules were also the guide in *Shama Churn Kundu* v. *Khettromoni Dasi* (1899), L.R. 27 Ind. App. 10, and in the late case (1910) of *Bur Singh* v. *Uttam Singh*, L.R. 38 Ind. App. 13.

There is no need for a third rule, and there is no such rule of law as that, in case of substantial benefit to the party drawing the will or procuring it to be drawn, it is essential that the testator should have an independent solicitor or other adviser. It may be expedient to take this precaution, as it will facilitate proof, but it is not a *sine quâ non*. In some cases it may appear that without such advice being available the will cannot stand; in others, such as this, that is not needful. The woman herself has furnished evidence to explain her conduct; and, if that were not enough, she had recourse to her friend Mr. Watkins; and she reviewed the whole situation two years after and during the incipient stage of her last illness, and confirmed what had been done.

The plaintiff having, as I think, fulfilled the requirements of the two rules mentioned, the onus is cast upon the husband to prove a lack of testamentary capacity and a presence of undue influence; but therein there is signal failure.

In *Barry* v. *Butlin* the will prepared by the solicitor of the deceased, under which he took a considerable benefit, one-fourth of the estate (the only son being excluded), was upheld, though the testator was of weak capacity and was 76 years of age. It is a case in many respects like this as to the estrangement of the relatives and the grounds whereon that arose, and in that case no independent solicitor was employed.

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The wife, no doubt, deceived and hoodwinked the husband and gave him to understand that she had made a will in his favour, which had not been revoked. On faith of this he expended money and labour and materials in improving the devised land, and in fairness this should be made good to the husband and paid out of the estate and be charged upon the land.

The parties probably can arrive at a proper figure (which should be on the liberal side) without the need of a reference.

This is a case, moreover, in which the litigation has been occasioned by the conduct of the wife, and it is fitting that all costs of both parties, including appeal, should be paid out of the estate.

Appeal allowed.

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REX v. WILLIAMS.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Maclaren, Magee and Hodgins, JJ.A. December 9, 1914.

EVIDENCE (§ XII A—920)—CORROBORATION — ACCOMPLICE — INDECENCY WITH MALE PERSON—CR. CODE (1906), SEC. 206.

Statement

CASE reserved and stated by the Senior Judge of the County Court of the County of Carleton, under sec. 206 of the Criminal Code.

The accused was tried on a charge of having committed an act of gross indecency with another male person during the month of February, 1914. There was a similar charge against the accused in respect of a brother of the same person, and a case was reserved by the learned trial Judge in respect of each charge, the following questions being submitted by him for the opinion of the Court:—

(1) Was the person with whom the offence was committed an accomplice?

(2) If he was an accomplice, was it essential to the validity of the conviction that his evidence should be corroborated?

(3) If corroborative evidence was necessary, was such evidence given?

The conviction was affirmed.

J. A. Macintosh, for the accused, argued that in each case the

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boy with whom the alleged offence was committed was an accomplice and that his evidence required corroboration. The statements of the accused which are relied on by the prosecution were obtained by inducements held out to him, and should be disregarded, and the accused should have been warned. He referred to Russell on Crimes, 7th ed., p. 266; *Rex* v. *Everest* (1909), 73 J.P. 269; *Rex* v. *Winkel* (1911), 76 J.P. 191.

[MEREDITH, C.J.O., referred to *Lewis* v. *Harris* (1913), 30 Times L.R. 109].

J. R. Cartwright, K.C., for the Crown, was not called upon to argue, but admitted, in reply to a question from the Court, that the person with whom the alleged offence was committed was an accomplice. He referred in this connection to *Rex* v. *Frank* (1910), 16 Can. Cr. Cas. 237, 21 O.L.R. 196.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O., at the conclusion of the argument, holding that corroboration of the evidence of the accomplice in this case was not essential to the validity of the conviction, and that, even if corroboration were necessary, it had been supplied.

Conviction affirmed.

HARGREAVES v. SECURITY INVESTMENT CO.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, Brown and Elwood, JJ. July 15, 1914.

1. VENDOR AND PURCHASER (§ I—1)—AGREEMENT FOR SALE—REMEDIES OF VENDOR—ACTION ON COVENANT AND FORECLOSURE—CONCURRENT REMEDIES—ELECTION BETWEEN.

The vendor under an agreement for sale of lands is not entitled to both a personal judgment on the covenant and to an order for rescission or foreclosure, but must elect which remedy he will pursue.

[*Goodacre* v. *Potter*, 18 D.L.R. 352, disapproved; *Tytler* v. *Genung*, 16 D.L.R. 581; *Jackson* v. *Scott*, 1 O.L.R. 488, considered.]

2. ACTION (§ I B—5)—PREMATURE; CONDITIONS PRECEDENT—PURCHASE INSTALMENTS ACCRUING PENDENTE LITE.

In an action upon an agreement of sale of lands upon deferred payments, the vendor suing for payments in arrear and for enforcement by foreclosure or by personal judgment for the arrears, the plaintiff cannot add a cause of action which has arisen after the writ was issued, *ex. gr.* a claim on the default in paying another instalment which accrued *pendente lite*.

[*Atty.-Genl.* v. *Avon*, 3 DeG. J. & S. 637, and *Evans* v. *Bagshaw*, 5 Ch. App. 340, followed.]

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HARGREAVES v. SECURITY INVESTMENT CO.

Elwood, J.

APPEAL by defendant from judgment at trial.

The appeal was allowed, varying the judgment.

J. F. Frame, K.C., for appellant.

Hon. W. F. A. Turgeon, K.C., for respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—This is an action brought by the vendor against the defendant under an agreement of sale of certain land in the city of Saskatoon. By the statement of claim the plaintiff alleges certain payments to be overdue, and claims: (1) Judgment for those payments overdue, together with interest and costs; (2) that a time be fixed for payment of the judgment, and that in default, all the right, title and interest of the defendant or of anyone claiming through or under it, in and to the land, be barred and foreclosed, and the agreement declared void and at an end, and that the defendant company or anyone claiming by, through or under it and in possession of the said land be ordered to deliver up possession to the plaintiff, and the registration of the caveat lodged by the defendant company vacated; (3) in the alternative to the last paragraph, that a time be fixed for payment of the judgment, and that in default of such payment a declaration be made that the plaintiff has a lien on the land for the amount of the judgment and costs, and that the land be sold to satisfy the claim.

At the trial it appeared that, in addition to the amounts for which the action was brought, there was a subsequent payment which had come due since the action was commenced, and in giving judgment the learned trial Judge ordered a reference to ascertain the amount due under the agreement, and an order for judgment for the amount sued on, and an order that the defendant pay within 6 months the amount ascertained by the registrar as being due under the agreement, and in default foreclosure. On a reference to the registrar it was ascertained that the amount for which the plaintiff should have judgment is the sum of $44,208.94 and the costs of the action, and that the amount due under the agreement, including the payment which accrued due since the commencement of the action, was $82,373.84; and judgment was entered for the $44,208.94, and an order taken out that the defendant pay into Court to the credit of this cause, within 6

months, the said sum of $82,373.84 and interest, and the costs; otherwise foreclosure.

From this judgment and order the defendant appeals. The two chief grounds of appeal are: (1) That the learned trial Judge could not at the same time give the plaintiff judgment against the defendant and make an order for foreclosure; and (2) that he could not in any event make any order with respect to the payment which fell due after the commencement of the action.

With respect to the first objection, counsel for the respondent cited a number of cases. With the exception of *Goodacre* v. *Potter*, 18 D.L.R. 352, none of the cases cited holds that the vendor, under an agreement for sale, could, as concurrent remedies, obtain a personal judgment on the covenant as well as an order for rescission or foreclosure. *Goodacre* v. *Potter*, in my opinion, was incorrectly decided; and it is perhaps not unimportant to note that the defendant in that case appears not to have been represented. The case of *Tytler* v. *Genung*, 16 D.L.R. 581, was cited as authority for the proposition that the plaintiff under an agreement for sale was entitled to personal judgment as well as foreclosure. *Tytler* v. *Genung*, however, merely decides that the vendor under an agreement for sale is entitled to bring an action for specific performance and for cancellation, and the order in *Tytler* v. *Genung* was one directing payment of the purchase money within a certain date, and in default thereof cancellation. There appears to have been no order for a personal judgment. In *Jackson* v. *Scott*, 1 O.L.R. 488, there was an order for a personal judgment, which also provided that, in the event of the defendant not paying within a reasonable time, the plaintiffs might apply for such further relief as they might be advised. It is quite apparent that that is quite a different order from the one in the present case. The order in that case merely gave the plaintiff the right to apply for further relief, and it is quite conceivable that if nothing were realized under the judgment the Court might grant a rescission or might order a sale of the land under the vendor's lien. The analogy of some of the remedies under an agreement of sale to those under a mortgage was referred to on the argument, but I have been unable to find any case except as above stated where that analogy has been carried so far as to order a personal judgment and foreclosure at the same time.

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The rights of the parties under a mortgage and under an agreement for sale are, in my opinion, quite different. Under a mortgage, the land always until final payment remains security for payment of the amount of the mortgage; and, no matter how much is realized under the mortgage, the mortgagee is entitled to foreclosure until the last cent is paid. Under an agreement for sale, however, the position of the parties is quite different. Where a vendor seeks rescission, he ordinarily, and in the absence of an agreement to the contrary, is obliged to bring into Court any moneys that he has received under the agreement, with the exception of, possibly, the deposit, and it is only because the agreement may provide that he is entitled to retain the payments made under the agreement in case of default that he is entitled to retain those payments. The question whether the deposit is to be forfeited upon the purchaser's default is one of the parties' intention, to be gathered from the whole agreement; so that if the contract contained any provision inconsistent with such a contention it will be excluded: Williams on Vendors and Purchasers, vol. 2, pp. 951, 952 and 953. Upon a breach of the contract, the vendor is entitled, at his election, either to rescind the contract or to affirm it and sue upon it for damages for the breach: Williams on Vendors and Purchasers, vol. 2, 948. The vendor is not entitled to rescission and damages for breach: *Henty* v. *Schroder*, L.R. 12 Ch.D. 666; *Jackson* v. *DeKadish* (1904), Weekly Notes 168. The remedies of a vendor are fully set out in McCaul on Vendor and Purchaser, at p. 150; and these remedies, according to the opinion of the author, do not appear to cover cancellation and a personal judgment as concurrent remedies but as alternative remedies. Beck, J., in *Schurman* v. *Ewing*, 7 W.L.R. 610, expresses the opinion that the plaintiff is not entitled to personal judgment as well as cancellation, and that by taking personal judgment the vendor would be in a position to continue to demand payment under the agreement of sale on the basis of its continuing in force. In the case at bar the agreement contains a stipulation that in case of default the vendor shall be at liberty to determine the agreement without any right on the part of the purchaser for any compensation for moneys paid under the agreement. As was pointed out by me in the unreported case of *Landes* v. *Kusch* (see 19 D.L.R. 520, 28 W.L.R. 915), it was surely never con-

templated by the parties at the time that they entered into the agreement that in case default were made and the vendor sought to recover the money he should be entitled to issue execution therefor and to recover practically the whole amount under the execution, and, in case there might be a small amount not recovered, then he should be entitled to rescission and retain all moneys so recovered under the execution. Yet, if the judgment appealed from were allowed to stand, that would, in my opinion, be the effect of the judgment. I am, therefore, of opinion that the judgment was incorrect in allowing both a personal judgment and foreclosure.

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So far as the other objection is concerned, I am of the opinion that the learned trial Judge was in error. The plaintiff cannot add a cause of action which has arisen after the writ has issued: *Atty-Gen.* v. *Aron Corporation*, 3 DeG.J. & S. 637; *Evans* v. *Bagshaw*, 5 Ch. App. 340, vol. 23, Hals. 139, note (E). It was, however, argued by counsel for the respondent that this is analogous to the order which is made in a foreclosure action or the one that is made in a suit for specific performance. A foreclosure action, however, is quite different from this. In that action the mortgagor, before he is entitled to redeem the property, must pay all *moneys* due under the mortgage. In a suit for specific performance the claim is for specific performance of an agreement for sale, and covers payments due and to accrue due. As is pointed out in McCaul on Vendors and Purchasers, p. 30, a judgment in an action for specific performance has the advantage of practically a judgment in advance for the subsequent instalments as they fall due. The present action is not one for specific performance, but for certain instalments overdue. In my opinion, therefore, the learned trial Judge was in error in ordering a reference to the local registrar to ascertain the amount due with respect to the instalments falling due after the issue of the writ. On the argument, counsel for the respondent was asked to elect as to which remedy he would accept—a personal judgment, or an order for payment and in default foreclosure. He stated that he was unable on the spur of the moment to elect, and desired, in the event of the appeal being allowed, to have the option of electing later. In my opinion, therefore, the judgment of the learned trial Judge should be varied by giving the respondent the

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right to either personal judgment for the amount sued on and costs or an order directing the defendant to pay the amount sued on and costs into Court to the credit of this cause within six months, and in default of such payment, the right, title and interest of the defendant or of anyone claiming through or under it in and to the said land to be absolutely barred and foreclosed, and the agreement sued on declared void and at an end, and that the defendant company or anyone claiming by, through, or under it and in possession of said land be ordered to deliver up possession to the plaintiff, and the registration of the caveat by the defendant company declared vacated. The appellant should have its costs of this appeal.

Appeal allowed, judgment varied.

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BROWN v. GALLAGHER & CO.

Ontario Supreme Court, Middleton, J. April 29, 1914.

1. LANDLORD AND TENANT (§ III E—115)—RENT—RE-ENTRY; RECOVERY OF POSSESSION—"RENT ACCRUING" AS DISTINCT FROM "RENT ACCRUED DUE."

Rent accruing due is an incorporeal hereditament but rent which has accrued due is a mere chose in action which does not pass to a purchaser of the reversion unless expressly assigned to him.

2. LANDLORD AND TENANT (§ III E—115)—RE-ENTRY—PURCHASER OF REVERSION—HIS RIGHTS.

A purchaser of the reversion does not in Ontario (differing from the English law under the Conveyancing Act 1911 Imp.) acquire a right of re-entry for a breach of a lessee's covenant to pay rent which took place before the conveyance of the reversion.

[*Cohen* v. *Tannar*, [1900] 2 Q.B. 609, applied; *Rickett* v. *Green*, [1910] 1 K.B. 253, distinguished.]

Statement

ACTION to recover possession of part of the premises No. 644 Yonge street, in the city of Toronto, and damages for retention of possession.

The action was dismissed.

W. M. Douglas, K.C., for the plaintiff.

A. C. McMaster and *R. G. Agnew*, for the defendant company.

Shirley Denison, K.C., for a third party, Annie Murphy.

Middleton, J.

MIDDLETON, J.:—The plaintiff, as the owner of premises known as 644 Yonge street, claims to recover possession against the defendant company and damages for retention of possession.

The defendant company claims to be entitled to possession under a lease made to it by the third party prior to her conveyance of the land in question to the plaintiff.

Annie Murphy, at that time the owner of the land in question, on the 18th September, 1912, leased the ground floor and basement of the premises in question to the company, for the term of five years, commencing on the 1st November, 1912, at an annual rental of $780, payable $65 monthly in advance. The first month's rent has been paid, but until the bringing of this action no further rent was paid.

At the time of the making of the lease, the premises were in bad repair and required substantial alteration. Mrs. Murphy by the lease undertook to make certain changes in the building. The stairway was to be moved so as to afford a separate means of access to the upper floors of the building, not included in the lease; partitions were to be removed so as to make the whole of the ground-floor available for store purposes; a furnace was to be installed in the basement of sufficient size to supply the requisite heat for the store premises. Any other alterations necessary were to be made by the lessee at its own expense.

When Mrs. Murphy undertook to make the contemplated changes, the structural condition of the building was found to be so seriously impaired by age and decay that the city officials intervened and threatened to demolish the whole structure unless some extensive repairs were made. Mrs. Murphy elected to make these repairs, and she was permitted to enter upon the premises and carry on her work of reconstruction without any objection on the part of the tenant. So far as revealed, and as I believe to be the fact, Mrs. Murphy and Mrs. Gallagher, the president of the defendant company, were working in perfect harmony. The company contemplated opening up a store for the sale of fish, fruit, etc., before Christmas, but the repairs and alterations proceeded so slowly that the Christmas season was past before completion. No rent was paid, because the tenant had no beneficial occupation, and possibly the tenant thought it had a substantial claim by reason of the loss of the most profitable month's business in the year. Had it not been for the intervention of the plaintiff, it is altogether likely that these two

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ladies would have adjusted their grievances without the assistance of the Court.

In the meantime, on the 27th November, 1912, Mr. Brown made an offer to purchase the property from Mrs. Murphy, this purchase to be subject to the Gallagher lease, and to be dependent upon the completion of the alterations necessary to bring the building into accordance with the city regulations. This is so stipulated in the offer. The offer was accepted on the 28th November, but the sale was not carried out until the alterations were substantially completed at the end of May. The conveyance from Mrs. Murphy to Brown is dated the 30th September, 1912, but the transaction was not closed nor was the deed handed over until the 23rd May, 1913. Upon the adjustment made when the transaction was closed, the vendor was charged with the rents up to the 1st June, although it was well known that the rent had not actually been paid.

At this time the premises were still lying fallow. The Gallaghers had a key, but no business was being carried on. A large sign had been placed upon the building announcing the contemplated opening for Christmas. When this was destroyed in the course of the alterations, another sign was placed upon the building announcing that the premises would be occupied by the Gallagher company. There never was any intention on the part of the company in any way to abandon the lease. The premises were thought not even then to be in a proper condition for occupation. No furnace had been installed.

At the trial some suggestion was made that a small Globe heater, which had been put in the basement for the purpose of keeping the premises dry during the construction work, should be regarded as a furnace. This contention is as absurd as it is dishonest. To keep this stove going, it would be necessary to have a stoker always beside it.

Under the direction of Mrs. Murphy's architect, a drain had been opened up in the cellar, and this has never been closed in. Possibly this by itself is not very serious, but the situation justifies Mrs. Gallagher in thinking that the premises were not even then ready for her use.

At the end of May or in the first few days of June, one

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Heslop, a discharged employee of Gallagher & Co., conceived the idea of getting possession of this store; and he approached Brown with the view of obtaining a lease. No notice of the conveyance of the reversion had been given to Gallagher & Co., but the fact that the conveyance had been delivered was known or suspected. Consequently a registered letter was written by the company's solicitors on the 3rd June to Brown, advising him that it was understood that he intended taking possession, but that the company insisted upon the lease and intended to bring action for possession and have the premises placed in proper condition for occupation.

Brown's evidence as to the receipt of this communication is very unsatisfactory. It is plain that it reached his hands in due course. He consulted his solicitor about it, in company with Heslop, before any concluded bargain had been made for a lease to Heslop. A lease was finally made by Brown to Heslop, bearing date the 9th June. This lease, it is said, was executed on the 6th June. By it the entire building was demised for a term of three years, commencing on the 9th June, at an annual rental of $1,800, payable $150 per month in advance. Heslop, it is said, placed some paint pails on Saturday the 7th; and, no doubt, Brown, using the key that he had received from Mrs. Murphy, went upon the premises.

The Gallagher company took possession of the premises on the 9th, and on the 10th a motion was made before me for an injunction. On the return of that injunction motion, the fact that Mrs. Murphy was entitled to the rent up to the 1st June was not disclosed. After argument, an order was made for a speedy trial, and permitting the defendant company to retain possession in the meantime, upon payment to Brown of the arrears of rent and the accruing rent. The speedy trial was not had, and the matter has dragged on from then to the present time, the Gallagher company remaining in possession, but having no beneficial enjoyment of the property owing to the uncertainty incident to this litigation, as the store could not be used advantageously without an expenditure of considerable money in constructing and placing the necessary fittings.

Brown now contends that he had a right to re-enter and

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forfeit the lease by reason of the non-payment of the rent. Obviously there had been no sufficient default in payment of the rent accruing due on the 1st June to entitle him to exercise this right, and it is contended by the company that Brown is not entitled to take advantage of any forfeiture arising from the default before the property was conveyed to him.

Rent which had accrued due before the conveyance of the reversion did not pass to the grantee of the reversion unless expressly assigned: *Flight* v. *Bentley* (1835), 7 Sim. 149; *Sharp* v. *Key* (1841), 8 M. & W. 379; *Salmon* v. *Dean* (1851), 3 Macn. & G. 344; nor did any right for breach of covenant, even though running with the land, which took place before the conveyance.

Cohen v. *Tannar*, [1900] 2 Q.B. 609, shews that a right of re-entry for breach of covenant cannot be exercised where the breach took place before the assignment. In England the law has now been changed, and, by the Conveyancing Act of 1911, sec. 10 of the Conveyancing Act of 1881 is made to apply to the right to re-enter where the assignment of the reversion is made after the breach. The section of the Conveyancing Act of 1881 amended by this Act is the same as sec. 5 of the Landlord and Tenant Act, 1 Geo. V. ch. 37 (O.) This statute was adopted here in 1911, but not in its amended form. That the English statute of 1911 changed the existing English law is plain from reference to the 19th edition of Woodfall on Landlord and Tenant, p. 291.

Much reliance was placed by the plaintiff on the case of *Rickett* v. *Green*, [1910] 1 K.B. 253; but, apart from the doubt that has been thrown upon that case by some adverse comments of text-writers, it is plain that the question there before the Court is not that raised here. It was there necessary, in order that proceedings might be taken against the tenants under the overholding tenant sections of the County Courts Act, that there should be six months' rent in arrear. The rent was payable quarterly. At the time of the conveyance of the reversion, February, 1909, one quarter was current. It did not fall due until after the assignment. On the second quarter falling due, proceedings were taken under the statute, and it was held that the fact that part of the rent was accruing at the date of the

conveyance of the reversion made no difference. Rent accruing due, as is well known, is an incorporeal hereditament, but rent which has accrued due is a mere chose in action. The conveyance of the reversion passed the rent accruing due, but it would not pass a mere debt due to the grantor.

This is sufficient to dispose of the plaintiff's case; but two other matters should be mentioned.

First, the proper inference from the conduct of the defendant and third party is that, when the tenant allowed the landlord to resume possession for the purpose of making the necessary repairs and alterations, it was an implied term that the payment of rent should be in the mean time suspended.

Secondly, owing to the failure to have beneficial occupation of the premises and the failure of the landlord to complete the repairs, the tenant had a claim which would equal or exceed the amount due for rent.

Finally, under the circumstances, if there was any default in payment of the rent, relief ought to be granted against any forfeiture thereby incurred.

Owing to the non-disclosure, on the injunction motion, of the arrangement made at the time of the conveyance, Brown has received from the defendant company $390 to which he has no right. He must now be ordered to refund this sum, less the month's rent now past due, or, if the parties so agree, it may be set off against rent yet to accrue due.

Damages are claimed in this action for the entry made by Brown. For his trespass I allow $25 damages. The defendant, no doubt, has a grievance owing to inability to use the premises beneficially pending the action; but this, in view of the injunction order, under which it was restored to possession, is a mere incident of the litigation for which no one is answerable.

The action must, therefore, be dismissed with costs, and the defendant will have judgment for $25 on the counterclaim with costs.

The defendant has made a claim against the third party for damages by reason of the breach of covenant for quiet enjoyment. Brown's act was a wrongful act, for which he alone was responsible, so this claim fails; but I give no costs, as Brown's

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conduct is to some extent the result of a declaration somewhat improvidently given at the time of closing the transaction, stating that the rent had not been paid.

To the other issues which remain to be adjusted between the defendant and the third party, this judgment will be entirely without prejudice, as the only claim I have to consider is that mentioned—the right to indemnity by virtue of this covenant.

Action dismissed.

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GLADU v. EDMONTON LAND CO.

Alberta Supreme Court, Scott, J. October 22, 1914.

1. HOMESTEAD (§ IV—25)—ALIENATION—BEFORE PATENT.

The provision of the Dominion Lands Act rendering void assignments or transfers of homesteads or purchased homesteads before the issue of letters patent does not apply to land as to which the locator had obtained the cancellation of his homestead entry and the substitution of a location upon half-breed scrip.

[See R.S.C. 1906, ch. 55, sec. 142.]

2. VENDOR AND PURCHASER (§ I E—25)—RESCISSION—"GROSSLY INADEQUATE PRICE"—TRANSFEREE'S OUTLAY, HOW MET.

Where an ignorant man not able to speak English is prevailed upon to sign a conveyance or transfer of his land at a grossly inadequate price, and the transfer is annulled, the relief may be made conditional on the repayment of the cost of survey and preparation of plan of subdivision of the land expended by the transferee, the benefit of which the grantor will obtain.

Statement

TRIAL of action to set aside a sale.

Judgment was given for the plaintiffs.

O. M. Biggar, K.C., and *A. F. Ewing*, K.C., for the plaintiffs.

C. C. McCaul, K.C., and *S. A. Dickson*, for the defendant.

Scott, J.

SCOTT, J.:—The plaintiffs seek to set aside a transfer made by plaintiff Gladu to defendant company of certain lands in or in the vicinity of Grouard. The grounds upon which they seek this relief are that Gladu executed the transfer without knowing the effect thereof and without the intention of divesting himself of the title and ownership of the lands; that defendant company obtained the execution thereof by falsely and fraudulently representing that it was some other and different document than a transfer of the land; that it was obtained without valuable consideration, and that the transaction was improvident and the circumstances of the parties such as to make it improper to

enforce it. A further ground relied upon is that the transfer was void by reason of its being in contravention of sec. 31 of the Dominion Lands Act.

Gladu entered for the lands in question as a homestead, about March, 1912. On or prior to June 11 of the same year, one Everest, an agent of defendant company, approached him with the object of buying his homestead. They met on that day at the house of Father Falher, a Roman Catholic priest, at Grouard, Gladu being a Roman Catholic and one of his parishioners. There a document was drawn up by Everest, which was interpreted by Father Falher to Gladu, who signed it. In effect it was an agreement for the sale whereby Gladu agreed to sell to Everest the lands in question except 40 acres thereof, the consideration being that Everest was to locate half-breed scrip upon the whole property at his own expense; to survey the whole property; to pay Gladu $1,000, of which $100 was to be paid at once and the balance when the scrip was located; to build Gladu a house of the value of $300; to pay the account of the Hudson's Bay Co. against him, amounting to $200 or $250, and to transfer five lots to Bishop Grouard. On the same day Everest obtained from Gladu an option to purchase the property on substantially the same terms as those contained in the agreement for sale. This option expired on August 10, 1912, but, by a memorandum indorsed upon it purported to have been signed by Gladu, it was renewed for a further period of fifty days from November 12, 1912. Beyond the advance by Everest or defendant company of sums amounting in all to about $350, nothing was done by them in the way of exercising their rights under the option before it finally expired.

On January 15, 1913, Gladu, at the instance of Everest or defendant company, applied to the Department of the Interior for the cancellation of his homestead entry and for permission to place half-breed scrip on the land. He was notified by letter from that department, dated February 18, 1913, that his entry would be cancelled, and he was allowed sixty days to locate half-breed scrip thereon. On March 14, 1913, more than two months after the option expired, Everest obtained from Gladu an agreement for the sale of the whole property in question for $2,000, payable $100 at the date of the agreement and the remaining

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$900 on or before sixty days after the registration of the title in Gladu's name. Although it is not so stated in the agreement, it is admitted by Everest that he was to pay for the scrip and the expenses of locating it, and that Gladu was to receive the $2,000 in addition to the amounts which had already been advanced to him. On the same day defendant company located the half-breed scrip, and also on the same day Gladu executed a transfer thereof to the company. The patent issued to him on June 30, 1913, and on July 10 following the company registered its transfer and obtained a certificate of title, the title being subject to the caveats hereinafter referred to.

On May 2, 1913, Gladu executed a transfer of the property to his co-plaintiff, who on the same day executed a declaration of trust whereby he declared that he would hold the property in trust for Gladu and for his sole use and benefit. On 23rd of the same month Blair filed a caveat claiming an interest under his transfer. On June 14 he gave an option to one Flater to purchase the property for $20,000. On June 28 the latter filed a caveat claiming an interest as purchaser under a memorandum in writing dated June 14, 1913. On July 2, 1913, defendant company filed a caveat claiming an interest under its transfer from Gladu, which was then unregistered.

I hold, upon the evidence, that at the time Gladu executed the agreements for sale of June 11, 1912, and March 15, 1913, it was his intention to sell the lands outright to Everest, and that he knew the nature and effect of those agreements. The first was interpreted to him by his parish priest, and it would be difficult to believe that the latter would have permitted him to execute it unless he knew its purport. The second agreement was interpreted to him by the subscribing witness, who in each case was first sworn by a justice of the peace to duly interpret them, and it is unreasonable to presume that the interpreter violated his oath by falsely interpreting it, especially in view of the fact that he has testified that he properly interpreted it. In addition to what I have stated, the conduct of Gladu throughout leads to no other conclusion than that he intended to sell the property to Everest. I also hold that at the time Gladu executed the transfer to defendant company he knew its nature and effect. That also was executed in the presence of an in-

terpreter, who was sworn as such, and who testified that he duly interpreted it to him. I am also of opinion that the transfer to defendant company was not in contravention of sec. 31 of the Dominion Lands Act. That section renders void only assignments or transfers of homesteads or purchased homesteads before the issue of letters patent. The land in question was not a homestead at the time of the transfer, as Gladu had previously abandoned his homestead entry, and the fact that by permission of the Department of the Interior half-breed scrip was located upon it would not, in my view, constitute it a purchased homestead.

The only other ground upon which the plaintiffs seek relief is that the transaction was improvident and that the circumstances of the parties were such as to make it improper to enforce it. There is nothing in the evidence to shew what the value of the property was on June 11, 1912, the date of the first agreement. For anything that appears in the evidence the price fixed by that agreement may have been its full value at that time. In my view, however, its value at that time is not material, as I think any rights which Everest or defendant company may have had under that agreement were abandoned by Everest accepting at that time an option in lieu of it and afterwards accepting a renewal of that option. It therefore follows that before Everest obtained the agreement of March 15 he and defendant company had, by reason of the expiry of the renewed option, forfeited any claim they may have had to even the 87 acres which was the subject matter of the first agreement. By reason of the value of the half-breed scrip not having been shewn, I am unable to determine whether the price fixed by the last agreement was greater or less than that fixed by the first. I think, however, that only the value of the property at the date of the last agreement and the contemporaneous transfer to the defendant company should be considered in determining the question of the adequacy of the consideration for the purchase.

On December 16, 1912, during the currency of Everest's renewed option, defendant company entered into an agreement with a firm of Zirbes & McKenzie to sell to them 87 acres of the 128 acres forming the area of the lands in question for $18,000. If that was the selling value of the 87 acres it follows that the value of the whole parcel was greatly in excess of that amount.

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The other evidence of value is that of plaintiff Blair that its value in March and July, 1913, was from $15,000 to $20,000; the affidavit of Mr. Henry, the managing director of the defendant company, endorsed upon the transfer, that in his opinion its value was $15,000, and the fact that in an agreement between defendant company and Zirbes & McKenzie and others, dated March 12, 1913, it is recited that that firm had re-sold five blocks of 36 lots each, and parts of four other blocks being portions of the 87 acres, for $12,900.

Everest states that under the agreement of March 15, 1913, he was to pay Gladu $2,000 in addition to the sum already advanced to him (about $500 in all), and, although it is not so stated, I think it must be assumed that he was to pay for the scrip to be located on the land. Its value not having been shewn, the total amount which he or defendant company would have to pay in order to acquire the title to the property cannot be determined, but, in order to find that they were paying a reasonably fair price for it, I would have to assume that the value of the scrip was at least $100 per acre, or $12,800 for the whole parcel. Even in the absence of evidence as to its value, I think it may reasonably be presumed that it is far below that amount. The only conclusion I can reach upon the evidence as to value is that the consideration payable by Everest or the defendant company was grossly inadequate.

Gladu is an ignorant, uneducated half-breed, who cannot speak the English language. In dealing with Everest he was dealing with one of far superior intelligence, who, by reason of his acting as the agent of defendant company at Grouard, must be presumed to be well acquainted with the value of real estate in that neighbourhood. In their dealings Gladu was without independent advice, and he appears to have been ignorant of the value of his property. That he was in needy circumstances at the time is shewn by the fact that he was indebted to the Hudson's Bay Co. in a large amount. The prospect of paying this debt and of receiving what to him must have been a large sum of money in the immediate future was a temptation which he appears to have been unable to resist, and he was thus practically at the mercy of Everest.

It appears to be a well settled principle that, under circum-

stances such as these, the burthen of shewing the fairness of the transaction is upon the person seeking to uphold it. (See *Evans* v. *Llewellin*, 1 Cox 333; *Baker* v. *Monk*, 10 Jur. N.S. 691; *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814, at 823; *Fallon* v. *Keenan*, 12 Gr. 388; and *Brady* v. *Keenan*, 14 Gr. 214.) As the evidence shews that the sale in question was an unfair one, it should not, in my opinion, be upheld.

It was contended by defendant company that the relief claimed by the plaintiffs cannot be granted, because *restitutio in integram* cannot be made by Gladu or those claiming under him. One of the grounds of this contention is that defendant company has entered into contracts for the sale of portions of the land in question to different persons, who have in turn agreed to sell to others, and that the rights of these different purchasers have intervened. I cannot see any force in this contention. The defendant company has not transferred any portion of the property to these purchasers, nor can it do so except subject to the interests of the plaintiffs. The right of these purchasers to acquire an interest in the property is, in my view, dependent entirely upon the defendant company obtaining such an interest in the property as would enable it to convey to them, and if it be held that it has not acquired an interest I fail to see how the purchasers from it could be held to have acquired any interest. Many of the purchasers obtained their agreements for sale before the issue of the certificate of title to defendant company, and those who obtained their agreements after its issue must, by reason of the Blair caveat being noted thereon, be presumed to have entered into the agreements with notice of his claim to the property.

Another ground for this contention is that the half-breed scrip which defendant company located upon the land cannot be restored. If it were the fact that scrip of similar nature and quality could not be procured in the market it might be open to question whether their inability to restore the scrip could disentitle the plaintiffs to the relief they seek, but in my view it is a matter of common knowledge that scrip of that description which would answer all the purposes of that placed upon the land can be procured in the open market. One of the defences raised by the defendant company is that the plaintiffs are estopped by their laches, but I cannot find that they have been guilty of

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laches to such an extent as would estop them from obtaining the relief they seek. For the reasons I have stated I hold that the plaintiffs are entitled to a judgment directing that upon payment by the plaintiffs to the defendant company of the amount found due to the latter upon the taking of the account now directed the transfer by Gladu to defendant company be set aside and the registration thereof and the certificate of title issued thereon cancelled.

It appears in evidence that defendant company have expended a large sum in procuring a survey of a property, or a large portion thereof, into lots, and in the preparation and registration of a plan thereof, and that this has increased the value of the property by an amount considerably in excess of the amount so expended. As the plaintiffs will have the benefit of such increase, I think it is only reasonable that they should bear this expense, especially in view of the fact that they consented to the preparation and registration of the plan.

I direct a reference to the Clerk of the Court to ascertain and state the amount which should be paid by the plaintiffs to defendant company for the moneys paid by it to plaintiff Gladu, the amount paid expended by it in the purchase and location of the half-breed scrip on the lands in question, and in procuring the survey and plan thereof and the registration of same, together with interest on the moneys so paid and expended. The plaintiffs will have the costs of the action.

Judgment for plaintiffs.

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REX v. SWETT.

Alberta Supreme Court, Stuart, J. November 14, 1914.

1. HABEAS CORPUS (§ I D—21) — NOTICE OF MOTION — ALBERTA CROWN RULES.

A motion for a writ of habeas corpus and a writ of certiorari in aid is properly instituted by serving a notice of motion under the Alberta Crown Practice Rules at least where the accused is in custody under a magistrate's conviction.

2. HABEAS CORPUS (§ I D—21)—SERVING NOTICE ON ATTORNEY-GENERAL—STATUS OF LOCAL AGENT.

A notice of motion for a writ of habeas corpus required under Alberta Crown Practice Rule to be served "upon the Attorney-General" need not be served personally upon that official; it is enough that service is made at the Attorney-General's office in Edmonton, but

service on his local agent elsewhere will not be allowed as its equivalent without proof of the local agent's authority to receive service in the particular case or a waiver by the Attorney-General of regular service.

3. SUMMARY CONVICTIONS (§ III—30)—IRREGULAR PLEA—STATEMENT OF ACCUSED IN ANSWER TO CHARGE.

The answer of the accused on a charge of frequenting a disorderly house contrary to sec. 238 of the Criminal Code, sub-section (*k*) that he "was there if that made him guilty," is not equivalent to a plea of guilty.

[See also the new sec. 229 of the Criminal Code as amended 1913, making it an offence to be found in a disorderly house without lawful excuse.]

4. EVIDENCE (§ VI L—581)—DISPROVING PLEA OF GUILTY STATED IN SUMMARY CONVICTION.

On a habeas corpus motion attacking a summary conviction as upon a plea of guilty for a vagrancy offence, the defendant's affidavit is admissible to shew that he did not plead guilty but had admitted only one of the essential circumstances which must concur to constitute an offence.

Statement

MOTION for writs of habeas corpus and certiorari in aid, in respect of an alleged illegal summary conviction for a vagrancy offence.

The prisoner was discharged.

Sec. 238, sub-sec. (k), of the Criminal Code, 1906, provides that—

> Every one is a loose, idle or disorderly person, or vagrant, who . . . (k) is in the habit of frequenting such houses [houses of ill-fame, etc.] and does not give a satisfactory account of himself or herself.

Peacock, for the motion.

Shaw, for the Crown.

Stuart, J.

STUART, J.:—This is an application for habeas corpus and certiorari in aid.

Some question was raised as to whether the new Crown Practice Rules which do away with the practice of beginning by summons and provide for service of a notice of motion are wide enough in their terms to cover an application for a writ of habeas corpus.

Rule 1 says: "In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding

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shall be by notice of motion in the first instance instead of by certiorari or by rule or by order *nisi*."

Rule 19 says: "The notice of motion for prohibition, certiorari, *quo warranto*, mandamus or habeas corpus, shall be returnable before a Judge of the Supreme Court or the Appellate Division."

Rules 17 and 18 also refer to habeas corpus applications.

I think, therefore, that there can be no doubt that a notice of motion is all that is required at least in those cases of habeas corpus where in order to succeed an order must be made quashing a conviction or an order or a warrant or inquisition as set forth in Rule 1. There are, of course, other circumstances in which a writ of habeas corpus may be required, such as an application to obtain possession of a child or to obtain the release of a person held in custody without any conviction, order, warrant or inquisition. What the practice should be in such a case it is not necessary for me to determine now. In the present case the accused is in custody under a conviction made by a magistrate and in such a case I think it is clear that a notice of motion is all that is required. It is a matter of the practice of the Court only.

A question was also raised with respect to the service of the notice of motion. Rule 2 provides that it shall be served "upon the Attorney-General." According to the recent decision of the Appellate Division in *Lawler* v. *City of Edmonton* this does not necessitate personal service. I am of opinion that service at the office of the Attorney-General is all that is required, but I think that at least that kind of service is required and that service upon a local agent of the Attorney-General is not sufficient in the absence of anything to shew that the Attorney-General has constituted such local agent an agent for that purpose. Inasmuch as in this case Mr. Shaw appeared for the Attorney-General and stated that he was instructed to so appear I do not think the present application should fail on that ground even if it were the case that no service was made at the Attorney-General's office in Edmonton. I think it well to intimate, however, that in any future case I could not allow service on the local agent as sufficient unless some evidence is given that he

has been constituted a general agent for that purpose or a special agent to receive service in the particular case or unless counsel appears for the Attorney-General and waives the objection.

The accused was convicted by Mr. Wilson a justice of the peace at Drumheller "for that he on the 11th day of October, 1914, did commit an offence by being a frequenter of a disorderly house."

The information was in the words "did commit an offence by being a frequenter of a disorderly house contrary to ch. 146, sec. 238, sub-sec. (k), of the Criminal Code of Canada."

By the affidavit of George R. Bates it appears that the notice of motion was served on the convicting magistrate on November 5. It was stated by Mr. Shaw that the magistrate had informed him that he had complied with the rule and had forwarded all the papers in his possession to the proper office. Upon enquiry at the office both of the District Court Clerk and the Supreme Court Clerk it is impossible to find the original papers so returned. I am, therefore, driven to use the material presented to me by the applicant.

According to the affidavit of the applicant there was no evidence taken, but the magistrate convicted him apparently as pleading guilty merely because in answer to the charge he had said, "I was there if that makes me guilty."

There is nothing upon the record to contradict this statement so far as the verified copies disclose. There is no affidavit by the magistrate contradicting it, and, as I think the affidavit of the applicant is admissible for such a purpose, at any rate in the case of a summary conviction, I must assume that the applicant's account of what happened is correct.

It is obvious, therefore, that the conviction cannot be supported. The statement made by the accused was clearly not a plea of guilty. Even if we assume that sub-sec. (k) of sec. 238, creates or describes an offence it is beyond argument that the answer given by the applicant was not an admission that he had committed the offence described. To admit being in a house of ill-fame on a certain occasion is surely not equivalent to an admission that he was in the habit of frequenting it.

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This being so there is no need to consider the other objections made and there must be an order quashing the conviction and releasing the prisoner. No costs.

Prisoner discharged.

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Re WILSON ESTATE.

Nova Scotia County Court, Judge Patterson. August, 1914.

1. WILLS (§ I E—53)—PROBATE—REFUSAL OF GRANT—REVIEW.
Section 155 of the Probate Act, N.S., excepts from the right of appeal "a grant of probate," but the right to appeal remains from a refusal of the grant.

2. WILLS (§ I B—21)—SIGNATURE OF TESTATOR—IMPRESS OF SEAL AS HIS SIGNATURE—SUFFICIENCY AS BASIS FOR "COMMON FORM" PROOF.
The impress of the testator's notarial seal upon his will may be a sufficient signature upon which to grant proof in common form.

Argument

APPEAL from the decision of the Registrar of Probate refusing to admit to probate a document purporting to be the last will of Alexander Wilson.

Alexander Wilson was a farmer residing at Pugwash, and died on June 16 last at about 75 years of age. He had been a justice of the peace and a notary public. In August, 1911, the deceased walked across the street to the rectory and produced a paper to the rector and his wife, declared to them it was his last will, and he asked them to witness it. They assented, and the deceased laid the paper down on the table and shewed the witnesses where to sign, and they accordingly signed in his presence and in the presence of each other, and then the testator asked the rector's wife to read his will over to him, and she read the document in question. The testator had not signed nor marked the will in their presence. The document was in the handwriting of the deceased, and bore a full attestation clause, also in his handwriting.

In March, 1914, the deceased put the will in an envelope, which he sealed with sealing wax, and then wrote on the outside of the envelope, "Alex. Wilson will," and gave it to a friend in Halifax for safe custody.

After the death of the deceased the document was produced,

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and was found to have the impression of the notarial seal of the deceased more or less distinctly impressed in several places upon it, so that it was apparent that the document had been folded several times and then been sealed in such a way that the impression shewed in the different layers of paper formed by the folding of the document. The will was unsigned.

The executor offered the document for probate and the registrar refused. Whereupon an appeal was taken.

The appeal was allowed.

The following authorities were cited: *In Goods of Emerson*, 9 L.R. Ir. 443; *Jenkyns* v. *Gaisford*, 11 W.R. 854; *In the Goods of Huckvale*, L.R. 1 P. 375; *In the Goods of Pearn*, 1 P.D. 70.

F. L. Milner, K.C., for the applicant.

J. A. Hanway, for one of the heirs, contended that there was no appeal, inasmuch as the statute said there should be no appeal from an order granting probate, and he contended that an order refusing probate was for this purpose the same as an order granting probate, and that no appeal lay.

Judge Patterson.

JUDGE PATTERSON:—The late Alexander Wilson of Pugwash died in June of this year. A document purporting to be his will, written wholly by himself, enclosed in an envelope endorsed by himself, "A. Wilson will," had two years previously been placed by him in the hands of an agent for safe keeping. On being produced it was found that the document was witnessed in due and proper form and Wilson's notarial seal placed upon it, but unless this seal can be considered a signature it was unsigned. The registrar, upon application by the executor named, refused to grant letters of probate, and an appeal was taken to me. No one having appeared before the registrar to oppose the grant, the appeal was an *ex parte* proceeding, but Mr. Hanway, representing one of the parties interested, appeared as an *amicus curiæ* to take the objection that no appeal lay. The governing section is 155 of the Probate Act, ch. 158, which reads:—

> Any party aggrieved by any order, decree or decision of the registrar other than a grant of probate . . . may appeal therefrom to the Judge sitting in the Court of Probate.

It is thus perfectly clear that no appeal lies against an order or decree granting letters of probate, but that is not this case. In

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this case the appeal is against an order refusing to grant. In other words, this case does not, in my opinion, come within the exception, and therefore an appeal lies.

I am quite unable to discover any good reason why there should be an appeal from a refusal to grant and not against a grant, but apparently the Legislature thought there was some such reason. I should have thought that it would have been better to have left the executor and the parties interested in opposing the grant upon the same footing, and to have obliged the executor upon the refusal of a grant and the parties interested upon a grant alike to have recourse to proof in solemn form. In my best judgment, however, that has not been done, and the statute has made a distinction. The executor may appeal against a refusal to grant letters of probate, but the parties interested upon a grant being made cannot appeal, but must, if they wish to proceed farther in the matter, call upon the executor to prove in solemn form.

On what I may call the merits of the application, I have little difficulty, without in the slightest degree committing myself to an opinion as to whether this alleged will can stand the test of proof in solemn form. I still think that letters of probate in common form should be granted. I may be quite wrong, but all that seems to me to be necessary for proof in common form is to make out what I may call a *primâ facie* case that the document produced is a will. While I recognize that the executor has some grave difficulties ahead of him if he is asked to prove this will in solemn form, I do not think anyone could say that he had not now made out a *primâ facie* case. Before the registrar, in accordance with usual practice, very little evidence was given, and the registrar was undoubtedly right in declining to grant the letters, but with the full evidence I have before me I do not think I would be justified in refusing them. A decree will be made directing that letters of probate be granted.

Probate ordered.

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Nova Scotia Supreme Court, Russell, J. October 23, 1914.

1. SALE (§ I C—16)—CONDITIONAL SALES—RECORDING; FILING—FOREIGN LAW DISTRICT—TERRITORIAL LIMITS OF BILLS OF SALE ACT.

The Nova Scotia Bills of Sale Act does not apply to a conditional sale in another province of a horse afterwards taken into New Brunswick by the conditional purchaser; and the conditional vendor may enforce his title in Nova Scotia against sub-purchasers.

Statement

ACTION to recover the value of a horse upon breach of an implied covenant for good title.

Judgment for plaintiff.

F. L. Milner, K.C., and *L. E. Ormond*, for the plaintiff.

C. R. Smith, K.C., and *R. K. Smith*, for the defendant.

Russell, J.

RUSSELL, J.:—Defendant sold a horse to plaintiff, receiving therefor $50 in cash, a horse worth $135, and a receipted store bill for $7. The horse had originally belonged to Abbie Hibbert, of Shediac, N.B., who delivered it to Maxime LeBlanc in New Brunswick under an agreement that the title should remain in Hibbert until the notes given for the purchase money were paid. Only $10 was paid on account of the notes by LeBlanc, who nevertheless sold the horse to Coster, the defendant, for $10 and another horse which he sold for $130. Coster says he knew nothing about Hibbert's lien, or rather his title to the horse. He sold the horse to the plaintiff as already stated, who says he knew nothing about the defective title until after the sale, and even then knew only from report that the title was defective. There is some evidence tending to shew that he had heard something about a lien note before he purchased, but I do not believe he had any clear knowledge of such a defect or anything amounting to notice. The horse was afterwards seized by Hibbert under his agreement, and plaintiff sues for breach of the implied warranty of title. After LeBlanc heard of plaintiff's loss he gave him a note for $75. This note was written by plaintiff—that is, filled in on a printed form—and is still held by plaintiff, who offered it back to LeBlanc, by whom it was refused. There is no consideration for the note other than the compunction that LeBlanc may have felt for having pocketed the purchase money for a horse that he did not own and had not paid for. LeBlanc could not pay defendant's

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debt without defendant's authority, even if he had given plaintiff the $75 instead of merely promising it. The gift would, I think, have had no effect on the legal relations between plaintiff and the defendant, who would still have remained liable for his breach of warranty. However that may be, I think it is clear that there was no consideration, whatever excellent motive there may have been for LeBlanc's promise to make good the loss to the extent of $75. The law of New Brunswick was not proved, but by consent a copy of the chapter (ch. 143, C.S.N.B. 1903) relating to sales such as that from Hibbert to LeBlanc was put in, as follows:—

Sec. 1. Where in any sale of any chattel the condition of the sale is such that the possession of the chattel passes without any ownership therein being acquired by the vendee until the payment of the purchase or consideration money or some stipulated part thereof, such condition shall be valid only as against a subsequent purchaser or mortgagee from the vendee without notice, in good faith, and for a valuable consideration, *when the said sale is evidenced in writing signed by the bailee or his agent and a copy of such writing filed as provided by sec. 2 of this chapter.*

Sec. 2. *A copy of such writing shall be filed with the registrar of deeds of the county in which the bailee or conditional purchaser resides* at the time of the bailment or conditional purchase, within fifteen days from the delivery of possession of the chattel mentioned in the agreement.

Sec. 4. The vendor shall leave a copy of the instrument by which a lien on the chattel is retained, or which provides for a conditional sale, with the bailee or conditional vendee at the time of the execution of the instrument, or within twenty days thereafter.

No amendments made to the above sections and the other sections make provision for the recovery of the chattels, etc., and is amended by Acts 1909, p. 130, ch. 31.

The validity of the sale I suppose is to be determined by the law of the place where it was made, but in construing that law we must assume that it was made with a view to its being enforced in New Brunswick. The essence of it is to require the filing of the agreement preserving the title of the vendor in the registry of deeds of the purchaser's residence. I think that must mean a purchaser resident in the province of New Brunswick. I cannot imagine that the New Brunswick Legislature would legislate as to registry in another province or in another country. Some purchasers are resident in places where they have no registrars of deeds. In places where they have registrars those registrars must be governed by the laws of their own country, which may not provide for or even permit the filing of such documents, or

may prohibit their being filed without special formalities not required by the statute referred to and not complied with in the case of the lien note given in connection with this transaction.

I am far from certain that I understand the provision of this New Brunswick statute. It seems to apply only to the case of a question between the vendor and a *bonâ fide* purchaser from the vendee for value without notice, and to say that in such a case the right is only retained in favour of the vendor when the lien note has been duly filed. It is silent as to the case of a purchaser with notice of the lien note, and there is no reason why the purchaser with notice or without consideration should be preferred to the original owner. I think this is in accordance with the general policy of registry laws. The purchaser with notice of such a claim relies, I presume, upon his warranties, as the purchaser in the present instance must be held to have done if, as defendant's counsel contends, he had notice of the lien note in favour of Hibbert.

The N.S. Bills of Sale Act does not, as I understand, apply to transactions consummated outside of the province. If so, there is, as I hold, no statute governing the rights of the parties. The common law, of course, recognizes the validity of the agreement between Hibbert and his immediate purchaser, and as Hibbert retained his title throughout he had a right to seize the horse. The plaintiff's title was defective, and he is entitled to recover under the implied warranty the value of the horse, which in this case is the same as the price—say $192.

Judgment for plaintiff.

GOLDBERG v. ROSE.

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Alberta Supreme Court, Stuart, J. June 2, 1914.

1. LANDLORD AND TENANT (§ III D—110)—DISTRESS—LANDLORD'S AUTHORITY TO BAILIFF—AS GOVERNING LANDLORD'S LIABILITY.

The landlord who has merely authorized a lawful distress for rent is not liable for the seizure by his bailiff of goods not subject to distress unless he has in some way confirmed such seizure.

Statement

TRIAL of action for illegal distress.

Judgment accordingly.

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Stuart, J.

T. M. Tweedie, for the plaintiffs.

C. T. Jones, for Mrs. McDougall.

H. P. O. Savary, for Mr. Rose.

STUART, J.:—I think there are absolutely no merits in this case at all. Of course, as far as the defendant McDougall is concerned, the plaintiffs had no chance of succeeding. It is quite clear from the evidence that she never authorized the distress and never confirmed it. Having never confirmed it, even if she had authorized a distress in the first instance, it is clear that if Rose seized some goods that were not subject to distress, and were privileged, she would not be liable. The action is, therefore, dismissed with costs as against the defendant McDougall.

In regard to the defendant Rose, I think the plaintiffs have very little merits against him either. With regard to the lease, it seems to me that is is fairly clear from the evidence that Mrs. McDougall knew about the terms of the lease, and accepted the rent after the defendants had gone into possession, although she never did execute the document itself. It is clear that her refusal to do so was a subsequent matter due entirely to the failure of the plaintiffs to give a good cheque for rent on all occasions, and inasmuch as a lease for two years is good, even though made verbally, I think that there was a lease for two years for a term of two years established by what occurred, and I think it was subject to all the terms of the written lease, one of which was that the lessee could not assign without the consent of the lessor. Now, with regard to that assignment that is alleged to have taken place, I am unable to see how it could benefit the plaintiffs; for the reason: if there is any assent to it on the part of Mrs. McDougall, or her agent Rose, arising out of the acceptance of rent from Ebert, that assent was given, in my opinion, owing to the assurance by the plaintiffs that they had sold out to Ebert; that is, not only their right under the lease to their property, but also their chattels which were on the premises. In other words, the assent was only *sub modo*. The plaintiffs were putting the landlord in a very peculiar position by assuring her that they had sold to Ebert and expecting her to consent to the assignment, and then secretly retaining all the rights of property in the chattels which they said they had sold. It would not occur to her to

search in such a case. This may be approaching very nearly to an estoppel, which is not pleaded, but I think it can be put on another ground rather than that of an estoppel, *viz.*, that the assent, if there ever was one, was given on the understanding that the goods were sold to Ebert and the property had passed to him. If that was not the case, then there never was any real assent to the assignment. I think, therefore, the goods were subject to distress for rental.

With regard to the argument that Rose had himself paid the rent to McDougall, I am of the opinion that there is nothing in this contention. It was not a real payment of rent at all, and was not paid by Rose on behalf of the tenant. It was merely an advance by him to the bank account in expectation of having the rent paid. That matter was entirely between him and Mrs. McDougall. The plaintiff had nothing to do with it at all, and can gain no advantage from it.

There remain, however, two other points which are somewhat more in favour of the plaintiffs. As I said at the beginning, Mrs. McDougall seems never to have authorized the seizure, and it is quite plain that Rose had no implied authority to make a distress for rent. He says that Mrs. McDougall did tell him to come down on those tenants and make them pay up and to seize their goods if necessary, but Mrs. McDougall denies this, and in the absence of any special authority directed to these particular goods and these particular tenants I think I must take it that Rose seized without authority. This, of course, makes it not so much an illegal distress for rent as a conversion of goods. Then there is something, I think, in the contention of the plaintiffs that goods to too large an amount were seized, although I think considerable deduction should be made from the values placed by the plaintiffs upon the goods referred to, because the plaintiff Goldberg gave, not the actual value, but the original cost, and I was not informed as to the value of them at the time of the seizure. The goods, however, appear still to be intact, the sale of them having been restrained by an injunction, and I have no evidence that they are of any less value now than they were at the time of the seizure. I have not any very satisfactory evidence as to the damages which the plaintiffs may have suffered owing to their detention in the meantime, but, as I have

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said, I think the goods were subject to a seizure for rent, and although Rose had no direct authority, I do not think he should be very severely punished for doing what he did, because agents, in his position, I am sure, frequently take the course which he took in this instance. I propose, therefore, to give the plaintiffs judgment against Rose for $25 damages and $25 costs.

With respect to the questions between Rose and Mrs. McDougall, I see no grounds for giving an indemnity, and Mrs. McDougall will be entitled as against Rose to any cost of the third party proceedings which may not be covered by her judgment for costs against the plaintiffs.

Judgment accordingly.

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SHIRK v. BATES.

Alberta Supreme Court, Simmons, J. December 23, 1914.

1. DISCOVERY AND INSPECTION (§ I—2)—PRODUCTION OF DOCUMENTS—ACCOUNTING—CONDITION PRECEDENT TO COMPELLING.

Parties suing for alleged breach of fiduciary relationship in a syndicate agreement must establish the alleged breach before they can obtain discovery from the defendants by way of accounting for the re-investment or profits alleged to have been made by them through the alleged diversion of the trust funds.

Statement

MOTION to compel a defendant to answer certain questions on his examination for discovery.

Motion refused.

J. McKinley Cameron, for the plaintiffs.

J. J. McDonald, for the defendants.

Simmons, J.

SIMMONS, J.:—The statement of claim alleges that the plaintiffs and Henry Hilliard, H. A. Langford, George Horn and the defendant Bates, entered into a syndicate or partnership agreement to incorporate companies to deal in and develop oil leases in the province of Alberta.

As a result the defendant company, the Producers Oil & Gas Co., Ltd., and three other defendant oil companies were incorporated. After reciting the terms of the syndicate agreement and the transactions which took place in regard to certain dealings relating to allotment of shares, addition of other members to the

syndicate and acquiring of shares by purchase or otherwise of the defendant companies, one from another.

The plaintiff then alleges as follows in paragraphs 14 and 15 of his claim:—

14. Plaintiffs claim that the defendant Bates was trustee of the said syndicate or partnership and received the various sums of money mentioned in this statement of claim as being paid by the promoters, and has used said money for the purchase of leases and the payment of rentals on oil rights which he has transferred to the Producers Oil & Gas Co., Ltd., and has received as said trustee, two hundred and thirty-five thousand (235,000) fully paid-up shares of the capital stock of the Producers Oil & Gas Co., Ltd., and has also received shares in the capital stock of the Fidelity Oil & Gas Co., Ltd., Progress Oil & Gas Co., Ltd., and International Oil & Gas Co., Ltd., as such trustee.

15. The plaintiffs further claim that the said Richard Bates has diverted said moneys and said shares from the purposes of the syndicate and wrongfully and unlawfully converted to his own use and benefit, the moneys paid to him as such trustee and said shares of the stock of the defendant companies, and has sold shares and converted the proceeds thereof to his own use, and has exchanged said shares for real and personal property and has used such money and proceeds of shares for the purchase of real and personal property without the knowledge or consent of the plaintiffs.

The plaintiffs then ask for (*a*) and (*b*) an account by the defendant Bates of all moneys received by him from the other members of the syndicate and the application made by him of said moneys, and (*c*) an account of all stock issued or allotted to Bates by the defendant companies and an *account of all properties purchased* by the defendant *Bates with any of said moneys or stock*.

The defendant, while under examination for discovery, refused to answer questions under (*c*). The defendant, in his statement of defence, specifically denies the allegations that he was a trustee for the plaintiffs, and puts the plaintiffs squarely to the proof of their allegations of a fiduciary relation.

Rule 571 must be taken as intended for just such a case as this. The plaintiffs want to prosecute an inquiry into the business transactions of the defendant upon the assumption that they will establish a breach of fiduciary relation. If the rule were not applied strictly under the circumstances such as are disclosed in this case, the plaintiffs might bring an action and allege a fiduciary relation for the sole purpose of gaining access to the defendant's books, accounts, and business transactions and relations.

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It is a condition precedent to the right of discovery relating to the disposition of the property alleged to be the subject of the trust that this evidence is material to the main issue—namely, the breach of trust.

The plaintiffs do not contend that such is the case. I hold that the plaintiffs must establish the alleged breach of the fiduciary relations before they can have inquiry into the disposition of the property alleged to be the subject matter of the breach unless evidence under the latter head is proper evidence on the issue which forms the basis of action: *Bedell* v. *Ryckman*, 5 O.L.R. 670.

Direction accordingly.

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S. C.

CAUCHON v. MacCOSHAM.

Alberta Supreme Court, Simmons, J. June 1, 1914.

1. ARCHITECTS (§ I—5)—RIGHTS AND LIABILITIES—PLANS FOR CONSTRUCTING BUILDING—NEGLIGENCE.

An architect is bound to exercise reasonable care, skill and diligence in the preparation of plans ordered from him, and his failure to do so will not only disentitle him to recover the price, but make him liable for the expense which the owner must incur to remedy the defect in a wall improperly built in reliance upon the plans.

Statement

ACTION by architects for preparing construction plans for a building, with counterclaim by the defendant alleging negligence in the preparation of the plans.

Judgment was given for the defendant.

A. Bury, for plaintiffs.

G. B. O'Connor, for defendant.

Simmons, J.

SIMMONS, J.:—The plaintiffs (Cauchon & VanTyne), who are architects, claim $900 for the preparation of plans for a warehouse which the defendant proposed to construct at the corner of 9th St. and Peace Ave., in the city of Edmonton. The defendants say the said plans were prepared by the plaintiff VanTyne only, and that when the defendant gave instructions to VanTyne to prepare said plans the latter was not then a member of the Alberta Architects' Association.

VanTyne was an architect in Spokane, State of Washington, and applied to the Architects' Association for admission in January, 1913, and paid his fees, but was not registered until

some weeks subsequent to that date, and admits that he was not registered when the defendant gave him instructions to prepare plans for a warehouse. Section 13 of ch. 43, 1906, as amended in 1911-1912, does not prohibit anyone from preparing plans such as the plaintiff prepared, but provides only that he shall not take or use the name of architect unless he is registered under the Act as a member of the Architects' Association.

The result is that the scale of fees prescribed by the Act cannot be invoked by the plaintiffs, since the plaintiff VanTyne was not registered as an architect under the Act.

The defendant in the first place instructed VanTyne to prepare plans for a two-storey warehouse, 100 ft. x 120 ft., on the corner of Ninth St. and Peace Ave., in the city of Edmonton. Subsequently the defendant requested him to make the plans suitable for a five-storey warehouse, four of which were to be constructed at the time. VanTyne says the defendant wanted the first and second floors to carry wheat six ft. high, and the third and fourth floors 200 lbs. and 150 lbs. per square ft., respectively. He prepared drawings on this basis, but allowed for aisle spaces. The defendant says aisle spaces were not mentioned by the plaintiff until at a subsequent date, when the loan company's agent made some objections to the plans. VanTyne contradicts this, and I am inclined to the view that aisle spaces were discussed between them while the plans were being prepared, but I am not convinced that VanTyne went into the matter in detail, nor did he explain to the defendant the relative results in weighting the supports and floors in the absence of allowance for aisle space and in such allowance. At any rate, as a result of the objections to the plans raised by the agent of the company who proposed to advance to the defendant a loan upon the warehouse, an additional row of supports were added to the plans.

Before the second storey was completed a break occurred in the west wall near the north-east corner, and shortly afterwards another break appeared in the east wall near the north-east corner. The cracks widened as the building progressed, and the evidence is quite clear that the north wall is tilting outwards and breaking away from the east and west walls of the building.

The defendant alleges this resulted from the negligence of the plaintiffs while preparing the plans in not providing sufficient

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supporting columns or posts in the basement to support the first floor, and in not providing a proper footing for the north wall of the building. The defendant counterclaims against the plaintiff in the sum of $10,000 damages for the said alleged negligence. The north wall is an excentric structure resting on the outer part of the concrete supporting base. The result of this form of construction is to increase the weight to a large degree upon the outer edge of the supporting base. This can be overcome by what is known as a cantilever construction in the base or supporting structure, which consists of steel bars laid lengthwise in the base and interlocked with steel bars at right angles which are anchored in concrete footings in the basement. The extra cost of such a construction would be about $2,500. The plaintiffs admit that a cantilever construction was not suggested by them to the defendant. The foundation is a clay loam, but in excavating soft places were encountered. The excavation was begun before the frost was out of the ground, but the construction of the concrete footings was not started until after the frost was out of the ground. The soil, however, was wet, and water accumulated in the excavation while the footings were being placed. The defendant wanted a building constructed at the minimum cost, and was more anxious to keep down costs than to ensure stability of construction. A great deal of expert evidence was given on both sides, and a wide divergence of views expressed. The positive contributing cause or causes of the defective wall could only be determined with absolute certainty by an examination of the conditions now existing under the footings, and it is obvious this cannot be done without tearing down and removing the walls and footings. However, I must do the best I can upon the evidence.

On the first branch of the case, as to supporting columns in the base, the defendants have failed to establish negligence. As to the excentric wall, however, I am of the opinion that it clearly was the plaintiffs' duty to warn the defendant of the probable risk of such a construction. An architect is defined as "a skilled professor of the art of building, whose business it is to prepare plans of edifices and exercise a general superintendence over the course of their erection" (Murray's English Dictionary). In the present instance the architect did not have the superintendence

of the construction. They were not asked to visit the proposed site, and did not make particular inquiries about the conditions of soil on the proposed site. Having in view the contract, which was one to prepare plans only, it was not their business to examine the site. The defendant assumed responsibility for any unusual conditions in the location, and did not give the plaintiffs any information which would require the plaintiffs to use precautions in that regard. The fact that the openings in the walls occurred so early in the construction before the second storey was completed leads to the conclusion that the footings were not extended to a sufficient depth to support the walls of the building, and this was a contributing cause to the defect in the walls and one for which the plaintiffs cannot be held responsible. They provided in the plans for footings sufficient under normal conditions with the exception of the excentric wall. The excentric wall on the north side would certainly aggravate the conditions arising out of the imperfect soil support. The evidence of Mr. Edwards, professor of civil engineering in the University of Alberta, is positive that even with proper footings the weight on the outer edge of the footings of the north wall would be 7.07 tons per square foot, while it is admitted the weight should not be more than 3 tons per square foot under the supporting columns of the wall. An architect is bound to exercise reasonable care, skill and diligence in the preparation of plans. In the matter of the excentric wall they failed to use reasonable care and diligence, and even if the defendant had used care in supplying proper foundations the building would not have been a building such as was required under the instructions given them by the defendants. In order to make it so it will be necessary to supply a cantilever base support. The cost of doing this is not very well established. None of the witnesses were able to make a very accurate estimate. It would, however, seem pretty clear that it could not be done for less than $2,500 or $3,000.

Having in view the fact that there were two contributing causes to the defect for one of which the plaintiffs are responsible, I will assess the damages against them for negligence at $500. I am not able to allow the plaintiffs anything for the preparation of the plans, as they failed to supply proper ones.

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The plaintiffs' claim is dismissed, and the defendant will have judgment for $500 damages on his counterclaim and costs of the counterclaim.

Judgment for defendant.

ONT.

S. C.

WRIGHT v. CITY OF OTTAWA AND OTTAWA DAIRY CO.

Ontario Supreme Court, Middleton, J. October 22, 1914.

1. MUNICIPAL CORPORATIONS (§ II F—175)—CONTRACTS—AS TO WATER SUPPLY—"EPIDEMIC EMERGENCY"—ABSENCE OF SEAL.

The absence of a formal contract under the seal of the municipality cannot be set up by a ratepayer in bar of the municipality paying the agreed consideration under an executed contract which was beneficial to it, *ex gr.*, the supply of water to the inhabitants in an emergency during an epidemic; nor is it an objection that the water was not supplied to the city itself but on the direction of the municipal council to those requiring it.

[*Campbell v. Community Hospital*, 20 O.L.R. 467, and *Lawford v. Billericay District*, [1903] 1 K.B. 772, considered.]

Statement

MOTION by the plaintiff to continue an interim injunction, heard at the Ottawa Weekly Court, and turned by consent into a motion for judgment.

The action was dismissed.

T. A. Beament, for the plaintiff.

F. B. Proctor, for the defendant city corporation.

G. F. Henderson, K.C., for the defendant company.

Middleton, J.

MIDDLETON, J.:—The plaintiff, as a ratepayer of the city of Ottawa, seeks to restrain payment by the city corporation to the dairy company of the sum of $750, being an amount said to be due by the city to the dairy company for water supplied during the month of July, 1914.

Epidemics of typhoid fever occurring in the city of Ottawa having been traced to the use of impure water supplied by the city, a temporary arrangement was made with the dairy company for the supply of water from an artesian well owned by the company. With the merits of this arrangement the Court has no concern; but it is fair to say that, from the evidence adduced, the contract was not sought by the dairy company but by the city officials. Under this arrangement the dairy company

undertook to supply water at a delivery pipe upon the street adjoining its premises, for the price of $750 per month, the arrangement to continue until terminated by notice from either party. This arrangement was understood to be temporary, pending the solution of the very difficult question of a satisfactory permanent water supply that confronted the municipality. The water has been supplied under this arrangement, and the water supplied was paid for by the municipality until further payment was stopped by the bringing of this action. Partly as the result of this action being brought, the dairy company requested the city to give the necessary notice discontinuing the arrangement, and, this notice having been given, nothing is now involved save the payment in question and the payment for one or two subsequent months.

The plaintiff's action is really based upon three contentions: first, it is said that the municipality had no power to make any such arrangement as that made; secondly, that the contract is not an executed contract so as to bring the case within the authority of *Lawford v. Billericay District Council*, [1903] 1 K.B. 772; and lastly, that there is no provision in the municipal estimates for payment of the amount.

After giving the matter the best consideration I can, and after paying much attention to the very careful argument made by Mr. Beament, I think the plaintiff's action entirely fails. The tendency of decision and legislation is more and more against any interference by the Courts with municipal government; and, apart from any express statutory provision, it appears to me to be plain that the municipality has, under its general control of municipal affairs, powers to buy and distribute water where this is necessary for the health and well-being of the inhabitants; the emergency arising from what was practically equivalent to a break-down of the system of water distribution undertaken by the municipality.

But, when reference is had to the statutes, it appears to me that the authority is plain. Originally the waterworks system of the city was under the control of commissioners appointed under the special Act 35 Viet. ch. 80. These commissioners had the duty of deciding upon all matters relative to supplying the

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city of Ottawa with a sufficient quantity of pure and wholesome water for the use of its inhabitants. By later legislation, 42 Vict. ch. 78, the corporation of the city, through its council, is given all the powers of the water commissioners. I therefore think that the council had ample authority to make the arrangement with the dairy company.

Then, again, I think it is plain that this contract is one which was beneficial to the municipality; and the rule laid down in *Lawford* v. *Billericay District Council*, *supra*, has been so enlarged as to be applicable to all contracts, undertaken in good faith, which are beneficial to the corporation, even though not essential for its purposes: *Campbell* v. *Community General Hospital, etc., of the Sisters of Charity, Ottawa*, 20 O.L.R. 467. Here the contract is an executed contract. The water has been supplied. It is true that it has not been supplied to the city itself, but it has been supplied on the direction of the council to those requiring it. There is no foundation for the distinction which Mr. Beament seeks to draw, that the operation of the rule in question is to be confined to cases in which the goods are to be supplied to the municipality itself. The absence of a seal and of any formal contract, therefore, affords no reason why the municipality should not meet its just obligations.

The remaining objection is, I think, based upon a misconception. The estimates do contain a sum of $9,000 for water supplies. This is equivalent to the sum covered by this arrangement, $750 per month. The object of the provision of the statute relied upon is to prevent the council incurring obligation without providing means for payment. Here the means for payment are provided, and it appears to me to be entirely beside the question to suggest that I should enter into any controversy as to whether this is a sum which should be charged against the waterworks and water-rates. With these matters neither the dairy company nor the Court has any concern.

In all aspects the action fails, and I think should be dismissed with costs.

Action dismissed.

ROSENVEESEN v. THACKERAY.

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Quebec Court of Review, Tellier, De Lorimier and Greenshields, JJ.
May 22, 1914.

1. ASSIGNMENT (§ I—8)—WHAT ASSIGNABLE, VALIDITY—UNEARNED PRICE FOR CONSTRUCTION WORK—CONSIDERATION CONTINGENT.

There can under Quebec law be validly made by a contractor a transfer of the whole or a part of the contract price as and when it becomes due although at the time of such transfer there is nothing actually due because the work has not been done, and although the amount to be paid to the transferee is not yet determined, but is thereafter to be fixed by arbitration between the contractor and the transferee, *ex. gr.* where the transfer is made to the extent of the damages which the latter incurs by the demolition of his party wall and exacts such transfer as security on consenting to the demolition.

Judgment

THE judgment inscribed for review was rendered by the Superior Court, LAURENDEAU, J., on October 18, 1912.

The appeal was allowed.

Kavanagh, Lajoie & Lacoste, for the plaintiff.

Lafleur, MacDougall, MacFarlane & Pope, for C. W. Lindsay.

The judgment in review was delivered by

Greenshields, J.

GREENSHIELDS, J.:—The *dispositif* of the judgment, the reversal of which is sought is in the following terms: (Translation) "Doth dismiss the action of the plaintiff as to the mis-en-cause, with costs, reserving to the plaintiff any recourse that he may otherwise have."

In July, 1905, the plaintiff was the lessee of a store situated on St. Catherine St. west, where he carried on the business of ladies tailoring. The mis-en-cause, Lindsay, was the owner of the adjoining lot of land, upon which he purposed erecting a large building. He let the contract to the defendant, Thackeray. In the course of the construction of the building, it was found necessary to demolish and rebuild the mitoyen wall between the building, of which the plaintiff was the tenant, and the property of the mis-en-cause. On the 28th of July, 1905, the plaintiff and the defendant Thackeray entered into a contract before Marler, notary public, in which, among other things, it was stipulated: "In executing such demolition, the contractor binds and obliges himself to protect the party of the second part and his property to a fair and ample extent: to observe in such demolition the most approved rules and utilize the most approved appliances which can be used in such work, not only in demolishing the said wall, but in rebuilding the same." And by par. 4 of

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the contract, it was further stipulated: "The contractor shall, in addition to the conditions herein undertaken by him, and upon completion of that part of the wall separating the premises of the party of the second part from the adjacent property, pay the party of the second part such damages which he or his business may have suffered by reason of his entering his premises and of executing such demolition. These damages shall be estimated by arbitration. The arbitrators to be chosen in the usual manner immediately upon completion of such demolition of said wall, which arbitrators shall decide the damage which the party of the second part has suffered by reason of such demolition and entering upon, with all possible diligence: And each of the parties hereto bind and oblige themselves to accept the decision of such arbitrators as the judgment of the highest tribunal, etc." In par. 5 the following provision is made: "The damages which the arbitrators shall settle as being the damages suffered by the party of the second part, shall be paid in cash forthwith as soon as the decision of such arbitrators is rendered; and in the event of the contractor failing to make such payment within twenty-four hours after such decision is rendered, the contractor authorizes the party of the second part to have such decision, as to the amount of damages, signified upon C. W. Lindsay, for whom he is undertaking the contract, who is hereby authorized by the contractor to make payment of the same and charge such payment to him, the said contractor, and to secure said payment, the contractor transfers to the party of the second part an amount equal to such damages and the costs of the arbitration to be taken with preference over his own claims out of the price of the contract entered into by him with Mr. C. W. Lindsay, before Marler, N.P., on April 7 last; and subrogates the party of the second part to such an extent in his rights under said contract; but upon payment being made to the party of the second part, he shall retransfer to the contractor the rights herein transferred by him to him." A copy of this contract was served upon the mis-en-cause on August 11, 1905. The wall was demolished. The plaintiff named his arbitrator. After considerable delay, the defendant Thackeray named one and two, if not three, persons to act as his arbitrator, but they never met or agreed upon any amount of damages; and, finally, the plaintiff's sole arbitrator

rendered a decision or award, so called, fixing the amount of damages due the plaintiff at the sum of $4,556.53. This award was rendered on June 28, 1906, and, on the 29th of the same month, was served upon the mis-en-cause. The service was made in the form of a notarial notification, and in and by which the plaintiff called upon the mis-en-cause to detain and retain in his hands, as due to the plaintiff, a sufficient amount of money to cover and pay the amount of the award, and to pay the same to the plaintiff within two weeks, on pain of being held responsible in all further loss and damages.

Both the defendant and the mis-en-cause neglected to pay; thereupon, on August 9, 1906, the plaintiff instituted an action against the defendant, making Charles W. Lindsay, mis-en-cause. By the conclusions of his action, in part, he prays: Wherefore the plaintiff prays that the defendant be condemned to pay the said sum of $4,556.57, for damages suffered for the reasons mentioned in the above declaration, and that the said C. W. Lindsay, mis-en-cause, be ordered to appear in the present case in order to declare what monies he has in his hands due Charles Thackeray, the defendant, on the contract herein mentioned, executed between him and the said Thackeray, before W. de M. Marler, notary, on April 7, 1905, and the said mis-en-cause be ordered by this honorable Court to pay said sum of $4,556.57 to the plaintiff, out of the said balance of any contract price, as above stated; and, furthermore, that the said mis-en-cause be ordered and enjoined not to dispossess himself of the price, or any part of the price due to the defendant, under said contract of April 7, 1905, the whole with costs against the mis-en-cause, if he contests, the said plaintiff reserving his right to take other and further proceedings and conclusions against the mis-en-cause, in case it be found that he has illegally paid any balance owing to the defendant.

The defendant and the mis-en-cause both appeared. The defendant alone contested the action.

On November 9, 1906, the plaintiff inscribed the cause for proof and hearing, and gave notice to the attorneys of the defendant and of the mis-en-cause, for February 11, 1907. On February 11, 1907, a consent was given, in order to avoid costs, that the case should be submitted upon questions of law only.

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These questions of law were stated, and were six in number. Mr. Justice St. Pierre answered these questions, and among the points decided was that the award rendered by the sole arbitrator was null and illegal and should be set aside, and was set aside; he decided, further, that the plaintiff's action was not premature, and that the plaintiff, notwithstanding the failure of the arbitration, was entitled to succeed on his common law claim against the defendant and ordered the parties to proceed to proof upon the issues as joined. Thereupon the case was reinscribed for proof and hearing, copy of which was served upon the mis-en-cause. It came for trial before Mr. Justice Curran, who, on April 20, 1909, rendered judgment, condemning the defendant purely and simply to pay to the plaintiff the sum of $2,197.34, with interest. It should be at once observed that no adjudication was made by this judgment as to the prayer of the plaintiff affecting the mis-en-cause.

On April 21, 1909, a copy of this judgment was served upon the mis-en-cause. At that time it is admitted that the mis-en-cause had in his hands and possession and due to the defendant a sum of money sufficient to discharge that judgment. The defendant inscribed in Review from the judgment, of Mr. Justice Curran, and on June 30, 1910, a judgment was rendered by the Court of Review, reducing the condemnation against the defendant and in favor of the plaintiff to the sum of $1,767.87. This judgment was in like manner served upon the mis-en-cause. It is, however, in proof, that between the rendering of the judgment by Mr. Justice Curran and the judgment by the Court of Review, the mis-en-cause made a settlement with his contractor, the defendant, and paid to the defendant the whole balance due under his contract notwithstanding the judgment rendered against the defendant, and notwithstanding the transfer made by the defendant to the plaintiff, copy of which had been served upon the mis-en-cause.

Upon the judgment being rendered in Review, the plaintiff being unable to secure payment from the defendant, the latter having become insolvent, demanded the amount from the mis-en-cause, and was answered that he, the mis-en-cause, owed nothing to the defendant, and had nothing to pay to the plaintiff. In the meantime the plaintiff had filed a claim on the insolvent

estate of the defendant, and had received a dividend, which reduced his claim to the sum of $1,423.14.—It should have been noted that the Court of Review, while modifying the judgment of Mr. Justice Curran, did not, any more than did the first judgment, adjudicate upon the prayer of the plaintiff with respect to the mis-en-cause. Thereupon the plaintiff, finding himself with no determination or adjudication with respect to the mis-en-cause, filed an inscription *ex parte*, the mis-en-cause not having pleaded, by which he sought for a final adjudication on his prayer against the mis-en-cause. He got that adjudication on October 16, 1912, in the shape of a dismissal of his action as to the mis-en-cause, under the reserve as above stated. This judgment is presently under revision.

The first question to be determined is as to whether or not, by the deed of July 28, 1905, there was a valid transfer by way of security, from the defendant to the plaintiff, of a sufficient amount to cover the damages which might, in the future, become due to the plaintiff by the defendant, out of the sum of money which, though not then possibly, but in the future, might become due by the mis-en-cause to the defendant, in virtue of the contract for the construction of the building of the mis-en-cause. I am of opinion that there can be validly made by a contractor, a transfer of the whole or a part of the contract price, although that sum may not then be actually due, the work not having been done, but which would become due, under a valid contract to do work, when that work has been done. I am, in like manner, of opinion, that because the amount to secure which the transfer had been made, is not then determined, the transfer is not thereby rendered invalid. See Laurent, vol. 24, No. 46; Fuzier-Herman, Repertoire, *verbo* Cession de créance No. 132. I conclude, therefore, that there was a valid transfer from the defendant to the plaintiff, of such amount of money as would be ultimately and legally determined to be due to the plaintiff, for the reasons set forth in the contract of July 28, 1905. A copy of this contract, containing this transfer, was served upon the mis-en-cause, and, by the transfer itself, authorization was given by the defendant to the mis-en-cause, to pay whatever amount was determined to be due, and to charge the same to him, the defendant. Now, in the action, the mis-en-cause was made a party to the suit.

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Call the proceeding a saisie-arrêt before judgment, or a conservatory process, and, in my opinion, the name is of no importance, the mis-en-cause had notice of such proceeding, was aware of the prayer included in the proceeding, so far as he was concerned. The transfer was referred to in the plaintiff's statement of claim, and I see no reason to deny the plaintiff an adjudication upon that prayer. It often happens, if a seizure before judgment in the hands of a third party is taken, and if the defendant contests the plaintiff's right, or denies any indebtedness, any proceeding against the tiers-saisi or the mis-en-cause, by whichever name he may be called, is often, and possibly properly should be, entirely suspended until the issue between the plaintiff and the defendant is finally decided.—Any proceeding against the tiers-saisi would be useless, if it was finally decided that no debt existed, as between the plaintiff and the defendant. The whole contest or conflict up to the final rendering of the judgment of the Court of Review of June 30, 1910, was between the plaintiff and the defendant. Apparently, the mis-en-cause was lost sight of and allowed to rest undisturbed. But once there was a final adjudication between the plaintiff and the defendant, I see no reason in law why the plaintiff should not bring his demand against the mis-en-cause before this Court for adjudication. The mis-en-cause never made any declaration in Court as to whether he owed or not. He urges that no formal order of the Court was ever given to him to make such declaration. That may be true, but it would be an additional reason why such order should now come, and we cancel the judgment "*a quo*," we issue an order of this Court, that the mis-en-cause do appear within fifteen days from this judgment and make his declaration as to what money he has retained, due the defendant under the said contract of construction, and reserve to the plaintiff his right to take any and all further and subsequent proceedings upon such declaration being made. And we condemn the defendant to pay the costs of this Court.

Appeal allowed.

REX v. OXLEY.

N. S.

S. C.

Nova Scotia Supreme Court, Russell, J. October 15, 1914.

1. HOMICIDE (§ III A—22) — ACCIDENTAL SHOOTING — HUNTING IN CLOSE SEASON.

The criminal liability of the accused, who while hunting with his friend accidentally shot the latter while aiming at what he believed to be a moose, is not sufficiently enhanced by the circumstance that the hunting took place in the close season (the latter infringement being merely *malum prohibitum* and not *malum in se*) to warrant a conviction for manslaughter on that ground alone, and the jury may be directed to acquit unless they find that the accused was criminally negligent in discharging the gun without exercising due care and precaution.

TRIAL of indictment for manslaughter.

Statement

The defendant and a friend went into the woods on a Saturday afternoon during the close season, hunting for moose. On Sunday morning they separated and shortly afterwards the defendant fired on what he believed to be a moose, but which proved to be his comrade, who was killed by the shot. It was contended for the defendant that there was no crime inasmuch as hunting moose on Sunday during the close season was not *malum in se* but merely *malum quia prohibitum*, and the following illustration from Foster's Crown Cases was referred to:—

> A shooteth at the poultry of B and by accident killeth a man. If his intention was to steal the poultry which must be collected from circumstances it will be murder by reason of that felonious intent, but if it was done wantonly and without that intention it will be barely manslaughter.
>
> The rule I have laid down supposeth that an act from which death ensued was *malum in se*, for if it was barely *malum prohibitum* as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose the case of a person so offending will fall under the same rule as that of a qualified man for the statutes prohibiting the destruction of the game under certain penalties will not in a question of this kind enhance the accident beyond its intrinsic moment.

James A. Hanway, for the Crown.
F. L. Milner, K.C., for the defendant.

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RUSSELL, J., said that the law was either in favour of the prisoner or that there was so much doubt about it that he would direct the jury not to convict.

The case then proceeded on the theory that the defendant had been criminally negligent in discharging the gun.

Verdict not guilty.

MAN.

C. A.

HARRIS v. WHITEHEAD.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 30, 1914.

1. SALE (§ I C—15)—CONDITIONAL SALES—REQUIREMENTS—INTENTION TO RETAIN OWNERSHIP, HOW TO BE SHEWN—POSSESSION.

It is necessary for a conditional vendor to clearly shew his retention of the ownership by the use of unequivocal provisions to that effect in the contract, so where the vendor of a motor car took from the purchaser a written promise to pay containing a clause that the car already in the purchaser's possession should "remain in the possession of owner until paid for," there is no effectual reservation of property as against a sub-purchaser.

Statement

APPEAL from a County Court.

Appeal allowed.

H. J. Symington, for appellant.

Honeyman & Thomas, for respondent.

Howell, C.J.M. Cameron, J.A. Perdue, J.A.

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

Richards, J.A.

RICHARDS, J.A.:—The plaintiff, who owned an automobile, which was in Whitehead's possession, agreed to sell it to him, Whitehead, for $550, and Whitehead gave plaintiff his note for that amount, payable at 60 days after date. On the note form, before it was signed, there was written by plaintiff, after the ordinary wording of the note, the following:—

This note is in payment for car No. 7100 & 153 license & is to remain in the possession of owner till paid for.

The plaintiff swears that before he took the note he tried to find a lien note form to use, and that he could not find one, and so wrote the above into the note, supposing it would have the same effect as a lien note. It does not appear that he told Whitehead of his intention to retain the title, or ownership, or that Whitehead agreed to or knew of such intention. The plaintiff

thereafter made no attempts to get possession of the car. While in Whitehead's possession it was sold by him, Whitehead, to Mr. Lee, and by the latter to the defendant Milord, who paid part at least of the price in cash. The plaintiff thereafter brought this action, one of replevin, and thereby got, and has since retained, possession of the car.

The defendant Milord denied the plaintiff's title and counterclaimed for damages for the loss of user of the car. The learned trial Judge gave judgment for the plaintiff, and the defendant Milord appealed.

The plaintiff relies on the use of the word "owner" in the clause above quoted from the note, as implying that he was to retain the title and ownership. He was the owner at the time he wrote that on the face of the note, but I do not see that we should imply anything further than that from the writing. An ordinary lien note simply provides that, in spite of the sale, the property, title and ownership shall not pass to the purchaser, but shall remain in the vendor. Now, the effect of such a transaction, coupled with the delivery to, or retaining of possession by, the purchaser, is to give the latter that possession of the chattel which is the ordinary evidence of ownership, and which may enable him to sell it, as his own, to an innocent purchaser, which is just what occurred here.

The only way in which the vendor can then justify his retaking the chattel, is by shewing that the property did not pass from him. In all such cases I would lean against holding that the property in such cases has not passed.

If I am right in that, it becomes necessary for the vendor to clearly shew his retention of the ownership by the use of unequivocal provisions to that effect in the contract of sale. It does not seem to me that the plaintiff has done so in this case. On the contrary, I think the facts shew that he meant to part with the ownership, or title, but to retain a right to re-take possession if he wished. Such a bare retention, without actual retaking of possession, would, in the case of the ownership having passed to Whitehead, be of no avail as against an innocent purchaser for value to whom the ownership again passed, as I think it did in this case to the defendant Milord.

The bare agreement that possession might be taken did not

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constitute a mortgage, or an agreement to mortgage, as, even if such possession had been taken, the title would have remained in Whitehead. At the utmost, it was an agreement for a pledge of the car by Whitehead to the plaintiff. But, as there was no delivery of possession, no pledge, except possibly an equitable one, was created; and, though an equitable pledge might be good as between the parties to it—as to which I express no opinion—it could not prevail as against an innocent purchaser for value.

The evidence as to damages, suffered by the defendant from being deprived of the use of the car since action begun, is too vague to be of any use. He says he thinks he should recover $3 per day, but does not shew that he was put to any expense or suffered actual loss. I agree that the damages should be nominal only.

My brother Perdue's judgment sets out fully the disposal to be made of this appeal, in which disposal I concur.

Perdue, J.A.

PERDUE, J.A.:—This is an action of replevin to recover a motor car. The facts are as follows:—In November, 1913, the plaintiff sold the motor car to the defendant Whitehead. Whitehead gave the plaintiff a document in the form of a promissory note for $550 in payment for the car, the note being in the words following:—

$550.00. Winnipeg, Nov. 24th, 1913.

Sixty days after date I promise to pay to the order of L. G. Harris at the Sterling Bank of Canada here the sum of five hundred and fifty dollars, value received. Interest at seven per cent. This note is in payment for car No. 7100 & 150 license and is to remain in the possession of the owner until paid for.

(Signed) T. P. WHITEHEAD,
57 Victoria St., Wpg.

At the time the sale was made the car was in the possession of Whitehead, and had been in his possession and use for some months. The plaintiff pressed him to return the car, and then Whitehead offered and agreed to buy it. The plaintiff expected to receive cash, but Whitehead would only give his note at 60 days. The plaintiff says he tried to find a form of lien note, but, not finding one, he drew up the above note, intending it to be a lien note. The plaintiff says Whitehead promised to restore to him the possession of the car, but did not do so, and

it remained in the possession of Whitehead continuously after the sale until he sold it to a person named Lee. Lee sold the car to the defendant Milord, who had no notice of the plaintiff's claim. The note was not paid, and in September, 1914, the present action of replevin was commenced against Whitehead and Milord.

If the doubtful expressions in the agreement written into the note are interpreted in accordance with the construction most favourable to the plaintiff, the agreement was that the car should remain in the plaintiff's possession until paid for. There is nothing in the writing saying that the ownership of the car should remain in the plaintiff or that the title to, or the property in, the car should not pass to Whitehead, and there does not appear to have been any verbal agreement to that effect. The plaintiff states that he sold the car to Whitehead and took the note in payment, but was to have possession of the car until it was paid for. At that time Whitehead had possession and continued to retain possession. The real transaction appears to have been this: The plaintiff agreed to sell the car, the purchaser being already in possession of it; the purchaser agreed to restore the possession to the plaintiff as security, but never did so. I think the effect of this, that the ownership or property in the car passed to the purchaser, and that the plaintiff had the purchaser's promise to pledge the car with the plaintiff as security for the price. But no pledge was ever actually made, because the possession of the property to be pledged must, in order to create a valid pledge, pass from the pledgor to the pledgee or to someone for him: 31 Cyc. 787; Addison on Contracts, 11th ed., 817-818. No doubt there may have been a valid agreement enforceable as between the plaintiff and Whitehead that the latter should restore possession to the plaintiff in order that it might be held as agreed, but such an agreement is not enforceable against a purchaser for value without notice, as Milord must be held to be.

The law governing the plaintiff's rights are very succinctly stated in 31 Cyc., p. 797, as follows:—

> Where there is a contract for a pledge which, however, does not constitute a valid pledge because of the lack of some requisite, as the non-existence of the property to be pledged, *or a want of delivery*, the contract is said to create an equitable pledge which a Court of equity will

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enforce between the parties and against the general creditors of the pledgor, *but not against subsequent bonâ fide purchasers or pledgees for value.*

See also Pomeroy's Eq. Jur., sec. 1235, where numerous English authorities are referred to.

The defendant Milord was a subsequent purchaser in good faith, without notice of the plaintiff's rights, and he obtained from Whitehead, through Lee, the legal title to and possession of the car. This furnishes a complete answer to the plaintiff's claim: *Pilcher* v. *Rawlins*, L.R. 7 Ch. 259, at 268, 269.

I think the appeal must be allowed with costs, and judgment entered for the defendant Milord in the County Court for the return of the car, and that the plaintiff pay to the defendant $5 damages under sec. 231 of the County Courts Act, together with costs of suit in the County Court.

Haggart, J.A.

HAGGART, J.A.:—This is an action of replevin for the recovery of a motor car. The plaintiff claims that at the time of the alleged sale to the defendant Whitehead it was agreed that the ownership and possession of the car should remain in the plaintiff until the car was paid for, and further alleges that this agreement was in writing.

The defendant Milord claims to be a purchaser for value without notice, denies that there was any written agreement, and alleges that the plaintiff permitted Whitehead to exercise acts of ownership so that he was able to sell the car to a third party for value without notice, who, in turn, sold it to the defendant Milord, and that the plaintiff is estopped from setting up acts of ownership against Milord.

The case was abandoned as against the defendant Whitehead. The defendant Milord claims under a sale from Whitehead to one Lee, and a *bonâ fide* sale from Lee to himself.

The trial Judge gave a verdict for the plaintiff, from which the defendant Milord appeals.

The plaintiff, in 1912, bought a motor car from the Breen Motor Co., which he stored in a garage on Good St., in the city of Winnipeg, while he himself took a trip to Europe. While the plaintiff was in Europe he received a letter from the defendant Whitehead asking if he, Whitehead, could take the car out, stating that the lamps and other things belonging to it were being stolen. The plaintiff did not reply to the letter. He re-

turned to Winnipeg in November of that same year, when he learned that the defendant Whitehead had taken the car out of the garage and was using it, and that it had been damaged to some extent. Through the Breen Motor Co. the plaintiff learned that the car had been brought to their shop for repairs by Whitehead.

The plaintiff located Whitehead at the St. Regis Hotel, where he first met him. The plaintiff subsequently met Whitehead several times, and says he continued insisting upon getting some satisfaction for the car. I will give the plaintiff's story as the result of these interviews:—"Finally I said this car belongs to me, and I will have to take possession of it in some way" . . . and that Whitehead, in reply, says:—"I will tell you what I will do. I will give you my note for sixty days. I have $9,000 coming in and other resources, and I will pay for it," and, further on, he proceeds:—"I went out to try and find a form of lien note, and could not, and when I came back he came in again and we made the bargain. I wanted $700, and I was finally beaten down to $550. Before this he said he would pay me for it, and said no mention of a note or anything else the first time he was in. Finally he said he would pay $550. Of course, I thought that was cash. Then he said he would give me a note. I tried to find a form of lien note, but could not, and made out a note for him at 2 months, which he signed, and the note in question is in these words:—

Winnipeg, Nov. 24th, 1913.

$550.00.

Sixty days after date I promise to pay to the order of L. G. Harris, at the Sterling Bank of Canada here, the sum of five hundred and fifty xx/100 dollars, interest at 7%. This note is in payment for car No. 7100, and 150 license, and is to remain in the possession of the owner until paid for."

T. P. WHITEHEAD,
57 Victoria St., Wpg.

And, proceeding further, the plaintiff says, referring, no doubt, to the last portion of the document:—

I first wrote that in as I could not find a lien note and made it as near a lien note as I could. Afterwards I tried to get hold of the car and could not. When he signed the note he promised to give me possession of the car just as soon as it was repaired, that I could have the car.

These occurrences were about November 24, 1913, the date of the note, shortly after which the plaintiff, leaving the car in

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the possession of the defendant Whitehead, went to Europe again, where he remained until the following summer. The defendant Whitehead was for some time in possession of the car, wrongfully or rightfully, before the price was agreed on and the note was given, and from that time until the transfer to the present defendant Milord, Whitehead remained in open possession of the motor. The note was never paid.

It may have been the intention of the plaintiff to retain something in the nature of a lien or stipulation that the property and ownership of the car should remain in himself; but I cannot gather from the document, or from the evidence, that such was also the intention of Whitehead. The note or agreement does not in express terms give the plaintiff a lien or reserve to him the right to get possession of the car. The plaintiff wrote the document himself, and it does not appear that at that time there was much serious conversation as to what should be its terms. If the plaintiff has not the security he thought he had, or perhaps might have had if he insisted upon it, it is his own fault. The document itself has not the effect claimed for it by the plaintiff.

I think, under all the circumstances, the defendant Milord receives substantial justice by getting a verdict for the delivery of the car to him, but, in deference to my brother Judges, I agree to a verdict of $5 on his counterclaim.

I would allow the appeal and enter a verdict for the defendant for motor car in question.

Appeal allowed.

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HART v. BROWN.

Alberta Supreme Court, Scott, Stuart, Beck and Simmons. October 21, 1914.

1. LANDLORD AND TENANT (§ III A—44)—RIGHTS AND LIABILITIES OF PARTIES —AS TO POSSESSION—LANDLORD'S CONTRACTOR—SCOPE OF EMPLOYMENT—DAMAGES.

That a building contractor for the erection of a large block for the defendant covering the location of the leased building and adjoining lands had razed the building, in the course of the operations contracted for, is evidence that what he did was authorized by the defendant so as to establish a claim for damages brought by a tenant who had been wrongfully dispossessed by such act.

Statement

APPEAL from Walsh, J.

The appeal was dismissed.

O. M. Biggar, K.C., and *A. U. G. Bury*, for plaintiff, respondent.
G. B. O'Connor, K.C., for defendant, appellant.
The judgment of the Court was delivered by

BECK, J.:—The defendant appeals from the judgment of Walsh, J., at the trial finding for the plaintiff with $1,500 damages. He contends first that he was improperly refused an adjournment for a sufficient period to enable him to meet an amendment allowed by the trial Judge of the plaintiff's statement of claim. The statement of claim in brief was as follows: The plaintiff was tenant in possession and occupation of the land in question under a lease from one Lee to one McDonald assigned to the plaintiff. A fire broke out on adjacent premises, and, there being danger to the building on the leased premises, the plaintiff temporarily removed his effects, replacing them the same day. The defendant then boarded up the entrances to the building, preventing the plaintiff from entering. A few days afterwards

the plaintiff informed the defendant that he intended at once to resume his business, the said premises having not been sufficiently injured to interfere in any way with his doing so, and the defendant thereupon told him that he could do so, and thereupon the plaintiff effected an entrance into his premises, opened them up and restored them to order for the purpose of at once resuming business and did carry on his business there till the evening of that day when, on leaving for his home, he locked up the said premises and made them secure, but the defendant, by himself, his servants or agents, the same evening broke into the said premises and removed therefrom and placed out upon the public sidewalk the furniture, papers and other effects of the plaintiff, and fastened up the said premises so as to prevent the plaintiff from obtaining access thereto.

Then follows a continuation of the story, concluding with an allegation that the defendant "pulled down and totally destroyed the premises, and has since retained possession thereof against the plaintiff."

There is a claim for damages with some particulars. The claim is very badly drawn. As the plaintiff was in possession at the time of the alleged wrongs, I think that it was sufficient for him merely to say so without setting out his title; though if he chose to anticipate he might set out his title, but in doing so it was necessary to trace his title from the last owner who was entitled to an estate in possession. There is no allegation that Lee, the lessor, had any estate in the land. The story on which he says the defendant consented to his putting his goods back into

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the building, and his statement that the premises were not so damaged by fire as to prevent his carrying on business in them, or that he notified the defendant to that effect, are quite obviously told in view of the pleader knowing that the lease contained provisions with respect to assignment and sub-letting, and to the case of the premises being injured or destroyed by fire, though these provisions are not set out. It was—to use a mild term—unwise for the plaintiff in anticipation to take upon himself the burden of proving that he had fulfilled any conditions of the lease.

The statement of defence is not better drawn. Practically every allegation of the statement of claim is denied. A number of mere conclusions of law are stated, without facts to support them. The only material affirmative allegations of fact are:—

(1) That the lease contained a provision forbidding the assignment or sub-letting of the premises, and provided that on default the lessor might re-enter and take possession of the premises.

(2) That the defendant took possession pursuant to the provisions of the lease and the powers thereby reserved, "the defendant being the assignee of the reversion from Lee, and McDonald having made default in the provisions of the said lease, and the said premises having become unfit for occupation by reason of the said fire."

Though the provision against assignment or sub-letting is set up, no breach of it is alleged. The words "having made default in the provisions of the said lease" are not sufficient. Four paragraphs intervene between the statement of this particular provision of the lease and the above allegation, which latter, moreover, is contained in a paragraph introduced by the words, "in the alternative," thus excluding the allegations of the other paragraphs. No condition regarding the consequences following from a fire are set up.

In this state of the pleadings—for which both sides are to blame—it is no wonder that a question should arise at the trial as to what was in issue. Counsel for the plaintiff was questioning the plaintiff with view of shewing the defendant's consent to an assignment of the lease. Counsel for the defendant objected that there was no allegation on the part of the plaintiff that the de-

fendant had consented to the assignment of the lease. I think there was in fact no such allegation. The learned Judge allowed an amendment of the statement of claim by setting up that the assignment was consented to by the defendant, and permitted the evidence to be given, saying that he did not see how counsel for the defendant could be taken by surprise, but if he was he would grant an adjournment to enable counsel for the defendant to find his client, who was in fact in town. This was declined, and the case proceeded, and although several witnesses were called on behalf of the defendant he himself was not called. I do not think there was any surprise in the proper sense. Counsel for the plaintiff stated to the Judge that the question of consent was the very question which was fought out on a motion for an injunction. This statement was not disputed, and a reference to the affidavits used on the motion, some portions of which appear in the evidence, shew that it was so. If counsel for the defendant was surprised I think he himself must have brought about the state of affairs which led to his being surprised by deliberately arranging that his client should not be present while knowing full well that the question of consent was in reality, in the mind of the plaintiff's solicitor, one of the most vital points in dispute.

The learned Judge offered the defendant an adjournment, which was not accepted. Had it been accepted it is most unreasonable to suppose that if counsel for the defendant, after seeing his client, could put forward just grounds for a further adjournment, the learned Judge would have refused it. To me it is quite clear that the learned Judge dealt with the defendant with entire fairness, and that he has no just cause of complaint on this score.

Then it is said that on the evidence it appears that the plaintiff took no interest in the premises, (1) because no assignment of the lease was proved, and (2) because no consent to the assignment was proved.

(1) The instrument of assignment was executed by a sister of the lessee, who, it is proved, had full authority in fact to do so, and possession was taken in pursuance of this instrument by the plaintiff as assignee of the lease. As between the lessee and the assignee, it was certainly binding and effective, and it is impossible

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to contend that anyone else—even the defendant as assignee of the reversion—can take exception to it on any other ground than that it was without his consent.

(2) As to the consent, the assignment is dated December 19, 1912. The lease had then only three months and fourteen days to run, that is, until April 1, 1913. The plaintiff swears that before concluding the arrangement for the assignment of the lease he had a personal interview with the defendant and told him he was proposing to take an assignment from McDonald, and asked the defendant if he would give an extension of the term, and that the defendant replied: "No, you can stay until the 1st of April, but not a day longer, as the building is coming down."

This is confirmed by the witness Bradley, who says he was present at this interview. It is not contradicted, and plainly is quite sufficient to prove a consent to the assignment. Then it is said that there is no evidence that it was the defendant who committed the things complained of.

The trial Judge came to a conclusion on this point against the defendant without any hesitation. I agree with him.

The defendant owned the premises. A contractor—named Prentice—for the building of a large block upon them necessitating the destruction of the leased building was at work on the premises. It does not expressly appear that Prentice was engaged by Brown, but it would be absurd to suppose that he was there and engaged in such work without Brown's authority. It was Prentice's men who in fact destroyed the leased building. The doing of this was clearly necessary in order to the carrying out by Prentice of the work Brown had engaged him to do. This was in effect a direction by Brown to Prentice to do what he did.

The damages assessed seem not fairly open to exception. I think the appeal should be dismissed with costs.

Appeal dismissed.

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Ontario Supreme Court (Appellate Division), Clute, Riddell, Sutherland and Leitch, JJ. June 15, 1914.

1. EASEMENTS (§ IV—46a)—PRESCRIPTIVE RIGHTS—LOSS OF—INTERRUPTION OF USER—LIMITATIONS ACT.

The Limitations Act, R.S.O. 1914, ch. 75, secs. 35 and 36, render it necessary for a person seeking to establish a prescriptive right to an easement under the statute to prove uninterrupted enjoyment for a period of 20 years immediately previous to and terminating in some action or suit in which the right is called into question.

[*Watson* v. *Jackson*, 30 O.L.R. 517, varied; *Parker* v. *Mitchell*, 11 A. & E. 788, followed.]

2. EASEMENTS (§ IV—46)—NONUSER—LOST GRANT—LIMITATIONS ACT.

The actual user of an easement by prescription under the Limitation Act, R.S.O. 1914, ch. 75, secs. 35 and 36, must during the whole statutory period be such as to carry to the mind of a reasonable person in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if denied; but where the doctrine of lost grant applies, nonuser not amounting to abandonment does not destroy it.

[*Hollins* v. *Verney*, 13 Q.B.D. 304, followed; *Re Cockburn*, 27 O.R. 450, referred to.]

3. EASEMENTS (§ IV—45)—LOST GRANT—USER—LIMITATIONS ACT.

The doctrine of lost grant as applied to easements was not superseded by the Limitations Act (R.S.O. 1914, ch. 75, and previous Acts) but before it can be applied there must be affirmative proof that a burden was imposed on the servient tenement of the right claimed; the evidence of user sufficient to raise the presumption of a lost modern grant depends upon the circumstances of each particular case and where established nonuser not amounting to abandonment does not destroy it.

[*Tilbury* v. *Silva*, 45 Ch. D. 98; *Re Cockburn*, 27 O.R. 450, referred to.]

4. WATERS (§ II C—87)—USE OF WATER—INTERFERENCE WITH FLOW—NATURAL STREAM.

The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement and there consume it for purposes unconnected with the tenement.

[*Watson* v. *Jackson*, 30 O.L.R. 517, varied; *McCartney* v. *Londonderry, etc., Co.*, [1904] A.C. 301, followed.]

Statement

APPEAL by the defendants from the judgment of MIDDLETON, J., 30 O.L.R. 517.

Judgment below varied.

H. H. Dewart, K.C., and *J. W. McCullough*, for the appellants.

I. F. Hellmuth, K.C., and *N. Sinclair*, for the plaintiff, the respondent.

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June 15. CLUTE, J.:—This is an action between lower and upper riparian owners, the defendants, the upper owners, also claiming prescriptive rights to dam the water and create a mill-pond for power and other purposes.

In February, 1911, the plaintiff purchased a part of lot 31 in the township of Markham, in the county of York, fronting on the east side of Yonge street. As described in the plaintiff's statement of claim: "A branch of the Don river, which is a strong, live stream, crosses Yonge street opposite the property and the residence thereon of the plaintiff, and runs in a winding way through the front of the property and to the front of and to the west and south of the residence and grounds surrounding the same and through the flats to the east thereof owned by the plaintiff."

It is further alleged that the front 35 acres of the property are used by the plaintiff with the residence, a general feature of which is the flowing stream of water, "without which the property would not have been purchased by the plaintiff;" that the banks of the Don are well marked, with an average height of 4 or 5 feet, with an average width of 12 feet, "and there has always been a strong, live, continuous flow of water at all times, even during the summer."

Prior to the 10th October, 1910, one L. G. Langstaff was the owner of part of lots 31, 32, and 33 in the 1st concession of Vaughan, on the west side of Yonge street, opposite the plaintiff's premises, and on that date he gave an option to one David James "to sell and dispose of my water power site in and upon" said lots 31, 32, and 33, for $2,000; "I am to have the option of taking all or part in fully paid-up shares in a limited company to be formed to work the said site, to supply water, etc., to the village of Thornhill and surrounding country." On the 30th December, 1910, James assigned this option to the defendant W. H. Jackson.

Differences having arisen between the parties under this option, W. H. Jackson brought an action against L. G. Langstaff, in which a consent judgment was obtained on the 16th December, 1911, directing that "upon the plaintiff undertaking to construct the dam" thereinafter mentioned, "and paying

$2,000 before the 1st of April next," the defendant forthwith to convey the 33 acres forming the mill-site, the conveyance to contain a covenant by the said Jackson "*to build a dam on the site of the old dam of the same height within* 21 *months from that date,*" with a covenant permitting the defendant to enter and examine the condition of the dam at all times and further provisions for the repair of the dam, the covenants to run with the land. The plaintiff to grant to the defendant, etc., his heirs and assigns, "and other people living or residing on" Langstaff's "*land, the right to boat on the pond created by the dam and* to build and maintain a landing stage for the boats, etc.," with a right to the defendant, his heirs and assigns, *to draw water from the said pond* for the supply of the defendant's sanitarium on the adjoining land to the north, with other provisions.

In pursuance of this judgment, the conveyance was made in April, 1912, by L. G. Langstaff to the defendant W. H. Jackson, conveying by metes and bounds the mill-site in question. The conveyance embodies the terms of the decree made in *Jackson* v. *Langstaff* on the 6th December, 1911, to build the dam within 21 months from the 6th December, 1911, as provided in the decree.

The defendants proceeded to construct the dam pursuant to the covenants contained in the said deed, and the present action is brought to obtain a declaration that the plaintiff is entitled "to have and enjoy the continuous free and full and natural flow of the waters of the river or stream upon, in, and through his lands, the same as it enters and runs upon and through the lands of the defendants, without interference or obstruction by them," and for an injunction to restrain the defendants from interfering with such rights, and to restrain them "from holding back on their lands, *for any purpose whatever,* any of the waters of the river Don as it enters upon and flows through the lands of the defendants, and from maintaining upon their land any obstructions to the continuous full and free and natural flow of the said waters," and for a mandatory order to remove any and all dams, obstructions, or impediments placed upon their lands "whereby or by means of which the full, free, and natural and continuous flow of the waters of the river . . . is at any time or times interfered with, impeded, or lessened."

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The defendants allege that "the 'old dam' referred to in the said judgment and in the said conveyance was constructed by the predecessors in title of the defendants, more than 40 years prior to the year A.D. 1878, upon the site where the present dam is situate." In that year it was "broken away for a distance of about 50 feet where the branch of the river Don in question flowed through, the total length of the dam being about 400 feet, and the balance of the dam remaining intact, and the work which is now complained of is the repairing of the said breach of about 50 feet. The other portions of the said dam remaining there now are the same as they were when the said dam was first built more than 40 years prior to the year A.D. 1878. The defendants further say that their predecessors in title, at a time prior to the year 1838, built the said dam for the purpose of collecting sufficient water in a pond to enable them to operate a grist mill, a saw mill, a tannery, or some or one of them; that their predecessors in title maintained the said dam and pond and used it, as of right, for the said purposes, or some of the said purposes, for a period of upwards of 40 years prior to the year A.D. 1878, and thence (with certain exceptions) until the present time."

The defendants further claim that the act complained of by the plaintiff is a repair of the portion of the old dam carried away, placed upon the old site. They deny seriatim the alleged wrongful acts, and claim the right to do what they have done: (1) by prescriptive right; (2) by lost grant, in case such prescriptive right cannot be supported; (3) as riparian proprietors.

The judgment declares: (1) that the plaintiff is entitled "to the continuous, full, free, and natural flow of the waters of the river or stream known as the Don upon, in, and through his lands, without sensible diminution or alteration thereof by the defendants." The defendants are restrained from doing or committing any act whereby "the actual, continuous, free, full, and natural flow from time to time of the waters of the stream known as the Don through the plaintiff's lands shall be sensibly diminished or altered."

The principal facts in the case are not in dispute. I think it clearly established that the defendants' predecessors in title had

constructed a dam on the site of what is called the old dam, and by such dam had formed a mill-pond, the water from which was used for the purposes of a flour mill, saw mill, and tannery, and that such user continued for over 40 years prior to 1878, and probably longer. In that year a part of the dam was carried away. It was reconstructed about 1887; but, before it had been used to any considerable extent, it was again carried away, and was a third time constructed in 1897, when, before much use of it was made, it was again carried away, and no attempt appears to have been made to reconstruct it until the acts complained of.

It is convenient to notice here that in the line of title through which the defendants claim there is a deed dated the 31st January, 1829, and registered on the 10th March, 1829, which conveyed a certain portion of lot number 31 in the first concession of Markham, on the east side of Yonge street, and also parts of lots 31 and 32 on the west side of Yonge street. The description of the mill-site is as follows: "Commencing where a post is planted a little westerly from the saw mill in the limit between lots numbers 31 and 32, then along the limit south 74 degrees west more or less to the allowance for road in the rear of the said concession, then north 9 degrees west 20 chains, then north 74 degrees east to the edge of the pond made by the dam on Lyons creek so-called, then along the edge of the pond where the water is raised to the highest that is necessary for any water privileges or hydraulic purposes, to where a post is planted near the edge of the water westerly of the saw mill, then on a straight course or line to the place of beginning to a post on lots numbers 31 and 32;" and reciting that it was the true intent and meaning of the parties to the said deed that the said Benjamin Thorne and William Parsons (the defendants' predecessors in title), their heirs and assigns, should possess and enjoy the mill-site together with the mill-pond formed by the dam as then constructed or as it might thereafter be constructed in as *full, ample, and beneficial a manner as he, the said William Purdy* (the grantor), his heirs or assigns, might, could, or *of right ought to enjoy the same* for any hydraulic or other purposes whatsoever on the therein above-described premises.

The question arising out of this conveyance is, whether upon

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its face it purports to convey more than the rights which pertain to a riparian proprietor, and, if it does so, whether the user of the waters under colour of such deed would, as against a riparian proprietor lower down on the stream, create a substantive right as by way of grant. It might do so as against a lower riparian proprietor if at the time of the grant he was the common owner of what is now both the upper and lower tenement. But, as this point was not taken by the defendants' counsel, I assume that the grantor was not the plaintiff's predecessor in title. If I am wrong in this (the evidence not being clear), this point should be spoken to.

The further question is, would the mere user under colour of the grant, where no right existed in the grantor to convey the mill-site, except as riparian owner, ripen into a right by 40 years' user, or, as in this case, nearly 50 years, down to 1887, which the defendants, claiming through such title, could avail themselves of? No authority was referred to by counsel, nor have I been able to find any covering the point. I am inclined to think that the deed conveys no more than the rights which the grantor had as riparian proprietor. If it conveys more, it might affect the question of lost grant—as to date and as to what was impliedly granted thereby.

The evidence shews that there are now four ponds used for power, and two ponds not so used, on this stream above the dam in question, and a pond below the plaintiff's property used for running a mill, and at one time there was a mill-pond and mill on the defendants' property.

The defendants cannot avail themselves of the statute (Limitations Act) R.S.O. 1914, ch. 75, secs. 35 and 36, as the foundation for a prescriptive right; for the period therein mentioned refers to the period next before some action wherein the claim or matter to which such period relates was or is brought into question. It is plain here that the water was not in fact penned back since 1878 except for a few days on the occasions of the rebuilding of the dam in 1887 and 1897, so that the defendants are not able to say that their user was brought down within the period required by the

statute before action brought: *Colls* v. *Home and Colonial Stores Limited*, [1904] A.C. 179; *Knock* v. *Knock* (1897), 27 S.C.R. 664; *Hyman* v. *Van den Bergh*, [1908] 1 Ch. 167, 173.

The construction of this statute and the cases bearing upon it are referred to in Halsbury's Laws of England, vol. 11, p. 272, para. 542. Although the Act apparently renders the right indefeasible after 20 years' user, the combined operation of these two provisions renders it necessary for a person seeking to establish a prescriptive claim under the statute to prove uninterrupted enjoyment for a period of 20 years immediately previous to and terminating in some action or suit in which the right is called into question: *Parker* v. *Mitchell* (1840), 11 A. & E. 788, and other cases referred to.

The period is not necessarily the period before the pending action; it may be the period before any action in which the right was brought into question: *Cooper* v. *Hubbuck* (1862), 12 C.B. N.S. 456.

No actual user would seem to be sufficient to satisfy the statute, unless during the whole statutory period the user is enough to carry to the mind of a reasonable person in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted: *Hollins* v. *Verney* (1884), 13 Q.B.D. 304, 315 (C.A.); Halsbury, *loc. cit.*, para. 541.

Where the doctrine of lost grant applies, non-user not amounting to abandonment does not destroy it: *Re Cockburn*, 27 O.R. 450, at p. 467. See Gale's Law of Easements, 8th ed., pp. 556, 557. Lord Coke appears to have been of opinion that, when a title by prescription was once acquired, it could only be lost by non-user during a period equal to that required for its acquisition: Coke's Littleton, 114 b; and Mr. Justice Littledale in *Moore* v. *Rawson* (1824), 3 B. & C. 332. Speaking generally, there must be an intention to relinquish the right.

In *Hall* v. *Swift* (1838), 6 Scott 167, where it appeared that, about 40 years since, a stream of water from natural causes ceased to flow in its original channel and did not return to it until 19 years before the action was brought, the Court held that the right to the flow of the water was not lost. Tindal, C.J., said that

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the interruption might have been occasioned by an extra dry season or from some other cause over which the plaintiff had no control.

The law upon this point is summed up by the learned writer at p. 562 of Gale's Law of Easements: "Where, however, there has not been a mere cessation to enjoy, but it has been accompanied by indications of an intention to abandon the right, as by a disclaimer, there is authority for saying that a shorter period will be sufficient to extinguish the right. Such direct evidence of intention appears to have been treated in the same manner as the similar indications afforded by a change in the status of the dominant tenement."

In *Lovell* v. *Smith* (1857), 3 C.B.N.S. 120, 127, Mr. Justice Willes said: "I do not think that this Court means to lay it down that there *can* be no abandonment of a prescriptive easement like this without a deed, or evidence from which the jury can presume a release of it." And in *The Queen* v. *Chorley* (1848), 12 Q.B. 515, 518, the Court said that the "cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect" as a release "without any reference to time." See Goddard on Easements, 7th ed., pp. 562, 563.

In the present case I do not think from the evidence that there was any intention to abandon the rights (if any) which the defendants' predecessor in title could claim, from the mere non-user on account of the dams being carried away by flood. On the contrary, the rebuilding of the dams from time to time evidences a contrary intention.

As to the defendants' claim by lost grant. The evidence of user sufficient to raise the presumption of a lost modern grant depends upon the circumstances of each particular case: Halsbury, vol. 11, para. 531; *Tilbury* v. *Silva* (1890), 45 Ch. D. 98. The general doctrine is stated in Goddard's Law of Easements, 7th ed., p. 167, that "if a right which is capable of having had a legal origin is proved to have existed and been exercised for a number of years, the law ought to presume that it had such an origin. The only legal origin for an incorporeal right is a

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grant; therefore if a grant cannot be produced it must be presumed that there was a grant once, which, in years gone by, has been lost."

The doctrine of lost grant was not superseded by the Prescription Act, although it received "a severe shock" in *Angus* v. *Dalton* (1877-8), 3 Q.B.D. 85, 4 Q.B.D. 162; *Dalton* v. *Angus* (1881), 6 App. Cas. 740.

It was said in *Blewett* v. *Tregonning* (1835), 3 A. & E. 554 *per* Patteson, J., at p. 585, that to sustain such a claim it should be proved that the user commenced about the time that the grant is presumed to have been made, for where no proof of this is given the evidence goes to prove a prescriptive right and not a grant; but this seems questionable: Goddard, p. 173; *Bass* v. *Gregory* (1890), 25 Q.B.D. 481.

In *Hunter* v. *Richards* (1912), 26 O.L.R. 458, affirmed 12 D.L.R. 503, it was held that, under the circumstances of that case, there could be no presumption of an implied grant, and a number of cases are reviewed in 26 O.L.R. at p. 470 *et seq.* The circumstances sufficient to prevent the operation of the doctrine in that case were: (1) that payments were made for the right to do the very thing complained of during the period that was covered by the lost grant; (2) that a grant could not be presumed, for the reason that an actual grant would have been void in that case, being in contravention of an Act of Parliament: Halsbury's Laws of England, vol. 11, para. 533, and *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 648.

The Courts, following their usual rule in favour of the presumption that an alleged right had a legal origin, when long enjoyment can be shewn, have readily adopted this convenient fiction. At first juries were told that from user during living memory or even during 20 years they could presume a lost grant, and subsequently that they not only might but were bound to presume the existence of a lost grant: *Bryant* v. *Foot* (1867), L.R. 2 Q.B. 161, 181; *Mounsey* v. *Ismay* (1865), 3 H. & C. 486, 496. The doctrine only applies where the enjoyment cannot be otherwise reasonably accounted for: *per* Lord Lindley in *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A.C. 229, 240.

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The user must, as in the case of prescription at common law, be as of right: *Solomon* v. *Vintners' Co.* (1859), 4 H. & N. 585, 602; this, with other cases, is referred to in Halsbury's Laws of England, vol. 11, para. 531.

It was said by Farwell, J., in *Attorney-General* v. *Simpson*, [1901] 2 Ch. 671, at p. 698, that "it cannot be the duty of a Judge to presume a grant of the non-existence of which he is convinced." The decisions of Farwell, J., and the Court of Appeal were reversed (*Simpson* v. *Attorney-General*, [1904] A.C. 476), without special reference to that part of Mr. Justice Farwell's decision above quoted, but it is contrary to Lord Blackburn's judgment in *Dalton* v. *Angus*, quoted below.

"It was practically settled by *Dalton* v. *Angus*, 6 App. Cas. 740, that where 20 years' open and uninterrupted user is proved, a jury may and ought to presume the existence of a lost grant, if, as said by Mr. Justice Field, at p. 762, there be no evidence in denial, explanation, or modification of the actual enjoyment, and that this presumption cannot be displaced by merely shewing that no grant was in fact made, though it is rebutted if there be an incapacity to grant the easement, extending over the whole period in the course of which the right (if granted at all) must have been granted:" Gale on Easements, 6th ed., p. 174. An early instance of the application of this doctrine is to be found in the case of *Campbell* v. *Wilson*, 3 East 294 (1803).

"The earliest reported decision is that of *Lewis* v. *Price* in 1761, referred to in Serjeant Williams's note to *Yard* v. *Ford* (1671), 2 Wms. Saund. 500, 504:" *per* Lord Blackburn in *Dalton* v. *Angus, supra,* at p. 812. Lord Blackburn continues: "I quite agree with what is said by the late Chief Justice Cockburn, that where the evidence proved an adverse enjoyment as of right for twenty years, or a little more, and nothing else, 'no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction.' He thinks that thus to shorten the period of prescription without the authority of the Legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would

produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of: even where it was originally a blunder, and inconvenient, *communis error facit jus*. But to refuse to administer a long-established law because it was based on a fiction of law, admitted to be for a purpose and producing a result very beneficial, is, as it seems to me, at least as great a usurpation of what is properly the function of the Legislature as it was at first to introduce that fiction."

An easement being the right enjoyed over and above the natural right, the burden involves a diminution or retraction from the natural right. It exists for the benefit of the dominant tenement only: *per* Cockburn, C.J., in *Mason* v. *Shrewsbury and Hereford R.W. Co.* (1871), L.R. 6 Q.B. 578; and *Simpson* v. *Godmanchester Corporation*, [1897] A.C. 696, *per* Lord Watson, at p. 703, who says: "It is no doubt one of the essential characteristics of a legal easement that its exercise shall be for the use and benefit of the dominant estate."

Before the doctrine of lost grant can be applied, it must be affirmatively established by the party claiming it that a burden was imposed on the servient tenement of the right claimed. For all that appears in the present case, and having regard to the greater supply of water in the early settlement of the township, there may have been sufficient water for the use of the mills on the defendants' property during the 40 years prior to 1878, using it strictly within the rights of a riparian proprietor and imposing no extra burden on the riparian proprietor below, and so raising no presumption of user under a lost grant.

The result is that all claim to prescriptive right, whether under the statute or by lost grant, must be excluded in this case. It is unnecessary to consider whether the Registry Act applies to a lost grant. See *Haigh* v. *West*, [1893] 2 Q.B. 19 (C.A.), as to enrolment.

It remains to consider the natural right which the defendants have as riparian proprietors to use the stream in question, as distinguished from that of an easement.

In *McCartney* v. *Londonderry and Lough Swilly R.W. Co.*, [1904] A.C. 301, 304, the Earl of Halsbury, L.C., referring to

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Swindon Waterworks Co. v. *Wilts and Berks Canal Navigation Co.*, L.R. 7 H.L. 697, 704, said: "In that case Lord Cairns, with the complete assent of Lord Hatherley and Lord Selborne, gave an elaborate exposition of riparian rights, which, though not a new decision, was nevertheless supposed to have settled and almost codified the law upon the subject."

The passage from the judgment of Lord Cairns referred to reads: "Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water."

In the *McCartney* case it was held that a railway company were not entitled to insert a pipe into a stream at the crossing, which was the only place where the land adjoined the stream, and to carry the water along the line to a distant tank and there con-

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sume it in working their locomotive engines on the whole line of their railway. Lord Macnaghten ([1904] A.C. at p. 307) says: "The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

Referring to these two cases, the law is summed up in Halsbury, vol. 11, para. 608, as follows: "A riparian owner may use the water for ordinary or primary purposes for his domestic wants and the general and usual requirements of his tenement, and he may also, subject to compliance with certain conditions, use it for other purposes—sometimes called extraordinary or secondary purposes—provided they are connected with or incident to his land. The dividing line between primary and secondary purposes has never been accurately fixed, and is probably incapable of accurate demarcation."

In *Roberts* v. *Gwyrfai District Council*, [1899] 1 Ch. 583, affirmed in [1899] 2 Ch. 608, it was held that where a riparian owner has a common law right to the uninterrupted flow of a stream past his tenement, the local authorities have no right, for the purpose of supplying water to their district, to alter the flow of water in a stream without the consent of the riparian proprietor lower down the stream, and by doing so they were "injuriously affecting" the natural right of such riparian proprietor, and they were restrained from so doing without any proof of sensible damage caused to him.

The application of the law as above indicated clearly precludes the defendants from supplying water to be used otherwhere than on the defendants' property, whether it be for supplying Thornhill, the sanitarium on Langstaff's property, or otherwise consuming the water off the premises of the defendants.

The head-note in the *McCartney* case sums up what appears to be the law upon this question: "The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, and there consume it for purposes unconnected with the tenement." To attempt to do so would be, not only an unreasonable use of the water, but would be a use altogether outside and beyond the right of the riparian proprietor to use the water.

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Having regard to the original option and to the claim of the plaintiff under his deed, I think the plaintiff, respondent, is entitled to a declaration that the defendants are not entitled to use the water of the stream for the purpose of supplying either Thornhill and the surrounding country or the Langstaff sanitarium with water, and to an injunction restraining the defendants from so doing.

With this restriction, there remains to be considered what is a reasonable use of the water by the defendants, having regard to their rights. In *Dickson* v. *Carnegie*, 1 O.R. 110, it was held that a riparian proprietor has not the absolute right to the natural and unobstructed flow of the water, but that the right is a qualified one, and subject to the lawful and reasonable use of the waters by a mill-owner above him on the same stream, and this although the user above him may be at times for an extraordinary purpose; and it was there held that where a mill-owner higher up the stream had held back the waters by a dam for the purpose of driving a mill, and where such user was found to be reasonable, the owner lower down the stream could not complain.

In *Ellis* v. *Clemens*, 21 O.R. 227, the question of reasonable use is considered. It was there held that riparian proprietors are entitled to make a reasonable use of the water of the stream, to detain and retard it within reasonable limits, but that any user which inflicts an injury upon a proprietor above or below is not to be considered reasonable.

I am not prepared to say that there may not be in certain seasons of the year such a flow of water as would entitle the defendants to enclose the water in a pond and use the same for power or mill purposes upon the premises. No doubt, the conditions have changed, as is shewn by the evidence. The lands have been cleared, thus causing a rapid and heavy flow of water at certain seasons, causing freshets, and creating a scarcity at other times, and the rights of the defendants are affected by such changes and must be exercised having regard thereto.

One mode of enjoying land covered with water is to row boats upon it, and the owner has the exclusive right: *Nuttall* v. *Bracewell* (1866), L.R. 2 Ex. 1, at p. 11. In *Hill* v. *Tupper* (1863), 2 H. & C. 121, it was held competent for the grantors in

that case to grant to the plaintiff a right of rowing boats in the canal. Of course, this implies that a party must first have the right to have the land covered with water.

A great deal of evidence, expert and otherwise, was given on the question of evaporation and seepage, and the learned trial Judge found that "the loss due to evaporation can be ascertained with some certainty, and, standing alone, would not amount to any very serious diminution of the flow in the stream." With this I agree.

The seepage from the pond, if any, would be chiefly through the dam, and from the nature of the soil and the lay of the land would, I think, find its way to the stream before it reaches the plaintiff's land. Nor am I able to say in advance that the combined loss attributable to evaporation and seepage is such as to preclude the defendants from creating a pond on their own land. See *Embrey* v. *Owen*, 6 Ex. 353; *Baily & Co.* v. *Clark Son & Morland*, [1902] 1 Ch. 649, 664; *Kensit* v. *Great Eastern R.W. Co.*, 23 Ch. D. 566, 569.

The result of my examination of the authorities, as applicable to the facts in this case, is, that the defendants fail to make good their claim to an easement either under the statute or by way of lost grant, and that they are limited in their claim to their right to use the water as riparian proprietors; while, upon the other hand, the plaintiff's claim for relief is too wide, and the form of the judgment, while not giving all that the plaintiff asked, might imperil the right of the defendants to the reasonable use of the stream as riparian proprietors. The form of the judgment below should follow as nearly as may be the order made in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L.R. 7 H.L. at p. 715. It should declare that the plaintiff, as owner of the lower tenement, being part of lot 31 in the 1st concession of Markham, east of Yonge street, is entitled to the waters of the stream called in his claim the Don river, to flow down to his tenement, subject to the ordinary and reasonable use of the said stream and waters by the defendants as riparian owners higher up upon the said stream, and that the threatened use of the said waters to supply water to Thornhill and the surrounding country and to the sanitarium north of the defendants'

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premises is not within such ordinary and reasonable use, and that the said defendants be restrained from so doing.

On the question of costs, also, I think the *Swindon* case must govern. I entertain no doubt that the defendants' purpose was to use the water in a manner to which they were not entitled, by diverting it to purposes of use beyond the premises of the defendants. The defendants have failed upon the main issue; and, while the above variation should be made in the decree, the respondent is entitled, as was said in the *Swindon* case, in substance to succeed, and to have his costs of appeal.

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Leitch, J.
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SUTHERLAND, and LEITCH, JJ., concurred; RIDDELL, J., *dissenting*.

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Saskatchewan Supreme Court, Newlands, Brown, and Elwood, JJ. November 28, 1914.

1. NEW TRIAL (§ II—8)—CRIMINAL CASE—MISDIRECTION AS TO LAW.

Where the trial Judge erred in his charge to the jury as to the validity of a seed grain mortgage in question on a false pretence charge, a new trial should be ordered by the appellate Court if it considers that the jury may have been influenced to convict by that portion of the charge.

2. CHATTEL MORTGAGE (§ II C—16)—FUTURE CROP—SEED-GRAIN MORTGAGES IN SASKATCHEWAN.

A valid chattel mortgage can be taken in Saskatchewan for the price of seed grain sold *bonâ fide* for seed purposes on any crop to be grown by the mortgagor whether the same be grown from the seed sold or not.

3. FALSE PRETENCES (§ I—10)—INFERENTIAL PRETENCE WITHOUT EXPRESS WORDS.

False pretences may be founded on the false idea conveyed fraudulently by the accused; it is not requisite that the false pretence should be made in express words.

[*R.* v. *Cooper*, 13 Cox C.C. 617, 46 L.J.M.C. 219, and *Edgington* v. *Fitzmaurice*, 29 Ch.D. 459, referred to.]

Statement.

CROWN case reserved by Lamont, J.

H. E. Sampson, for the Crown.

H. Y. MacDonald, K.C., for the accused.

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NEWLANDS, J.:—This is a case reserved by my brother Lamont for the opinion of this Court.

The accused was charged with obtaining a quantity of wheat by false pretences. The reserved case states:—

"The accused went to Koenig and asked him if he had any seed grain for sale, saying that he required 275 bushels to sow, that he had no money, but that he would give a seed grain mortgage for the purchase-price . . . The accused obtained 275 bushels altogether, and sowed on his farm 180 bushels. (He sold the balance the day after he got it.) Some time later the accused saw Parks (the owner of the wheat) and gave him a seed grain mortgage on the south-east of 20-27-25, west 2nd, and the north-west of 28-27-25, west 2nd. He had no interest whatever in the north-west of 28-27-25 . . . I instructed the jury that the statement made by the accused that he required 275 bushels to sow could be interpreted as a declaration on his part that he was farming in such a large way that he required 275 bushels to seed the land which he was sowing in wheat; and that the statement that he would give a seed grain mortgage for the price thereof implied that he was in a position to give a valid seed grain mortgage therefor; and that, if these were false to the knowledge of the accused and were made with the fraudulent intent of inducing Koenig or Parks to part with the wheat, and as a result thereof they did part with it, that they could find the accused guilty of obtaining by false pretences the wheat which he took to the elevator and sold. The jury found the accused guilty.

"The questions reserved for the Court are:—

"(1) Was I right in so instructing the jury?

"(2) Was there evidence on which the jury were entitled to convict the accused? (This question I reserve at the request of counsel for the accused.)"

The seed grain mortgage given by the accused was filed in the wrong registration district, and was therefore invalid against subsequent purchasers, and the accused, having assigned his interest in the crop, the mortgagee, Parks, was unable to recover the amount secured thereby. The learned Judge, in his charge to the jury, said:—

"For the purposes of this case I am not going to ask you to consider whether or not he had altogether parted with his

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interest for that year in the crop grown upon section 20. I am going to ask you to assume that, having an interest in the property he had a right to place a seed grain mortgage upon that land for whatever amount of seed was necessary to sow the south-east quarter of section 20; that, having done that, for the purposes of this case that seed grain mortgage was a valid mortgage to the extent of the grain sown upon that quarter section. What was that? You have the evidence of one of the witnesses before Hyde that there was 150 bushels sown upon the quarter section; but you have the evidence of Hyde, who was farming the land, although the accused actually sowed the grain, that he sowed 120 acres, and 1½ bushels to the acre, which would amount to 180 bushels of seed grain. Now, to give a seed grain mortgage upon the land he could only give, under the statute, a valid mortgage for what was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell, then that is obtaining seed by false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the south-east quarter of 20."

The statute, which the learned Judge referred to is the Chattel Mortgage Act ch. 144, R.S.S. Section 17 of that Act provides that no mortgage, etc., which is intended to have effect as a security on any growing crop or crop to be grown in future shall be valid except the same be made as a security for the purchase price of seed grain. Sub-section 2 provides that the affidavit of *bonâ fides* among the other necessary allegations shall contain a statement that the same is taken to secure the purchase price of seed grain, and sub-sec. 5 provides that the date of the purchase of the seed grain, the number of bushels purchased, and the price thereof per bushel, shall be stated in the mortgage as well as in the affidavit of *bonâ fides*. And this sub-section further provides that such a mortgage shall be a first and preferential security for the sum therein mentioned. The mortgage given contained these particulars as well as the affidavit of *bonâ fides*, and would have

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been a valid security as far as the south-east quarter of 20 was concerned if it had been filed in the proper registration district.

The learned trial Judge's opinion as expressed in his charge to the jury is that in order that a seed grain mortgage be valid, the seed grain, the price of which is secured by the mortgage, must be sown on the land covered by the mortgage, and that therefore the mortgage in question was valid only for the price of the 180 bushels sown on the south-east quarter of 20, and invalid as to the balance of the grain which the accused sold. Is this a correct interpretation of the statute in question? I am of the opinion it is not. The statute makes no mention of where the seed grain is to be sown. The mortgage to be valid must contain only, the date of the purchase of seed grain, the number of bushels purchased, and the price thereof per bushel, and the affidavit of *bonâ fides* which is taken by the mortgagee must contain the same information and a statement by him that the same is taken to secure the purchase price of seed grain. It was not, in my opinion, the intention of the Legislature that the seller should have to follow the grain to see that it was sown upon the land mentioned. This would be a practical impossibility unless the vendor sowed the grain himself. The sale must on his part be a *bonâ fide* sale of seed grain, and he must swear to that fact, but he is required to go no further, and if the requisites of the statute are complied with his security is a valid one. In this case the statute was complied with, and therefore the mortgage given by the accused was a first and preferential security upon the crop grown on the south-east quarter of 20.

Now, the inducement upon which the vendor sold the grain was that the accused would give him a valid mortgage for the price thereof, and as he was given this, there is no fraud on the part of the accused. As it subsequently turned out, this mortgage was no security, but that was the fault of the mortgagee. He filed his mortgage in the wrong registration district, and it was therefore invalid as against subsequent purchasers for value. As this state of affairs could not have been in the contemplation of either party at the time of the sale of the grain or the giving of the mortgage, it does not affect the question I am considering.

The learned Judge was therefore wrong in telling the jury:—

"Now, to give a seed grain mortgage upon the land he could

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only give, under the statute, a valid mortgage for what was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell, then that is obtaining seed by false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the south-east quarter of 20."

What the reasons of the accused were for including the quarter of 28 in which he had no interest in the mortgage are not given, but the fact that this quarter was included would not invalidate the mortgage on the quarter that he owned and on which a crop was sown. At the time he purchased the wheat no land was mentioned. He simply said he would give a seed grain mortgage for the price. This was, in my opinion, the inducing cause for the sale of the wheat to him. Subsequent events shew that at the time he made this statement he did intend to give a valid seed grain mortgage for the price, and it was therefore not a false pretence. The amount of wheat he wanted would have nothing to do with the sale if he could give a valid seed-grain mortgage for the price, and therefore if it was not made to induce the vendor to sell him the wheat it was not a false pretence.

I am of the opinion that the learned Judge was wrong in instructing the jury as he did, and that both questions should be answered in the negative.

The conviction should therefore be quashed.

Brown, J.

BROWN, J. (after stating the case reserved):—Dealing first with the second question submitted, the following evidence of Koenig shews what actually took place:—

"Q. What took place between you and him (the accused) at that time? A. He came and asked me if I had any wheat to sell. I told him I had. He said, 'I would like to have 275 bushels of wheat, to sow.' He said he didn't have the money to pay for it, but said he would give a seed grain mortgage on it. I told him I could not sell it to him until I seen Mr. Parks, the agent."

After Koenig had seen Parks he again interviewed the accused, and the following evidence shews what occurred:—

"His Lordship: Well, you say he asked you then, 'Have you seen Mr. Parks?' and you said to him, 'Yes, you can have it under that condition.' Is that exactly the way it was put? A. Yes, that is the way it was put."

A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation: Criminal Code, sec. 404. To fully appreciate the force of the language used by the accused, it is necessary to have in mind sec. 17 of the Chattel Mortgage Act, ch. 144, R.S.S., and which, in view of another phase of this case, it seems to me advisable to quote in full:—

"17. No mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer or assignment hereafter made, executed or created, and which is intended to operate and have effect as a security shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part be valid except the same be made, executed or created as a security for the purchase price and interest thereon of seed grain.

"(2) Every mortgage or incumbrance upon growing crops or crops to be grown, made or created to secure the purchase price of seed grain shall be held to be within the provisions of this Act, and the affidavit of *bonâ fides* among the other necessary allegations shall contain a statement that the same is taken to secure the purchase price of seed grain.

"(3) No mortgage or incumbrance to secure the price of seed grain shall be given upon any crop which is not sown within one year of the date of the execution of the said mortgage or incumbrance.

"(4) Every registration clerk shall be entitled to receive the same fees for his services as provided for under sec. 35 of this Act.

"(5) Every such seed grain mortgage so taken and filed shall not be affected by or subject to any chattel mortgage or bill of sale previously given by the mortgagor or by any

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writ of execution against the mortgagor in the hands of the sheriff at the time of the registration of such seed grain mortgage but such seed grain mortgage shall be a first and preferential security for the sum therein mentioned; the date of the purchase of seed grain, the number of bushels purchased and the price thereof per bushel must be stated in the mortgage as well as in the affidavit of *bonâ fides*."

The accused wanted grain; he had no money to pay for same; but by his statement he evidently knew that he had the right to give a chattel mortgage on his crop to be grown to secure the purchase-price thereof. Under the circumstances, what meaning is the language which he used in getting the grain reasonably capable of conveying? It seems to me that it might be said, as stated by the learned trial Judge, that he thereby represented that he was farming in such a large way that he would require during that year for seed wheat 275 bushels, or, to say the least, that his present farming prospects and plans were such that he would require that amount of grain for seed. Taking the interpretation which is more favourable from his point of view, I am of opinion that the language used would constitute a false statement of fact within the meaning of the Code, assuming, of course, that he had no such prospects or plans as suggested. In *Reg.* v. *Cooper*, 13 Cox C.C. 617, 46 L.J.M.C. 219, the accused was charged with falsely pretending that he was a dealer in potatoes, and as such dealer, in a large way of business and in a position to do a good trade in potatoes and able to pay for large quantities of potatoes, as and when the same might be delivered to him. The only evidence thereof was the following letter from the prisoner to the prosecutor:—

> "Dear sir:—Please send me one truck of regents and one truck of rocks as samples at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours truly, William Cooper.
>
> "P.S.—I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on."

It was held that the false pretences alleged were proved, the letter reasonably conveying to the mind the construction put

upon it in the indictment. Lord Coleridge, C.J., is reported at p. 620 as follows:—

"The question for the Court, as I understand the case, is whether there was evidence upon which the false pretences alleged in the indictment could fairly be sustained. The indictment alleges that the prisoner falsely pretended that he was a dealer in potatoes, and as such dealer then was in a large way of business, and that he was in a position to do a good trade in potatoes, and that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that a large quantity of potatoes was obtained by means of those false pretences. It is not contended by the prisoner's counsel that if the false pretences were truly alleged in the indictment they were not negatived by the evidence. The question is whether the letter set out in the case, which was the only evidence of the false pretences, sustains the allegations thereof in the indictment. At first I was under the impression that it was enough for the prisoner to shew that the false pretences alleged to be conveyed by the letter to the prosecutor did not necessarily arise from the letter, but if the letter would bear an innocent construction the charge would not be made out; but upon consideration I am satisfied that that was a mistaken view, and that it was a question for the jury whether the false pretences alleged did or did not reasonably arise from the letter. I have no desire to protect persons who conduct their business in a loose and careless manner, but at the same time we must be guided in our decisions by the principles of the criminal law. The true principle applicable to this case was well enunciated by Blackstone, J., during the course of the argument in *Reg.* v. *Giles*, 10 Cox C.C. 44: 'It is not requisite that the false pretence should be made in express words, if the idea is conveyed.'"

Denman, J., at p. 622, says:—

"In *Reg.* v. *Giles*, 10 Cox C.C. 44, the prisoner pretended that she had power to bring the prosecutrix's husband back, and that was held to be a statement of fact. That warrants us in holding that where a man is not in a position to do what he professes he will do at a given time, he is making a false

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statement of fact. The indictment charges that the prisoner falsely pretended that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that pretence, I think, is proved by the letter." And Pollock, B., on the same page, says:—

"Having heard the whole of the argument, I have come to the conclusion that the conviction should be affirmed. It is not sufficient for the prisoner to shew that the letter might bear another meaning, if it is reasonably capable of bearing the meaning imputed to it in the indictment. It is the duty of the prisoner to shew by special circumstances that it bore the construction he contends for. I think that the false pretences charged may be fairly inferred from the letter, and that the conviction should be affirmed."

In the case of *Edgington* v. *Fitzmaurice*, L.R. 29 Ch.D. 459, at 483, Bowen, L.J., is reported as follows:—

"There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

The evidence goes to shew that neither at the time the wheat was obtained nor at any time thereafter did the accused have any need for 275 bushels of seed wheat. As a matter of fact, he had only a quarter-section of land, and even had he cultivated the whole quarter and seeded it in wheat he would not have required 275 bushels. He apparently had only 120 acres under cultivation, and in order to sow that amount required only 180 bushels of grain. This, together with the very important evidence that he, almost immediately after the purchase, sold a large quantity of the grain, goes to shew that the representations of the accused were false and were fraudulently made. The accused gave a mortgage on the 120 acres actually sown to secure the whole of the purchase-price, and this, in my opinion, constitutes a valid mortgage for the whole price to the full extent of the grain grown on the 120 acres. But it will be necessary for me to deal with this point at greater length when I am considering the first question

submitted. The representations made were such that their truth or falsity was a material element in the value of the security promised, and can, I think, be fairly said to have been an inducing cause to the vendor to part with his grain. The vendor would have a right to expect that the accused would sow enough land to require the 275 bushels as seed, and that the chattel mortgage could and would be given on the grain to be grown on that amount of land. In the case of *Edgington* v. *Fitzmaurice*, *supra*, Bowen, L.J., at p. 483, says:—

> "Then the question remains—Did this misstatement contribute to induce the plaintiff to advance his money? Mr. Davey's argument has not convinced me that it did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact."

As to the second question, therefore, I am of opinion that there was ample evidence on which the jury could convict.

Dealing with the first question submitted, the learned trial Judge in his charge to the jury used the following language:—

> "Now, to give a seed grain mortgage upon the land he could only give, under the statute, a valid mortgage for what was used for seed grain purposes, and if he bought more wheat than what he needed for seed grain purposes, and you are satisfied that at the time he bought it he knew he was not going to use it for seed grain purposes, and that he could not give a valid seed grain mortgage for that grain which he was going to sell, then that is obtaining seed by false pretences to the extent which he bought over and above the amount that was bought that was necessary to sow the south-east quarter of 20."

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The consideration of this portion of the charge requires an examination of sec. 17 of the Chattel Mortgage Act above quoted. The object aimed at by the Legislature, as appears from an examination of this section, is in my opinion to enable farmers who are in need of seed grain and who are not in a position to pay cash for the same to nevertheless secure sufficient for their need. They are put in the position of being able to give to the vendor security on crops not yet in existence, and this security is made preferential. There is nothing in the language of the statute which would confine the security given to the crop grown from the seed actually furnished. To so construe the statute would mean that the vendor of seed grain would, at the risk of losing his security, or, having no security at all, be compelled to see that the grain sold was actually sown. This would be practically impossible unless the vendor himself sowed the grain. In that view of the law, I venture to suggest that very few men would want to part with their grain, and what appears to me to be the very object of the statute would be defeated. I am of opinion that it is sufficient if the vendor *bonâ fide* sells the grain for seed purposes, and that he can take a valid security for the purchase price on any crop whether the same be grown from the seed sold or not. The accused would therefore be able to give a valid mortgage on the crop grown on the south-east quarter of section 20 to secure the price of all the grain purchased.

I am therefore of the opinion that the learned trial Judge erred in his charge to the jury on this point, and as the jury may have been influenced by that portion of the charge, a new trial should be ordered.

ELWOOD, J.

ELWOOD, J., concurred with BROWN, J.

New trial ordered.

NICHOLSON v. GRAND TRUNK R. CO.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ. A. December 21, 1914.

1. COSTS (§ II—37)—SEVERAL DEFENDANTS; SAME CONTESTATION—THIRD PARTY NOTICE—AS BETWEEN CO-DEFENDANTS.

Where one of two defendants sued in negligence for flooding lands is found solely responsible for the injury but had served a third party notice claiming indemnity against his co-defendant and offered evidence at the trial to throw the blame on such co-defendant, the costs of the co-defendant may be ordered against the party so found responsible for the injury.

Statement

APPEALS by the defendant railway company and by the defendant Scott from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, in favour of the plaintiff as against the appellants, but dismissing the action as against the defendant Mills; the plaintiff did not appeal as to Mills.

The plaintiff was the owner of a lumber-yard and several buildings adjoining the Strathroy station of the defendant railway company. The defendant Mills was the owner and the defendant Scott the lessee of a coal-shed in the same neighbourhood; and the action was brought to recover damages for the flooding of the plaintiff's property, arising from obstructions in a drain passing through the parties' respective properties.

Defendant Scott's appeal was allowed; railway company's appeal was dismissed.

T. G. Meredith, K.C., for the appellant Scott.

D. L. McCarthy, K.C., for the appellant railway company.

J. M. McEvoy, for the plaintiff, the respondent.

The judgment of the Court was delivered by

Maclaren, J.A.

MACLAREN, J.A.:— . . . The railway track at Strathroy runs east and west. The plaintiff's lands which were flooded adjoin the station grounds on the north. On the railway side of the boundary-line, the defendant company has a drain which conveys the water from the right of way westward to the river. It was constructed with a galvanised iron pipe, 20 inches in diameter, which runs close to the plaintiff's southern boundary, then passes under Frank and Metcalfe streets at their intersection, and 130 feet farther westward runs under the defendant Scott's

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coal-shed. The top of the pipe is slightly below the surface of the ground. It was originally a continuous tube for the distance above-mentioned, but for some time before the flood in question it had been out of repair—two sections of over 100 feet each adjoining the plaintiff's land having been taken up, leaving an open ditch there about 2 feet deep; a third section, of about 40 feet, east of Scott's shed, being in the same plight. In ordinary high water, the mouth of the pipe or culvert under Frank and Metcalfe streets was often blocked by pieces of lumber, bark, and other refuse, and the railway men from time to time cleaned these out, and drove in stakes to prevent them going into the pipe.

In the latter part of March, 1913, there were two floods, of which the plaintiff complained to the railway agent, and the obstructions then at the mouth of the pipe were removed and missing stakes replaced. On the 3rd April, there was an unusual rainfall. The next morning, the plaintiff's land, buildings, and lumber were flooded. He complained again to the railway agent, who sent his men to remove the obstruction. East of Frank street, the water was considerably above the pipe and only 2 inches lower than the sidewalk. They found the water at the west end of Scott's shed lower than at the east end, and concluded that the obstruction was under this shed. The coal was removed by the railway men and Scott's men, and it was found that the flooring and stringers had dropped down and had broken the pipe. The coal and the broken flooring were cleared out by 3 o'clock in the afternoon, and the water began to go down. By the next morning, the water had entirely subsided.

The railway men were of opinion that the obstruction under Scott's shed was the cause of the flooding of the plaintiff's premises. . . . They judged that the water west of the shed was about 18 inches lower than on the east side. The removal of the coal proved that they were right in their belief that there was an obstruction under the shed; but they were manifestly mistaken in their idea that this obstruction was the cause of the flooding of the plaintiff's premises. The measurements and levels taken at the time by the witness Manigault, a civil engineer of the town, shewed that at the height of the flood the

water on the plaintiff's premises was two and a half feet higher than at the east end of Scott's shed; and there is no evidence to the contrary. All the evidence for all parties is to the effect that the land between Metcalfe street and the shed was not flooded, and that the open ditch east of the shed did not overflow, while east of Metcalfe and Frank streets it was entirely flooded, and rose to within 2 inches of the top of the sidewalk. . . .

It is proved by the plaintiff and not contradicted that the stakes that the railway company had from time to time placed at the mouth of the pipe east of Frank and Metcalfe streets were not there for a week before the flood. The evidence is not clear as to the exact time of the subsidence of the flood. . . .

The defendants Scott and Ellis produced two civil engineers, who examined the premises and who heard the evidence. They gave expert evidence in corroboration of that of Manigault, that there must have been some obstruction in the pipe or culvert under the street. I do not see that expert evidence was necessary to prove this, if the uncontradicted evidence of Manigault as to the levels is true, unless the law of gravitation was suspended, or unless it is not true that water will, if unobstructed, find its own level. If this pipe or culvert of 20 inches diameter was not obstructed, but the water had a free flow, then it could not be possible that the water on the west side of the street would be $2\frac{1}{2}$ feet lower than on the east side, and that the open ditch between the street and the coal-shed had not overflowed its banks, and this was proved by Manigault and not contradicted, but corroborated as to the latter statement by the evidence given on behalf of the railway company.

I am, consequently, of opinion, that the appeal of the defendant Scott should be allowed and the action dismissed as to him, and that the appeal of the railway company should be dismissed.

As to costs, those connected with the appeal of the railway company should follow the ordinary rule. As to the costs of the defence and appeal of Scott, the circumstances are entirely exceptional. The railway company gave a third party notice, and claimed indemnity over against him. In the circumstances, I think that it was quite reasonable for the plaintiff to bring a

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joint action against the two defendants rather than to have proceeded against one of them, and, if he failed, then to proceed against the other. This latter course might possibly result in his failing to recover against either, even if the fact were that one of them, or perhaps both, had caused him the injury. . . .

[Reference to *Besterman* v. *British Motor Cab Co.*, [1914] 3 K.B. 181, per Vaughan Williams, L.J., at p. 186.]

In the present case, the railway company brought witnesses to prove that the flooding complained of was caused by the obstruction under the defendant Scott's coal-shed; and having, in my opinion, failed to establish this, it ought, in consequence, to pay the costs of its co-defendant both in this Court and in the Court below, to the exoneration of the respondent; the respondent's costs to include all costs incurred by reason of Scott having been joined as a defendant.

ONT.
S. C.

BAIRD v. CLARK.

Ontario Supreme Court, Middleton, J. December 23, 1914.

1. SALE (§ II C—37)—WARRANTY—FOXES—FITNESS FOR BREEDING—INTERPRETATION.

On the sale of a pair of black foxes for breeding purposes with an undertaking to make an exchange should the buyer "fail to get a good black male from either pair mated" to other foxes owned by the buyer, there is merely a warranty that the quality of the foxes were such that as the result of breeding in the manner specified in the contract one good black male would be found among the progeny; there is no undertaking to insure the lives of the foxes and there is no right on the part of the buyer to demand another male when the female of the pair died and the male was successfully mated, but the progeny were destroyed by the mother fox before they could be removed from the kennel.

Statement

ACTION for damages for breach of a contract, tried without a jury at Ottawa.

Action dismissed.

G. F. Henderson, K.C., for the plaintiff.

J. A. Ritchie, for the defendant.

Middleton, J.

MIDDLETON, J.:—The plaintiff purchased a pair of black foxes from the defendant, on the terms of a contract evidenced in

writing. The plaintiff William Baird, acting on behalf of himself and his co-plaintiffs, wrote on the 3rd October, 1913, to the defendant, agreeing to purchase the foxes for $6,000, "on the understanding agreed upon, i.e., should we fail to get a good black male from either pair mated, as we said, your male with our old bitch, and our young male with your female, then you agree to exchange the male you are sending for a good silver black male next year." The terms of this letter being expressly accepted by the defendant, the foxes were shipped and paid for. This action is brought upon the theory that there has been a breach of the undertaking above quoted.

In order that the situation may be understood, it is necessary to state that the plaintiffs were the owners of a pair of foxes, and, for the purpose of avoiding undue inbreeding, desired to purchase this other pair from the defendant.

Foxes mate only in the month of February, and in order that mating may be successfully accomplished it is necessary that the mates should become acquainted for some considerable time previously.

Upon the receipt of these foxes, the plaintiffs attempted to mate in the manner contemplated, and mating was successfully accomplished so far as one pair was concerned, and in due course the female whelped.

At the time of the birth of their young, foxes are very nervous, and the female is apt to make away with her young if she is in any way disturbed. The young do not leave the kennel for a month after birth. I do not think that there can be any doubt, upon the evidence, that live foxes were born, but this litter was never seen, and no doubt was destroyed by the mother.

The other pair was not successfully mated, as the female died early in December.

I am inclined to think that death took place from natural causes, but this does not appear to be material. There was a suggestion that the plaintiffs were negligent in their treatment of these foxes, but there is no foundation for this suggestion. The one thing certain is that mating never took place.

Two entirely opposite theories are put forward as to the true construction of the document in question . The plaintiffs con-

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tend that the intention was that, upon the purchase of these foxes from the defendant, they should in the result secure a good black male. The foxes purchased were not pure black, but cross foxes. What the plaintiffs desired was a good male for breeding purposes, and they contend that this contract was to ensure this. The defendant, on the other hand, contends that all he was undertaking by the contract was to guarantee the quality of the foxes to be such that, as the result of breeding in the manner indicated, one good black male would be found among the progeny.

The case has given me a good deal of anxiety, and I find it by no means easy to determine the issue thus raised; but in the result I have come to adopt the view of the defendant. I do not think that the contract can be construed as an undertaking on his part to insure the lives of these foxes. Had both foxes been destroyed by inevitable accident immediately after delivery, the position would be the same. I think it reasonably clear that the plaintiffs could not then have demanded the delivery of the silver black fox.

As there was no mating in the case of the one pair, and as it is unknown what the result of the mating was in the case of the other pair, the plaintiffs have, I think, failed to prove their case.

The case is free from any suggestion that the contract was a tricky one, for the defendant simply accepted the drafting of the plaintiffs, and I fear that what the plaintiffs now ask is that I should make a better and more favourable bargain for them, placing all the risk in the event of failure to mate upon the defendant. The answer to the action is, shortly, that "it is not so written in the bond."

I trust that the defendant may be willing to forego costs. I can see no reason for refusing to award them, if asked.

TOWN OF CARMANGAY v. SNYDER.

ALTA.

S. C.

Alberta Supreme Court, Stuart, J. October 31, 1914.

1. PARTIES (§ III—120)—BRINGING IN; THIRD PARTY—VENDOR AND PURCHASER—CROP AGREEMENT—TAX CLAIM.

A third party notice by the purchaser under a "crop agreement" claiming indemnity against his vendor in an action brought by a municipality for taxes, will not be struck out although the agreement is silent as to who shall pay the taxes.

Statement

MOTION by third party to strike out the third party notice.

The motion was refused.

A. B. Hogg, for the defendant.

F. C. Moger, of *Taylor, Moffat & Moger*, for the third party.

Stuart, J.

STUART, J.:—This is an application by the third party to strike out the third party notice. The town of Carmangay had sued the defendant Snyder for taxes on a certain parcel of land said to be included in the town limits, or possibly within the limits of the school section. At any rate Snyder was assessed for the taxes, and he claims that the third party, Carman, was bound to indemnify him as to the taxes. The situation is this, that the third party, Carman, had, by an agreement in writing, which was dated September 22, 1908, agreed to allow Snyder to have possession of the land for 10 years, and Snyder agreed to crop it and to pay one-half of the proceeds of the crop each year to Carman. It was really what is generally known as a crop agreement. Ultimately the agreement provided that Snyder might buy the land at $26 an acre, and that the payments made through the crop should be credited on the total sum. It is contended by Snyder, the defendant, that, under the terms of this agreement, he had become the tenant of Carman, the owner, and that, inasmuch as the relation of landlord and tenant existed between them, there was an implied obligation upon the landlord to indemnify the tenant for taxes. The peculiar thing about it is, as far as I understand the case and the law, that counsel for the defendant took a position which was most favourable for the third party, and counsel for the third party took a position most favourable for the defendant. Counsel for the defendant says he was the lessee, and, therefore, he was entitled to be indemnified by the landlord. The trouble about that is,

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if the agreement is to be interpreted as a lease at all, it must be a lease for 10 years, and if it is a lease for 10 years, then it comes under the Real Property Act, which, by sec. 55, enacts that there is an implied covenant by the lessee to pay the taxes. In my opinion, however, it is not a lease at all, but merely a vendor and purchaser agreement. It is impossible to say from the terms of the agreement that there was any certain annual payment agreed upon which could be treated as a reasonable rental, and certainly no right of distress for non-payment. I think, therefore, that it was not a lease, but an ordinary vendor and purchaser agreement, and, as it does not say anything about the taxes, I think the vendor is possibly liable to pay them as between himself and his purchaser. The vendor is bound to give a good title free of all encumbrances, and taxes are an encumbrance on the land. And without, therefore, expressing any final opinion on the matter, my opinion is that the application should be dismissed, and the matter should go to trial between the defendant and the third party, and the liability of the third party to indemnify the defendant should be tried out in Court. I understand that the plaintiff has judgment against the defendant already, and is, therefore, not concerned in this at all. The application will, therefore, be dismissed, and the costs will be costs in the cause as between the defendant and the third party.

Application dismissed.

B. C.

S. C.

HUMBER v. McCONNELL.

British Columbia Supreme Court, Murphy, J. October 20, 1914.

1. SALE (§ III C—70)—RESCISSION — INNOCENT MISREPRESENTATIONS — LACHES—EFFECT.

Where the buyer by his own acts so deals with the property purchased as to put it out of his power to return it to the seller in like condition as when it was bought, and this after ascertaining that the seller had made material misstatements as to the subject-matter in the negotiations, damages will not be awarded in the absence of any warranty if there was no fraud and the statements were made in a belief of their truth, but *semble*, the buyer might have rescinded had he acted promptly on learning of the misrepresentation.

Statement

ACTION for misrepresentations on the sale of a baseball franchise.

The action was dismissed.

McDiarmid, for plaintiff.
Higgins, for defendant.

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MURPHY, J.:—Three misstatements of fact are relied upon, *viz.*: that the fence advertising had not been let; that the debts of the Victoria Baseball Club Ltd. did not exceed $2,000 at the time of the sale; and that the taxes were all paid. As to the first, what was said was true; Gibson had indeed, apparently, assumed to deal in some way with the fence advertising, but he had no authority whatever for such action. As to the second, if the question of taxes be excluded, I am not convinced it was untrue. The claim of Delma would, if correct, make the amount exceed $2,000, but it was not shewn to be a just debt. True, it was ordered paid by the league, but apparently the making of such order was not contested by Kingham, and McConnell was not heard. With the local improvements taxes included, the club's indebtedness was clearly in excess of $2,000. I find that what was said by McConnell about taxes led plaintiff (and would have led any person) to believe that all taxes of any kind were paid. I find this statement was untrue but was made by McConnell in the belief—and the reasonable belief—that it was true. I find plaintiff would not have entered into the bargain had he known the truth about the taxes. There was no warranty, express or otherwise, by McConnell and, if the plaintiff can succeed, it must be on the ground of innocent misrepresentation. Whether or not he might have so succeeded if he had repudiated the transaction when he first became aware of the truth, which was within a couple of days of the closing of the bargain, it is not necessary in the view I take to decide. What he did do was to enter into negotiations, without prejudice, which lasted for some time, and throughout which and for some time afterwards continued to treat the team as his property. Taking it as he did at the beginning of the season, it is obvious from the evidence that it speedily became a different property from what it was when he got it and it became such by virtue of decisions made by him as to the release of some players and the purchase of others. In short, he, by his own acts, put it out of his power to return McConnell what he had bought and that after he had full know-

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ledge of the misstated facts. He did indeed issue a writ, but he failed to serve it, though defendants were in Victoria for several days after he had taken this step, and were there for one full day after all negotiaions had ceased. At the time defendants were served the shares sold had become valueless for the club had not only forfeited its $1,000 deposit with the league, but had lost its franchise. Unless fraud be proven, as I understand the law, a plaintiff cannot succeed under such circumstances. As I expressly find there was no fraud, the action is dismissed.

Action dismissed.

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RADFORD v. STANNARD.

Alberta Supreme Court, Scott, Stuart, and Simmons, JJ.
December 18, 1914.

1. PRINCIPAL AND AGENT (§ III—31)—FIDUCIARY CAPACITY; CONFLICT OF INTEREST—AGENT'S NON-DISCLOSURE—PRINCIPAL'S REMEDY.

A person in a fiduciary relation is not allowed to put himself in a position where his duty and interest conflict; he is bound to communicate all the information he has acquired respecting the property which is the subject of the fiduciary transaction, and may be held liable to account for the share of profit which in bad faith he obtained by the amount of which the person to whom he owed the duty would have benefited had disclosure been made.

[*Bray* v. *Ford*, [1896] A.C. 44; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, applied.]

Statement

APPEAL from judgment of Beck, J.

The appeal was dismissed.

C. H. Grant, for the plaintiff.

H. H. Hyndman, for the defendant.

Scott, J.
Simmons, J.

SCOTT, J., concurred with SIMMONS, J.

Stuart, J.

STUART, J.:—It is with much hesitation that I simply refrain from dissenting in this case. No doubt the appeal is upon a question of fact, but I have examined the evidence with considerable care and I feel great difficulty in finding anything which could reasonably be said to support an inference of a definite agreement that Stannard should get a one-fourth interest in the dredge.

I am not sure of the legal ground upon which the learned trial Judge decided that the plaintiff was liable. But certainly

any such liability must rest upon some agreement of some kind. For myself I can find nothing but vague conversations and indefinite and inconclusive negotiations throughout the whole testimony of Stannard with the exception of a passage in his cross-examination.

In view of the defendant's clear admission there that there was never anything definite agreed about it (which I think meant much more than that it was not put into writing) it is difficult for me to see how any agreement certain and definite enough to found liability upon can be inferred. Where the defendant's evidence was so uncertain as to times and places, and where in one or two places it was so erroneous as to time, as, for example, when he repeated positively that it was about June 4, that he was told by Radford that an offer admittedly not made until June 20, had been accepted and gave special reasons for his certainty as to the date, it seems to me that a definite statement of the words used by the parties at the conversation at which he claimed an agreement had been arrived at should be demanded of a person in his position. Obviously everything would depend upon the terms of that conversation, and it should be for the Court, not the witness, to decide whether an agreement had been made or not. Then, when we have him saying that there never was anything definitely agreed and waiting for months after, he knew of the resale, and knew of the profit before he made any claim, it seems to me that what ought to be considered is whether, if there has been a loss, the other alleged parties could have upon Stannard's testimony made him liable for his share of that loss, supposing that testimony had been given by a third party. Clearly they could not have done so although when given by Stannard himself, it might have been taken as an *admission*, which would be another matter.

And not only do I find nothing in this evidence to support an agreement between the four of them, but I am unable after repeated readings to discover any assertion by Stannard that Radford had agreed to act for him and to make an agreement with the other two on Stannard's behalf that Stannard should have an equal interest with Radford. It may be true that when two men agree to buy property jointly, there is a presumption

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even if nothing is said about it that they are to buy on equal shares, each one-half. But certainly it cannot be said that there is such a presumption when the intention is to become joint purchasers with two other persons who are not parties to the conversations. As a matter of fact Radford acquired more than a half share. But supposing he had acquired less than a half share would there have been a presumption that he and Stannard were to each have an equal share in the absence of any evidence? I think certainly not, when it was understood that two other persons were to join them. To apply again the test already used; can it be asserted that if there had been a loss, Radford could have called upon Stannard to bear one half of his share of the loss upon such evidence as was presented? I cannot believe that such a contention could be maintained.

It may be, if there had been sufficient shewn to create an agreement, that Stannard might have left it to Radford as his agent to carry out the details and if Radford failed to perform the trust imposed upon him and accepted, he would be liable. But my difficulty lies in finding any basis in the way of an injured agreement which Radford was to carry out on Stannard's behalf.

However, as the other members of the Court entertain a contrary view, I shall not express any formal dissent.

Simmons, J.

SIMMONS, J.:—This is an appeal from Beck, J., wherein he allowed the defendant the sum of $1,260.44 and $37.56 interest as his share arising out of the purchase and sale of a dredge. Stannard says Radford offered to sell him Radford's teaming outfit in March, 1912. There was at that time a proposition under consideration by Radford, Stannard and one Pheasey to purchase the plant of the Edmonton Concrete Co. Ltd., and Radford agreed with Stannard to enter into a contract to purchase the plant on condition that Stannard would purchase Radford's outfit of teams and wagons used for hauling gravel. The sale of Radford's team and plant to Stannard was made, but a hitch occurred in the negotiations because Pheasey who was one of four shareholder directors of the Edmonton Concrete Co. Ltd. could not get the company to meet and conclude the sale.

The offer of the purchasing syndicate was made by letter of June 20, 1912, and signed by Radford, but it is admitted he made the offer on behalf of the purchasing syndicate. On May 25, a letter was written signed by Radford and Stannard addressed to the Edmonton Concrete Co. Ltd., withdrawing the offer to purchase. Radford says that subsequent to that date Stannard had nothing to do with the negotiations and Radford, Pheasey and one Batson entered into an agreement to purchase a part only of the plant of the Edmonton Concrete Co. Ltd., namely the dredge.

Stannard says the letter of withdrawal of May 25, was written for the purpose of making the Edmonton Concrete Co. hurry up and was not intended by the proposed purchasing syndicate as a termination of the negotiations as between the members of the purchasing syndicate to purchase the "Edmonton Concrete Co. Ltd." plant.

Stannard says Radford agreed to represent him at the meeting where a sale of the dredge was made to the purchasing syndicate and that next day Radford said to him, "Will you go in and buy the dredge along with Pheasey and Batson and I for $14,000" and I said "Yes, you bet I will." Stannard says about two or three days after Radford met him on the street and told him they had accepted our offer and gave us three payments, next fall, July, and the following fall. One Robertson was Radford's bookkeeper when Radford sold his team and outfit to Stannard, and Robertson then entered into the employment of Stannard in the same office as Radford formerly occupied.

Robertson says that in May and June, 1912, after he entered the employment of Stannard that Radford was in the office very frequently and he heard a considerable discussion in relation to the purchase of the dredge and the impression he got from the conversations was that Stannard was a member of the purchasing syndicate.

The learned trial Judge accepted the statement of Stannard and it is corroborated to some extent by the bookkeeper Robertson. The dredge was re-sold by Radford, Pheasey and Batson at a profit and Stannard claims a half interest in the share of Radford in the profit of sale. Although Radford behind Stan-

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nard's back entered into an agreement with Pheasey and Batson in which the respective interests of the members of the syndicate are not consistent with the interests which were proposed to be allotted under the agreement which Stannard alleges this will not release Radford from his obligation to account to Stannard, accepting Stannard's version that there were negotiations in the first place to purchase the whole plant. These negotiations did not result in a sale, but resulted in a sale of part of the plant of the Edmonton Concrete Co. Ltd. During the progress of these negotiations, namely, immediately after the letter of May 25, Radford agreed to represent Stannard at the subsequent negotiations. The dredge was purchased and shortly afterwards re-sold at a profit.

It is an inflexible rule of a Court of Equity that a person in a fiduciary relation is not allowed to put himself in a position where his duty and interest conflict, *per* Lord Herschell, *Bray* v. *Ford*, [1896] A.C. 44, 51.

When standing in a fiduciary relation he is bound to communicate all the information he has acquired respecting the property, the subject of the transaction: *Emma Silver Mining Co.* v. *Grant*, 11 Ch.D. 918, 922.

He must take upon himself the whole proof that the thing is righteous: *Gibson* v. *Jeyes*, 6 Ves. 266.

Radford obtained an unrighteous advantage by concealing from Stannard the facts in regard to the sale of the dredge, and was enabled to do so as a result of the fiduciary relation and is properly held liable to account for one half of his profit. I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

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WATERS v. CAMPBELL.

Alberta Supreme Court, Scott, Beck, Stuart, and Walsh, JJ.
October 21, 1914.

1. GARNISHMENT (§ III—66)—PROCEDURE—APPEARANCE BY GARNISHEE—ISSUE AS TO GARNISHEE'S INDEBTEDNESS.

Where the garnishee enters an appearance to the garnishee summons and besides denying the debt alleges in the appearance that the unpaid purchase money under his contract to purchase lands did not constitute an attachable debt as the sale had not been completed nor title accepted, it is not competent for the judgment creditor to take out a summons to shew cause why the garnishee's appearance should not be struck out and judgment entered against him on the ground that the debt is attachable; the creditor's proper procedure is under

Alberta rule 654 to apply for an order fixing a time and place for summary trial or directing an issue.

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Statement.

APPEAL from the judgment of Simmons, J., dismissing an application by the plaintiff, the judgment creditor, made under an order to shew cause issued by His Honour Judge Taylor against the garnishees.

The appeal was dismissed.

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

C. C. McCaul, K.C., for defendant Campbell.

C. A. Grant, K.C., for garnishees.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—I think this appeal should be dismissed. The garnishee entered an appearance to the garnishee summons denying the existence of any debt and also alleging that, under a certain agreement of sale between the defendant, the judgment debtor, and the garnishees, part of the purchase money remained unpaid and was payable by instalments but that the garnishees, the purchasers, had not accepted title nor had the sale been completed, and that the garnishees would object that the moneys did not constitute an attachable debt. The plaintiff, the judgment creditor, thereupon obtained from His Honour, Judge Taylor, acting as local Judge of the Supreme Court, a chamber summons calling upon the garnishees to shew cause why their appearance should not be struck out and judgment entered against them for the amount of the plaintiff's judgment and costs on the ground that the debt due to the defendant from the garnishees was an attachable debt. The application was heard by my brother Simmons in vacation and was dismissed after hearing argument on behalf of the garnishees and the judgment debtor.

From this judgment the plaintiff has appealed. In my opinion, the plaintiff adopted a course not authorized by the rules. The present r. 654, which contains nothing materially different from the old rule so far as this application is concerned, states in effect that if the garnishee denies liability or claims that the debt is not attachable he shall enter an appearance giving his reasons,

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after which, on application of the plaintiff . . . on two days' notice given to the garnishee, the Judge may fix a time and place for summarily determining the question of liability or whether the debt is attachable as the case may be or may order that an issue . . . be tried.

The plaintiff did not adopt this procedure. Instead he seems to have attempted an application of old r. 103, which deals with applications to strike out the appearance of a defendant and to enter summary judgment. There does not appear to have been any application to fix a time and place for disposing of the matter summarily. Possibly, however, the parties may have tacitly assumed that there and then was as good a time and place as any. But certainly there was no material presented to the Judge below upon which the matter could be disposed of. The agreement referred to was not put in evidence. It is not before us now and we do not know its terms. In these circumstances I see no advantage in discussing a purely hypothetical case. Certainly the plaintiff was not entitled to the order asked for.

There is no reason why, after the dismissal of this appeal, the plaintiff should not take the proper course indicated by the rule I have referred to. The plaintiff should stand in the same position as in the case of a failure to get summary judgment under old r. 103. It is in my opinion quite unnecessary for us to direct an issue. Indeed there is an objection to giving such a direction because it is no doubt still possible if the agreement is produced to decide the matter summarily without a trial in open court. But the parties should be careful to have all relevant facts presented in some form to the Judge. There is a danger of something being overlooked where a summary hearing in chambers takes place.

The respondents should have their costs of the appeal.

Appeal dismissed.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Sutherland, and Leitch, JJ. June 15, 1914.

1. DOWER (§ I A—5)—RIGHT TO—NATURE AND EXTENT—DOWER ACT—CRITERION.

The object of sec. 23 of the Dower Act, 9 Edw. VII, Ont. ch. 39, was to place the widow as nearly as possible as to the amount she should receive in gross in lieu of an assignment of dower in the same position as she would have been were it possible to make an assignment by metes and bounds; subject to the qualification that she shall not have the benefit of permanent improvements made after the alienation by or death of the husband; it does not make one-third of the rental value at that time an absolute criterion nor enlarge her right in respect to dower.

[*McNally* v. *Anderson*, 9 D.L.R. 449, 4 O.W.N. 901, referred to.]

2. DOWER (§ II—34)—ASSIGNMENT FOR CREDITORS—UNASSIGNED DOWER.

Where a mill and machinery and plant belonging to the debtor had been removed in his lifetime by parties claiming under his assignment for creditors, in which his wife had not joined to bar dower, and under circumstances which at most would amount to permissive waste for which equity does not readily interfere, and which the wife would have no *locus standi* to prevent, she is not entitled to have the value of the buildings so removed taken into account on an award in gross in lieu of dower.

[*Wallace* v. *Moore*, 18 Gr. (Ont.) 560; *Robinet* v. *Pickering*, 44 U.C.R. 337, referred to.]

Statement

APPEAL from the judgment of MIDDLETON, J., fixing the amount of the plaintiff's dower.

The appeal was allowed, declaring the principle on which the dower should be computed.

E. D. Armour, K.C., for the appellant.

W. R. Meredith, for the plaintiff, respondent.

Clute, J.

The judgment of the Court was delivered by CLUTE, J.:—Appeal from the judgment of Middleton, J., on an appeal from the report of the Local Master at St. Thomas, upon a reference directed by the trial Judge to ascertain the amount due to the plaintiff for dower (9 D.L.R. 449, 4 O.W.N. 901).

The plaintiff's husband, James McNally, on the 10th May, 1899, made an assignment of his real and personal estate, including the lands in question, for the benefit of his creditors, to Stephen Pierce.

The wife did not join to bar her dower. At the date of the assignment, there was a mortgage, in which the wife had joined

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with the husband, which had in fact been paid off but not discharged. The question of the mortgage was disposed of by the trial Judge.

At the time of the assignment, there was upon the land a saw-mill, engine-house, machinery, plant and tools, a workshop, and a cooper-shop. The business carried on upon the premises was that of sawing lumber and manufacturing staves and headings of barrels. In October, 1907, Pierce sold and conveyed the premises to William Warnock, who subsequently sold to the defendant. Pierce had erected an additional building upon the property, which was removed in the lifetime of the husband, who died on the 22nd October, 1911, the plaintiff being then 65 years of age. The defendant erected upon the premises a house made of new material, which the Master finds was a permanent improvement. He also removed the main workshop and converted it into a terrace of three dwellings, and tore down the engine-house and saw-mill. The cooper-shop, engine-house, and their equipment were all disposed of before the death of the husband, and at his death the land was occupied on Cedar street by the new dwelling and the terrace. The Master finds that the value of the property as a saw-mill was decreasing on account of the scarcity of material. The rental value of the property as a going concern at the time of the assignment was put at $250 or $300, and the whole value of the property at that time was estimated by McNally and intending partners at $3,700 as a going concern.

In arriving at the value of the widow's dower, the Master took "into consideration the fact that the terrace which was upon the said lands at the time of the death of the husband was partly composed of material from the old buildings and partly from new material, and that labour had been expended upon its erection. The value of the land was given at from $500 to $550, and, taken together with the value of the material used on the place, the total value of the land and buildings out of which dower comes should be ascertained at $900, which when capitalised will amount to $116.48. In fixing the value of the lands and premises, which I have ascertained at the date of the death of the husband, I have allowed for everything which was upon

the lands at the time of alienation by the husband and which was incorporated in the new building, but have not allowed for permanent improvements, which would include the new building on lot 25, and such labour and new material as was used in erecting the terrace."

The principle upon which the computation was made by the Master was attacked before Middleton, J., who says in his judgment:—

"Prior to the statute which governs this case, the Dower Act, now found as 9 Edw. VII. ch. 39, sec. 23, the widow would have been entitled to take one-third of the rental produced by the property as it was on the date of her husband's death. By this statute it is provided that 'the value of permanent improvements made after the alienation of the land by the husband . . . shall not be taken into account; but the damages or yearly value shall be estimated upon the state of the property at the time of such alienation . . . allowing for the general rise, if any, in the price and value of land in the particular locality.' In case of the owner who has made improvements, the Legislature has substituted an arbitrary standard, 'the state of the property at the time of alienation.' The widow may shew a general increase of value, and so increase the amount coming to her; but she is not subject to having the amount cut down either by a general depreciation of the value of land, or upon any hypothetical view that apart from the improvements the value would have depreciated."

After referring to the rental value of the property at the time of alienation as from $300 to $350 a year, the widow being then 67 years of age, the learned Judge says: "Taking her share of the rental as $100 per annum, she would now be entitled to $722, on the basis of interest at five per cent., the legal rate, and also entitled to $200 for the two years which have elapsed since the death of her husband—a total of $922;" and the report of the Master was varied accordingly.

The part of sec. 23 of 9 Edw. VII. ch. 39 referred to by my brother Middleton was first introduced into the Dower Act, 32 Vict. ch. 7, by sec. 21, taken in part from 24 Vict. ch. 40, sec. 17, and came into force on the 1st February, 1869. It may throw

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some light upon the question of the construction to be put upon this section to consider the right of the widow to dower at common law and under 24 Vict. ch. 40.

In *Williams* v. *Thomas*, [1909] 1 Ch. 713, 720, the position of the dowress is very clearly stated by Cozens-Hardy, M.R.: "At law the dowress was entitled under Magna Carta to have an assignment of dower by metes and bounds within forty days after the husband's death. Until such assignment she had no right of entry upon and no estate in any part of the intestate's land, but after assignment she became tenant in dower of the portion assigned. In order to obtain assignment she had to issue a writ of dower. If she obtained judgment, dower was assigned by the sheriff, and thereupon she could recover possession by ejectment. Such a writ did not at common law entitle her to obtain damages or an account, but by the statute of Merton, 20 Hen. III., a right to damages against the deforcers was given to her. If, however, the heir died before the actual assessment of damages she could recover nothing, and, similarly, if she died before assignment of dower her representatives could get nothing, and if she died after assignment, but before assessment of damages, her representatives could not get damages. This procedure at common law was obviously very inconvenient and very inadequate to protect the dowress. The Courts of Equity claimed jurisdiction in the matter, but not only did the Courts of Equity assume jurisdiction, but they enlarged the widow's rights. They gave her one-third of the rents and profits from the intestate's death until assignment of dower, and they granted an account, . . . and in taking such account the heir in occupation of any part of the real estate would be charged with an occupation rent."

In England the widow is not entitled to dower in land which has been absolutely disposed of by her husband in her lifetime or by his will, and is practically confined to property in respect of which the husband dies intestate: Halsbury's Laws of England, vol. 24, para. 366; Dower Act, 1833. While the widow is entitled to be endowed immediately after her husband's death (*ib.*, para. 374), the effect of the assignment of dower, completed by the wife's entry, is to vest in her a freehold estate for

life in the property assigned (para. 380). "She may not cut timber, but if timber was cut after the husband's death and before the lands assigned were set out by metes and bounds, she is entitled during her tenancy in dower to the income of one-third of the proceeds: *Bishop* v. *Bishop* (1841), 10 L.J.N.S. Ch. 302" (para. 381).

In *Doe dem. Riddell* v. *Gwinnell*, 1 Q.B. 682, it was held that the widow was entitled in copyhold lands to one-third in value of all the lands, estimating the value as it was at the time of the assignment, although they had been conveyed away during the husband's lifetime and improved in value by buildings erected before the conveyance and after the assignment, and although, by conveyances subsequent to that by the husband, the land, etc., had been divided into several parcels and was held by several parties at the time of his death. This case was referred to in *Norton* v. *Smith*, 20 U.C.R. 213, at p. 216, in which it was held that the damages, to which she was entitled only from the time of demand made, should be calculated upon the average value of the land during that period, irrespective of improvements made by the tenants, and that the allowance to be paid to her should be estimated upon a computation of one-third of the occupation value of the land only without the buildings.

Then followed "An Act for the better Assignment of Dower in Upper Canada," 24 Viet. ch. 40—sec. 5, sub-sec. 2, of which makes provision so as to avoid assigning dower in improvements after alienation by the husband if practicable, providing that such improvements shall not be allotted to the widow, or, if necessary, to make a deduction from the lands allotted to the widow, proportionate to the benefit she might derive from such improvements; and sec. 17 declares that nothing shall be allowed for the use of permanent improvements made after the alienation by, or death of, the husband. This was re-introduced with some changes in 32 Viet. ch. 7, sec. 31, sub-sec. 2.

Sub-section 3 of sec. 5 of 24 Viet. provides for the assessment of a yearly sum in lieu of dower where the assignment cannot be made. This sub-section is carried into sec. 31, sub-sec. 3, of 32 Viet., with the addition that the yearly sum shall be "as near as may be one-third of the clear yearly rents of the premises, after deducting any rates or assessments payable thereon."

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Section 29 of 9 Edw. VII. ch. 39 corresponds almost word for word with sec. 31 of 32 Viet. ch. 7. *Wallace* v. *Moore*, 18 Gr. 560, makes special reference to secs. 21 and 31 of 32 Viet. ch. 7, corresponding with secs. 23 and 29 of the present Act. In that case the Master had apparently taken the value of the land as the basis of his calculation and fixed the value of the dower by a 5 per cent. rate upon the value of the land, as was done by the Master here. Spragge, C., points out that the result arrived at may be very different from the annual value. Referring to sec. 21 (now 23), he points out that the "damages for the detention of dower must be the loss sustained by the widow by reason of her proportion of rents, or of the value of occupation, not having been paid to her. The words 'yearly value' speak for themselves." He then refers to sub-sec. 3 of sec. 31 (now sub-sec. 2 of sec. 29), which provides that in cases where from circumstances the assignment by metes and bounds cannot be made, they shall assess a yearly sum of money, being as near as may be one-third of the clear yearly rents of the premises after deducting any rates assessable or payable thereon. "Nothing can indicate more clearly the intention of the Legislature that the compensation to the widow should be one-third of the yearly value or yearly rents received—not a percentage upon the gross value." In that case a portion of the property consisted of village lots. Of these lots only one had buildings upon it at the death of the husband; the rest were vacant and of no annual value, producing no rents or profits. The Master in that case took the gross value of the whole of the lots, and upon that value fixed a percentage, and in that respect it was decided that he proceeded upon an erroneous principle. The learned Chancellor points out that, independently of the decree, the right of the widow would be to have her dower assigned by metes and bounds, upon the principle prescribed by sub-sec. 2 of sec. 31 (sec. 29, sub-sec. 1, *a* and *b*). Then follows what I think must be the principle in assessing the damages to be applied in the present case. The Chancellor says: "The value directed by the decree to be ascertained is in lieu of that right; and it would be ignoring that right and palpably unjust to say, because certain property has yielded no annual profit

hitherto, her dower in it is of no value. Obviously it is of some value. Suppose buildings put upon these lots, the rentable value would be compounded in part of the value of the buildings, and in part of the value of the land, and so much of the rentable value of the whole as is properly attributable to the land is the rentable value of the land. It may be the building that gives the rentable value to the land, but still it is the rentable value of the house and land, and not of the house only; for the house elsewhere than on the land might be of much less annual value than the house and land together, and would be certainly of some less annual value."

The facts of the case are not fully set forth in the judgment, but throughout the case, although the present Act was in force, there is no suggestion that the date of alienation is to be taken in order to ascertain the yearly value of the property. On the contrary, the date of the death is the time referred to, and even that may be modified by improvement in the condition of the estate after the husband's death. "It may be that in this case, at the death of the husband, the farm property was in so bad a condition that its annual value was very small. . . . I do not think that this clause of the Act (sec. 21, now 23) calls for an estimate of value based on the actual condition and productiveness of the property at the date of the husband's death. Such a construction would lead to consequences certainly not contemplated by the Act. For instance, farm property might, from bad husbandry . . . have fallen into such a condition that its productiveness would not at the time repay the cost of the cultivation; and yet, with repair and good husbandry, the annual value might be very considerable. And so with house property; it might at the death of the husband be in such a state of dilapidation as to be literally untenantable; and its rentable value while in that condition scarcely anything; while, if put in repair or let upon an improving lease, it might bring a large rental. It would be at once unjust, and not according to the spirit of the Act, in any such cases to compute the allowance to the widow upon the actual annual value at the date of the death of the husband. . . . Reading the whole together, and looking at the mischief it was intended to remedy, I think

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it would be pushing this clause beyond its object and meaning if it were interpreted to mean anything more than that permanent improvements made after the death of or alienation by the husband should be excluded from consideration—in the words of the first part of the clause, should 'not be taken into account.' . . . The clause applies to arrears of dower as well as to fixing a money value in lieu of an assignment by metes and bounds."

The head-note in *Wallace* v. *Moore* would indicate that in that case, as to a portion of the lands at all events, there had been an alienation by the husband. It reads: "The mere fact that at the death of, or alienation by, the husband, his lands were of no rentable value, is not alone sufficient to disentitle the widow to claim damages, if the land has been subsequently made rentable by means of improvements or otherwise either by the heir or vendee; and in such a case a portion of the rent is attributable to the land."

This is inconsistent with the view that the rentable value at the time of alienation is to be taken as the basis for the allowance of a sum in lieu of dower to the widow.

The only other case decided since the statute relating to these sections is *Robinet* v. *Pickering*, 44 U.C.R. 337. In that case Armour, J., points out that the view taken by the Court in *Norton* v. *Smith* was adopted by the Legislature in passing the Act 24 Viet. ch. 40. After referring to the section as to improvements, he says: "Now, if the commissioners in this case have assigned to the demandant a portion of the land in question, the beneficial enjoyment of which by her in the condition in which it was at the time of such assignment will be to her equal in value to the beneficial enjoyment by her of one-third of this land had it remained up to that time in the same condition as it was at the time of its alienation by the husband, they have done what in my opinion the law required them to do."

Having regard to the law as it stood before 32 Viet. ch. 7, sec. 21, was passed, and the object of that section being to modify the law as to permanent improvements made after the alienation or death of the husband so that such improvements should not be taken into account, and having regard to the disjunctive

form of sec. 21 (now 23), I think that the words "but such damages or yearly value shall be estimated upon the state of the property at the time of such alienation or death" (*i.e.*, so far as improvements are concerned) refer to the condition of the property so as to exclude improvements, and not to its rentable value, nor to "yearly rents" which may be given where dower cannot be assigned, which is provided for by sec. 29, sub-sec. 2. Section 21 (now 23) was passed for the purpose of preventing the widow getting the value arising from permanent improvements, and is not to be taken as indicating that she was entitled at all events to one-third of the rental value at the time of alienation or death. If such were the case, it might happen that, instead of permanent improvements being made upon the property, it might decrease in value by decay, so that its rental value might be wiped out at the date of the death of the husband. It seems to me that it would defeat the object of the statute to hold that the rental value at the time of alienation, or even at death, is the criterion by which the amount allowed her in lieu of an assignment of dower is to be ascertained. The object of the statute was, in my opinion, to place her as nearly as possible, as to the amount that she should receive, in the same position as she would have been were it possible to make an assignment by metes and bounds. And, while she is not entitled, I think, to fix the rental value at the time of alienation as the basis of her claim, so neither will that claim be defeated, although at the time of alienation or death of the husband the property may have had no rental value.

Then, as to the right of the widow to any allowance on account of the mill premises having been allowed partially to go to waste and then to be totally removed and sold. Her life interest does not become vested until her dower is assigned. In the present case the mill, machinery, and plant were all removed after alienation and before the husband's death; that is, before she had a life estate vested in any part of the premises. It would appear that the mill had remained idle for some time, and its value had very much decreased; that would probably, at most, be regarded as permissive waste, for which Courts of Equity do not readily interfere, and in the present case, the

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waste having occurred before the widow's right accrued, she would have had no *locus standi* to have in any way prevented it. Nor has she, I think, any right to complain of the removal of the mill, etc., at common law. Where land has been assigned for dower on which is an open mine she can work it for her benefit: *Stoughton* v. *Leigh* (1808), 1 Taunt. 402. The dowress is in the same position as a life-tenant and is entitled to the interest of one-third of the proceeds of the sale of timber: *Bishop* v. *Bishop*, 10 L.J. N.S. Ch. 302; *Dickin* v. *Hamer* (1860), 1 Dr. & Sm. 284. After the husband's death, the widow has the ordinary profits of a tenant for life: Bewes, Law of Waste, pp. 270, 108, 202. I have not been able to find any case which gives her any right at common law to an interest in the proceeds of the sale of property removed before her husband's death. Until such time her right is inchoate. By the death of her husband she becomes dowable, and from that time Equity will give her a portion of the rent and one-third of the interest upon the proceeds of the sale of timber or mines since her husband's death. Her life estate, however, only becomes vested after assignment; and, as she has no right to come to the Court to stay waste before she becomes dowable, so, in my opinion, she has no right to any interest in the proceeds resulting from such waste, unless it be given her by sec. 23 of the statute.

For the reasons above indicated, while she is not entitled, in my opinion, to call for one-third of the rental at the time of alienation, so neither is she entitled to ask for an account of the value of the property sold; the section in question is a provision to prevent her receiving the benefit of improvements, and was not intended to, and does not, in my opinion, enlarge her right in respect to dower. She is not entitled, I think, to any claim in respect of the mill property removed prior to her husband's death.

The improvements made were all of a permanent character. While these improvements ought not to be taken into account in fixing her dower, yet, as is pointed out by the Chancellor in *Wallace* v. *Moore*, the rent arises not alone from the houses but from the buildings and the land, and the widow is entitled, in my opinion, to have that one-third portion of the rent, as far as

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it may be ascertained, which arises from the land, given to her in lieu of dower.

While, upon the one hand, I am unable to agree in the construction of the statute by my brother Middleton, upon the other hand I do not think that the method adopted by the Master proceeded upon the right principle. He took simply the value of the land plus the value of the old buildings, and made his calculation by a percentage upon that. What he should have done, in my opinion, was to ascertain what would be the reasonable portion of the rent referable to the land and allow one-third of that, having regard to the age of the widow, capitalised. Whether it would amount to more than the Master has allowed, I am unable to say from the data before me. If the plaintiff is not willing to accept that sum, there should be a reference back to the Master to ascertain the amount to which the plaintiff is entitled upon the principle above indicated.

This is not a case for costs.

Appeal allowed.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 12, 1914.

1. DAMAGES (§ III L—232)—EXPROPRIATION—CONDEMNATION OR DEPRECIATION IN VALUE—INJURY TO BUSINESS—COMPENSATION—BASED ON CAPITALIZATION OF PROFITS—GOODWILL—MUNICIPAL CORPORATION.

On the expropriation of lands and buildings by a city for park purposes, the owner who has carried on a profitable restaurant, and boat-house business there which, because of the peculiar situation of the property, is not capable of being transferred to other premises in the neighbourhood, is not entitled to demand that compensation for the land value shall be fixed by capitalizing at 4 per cent. the net annual revenue, as on the loss of a definite and fixed income; the business being one in which the absolute continuity of the profits is doubtful, an award is properly based upon three factors: (1) the value of the land, (2) the buildings, plant and stock in trade, (3) damages for disturbance; and where the land value had been fixed with regard to its special adaptability for the business, an allowance of three years' profits for disturbance amounting to an extinguishment of the good-will pertaining to the location was affirmed.

[*Earl of Eldon* v. *North-Eastern R. Co.*, 80 L.T.R. 723, and *Commissioners* v. *Glasgow and South Western R. Co.*, 12 A.C. 315, specially referred to.]

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Statement

APPEAL by the claimants, P. V. Meyer & Co., from an award of P. H. Drayton, K.C., Official Arbitrator. The award recited: (1) a by-law of the Corporation of the City of Toronto, No. 5735, passed on the 12th June, 1911, enacting that certain lands therein described, *inter alia* the lands of the claimants, in the city of Toronto, be expropriated and taken for park purposes; (2) a notice given under the Municipal Arbitrations Act by the claimants that they desired to have the question of what sum should be paid her by the corporation for compensation for the lands and property taken, determined by the Official Arbitrator; (3) the reference of the question of the amount of compensation to the Official Arbitrator; and (4) that the arbitrator had taken upon himself the burden of the reference, heard the evidence, viewed the premises, and heard counsel. And the Official Arbitrator awarded that the corporation should pay the claimants $128,956, with interest from the expropriation until payment, in full compensation for the claimants' lands and premises expropriated under the by-law, and for the business disturbance, stock-in-trade, goods, chattels, and plant, etc.

The Official Arbitrator gave reasons in writing for his award.

The appeal was dismissed.

C. A. Masten, K.C., and *J. R. L. Starr*, K.C., for the appellants.

G. R. Geary, K.C., for the respondents.

Hodgins, J.A.

January 12, 1914. The judgment of the Court was delivered by HODGINS, J.A.:—This is an appeal by the claimants from an award of the Official Arbitrator, dated the 26th March, 1913, whereby they were awarded the sum of $128,956, made up as follows:—

Land	$ 80,750
Buildings	28,000
Business disturbance	15,500
Stock-in-trade	4,706
	$128,956

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The Official Arbitrator appears to have allowed for those elements which, as a rule, go to make up the damages in a case such as this; but counsel for the appellants, in their able argument, attacked the award as not being founded upon a proper principle. Apart from that, it does not seem that the figures allowed by the Official Arbitrator are open to much question, except possibly upon one point, namely, the allowance of profits for only three years, which period, it was contended, was altogether too short, under the circumstances.

The principle contended for on behalf of the appellants was, that the net annual revenue produced from the property in question should be ascertained and capitalised at four per cent., and the capital so arrived at allowed as compensation. To this was to be added a sum, similarly calculated, representing potential value if more land was used and the buildings enlarged. Broadly speaking we were invited to apply to this case the method adopted in calculating damages where tithes or fee farm rents or leasehold interests based upon well-secured rentals, or lands producing an annual rent which formed an unquestioned security (as in *Earl of Eldon* v. *North-Eastern R.W. Co.* (1899), 80 L.T.R. 723), were being expropriated. And the question is, whether that method, based as it is upon the absolute or relative security of the thing expropriated, or its practical certainty as to revenue, and where the measure of damage is the loss of a definite and fixed income, or one which is in its nature susceptible of calculation, can be applied to a case where the profits depend upon, firstly, a suitable location, environment, and equipment, and, secondly, upon application thereto of the personal exertions and talents of the proprietor to produce business profits, this being subject to the contingencies of death, bankruptcy, failing health, or the falling away of business. The methods applied in ascertaining compensation, so far as I have been able to see, differ somewhat according to the subject-matter, but a broad distinction seems to be drawn between the cases I first mentioned and those similar to the present case, and it is this: In the former cases the yearly value is multiplied by a certain number of years' purchase in order to arrive at the capital value. This is because the com-

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pensation is intended to represent an amount capable of yielding what the thing expropriated produced, and the number of years' purchase is varied according to the class of security being dealt with.

This is clearly put in the judgment of Lord Justice Fitz Gibbon in *In re Leader's Estate*, [1904] 1 I.R. 368, at p. 373, as follows: "An estimate at twenty-five years' purchase means an estimate that the property is a 4 per cent. security. Thirty-three and one-third years' purchase indicates that it is a 3 per cent. security, and unless it be assumed that the intrinsic value or price of any given superior interest justifies its being estimated as equivalent to that of 'trustee securities,' giving an indemnifying redemption price would not be right." See also *In re White's Estate*, [1909] 1 I.R. 35; *In re Close's Estate*, [1905] 1 I.R. 207; and *In re Fitz Gerald's Estate*, [1902] 1 I.R. 444.

In cases similar to the present, the rule seems to have been adopted of ascertaining the value of the land and buildings treated as capable of yielding a certain amount of profit per annum, and then adding to that, compensation for disturbance. The latter is the method followed by the Official Arbitrator. The decisive element in this case seems to me to be the importance of the personal equation in producing the results from the carrying on of the business, which are shewn. It cannot be denied that that personal element is a precarious one—a consideration which seems to be considered of great importance in dealing with the amount to be allowed in expropriation proceedings. In a case referred to on the argument of *In re Athlone Rifle Range*, [1902] 1 I.R. 433, the circumstance that the Secretary of State for War, who was otherwise an ideal tenant and one likely to remain in possession during the whole term of years, had the right to surrender the lease at the expiration of seven or fourteen years, was given as the reason for taking the case out of the class that I have already mentioned, where certainty is the chief factor.

In the case of *Penny* v. *Penny* (1868), L.R. 5 Eq. 227, the contingency that by the son's continued occupation under the will the estate might have been compelled to take a reduced rent,

was held materially to affect the value. In *In re Duke of Northumberland and Tynemouth Corporation*, [1909] 2 K.B. 374, quittances were allowed for on the basis of sixteen years' purchase instead of a large number of years, because their payment was not compulsory nor universal.

In *Ex p. Ashby's Cobham Brewery Co.*, [1906] 2 K.B. 754, 95 L.T.R. 260, Kennedy, J., in justifying the number of years' profits allowed as the basis of the value of licensed premises, remarks (95 L.T.R. at p. 270): "One must bear in mind . . . in regard to the capitalisation of the annual value of licensed premises, that the circumstances of the privileged trade carried on in them render non-existent any risk of not securing a continuity of occupation." In that case ten and eleven years' profits were allowed as against three years in *Page* v. *Ratliffe* (1896), 75 L.T.R. 371.

The contention of the appellants did not meet with the assent of the Supreme Court of New Zealand in a somewhat similar case of *Russell* v. *Minister of Lands* (1899), 17 N.Z. L.R. 780. But it is a matter of some difficulty, if not impossibility, to ascertain what formula will state the proper way of arriving at a correct result.

In *Lord Mayor, etc., of Dublin* v. *Dowling* (1880), 6 L.R.Ir. 502, at p. 509, May, C.J., says: "The marketable saleable value of the premises is increased by the profits of the business carried on upon them, and this additional value is inherent to the premises, and is not considered as annexed to the person of the owner."

In *Commissioners of Inland Revenue* v. *Glasgow and South-Western R.W. Co.*, 12 App. Cas. 315, the position is thus stated: "Now the language of the Legislature is this—that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as 'damages for loss of business' or 'compensation for the goodwill' taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as

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a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation:" per Lord Halsbury, L.C., at p. 321. In dealing with the case of the occupier and owner being one and the same person, Lord Watson, in the same case, p. 323, says: "When a proprietor instead of letting his land to a tenant occupies it himself for the purposes of trade, that is a special kind of occupancy which must be taken into account in estimating the value of the land; and the claim made here, which was affirmed by the jury to the extent of £9,500, was obviously intended to cover the loss which Sommerville & Co. sustained by reason of their having to give up the occupancy of the saw mills which the railway company took for the purposes of their undertaking. Upon that footing it is an item of value which is rightly included in the price."

In a later case Lord Watson, in discussing the value of a tramway undertaking, says: "Again, I can well understand that future profits might be assumed as an element in ascertaining rental value, and yet that, in a compulsory sale, they might afford grounds for a further allowance in respect of the seller's loss of profits arising from disturbance of his business" (*Edinburgh Street Tramways Co.* v. *Lord Provost, etc., of Edinburgh*, [1894] A.C. 456, at p. 476.

But in none of these cases is the exact method of arriving at the additional value given. It is treated as something to be determined under the particular circumstances of each case. Apart from compensation for disturbance, the difference between the principle adopted by the Official Arbitrator and that argued for by the appellants is well illustrated in the case of *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board*, [1893] 1 Q.B. 375, *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board*, [1893] A.C. 444, where the variance was between "the value of the said mains, pipes and fittings, regarded as a plant capable of earning a profit" and "the value . . . to be measured not

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. . . by their mere value as plant *in situ*, but by the revenue which the joint board was enabled to earn by their means."

While in this case, as well as in the *Edinburgh Street Tramways* case, the revenue basis was not given effect to, it was upon the ground that the language of the statute was not wide enough to permit a capital value, based upon profits, to be paid.

I can nowhere find that the method urged upon us is the invariable or only method that can or may be adopted. It is clearly one way of arriving at a valuation, and in some cases the obvious way. But where any fluctuating or precarious or personal element enters into the problem, which renders the absolute continuity of the profits doubtful or questionable, either in amount or duration, I think the principle to be adopted may be, and probably should be, that followed here by the Official Arbitrator.

He seems to have allowed a very substantial amount for the land and buildings in question, and has considered the probability of enlargement and the absolute suitability of the premises for the business then being carried on upon them, and their unique situation; all having in them an element of profit-earning. I can find no reason, nor was any suggested on the argument, why his figures should be disturbed unless he had in some way departed from the correct principle to be applied. The only point which has given me doubt is whether the amount allowed for disturbance, namely, three years' profits, is sufficient.

On the argument I had the idea that possibly some of the land statutes relating to England or Ireland might have some bearing on the amount to be allowed, but I do not find them of much assistance. The Irish Land Act of 1870 allows only one year's rental for disturbance where the rent is £100 or over, while it grades up to seven years, the latter being given when the rent is £10 or under. The cases under these and similar Acts where land was taken, have dealt with the number of years' purchase which should be allowed, having regard to the class of security then under consideration. See *Martin* v. *Trodden* (1872), Donnell's Land Act Reprs. 417; *McCoey* v. *Renaghan* (1872), *ibid.* 412; *Devine* v. *Huey* (1871), *ibid.* 411; *Prentice's*

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Estate (1906), 40 Ir. L.T.R. 244; *Redmond's Estate* (1904), 38 Ir. L.T.R. 248.

I think that no objection can be taken to the amount allowed for disturbance unless there is a difference between a case where the business is annihilated so that the owner cannot go elsewhere, and acquire a new goodwill, and the case where a move can be made to a property which in a few years can gain as good a reputation as that which has been expropriated.

On principle, I do not see much difference between the destruction of the goodwill of the business carried on in a particular property where there is no similar place to which the owner can go, and the destruction of the goodwill where the owner can move elsewhere. In both cases the goodwill attached to or affecting the value of the property in question is wholly gone, and whatever goodwill is thereafter acquired is new, and is attributable to a different property. The only goodwill which continues to exist is attributable to the reputation of the owner, and goes with him to his new stand. That goodwill ceases where the owner does not resume business; but that personal goodwill is not a thing to be paid for in compensation proceedings. See *per* Bramwell, L.J., in *Bidder* v. *North Staffordshire R.W. Co.* (1878), 4 Q.B.D. 412, at p. 432.

In Cripps on Compensation, 4th ed., p. 99, goodwill is defined as the probability of the continuance of a business connection, and its value is said to be fixed at a certain number of years' purchase, according to the nature of the particular trade or business. Examples may be found in Allan on Goodwill, at pp. 84-5, of the number of years' profits allowed; and in no case there cited has more than three years' been given.

In Fletcher on Valuations, p. 88, it is said that it is usual to charge two years' loss of profit for loss or injury to goodwill; and in Curtis on Valuation of Land, instances are given, on pp. 203 to 215, of valuations where business property is being expropriated, and in none of them is three years' profits exceeded. At p. 209 the example allows three years' purchase in a case where no suitable premises were obtainable close by.

In most of the reported cases, a lump sum has been given. See *White* v. *Commissioners of Works and Public Buildings*, 22

L.T.R. 591; *Bailey* v. *Isle of Thanet Light Railways Co.*, [1900] 1 Q.B. 722; *Ripley* v. *Great Northern R.W. Co.*, L.R. 10 Ch. 435.

Goodwill in this case is hardly the appropriate word, because it is not sold or dealt with; but I use it as expressing the thing which the appellants lose, *i.e.*, their loss of connection in consequence of expropriation. If the Official Arbitrator has not allowed fully for the various heads of loss which he has included in the award, compensation for business disturbance merely on a three years' basis would hardly be reasonable. But, under the circumstances, I think it is not inadequate.

Upon the whole, therefore, I come to the conclusion that the award has been arrived at upon a correct principle, and that under the circumstances of this case that principle has been properly applied. To deal with the case otherwise than as has been done would be to give a sum sufficient to purchase a perpetual annuity to the claimants, for the amount of the yearly profits, and there is no evidence that any hypothetical buyer would purchase on those terms.

The appeal should, therefore, be dismissed with costs. The cross-appeal was abandoned on the argument, and the respondents should pay the costs of it on that footing.

Appeal dismissed.

Re CONLIN ESTATE.

ALTA.
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Alberta Supreme Court, Stuart, J. October 5, 1914.

1. EXEMPTIONS (§ II A — 12b) — HOMESTEADS — EXEMPTION ORDINANCE — EXECUTIONS — ADMINISTRATION ORDERS.

The duty of an administrator is to realize the assets of the decedent's estate available to pay debts, but he may not without the consent of the widow proceed to sell the homestead and distribute the proceeds in payment of debts if the homestead was exempt under the Exemption Ordinance; such homestead in the occupation of and necessary for the widow and children did not constitute assets available either under execution or under an administration order.

Statement

MOTION by an administrator for directions under the Trustee Ordinance.

Order accordingly.

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RE CONLIN ESTATE.

Stuart, J.

Austin de B. Winter, of *Clark, McCarthy & Co.*, for the administrator.

J. B. Roberts, for the creditor.

STUART, J.:—I have decided to ask the parties to re-argue this case. The application is by the administrator of the deceased's estate for direction and advice under the Trustee Ordinance. The administrator has sold a quarter-section of land for $1,600, which was at the deceased's death his homestead and admittedly exempt under the Exemption Ordinance. At the time of the sale the widow and children were in occupation and it was necessary for their maintenance. It is claimed that the proceeds are also exempt under sec. 5 of the Exemption Ordinance. There is no writ of execution attempted to be enforced at all. Therefore, if sec. 5 is to be interpreted in the light of sec. 2 and if "seizure under execution" in sec. 5 has no wider meaning than "seizure by virtue of writs of execution" as used in sec. 2, it would be difficult to see how any exemption is declared which would apply to this case. The administrator simply wishes to know if he ought to pay debts out of the proceeds of the homestead.

On the other hand, there is no doubt that, if sec. 2 did not compel a narrower interpretation of sec. 5, there ought to be very good ground for arguing that the administrator had no power to do anything more than the Court would compel him to do, that an order for sale in an administration action or in any proceeding might be considered as a "seizure under execution" in its wider sense, as set forth in Hals., vol. 14, p. 3, where it is said that "execution in its widest sense signifies the enforcement or effectuation of the judgment or orders of Courts of justice;" that, therefore, the administrator had no wider power than the Court, and, in the absence of consent by the beneficiaries of the exemption clause, he had no right to sell at all. The affidavits are not clear as to the facts, but the inference may be drawn that the sale was in opposition to the desire of the widow.

Then, assuming that sec. 2 compels a narrower interpretation of sec. 5, that is, that in the latter section exemption against seizure by virtue of a writ of execution is all that is provided for, there is still a serious question which, I think, is deserving of consideration. I have still some doubt as to the power of the

administrator to sell against the consent of the widow. It is the administrator's duty, no doubt, to realize the assets of the estate and to pay debts. But what are "assets" in the hands of the administrator? I think only such property as could before the intestate's death have been made available either in a Court of law or a Court of equity for the payment of his debts. See Encyclopædia of the Laws of England, under the word "Assets." Now, how could his homestead have been made available for the payment of the intestate's debts? Certainly by no legal process, for that involves a writ of execution, and from such process the homestead was exempt. And there would have been no process in a Court of equity by which the homestead could have been sold. To say that sale in an administration action is possible is to beg the question. Only "assets" which could have been made available either by legal or equitable process before the death for payment of debts can be made subject of an administration order. This line of reasoning causes me to feel some doubt whether this homestead, being in the occupation of and necessary for the widow and children, was really "assets" with which the administrator had the power to deal, except, at any rate, subject to their rights. These are the points not touched upon during the previous argument upon which I should like to hear counsel again before making any final decision. The point appears to be a new one, and I should not like to decide it without directing counsel's attention to it and hearing what they have to say.

The matter may, therefore, be mentioned and re-argued before me, in Chambers, when, I think, more definite information should be given upon the point of consent to the sale by the widow and children.

Counsel for the creditor having appeared and stated that he has nothing to add, and that the widow was not in fact consulted as to the sale, I have now merely to add that I think the view I suggested is the correct one, and that the administrator exceeded his authority in selling the land. In the circumstances, the proceeds must be held to be exempt and applicable only to the use of the beneficiaries, subject, of course, to the ordinary costs of administration, but not including the costs of this application, which I think the administrator should bear.

Direction accordingly.

MAN.

C. A.

Re KILDONAN AND ST. ANDREWS ELECTION. GUNN v. MONTAGUE.

Manitoba Court of Appeal, Richards, Perdue, Cameron and Haggart, JJ.A. December 11, 1914.

1. ELECTIONS (§ IV—90)—CONTESTS—PETITION—SUBSTITUTIONAL SERVICE—GROUNDS FOR—PENDING PERIOD FIXED FOR PERSONAL SERVICE.

An order for substitutional service of an election petition under the Manitoba Controverted Elections Act, sec. 23, may in a proper case be made before the expiry of the time granted by the Judge for personal service within Manitoba.

[*McLeod* v. *Gibson*, 35 N.B.R. 376, applied; *Re Kildonan and St. Andrews*, 19 D.L.R. 478, affirmed.]

Statement

APPEAL from Prendergast, J., *Re Kildonan and St. Andrews*, 19 D.L.R. 478.

The appeal was dismissed.

J. E. Adamson, for the petitioner.

A. J. Andrews, K.C., and *M. G. Macneil*, for respondent.

The judgment of the Court was delivered by

Richards, J.A.

RICHARDS, J.A.:—The facts are stated in the reasons for judgment delivered by Mr. Justice Prendergast.

Though he dismisses the objection that neither the electoral division nor the date of the election is stated in the style of cause in the orders of 7th and 18th August, because he considers the objection as in the nature of an appeal, we think that the other grounds stated by him meet and dispose of the point.

The second objection, which does not appear to have been raised before Mr. Justice Prendergast, as he has not referred to it, is that there was no power to make the order for substitutional service till after the expiry of the 18th, the last day of the time allowed by the order of the 7th for making personal service. It is founded on the initial words of sec. 23, sub-sec. 2, of the Act, which says:—

> If service cannot be effected on the respondent or respondents personally within the time granted by the Judge, then substitutional service as directed by the Judge shall be good service.

It is argued that it cannot be known till after the expiration of the extended time granted by the Judge, that personal service cannot be effected within that period, and that, therefore, the order made before that time expired was made without jurisdiction.

It seems to us, however, that it may frequently be apparent

before the expiry of the extended time that service cannot be made within that time, and that it, in fact, was so shewn in this case. The personal service indicated by the Act is required to be made within Manitoba. Here, there was before the Judge on the 18th evidence that the respondent was out of this province, and that the state of his health would prevent his returning to Manitoba till after the 18th.

The point raised by the objection to the order of the 18th, that it fixed no time within which the substitutional service was to be made, was dealt with by the Supreme Court of New Brunswick in *McLeod* v. *Gibson*, 35 N.B.R. 376, referred to by Mr. Justice Prendergast.

Five Judges sat in the Court that dealt with that case, and though only one, Mr. Justice Gregory, referred to the point, the others necessarily concurred in his view by dismissing the rule to set aside the order.

The provisions of the Dominion Act, under consideration in that case, were the same in effect as those of our sec. 23 and its sub-section. It will be observed that sub-sec. 2 does not require the Judge to limit the time. We think that, as stated by Mr. Justice Gregory, in the words quoted by Mr. Justice Prendergast, "that question would be subject . . . to the opinion of the Court or Judge as to the reasonable promptness with which the petitioner carried out his permission obtained."

In the present case the petitioner made the substitutional service on the next following day.

The appeal will be dismissed with costs in the cause to the petitioners.

Appeal dismissed.

REX v. WILSON.

Alberta Supreme Court, Hyndman, J. October 1, 1914.

1. CONTINUANCE AND ADJOURNMENT (§ I—4)—CRIMINAL LAW — SUMMARY TRIAL BY MAGISTRATE—ADJOURNMENT SINE DIE FOR DELIBERATION.

Where the magistrate who had heard the evidence on a summary trial had adjourned to a fixed date for judgment but, being unable to then attend, another magistrate took his place and further adjourned the case *sine die*, the conviction recorded by the first magistrate at a later date when the accused was again brought before him is invalid, as any adjournment must be to a day certain.

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[See *R.* v. *Morse*, 22 N.S.R. 298; *R.* v. *Quinn*, 2 Can. Cr. Cas. 153; *Plante* v. *Cliche*, 17 Can. Cr. Cas. 43, 38 Que. S.C. 542; *Cairns* v. *Choquet*, 3 Que. P.R. 25; *R.* v. *Smith*, 16 Can. Cr. Cas. 432; *Donahue* v. *Recorder's Court*, 18 Can. Cr. Cas. 182; *Ex parte Giberson* (No. 3), 18 Can. Cr. Cas. 355; *Dick* v. *The King*, 19 Can. Cr. Cas. 44.]

Statement

MOTION by way of certiorari to quash a conviction on summary trial for retaining possession of stolen property knowing it to have been stolen (Cr. Code sec. 399).

The motion involved the validity of an adjournment *sine die* made after the conclusion of the testimony.

The conviction was quashed.

J. A. Clarke, for applicant.

L. T. Barclay, contra.

Hyndman, J.

HYNDMAN, J.:—This is a motion in the nature of a certiorari to quash a conviction and order of commitment made by Geo. W. Massie, Esquire, Police Magistrate for the Province of Alberta, whereby Claude Wilson (the applicant) was sentenced to three months' imprisonment in the Fort Saskatchewan gaol "for that he, the said Wilson on or about the 22nd of August, 1914, at Edmonton, did unlawfully have in his possession certain stolen property, to wit, a gold watch and chain, he well knowing the same to be stolen."

The grounds of the motion are:—

1. That the finding of the police magistrate was not in accordance with the evidence or the weight of evidence.

2. That there was no evidence that any chain had been stolen by the said Claude Wilson at any time.

3. That there was no evidence that the said Claude Wilson knew that the said gold watch or chain had ever been stolen.

4. And upon the grounds that adjournment of the said proceedings against the said Claude Wilson on the 8th day of September were taken when the said Claude Wilson was not present, and that no other proceedings could thereafter be taken.

5. On the grounds that Robert Belcher, Police Magistrate, had no power to adjourn the said case on the 8th day of September or on the 9th day of September, and that when the said Robert Belcher adjourned the said case on the 8th of September, he did not adjourn the same to any definite date.

I do not think ground (1) can properly be considered on a motion of this character and on the argument counsel for applicant relied entirely on grounds 4 and 5.

The facts, so far as I can gather same from the return made by the police magistrate and the affidavits filed are shortly, as follows: The information and complaint was sworn on August 31, 1914, before said Massie, P.M., and the accused was arraigned before him the same day and pleaded "not guilty." Accused was then remanded until Thursday, September 3, and on Thursday was again remanded until Friday, September 4, at 11 o'clock, a.m., when he consented to be tried summarily and the evidence was taken by said Massie who reserved judgment till Tuesday, "September 8th, at 10 a.m."

It appears that Mr. Massie did not attend Court on September 8, but that his place was occupied that day by R. Belcher, Esquire, a police magistrate for the province. The accused, although in custody, was not present in Court, but his solicitor, Mr. J. A. Clarke was present, so that if an adjournment had been made to a definite date there could be no objection to the personal absence of accused. The affidavit of Clarke is to the effect that Mr. Belcher adjourned the case, but that such adjournment was not to any definite date but "*sine die.*" On the following day, September 9, accused was brought before Mr. Belcher and the case was further adjourned to the following day, the 10th, and on that occasion Mr. Massie was present, found accused guilty and sentenced him to three months' imprisonment to the provincial gaol at Fort Saskatchewan.

From the memoranda on the information and complaint it is impossible to say whether an adjournment was made from the 8th to the 9th. Following is a copy of the memoranda which is material:—

Reserved judgment to Tues. Sept. 8 -10 a.m.
G. W. M.
9.9.14.
Adjourned till 10 a.m. 10.9.14.
R.B. P.M.

The figures 9.9.14 might possibly have been intended to mean that on the 8th the case was adjourned to the 9th, or it may

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simply be the date on which the latter memo "adjourned till 10 a.m. 10.9.14" was made.

In view of the affidavits of the accused and Clarke to the effect that accused was not present on the 8th and that no definite date was mentioned, and Mr. Clarke's statement being uncontradicted, I am inclined to the conclusion that the adjournment of the 8th was to no definite day.

If such was the case then the conviction cannot stand. The authorities are clear on the point that an adjournment by a magistrate (although after the hearing he might even adjourn for a longer period than eight days) must in any event be to a day certain and fixed and must be stated in the presence of the parties or their solicitors.

The conviction and order of commitment must, therefore, be quashed. There will be the usual order for protection, and no costs will be allowed.

Conviction quashed.

SASK.
S. C.

REX v. SCHURMAN.

Saskatchewan Supreme Court, Newlands, Lamont, Brown, and Elwood, JJ. November 28, 1914.

1. TRIAL (§ III E 5—263)—CRIMINAL CASE—INSTRUCTION AS TO REASONABLE DOUBT.

In order to enable a jury to return a verdict against the prisoner, they must be satisfied beyond any reasonable doubt of his guilt; this is a conviction created in their minds not merely as a matter of probability and if it was only an impression of probability their duty was to acquit.

[*R.* v. *White*, 4 F. & F. 384, and *R.* v. *Krafchenko*, 22 Can. Cr. Cas. 277, 17 D.L.R. 244, applied.]

2. NEW TRIAL (§ II—8)—CRIMINAL CASE—MISDIRECTION AS TO REASONABLE DOUBT.

A new trial will be ordered in a criminal case on the ground that the instruction to the jury may have misled them on the question of reasonable doubt and so have led them to apply the rule as to the balancing of mere probabilities as in civil cases.

Statement

MOTION for leave to appeal on a conviction for attempted rape.

By consent of the Crown the case was dealt with on the motion as if a case had been stated after leave to appeal.

J. A. Allan, K.C., for accused.

T. A. Colclough, K.C., Deputy Attorney-General, for Crown.

The judgment of the Court was delivered by

BROWN, J.:—The accused was tried with a jury and convicted on the charge of attempted rape. At the conclusion of the charge to the jury by the learned trial Judge, Mr. Allan, K.C., counsel for the accused, made the following request:—

> "I would ask your Lordship to direct the recall of the jury and to direct them that a verdict of acquittal does not necessarily mean a verdict of finding that the prosecutrix is a woman of loose character, that it simply means that they are not convinced that her story is the correct one with such conviction as will enable them to bring in a verdict of 'guilty.' The principle of reasonable doubt may well be applied where stories are contradictory and they cannot bring their minds to a decision as to which story is to be accepted and that in such cases the doubt must be given to the prisoner."

The trial Judge refused to recall the jury and refused to grant a reserved case. The accused now applies to this Court for leave to appeal, and on the argument before us counsel for the Crown agreed that we should deal with the matter as if a case had been stated.

The following portions of the Judge's charge are, in my opinion, the only ones material to the consideration of the question:—

> "However, this case, like so many unfortunate cases of a similar nature, involves the question of which of two witnesses to believe. You have the two contradictory stories one told by Mrs. Sholts, the other by the accused, Schurman," and again "You are the sole judges of the facts. You have heard the evidence of both parties, and it is for you to say which of the stories is to be believed. You are not bound by any expression of opinion I may make on the facts. It is for you to say which witness you are to believe," and further, "I must say that it makes it very difficult for you, because there is so little to help you to come to a conclusion. But you must form a conclusion from the evidence. It is for you to say which of these two parties is telling the truth. If you believe that the story of the woman is the correct one, then you must find that the accused is guilty of an attempt to commit the offence charged. If, on the other hand, you believe that the story of the man is correct, then you must find

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that the woman is a woman of loose character, and, more than that, that she is guilty of telling deliberate lies in the witness-box. I need not say much in regard to the presumption of the prisoner's innocence. Mr. Allan has gone into that fully. The prisoner is presumed to be innocent until he is proved to be guilty. That is quite true, but on the other hand, as soon as there is sufficient evidence before you which would tend to point to the guilt of the accused, then the presumption is on the other side, because if you believe one story he is guilty, and if you do not believe that story he is innocent. Then there is the point Mr. Allan mentioned about reasonable doubt. There does not seem to be much room for doubt in this case. There cannot be even reasonable doubt if you believe either one of these stories. If you believe the story of the woman there is no doubt of the guilt of the accused, and if you believe his story then there is no room for doubt of his innocence."

Unfortunately we do not know what Mr. Allan's remarks to the jury were on the question of presumption and reasonable doubt, but we can scarcely assume that they were sufficient to offset any wrong impression that the Judge's charge may have made on the minds of the jury. I am of opinion that the Judge's charge is objectionable for two reasons: Firstly, it tended to give the jury the impression that they must believe the story either of the prosecutrix or of the accused, and that it was their duty to decide which one of the two was telling the truth. The possibility of neither party stating the whole truth was not, in my judgment, sufficiently put before the jury. As a matter of fact, in cases of this character, according to my experience, it very often happens that both parties considerably colour the truth. Then, in the event of the jury being unable to satisfy themselves as to who was telling the truth, it should have been made clear to them that their duty was to acquit. Secondly, I am of opinion that the Judge erred in stating,

> "As soon as there is sufficient evidence before you which would tend to point to the guilt of the accused, then the presumption is on the other side."

An accused person is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and the presumption of innocence, therefore, cannot be shifted at the point where the evidence

tends or inclines in the direction of guilt. In *Reg.* v. *White*, 4 F. & F. 383, at 384, Martin, B., is reported to have instructed the jury

> "that, in order to enable them to return a verdict against the prisoner, they must be satisfied, beyond any reasonable doubt, of his guilt; and this as a conviction created in their minds, not merely as a matter of probability; and if it was only an impression of probability, their duty was to acquit."

This case, though decided in 1865, has always been regarded as laying down the rule correctly. In Russell on Crimes, at p. 2058, the following statement appears:—

> "A person accused of crime is presumed to be innocent until the presumption is rebutted by legal evidence, whether direct or circumstantial, excluding all reasonable doubt of his guilt."

Taylor on Evidence, 10th ed., lays down the rule as follows (p. 113):—

> "One of the most important of disputable legal presumptions is that of innocence. This, in legal phraseology, 'gives the benefit of a doubt to the accused,' and is so cogent, that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burden of proof, may constitute sufficient ground for a verdict. To affix on any person the stigma of crime requires, however, a higher degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt."

I think Mathers, C.J., in the case of *Rex* v. *Krafchenko*, 22 Can. Cr. Cas. 277, at 296, 17 D.L.R. 244, has very correctly stated the rule where he says:—

> "I have told you that you should not convict if you have a reasonable doubt of the prisoner's guilt. By the term reasonable doubt I do not mean a possible doubt, but an actual and substantial doubt. A juror may not create materials of doubt by resorting to trivial suppositions and remote conjectures as to a possible state of facts different from that established by the evidence. If, after a fair and impartial consideration

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of all the evidence in the case both for the Crown and for the defence, you have an abiding conviction of the guilt of the defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond reasonable doubt; but if the evidence has left you in that condition of mind that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge, then you have a reasonable doubt."

In my view the charge of the learned trial Judge may have misled the jury, and therefore the conviction should be quashed and a new trial ordered.

New trial ordered.

ALTA.

S. C.

KARRAR v. SCHUBERT.

Alberta Supreme Court, Walsh, J. October 7, 1914.

1. BROKERS (§ II A—5)—REAL ESTATE—AGENCY CONTRACT—NECESSITY FOR WRITING, HOW LIMITED.

The Alberta statute, 1906, ch. 27, requiring real estate agent's commission contracts to be in writing does not apply to a contract by the recipient of a commission from the owner to divide it with another person through whose influence such recipient obtained the listing from the owner.

[*Heaton* v. *Flater*, 16 D.L.R. 78, followed.]

Statement

ACTION for share of real estate broker's commission, involving statutory requirement in form of agency contract.

Judgment was given for the plaintiff.

H. R. Milner, for plaintiff.

G. B. O'Connor, K.C., for defendants.

Walsh, J.

WALSH, J.:—I find that the agreement set up by the plaintiff was, as a matter of fact, entered into by the defendants with him. That agreement was in effect that, in the event of a sale being made by the defendants of the Toanes farm, a listing of which they secured through the medium of the plaintiff, they would pay him one-half of the resulting commission. The plaintiff tells a story of his arrangement with the defendants which I believe. It is materially corroborated by the evidence of his witness Klukas. The defendants deny the truth of this story. The defendant Wenzel's denial, however, struck me as being

half-hearted. I am satisfied that the letter to the plaintiff which he dictated, but which his more astute partner, Schubert, destroyed before delivery, contained statements confirmatory of the plaintiff's contention, and that it was because of this that it failed to pass Schubert's censorship. The fact that it did not reach the plaintiff amounts to nothing. Its value lies in the fact that Wenzel spread upon it his understanding of the facts. It is as though he had been overheard by someone, not necessarily the plaintiff, telling his partner a story corroborative in some respects at least of that put forward by the plaintiff. The fact that the carbon copy of this letter which the plaintiff's witnesses, Schickendaz and Zwarg, saw on the defendant's files, a few months ago, has since mysteriously disappeared lends colour to the suspicion which I entertain that its contents strengthened the plaintiff's case. There are other facts of a minor character, which I need not detail here, which confirm me in my conviction that the plaintiff's claim is well founded in fact.

The only objection of a legal character raised to the plaintiff's right to recover upon a finding of fact favourable to him is that his claim is within ch. 27 of the statutes of Alberta for 1906, and, there being no contract or note or memorandum of the contract in writing, he cannot recover. The statute provides that "no action shall be brought whereby to charge any person either by commission or otherwise for services rendered in connection with the sale of any lands, tenements or hereditaments or any interest therein unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing." I agree in the view taken of this statute by my brother, Stuart, in *Heaton* v. *Flater*, 16 D.L.R. 78. In this case the money payable "by commission or otherwise for services rendered in connection with the sale of" the lands in question was that which was paid by Toanes, the owner of the land, to the defendants, the agents by whom the sale was actually made. It was to Toanes and the defendants that the services were rendered in connection with the sale of these lands which resulted in the payment of the commission, and it is, in my opinion, the contract for that commission, and not the contract of one seeking a share of it from

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the original recipient of it, that must be evidenced in the manner prescribed by the statute.

There will be judgment for the plaintiff for $1,000 and costs.

Judgment for plaintiff.

QUE.

C. R.

DESPAROIS v. FROTHINGHAM.

Quebec Court of Review, Tellier, Greenshields and Beaudin, JJ.
June 23, 1914.

1. NEGLIGENCE (§ I—1)—AS BASIS OF ACTION—OWNER'S LIABILITY TO SERVANT OF THIRD PARTY—DANGEROUS MACHINERY.

A company operating a factory will be liable in damages for negligence causing personal injury through leaving a projecting set screw on a shaft unprotected although the injured person was a sub-employee of the person who had contracted with the company on a piece-work basis with free use of that part of the factory, if the company still retained control of the machinery and equipment and were under obligation to keep it in repair.

Statement

THE judgment inscribed for review, which is confirmed, was rendered by the Superior Court, Guerin, J., on October 14, 1913.

The appeal was dismissed.

Pelletier, Tourneau & Beaulieu, for the plaintiff.

McLennan, Howard & Aylmer, for the defendant.

Greenshields, J.

GREENSHIELDS, J.:—The plaintiff is the father of, and tutor to, Charles Desparois, a young man, who, at the time of the accident referred to, was eighteen years of age. The defendant owned a factory equipped with machinery for the manufacture of shovels and other instruments. The defendant company made a contract with one Adelard Nantel by which it gave him the use of a room in this factory, equipped with the necessary machinery to do the completing work on shovels. It would appear from the evidence that Mr. Nantel was furnished with this room and this machinery, and the power necessary to operate it, free of any charge, except that its value was taken into consideration in the reduced price at which he was paid per shovel, or per dozen, or per hundred shovels completed by him. In any event, he was paid by piece-work, except in a few cases where new work was not required on shovels, but rather repairs or cleaning was necessary; in that case he was paid by the hour or by the day. Nantel employed his own help, independent entirely of the company de-

fendant. The company defendant, on the other hand, were under the obligation to maintain the machinery and equipment and to do all the repairs, if any were necessary. If a machine became out of order it was the duty of the defendant company to repair it. They had a general superintendent who had access to Nantel's premises, and could and did visit them almost daily.

On October 17, 1912, the youth, Charles Desparois, was in the employ of Nantel; he was exclusively under the control of Nantel, and, therefore, entirely beyond the control of the company defendant. While at his work he was caught in a revolving shaft, and suffered severe injuries. His father in his quality sues for compensation. He bases his claim against the defendant on the statement that the accident was due to the fault and negligence of the defendant, in that it did not have a proper protection around a dangerous machine, or any indication that there was danger; that there was no proper guard covering the shaft, and particularly the screw; that the machine was not constructed according to the best practice and custom and requirements of law; that it was the property of the defendant, and was under its control.

The company defendant denies all responsibility and all the essential allegations of the plaintiff's action; it further alleges that Charles Desparois was not in its employ; not subject to its orders, and finally that the accident was due to the fault of Charles Desparois himself.

Option was made for trial by jury. The trial was had, resulting in a verdict in favour of the plaintiff, and the jury assessed the damages at $3,000, for which the judgment was given. From this judgment the inscription in review is taken.

Practically three points are submitted by the defendant: (1) As to the legal responsibility of the defendant, the defendant urging that inasmuch as the young man was not in its employ no legal obligation existed to protect him; (2) that Nantel alone was responsible for the condition of the machinery; (3) that the amount is excessive. The jury found that the accident was due to the fault and negligence of the company defendant, its employees, officers and representatives, because the protecting set screw of the machinery upon which the plaintiff's son met with the accident was not properly protected. There is no doubt,

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from the evidence, that the accident occurred through some of the young man's clothing being caught by this set screw, which projected from the shaft a distance of an inch, or an inch and a half. It was frankly admitted by counsel that had this set screw not projected from the shaft it is most unlikely that the accident would have happened; and it is equally unlikely that it would have happened if it had been effectively guarded. There was a so-called guard covering this end of the shaft; that it was a proper guard, in the condition in which it was, is more than doubtful. The evidence is somewhat contradictory. Witnesses testify that the vibration would loosen it, and that it would fall off, and that it was known to have fallen off. After the accident, when the boy was found, the guard was on the floor, and was broken; there was no eye-witness to the accident. The boy says he felt his clothing being drawn by the shaft, and then he lost consciousness. There is no doubt he was drawn around this shaft with great violence.

These are practically the facts upon which the Court has to determine the responsibility of the defendant. The jury found that the shaft was not properly guarded; it could have been, there is no doubt. The jury having found this as a fact, and there being abundant evidence for the consideration of the jury, it would not, it seems to us, be proper to disturb that finding of fact. It, then, being assumed that that finding was correct; it being proved that the shaft, including the guard, was owned by the defendant, and was placed by the defendant for hire, or for a consideration, at the disposal of Nantel and his men; it being proved that, so far as the repairs or changes in that shaft were concerned, it was entirely under the control of the defendant, can it be successfully contended that the defendant is not responsible for the damage done by that dangerous thing around which it allowed men to work? We are of opinion it cannot. The defendant did place at the disposal of others, and to be used by others, for its benefit and profit, a non-guarded, dangerous thing, and that unguarded, dangerous thing caused the damage, and the defendant should pay. We do not wish it to be understood that the defendant company would be responsible for all damage that might result to an employee of Nantel's. If one of his employees had been instructed, for instance, to do something

in a dangerous manner, and injury resulted, Nantel would no doubt be responsible under the common law, and alone responsible; but in the present case, it was the dangerous thing under the control of the defendant and owned by the defendant which caused the accident. The second objection raised by the defendant would seem to be disposed of by the answer to the first. The jury found no fault attributable to the boy, and we are of opinion that the proof justified such a finding. Now, as to the quantum of damages. The injuries were extremely serious. I am satisfied that they are permanent, and we do not find the award of the jury excessive, and the judgment is confirmed.

Appeal dismissed.

Re LORD AND ELLIS.

Ontario Supreme Court, Meredith, C.J.C.P. February 20, 1914.

1. LAND TITLES (TORRENS SYSTEM) (§ III—30)—TRANSFERS—TAX DEED—LIMITATIONS OF TIME UNDER OLD AND NEW SYSTEMS.

The limitations of time within which deeds of land sold for taxes must be registered to preserve their priority (R.S.O. 1897, ch. 224, sec. 204, and R.S.O. 1897, ch. 136, sec. 91) are applicable to registrations under the Registry Act only and not to registration under the Land Titles Act (Torrens system); the purchaser at a tax sale of land registered under the Torrens system must lodge a "caution" or register his tax deed to avoid being cut out by a transfer made by the registered owner

[See subsequent statute, 4 Geo. V. (Ont.), ch. 24, sec. 2, to same effect.]

Statement

APPLICATION by Mrs. Lord and one Hay to rectify the register of a Land Titles office.

Order accordingly.

R. G. Agnew, for the applicants.

G. H. Sedgewick, for William Ellis and Richard Ellis, the respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The substantial question involved in this application is, whether the applicant Mrs. Lord is, or the respondents are, really entitled to the land in question; which land is, and has been since the year 1892, within, and subject to, the provisions of the Land Titles Act.

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One Manton was, for a number of years, the registered owner; and he, in the year 1908, transferred the land to one Lord, who, in the same year, became the registered owner. This is proved to have been a transfer for valuable consideration: Lord testified to it; and his testimony has not been contradicted. Later in the same year, 1908, Lord transferred the land to one Hay, who, also in the same year, became the registered owner. This also is proved, in similar manner, to have been a transfer for valuable consideration. In the year 1911, Hay deeded the land to the applicant Mrs. Lord, for, according to the evidence adduced, valuable consideration; and it is under this deed that the applicant Mrs. Lord seeks to be registered as owner of the land. Such registration is prevented by the registrations of the respondents, and of him through whom they acquired title, as owners, under the deeds through which the respondents claim title; and so the direct object of this application is to have such registrations removed from the register, on the ground that they were improperly made, to make the way clear for the registration of the applicant Mrs. Lord as owner.

In the year 1901, apparently, whilst Manton was the registered owner, the land was sold, for taxes, to one Phillip Ellis who seems to have obtained his deed, under that sale, in October, 1902; but no attempt to become registered owner under it, or to give notice, in any manner, of it, seems to have been made until the month of May, 1911, between nine and ten years after the sale. In September, 1911, Ellis was registered as owner of the land, under this tax sale deed; and, in the next following month of November, he deeded the land to the respondents, William Ellis and Richard Ellis, trustees for the Bedford Park Company, and in the same month they were registered as owners under this deed; and it is by virtue of these transfers only that the respondents claim title.

In these circumstances, if the respondents were transferees for valuable consideration, the application would doubtless fail; whether either of the applicants could have any other relief need not be considered. As far as the evidence has gone, however, it is proved that the respondents are not transferees for valuable consideration; that in fact the purchaser at the tax sale bought

merely as their agent for them. And, therefore, for the present, I must deal with this case, in fact, as if the respondents are not transferees for valuable consideration, but are, substantially, in the same position as if they were directly the purchasers of the land at the tax sale.

At the time when the tax sale registration, and the registration following it, were made, Hay was the registered owner; and he is a party to this application; though, I may say, that seems to me to be unnecessary, because I consider that whatever right he may have had, and would still have, respecting the land, if he had not made the deed to Mrs. Lord, passed to and can be enforced by her under that deed.

All this being so, there are, as it seems to me, just two substantial questions for consideration now: (1) was the registration of the tax sale purchaser as owner wrong? and, if so, (2) can it be rectified now at the instance of the applicant Mrs. Lord? And it would be in better order to consider the second question first.

Each of these questions depends very much, if not altogether, upon the 66th section of the Land Titles Act, 1 Geo. V. ch. 28, that part of the Act dealing especially with "sales for taxes." And that section, in so far as it affects these questions, is in these words: "Where land is sold for taxes, the purchaser may at any time after the sale lodge a caution against the transfer of the land; and upon the completion of the time allowed by law for redemption, and upon the production of the transfer of the land in the prescribed form, with proof of the due execution thereof by the proper officer, the proper Master of Titles shall cause a notice to be mailed to the proper post-office address of the persons who appear upon the register to be interested in the land; and after the expiration of three months from the mailing of the notice, shall register the purchaser at the sale as owner of the land, with an absolute title; and shall, if required, issue to him a certificate of ownership in the prescribed form, unless the registration is in the meantime stayed by order of the Court, and in that case the registration shall not be made, nor shall the certificate be issued, except in accordance with the order and direction of the Court."

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Notice of the application for registration of the purchaser at the tax sale as owner was sent by post to Hay; and I assume that the provisions of the Act in this respect were complied with: see sec. 112; but the notice never reached Hay; it was returned to the sender by the post-office officials unopened; and neither Hay, nor any one through whom he acquired title, nor any one claiming under him, ever had any actual notice of the application for such registration.

Whatever might be said if Hay had appeared upon that application, I cannot consider that, not having appeared upon it, nor indeed ever having had any kind of actual notice of it, he would have been forever precluded from asserting his rights as registered owner; I can but consider that, as long as no new rights were acquired under the provisions of the Act for valuable consideration, he might still have asserted his rights. The 66th section does not expressly or impliedly declare that he should not: why should it? Why should he, or she who claims through him, be worse off now, except on the question of costs, than he was when the registration had not been effected? Nor is there anywhere else in the Act anything so expressly or impliedly enacted. Section 113 of the Act, which cures the omission to send and the "non-receipt" of notices, cures them only for the benefit of a purchaser for valuable consideration when registered, and does not, I think, apply to a question of validity between the original parties.

Section 66 provides that the purchaser at the tax sale, after the requirements of the section have been complied with, shall be registered as owner of the land with an absolute title. But secs. 116 and 115 provide for the rectification of the register. Can any good reason be advanced for contending that sec. 116 does not apply to this case? For contending that a registration under sec. 66 stands in any different position from a registration under any other part of the enactment? These sections are expressly made subject to rights acquired by registration under the Act; that I hold to mean such rights as a purchaser for valuable consideration from the registered owner would acquire. No reason has been suggested, nor can I find any, why justice may not be done between the original parties to the injustice.

And so I proceed to consider the first and wider question: was the registration of the tax sale purchaser as owner, in the face of the registrations between the time of the tax sale deed and the time of registration under it, right or wrong?

I can come to no other conclusion than that it was wrong To give it validity would lead to this extraordinary state of affairs, opening wide a gate of injustice: namely, that there is no limit to the time in which a tax sale purchaser may come in and he registered, under his tax sale deed, as owner with an absolute title; and notwithstanding that in the meantime there may have been any number of transfers in good faith and for valuable consideration from registered owner to registered owner. So that, instead of the Act making titles simple, plain, and sure, it would, in regard to sales for taxes, be but a snare to the wary and unwary alike.

But, if the Act be even as lame as that, effect must be given to it: the question is, is it?

Mr. Agnew, for the applicants, relied upon the Assessment Act, R.S.O. 1897, ch. 224, sec. 204, and the Registry Act, ib., ch. 136, sec. 91, as each providing a limitation in time within which deeds of lands sold for taxes must be registered to preserve their priority. But I cannot consider either enactment applicable to registration under the Land Titles Act; each is, I think, applicable to registration under the Registry Act only. Under the Land Titles Act alone the rights of the parties in this matter are to be found.

For the respondents, it is then said that, there being no statutory limitation of the time within which a tax sale purchaser must be registered, he may be registered at any time, however remote, with the same effect as if immediately registered; but that by no means follows. There is no time limited by statute within which a purchaser for valuable consideration must be registered, yet if he delay he may be cut out. Why should it be different with a purchaser at a tax sale?

Section 66 of the Land Titles Act provides that a purchaser at a tax sale may, at any time after the sale, "lodge a caution against the transfer of the land." For what purpose? Assuredly to retain priority. If there be no limit to the time with-

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in which he may be registered and obtain his priority, for what purpose could this provision for lodging a caution have been enacted?

Given the power to "lodge a caution" immediately after the tax sale purchase, there was no need to limit a specified time within which the deed must be registered to retain priority. If such a purchaser does not take the precaution to lodge a caution, or become registered as owner under his deed, he runs just the same chance as any one else neglecting to register—he may be cut out. There was no need to express this in sec. 66; the earlier sections make it plain; sec. 42 provides that "a transfer for valuable consideration of land registered with an absolute title, when registered, shall confer on the transferee an estate in fee simple in the land transferred . . . ;" subject to certain liabilities, all of which, except perhaps "municipal taxes," have no bearing on this case.

So that, notwithstanding the tax sale and the deed under it, both Lord and Hay became, under sec. 42, each absolute owner of the land unless the tax sale purchaser's rights can be considered "municipal taxes," subject to which each took. But, as their transfers were made and registered long after the tax sale, and after the deed under it was made, that is out of the question. By, and at, the sale, the municipal taxes in respect of which the sale was made were paid, and so ceased to be taxes: the right which the purchaser acquired was ownership of the land subject to redemption for a limited time after the sale; a right in respect of which he might be, and ought to have been, entered upon the register in order to save it. It need hardly be added that, if the sale had been for taxes for which Hay was liable, the case would be a very different one.

Therefore, upon the evidence adduced on this application, relief should be given to the applicant Mrs. Lord; the register should be rectified by removing from it the registrations under which the respondents claim and have title; and the applicant Mrs. Lord should be registered as owner, under her deed from Hay: but there should be no order as to costs of this application, or of the rectification of the record: the respondents ordinarily should pay all costs in such a case as this; but, in all probability,

there would have been no need for this application, the respondents would never have been registered as owners, if the application for registration under the tax sale deed had been opposed, and in all probability it would have been opposed, if Hay had taken the precaution to "furnish a place of address in Ontario," under the provisions of sec. 112 of the Land Titles Act. Though I cannot think that, in providing for notice by mail in sec. 66 of the Act, the Legislature had in mind any objection to registration under a tax sale deed such as that in question in this matter, because that cannot be a recurring one, but is one which it would be thought was plainly provided for in the Act, and one which, if not so made plain, could occur but once, once settled the settlement would be applicable to all cases alike; and, though I cannot but think that that which was in the mind of the Legislature in providing for this notice was objection to the validity of the tax sale, an objection which could be made as well by one who was liable for the payment of the taxes in respect of which the sale took place as by any one else, and an objection so favoured at one time in some Courts, especially those of the neighbouring States, as to make the common saying of some years ago that "a tax sale is *prima facie* bad," not wholly unjustifiable; though in these days, in these Courts, especially since the final decision in the case of *Toronto Corporation* v. *Russell*, [1908] A.C. 493, it assuredly would be unjustifiable; yet—notwithstanding all these things—I cannot but think that the question of priority of registered owner or tax sale purchaser might have been raised before the Master during the three months' suspension of registration of the tax sale purchaser; and that, if so raised, the tax sale purchaser would not have been registered.

Upon the argument no one suggested that the Court had not unfettered power over the costs of this application; the case was on all hands treated as if there were such power; but, on reading sec. 116 of the Act, it will be seen that that may not be so: however, whatever its effect may be, in making no order as to costs there is no violation of any of its provisions, or exercising the power it confers.

But the evidence adduced upon this application is meagre,

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and it may not have been known, when evidence might have been given, what facts would be material; therefore, if the respondents desire to controvert any of the essential facts which I have found against them, they may take an issue for the trial and determination of them in the usual manner, and in the meantime this application may stand adjourned *sine die*, with liberty to either party to bring it on again on two days' notice, and further directions and all questions of costs will be reserved for consideration after the determination of the issue.

[See 4 Geo. V. ch. 24, sec. 2 (O.), amending sec. 66 of the Land Titles Act, in accordance with the above decision.]

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WALTON v. FERGUSON.

Alberta Supreme Court, Walsh, J. November 23, 1914.

1. DAMAGES (§ III A—40)—MEASURE OF COMPENSATION—ON CONTRACTS GENERALLY—CONTEMPLATION OF PARTIES.

The measure of damages for breach of contract where no special circumstances were communicated or known to the defaulting party which would enhance the loss ordinarily resulting from the breach, is the amount of injury which would arise generally, that is such as would arise according to the usual course of things from such breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

[*Hadley* v. *Baxendale*, 23 L.J. Ex., 179, applied; See also *Walton* v. *Ferguson*, 16 D.L.R. 533.]

Statement

ASSESSMENT of damages for breach of contract.

Judgment accordingly.

A. A. McGillivray and *J. M. Oldham*, for the plaintiff.

A. H. Clarke, K.C., and *E. V. Robertson*, for the defendant.

Walsh, J.

WALSH, J.:—This case comes to me for an assessment of the defendant's damages for breach of a contract between her and one Staffen, under which she was given the right to the use of a traction engine and plough for putting in the spring crop in the year 1912 on land bought by her from him. It was referred back for this purpose by the Appellate Division (16 D.L.R. 533), on the plaintiff's appeal from an award of $2,500 damages on the first trial.

The first question which I have to determine is the measure

of damages appropriate to this breach. The defendant says that, after being denied the use of the engine and ploughs, to which she was entitled under the agreement, she tried in three different places to hire a steam or gasoline ploughing outfit with which to have the work done, but all of these outfits were engaged at other work and so she was not able to secure any of them. There were other ploughing engines in that part of the country, but there is no evidence before me that any of them could have been engaged by her. On the contrary, the evidence on the point rather leads me to think that there would have been difficulty in getting any of them to do her work, owing to the fact that they were otherwise engaged. She then tried to buy horses with which to do the ploughing, but failed in this, as she had no money with which to pay for them and no one seemed willing to sell on credit. She tried to hire horses for this purpose, but unsuccessfully, as there were none available for that purpose. And so her land went unploughed that spring and her sowing was done on the stubble, with a much smaller resultant crop than would have followed a sowing on ploughed land. It is claimed also that loss resulted in the following year from this sowing on the stubble, as the ground had to be gone over twice more than would have been the case if it had been ploughed in 1912, and this at a cost of $5 per acre.

The defendant claims that the measure of her damages is the difference between the net value to her of such a crop as she might reasonably have expected from one grown upon ploughed land and the net value of the crop which she in fact harvested, plus the extra cost of going over the land in the following year. The plaintiff's contention is that the value to the defendant of the use of the engine and ploughs is the full measure of his liability.

The rule laid down in *Hadley* v. *Baxendale*, 23 L.J. Ex. 179, is that

> when two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were com-

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municated by the plaintiff to the defendant and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only have been supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract.

This rule has been acted upon ever since it was enunciated, and is now the accepted guide for the determination of disputes of this character. There was in this case no communication to Steffan of any special circumstances under which this contract was made, so that the second part of this rule cannot be invoked to swell the defendant's damages beyond those recoverable under the first part of it.

Now, what damages would naturally arise or might the parties reasonably contemplate as likely to result from the breach of such a contract as this? Would it be that the defendant would have the work intended to be done by the engine and ploughs otherwise performed, or would it be that no ploughing at all would be done that season? If the facts known to Steffan were that no engine but his would be available, and that the defendant had not horses of her own with which she could do the ploughing, and that she was financially unable to buy other horses, and that it would be impossible to hire any for the purpose, he, of course, would have such knowledge of these special circumstances as would bring him within the second part of the rule in *Hadley* v. *Baxendale*, *supra*, so as to make him liable for the damages which under these facts would inevitably follow a breach of his contract, namely, those flowing from the defendant's inablility to have her land ploughed at all. But that is not the case here. I have to figure out as best I may what would be in the minds of the contracting parties as to what would be likely to happen if the defendant was denied the use of the engine and ploughs. It seems to me that, in the usual course of things, the defendant would get her ploughing done by someone else, and that the extra cost to her beyond the expense she would have been under with Steffan's engine and ploughs would be the measure of her damages.

Mr. McGillivray admitted a liability on this basis of $681, by which amount he is willing that the plaintiff's mortgage debt should be reduced. This is figured out as being the value to the defendant of the use of the Steffan engine and ploughs on the basis of the cost of having 355 acres ploughed with another steam or gasoline engine at $2.50 per acre, being $887 less $206, the admitted cost to the defendant of ploughing with the Steffan engine and ploughs if she had had the use of them. Mr. Clarke, while admitting the correctness of the above figures as far as they go, contended that, if I took the view of the measure of damages which I have taken, the defendant should have an additional allowance equal to the cost of discing and drilling the land, because, if she had had the use of the Steffan engine, it could have pulled the disc and the seeder behind the ploughs, and thus by the one effort have performed the operations of ploughing, discing and seeding, and saved the extra cost of a separate discing and a separate seeding. It is quite true that the evidence supports his contention as to the possibilities of the engine in this respect, but I do not think that the result contended for follows. The figures arrived at are based upon the theory of another engine having been hired for the ploughing. It is but extending the theory a little to say that, if the engine had been hired, it would have operated not only the ploughs, but the disc and the seeder as well, so that the threefold operation would have been performed at the expense of $2.50 an acre, and so I think that the allowance should not be increased.

The Clerk, in taking the accounts under the mortgage, will give the defendant credit for $681 on this account as of May 1, 1912. The costs of the former trial and of the appeal were disposed of by the judgment of the Appellate Division, which reserved to the Judge upon the second trial the disposition of the general costs of the action and of the second trial. The plaintiff should have the general costs of the action and the defendant should have the costs of her counter-claim upon the scale appropriate to the amount of her recovery, without any set-off to the plaintiff by reason of the amount claimed being larger than the amount recovered. The defendant should have the costs of the second trial. Mr. McGillivray stated that at the opening of the Court he had made an offer to the counsel for the

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defendant of an amount equal to that which I am allowing, but I think that offer was too late to justify any reduction in the defendant's costs by reason of it, as the witnesses were all there then and counsel had made every preparation for the trial.

Judgment accordingly.

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REX v. GUAY.

Quebec Superior Court, Guerin, J. September 11, 1914.

1. CRIMINAL LAW (§ II B—49)—SPEEDY TRIAL WITHOUT JURY—CHANGING OPTION—CR. CODE SEC. 826.

If the accused has regularly consented to a "speedy trial" without a jury under Part XVIII. of the Code, he has no right afterwards to change his option by re-electing for a jury trial.

[*R.* v. *Keefer*, 5 Can. Cr. Cas. 132, referred to; and see *R.* v. *Hebert*, 10 Can. Cr. Cas. 290.]

2. EVIDENCE (§ IV E—410)—RECORD OF COURT HOLDING SPEEDY TRIAL UNDER CRIMINAL CODE—RECITAL OF FACTS AFFIRMING JURISDICTION.

If the record of a County or district Judge's Criminal Court (or in Quebec a Judge of Sessions or district magistrate) on a prosecution under the speedy trials clauses (Part XVIII. of the Cr. Code) produced on a habeas corpus motion in pursuance of an ancillary writ of certiorari contains the recital of facts requisite to confer jurisdiction, it is conclusive and cannot be contradicted by extrinsic evidence, the proceedings of such Court under Cr. Code sec. 834 having to be considered as those of a Court of record.

[*Re Sproule*, 12 Can. S.C.R. 140, followed; *R.* v. *Murray*, 1 Can. Cr. Cas. 452, and *Ex parte Goldsberry*, 10 Can. Cr. Cas. 392, referred to.]

3. CRIMINAL LAW (§ II B—49)—SPEEDY TRIALS CLAUSES—OPTION OF NON-JURY TRIAL—CR. CODE SEC. 826.

An election of speedy trial without a jury under Part XVIII. of the Cr. Code must be a general one so as to include any Judge or official who may legally preside under Cr. Code sec. 823, and must not be limited by making it a consent to be tried only by the particular Judge before whom the accused is arraigned.

[*R.* v. *McDougall*, 8 Can. Cr. Cas. 234; *R.* v. *Stewart*, 15 Can. Cr. Cas. 331, referred to.]

Statement

PETITION for discharge on habeas corpus brought by the prisoner Arthur Guay against the Governor of the Penitentiary of St. Vincent de Paul as respondent to the writ. The habeas corpus was supported by a writ of certiorari in aid to which the magistrate was respondent.

The writ of habeas corpus and the writ of certiorari in aid were ordered to be quashed and the prisoner remanded.

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GUERIN, J.:—Petitioner is a prisoner undergoing a sentence of two years' detention in the Penitentiary of St. Vincent de Paul. He has been brought here on a writ of habeas corpus supported by an ancillary writ of certiorari, the merits of which are now both submitted.

On a plea of guilty, his case was disposed of by a speedy trial held at Sherbrooke under the presidency of the District Magistrate of the District of St. Francis. Sentence was pronounced on the 14th April, 1914, on a conviction of housebreaking and of theft.

The main grounds of the petition are: that it does not appear in any way that petitioner chose a speedy trial, and that he gave no such notice to the sheriff of the district; that, on the 14th April, 1914, he made a motion stating that if an entry had been made of a plea of *guilty* and an option for a speedy trial, this has been the result of a mistake; that notwithstanding this, the Judge sentenced him, refusing to allow him to have a trial by jury; that it does not appear in any way that petitioner ever pleaded to the accusation when the speedy trial was had, nor that he was arraigned; that, although the speedy trial took place on the 9th April, 1914, the whole *proces verbal*, or record of trial, was made up on the 14th April; that none of the procedure regulating speedy trials has been followed; that the failure by the Judge to follow such procedure deprived him of the qualification and jurisdiction to try this case.

A number of other reasons are also given and affidavits have been produced in support thereof. They are all extraneous, however, of the record of the trial as submitted by the Judge's return upon the ancillary writ of certiorari, and under the authority of *Re Sproule*, 12 Can. S.C.R. 140, they should not be considered upon the merits of the writ of habeas corpus.

It is urged by the petitioner that such an order be made as to law and justice may appertain.

REASONS FOR THE DECISION.

1. *Re-election for trial by jury.*

If, under 825 Cr. Code, the prisoner has regularly consented to have his case disposed of by speedy trial before a Judge with-

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out a jury, he cannot change his option and obtain a jury trial. The Criminal Code does not provide for such a request, the Judge having no power to grant it, and no discretion, therefore, to exercise. The rule is just the opposite, when a prisoner, having elected to be tried by a jury, desires to re-elect for a speedy trial without a jury. Special provision is made for this under 824 Cr. Code. The reason is obvious; the long delays which oft-times elapse between the committal of the accused and the summoning of the jury might entail great hardship, and the Crown is equally interested in reducing the public expenses which a jury trial entails. Vide *R.* v. *Keefer*, 5 Can. Cr. Cas. 132.

2. *Change of Plea.*

In the District of Montreal, it is customary to allow the accused to change a plea of *guilty* to a plea of *not guilty* at any time before he is sentenced. This custom prevails, also, in England.

Vide note in *R.* v. *Sell*, 9 Carrington and Payne 348. Without the fact of sentence having been passed, it would have been the ordinary case of a prisoner being allowed to retract his plea, in which there is never any difficulty.

Vide also *R.* v. *Clouter & Heath*, 8 Cox C.C. 227. On a trial for forgery against two prisoners, one of them, after the opening speech for the prosecution, asked to be allowed to withdraw his plea of *not guilty* and to plead *guilty*. This was done and the plea of *guilty* recorded. He was then examined as a witness on the part of the prosecution against his co-defendant, and in the course of such examination, swore that he had no knowledge of the instrument in question being forged. Upon this he was allowed to withdraw his plea of *guilty* and to plead *not guilty*, the jury withdrawing their verdict. The trial of the other prisoner was then proceeded with, and on his acquittal, the one who had withdrawn his plea was put upon his trial.

Vide also *R.* v. *Burke*, 24 Ont. R. 64.

Although this is the custom generally followed, it does not mean that there are no exceptions and that the discretion of the Judge is abrogated. Vide *R.* v. *Brown*, 17 L.J.M.C. 145. In this case, it was held that it is purely for the discretion of the Judge

at the trial whether a plea may be withdrawn or not; and the exercise of such discretion cannot be reviewed on a case reserved. Lord Denman, C.J., observed: "There is no case in which the discretion of the Judge upon this point has been overruled by us."

3. *Jurisdiction of Trial Judge.*

It appears from the record that in the month of April, 1914, a warrant issued against petitioner on the 7th at Sherbrooke, that on the 8th he was arrested at the township of Wotten between 4 and 5 p.m., that he was brought back a distance of 64 miles to Sherbrooke, and that on the 9th he appeared before the district magistrate, who committed him for trial at the next term of the Court of King's Bench on the charge of shop-breaking and theft, and issued his precept to all or any of the constables or other peace officers in the District of St. Francis, to convey the prisoner to the common gaol at Sherbrooke, and to the keeper of said gaol to receive the prisoner and keep him until thence delivered by due course of law. Under 826 Cr. Code, "every sheriff shall within twenty-four hours after the prisoner charged as aforesaid, is committed to gaol for trial, notify the Judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such Judge shall cause the prisoner to be brought before him."

It does not appear from the record that this formality was complied with. The prisoner undefended appeared again before the district magistrate on the day of his committal to the King's Bench, underwent a speedy trial, pleaded guilty and was convicted. The absence of the sheriff's notification in writing would indicate that petitioner did not pass through the hands of the sheriff at all, and consequently was never in gaol, where he should have been placed in obedience to the committal.

It has been held by the full Bench of the Supreme Court of Saskatchewan that the words "committed to gaol for trial" refer to the actual incarceration of the accused in gaol for the purpose of detention in custody until tried, and not a temporary detention elsewhere, and that 24 hours must elapse during which

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the prisoner must be so detained *de facto* in gaol, before the sheriff may give his written notification to the Judge and the prisoner be brought before the Court for a speedy trial. *R.* v. *Tetreault*, 17 Can. Cr. Cas. 259.

In view of the application made by the petitioner to be allowed to withdraw his plea of *guilty*, it is apparent that these 24 hours would have been precious to him to obtain counsel and prepare his defence.

Moreover, the record does not shew any entry on the 9th April of the prisoner's consent to such speedy trial. This was not in accord with 825(2) Cr. Code, "and entry shall be made of such consent at the time the same is given."

Before this entry was made, the prisoner, through his counsel, formally moved to be allowed a trial by jury, which was rejected; the entry of prisoner's consent on the 9th was made on the 14th April.

The record of trial and conviction of the 14th April, states that the prisoner being committed for trial, having been brought before him, the District Magistrate, on the 9th April, 1914, and the offence having been read over to the prisoner, "and being told that he had the option forthwith of being tried before a Judge without the intervention of a jury, or to remain in custody or under bail as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction, and then asked by me if he *consented to be tried before me* without the intervention of a jury, consented to be so tried."

It has been held by eminent authority that an election for speedy trial under part xviii. of the Cr. Code (speedy trials), must be a general one, to be tried by a Judge having jurisdiction thereunder, and is invalid if restricted to trial only by the Judge before whom the arraignment takes place, 825 Cr. Code. Vide *R.* v. *McDougall*, 8 Can. Cr. Cas. 234, and the remarks of Mr. Justice Anglin, now of the Supreme Court of Canada. Vide *R.* v. *Stewart*, 15 Can. Cr. Cas. 331, a judgment of the Supreme Court of Nova Scotia, and the remarks of Townsend, C.J.: "The defendant, when he elected to be tried, was not submitting himself to the particular Judge, but to the County Court Judge's Criminal Court."

Under 823 Cr. Code, *Judge* means in Quebec in any district wherein there is no Judge of the Sessions of the Peace, but wherein there is a district magistrate, "such district magistrate or any Judge of the Sessions of the Peace."

This being the case in the District of St. Francis, if the interpretation given above is to prevail, the restricted election of the prisoner to be tried by the district magistrate only, would be defective and consequently fatal to his jurisdiction; the consent to a speedy trial, the plea of guilty and the sentence would be void.

The particular importance of such an objection in the present case is the fact that his plea of *guilty* at the trial had to be recorded after his consent to a speedy trial had been given, and there existed always the possibility in law that his case might be tried by any Judge of the Sessions of the Peace, instead of the district magistrate himself. Another exercising his discretion might have allowed the prisoner to withdraw his plea of *guilty*.

On the other hand, it is to be observed that the restricted consent to one person alone is the universal practice in the District of Montreal, although there are there more than one Judge of the Sessions of the Peace. To this practice, however, no one has taken exception; such negative evidence is by no means conclusive that such a custom is in accordance with 825 Cr. Code.

Whether, under the circumstances, the district magistrate acquired jurisdiction to try the prisoner is well open to controversy, but by law I have no power on a writ of habeas corpus to pronounce an effective judgment as to the jurisdiction of the trial Judge.

4. *Habeas Corpus.*

Under 834 Cr. Code the Judge sitting on any trial under part xviii., Cr. Code (speedy trials), for all the purposes thereof and the proceedings connected therewith or relating thereto, shall be a Court of Record, and the record in any such case shall be filed among the records of the Court over which the Judge presides as part of such records.

No constitutional question has been raised as to whether the

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Parliament of Canada has the authority to create such a Court (section 101, British North America Act, 1867), rather than the legislature of the province which has exclusive authority as to the constitution, maintenance and organization of the Provincial Courts of Criminal Jurisdiction: sec. 91(27), and sec. 92(14), B.N.A. Act. In Ontario this Court has been formally constituted a Court of Record by the Provincial Legislature. R.S.O. 1914, ch. 61. This has not been done in Quebec. Vide article 3305, R.S.Q. In the absence of objection, however, the district magistrate thus presiding, *e.g.*, for the purpose of this case, is to be considered as a *Court of Record*.

Article 50 of the Code of Civil Procedure which enacts that all Courts within the province are subject to the superintending and reforming power, order and control of the Superior Court and of the Judges thereof, has no application to the present case, which is not a civil process. Procedure in criminal matters is regulated by the exclusive legislative authority of the Parliament of Canada. Sec. 91(27), British North America Act.

The judgment of a Court of Record cannot be enquired of on a writ of habeas corpus. Were it possible to do so, a single Judge of the Superior Court might assume to enquire of a conviction confirmed by the Court of Appeals as well as that of a Judge of speedy trials of indictable offences. To state such a possibility is its own refutation. Vide the following cases and the authorities therein cited: *In re Sproule*, 12 Can. S.C.R. 140; *In re O'Cain*, 13 R.L. 275 (this was the unanimous decision of the old Q.B.: Dorion, C.J., Monk, Ramsay, Sanborn & Tessier, JJ.); *Ex parte Plante*, 6 L.C. Rep. 106, Bowen, C.J.; *R.* v. *Murray*, 1 Can. Cr. Cas. 452, a judgment of the Court of Appeals of Ontario; *R.* v. *St. Denis*, 8 Ont. P.R. 16; *Ex parte Goldsberry*, 10 Can. Cr. Cas. 392, same case *sub nom. Goldsberry* v. *Bernatches*, 12 R. de J. (Larue, J.).

The writ of error having been abolished in Canada, petitioner's recourse to attack the conviction is by appeal under sections 1013 *et seq.* of the Cr. Code.

The proceedings in petitioner's case, not being susceptible of review under a writ of habeas corpus, I have only to examine the warrant of commitment under which he is detained in the

penitentiary. As I find it regular, the writ of habeas corpus and the ancillary writ of certiorari are quashed and the prothonotary is ordered forthwith to return the record held under the writ of certiorari to Henry Walter Mulvens, Esquire, District Magistrate of St. Francis, Sherbrooke, P.Q., as provided by section 1127 of the Criminal Code.

Prisoner remanded.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. February 23, 1914.

1. LIMITATION OF ACTIONS (§ I A—1)—STATUTES—RAILWAYS—"FOR DAMAGE OR INJURY SUSTAINED BY REASON OF A RAILWAY"—ONE YEAR.

The provisions of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, sec. 223, whereby actions for damage or injury sustained by reason of a railway under that Act, must be brought within one year, are in effect incorporated with the special Act 36 Vict. (Ont.), ch. 99 (under which the London Street Railway Co. was incorporated) and the limitation of one year substituted for that of six months under the Railway Act, C.S.C. ch. 66, sec. 83, which by the special Act were declared to be incorporated therewith.

[*Re Wood's Estate*, 31 Ch. D. 607; *Clarke* v. *Bradlaugh*, 8 Q.B.D. 63, and *Metropolitan* v. *Sharpe*, 5 A.C. 425, referred to.]

Statement

APPEAL by the plaintiffs from the judgment of LATCHFORD, J., at the trial at London, dismissing the action, which was brought to recover damages for injuries sustained by the plaintiffs owing to the alleged negligence of the defendant company. The trial Judge held that the action, not having been brought within six months after the happening of the injury of which the plaintiffs complained, was barred by the provisions of the defendant company's special Act, 36 Vict. ch. 99 (Ontario, 1873). Section 16 of that Act provides that "the several clauses of the Act of the Legislature of the late Province of Canada, known as 'The Railway Act' . . . with respect to . . . 'actions for indemnity' . . shall, in so far only as the same are not inconsistent with or repugnant to any of the provisions of this Act, be incorporated with this Act . . ." And sec. 83 of the Railway Act, C.S.C. ch. 66, provides that "all suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted

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within six months next after the time of such supposed damage sustained . . . and not afterwards. . . ."

The appeal was allowed, HODGINS, J.A., dissenting.

R. U. McPherson, for the appellants.

W. N. Tilley, for the defendant company, the respondent.

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February 23. MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment dated the 7th October, 1913, which was directed to be entered by Latchford, J., at the trial before him at London on that day. The action is brought to recover damages for injuries sustained by the appellants owing to the alleged negligence of the respondent; and the trial Judge held that the action, not having been brought within six months after the happening of the injury of which they complain, was barred by the provisions of the respondent's special Act, ch. 99 of the statutes of 1873.

By sec. 16 of the special Act, among other clauses of the Act of the Legislature of the Province of Canada known as "The Railway Act," that with respect to "actions for indemnity" was incorporated with the special Act. The Railway Act referred to is ch. 66 of the Consolidated Statutes of Canada, and the clause with respect to actions for indemnity is sec. 83, which provides that "all suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted within six months next after the time of such supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards. . . ."

The effect of incorporating this section in the special Act is the same as if the provisions of it had formed a part of the special Act. As was said by Lord Esher, M.R., in *In re Wood's Estate*, 31 Ch. D. 607, 615: "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those

clauses in the later Act, you have no occasion to refer to the former Act at all."

See also as to this, and as to the effect of the repeal of an enactment which has been incorporated in a subsequent Act: *The Queen* v. *Stock*, 8 A. & E. 405; *The Queen* v. *Inhabitants of Merionethshire* (1844), 6 Q.B. 343; and *The Queen* v. *Smith*, L.R. 8 Q.B. 146.

Chapter 66 of the Consolidated Statutes of Canada, except sec. 155 and secs. 158 to 161 inclusive, was repealed in the revision of 1877; but, apart from the effect of the Acts respecting the Revised Statutes of Ontario and of the Interpretation Act of 1897, to which I shall afterwards refer, its repeal had no effect on the respondent's special Act, the rule of construction being that, "where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second:" *per* Brett, L.J., in *Clarke* v. *Bradlaugh*, 8 Q.B.D. 63, 69.

Unless, therefore, the provisions of the special Act as to actions for indemnity have been repealed or so amended as to extend the period of limitation to one year, the ruling of the trial Judge was right, and the action was properly dismissed.

It was argued by counsel for the appellants that the provisions of the respondent's special Act which is in question was superseded by sec. 223 of the Ontario Railway Act, 1906, the provisions of which are that "all actions or suits for any damages or injury sustained by reason of the construction or operation of the railway 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."

It was answered by the respondent's counsel that not only does the rule of construction that a special Act is not repealed by a subsequent general Act dealing with the same subject-matter, unless by express reference or necessary implication (Beal's Cardinal Rules of Legal Interpretation, 2nd ed., pp. 460-470, and cases there cited), prevent the repeal of ch. 66 and the enactment of sec. 223 from operating so as to repeal the limitation provision of the respondent's special Act, but the Act it-

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self expressly provides that where the provisions of the special Act and its provisions are inconsistent, the special Act shall be taken to override the provisions of the Act of 1906; and in support of that contention secs. 3 and 5 are relied upon.

That the limitation provision of the special Act is inconsistent with sec. 223 of the Act of 1906 is not open to question, the provision of the one being that actions shall be brought within six months and not afterwards, and of the other that they shall be brought within one year and not afterwards.

In order to arrive at a proper understanding of the provisions of the Act of 1906 which affect the question at issue, the meaning of which is by no means clear, and to determine which of these contentions is entitled to prevail, it will be necessary, or at all events desirable, to trace the history of railway legislation from the consolidation of the statutes of Canada in 1859 down to and inclusive of the enactment of the Act of 1906, and to consider how far, if at all, the respondent's special Act is affected by the provisions of the subsequent legislation, including the amendment to the Interpretation Act made in 1897 by 60 Viet. ch. 2.

In the revision of the statutes of Ontario in 1877, ch. 66 of the Consolidated Statutes of Canada, except sec. 155 and secs. 158 to 161, inclusive, was repealed, and it became ch. 165 of R.S.O. 1877, and its sec. 83, without any change in it, became subsec. 1 of sec. 34 of that chapter.

By 40 Viet. ch. 6, sec. 6, it was provided that, on the coming into force of the Revised Statutes, the Acts mentioned in schedule A, of which ch. 66 was one, should "stand and be repealed . . . ;" and by sec. 11 it was provided that "any reference in any former Act remaining in force, or in any instrument or document, to any Act or enactment so repealed, shall, after the Revised Statutes take effect, be held, as regards any subsequent transaction, matter or thing, to be a reference to the enactments in the Revised Statutes having the same effect as such repealed Act or enactment."

In the revision of 1887, ch. 165 was repealed, and was replaced by ch. 170 of the new revision, and sec. 34(1) became, without change, sec. 42(1).

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By 50 Vict. ch. 2, provisions in regard to the revision of 1887, similar to those contained in secs. 6 and 11, were enacted by secs. 5 and 10.

In the revision of 1897, ch. 170 was repealed, and was replaced by ch. 207 of the new revision, and sec. 42(1) became, without change, sec. 42(1).

By 60 Vict. ch. 3, provisions in regard to the revision of 1897, similar to those contained in secs. 5 and 10, were enacted by secs. 5 and 10.

The effect of this legislation was that, after the coming into force of the Revised Statutes of 1897, the reference in the respondent's special Act to sec. 83 of the Consolidated Statutes of Canada, as regards any subsequent transaction, matter, or thing, was to be taken to be a reference to sub-sec. 1 of sec. 42 of ch 207 of the Revised Statutes of 1897.

In 1897, an amendment to the Interpretation Act was passed (60 Vict. ch. 2), by sec. 6 of which (now clause 6 of para. 48 of sec. 7 of the Interpretation Act, 7 Edw. VII. ch. 2), it is provided: "Whenever any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment. . . ."

This section and the other provisions of the Act are made applicable to every Act subsequently passed, except in so far as they are inconsistent with the intent and object of the Act, or the interpretation which they would give to any word, expression or clause is inconsistent with the context, and except in so far as they are declared by the subsequent Act not applicable to it (sec. 1).

The first change made after the passing of this Act in the indemnity section (sec. 83 of C.S.C. ch. 66; sec. 34 of R.S.O. 1877, ch. 165; sec. 42 of R.S.O. 1887, ch. 170; sec. 42 of R.S.O. 1897, ch. 207) was made by the Ontario Railway Act, 1906 (6 Edw. VII. ch. 30), which repealed, among other Acts, ch. 207, R.S.O.

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1897, and substituted for its sec. 42(1) the following, as sec. 223:—

"223.—(1) All actions or suits for any damages or injury by reason of the construction or operation of the railway 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 such damage ceases, and not afterwards.

"(2) Nothing in this section shall apply to any action brought against the company upon any breach of contract, express or implied, as to or upon any breach of duty in the carriage of any traffic nor to any action against the company for any damages under any section of this Act respecting tolls.

"(3) This section shall apply to street railway companies."

The effect of this legislation, unless the application of sec. 6 of the Interpretation Act which I have quoted is excluded by reason of the provisions of sec. 1 of that Act, was to substitute for the reference in the respondent's special Act to sec. 83 of ch. 66 of the Consolidated Statutes of Canada, and to the corresponding section in the Revised Statutes of 1897, which had taken the place of it, a reference to sec. 223 of the Act of 1906, and in effect to amend the special Act by making the provisions of it as to "actions for indemnity" those contained in sec. 223, instead of those contained in sec. 83 of ch. 66 of the Consolidated Statutes of Canada.

The next step in the inquiry is to ascertain if there is anything in the Act of 1906 to exclude the application of sec. 6 of the Interpretation Act of 1897.

By sec. 2(1), the expression "The Special Act" is to be "construed to mean any Act authorising the construction of or otherwise specially relating to a railway or street railway, whether operated by steam, electricity or other motive power, and with which this Act is incorporated."

Although the language of this sub-section is "with which this Act is incorporated," it is, I think, to be read as if the words were "with which this Act or any part of it is incorporated;" and, so reading the sub-section and applying sec. 6 of the Interpretation Act of 1897, it includes the respondent's special Act,

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because the sections of the Act of 1906 are, for the reasons I have already mentioned, substituted for those of ch. 66 of the Consolidated Statutes of Canada, which were incorporated with the respondent's special Act. If sec. 2(1) is not to be read as I would read it, there is no railway to which it would be applicable, for I know of no Act relating to a railway with which the whole of any general Railway Act has been incorporated.

Section 3, which deals with the application of the Act, provides:—

"3.—(1) This Act shall, unless otherwise expressed, apply to all persons, companies, railways (other than Government railways) and (when so expressed) to street railways within the legislative authority of the Legislature of Ontario, and whether such railways are operated by steam, electricity or other motive power, and whether constructed and operated on highways or on lands owned by the company or partly on highways and partly on such lands, and shall be incorporated and construed, as one Act, with the special Act, subject as herein provided.

"(2) No section of this Act shall apply to street railways unless it is so expressed and provided."

It is manifest, I think, that it was intended by this section that, unless otherwise expressed in the Act, and subject to the provisions as to street railways, the whole Act should apply to all persons, companies, railways, and street railways, except Government railways, within the legislative authority of the Legislature of Ontario.

Section 4 deals with the mode by which provisions of the Act may be excepted from a special Act or extended, limited, or qualified by it.

Section 5 deals with the exceptions, and provides: "5. If in any special Act heretofore passed by the Legislature it is enacted that any provision of the Railway Act of Ontario" (*i.e.*, R.S.O. 1897, ch. 207) "or of the Electric Railway Act, or of the Street Railway Act in force at the time of the passing of such special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such special Act, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited or

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qualified in like manner; and unless otherwise expressly provided in this Act or the special Act this Act shall apply to every railway company incorporated under a special Act or any public Act of this Province, and the sections expressly made applicable shall apply to every street railway so incorporated, but where the provisions of the special Act and the provisions of this Act are inconsistent the special Act shall be taken to override the provisions of this Act so far as is necessary to give effect to such special Act."

In drafting the sections of the Act of 1906, the draftsman, instead of following the Ontario Act R.S.O. 1897, ch. 207, has followed the Dominion Act of 1903, 3 Edw. VII. ch. 58, secs. 3, 4, and 5, though he has made some changes which do not tend to make clear their meaning, but rather to have a contrary effect.

Section 3 is an adaptation of sec. 3 of the Dominion Act; sec. 4 is practically the same as sec. 4 of the Dominion Act; and sec. 5 is somewhat like sec. 5 of that Act, though it varies from it in some important particulars. The reference in the early part of the Dominion section is to "any provision of the general Railway Act in force at the time of the passing of such special Act," and in place of this there is substituted in the Ontario Act "any provision of the Railway Act of Ontario or of the Electric Railway Act, or of the Street Railway Act in force at the time of the passing of such special Act;" and, instead of providing in the latter part of the section, as the Dominion section does, as follows "and, unless otherwise expressly provided in this Act, where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the special Act shall be taken to override the provisions of this Act as far as is necessary to give effect to such special Act," the provision is: "and unless otherwise expressly provided in this Act or the special Act this Act shall apply to every railway company incorporated under a special Act or any public Act of this Province, and the sections expressly made applicable shall apply to every street railway company so incorporated, but where the provisions of the special Act and the provisions of this Act are inconsistent the special Act shall be

taken to override the provisions of this Act so far as is necessary to give effect to such special Act."

The reference to named general Railway Acts in the early part of the section creates the difficulty I have pointed out of applying it, if read literally, to railways with whose special Acts are incorporated provisions of earlier Acts such as ch. 66 of the Consolidated Statutes of Canada.

In the Dominion Revision of 1906, sec. 3 of the Act of 1903 was divided, and the latter part of it became the first part of sec. 3 of the revised Act and the remainder of it became sec. 5. Section 5 of the Act of 1903 was also divided, and the latter part of it became the latter part of sec. 3, and the remainder of it became sec. 4; but nowhere do I find anything in the Act of 1903 or in the revised Act like the provision in sec. 5 of the Ontario Act of 1906 which is interposed between the first and the last parts of the section and reads as follows: "in this Act or the special Act this Act shall apply to every railway company incorporated under a special Act or any public Act of this Province, and the sections expressly made applicable shall apply to every street railway company so incorporated, but"

It is possible that this is but a duplication of sec. 3, with some words added intended to make it clear that the Act applied to companies previously incorporated; but, if that were the intention, the qualification at the end of the section would appear to have an opposite effect as to these matters.

The provisions of ch. 207 of R.S.O. 1897 were reasonably clear.

Section 4 provided that, where not otherwise expressed, "the following sections to section 44 inclusive shall apply to every railway which is subject to the legislative authority of the Legislature of this Province and has been authorised to be constructed by any special Act of the late Province of Canada or of this Province, passed since the 30th day of August, 1851" (*i.e.*, the date on which the Railway Clauses Consolidation Act was passed) "or is authorised to be constructed by any special Act passed after this Act takes effect; and this Act shall be incorporated with every such special Act; and all the clauses and

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provisions of this Act, unless they are expressly varied or excepted by such special Act, shall apply to the undertaking authorised thereby, so far as applicable to the undertaking, and shall, as well as the clauses and provisions of every other Act incorporated with such special Act, form part of such special Act, and be construed together therewith as forming one Act."

By sub-sec. 1 of sec. 5, it was provided that "every special Railway Act shall be a public Act, and for the purpose of incorporating this Act or any of its provisions with a special Act, it shall be sufficient in such Act to enact that the clauses of this Act, with respect to the matter so proposed to be incorporated, referring to the same in the word or words at the head of and introductory to the enactment with respect to such matter, shall be incorporated with the special Act, and thereupon all the clauses and provisions of this Act with respect to the matter so incorporated shall, save in so far as they are expressly varied or excepted by the special Act, form part thereof, and the special Act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which the special Act relates."

And by sec. 45, unless otherwise provided, all the subsequent sections of the Act and sub-sec. 4 of sec. 41 were made applicable "to every railway subject to the legislative authority of the Legislature of this Province, made or to be made in this Province."

The provisions of the Consolidated Statutes of Canada as to these matters were substantially the same, the corresponding sections being sec. 4, which corresponds with sec. 2, sec. 5 with sec. 3, and sec. 45 with sec. 127; the only differences being that sec. 2 included secs. 2 to 125 inclusive and did not contain the limitation as to the railway being a railway "subject to the legislative authority of the Legislature of this Province," and that sec. 3 did not contain the provision that "every special Railway Act shall be a public Act," no other changes having been made in the revisions of 1877 and 1887; the difference in the number of the sections mentioned in sec. 2 of ch. 66 of the Consolidated Statutes of Canada was the result of many of the sections of that Act having been made sub-sections in the subsequent Acts.

The difficulty which I have pointed out owing to the interpretation of the expression "the special Act" occurs in all the Acts, that interpretation being applied to all of them, although it has been got rid of in the Dominion legislation subsequent to the Railway Act of 1868 by omitting the words "with which this Act is incorporated."

The general Railway Acts are all, I think, in substance what the Act of 1851 was called, Railway Clauses Consolidation Acts. Referring to the nature and purpose of such Acts it was said by the Lord Chancellor (Lord Selborne) in *Metropolitan District R.W. Co.* v. *Sharpe* (1880), 5 App. Cas. 425, 430: "I pause to observe that it is of the greatest importance, in any case like that which your Lordships have now to deal, to remember the principles of the scheme of legislation in those statutes" (the Lands Clauses Consolidation Acts and the Railway Clauses Consolidation Act). "They were passed because the Legislature thought that a considerable number of general provisions, which had been ascertained, after sufficient experience, to be proper and necessary to be introduced into Acts authorising undertakings of the character there referred to, had better be enacted once for all in a general form; so that, when any particular undertaking afterwards came to be authorised, the special Act might be introduced in a short form, containing only such clauses as were suggested by the circumstances of the particular case. A general incorporating clause, of which your Lordships have a specimen here, was to supersede the necessity of repeating in every such special Act those provisions which were universally or generally applicable."

Bearing this in mind, and applying it to the respondent's special Act, it follows that that Act was introduced "in a short form, containing only such clauses as were suggested by the circumstances of the particular case," and its sec. 16 is a general incorporating clause, and was intended to supersede the necessity of repeating in the special Act such of the provisions of C.S.C. ch. 66, which were universally or generally applicable, as it was deemed proper to make applicable to the respondent's undertaking.

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In all the legislation of this Province down to the Act of 1906, the provisions of secs. 1 and 2 of the Act of 1851, which deal with the manner and effect of incorporating in special Acts provisions of the general Act, and of excepting, extending, limiting, or qualifying them, have been continued. It is difficult to understand why, after providing, as sec. 1 does, that all the clauses and provisions of the general Act, save as they should be expressly varied or excepted by the special Act, should apply to every railway which thereafter should be authorised to be constructed and should be incorporated with the special Act so far as the same should be applicable to the undertaking, it was thought necessary to provide by sec. 2 that for the purpose of making any incorporation of the Act with the special Act, it should be sufficient to enact that the clauses of it with respect to the matter proposed to be incorporated in the word or words at the head of and introductory to the enactment with respect to such matter, should be incorporated with the special Act, and that thereupon all the clauses and provisions of the Act with respect to the matter so incorporated, should, save as expressly varied or excepted by the special Act, form part of it, and that the special Act should be construed as if the substance of such clauses and provisions were set forth with reference to the matter to which the special Act relates.

The only explanation which suggests itself is that the Provincial Legislature followed in its legislation the lines of the Railway Clauses Consolidation Act of 1845 (8 Viet. ch. 20, Imp.); but why that form of legislation was adopted by Parliament I have been unable to discover.

Inasmuch, then, as the clauses of the general Act which were incorporated with the respondent's special Act were provisions universally or generally applicable in the case of the incorporation of railways, it would seem reasonable that when any changes in them which were deemed necessary or desirable were made, the amended provisions should apply to and be incorporated in the special Act in substitution for the clauses which have been incorporated, but until the amendment of the Interpretation Act in 1897, there was nothing to effect this change in the special Act unless it was provided for in the amending Act.

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Applying then the Interpretation Act to the respondent's special Act, as I think it should be applied, the reference in it to the general Act is to be read as a reference to the corresponding section of the Act of 1906, and I see no reason why that should not be treated as having been done before the inquiry, rendered necessary by the latter part of sec. 5, to ascertain if the provisions of the special Act are inconsistent with those of the Act of 1906, is entered on; and, if that be the proper view, there is no inconsistency between the Act and the special Act as to the provisions under the heading "Actions for Damages" in the Act of 1906, as *ex hypothesi* sec. 223 is incorporated in the respondent's special Act.

There may be in special Acts provisions not introduced by incorporating provisions of general Railway Acts with which some of the provisions of the Act of 1906 may conflict, and it may well be, I think, that the introduction into sec. 5 of its concluding provision was designed to provide that in such cases, but in such cases only, the provisions of the special Act should override the provisions of the Act of 1906.

Upon the whole I am of opinion that, as the result of the subsequent legislation to which I have referred, the provisions of sec. 223 of the Act of 1906 have been written into and incorporated with the special Act, in substitution for the provisions of sec. 83 of ch. 66 of the Consolidated Statutes of Canada, and that the ruling of the learned Judge was erroneous; and it follows that the appeal must be allowed, and the judgment which has been entered set aside, and a new trial ordered.

The costs of the last trial and of the appeal should be paid by the respondent.

MACLAREN and MAGEE, JJ.A., concurred.

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

HODGINS, J.A.:—I am unable, with great respect, to agree with the conclusion that the effect of the Interpretation Act is to replace sec. 42 of R.S.O. 1897, ch. 207 (which by force of the former was substituted for the indemnity section incorporated in the original Act) by sec. 223 of the Railway Act of 1906.

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The repeal of ch. 207, R.S.O. 1897, was the occasion which

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brought into play the provision of the Interpretation Act, as applied to this case.

But in the same Act which effected the repeal there is a distinct provision as to a possible clash between the special Act and the general Act; and this specific reference should, I think, govern.

Under sec. 3, the Railway Act is "incorporated and construed, as one Act, with the special Act," and the special Act is defined in sec. 2, sub-sec. 1, as any Act authorising the construction of a railway or street railway, and with which the Railway Act is incorporated.

I take it that the effect of these two provisions is to amalgamate each special Act and the Railway Act into one Act, and that every part of each of them must be construed as if it had been contained in one Act: *per* Lord Selborne, L.C., in *Canada Southern R.W. Co.* v. *International Bridge Co.* (1883), 8 App. Cas. 723. Very properly, therefore, sec. 5 provides that where the provisions of the special Act and the provisions of the Railway Act are inconsistent, the special Act prevails. In this view, as the indemnity sections are inconsistent, that one which is part of the special Act overrides the other.

If the Interpretation Act applies at all, then the "substituted Act," referred to in it, is the product of the amalgamation of both Acts; and, as under it the provision in the special Act governs, the result is the same.

I think the appeal should be dismissed.

Appeal allowed; HODGINS, J.A., *dissenting.*

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Hodgins, JJ.A., and Riddell, J. May 1, 1914.

1. EMINENT DOMAIN (§ III E—165)—CONSEQUENTIAL INJURIES—VALUES IN VICINITY—OPINION EVIDENCE.

In eminent domain proceedings opinion evidence of a person competent to speak on the subject is admissible to prove the general course of values of what had been shewn to be a certain class of real estate in the vicinity, and does not contravene the rule prohibiting proof of collateral issues as to the value of separate properties in the neighbourhood.

[*Lewis v. New York Elevated R. Co.*, 105 N.Y. 572, followed; *Re National Trust and C.P.R.*, 15 D.L.R. 320, 29 O.L.R. 462, referred to.]

2. APPEAL (§ VII L—480)—REVIEW OF FACTS—AS TO DAMAGES AND VALUES —APPELLATE JURISDICTION TO INCREASE—AWARD.

On an appeal from an award made in expropriation proceedings under the Railway Act, R.S.C. 1906, ch. 37, the court may reject the method of ascertaining the damages adopted by the arbitrators and act upon another method shewn by the evidence if of opinion that the latter is preferable, and may increase or diminish the damages accordingly, although the *quantum* is the only question on the appeal.

[*James Bay v. Armstrong*, [1909] A.C. 624; *Re Ketcheson and C.N.R.*, 13 D.L.R. 854, 29 O.L.R. 339, and *Re Cavanagh and Can. Atlantic*, 14 O.L.R. 523, followed.]

Statement

APPEAL by C. M. Billings from an award, under the Railway Act of Canada, made by Duncan Byron MacTavish and George F. Macdonnell, two of the arbitrators, the third arbitrator, John I. MacCraken, dissenting.

The appeal was allowed.

I. F. Hellmuth, K.C., and *D. J. McDougal*, for the appellant.

E. D. Armour, K.C., and *A. J. Reid*, for the respondent company.

The judgment of the Court was delivered by

Hodgins, J.A.

HODGINS J.A.:—The respondent urges that the arbitrators have not erred in any question of principle, and that, as the appeal involves only a question of amount, this Court should not interfere, there being evidence on which the award could properly be supported.

But, if it were only a question of the amount of the compensation allowed, the cases of *James Bay R. W. Co. v. Armstrong*, [1909] A.C. 624, *Re Ketcheson and Canadian Northern Ontario R. W. Co.*, 13 D.L.R. 854, and *In re Cavanagh and Canada Atlantic*

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R. W. Co. (1907), 14 O.L.R. 523, indicate that this Court has jurisdiction to increase or diminish the amount awarded within the limits of the rule therein laid down.

One of the arbitrators, Mr. Macdonnell, in one of the papers furnished as containing his reasons, says: "The sale from H. B. Billings was at the rate of $3,500 per acre; and, although the railway company asserted that a special price was paid for this land, I think this sale is the best evidence we have to go on to determine the value of the lands in question. As I understand the effect of the legal decisions, the proprietor is not entitled to have the value of the lands taken, based on what he might sell them for at a problematical sale in the future, as city or town lots, but he is entitled to the present value of the lands, based on what a reasonable purchaser would give for them at the present time, keeping in view their potential value and the opportunity of making money out of them later on by subdividing. It is, of course, quite obvious that any such amount as $3,500 per acre is far beyond the value of farm or market-garden property except as it might be bought with a view to sell for other purposes; but, on the evidence, I would be inclined to say that the lands taken should be assessed at that rate, which, as they consist of 1.49 acres, would amount to $5,215."

To this amount (i.e., $5,215) the award adds the sum of $1,000, "in order" (to quote Judge MacTavish) "to fully compensate the claimant, as his land was a little better situated" (than the five acres owned by H. B. Billings at $3,500 per acre), "having a frontage on Bank street road." Judge MacTavish, at the conclusion of his reasons, adds: "I concur in the reasons given by Mr. Macdonnell for his computation." In a subsequent memorandum Mr. Macdonnell thus states the position: "I did not think it proper to subdivide values on the basis of front and rear lots, as this seemed fanciful. No subdivision has actually been made, nor have steps been taken for that purpose, either on this property or in the vicinity, and the owner, though present at the hearing, did not give any evidence, and in fact no evidence was tendered at all of any intention on his part to subdivide his land."

This latter reason given by Mr. Macdonnell is not consistent with his former opinion nor with the addition of $1,000 for "fron-

tage on Bank street;" and I am inclined to think that Judge MacTavish's agreement with the computation made by Mr. Macdonnell only involves his approval of the views found in the earlier memorandum.

If so, the question is not one of principle, but a difference between the mode of ascertainment adopted by the two arbitrators and that favoured by all the witnesses both for and against the claimant.

For the reasons given in the *Ketcheson* case, I think this Court may reject the method favoured by the arbitrators, if, upon the evidence given in the case, another is preferable or more likely to do justice between the parties.

The evidence, speaking broadly, discloses that the city of Ottawa is spreading southward along and on both sides of Bank street. In consequence of this, speculation in lands has extended beyond the canal, while the territory in which the land in question lies is described by one witness, Davis, called by the respondent, as "the coming land of the future." With this the general body of the evidence coincides. While much testimony was given of individual sales on and near Bank street, at considerable distances from the appellant's property, and, therefore, of no specific value, the result of it all is to establish a gradual and noticeable rise in values in the district south of the Rideau river. This is relevant evidence within the principle—if adopted—stated in the case of *Levin* v. *New York Elevated R. R. Co.* (1901), 165 N.Y. 572, in which opinion evidence of a person competent to speak on the subject, as to the general course of values of what had been shewn to be a certain class of real property in the vicinity, was admitted as not contravening the rule prohibiting proof of collateral issues as to separate properties in the neighbourhood. The reasoning in that case commends itself to me. See *Re National Trust Co. and Canadian Pacific R. W. Co.* (1913), 15 D.L.R. 320, 29 O.L.R. 462.

I think the arbitrators might well act upon it in arriving at a general basis of value in the locality.

All the witnesses, both for the appellant and respondent, value the 200 feet on Bank street, which is taken, upon a frontage basis, the only difference between them being the amount to be allowed. The figures vary from $20 a foot to $75 or $80, and both Rogers, for the appellant, and Davis and Scrivens, called for the respon-

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dent, base their figures, relative to the whole Bank street frontage, upon its present condition, *i.e.*, part above and part below the level of Bank street. The other witnesses deal with it, inferentially, as if the Bank street frontage was level, upon the theory that what the railway company has taken would be cut down and that the adjacent property would be filled up.

Taking the award as it stands, the 200 feet on Bank street by a depth of 100 feet represents forty-one hundredths of an acre, and, calculated upon the basis of $3,500 per acre plus the $1,000 for frontage on Bank street, its value works out at $13.75 per foot frontage, or $6.25 per foot less than the lowest at which any witness for the respondent has placed it.

There is little, if any, evidence of sales in this district on Bank street. None of the witnesses can really point to anything reasonably similar to the property in question, and it is evident that flooding from the creek will have to be guarded against at an expense which it is hard to estimate. The witnesses, too, who have placed a value upon the frontage, do so relying practically on their observation of the progress of other properties in localities to the north and in one case to the south of the land in question.

It is somewhat startling, of course, to find that the highest value, $75 or $80 per foot, works out at $34,000 per acre. But Mr. Rogers thinks this a reasonable value, and bases his ideas upon the rapid increase of value within the past few years. It is probable that the chastening influence of a period of depression has not yet modified the views of real estate operators in this favoured locality.

The frontage value, ascertained by striking an average, is, on the part of the appellant, $62, and, on the part of the respondent, $25.

Taking the admission of Mr. Clarke, referred to later on, that there is enough filling in the land expropriated to level up the 100 feet on each side of the right of way, then upon the basis of $25 as it now stands, plus the value of the filling, $4,154, this 200 feet, when levelled up, would come out at $45 per foot. Dealing with it at $62 per foot, and deducting this $4,154, the lots would represent a value of $41 per foot.

Viewing the question in every aspect, and endeavouring to pay due regard to the evidence on both sides, as well as the ad-

mitted difficulties caused by the lie of the land, the necessity of dealing with the line and flow of the creek, and, what is agreed upon by all, the carrying of the property for some years, I think it would not be unreasonable to place the present frontage value of the Bank street lots, including all their potentialities, at not more than $30.

In dealing with what is called "filling" by the dissenting arbitrator, there is no record of the reason why an allowance was not made for it, save a memorandum of Mr. Macdonnell read to the other arbitrators before the award was made. No reference to it appears in Judge MacTavish's reasons. The award does not mention it in terms, and it can only be included, if at all, in the $3,500 per acre allowed. It is really part of the land taken, and should, if at all, be allowed as an element in its value. The case of *The King* v. *Kendall*, 8 D. L. R. 900, does not seem in point except so far as it lays down the principle that the property must be assessed at its market value in respect of the best uses to which it can be put by the owner, taking into consideration any prospective capabilities and any inherent value it may have.

If, before levelling down the 100 feet to the grade of Bank street, the appellant found that there would have to be removed clay which he could sell *in situ*, at a price, I can see no good reason why he should not be compensated for it at that value. The evidence is that it is worth 20 cents per cubic yard over and above the cost of digging it down. In this value Mr. Clarke, the engineer called for the respondent, agrees, and also admits that there is sufficient there to fill up the 100 feet on each side of the right of way to a sufficient height to make it good property. Therefore, it would seem that a fair allowance to make for it would be the 20,774 cubic yards at 20 cents a cubic yard, as its removal would not only net that amount to the appellant, but would leave the frontage taken by the respondent as level building land fronting on Bank street and available in relation to that thoroughfare.

Both parties seem satisfied with the amount allowed for the other lands taken and with the amount allowed for depreciation to the remainder of the property. The allowance for that element is not accurately expressed, and is intended, I think, to mean that, upon the assumption that it is worth $3,500 per acre, it is damaged to the extent of 25 per cent. The lands taken, apart

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from the Bank street lots, have an area of 1.085 acres, and, at that valuation, would amount to $3,797.50.

But I do not see that any damage has been suffered by the Bank street lands within a distance of 100 feet on each side of the railway allowance which is not sufficiently compensated for in the allowance made for the filling. This leaves the damage by the railway confined to that part of the remainder of the property which forms a 100-foot strip in rear of the Bank street lots, on each side of the lands taken.

The award should, therefore, be increased in the following way:—

200 feet taken on Bank street at $30 per foot	$6,000.00
Rest of land taken, 1.085 acres, at $3,500 per acre	3,797.50
Filling 20,774 cubic yards at 20 cents	4,154.80
Damage to 100 feet strip on each side of railway in rear of Bank street lots, 2 $\frac{16}{100}$ acres on the basis of 25 per cent. of its value	1,890.00
Total	$15,842.50

The respondent should pay the costs of the appeal.

Appeal allowed.

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Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Riddell, J. May 12, 1914.

1. VENDOR AND PURCHASER (§ I C—10)—DEFECTIVE TITLE—RESCISSION OF CONTRACT—DAMAGES—COSTS OF INVESTIGATING TITLE.

An order made under the Vendors and Purchasers Act (Ont.), declaring that the title to the land in question was doubtful and not such as the purchaser was bound to accept, is not subject to recall or modification until passed and entered, if it has been acted upon or if the parties have changed their position on account of it, and such order in such contingency will be *res judicata* between the parties, although the formal order was not issued, in support of the purchaser's action to rescind the agreement; but, except as to the giving of any damages to which the purchaser may have been entitled in addition to the costs of investigating the title, it was competent for the purchaser to have sought in the "vendor and purchaser" proceeding under the Act, a return of the money paid and interest thereon and the costs of investigating the title.

[*Re Piggott and Kern*, 12 D.L.R. 838, 4 O.W.N. 1580; *Davidson* v. *Taylor*, 14 P.R. (Ont.) 78; *Moody* v. *Canadian Bank of Commerce*, 14 P.R. (Ont.) 258; *Port Elgin* v. *Eby*, 17 P.R. (Ont.) 58, referred to.]

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2. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT — RETURN OF DEPOSIT—DEFECTIVE TITLE—DEFECT REMEDIED—COUNTERCLAIM—SPECIFIC PERFORMANCE.

The purchaser's action to rescind and for a return of his deposit on the ground that the vendor was unable to make title at the time fixed by the contract for closing when time was of the essence of the contract, is not defeated by shewing that the defect had been cured since the issue of the writ; but if the defendant not only defends but counterclaims for specific performance the title may ordinarily be made good *pendente lite* subject to any defence available to the counterclaim.

[*Halkett* v. *Dudley*, [1907] 1 Ch. 590; *Re National Provincial Bank and Marsh*, [1895] 1 Ch. 190; *Re Scott and Alvarez*, [1895] 2 Ch. 603, referred to.]

3. VENDOR AND PURCHASER (§ I C—10)—ACCEPTANCE OF TITLE BY PURCHASER—WAIVER—SUBMITTING QUESTION OF TITLE TO COURT.

A vendor's claim that the purchaser had accepted the title is waived by the vendor submitting the question whether the vendor had made out a good title to the decision of the court under the Vendors and Purchasers' Act (Ont.) (*Per* Hodgins, J.A.).

4. VENDOR AND PURCHASER (§ I C—10)—TITLE—OBJECTIONS TO—TAKING POSSESSION—WAIVER OF RIGHT TO OBJECT.

Taking possession is no waiver of the right to object to a defective title where the contract provided for giving possession prior to the time within which the vendor was to furnish a good title. (*Per* Hodgins, J.A.)

[*Aldwell* v. *Aldwell*, 6 P.R. (Ont.) 183; *Rankin* v. *Sterling*, 3 O.L.R. 646, referred to.]

Statement

ACTION for the rescission of an agreement for the purchase by the plaintiffs from the defendant and the sale by the defendant to the plaintiffs of lands in the city of Hamilton.

December 19, 1913. The action was tried before FALCONBRIDGE, C.J. K.B., without a jury, at Hamilton.

W. S. MacBrayne and *W. M. Brandon*, for the plaintiffs.

E. D. Armour, K.C., and *F. Morison*, for the defendant.

Falconbridge, C.J.K.B.

February 21. FALCONBRIDGE, C.J. K.B.:—The plaintiffs paid $7,000 on account of purchase-money, went into possession, and made alterations in the property, removed buildings, gates and fences, and cut down, or at least cut branches off, trees.

It is true that the agreement provided that the purchasers (plaintiffs) should have possession at once; but, in view of the fact that a firm of solicitors on the 15th May, then acting for both parties, certified that the defendant had a good title, subject only to a certain mortgage, and of the other surrounding circumstances, it seems to me that the purchasers are not in a position to ask that the contract be rescinded.

These solicitors' certificate of title would appear to be, in

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view of my brother Middleton's judgment in *Pigott* v. *Bell* (1913), 5 O.W.N. 314, quite correct. But the plaintiffs retained other solicitors, and an objection to the title was argued before me. I thought the purchasers might be exposed to a "reasonable probability of litigation," and so the title was classed as doubtful: *Re Pigott and Kern* (1913), 12 D.L.R. 838, 4 O.W.N. 1580.

I am informed that no order was taken out on this judgment—and it is contended that it is competent for me now to hold, in view of subsequent events, that this objection is not a valid one. In *Re Consolidated Gold Dredging and Power Co.* (1913), 5 O.W.N. 346, no order had been issued on a judgment of mine in Chambers; and, it being represented to me that the facts had not been quite correctly placed before me, the matter was re-opened and again argued, and I dismissed the original application.

Be that as it may, I am of the opinion that the plaintiffs are not now in a position to maintain this action; and it must, therefore, be dismissed.

It is doubtful whether, in any aspect of the case, proper notices were given by the plaintiffs to rescind or put an end to the contract.

It will be seen from the above narrative of events that the plaintiffs, who bought for speculative purposes, have had a pretty hard time, and I make no order as to costs.

The plaintiffs appealed from the judgment of FALCONBRIDGE, C.J. K.B.

April 22. The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and RIDDELL, J.

Argument

I. F. Hellmuth, K.C., and *W. S. MacBrayne*, for the appellants, argued that the evidence shewed that it was a matter of the greatest importance that the contract should be carried out within the time provided. The learned trial Judge had no power to prevent the issue of the order pronounced by him in *Re Pigott and Kern*, 12 D.L.R. 838, the order took effect from the day it was pronounced: *Port Elgin Public School Board* v. *Eby* (1895), 17 P.R. 58; *Nott* v. *Riccard* (1856), 22 Beav. 307, 311. [RIDDELL, J., thought it was doubtful whether the order could now be issued.] They referred to Fry on Specific Performance,

4th ed., p. 385, para. 890 ("The Court will not compel the purchaser to buy a law-suit"); *Re Edgerley and Hotrum* (1913), 11 D.L.R. 783, *Laycock* v. *Fowler* (1910), 15 W.L.R. 441, a case very close to the case at bar. [RIDDELL, J., referred to *Boyman* v. *Gutch* (1831), 7 Bing. 379.] Counsel referred to Encyc. of Laws of England, vol. 14, pp. 462, 463, citing *Brewer* v. *Broadwood* (1882), 22 Ch.D. 105, and other cases on the same lines. The merits of the case are all with the purchaser. The whole matter has got into a slough through the "pig-headedness" of the vendor. The judgment of MIDDLETON, J., in *Pigott* v. *Bell*, 5 O.W.N. 314, being *res inter alias acta*, can have no bearing on the case at bar. The giving of time is only a waiver to the extent of substituting the extended time for the original time: Fry, op. cit., 5th ed., para. 1126; *Devlin* v. *Radkey* (1910), 22 O.L.R. 399, 408.

E. D. Armour, K.C., for the defendant, the respondent, argued that no proper notices were given by the plaintiffs to put an end to the contract. It is of course true that a doubtful title cannot be forced upon an unwilling purchaser, but this was never a bad title. The contract remained a good contract, although it was for a time unenforceable. Notice should have been given us, allowing us a reasonable time within which to remove the objection, and the time of one week given was unreasonably short. The purchaser had not a right to rescind, but merely a right to fix a time within which the vendor must complete: *King* v. *Wilson* (1843), 6 Beav. 124, 126. The time-limit must be a reasonable one: *Macbryde* v. *Weekes* (1856), 22 Beav. 533, 543; *Crawford* v. *Toogood* (1879), 13 Ch.D. 153, 158. Notice was sprung upon us, and was not unequivocal in its terms: see as to notice, *Reynolds* v. *Nelson* (1821), 6 Madd. 18, 26. The agreement had expired, and was like an expired lease: see Prideaux on Conveyancing, 17th ed., pp. 131, 132. As to the power of a Judge to change his decision, see *In re St. Nazaire Co.* (1879), 12 Ch.D. 88, 91, where Jessel, M.R., refers to *Miller's Case* (1876), 3 Ch.D. 661. As the contract was still subsisting, we had a *locus pœnitentiæ*: *Glasgow* v. *Glasgow* (1883), in note to *Canadian Land and Emigration Co.* v. *Municipality of Dysart* (1885), 9 O.R. 495, at p. 511. McNiven was not a necessary party to the action of *Pigott* v. *Bell*, *supra*. See on reasonable notice, *Stickney* v. *Keeble* (1913), 57 Sol. J. 389.

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Argument

Hellmuth, in reply, argued that the position of the parties was quite different from that stated by counsel for the respondent. There was no "dallying along" on the part of the appellants. The vendor is bound by his election in the proceeding under the Vendors and Purchasers Act, which amounted to an action for specific performance. He referred to *Harwood* v. *Blond* (1842), Flanagan & Kelly 540; *Harris* v. *Robinson* (1892), 21 S.C.R. 390, 396, 398; *Davidson* v. *Taylor* (1890), 14 P.R. 78; *Moody* v. *Canadian Bank of Commerce* (1891), 14 P.R. 258.

[MEREDITH, C.J.O., referred to *In re Scott and Alvarez's Contract*, [1895] 1 Ch. 596, 627, 628, [1895] 2 Ch. 603.]

Hodgins, J.A.

May 12. HODGINS, J.A.:—The crucial point in this case, as it seems to me, is the view to be taken of the action of the respondent in presenting his petition under the Vendors and Purchasers Act, and the result of the judgment thereon.

The agreement is dated the 12th March, 1913, and provides for the sale, for $32,000, of lands in Hamilton, the appellants being the purchasers.

They were to have possession at once, "to cut down trees, remove fences, clear off all obstacles necessary to put property in good saleable condition, survey and open up street through the said property, sell or build on said property, also it is agreed that should we (the appellants) or any of us sell any of the vacant land before the 16th day of June, 1913 (the date specified for closing), the proceeds of same shall be paid to M. A. Pigott (the respondent) to be applied on the purchase-price."

It is evident from this that the property was bought to be resold, and that the purchase was, in that view, speculative, to the knowledge of both parties.

The provision as to title is as follows: "Title: good title to be made within fourteen days, and in default deposit to be repaid, and this offer void at my option" (i.e., the appellants' option). "Registrar's abstract to be delivered by you, but you are not to be called upon to produce or deliver any title deeds, or copies, except those in your possession or control. . . . Property to be free from all incumbrances, taxes, water rates and local improvement rates to closing of sale June 16th, 1913. Possession to be given at once. Time to be of the essence of this contract."

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The deposit was $2,000, payable on the date of the contract "and a further cash payment of $4,000 on the 3rd day of April, 1913, and the balance of M. A. Pigott equity on the 16th day of June, 1913, without interest."

The fourteen days passed, and nothing appears to have taken place with regard to the title within that time. Messrs. O'Heir & Morison were retained by the appellants on or about the 27th March, 1913, just after the expiry of the fourteen days. The solicitors were aware of the Bell agreement before this retainer, and had seen Mr. Bell as to it, and had determined to get evidence that it had been performed, in which case, as Mr. O'Heir put it, "I had nothing to do with Mr. Bell."

Mr. O'Heir then got declarations, one from the respondent, dated the 1st May, 1913, and one from the City Engineer of Hamilton, dated the 12th May, 1913, after which he wrote the appellants, on the 15th May, that he had examined the title to the property, and that the respondent "has a good title thereto subject to the mortgage. . . . Your deed of course has not yet been obtained, as the time has not yet arrived when the purchase is to be closed according to contract. You will require to arrange with Mr. Pigott about obtaining possession, as we do not know what arrangement has been made."

Shortly after this, the appellants, having gone into possession, made an application to the city council for approval of a plan inconsistent with that which was contemplated by the Bell arrangement, and found themselves opposed by Bell, who then claimed that his agreement was in force and bound the lands in question.

This led to the appellants retaining their present solicitors, who at once insisted on the removal of the Bell agreement as a cloud on the respondent's title.

The correspondence on this point began on the 13th June, 1913, by the appellants' solicitors requiring a release from Mr. Bell and the Bank of Hamilton, so that the matter might be closed by the 16th June. On the same day, the respondent's solicitors, after stating that the objection was not open to the appellants, because they, as the latter's solicitors, had given a written certificate that there was a good title, contended that the agreement had been performed, and therefore formed no cloud, and added: "In any event the sale must be carried out promptly on the

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16th instant, otherwise the vendor will be compelled to institute proceedings for specific performance. We cannot extend the time nor waive any rights which the vendor has under the contract."

On the 16th June, the appellants' solicitors reiterated their objection, and said: "The purchasers are prepared to complete this agreement at once upon this agreement being released, but we do not think that they can safely do so until some arrangement is made."

Thus, on the 16th June, the date for closing, and that on which the title was to be free from all incumbrances, the parties had arrived at a deadlock.

The respondent took no steps other than telephoning for a further payment on the 19th, and the appellants' solicitors replied, insisting that active steps should be taken at once to get rid of the objection, and threatening proceedings leading to rescission and a return of the purchase-money, and damages. No reply having been returned to this, the appellants' solicitors wrote again on the 23rd June, saying: "We must now notify you that unless you are prepared to shew a perfect title to this property by Monday the 30th June at 3 p.m., my clients will ask for a rescission of this agreement, the return of the purchase-money with interest, and all damages which they have sustained by reason of the non-completion of the sale. We give this notice for the purpose of making the date mentioned the outside limit for carrying out the terms of this agreement."

No reply was sent, as the respondent took proceedings under the Vendors and Purchasers Act, the result of which is seen in *Re Pigott and Kern*, 12 D.L.R. 838, 4 O.W.N. 1580.

The petition relates this objection, and the refusal of the appellants to accept the declarations obtained by Messrs. O'Heir & Morison, on the 1st and 12th May, 1913, as an answer thereto, and the notice of motion asks a declaration that the objection of the purchaser had been satisfactorily answered, that the Bell agreement did not constitute a valid objection or cloud upon the title, and that a good title had been shewn in accordance with the conditions of the contract of sale.

The observations which I have to make upon the above facts are these. The objection that the appellants had accepted the title would be formidable if it had been insisted upon, instead

of being abandoned by submitting to the Court the question of whether the vendor had made out a good title. Taking possession was no waiver, as the contract provided for its being given "at once," which might well be before the fourteen days expired: *Stevens* v. *Guppy* (1826), 3 Russ. 171; *Upperton* v. *Nickolson* (1871), L.R. 6 Ch. 436; *Aldwell* v. *Aldwell* (1874), 6 P.R. 183; *Rankin* v. *Sterling* (1902), 3 O.L.R. 646; *In re Gloag & Miller's Contract* (1883), 23 Ch.D. 320.

The time limited by the letter of the 23rd June, 1913, if the respondent had been proceeding to clear up the title, would have been, in view of the information in the possession of the appellants' then solicitors (see Mr. MacBrayne's letter and his affidavit on the Vendors and Purchasers Act application), too short: *Hetherington* v. *McCabe* (1910), 1 O.W.N. 802; *McMurray* v. *Spicer* (1868), L.R. 5 Eq. 527, at p. 543; *Crawford* v. *Toogood*, 13 Ch.D. 153; *Green* v. *Sevin* (1879), 13 Ch.D. 589; *Stickney* v. *Keeble*, 57 Sol. J. 389. It must have been obvious that a longer time than seven days would be necessary if a law-suit were to be instituted. Time had ceased to be of the essence of the contract so far as to prevent the appellants cancelling it on the expiration of the fourteen days, as it may cease, even where the property is bought for speculative purposes: *Harris* v. *Robinson*, 21 S.C.R. 390, at p. 398, *per* Strong, J.

But here the purchasers had insisted, as was their right, on a good title free from all incumbrances before the 16th June, the date of closing. They had not waived that time, nor had the vendor.

Advantage of the extension proffered in the letter of the 23rd June was not taken by the respondent.

Where the vendor, in face of such a notice, instead of intimating his willingness to endeavour to comply with the requisition, while asserting that the time given is too short, takes the position that he will not clear up the title at all, thus disabling himself from claiming that the time was unreasonable, and declines to take advantage of the offer to extend, the notice may be treated as a good notice to rescind: *Nott* v. *Riccard*, 22 Beav. 307, 311. But it is not necessary to deal with the case as depending on the effect of that letter. Before the 16th June, the date set for closing, both parties had taken up their positions, and there was no waiver

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upon either side of that time and the necessity for a good title on the one hand and the payment of the money on the other. It was quite open to the respondent to insist that the appellants had in fact accepted the title, and he did so assert before the 16th June. The appellants, on the other hand, ignored that assertion, and relied on the position that the respondent was bound to give a good title.

"It is an elementary principle that if a vendor contracts to sell land without any saving condition as to the nature of the title he is to confer upon the purchaser, the law implies that it is incumbent on him to make out a good title in fee simple:" *Armstrong* v. *Nason* (1895), 25 S.C.R. 263, 268. It was when the parties were in that position that the respondent applied to the Court under the Vendors and Purchasers Act to have it declared that he had shewn a good title. I view the effect of that application from a standpoint different from that of the judgment below. It is not correct that the title was always good, as counsel argued. There was a period when that could not be asserted as a fact, and that period was the time elapsing from the judgment on the Vendors and Purchasers Act application until the trial of *Pigott* v. *Bell*, 5 O.W.N. 314.* The judgment of the 2nd July, 1913, was to the effect that a good title had not been made. The respondent could not then have forced the appellants to take it.

I think the objection taken to the title was, if unanswered, one that went to the root of the contract and was quite as serious as that given effect to in *In re Prickett & Smith's Contract*, [1902] 2 Ch. 258, where the sale was admittedly for building purposes; in *Cato* v. *Thompson* (1882), 9 Q.B.D. 616, and *In re Cox & Neve's Contract*, [1891] 2 Ch. 109, both cases of restrictive covenants; and in *Gamble* v. *Gummerson* (1862), 9 Gr. 193, a case of an inchoate right of dower.

The respondent here was insisting that the Bell contract was spent and inoperative, a matter to be established by evidence, for it contained in itself no provision making it come to an end for all purposes at any specific time. See the judgment in *Pigott* v. *Bell* (*ante*). The application under the Vendors and Purchasers Act purported to supply such evidence as might be properly done in such a case.

*The judgment in *Pigott* v. *Bell* was given on the 17th November, 1913.

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The result of the application was, that the appellants' objection was held to be a good one. The respondent, therefore, had no good title, free from all incumbrances, on the 16th June, nor by the 30th June, and he had taken an untenable position. His so doing was a breach of his duty to the appellants, and put him in default: *In re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648.

The application itself exhausted, as is said in *Thompson* v. *Wringer* (1881), 44 L.T.R. 507, all the subjects thought necessary to be brought to the attention of the Judge, and disposed of every question between the parties.

It is not open to the objection suggested in *In re Wallis & Bernard's Contract*, [1899] 2 Ch. 515, that the general question of a good title should be left for an action for specific performance, a difficulty shared by Mr. Justice Ferguson (see *Re Bingham and Wrigglesworth*, 5 O.R. 611, who, however, followed *Thompson* v. *Wringer*, in *Re Craig*, 10 P.R. 33.

The principle underlying *Thompson* v. *Wringer* (*ante*), that, upon such applications, when the question raised finally disposes of the real and only dispute between the parties, an order may be made which otherwise would be the result of a Master's certificate that a good title has not been shewn, has been adopted in very many cases under the Act. The importance of this is shewn by the remark of Parker, J., in *Halkett* v. *Earl Dudley*, [1907] 1 Ch. 590, at p. 593, that a general reference is for the benefit of both parties, and the vendor has up to the date of the certificate to perfect his title.

In *Turner* v. *Marriott* (1867), L.R. 3 Eq. 744, Malins, V.-C., upon a certificate that a good title had not been made out, ordered a return of the deposit and interest and gave a lien on the land for these and the costs of investigating the title. This is said by Parker, J., in *In re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. at p. 655, to be "all the relief which could be obtained on the footing that the vendors could not by reason of the state of their title fulfil their contract at all."

Exactly the same remedy has been applied under the Vendors and Purchasers Act in England, where the title is held bad or too doubtful to be forced upon a purchaser. See numerous cases beginning with *In re Yielding and Westbrook's Contract* (1886), 31

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Ch.D. 344, down to *In re Nisbet & Potts' Contract*, [1906] 1 Ch. 386, affirming Farwell, J., in [1905] 1 Ch. 391. In 1877, in *In re Burroughes Lynn and Sexton*, 5 Ch.D. 601, the Court of Appeal expressly held that whatever could be done "upon a reference as to title under a decree where the contract was established" could be done upon a proceeding under the Vendors and Purchasers Act, and that what the Act had done was to enable the parties to dispense with the form of a bill or answer, and at once put themselves in Chambers in exactly the same position in which they would have been, and with all the rights they would have had, under the form of decree.

In *In re Higgins & Hitchman's Contract* (1882), 21 Ch.D. 95, no order for rescission was made upon the terms stated in the cases already cited, because the vendor asserted that his right to rescind under the contract, on returning the deposit alone, still existed. But in *In re Arbib and Class's Contract*, [1891] 1 Ch. 601, the Court of Appeal held that such a right did not exist where a judicial decision had intervened, and ordered the return of the deposit, with interest and the costs of investigating the title.

In 1886, the Court of Appeal in England, in *In re Hargreaves & Thompson's Contract*, 32 Ch.D. 454, while declining to treat an application under the Vendors and Purchasers Act exactly as an action for specific performance or for rescinding the contract, decided that the Court should make such order as would be just as the natural consequence of what was decided. Consequently the Court, holding that the vendor had not made a good title and the purchaser was not bound to complete, gave the damages naturally flowing from such order, namely, the return of the deposit with interest and the costs of investigating the title, but not extraordinary damages. In the latter case Lindley, L.J., speaks of the Act as intended to obtain a decision upon some isolated point, instead of compelling recourse to the whole machinery of a specific performance action: a view shared by Kekewich, J., in *In re Wallis & Bernard's Contract*, [1899] 2 Ch. 515, and by Collins, L.J., in *In re Hughes & Ashley's Contract*, [1900] 2 Ch. 595. It should be noted that in the earlier case (*In re Burroughes Lynn and Sexton*, *ante*), the Court of Appeal treat the application as similar to proceedings upon a reference when the contract is established.

There are other matters obviously outside the scope of the

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Vendors and Purchasers Act, of which an example is found in *In re Young & Harston's Contract* (1885), 29 Ch.D. 691, the recovery of interest erroneously paid by the purchaser; but the claim for damages other than the usual damages has not been treated as ousting the jurisdiction to make such order as is the natural consequence of the decision on the point at issue. See *In re Scott & Alvarez's Contract*, [1895] 1 Ch. 596, at pp. 627, 628; *In re Wilson & Steven's Contract*, [1894] 3 Ch. 546.

These views coincide, it seems to me, with the principle already alluded to, where the isolated point really decides the whole controversy; and I can find nothing which really militates against it.

Under the circumstances of this case, I think, the appellants, had they asked it, would have been entitled to an order for the return of their deposit with interest and their costs of investigating the title.

But they did not ask for this, and, instead, bring the present action for rescission and return of their deposit, and for damages, including those described in *In re Hargreaves & Thompson's Contract (ante)* as extraordinary damages. One difference between such an action and one for specific performance is pointed out in *In re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190, and *In re Scott & Alvarez's Contract*, [1895] 1 Ch. 596, [1895] 2 Ch. 603, where it was laid down that in an action at law for the deposit the purchaser would be bound by the conditions of the contract to take a limited title, while in an action for specific performance the condition could not be enforced if the title were bad in the sense of being no title at all.

But I have found no case which establishes the proposition that where a purchaser brings his action at law for a deposit he may be met by saying that the title is now a good one, though bad before. Upon principle I do not see how matters subsequent to the breach of contract can cure the breach existing when the action is brought. They merely go to damages: *Callender* v. *Hawkins* (1877), 2 C.P.D. 592. It might be different if the respondent in this case, instead of merely defending the action, had by counterclaim asked for specific performance.

The reason why in an action for specific performance the title may be made good *pendente lite* is given in the quotation from the

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judgment of Parker, J., in *Halkett* v. *Earl Dudley* (*ante*). And under the Vendors and Purchasers Act it is quite possible that subsequent events making or shewing the title to be good may, pending an enlargement or an appeal, or upon a reference ordered by the Judge hearing the application, or by subsequent application in the same matter, be put in evidence. See Con. Rules 511 and 523; *In re Scott & Alvarez's Contract* (*ante*); *In re Nichols' and Von Joel's Contract*, [1910] 1 Ch. 43; Vendors and Purchasers Act, R.S.O. 1914, ch. 122, sec. 4. But this is received upon the same principle and because the proceeding is similar in its essential character to a reference in an action for specific performance.

But, granting that the judicial decision against the title is not appealed against, and no further time is given, then, it seems to me, it makes an important and radical change in the position of the parties; and—especially if taken advantage of, as here, by the prompt issue of a writ claiming rescission—should entitle the one so acting to the full benefit of the decision.

Independently of authority, I should have thought it would be a reproach to our system of jurisprudence if, in a case where the difficulty between vendor and purchaser had narrowed down to one point, on which hung the final outcome of the contract, the Court could not, under the Vendors and Purchasers Act, dispose of it both on the facts and law, and give the relief flowing from the decision, especially so as an appeal is allowed and a reference may be had if the circumstances warrant it. This is all that is required in the present case, and my examination of the authorities leads me to think that it is fully covered by them.

It is argued, however, that the appellants cannot have the benefit of the decision under the Vendors and Purchasers Act because the order has never issued and because there is involved in the learned trial Judge's judgment in this case a withdrawal of the permission given during the course of the trial to take out that order. Under our Rule 512 a decision is operative for the purposes of appeal and otherwise from the date of its pronouncement. (See *Davidson* v. *Taylor*, 14 P.R. 78; *Moody* v. *Canadian Bank of Commerce*, 14 P.R. 258). And, if it had appeared to the learned trial Judge that it had been acted upon or had effected an important change in the rights of the parties, he would have been the last one to throw any doubt upon the right to issue it

now. It was clearly correct in law when pronounced. See *Price* v. *Strange* (1820), 6 Madd. 159, and *Mullings* v. *Trinder* (1870), L.R. 10 Eq. 449, and the reason given by Romilly, M.R.

The event has proved it to be correct in fact; and, while I do not doubt the power of a Judge to recall or modify his judgment until it is passed and entered (*Preston Banking Co.* v. *William Allsup & Sons*, [1895] 1 Ch. 141, at p. 145), I think there is a restriction on this right where it has been acted upon, or where, due to it, the parties have changed their position: *Hatton* v. *Harris*, [1892] A.C. 547, 558, 560; *Stewart* v. *Rose*, [1900] 1 Ch. 386; *Port Elgin Public School Board* v. *Eby*, 17 P.R. 58.

I have already pointed out what I think the effect of the order was, and its consequences to the parties; and the decision as such, and apart from its legal informality, is a fact in the dealings of these parties that cannot be ignored. If they should be entitled to issue the order in proper form, I am unable to suggest any other course than an application to the learned trial Judge to allow this to be done.

The respondent further argued that, even if the order in question were issued, yet in the present action the appellants must prove their allegation that the title was bad before they can recover at law as for a breach of the agreement. *Boyman* v. *Gutch*, 7 Bing. 379, was relied on for this. But in that case the question was, whether, when the property was offered for sale, the defendant had a good title, *i.e.*, at the date of the contract.

I do not think that the appellants are bound to prove that the title was bad at the date of the trial, or that the respondent could shew, in order to defeat the action, that the defect had been cured since the issue of the writ. It is of course obvious that the judgment in *Pigott* v. *Bell* does not really cover the ground, and that the reservation of the rights of the Bank of Hamilton prevent it assisting the respondent to the full extent. The reasons for judgment on the application under the Vendors and Purchasers Act recognised those rights, and they have not been judicially dealt with even in the judgment in appeal. The title, therefore, comes within the class of doubtful titles, and there is nothing in this contract that binds the appellants to take the title such as it is, nor does the Bell agreement establish by its own force the invalidity of their objection. If the proper order had been made on

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the application under the Vendors and Purchasers Act, then the only relief left unadministered would be the giving of any damages not covered by the usual rule in vendor and purchaser cases. Unless this Court is prepared to ignore the decision on the application altogether, it cannot refuse to give the ordinary relief, *i.e.*, the return of the money paid, with interest and the costs of investigating the title; while any extraordinary damages may well be referred to the Master, as indicated at the trial.

But the onus on the appellants in this case is surely no greater than this. They must satisfy the Court that, at the date of the issue of the writ, the respondent had broken the contract in an essential point. That was done when the respondent failed to shew a good title on the 16th June; and the view that, if he established a good title at the trial, it would be sufficient, is borrowed from the practice in equity and not at law.

The respondent, however, goes even deeper than this. He contends that his title is good, and that to recover his money the appellants must prove that it is bad. This is the issue, he says. He relies upon the judgment in *Pigott* v. *Bell* as shewing that he has a good title, and asserts that it also proves that at no time was it bad. He objects to the appellants relying on the result of the application under the Vendors and Purchasers Act, contending that the mere decision, without a formal order, binds no one.

Even if this extreme view has to be met, I am of opinion that the appellants have successfully answered it. Dealing with the judgment in *Pigott* v. *Bell* strictly, it does not shew that the title was good before its date, *i.e.*, on the 17th November, 1913. Nor does it get rid of the claims, if any, of the Bank of Hamilton or of its sub-purchasers, for they are expressly reserved, and would hardly have been so reserved if they were clearly intangible. The pleadings in *Pigott* v. *Bell* set up a claim by Bell, made after the agreement in question herein and shortly before the sale thereunder was to be completed, and alleges, in paragraph 13, that the "defendant (Bell) by making said claim has created a cloud upon the plaintiff's title to his said land," and asks the removal of the cloud upon the plaintiff's title caused by the making of the said claim. This is an admission that the cloud arose and existed after the agreement in this case had been made, and when it was on the point of performance.

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If more were needed, it would appear to me clearly relevant to shew what was the material laid before the Judge upon the application under the Vendors and Purchasers Act, and what he decided upon the 2nd July. It is a fact, at all events, necessary in explanation of why the *Pigott* v. *Bell* action was begun, *i.e.*, in order to clear up a point which had rendered the title a doubtful one.

Now a doubtful title is not a good title: *per* Lindley, L.J., in *In re Scott & Alvarez's Contract*, [1895] 1 Ch. at p. 613. "If the vendor cannot clear the estate, the necessary consequence is, that the purchaser cannot be compelled to complete the contract:" *per* Blake, V.-C., in *Spohn* v. *Ryckman* (1859), 7 Gr. 388, at p. 392. It may be that that defence must be decided in point of law by the trial Judge, or it may be that the acceptance by both parties of the opinion of a Judge or of an eminent counsel that it was such a title, might be proved. If the former is the correct rule, then the judgment of the trial Judge is appealable upon that point; and, speaking for myself, I would hold the title doubtful, *i.e.*, not a good title, until the cloud created by the Bell agreement was entirely removed or the rights yet undetermined were settled in such a way as to bind all parties. See *In re Nichols' and Von Joel's Contract*, [1910] 1 Ch. 43.

In the statement of claim in *Pigott* v. *Bell* it is alleged that the Bank of Hamilton, with the consent and approval of the plaintiff and defendant, applied to the Corporation of the City of Hamilton for the approval of the street agreed to be laid out by the bank, and that the said street was so approved of by the said corporation, and the said street had been duly opened and known as Rutherford avenue, and has been shewn on a plan duly registered.

The Bank of Hamilton had the right to reserve a strip of one foot on the northerly side of that street, but only from the eastern boundary of the Pigott property. I assume that that left Rutherford avenue as open along the southerly boundary of the Pigott property. Pigott and the bank agree to restrictions as to building within eight feet of Rutherford avenue if the corporation so require, and they also agree that, when selling or conveying any of the lots fronting upon Proctor avenue, they will have inserted in the deeds thereof covenants restricting the use of, and providing for the material to be used in buildings upon, those lots. Whether

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these provisions give the Bank of Hamilton or those claiming under it any rights or not cannot be determined without their being present.

Upon the whole case, I think the judgment should be reversed and judgment should be entered for the $7,000, with interest and costs of investigating the title. I do not think that, under the facts of this case, any further damages would be recoverable, as the case seems to fall within the rule in *Bain* v. *Fothergill* (1874), L.R. 7 H.L. 158.

But, as the question of damages was expressly left over on both sides, there should be a reference as to any other than those now allowed, claimed by the appellants, and as to those claimed by the respondent, reserving further directions and costs of reference. But I think that the appellants should be allowed to enforce their judgment for $4,000 in the meantime, as they paid $7,000, and the respondent claims only $3,000.

If the respondent had submitted to the order made upon the application under the Vendors and Purchasers Act, and had pleaded that this action was unnecessary, then he could not in fairness be asked to pay the costs of the action. But he did not do so, and should, I think, pay the costs, both of it and of the appeal.

Meredith, C.J.O. Magee, J.A.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

Riddell, J.

RIDDELL, J., dissented.

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Ontario Supreme Court (Appellate Division), Mulock, C.J. Ex., Riddell, Sutherland, and Leitch, JJ. March 30, 1914.

1. FRAUDULENT CONVEYANCES (§ II—8)—VOLUNTARY CONVEYANCE—"EFFECT TO DEFEAT"—ONUS.

The mere proof of the existence of particular debts prior to a voluntary settlement does not, without more, establish fraudulent intent and thus invalidate the settlement, but to have that effect it is necessary to shew such a state of the settlor's affairs at the time of the settlement as would lead the court to infer that the effect of the settlement was to defeat or delay creditors.

[*Townsend* v. *Westacott*, 2 Beav. 340; *Skarf* v. *Soulby*, 1 Macn. & G. 364, and *Godfrey* v. *Poole*, 13 A.C. 497, referred to.]

2. FRAUDULENT CONVEYANCES (§ II—8)—VOLUNTARY CONVEYANCE—JUDGMENT AS ANTECEDENT DEBT; TEST.

As against a person not a party to the proceedings in which a judg-

ment had been recovered and execution issued, proof of such proceedings does not prove that the debt is still unpaid; the person relying on such judgment as an antecedent debt to a voluntary conveyance attacked in a creditors' action is bound to shew an unpaid debt.

3. FRAUDULENT CONVEYANCES (§ VII—35)—VOLUNTARY CONVEYANCE—SUBSEQUENT CREDITOR.

So far as a creditor's action to set aside his debtor's voluntary conveyance is dependent upon the creditor's own claim incurred after the conveyance was made and not upon the existence of prior debts, he must shew fraudulent intent.

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APPEAL by the plaintiff from the judgment of DOYLE, Co.C.J., dismissing the action, which was brought in the County Court of the County of Huron, by an execution creditor of the defendant David Brown, to set aside three conveyances of different parcels of land, made by the defendant David Brown to his wife, the defendant Rosa Brown, on the 22nd February, 1906, the 5th September, 1907, and the 6th January, 1910, respectively, as fraudulent and void against the plaintiff and other creditors of David Brown; the consideration stated in each conveyance being natural love and affection and $1. Statement

The appeal was dismissed.

R. McKay, K.C., for the appellant.

C. Seager, and *R. C. H. Cassels*, for the defendants, the repondents.

The judgment of the Court was delivered by MULOCK, C.J.Ex.:—This is an action by an execution creditor to set aside three conveyances of certain lands, from the defendant David Brown to his wife Rosa Brown, as fraudulent and void against the plaintiff and other creditors of David Brown. Mulock, C.J.Ex.

The case was tried by His Honour Judge Doyle, of the County Court of the County of Huron, who dismissed the action, and from his judgment the plaintiff appeals.

The following are the conveyances from David to Rosa Brown, which the plaintiff attacks:—

1. Conveyance dated the 22nd February, 1906, of lots 701 and 685 in the town of Goderich, in the county of Huron.

2. Conveyance dated the 5th September, 1907, of an undivided half interest in part of lot 69 in the said town of Goderich.

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3. Conveyance dated the 6th January, 1910, of the other undivided half interest in lot 69.

The consideration stated in each of these conveyances is natural love and affection and one dollar.

On the 9th September, 1911, the plaintiff recovered judgment against the defendant David Brown for $177.91 debt and $19.50 taxed costs, and on the 23rd September, 1911, caused a writ of execution for these sums to be issued and placed in the hands of the Sheriff of the County of Huron.

The debt for which the plaintiff's judgment was obtained was for solicitor's costs in an action wherein the plaintiff had acted as David Brown's solicitor. The retainer was given in September, 1910, some eight months after the last of the three conveyances.

There is no evidence of any present indebtedness by the defendant David Brown which existed prior to the year 1909. In that year he and his wife became jointly indebted to the Bank of Montreal in the sum of $800, by the discount of their note for that amount. From time to time payments were made upon it, and at the date of the last conveyance, that of the 6th January, 1910, the unpaid balance was $200, for which the bank held the renewal note of the defendants. The wife being liable along with her husband, the bank was not prejudiced by the transfer to her of any of her husband's property, and is not objecting thereto.

The only other debts of David Brown now unpaid, and which existed prior to the conveyance of the 6th January, 1910, are: one amount of $41.27 owing to the Goderich Planing Mills Company, and the other of $5 due to one Freeman, both of which claims were, however, disputed by the defendant David Brown.

At the trial, an unsuccessful attempt was made to shew that the defendant also owed his brother about $300, also $2,000 on a mortgage. Thus all of his debts or liabilities which originated prior to the date of the last conveyance are the three named sums, $200, $41.27, and $5. No one of these debts was owing when the conveyance of the 5th September, 1907, was made,

and they represent the husband's total indebtedness to-day, outside of the plaintiff's claim.

The defendants, who are Austrians, came to the town of Goderich about the year 1902, when the husband established himself in the junk business in a small way, his brother and wife assisting him financially; and the explanation of his making the conveyances to his wife doubtless is, that she had given to him substantial sums of her own money, wherewith he had been able to make money and acquire the properties in question, whereupon his wife considered herself entitled to the properties, and her husband, yielding to her wishes, conveyed the same to her. Nevertheless, they were made without valuable consideration; and the question is, whether they or any of them are void as against the creditors of the defendant David Brown.

The wife being jointly liable with her husband to the bank, the properties, though vested in the wife, remain exigible in payment of the bank's claim. Therefore, the bank is not prejudiced and could not maintain an action to set aside these conveyances.

There thus remain but two prior creditors, namely, the Goderich Planing Mills Company, in respect of their claim for $41.27, and Freeman, in respect of his claim for $5. The plaintiff being a subsequent creditor, in so far as his right to impeach the conveyances depends on the fact that there are prior creditors, the case must be dealt with as if either or both of those prior creditors were plaintiffs; and, if such prior creditors are not entitled to impeach the conveyances, neither is the plaintiff, who is a subsequent creditor, for his equity is no higher than that of the prior creditors: *Jenkyn* v. *Vaughan* (1856), 3 Drew. 419; *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538.

Assuming, then, that these two prior creditors are plaintiffs in this action, are they entitled to impeach these conveyances, or any of them? Brown contested those two claims, but on the 17th May, 1911, judgment was given against him in favour of the Goderich Planing Mills Company for $41.27 and interest, making a total of $43.33, and execution therefor was placed in the bailiff's hands.

On the 21st December, 1911, judgment was also obtained

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against him in respect of the $5 claim. For all that appears, these judgments may have since been paid. As against the wife, the plaintiff was bound to shew an unpaid debt. The recovery of judgment, and the evidence of the Clerk of the Division Court that a writ of execution had been placed in the bailiff's hands, does not, as against a person not a party to that action, prove that the debt is still unpaid.

On this ground alone the plaintiff's claim for relief, so far as it depends on proving the existence of debts prior to the settlement, fails.

But, assuming that those debts are still unpaid, are the facts such as to satisfy the Court that the settlements in question had the effect of hindering or delaying either of these two creditors? Ever since the husband's arrival in Canada he has been, and still is, carrying on the junk business in the town of Goderich. Beginning in a small way, his stock of junk has steadily increased until at the time of the trial, on the 22nd December, 1911, he had junk on hand worth at least $5,000. In addition thereto, he owned horses and vehicles required for carrying on his business. These circumstances rebut any presumption that the settlements were made with intent to defeat the trifling claims of $43.33 and $5, his only debts prior to the settlements, except that of the bank.

The mere existence of any debt prior to the settlement is not sufficient to induce the Court to set it aside (*Townsend* v. *Westacott* (1840), 2 Beav. 340.) Thus in *Skarf* v. *Soulby* (1849), 1 Macn. & G. 364, 375, which was a creditor's suit to set aside a voluntary conveyance as fraudulent and void against creditors, Cottenham, L.C., said: "The existence therefore of property at the time of the settlement, not included in it, ample for the payment of debts then due, would negative the fraudulent intention;" and he ordered a reference to the Master "to inquire what debts were owing by the settlor at the time of the execution of the settlement . . . and what at the time of the settlement was the amount of the settlor's property not included in the settlement."

The principle involved in this judgment has been generally approved of and followed (*Holmes* v. *Penney* (1856), 3 K. &

J. 90; *Thompson* v. *Webster* (1859), 4 Drew. 628; *Freeman* v. *Pope*, L.R. 5 Ch. 538; *Godfrey* v. *Poole* (1888), 13 App. Cas. 497, 503); and I think the authorities now establish the proposition that the mere proof of the existence of particular debts prior to a voluntary settlement does not, without more, establish fraudulent intent, and thus invalidate the settlement, but that it is necessary to shew such a state of the settlor's affairs at the time of the settlement as would lead the Court to infer that the effect of the settlement was to defeat or delay creditors, and that, therefore, such was the settlor's fraudulent intent.

In the present case, the settlor had been carrying on a lucrative and safe business for years, and at the time of the settlement possessed stock in trade worth several thousands of dollars, not included in the settlement, and has since continued to carry on the same business and at the same place. These circumstances shew that the settlement cannot have had the effect of defeating or delaying the two creditors in question in the recovery of their trifling claims, and it cannot be inferred that the settlor was guilty of any fraudulent intent to defeat or delay his creditors. Thus, if those two creditors were plaintiffs here they would fail in the action, and the plaintiff's action, so far as it depends on their equity to set aside any of these settlements, must also fail.

The remaining question is, whether, as a subsequent creditor, the plaintiff is entitled to the relief sought. In his statement of claim he charges that, at the times of the making of the three conveyances, the defendant David Brown was in insolvent circumstances, unable to pay his debts in full; that he was at the time engaged in a hazardous business; that the conveyances were made for the purpose of putting his assets out of the reach of creditors; that, when those conveyances were made, David Brown had no other assets available for the payment of his creditors; and that, unless the conveyances are set aside, the plaintiff and other creditors will be unable to obtain payment of their just claims.

There is no evidence to support any of these charges. The learned trial Judge has found that the business was not a hazardous one (there is no evidence to shew that it was); and

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the fact that the settlor was practically free from debt negatives the charge of insolvency; and the further fact that subsequent to the conveyances he has incurred no debts, justifies the inference that the settlements were made with no fraudulent intent towards creditors, past or future, but solely for the purpose of discharging what he considered to be a moral obligation on his part towards his wife.

The plaintiff, a subsequent creditor, has failed to shew any fraudulent intent on the settlor's part with reference to subsequent creditors, including himself; and, therefore, he is not, in respect of his own claim, entitled to impeach any of these settlements.

For these various reasons, this appeal should be dismissed with costs.

Appeal dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Court without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

SHEPHARD v. BRUNER.

Alberta Supreme Court, Stuart, J.

PARTNERSHIP (§ IV—15)—*In real estate—Reference and accounting.*]—Action by plaintiff to declare him entitled to a partnership interest with the defendant in certain land transactions.

Peacock, for the plaintiff.

Clifford T. Jones of Jones, Pescod & Adams, for the defendant.

STUART, J., on a review of the evidence gave judgment for the plaintiff declaring him entitled to a one-half interest in the property subject to the defendant's lien for all payments made over and above his one-half share, with interest thereon at the rate specified in the agreement. Reference to the Clerk to take the accounts so as to ascertain the exact position. When this is ascertained, a motion for final judgment may be made. The plaintiff will be entitled to his costs.

Judgment for plaintiff.

BRAITHAITY v. MACKENZIE, MANN & CO.

Alberta Supreme Court, McCarthy J. December 31, 1914.

MASTER AND SERVANT (§ II A—30)—*Workmen's Compensation Act (Alta.), sec. 3.*]—Action for damages for negligence.

L. T. Barclay, for plaintiff.

O. M. Biggar, K.C., for the defendant.

MCCARTHY, J.:—This action came on for trial before me at Edmonton on November 13, 1914, and at the close of the trial I delivered judgment dismisssing the plaintiff's claim for damages

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for negligence. An application was made to me under sec. 3 of the Workmen's Compensation Act to proceed to assess compensation to the plaintiff under that Act. Counsel for the defendant argued that the defendant is not liable to pay compensation under the Workmen's Compensation Act, for the reason, amongst others, that the defendant is not, on the facts of the case as proved, an "undertaker" within the meaning of sec. 2 of the Act. From all that appeared in evidence before me at the trial, and no additional evidence was tendered in respect of the claim under the statute, I must agree with the view urged upon me that the defendant is not liable to the plaintiff to pay compensation.

Application dismissed.

BRADDICK v. PERKY.

Alberta Supreme Court, Hyndman, J. October 9, 1914.

FRAUDULENT CONVEYANCES (§ II—8)—*Voluntary—Forbearance—Concealment of real consideration—Tests of validity.*]—Interpleader issue attacking an assignment on the ground that it was voluntary.

Clifford T. Jones, of *Jones, Pescod & Adams*, for the plaintiff.

D. S. Moffatt, of *Taylor, Moffatt & Moyer*, for the defendant.

HYNDMAN, J.:—I am of the opinion that the assignment to the claimant deputy was a voluntary one made and served upon the C.P.R. Co. without his knowledge. That the claimant exercised no special forbearance towards the defendant Perky, because of this assignment. The promises to give security were very indefinite and vague, and generally unsatisfactory. Furthermore, the consideration expressed in the written documents is $1, no mention being made of the past indebtedness which it was claimed was the real consideration. Under all the circumstances of this case, therefore, I think the assignment to the deputy must be declared to be invalid as against the garnishee order.

There will be judgment accordingly, but without costs to either party, on the issue.

Judgment setting aside assignment.

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AMES-HOLDEN McCREADY CO. v. REIBEN.

Saskatchewan Supreme Court, Elwood, J. December 18, 1914.

BILLS OF SALE (§ II—5)—*Statutory requirements—Change of possession—Consideration—Past due note.*]—Appeal from the Local Master.

Bigelow, K.C., for execution creditors (appellants).

Griffith, for claimant (respondent).

ELWOOD, J.:—In this matter I am of the opinion that the Local Master erred in making the order for an issue, because, in my opinion, from the evidence before him at the hearing the claimant did not make out a *primâ facie* case. The bill of sale tendered does not comply with the Bills of Sale Act. It was not registered and does not comply with the other requirements of the Act; therefore, if the claimant relied on that bill of sale he did not make out his case. Further, there was no evidence before the Local Master that there was a change of possession of the goods, and in my opinion it was necessary to shew that there was an actual and continued change of possession.

On the return of the motion before me counsel for the claimant filed the affidavits of J. H. Johnston and the claimant. I allowed these affidavits to be put in because counsel for the claimant stated to me that oral testimony had been offered before the Local Master which the Local Master refused to accept. On the reading of the affidavits, I asked counsel for the claimant whether these affidavits proved all that would have been proven by oral evidence which was offered by the claimant on the hearing before the Local Master, and I was informed that these affidavits did prove everything that would have been proven by the oral evidence which was refused. I am of the opinion that even if the oral evidence had been before the Local Master it would not have been sufficient to prove that there was an actual and continued change of possession such as is required. The affidavit of the sheriff shews that he seized the goods on a certain quarter section, and from the affidavits filed by the claimant it appeared that these goods had belonged to the execution debtor, and I would assume had been grown upon the quarter section on which they were seized. I think I would therefore be justified in assuming that the quarter section on which the goods were seized was the

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property of the execution debtor, and that there was no other party other than the defendant in the occupation of the lands.

There is another objection, and while there is evidence of the claimant that the consideration of the bill of sale was a partly past-due note and part cash, yet the affidavit of the defendant filed is that it was given in payment of the past-due note, and that, in my opinion, would not be good consideration as against execution creditors. There were three executions registered prior to the alleged sale; under all the circumstances, therefore, I am of the opinion, as I said before, that the Local Master erred, and the appeal will be allowed with costs and the claim of the claimant barred. The costs of this appeal and the costs of the interpleader proceedings, together with the costs of the sheriff of and incidental to this appeal, will be paid by the claimant.

Appeal allowed.

MILLS v. HARRIS & CRASKE.

Saskatchewan Supreme Court, Newlands, J. October 2, 1914.

MOTIONS AND ORDERS (§ I—3) — *Notice of Motion — Service of — Rule* 693.] — Appeal from Master in Chambers dismissing a motion on the ground that the notice contravened r. 693.

H. V. Bigelow, K.C., for defendants (appellants).
C. M. Johnston, for plaintiff (respondent).

NEWLANDS, J.:—This is an appeal from the Master in Chambers dismissing a motion made after vacation on the ground that the notice of motion was given during vacation, such a notice being "contested business" and therefore forbidden by r. 693 unless authorized by the order of a Court or Judge.

If it was not for the proviso to r. 693, I would without hesitation hold that the giving of a notice was not "contested business" unless it was for a matter to be heard during vacation and that the hearing of the motion and not the giving of the notice would be "contested business." The proviso I refer to is as follows: "Provided that notice of trial and notice of appeal to the Court *en banc* may be given during vacation."

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By referring back to r. 549 Con. Ord. 1898, it will be found that this proviso read: "Provided that notice of motion to set down for trial may be given and heard during vacation." By the practice under these rules—*i.e.*, ch. 21, Con. Ord. 1898—an action was set down for trial by order, which order was made on motion after a notice of motion had been given. The hearing of this motion was contested business, and therefore the object of the proviso was to make this piece of contested business an exception to the contested business that was forbidden to be done in vacation. When this rule was amended and consolidated by the present rules, the order setting down for trial was abolished, and a notice of trial substituted, and it is quite probable that the proviso was amended to conform to that change and not for the purpose of giving a new meaning to "contested business" in the rule.

However, I do not think that the proviso restricts the meaning of the rule, its object being to enlarge rather than restrict the meaning, and as "contested" means opposed, it is only business that is or can be opposed that is prohibited. To give an instance of what I mean there is nothing in the rule that says a party must enter an appearance. Now, the entering of an appearance is the first step a party takes in contesting a suit, and is in that sense contested business, but, as the other party cannot prevent the defendant from entering an appearance within the time limited he cannot oppose it, and therefore it is not contested business in the sense that the word is used in the rule, because under this rule an appearance must be entered during vacation, though the delivering of a defence is expressly made unnecessary.

Under the former practice when a summons took the place of a notice of motion, it was usual to serve in vacation all summonses granted during that time returnable after the close of vacation. I am, therefore, of the opinion that there is nothing in the rule to prevent the giving of a notice of motion to be made after vacation, during that time.

As to the hearing of the application on the merits, there is not sufficient material before me. The affidavit upon which this motion is made refers to other affidavits that are not before me. I, therefore, reverse the decision of the Master on the pre-

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liminary objection that was taken before him, and leave him to deal with the question on the merits. The order of the Master is, therefore, set aside with costs

Order accordingly.

BANK OF BRITISH NORTH AMERICA v. GRAHAM.

Saskatchewan Supreme Court, Elwood, J. December 19, 1914.

JUDGMENT (§ VII F—300)—*Relief Against—Motion to Set Aside—Procedure—Rehearing.*]—Application to set aside a default judgment.

P. M. Anderson, for the defendant.

H. W. Ward, for the plaintiff.

ELWOOD, J.:—I am very much of the opinion that the objection raised by Mr. Anderson as to the breach of the Bank Act is well taken, though in view of other objections raised I do not think it is necessary for me to express an opinion on this point. I am further of the opinion, on the admission of Mr. Ward, counsel for the plaintiff, that the plaintiff had no right, and in view of the letter of Mr. McEachern, apart entirely from the conversation which the defendant's solicitor had with Messrs. Livingstone, Wilson & Wilson to sign judgment without notifying the defendant. On February 27, 1914, they wrote the defendant that they had granted an extension of time, and this, I think, would entitle her to be notified before taking any further proceedings against her.

The result will be that the judgment and order *nisi* will be set aside with costs to be paid by the plaintiff to the defendant and the plaintiff to pay the costs of this application. The defendant will be at liberty to enter an appearance and deliver her defence within two weeks from this date.

Application granted.

ROYAL BANK OF CANADA v. BALL.

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British Columbia Supreme Court, Murphy, J. September 16, 1914.

BANKS (§ I—1)—*Purchase of banking business by bank—Its right to take chattel mortgage—Bank Act.*]—Action by a bank claiming under a chattel mortgage, against which the Bank Act R.S.C. 1906, ch. 29, sec. 76, is invoked.

Tupper, K.C., and *O'Neill*, for plaintiffs.

MacInnes, for defendants.

MURPHY, J.:—I am unable to hold valid the contention that the plaintiffs have no title. In my opinion the agreement of January 13th, 1913, gave them a good equitable, if not legal, title to the chattel mortgage, subject to their right to divest themselves thereof by electing to reject same within six months. Even if the legal title is outstanding—as to which I express no opinion—it is, if this view be correct, vested in a bare trustee, who, on demand, must transfer it to plaintiffs. That condition of things—assuming it to exist—cannot, I think, constitute a defence by Ball.

Neither do I think said agreement contravenes sec. 76 of the Bank Act. The agreement was for the purchase of a banking business. The fact that amongst the securities taken over was a chattel mortgage taken to secure a past due debt cannot, in my opinion, embarrass plaintiffs in carrying on this action.

As to the objection to the chattel mortgage, the only one that has caused me hesitation is the question of the identity of the goods. Taking defendant's examination for discovery in conjunction with exhibits 12 and 13, however, I have come to the conclusion that the goods covered by the mortgage are *primâ facie*, at any rate, identified with the goods sold by Ball. No evidence to the contrary was given. Although no argument was made on plaintiff's behalf that defendant is not a *bonâ fide* purchaser for value under the agreement, ex. 13, it may well be on the true construction of that document that he is merely an agent for the mortgagor to hold a sale, but it is unnecessary, in the view I take of the case, to express an opinion.

There will be judgment for plaintiff for the amount claimed.

Judgment for plaintiff.

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MORIN v. DUPUIS.

Saskatchewan Supreme Court, Brown, J. November 21, 1914.

JUDGMENT (§ VII F—300)—*Procedure—Rehearing—Restoring case—Jurisdiction of Local Master—Rule* 351.]—Appeal from the decision of a Local Master dismissing an application to restore a case which had been dismissed for default by a Supreme Court Judge.

P. H. Gordon, for appellant.

A. Lloyd Griffiths, for respondent.

BROWN, J.:—This is an appeal from the Local Master at Weyburn. This action was set down for trial at the regular sittings of the Supreme Court held at Weyburn in October. I happened to preside at that Court, and upon the case being called in its regular order the defendant appeared by counsel, but neither the plaintiff nor counsel on his behalf were present. The action was therefore dismissed. Application was subsequently made by the plaintiff to the Local Master at Weyburn to set aside the judgment so obtained and to have the case restored to the list under rule of Court No. 351. The Local Master dismissed the application, on the ground that he had no jurisdiction to entertain same, and although he does not so state, I presume he was of opinion that the trial Judge alone had such jurisdiction. Supreme Court rule No. 351 is as follows:—

> 351. Any verdict or judgment obtained, where one party does not appear at the trial, may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within fifteen days after the trial.

The old rule of Court for which 351 was substituted reads as follows:—

> 256. Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or Judge upon such terms as may seem fit upon an application within fifteen days after the trial.

Under this old rule the practice was to apply to the Judge who presided at the trial. The present rule follows the wording of English rule No. 457, and seems to differ materially from our old rule of Court in that application may be made to "a Judge." I see no reason why the phrase "a Judge" should be restricted in its meaning to the Judge who tried the case. On its face it means, any Judge of the Supreme Court. Under the English

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rule it was laid down, in the case of *Vint* v. *Hudspeth*, 29 Ch.D. 322, that the proper practice under that rule was to apply to the Judge who gave the judgment to restore the action. In that case the plaintiff, whose action had been dismissed in default of appearance at trial, appealed to the Court of Appeal from the judgment so obtained; and Cotton, L.J., said, in the course of his judgment:—

> I am far from saying that this Court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the Court of Appeal from being flooded by having to hear cases in the first instance. It is therefore right that the plaintiff should first apply to the Judge who gave the judgment to restore the action. It cannot be said that the plaintiff did not know that the action was going on against him. He has only himself to thank for all the difficulty that has occurred. The appeal must stand over for a fortnight, to give time for the plaintiff to make such application to the Judge as he may be advised.

The point emphasized in the judgment is that the proper practice is, not to appeal from the judgment, but to apply in the first instance to the lower Court to restore the action. There is nothing in the judgment itself to indicate why special reference was made to the Judge who gave the judgment. The reason will, I think, be found in the English practice. There, as I understand it, each case is assigned to a particular Judge to deal with, and all applications, interlocutory and otherwise, made in, as well as the trial of the action, are disposed of by the particular Judge to whom the case is thus assigned. There is no such practice here. On the contrary, with us the trial Judge, as a rule, never hears of the case until he is called upon to try it. Moreover, to so restrict the rule would, in my opinion, cause much inconvenience under our practice. I am, therefore, of opinion that any Supreme Court Judge in Chambers had jurisdiction to entertain this application; and, that being so, the Local Master would have jurisdiction under rule 620.

The appeal will, therefore, be allowed with costs; the judgment in question will be set aside, and the action restored to the list for trial at the next regular sittings of the Court to be held at Weyburn. The plaintiff must pay the defendant his "costs of the day" on the trial of the action, including a counsel fee of $40 and his costs of the motion to the Local Master. The plaintiff's costs of this appeal will be offset against the costs which he is so ordered to pay the defendant, and the plaintiff will pay the defendant any difference.

Appeal allowed.

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MURDOCK v. KILGOUR.

Ontario Supreme Court, Lennox, J. November 2, 1914.

INTOXICATING LIQUORS (§ I A—1)—*Prohibition and regulation—Canada Temperance Act—Voting on—Ballot—Returning officer—Injunction.*]—This action was brought by Andrew Elisha Murdock against F. W. Kilgour, president of the Welland County Hotel Keepers' Association, Hugh A. Rose, returning officer, and His Honour L. B. C. Livingston, Judge of the County Court of the County of Welland, for a declaration in respect of a vote taken in the county of Welland upon the question of the adoption of the Canada Temperance Act in that county.

The plaintiff moved for an order prohibiting the defendant Livingston, until the trial and determination of the action, from determining or certifying, as a result of the pending scrutiny under the Canada Temperance Act, whether the majority of votes given on the proceedings had and taken in the county, pursuant to a proclamation of the Governor in Council in that behalf, for a polling of votes under the Act, was or was not in favour of the petition to the Governor in Council for bringing into force in the county Part II. of the Act, or for an injunction instead of a prohibition; and for an injunction restraining the defendant Rose, returning officer under the proclamation, from transmitting any return to the Secretary of State with reference to the question whether or not the majority of votes was in favour of the petition.

The motion was heard in the Weekly Court and was turned into a motion for the judgment.

The injunction was granted.

W. E. Raney, K.C., for the plaintiff.

James Haverson, K.C., for the defendants.

LENNOX, J.:—The plaintiff does not desire an order prohibiting the County Court Judge.

There are two questions to be determined, namely:—

1. Have I jurisdiction?

2. Was the vote taken according to law?

The first question is the only one presenting any difficulty. I

cannot see that there is much help to be derived from the authorities referred to. I am of opinion that I have jurisdiction.

The other question, I think, is hardly open to argument. Literal compliance with the statute is not essential, but there must be at least substantial compliance. To mention only one point the ballot used cannot be said to be even the substantial equivalent of the one prescribed by the statute. It is not, of course, relevant to argue that it is as good or better than the statutory form.

There will be a perpetual injunction restraining the returning officer as asked for. I make no order as to costs.

Injunction granted.

GAUTHIER v. VILLAGE OF CALEDONIA.

Ontario Supreme Court, Latchford, J. November 2, 1914.

HIGHWAYS (§ IV A—155)—*Defect in sidewalk—Falling on ice-covered sidewalk—"Gross negligence" defined—Municipal Act, R.S.O. 1914, ch. 192, sec. 460, sub-sec. 3.*]—Action for damages for personal injuries sustained by reason of a fall upon an ice-covered sidewalk in the village of Caledonia.

The action was dismissed.

W. E. Kelly, K.C., for the plaintiffs.

H. Arrell, for the defendants.

LATCHFORD, J.:—This action is brought by Alexis Gauthier and his wife against the defendant corporation for damages resulting from injuries sustained by Mrs. Gauthier on the morning of the 6th March, 1914, by falling on an ice-covered sidewalk near her residence, at a point immediately east of a driveway leading from the travelled way of a street into the premises of one Martindale.

Mrs. Gauthier's injuries were very serious. Her left leg was broken in two places. While she made a good recovery, she is still lame and suffering from pain and from shock to the nervous system.

The weather on the day prior to the accident was warm, and

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the snow on the lawns of the plaintiffs and their neighbour Martindale melted rapidly. Some of the resulting water was not absorbed by the still frozen sod, but flowed over and upon the granolithic sidewalk on the north side of the street, there forming, when the temperature fell during the night, a coating of ice, about a quarter of an inch in thickness, and extending diagonally across the sidewalk over an irregular area not more than two or three feet in greatest width.

During the night there was a slight fall of snow—just sufficient to cover and conceal the ice formed on the pavement, which at the point in question has an inclination towards the east of about one foot in twenty.

The lightly covered ice upon the down grade of the pavement eastward made the sidewalk unsafe and dangerous, and the accident to Mrs. Gauthier was caused by this dangerous condition, and not by any negligence on her part.

A number of credible witnesses living west of the plaintiffs on the same street, and on their way to and from work using the sidewalk several times each day, testified that they never saw water flowing across the sidewalk near the driveway or forming ice there. No complaint was ever made to the defendants by the Gauthiers or any other person regarding the condition of the sidewalk at the point referred to, nor had the defendants any knowledge or notice of the formation of the ice.

I find that under ordinary circumstances the water from the lawns did not flow over the pavement but ran down easterly inside the line of the sidewalk. The levels taken by Mr. Fair, a civil engineer of long experience, shew that in a distance of five feet north from the inner line of the pavement there is a fall of over two inches. This depression would have to be filled before there could be a flow over the sidewalk. Vehicles passing into or out of Martindale's, when the soil in the driveway was soft, would sink and form, on each side of the wheels, elevations which, especially when frozen, would impede the flow to the east, and tend to divert it over the pavement. The evidence on the point is slight, but to my mind sufficient. Such conditions could exist but seldom at the same time, and the overflow would accordingly be of the rare occurrence spoken of by the witnesses.

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The plaintiffs say that the water flowed over the sidewalk only three or four times during the winter of 1913-14. Mrs. Gauthier saw no ice there except on the morning of the accident, and the witness Pettigrew on but that and another occasion. Martindale and his wife both swear they never observed ice on the sidewalk, formed, as this was, by flowing water, except on the occasion when Mrs. Gauthier was injured. On the same day the witness Harris slipped and fell at the same place; and shortly before or shortly afterwards Miss Lyons also fell there. Neither observed ice there previously; and Harris says he would not have fallen but for the circumstance that the ice was lightly covered with snow.

It is strenuously urged that the defendants should have placed a catch-basin with proper drainage at a point where it would gather and dispose of such water as overflowed, and, when frozen, rendered dangerous the sidewalk. Failure to provide such a means of disposing of the overflow is in fact the chief negligence attributed to the defendants, and the only negligence —if such it can be called—established against them.

The facts established do not, in my opinion, afford the plaintiffs any right of action.

Since 1894 no municipal corporation has been liable for accidents arising from persons falling owing to the presence of ice upon a sidewalk except in cases where "gross negligence" on the part of the corporation has been established: 57 Vict. ch. 50, sec. 13. The enactment then passed has been carried down through the several revisions of the Municipal Act, and is now found in R.S.O. 1914 ch. 192, sec. 460, sub-sec. 3.

Prior to 1894, when mere negligence to repair on the part of a municipal corporation gave a right of action, it was held, in a case where the facts are very like those of the present case, that the plaintiff was not entitled to recover: *Forward* v. *City of Toronto* (1888), 15 O.R. 370. In the judgment of the Common Pleas Division, unanimously reversing the verdict at the trial, Mr. Justice Rose said (p. 373): "To permit this verdict to stand would in effect be to declare that wherever the corporation build sidewalks in front of lanes, or carriage ways, where the land sloped toward the street, or indeed in front of any land sloping towards the street, it at once became burdened with the duty of

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preventing water running from such higher land upon the walks and forming into ice, or with the duty of without delay removing such ice, although it had no notice of its formation other than the notice derived or imputed from the formation of the land and the building of the walk. To declare such to be the law, would be to bind upon municipalities burdens hard to be borne, and to require of them the performance of a duty which they might well declare to be impossible."

"Gross negligence," as used in the Act of 1894, has been defined as "very great negligence:" Sedgewick, J., in *City of Kingston* v. *Drennan* (1896), 27 S.C.R. 46, at p. 60; Osler, J.A., in *Ince* v. *City of Toronto* (1900), 27 A.R. 410, at p. 414.

To hold the defendants liable in the present case would be to deprive them of the benefit of the statute exempting them from liability when an accident is occasioned by ice on a sidewalk in all cases where there has not been gross negligence on their part.

Such negligence not having been established, the plaintiffs fail. It is not, I think, a case for costs.

Action dismissed.

CITY OF TORONTO v. CONSUMERS GAS CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. September 21, 1914.

MUNICIPAL CORPORATION (§ II G—235) — *Construction of sewer—Necessary lowering of gas company's main—Expense of —Liability for—Municipal Act, R.S.O.* 1914 *ch.* 192, *secs.* 325, 398(7)—*Injurious affection of land of company in which main laid*—11 *Vict. ch.* 14.]—Appeal by the defendant company from the judgment of the Senior Judge of the County Court of the County of York, after trial of an action in that Court without a jury, in favour of the Corporation of the City of Toronto, the plaintiff (respondent).

The appeal was allowed.

I. F. Hellmuth, K.C., and *W. B. Milliken*, for the appellant company.

G. R. Geary, K.C., for the respondent corporation.

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The judgment of the Court was delivered by MEREDITH, C.J. O.:—The action is brought to recover the expense incurred by the respondent in lowering a 20-inch gas main belonging to the appellant, laid on Eastern avenue, one of the public highways of the city of Toronto, at or near the intersection of that street with Carlaw avenue, another of the public highways of the city, which was necessitated by the construction by the respondent, in the public interest, of a sewer on Carlaw avenue.

It is conceded by the appellant that the lowering of the gas main was necessary to enable the sewer to be constructed, and that, if the appellant is liable to pay the expense incurred in lowering the gas main, the respondent is entitled to recover the amount sued for; and the action is really brought for the purpose of obtaining a judicial determination as to whether the cost of such a work is to be borne by the appellant or by the respondent.

When the appeal was opened and the fact that the case is a test one was mentioned, it was suggested that it was undesirable that the parties should be concluded by a judgment of this Court from which there is no appeal, and it was agreed by counsel that the case should be treated as if the action had been removed into the Supreme Court.

If it were not for the decision of the Supreme Court of Canada in *Consumers Gas Co.* v. *City of Toronto*, 27 Can. S.C.R. 453, and the provisions of sec. 325 of the Municipal Act, R.S.O. 1914 ch. 192, I should be inclined to agree with the conclusion of the learned Judge of the County Court. It was, however, held in that case that the soil occupied by the pipes of the appellant is land taken and held by the appellant under the provisions of its Act of incorporation (11 Viet. ch. 14); and by sec. 325 it is provided that "where land is expropriated for the purposes of a corporation or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is

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injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom. . . . ''

The sewer in the laying down of which it became necessary to remove the pipes of the appellant was constructed under the authority of cl. 7 of sec. 398 of the Municipal Act, which empowers the councils of all municipalities to pass by-laws "for constructing, maintaining, improving, repairing, widening, altering, diverting, and stopping up drains, sewers, or watercourses; providing an outlet for a sewer or establishing works or basins for the interception or purification of sewage; making all necessary connections therewith, and acquiring land in or adjacent to the municipality for any such purposes.''

The land of the appellant, i.e., the soil in which its pipes were laid, was injuriously affected by the exercise of the power of the respondent or its council in the construction of the sewer, the laying of which necessitated the removal of the pipes, and the appellant was entitled to compensation for the damage necessarily resulting from the exercise of that power, and it follows that the appellant cannot be required to repay to the respondent the expense incurred in taking up and relaying the pipes.

The appeal should be allowed with costs and the judgment appealed from reversed; and, in lieu of it, judgment should be entered dismissing the action with costs.

Appeal allowed.

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ARCHAMBAULT v. CHAUSSÉ.

Quebec Superior Court, Archibald, J. (Montreal). February 7, 1914.

PARTIES (§ III—120)—*Bringing In—Quebec Practice—Action en arriere-guarantie.*]—Action to obtain title to an immoveable brought against Chausse, who called in his vendors, the Dussaults, in warranty, who in turn called in Lacombe, the purchaser from them.

Rodier & Archambault, for plaintiff.
D. Brodeur, K.C., for defendant.
McAvoy & Lamontagne, for Dussault *et al.*
O. A. Goyette, K.C., for Lacombe.

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ARCHIBALD, J., said that it has sometimes been doubted whether an action in simple warranty will lie against a person without contractual obligation upon the basis of fault alone. That, however, is at present decided by jurisprudence in the affirmative. But it is not a warranty of the same kind as formal warranty. French jurisprudence at the present time is undoubtedly in favour of allowing an action of warranty where the obligation to warrant arises out of fault, and also of allowing all the procedure of actions in formal warranty to apply to such a case. But yet there is a distinction; there must be close connection between the fault which forms the basis of the obligation to warrant and the occasion upon which the warranty is sought to be applied. Thomine on Procedure, 338, Garsonnet, 957, and Sirey, 365 (art. 181), referred to.

The action *en arrière-guarantie* by defendant Dussault against Lacombe was dismissed, and judgment ordered against Dussault to indemnify Chausse for his loss by reason of Archambault's action in which judgment had been rendered *ex parte* in default of defence by the principal defendant or the defendants in warranty.

Judgment accordingly.

DOWNING v. JAQUES.

Quebec Court of Review, Sir Charles P. Davidson, C.J., Archibald and Greenshields, JJ. May 9, 1914.

CARRIERS (§ III J—487)—*Connecting Carriers—Contract at Through Rate.*]—Appeal by way of review from Saint-Pierre, J., adjudging re-imbursement by defendant of excess freight charges he was compelled to pay by connecting carriers on a through shipment in respect of which defendant had through his agent made a through freight rate from London, Eng., to Cranbrook, B.C.

THE COURT OF REVIEW, on a consideration of the facts, affirmed the judgment appealed from.

Vipond & Vipond, for plaintiffs.

Smith Markey & Co., for defendant.

Appeal dismissed.

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FRASER v. LANDE.

Quebec Court of Review, Archibald, Mercier and Beaudin, JJ. June 6, 1914.

BROKERS (§ II B—12)—*Real Estate—Listing of Wife's Property Authorized by Husband—Wife's Refusal to Sell when Purchaser Found.*]—Action for commission on procuring a purchaser of real estate, although the defendant's wife, who owned the property, refused to sell.

Meredith, Macpherson & Co., for plaintiff.

Lamothe & Co., for defendant.

THE COURT OF REVIEW held that plaintiff had performed his part of the contract with the husband, and awarded the plaintiff the usual commission of 2½ per cent. in an action against him, although his wife, to whom the property belonged, refused to sell after the purchaser was procured.

Judgment for plaintiff.

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SPRINGER v. ANDERSON.

Alberta Supreme Court, Walsh, J. November 18, 1914.

VENDOR AND PURCHASER (§ I—1)—*Description of Lands—Right of vendor to re-subdivide—Finality of registered plan, how limited.*]—Action by a purchaser for specific performance of an agreement for sale of lands, according to the original plan, resisting registration by the vendor of a new sub-division plan. The plaintiff agreed to buy from the defendant Anderson two lots according to an unregistered plan which Anderson had prepared of the sub-division of which these lots formed part. After the execution of the agreement, Anderson sold the sub-division to the defendant company, which had a new plan of the sub-division prepared and registered. This new plan differed in a great many respects from the plan prepared by Anderson according to which the sale was made to the plaintiff, but the new plan preserved the identity of the lots bought by the plaintiff under a new block and lot number. The plaintiff being dissatisfied with the general scheme of this new plan, recorded a caveat against the entire sub-division for the purpose of preserving his right to his lots according to the

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original plan. Being notified to proceed under this caveat, he commenced this action, claiming specific performance of the agreement according to the original plan, and paid into Court the entire balance of the purchase money and interest owing by him under his agreement.

G. B. O'Connor, K.C., referred to the following authorities: *Peacock* v. *Penson*, 18 L.J.Ch. 57; *Myers* v. *Watson*, 61 Eng. Rep. 202; *Carey* v. *City of Toronto*, 11 A.R. (Ont.).

John Cormack, for the defendants.

WALSH, J.:—The defendants offer to give title to the plaintiff to the exact parcel of land which they agreed to sell to him. This parcel will not be known by the description given to it in the agreement of sale because of the substitution of the new plan for the tentative plan which was in existence when the agreement was entered into, but it is exactly the same piece of ground. The plaintiff objects to take title according to the substituted plan because of the many changes that have been made in it from the original plan. He advances several complaints against the substituted plan, some of which are simply voiced by his counsel, but some of which are vouched for by his oath. He complains that the name of the sub-division has been changed from Boulevard Heights to Boulevard Crescent; that the names of the streets have been changed from those given to them on the original plan; that in some portions of the sub-division the size of the lots has been reduced from 50 x 150 to 33 x 120; that Bedford Road, which, according to the original plan, was the front street of the sub-division skirting the edge of the high bank of the river, has been diverted, so that it is now in some places about 30 feet from the edge of the bank, and that between the south boundary of this road and the river a new block of lots has been laid out, which, if built upon, will interfere with his view; and that a new road has been laid out between the street on which his lots front and the river. I am not sure that these are all the complaints which he makes, but they are the serious ones. In my opinion these objections are all fantastic in the highest degree. I think there is no substance in any of them. The objections to the change of name of the sub-division and the streets, and the reduction in the size of the lots in a portion of the sub-division, are trivial. The

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laying out of the new block 6 will not, in my opinion, affect the view from the plaintiff's lots in the slightest degree. According to the evidence, no buildings can be put upon these portions of any of the lots which are below the edge of the bank, and the nearest lot to the plaintiff's property on which any building can be put up between Riverside Drive and the edge of the bank is lot 19, which is, as nearly as I can figure out from the map, practically 500 feet distant from the nearest part of the plaintiff's property. The buildings if erected between the Drive and the top of the bank at this point, and east of this point, would not obstruct in any way the plaintiff's view up the valley of the river. I cannot see that the laying out of the new road known as Dufferin Terrace can prejudice or affect the plaintiff at all. This road and Riverside Drive converge practically in front of the plaintiff's property, and it seems to me that it would be a distinct advantage to the plaintiff, in the carrying on of the attractive establishment which he proposes to set up there, that he should have these roads meeting in front of it. I can quite well understand how changes made in a plan according to which property is sold might prejudice the purchaser so as to induce the Court to withhold its sanction from the change, such, for instance, as the cutting out of a street or lane giving access to the purchased property, although I must confess that since reading the Ontario case of *Carey* v. *City of Toronto*, 11 A.R. (Ont.), to which Mr. O'Connor, with his usual fairness, directed my attention, I am not sure even of this. But with respect to changes of the character here complained of, I can see nothing upon which to base any relief for the plaintiff. There is no absolute finality even to a registered plan. A Judge has the power to order an amendment of it. If the original plan here in question had been registered, and the defendants had come to me with an application to amend it by the substitution of the present registered plan, I would not have hesitated to make the order, so far, at least, as any objections now raised by the plaintiff are concerned. I think the defendants are entitled to specific performance of their agreement, giving to the land the new block and lot numbers appearing on the substituted plan. The plaintiff is entitled to a reference to the clerk as to title if he sees fit. Upon a good title being shewn and a proper transfer deposited with the clerk and the duplicate certificate of title being left with the

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registrar of Land Titles, the money paid into Court by the plaintiff may be paid out to the defendant company. If this is sufficient to satisfy the defendants' claim, the transfer may thereupon be given out to the plaintiff for registration. If it is not sufficient, it may be so given out upon payment into Court by the plaintiff of the balance. The registrar will take the accounts if there is any dispute as to the amount owing. The plaintiff's caveat will be removed from all of the land covered by it with the exception of the two lots in question, and plaintiff will pay the costs of the defendant company. There will be no costs to the defendant Anderson.

Judgment for defendant.

SHARPE v. CANADIAN PACIFIC R.W. CO.

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Ontario Supreme Court, Britton, J. November 2, 1914.

RAILWAYS (§ IV—87)—*Trespassers—Death of servant — Lineman run over by engine of another railway company — Workmen's Compensation for Injuries Act—Conforming to orders of superior—Absence of warning.*]—Action brought on behalf of the parents of Thomas L. Sharpe, who was killed on the evening of the 19th March, 1913, on the track of the defendants the Toronto Hamilton and Buffalo Railway Company, by a light engine of that company, running reversely, to recover damages for his death.

The action was tried before BRITTON, J., and a jury, at Peterborough.

F. D. Kerr, and *V. J. McElderry*, for the plaintiff.

J. D. Spence, and *G. W. Wallrond*, for the defendants the Canadian Pacific Railway Company.

J. A. Soule, for the defendants the Toronto Hamilton and Buffalo Railway Company.

BRITTON, J.:—At the close of the case for the plaintiff and again at the close of the evidence, counsel for the defendants asked for dismissal of the action. I reserved my decision and

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submitted questions to the jury, which the jury answered; and they assessed the damages at $1,000.

The deceased was a "line-man" in the employment of the defendants the Canadian Pacific Railway Company, and on the day of his death had with others been working for that company at Welland. That company had certain running rights on the railway of the defendants the Toronto Hamilton and Buffalo Railway Company; and the Canadian Pacific Railway Company had a car, called a boarding-car or sleeping-car, which the workmen could use, and, if the workmen used it, they were charged a certain sum agreed upon, which was deducted from their wages. This car was on a dead-end track in the north-western part of the yard of the Toronto Hamilton and Buffalo Railway Company.

On the morning of the accident, the deceased, with his boss and four other workmen, went to Welland to do some work. They travelled part of the way upon a hand-car, then walked to the station of the Toronto Hamilton and Buffalo Railway at Hamilton, and took a Canadian Pacific train for Welland. At the close of the day, they returned to Hamilton, and intended to go to the sleeping-car to stay all night. Upon arriving at the place where the hand-car had been left, they found that the hand-car had been removed. Then all started to walk to the sleeping-car or boarding-car. Just before the accident, all were walking on the east-bound track.

At the place of the accident there were three tracks, one for east-bound trains, one for west-bound trains, and the third track had upon it cars at rest. These men were walking westerly upon the east-bound track, when a train was seen approaching them from the west. The men all got off the east-bound track, stepping to the north upon the west-bound track. Four of them went further to the north and entirely off the west-bound track; but the deceased and one other continued to walk westerly upon the west-bound track, when they were overtaken and run over by the light engine running reversely.

The deceased was not in the employment of the Toronto Hamilton and Buffalo Railway Company. He was not upon their tracks by any permission of that company, express or im-

plied. There was no evidence of permission by the Toronto Hamilton and Buffalo Railway Company to any of the men in the employ of the Canadian Pacific Railway Company to walk upon these tracks. If it should be deemed of any importance that these workmen, on the occasion in question, used a hand-car upon the tracks of the Toronto Hamilton and Buffalo Railway, or that workmen of the Canadian Pacific on other occasions used a hand-car to go to and from their work, I cannot say that there was evidence of any express permission by the Toronto Hamilton and Buffalo Railway Company to the Canadian Pacific Railway Company or to the employees of that company. It would be a fair inference that the use of a hand-car by the Canadian Pacific men upon the tracks of the Toronto Hamilton and Buffalo Railway Company was permitted by the latter company, but that does not affect the present case.

The jury have found that it was actionable negligence to use a red light instead of a white light at the rear end of a locomotive—front end when running reversely—so as to create liability to a person injured when rightfully upon the track. I neither assent to nor dissent from that finding, but I am of opinion that the accident to the deceased was not occasioned by the absence of a white light.

I put my decision upon the ground that the unfortunate deceased was a trespasser as to the Toronto Hamilton and Buffalo Railway Company, and that there was no duty on the part of that company to the deceased to use a white light, or any other than not wilfully to run him down or put him in danger.

I do not think that there was any evidence to go to the jury as to negligence in the use of red or white lights on the part of the Toronto Hamilton and Buffalo Railway Company.

The accident did not occur by reason of any neglect on the part of the Toronto Hamilton and Buffalo Railway Company to fence. There was a notice warning persons who were not employees of the Toronto Hamilton and Buffalo Railway Company to keep off their right of way.

Whether the deceased was a workman of the Canadian Pacific Railway Company and under the direction of a man to whose orders the deceased was bound to conform, or not, makes no dif-

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ference to the Toronto Hamilton and Buffalo Railway Company. The deceased was not an employee of the Toronto Hamilton and Buffalo Railway Company; and as to these defendants the action must be dismissed.

Upon the answers of the jury affecting the defendants the Canadian Pacific Railway Company, I am of opinion that the plaintiff is entitled to judgment against that company.

The deceased was, in my opinion, at the time of the accident a workman in the employ of the Canadian Pacific Railway Company. He was then returning from the work of the day to the place provided by these defendants, to remain over night. He had the tools of his trade and for his work in his possession. It was intended both by the deceased and his employers that he should continue work for these defendants on the following and other days. The sleeping-car was provided by those defendants for the deceased and other workmen similarly employed. Ashby and Brunker were persons in the employ of the Canadian Pacific Railway Company, having charge of the deceased and directing him as to his work and the place where it was to be performed. These were persons to whose orders the deceased was bound to conform. These persons assumed that they had the right to go through the opening in the fence and to go upon the right of way of the defendants the Toronto Hamilton and Buffalo Railway Company and to walk along the tracks.

As between the deceased and the Canadian Pacific Railway Company the deceased was rightfully upon the track. He was invited to go with those over him, and by them, to this place of danger. There was no warning to the deceased by his boss of any danger.

So far as appears, the deceased did not know that he was upon the tracks of the Toronto Hamilton and Buffalo Railway or upon any right of way other than that of his employers. There was, in my opinion, negligence on the part of those servants of the Canadian Pacific Railway Company who were over the deceased, and the accident occasioning the death of the deceased was caused by his conforming to the instructions given to him. The "boss" led the way, the deceased followed, and the accident happened by reason of his following instructions.

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In order to shew compliance with an order of a master or superior officer, it is not necessary that the order should be of a formal and imperative character. If the employee knows what evidently is required of him, and even if he suggests something in the way of doing it, he being ignorant of danger, and if the master adopts and directs it, and in the doing of it an injury to the workman is caused, there may be liability by the master.

If the employer signifies in any reasonable way what is wanted, and the servant, all in good faith, obeys, that is sufficient. See Labatt on Master and Servant, vol. 4, p. 3915.

There will be judgment for the plaintiff against the defendants the Canadian Pacific Railway Company for $1,000 with costs.

The action against the defendants the Toronto Hamilton and Buffalo Railway Company will be dismissed with costs if such costs are demanded.

Judgment against defendant Canadian Pacific R. Co.; case dismissed as against the other defendant.

Judgment against C.P.R.; dismissed as to other defendant.

HORD v. WOLF.

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Saskatchewan Supreme Court, Elwood, J. December 21, 1914.

JUDGMENT (§ III B—213)—*Personal judgment—Foreclosure—Agreement of sale.*]—Appeal from the Master.

C. M. Johnston, for the defendant (appellant).

A. L. McLean, for the plaintiff (respondent).

ELWOOD, J.:—This is an application by way of appeal from the judgment of the Master in Chambers, who refused to set aside, cancel, and discharge the executions issued against the defendant herein and the sale of the land covered by the agreement sued on herein. The application to the Master in Chambers and to me was made on the following grounds, namely: (1) That the order and judgment were obtained *ex parte* and without notice to the defendant; (2) that the said judgment was issued

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for an amount in excess of the agreement for sale sued on; (3) that the plaintiff was not entitled, under the agreement for sale, for an order for personal judgment and an order for foreclosure of the agreement sued on, or for an order for the sale of the land covered by the agreement sued on; (4) the order for personal judgment and for the sale of the land covered by the agreement for sale was not drawn up and issued in accordance with the fiat of the Honourable the Master in Chambers.

So far as the second ground is concerned, it was stated on the argument that the objection therein contained was withdrawn. The facts material to the application are as follows: The writ of summons was served on the defendant personally on March 17, 1913. No appearance was ever entered. On April 10, 1913, the plaintiff obtained *ex parte* from the Master in Chambers an order that the plaintiff have leave to enter judgment for the amount sued on, together with costs, and also a decree that the amount due under the agreement sued on was the amount for which the judgment was to be entered, and the defendant was further ordered to pay into Court to the credit of the cause, on or before May 15, 1913, the said sum, together with interest and costs, and that in default the premises be sold and the proceeds of the sale to be applied in payment of the costs of sale, etc., the costs of the action and payment of the amount due under the judgment, and the balance to be paid into Court to the credit of the cause. The *fiat* under which this order was taken out provided *inter alia* as follows: In default of payment also as above provided, the agreement to be cancelled and the moneys paid forfeited. The above order was served upon the defendant by filing a copy in the office of the proper local registrar on April 22, 1913. Default was made in payment, and the land was duly sold. On July 3, 1914, the defendant was personally served with the notice of motion to confirm the sale, which motion was returnable on July 6, 1914, before the Master in Chambers. The motion came before the Master in Chambers on August 4, 1914, and an order was made confirming the sale, and on this latter motion counsel appeared on behalf of the defendant. The evidence before me shews that the defendant had no personal knowledge of the judgment against him until some time in the month of March, 1914, and that he thereupon caused steps to

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be taken to vacate a caveat lodged by the plaintiff against certain lands, but took no steps to set aside the judgment and order complained of until he launched the application herein, which was on November 24 of this year.

So far as the first of the above objections is concerned, I am of the opinion that while the proper practice to have adopted was to have served a notice of motion for the application by filing it in the office of the local registrar, yet the obtaining of the order *ex parte* was not a nullity but merely an irregularity, and as such could be waived.

So far as the third objection is concerned, I am of the opinion that the plaintiff was under the agreement for sale entitled to an order for sale as well as a personal judgment. It is quite true that so far as the pleadings are concerned there should have been a prayer for a declaration that the plaintiff was entitled to a lien on the lands for the amount of the moneys due, but the statement of claim did ask for a personal judgment, and did ask for a sale of the lands in question, and, while the order directing the sale did not declare that the plaintiff was entitled to a lien under the order, it declared the amount due for principal and interest under the agreement for sale, and it did, in effect, declare the plaintiff entitled to a lien; at any rate, the order granted the plaintiff what he claimed under the statement of claim, and consequently the order could not be declared a nullity. The order as drawn up did not order foreclosure, and I am of the opinion that a personal judgment and foreclosure could not be ordered. It is objected, however, that the *fiat* upon which the order was drawn up did order foreclosure. That is quite true, but the *fiat* so far as it ordered foreclosure was never acted upon and the order as it was drawn up omitted the portion of the *fiat* which ordered foreclosure; in all other respects it followed the *fiat*. I am of the opinion that the fact of the order not following the *fiat* in that respect cannot invalidate the order. At any rate, I am of the opinion that none of the above objections caused the proceedings taken to be a nullity. There was no affidavit of merits on the part of the defendant, and there was no suggestion that he had any defence on the merits that would entitle him to the relief, and, as I have stated above, the defects complained of do not render the proceedings a nullity, but are mere irregu-

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larities. These irregularities do not avoid the proceedings, and may be waived. I think that possibly the delay that occurred up to the month of July is explained to a certain extent, although I express no opinion on that point. I am, however, of the opinion that all of the irregularities were waived when the defendant appeared on the application to confirm the sale. It was stated by counsel that the defendant appeared and got an enlargement and did not oppose the motion to confirm the sale. There does not appear, however, to be any evidence before me of that, but if the defendant opposed the confirmation of the sale, then, the order having been made, his remedy was to appeal from that order, and, not having done so, the order must stand. If he did not oppose the confirmation, then he waived the irregularity. In addition to that, he apparently, without good reason, waited until November 24 before launching this motion, and I am of the opinion that under the circumstances of the case he cannot now succeed on the application. The result will be that the application will be refused and the appeal dismissed, with costs to be paid by the defendant to the plaintiff.

Application refused.

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COMPUTINC SCALE CO. v. SWEET.

Nova Scotia County Court, Wallace, J. November 20, 1914.

MOTIONS AND ORDERS (§ I—2)—*Notice of motion to set aside verdict—Premature, when.*]—Application to set aside the verdict of a jury, involving the sufficiency of the notice of motion under the County Court Act.

A. Whitman, for plaintiff.

W. O'Hearn, K.C., for defendant.

JUDGE WALLACE:—Section 86 of the County Court Act (ch. 156, R.S.N.S.) enables a Judge of the County Court, on application, to set aside the verdict of a jury in any action tried before him and grant a new trial. Sub-section 4 of this section requires that the notice of the application shall be served within ten days "after service of the order for judgment."

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C. C.

Counsel for plaintiff having made his application in this case before the order for judgment was taken out, I now decide that such a motion is premature. It is urged by counsel for plaintiff that the practice of the Supreme Court must be followed. I think, however, that the words, "in accordance with the practice of the Supreme Court," occurring in sec. 86 (1), refer exclusively to the words preceding them, and that the words in sub-sec. 4 must be given the meaning I have attached to them.

In the effort to sustain the verdict for defendant, counsel for defendant contends that defendant, being a foreigner and unable to read the English language, the written agreement should have been read over to him before its execution in order to bind him. I cannot find any authority to justify such a contention. There is no evidence that any mis-statement was made or that anything was said to mislead him as to the nature or contents of the document. He certainly knew it was a contract in relation to the machine he was buying. There was no obligation on the part of the vendor to read such a document or to declare its contents to the other party, although if that party, being unable to read, desired to have the agreement read or its contents declared, such desire must be respected.

Order accordingly.

ALEXANDER v. ENDERTON.

MAN.
C. A.

Manitoba Court of Appeal, Richards, Perdue, Cameron and Haggart, JJ.A. December 23, 1914.

[*Alexander* v. *Enderton*, 15 D.L.R. 588, affirmed.]

VENDOR AND PURCHASER (§ I E—27)—*Rescission of Contract—Misrepresentation—Principal and Agent.*]—Appeal from the judgment of Mathers, C.J., K.B., *Alexander* v. *Enderton*, 15 D.L.R. 588, dismissing an action to set aside a conveyance.

A. J. Andrews, K.C., *F. M. Burbidge*, and *E. R. Chapman*, for defendants.

The judgment of the Court was delivered by

MAN.

C. A.

RICHARDS, J.A.:—The learned trial Judge seems to have carefully weighed the evidence, and we see nothing that would justify our reversing his findings of fact.

The representation complained of, as made by Mr. Oakes, was found by the Judge to be in answer to a question by one of the plaintiffs as to whether the defendant Enderton was the purchaser, to which he, Oakes, replied, not so far as he (Oakes) knew. The fact that this was the form of Oakes' statement is corroborated by the evidence of the plaintiff, F. H. Alexander. The learned Judge further finds that such statement was the truth and that Oakes did not know.

An agent may bind his principal by representations made, or purporting to be made, on behalf of the principal. But the above was not such. It was patently only made as a statement of his, Oakes' own knowledge of the matter, and we must, on the learned trial Judge's findings, assume that it was true. It shewed on its face that it was not made on behalf of his principal, and the plaintiff should have known that it was not. It cannot, therefore, be relied on as a misrepresentation. But, even if it could be held to have been made on behalf of the principal, that is to say, to be really such a representation as should be held to be the principal's own representation, that fact becomes immaterial because of the trial Judge's finding that the plaintiffs did not rely on it in entering into the contract.

The appeal will be dismissed with costs.

Appeal dismissed.

SASK.

S. C.

PRIME v. MOOSE JAW ELECTRIC R. CO.

Saskatchewan Supreme Court, Lamont, J. May 28, 1914.

JURY (§ I B—10)—*Right to Trial by—When Right Exists—Civil Actions—Notice—Sufficiency—Rule* 238.]—Appeal from an order striking out jury notice.

F. G. Wheat, for plaintiff.

F. W. Turnbull, for defendant.

LAMONT, J.:—I am of opinion this appeal must be allowed. The Judicature Act provides that in an action of tort, where the

damages claimed exceed $500, either party has the right, unless otherwise ordered by a Judge, to have the issues of fact or the assessment of damages tried and determined by a jury, provided he gives the necessary notice and pays the prescribed fee 15 days before the day fixed for the trial. In this case the plaintiff has complied with the Act and the rules relating thereto, and has done everything he has had to do to entitle him to have the facts tried and the damages assessed by a jury.

The defendant, as he was entitled to do under r. 237, gave notice of trial. By so doing he cannot cut the plaintiff out of his right to have the cause tried before a jury if he complies with the rules as to notice and fees as he did in this case. The statute was passed in contemplation of the practice then existing of having the jury and non-jury cases all tried at the same sittings. Now they are heard at different times. As the plaintiff gave the proper notice 20 days before the first day upon which it can be urged it was to be entered for trial (r. 238), the appeal will be allowed and the action entered for trial at the jury sittings.

I express no opinion as to what the plaintiff would be entitled to had he not given 20 days' notice before May 19th but had before the date of the jury sittings.

Appeal allowed.

NICHOLS & SHEPARD CO. v. GAILING.

Saskatchewan Supreme Court, Brown, J. June, 1914.

[*Lekas* v. *Zappas*, 10 D.L.R. 646, considered.]

GARNISHMENT (§ I C—24)—*What Subject to—Promissory Notes—Test of Exigibility—Debts, Due or Accruing.*]—Appeal from decision of Master.

H. Ward, for plaintiffs, appellants.

W. H. McEwen, for garnishees.

BROWN, J.:—With deference I would allow this appeal and refuse to follow the reasoning in *Simpson* v. *Phillips*, 3 Terr. L.R. 385, which influenced the learned Master in deciding the point at issue. I prefer the reasoning in the case of *Macpherson Fruit Co.* v. *Hayden*, 2 W.L.R. 427. By the rules all debts due and accruing due are attachable under garnishee proceedings. There

SASK.
S. C.

is no limitation to such cases as are not available under a *fi fa*, and I see no reason or principle of law that would compel or justify such a limitation.

The case of *Roblee* v. *Rankin*, 11 Can. S.C.R. 137, is not authority for such a conclusion—on the contrary, it is, in my opinion, the reverse. In that case it was held that money owing under a note not yet matured was not attachable because of the negotiable character of a note, but that money owing on a note overdue was attachable. A note overdue is seizable under a *fi-fa* The case of *Lekas* v. *Zappas*, 10 D.L.R. 646, 6 S.L.R. 197, does not in any way adopt what was laid down in *Simpson* v. *Phillips*, *supra*, so far as the point at issue is concerned.

The appeal will be allowed with costs against the garnishees, the order of the Master set aside, and the garnishees will pay the money under the respective mortgages into Court to the credit of this cause from time to time as the same falls due. The plaintiffs will have their costs of application to the Master against the defendants.

Appeal allowed.

QUE.
S. C.

GROSS v. MILLMAN.

Quebec Superior Court, Guerin, J. October 15, 1913.

LEVY AND SEIZURE (§ I A—15)—*Contestation of an Opposition to Seizure—Misnomer.*]

St. Germain & Co., for plaintiffs.

Jacobs, Hall & Co., for defendant, opposant.

GUERIN, J., held that an opposition to a seizure of immoveables will not be maintained on the ground that the names of plaintiffs in the procès-verbal of seizure are different from the names the plaintiffs were known under and in which they had taken action against the opposant, where no prejudice has resulted to the latter.

Opposition dismissed.

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