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ANNOTATED

Alphabetically Arranged Table of Annotations found in Vols. I-LXIII. D.L.R.

VOL. 63

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CASES REPORTED

IN THIS VOLUME

Acme Steel Goods Co. of Canada v. Walsh Construction Co. . . (B.C.) 529
Aliotis and Cliris, Re . . . . (N.S.) 346
Att'y-Gen'l of British Columbia v. Att'y-Gen'l of Dom. of Canada . . . . (Can. Ex.) 82
Bank of Toronto v. Roeder and Knox . . . . (Sask.) 459
Banque D'Hochelaga v. Hayden and Gillespie Elevator Co. . . (Alta.) 514
Barclay v. Holmes . . . . (Alta.) 269
Barnes v. Barnes . . . . (Sask.) 680
Barthelmes v. Bickell . . . . (Can.) 203
Bartle v. Grand Trunk Pacific R. Co. . . . . (Sask.) 699
Bennett v. Town of Edmonton . . . . (Alta.) 605
Bickell, Barthelmes v. . . . . (Can.) 203
Bilsland v. Bilsland . . . . (Man.) 120
Bissett v. Town of Beausejour . . . . (Man.) 355
Bitzer, Peterson v. . . . . (Can.) 182
Black Lake Asbestos and Chrome Co., Samuel v. . . . . (Can.) 617
Bontex Importing Co. v. Panar . . . . (Sask.) 200
Borth v. Higgins & Thompson . . . . (Sask.) 628
Boyle, Seguin v. . . . . (Imp.) 369
Canadian Bank of Commerce v. Bezy . . . . (Sask.) 696
Canadian Grain Co. v. Mitten Bros. . . . . (Sask.) 438
Carson, Re . . . . (Sask.) 352
Charest v. Montreal Tramways Co. . . . . (Que.) 391
City Safe Deposit and Agency Co. v. Central Railway Co. of Canada; Re Armstrong's Claim . . . . (Can. Ex.) 504
Codville Co. v. Jordan . . . . (Sask.) 694
Curtis v. Langrock . . . . (Alta.) 282
Dauntless Mfg. Co. Ltd., Re . . . . (Alta.) 457
Davy v. Davy . . . . (B.C.) 341
Deans v. Orr . . . . (Sask.) 720
Degrow v. Union Bank of Canada . . . . (Sask.) 688
Detroit Fuse and Manufacturing Co. v. Metropolitan Engineering Co. of Canada . . . . (Can. Ex.) 179
Diner, R. v. . . . . (Alta.) 609
Dunstall, Ross v. . . . . (Can.) 63
Emery, Ross v. . . . . (Can.) 63
Evans v. Hamilton . . . . (Sask.) 710
Fraser v. Aztec . . . . (Can. Ex.) 543
Freeburg v. Farmers' Exchange Bankers and Weyburn Security Bank . . . . (Sask.) 142
"Freiya," The, v. The "R.S." . . . . (Can. Ex.) 687
Frey v. Floyd . . . . (B.C.) 614
Fyfe v. Municipality of Bertawan . . . . (Alta.) 674
Gallagher, R. v. . . . . (Alta.) 629

Gnaedinger & Sons v. Turtleford Grain Growers Co-operative Ass'n ....(Sask.) 498
Goebel v. Canadian Bank of Commerce ....(Sask.) 723
Gold Seal Limited, R. v. ....(B.C.) 657
Griffiin v. Cape Breton Electric Co. ....(N.S.) 251
Hamar, Re; Ex parte McGuinty & Co. ....(Sask.) 241
Harris v. Ferguson ....(Sask.) 672
Head-Patrick v. Patrick ....(Sask.) 158
Herron, R. v. ....(Sask.) 163
Hiltz v. Creaser ....(N.S.) 437
Holm v. Morgan ....(Sask.) 383
Huey v. Doody ....(N.B.) 115
Jamieson (Gregory), Re ....(Alta.) 365
Jobin v. Drolet ....(Que.) 104
Johnston v. Alberta Foundry and Machine Co. ....(Alta.) 161
Karson, The King v. ....(Can. Ex.) 237
Kelly, The King v. ....(Can. Ex.) 402
King, The, v. Karson ....(Can. Ex.) 237
King, The, v. Kelly ....(Can. Ex.) 402
King, The, Kitchen v. ....(B.C.) 425
King, The, v. New England Co. ....(Can. Ex.) 537
King, The, Powers v. ....(Can.) 647
King, The, R. G. Long v. ....(Can. Ex.) 134
King, The, The Wolfe Co. v. ....(Can.) 647
King, The, Zornes v. ....(Alta.) 478
King's Park Co. v. Buchanan ....(Man.) 666
Kitchen v. The King ....(B.C.) 425
Kourzswki v. Metropolitan Fire Ass'n of Canada ....(N.S.) 456
Kusch v. Peat ....(Sask.) 408
Land Titles Act, Re; Re Massey-Harris Co. ....(Sask.) 428
Langley, Re Estate of ....(Sask.) 700
Levey v. Rur. Mun. of Rodgers No. 133 ....(Sask.) 452
Levine v. Dominion Express Co. ....(Sask.) 422
M.F. Whalen v. Point Anne Quarries ....(Can.) 545
MacDonald v. Pier ....(Alta.) 577
Mackay v. Attorney-General of British Columbia ....(Imp.) 171
Mackenzie v. Palmer ....(Can.) 362
Marsh v. Royal Bank of Canada ....(Sask.) 659
Mason v. Ellis ....(Sask.) 395
Matheson v. Murray ....(N.S.) 108
Maycock v. J. J. Murray & Co. ....(Alta.) 414
McCabe v. Leish ....(Sask.) 705
McDougall v. Gariepy ....(Alta.) 214
McKay v. McDougall ....(Sask.) 247
McLean v. Dinning and Saskatchewan Co-operative Elevator Co. ....(Sask.) 507
McMillan v. Canadian Northern R. Co. (sub nom C. P. R. Co. ....(Sask.) 257
McNab v. Town of Trenton ....(N.S.) 306

McPherson v. Bailey ....(Sask.) 715
Moore, R. v. ....(Alta.) 472
Nesbitt v. McCartney ....(Alta.) 93
New England Co., The King v. ....(Can. Ex.) 537
Northern Lumber Co. v. Shepitka, C.P.R. Co. ....(Sask.) 174
O'Donnell v. Canadian National Railways ....(Sask.) 719
Osadchuk v. Russniak ....(Sask.) 323
Pachal v. Markham and Myers ....(Sask.) 97
Paisley v. Local Improvement Dist. No. 399 ....(Alta.) 242
Palmer, Mackenzie v. ....(Can.) 362
Peradsky v. Peradsky ....(Sask.) 337
Perry v. Canadian Pacific R. Co. ....(Sask.) 702
Peterson v. Bitzer ....(Can.) 182
Phinn v. Glover ....(Ont.) 523
Pipke, Re ....(Alta.) 430
Pointe Anne Quarries, M.F. Whalen v. ....(Can.) 545
Powers v. The King ....(Can.) 647
Quebec Liquor Commission v. Lessard ....(Que.) 177
R. G. Long v. The King ....(Can. Ex.) 134
Repeta v. Shumski ....(Sask.) 711
R. v. Diner ....(Alta.) 609
R. v. Gallagher ....(Alta.) 629
R. v. Gold Seal Limited ....(B.C.) 657
R. v. Herron ....(Sask.) 163
R. v. Moore ....(Alta.) 472
R. v. Ritter ....(Alta.) 663
R. v. Sileski ....(Que.) 146
R. v. U.S. Fidelity ....(B.C.) 469
Ritter, R. v. ....(Alta.) 663
Roan v. Quinn and Madden ....(Alta.) 154
Ross v. Dunstall ....(Can.) 63
Ross v. Emery ....(Can.) 63
Rowan v. White ....(Alta.) 445
Royal Trust Co. v. Fairbrother & Valentine ....(Alta.) 637
St. Paul Lumber Co. v. British Crown Ass'ce Corp'n ....(Alta.) 386
Samuel v. Black Lake Asbestos and Chrome Co. ....(Can.) 617
Sapera Tobacco Co. v. Royal Bank of Canada ....(Ont.) 58
Schon v. New York Life Insurance Co. ....(N.S.) 475
Seguin v. Boyle ....(Imp.) 369
Shebley v. Rur. Mun. of Mervin No. 499 ....(Sask.) 632
Sileski, R. v. ....(Que.) 146
Smith, Re; Ex parte Vancise ....(Sask.) 359
Spriggs v. Spriggs ....(Sask.) 279
Stanbridge v. Tenning ....(Man.) 540
Succession Duty Act and Walker, Re ....(B.C.) 397
Thoreson v. Zumwalt ....(Sask.) 713
Todd v. Potvin ....(Alta.) 233
Tolley & Co. v. Skuce ....(Sask.) 602

United Grain Growers v. McRae and Rur. Mun. of Little Bow ....(Alta.) 138
United Mine Workers of America, Dist. No. 26 v. Dominion Coal Co. ....(N.S.) 274
U.S. Fidelity, R. v. ....(B.C.) 469
Walkden v. Walkden ....(Alta.) 332
Wayne v. Ballantyne ....(Sask.) 232
Wilson v. Cristall ....(Alta.) 187
Wolfe Co., The, v. The King ....(Can.) 647
Young v. Northern Life Assurance Co. of Canada ....(B.C.) 107
Zimmerman v. Archer ....(Sask.) 399
Zornes v. The King ....(Alta.) 478

TABLE OF ANNOTATIONS.

CONCISE BRIEFS OF THE LAW.

Appearing in vols. 1 to 63 inclusive.

	Vol.	Page
ADMIRALTY—		
Liability of a ship or its owners for necessaries supplied. By W. B. Laidlaw	1	450
Torts committed on high seas. By C. A. Hale	34	8
ADVERSE POSSESSION—		
Tacking — Successive trespassers. By E. Douglas Armour, K.C.	8	1021
AGREEMENT—		
Hiring—Priority of chattel mortgage over. By A. B. Morine, K.C.	32	566
ALIENS—		
Their status during war. By I. Freeman	23	375
ANIMALS—		
At large. By A. B. Morine, K.C.	32	397
At large. By A. B. Morine, K.C.	33	423
At large. By A. B. Morine, K.C.	35	481
APPEAL—		
Appellate jurisdiction to reduce excessive verdict. By W. J. Tremeear	1	386
Judicial discretion—Appeals from discretionary orders..	3	778
Pre-requisites on appeals from summary convictions. By W. J. Tremeear	28	153
Service of notice of—Recognizance. By W. J. Tremeear.	19	323
ARBITRATION—		
Conclusiveness of award. By C. E. T. FitzGerald	39	218
ARCHITECT—		
Duty to employer. By W. J. Tremeear	14	402
ASSIGNMENT—		
Equitable assignments of choses in action. By F. B. Kenny	10	277
ASSIGNMENTS FOR CREDITORS—		
Rights and powers of assignee. By W. J. Tremeear	14	503
ATTORNEY—		
Power of—Effectiveness of a conveyance executed under a power of attorney after the death of the constituent, where the power provides that it shall not be revoked by the death of the constituent. By E. Douglas Armour, K.C.	59	369
AUTOMOBILES—		
Obstruction of highway by owner. By A. B. Morine, K.C.	31	370
Criminal responsibility for negligence in motor car cases. By W. J. Tremeear	61	170
AUTOMOBILES AND MOTOR VEHICLES—		
Law of. By I. Freeman	39	4
BAIL—		
Pending decisions on writ of habeas corpus. By W. J. O'Hearn, K.C.	44	144
Right to on commitment. By W. J. Tremeear	50	633
BAILMENT—		
Recovery by bailee against wrongdoer for loss of thing bailed. By W. J. Tremeear	1	110

BANK INTEREST—
Rate that may be charged on loans. By C. E. T. Fitz-Gerald 42 134

BANKRUPTCY—
Act of Canada—Amendment Act of 1921. By J. A. C. Cameron, K.C. 59 1
Law in Canada under Bankruptcy Act of 1920. By J. A. C. Cameron, K.C. 53 135
Secured creditors under the Act. By J. A. C. Cameron, K.C. 56 104

BANKS—
Deposits—Particular purpose—Failure of — Application of deposit. By Lawrence Jones 9 346
Written promises under s. 90 of the Bank Act. By J. D. Falconbridge 46 311

BILLS AND NOTES—
Effect of renewal of original note. By J. A. Couch 2 816
Filling in blanks. By W. B. Laidlaw 11 27
Presentment at place of payment. By W. J. Tremeear 15 41

BROKERS—
Real estate brokers—Agent's authority. By R. A. Ingersoll 15 595
Real estate agent's commission—Sufficiency of services. By J. A. Couch 4 531

BUILDING CONTRACTS—
Architect's duty to employer. By W. J. Tremeear 14 402
Failure of contractor to complete work. By W. J. Tremeear 1 9

BUILDINGS—
Municipal regulation of building permits. By R. J. Dowdall 7 422
Restrictions in contract of sale as to the user of land. By W. J. Tremeear 7 614

CARRIERS—
The Crown as common. By Charles Morse, K.C. 35 285

CAVEATS—
Interest in land—Land Titles Act—Priorities under. By R. A. Ingersoll 14 344
Parties entitled to file—What interest essential—Land titles (Torrens system). By W. J. Tremeear 7 675

CHATTEL MORTGAGE—
Of after-acquired goods. By W. J. Tremeear 13 178
Priority of—Over hire receipt. By A. B. Morine, K.C. 32 566

CHEQUES—
Delay in presenting for payment. By C. E. T. Fitz-Gerald 40 244

CHOSE IN ACTION—
Definition—Primary and secondary meanings in law. By F. B. Kenny 10 277

COLLISION—
On high seas—Limit of jurisdiction. By C. A. Hale 34 8
Shipping. By B. Gordon 11 95

COMPANIES—
Abridgment of Company Law of Canada. By H. H. Donald 63 1
Debentures and specific performance. By G. C. Papineau-Couture 24 376
Directors contracting with a joint-stock company. By A. Hannah 7 111

COMPANIES—Continued.
Franchises—Federal and provincial rights to issue—B.N.A. Act. By G. M. Clark 18 364
Jurisdiction of Dominion and Provinces to incorporate companies. By F. W. Wegenast 26 294
Powers and duties of auditor. By W. J. Tremeear 6 522
Receivers—When appointed. By R. J. Dowdall 18 5
Share subscription obtained by fraud or misrepresentation. By W. J. Tremeear 21 103

CONFLICT OF LAWS—
Validity of common law marriage. By J. A. Couch 3 247

CONSIDERATION—
Failure of—Recovery in whole or in part. By F. B. Kenny 8 157

CONSTITUTIONAL LAW—
Corporations—Jurisdiction of Dominion and Provinces to incorporate companies. By F. W. Wegenast 26 294
Power of legislature to confer authority on Masters. By A. H. F. Lefroy, K.C. 24 22
Power of legislature to confer jurisdiction on provincial courts to declare the nullity of void and voidable marriages. By A. B. Morine, K.C. 30 14
Powers of provincial legislatures to confer limited civil jurisdiction on Justices of the Peace. By A. H. F. Lefroy, K.C. 37 183
Property and civil rights—non-residents in province. By Lawrence Jones 9 346
Property clauses of the B.N.A. Act—Construction of. By A. H. F. Lefroy, K.C. 26 69

CONTEMPT OF COURT—
By J. Crankshaw, K.C. 51 46

CONTINUANCE AND ADJOURNMENT—
By W. J. Tremeear 18 223

CONTRACTORS—
Sub-contractors—Status of, under Mechanics' Lien Acts. By R. L. Reid, K.C. 9 105

CONTRACTS—
Commission of brokers—Real estate agents—Sufficiency of services. By J. A. Couch 4 531
Construction—"Half" of a lot—Division of irregular lot. By W. B. Laidlaw 2 143
Directors contracting with corporation—Manner of. By A. Hannah 7 111
Distinction between penalties and liquidated damages. By C. E. T. FitzGerald 45 24
Extras in building contracts. By W. J. Tremeear 14 740
Failure of consideration—Recovery of consideration by party in default. By F. B. Kenny 8 157
Failure of contractor to complete work on building contract. By W. J. Tremeear 1 9
Illegality as affecting remedies. By W. J. Tremeear .. 11 195
Money had and received—Consideration—Failure of—Loan under abortive scheme. By Lawrence Jones.. 9 346
Part performance—Acts of possession and the Statute of Frauds. By W. B. Laidlaw 2 43
Part performance excluding the Statute of Frauds. By W. J. Tremeear 17 534
Payment of purchase money—Vendor's inability to give title. By R. A. Ingersoll 14 351
Rescission of, for fraud. By A. B. Morine, K.C. 32 216

CONTRACTS—Continued.
Restrictions in agreement for sale as to user of land. By W. J. Tremeear 7 614
Right of rescission for misrepresentation—Waiver. By W. J. Tremeear 21 329
Sale of land—Rescission for want of title in vendor. By J. A. Couch 3 795
Statute of Frauds—Oral contract—Admission in pleading. By W. B. Laidlaw 2 636
Statute of Frauds—Signature of a party when followed by words shewing him to be an agent. By J. A. Couch 2 99
Stipulation as to engineer's decision—Disqualification. By W. J. Tremeear 16 441
Time of essence—Equitable relief. By J. A. Couch 2 464
Vague and uncertain—Specific performance of. By A. B. Morine, K.C. 31 485

CONTRIBUTORY NEGLIGENCE—
Navigation—Collision of vessels. By B. Gordon 11 95

CORPORATIONS—See Companies.

COURTS—
Judicial discretion—Appeals from discretionary orders. By W. B. Laidlaw 3 778
Jurisdiction—Criminal information. By W. J. Tremeear 8 571
Jurisdiction—Power to grant foreign commission. By W. J. Tremeear 13 338
Jurisdiction—"View" in criminal case. By W. J. Tremeear 10 97
Jurisdiction as to foreclosure under Land Titles registration. By R. A. Ingersoll 14 301
Jurisdiction as to injunction—Fusion of law and equity as related thereto. By R. J. Dowdall 14 460
Publicity—Hearings in camera. By R. J. Dowdall 16 769
Specific performance—Jurisdiction over contract for land out of jurisdiction. By J. A. Couch 2 215

COVENANTS AND CONDITIONS—
Lease—Covenants for renewal. By J. A. Couch 3 12
Restrictions on use of leased property. By B. Gordon.. 11 40

CREDITOR'S ACTION—
Creditor's action to reach undisclosed equity of debtor—Deed intended as mortgage. By W. J. Tremeear .. 1 76
Fraudulent conveyances—Right of creditors to follow profits. By J. A. Couch 1 841

CRIMINAL INFORMATION—
Functions and limits of prosecution by this process. By W. J. Tremeear 8 571

CRIMINAL LAW—
Appeal—Who may appeal as party aggrieved. By W. J. Tremeear 27 645
Concurrent motions for new trial under Criminal Code, sec. 1021, and on case reserved. By W. J. Tremeear. 57 127
Cr. Code (Can.)—Granting a "view"—Effect an evidence in the case. By W. J. Tremeear 10 97
Criminal trial—Continuance and adjournment—Criminal Code, 1906, sec. 901. By W. J. Tremeear 18 223
Gaming—Betting house offences. By W. J. Tremeear.. 27 611
Habeas corpus procedure. By W. J. Tremeear 13 722

CRIMINAL LAW—Continued.
Insanity as a defence—Irresistible impulse—Knowledge of wrong. By W. J. Tremeear 1 287
Leave for proceedings by criminal information. By W. J. Tremeear 8 571
Contributory negligence, and homicide by negligent act. By W. J. Tremeear 56 5
Orders for further detention on quashing convictions. By W. J. Tremeear 25 649
Prosecution for same offence, after conviction quashed on certiorari. By W. J. Tremeear 37 126
Questioning accused person in custody. By W. J. Tremeear 16 223
Sparring matches distinguished from prize fights. By W. J. Tremeear 12 786
Summary proceedings for obstructing peace officers. By W. J. Tremeear 27 46
Trial —Judge's charge—Misdirection as a "substantial wrong"—Criminal Code (Can. 1906, sec. 1019). By W. J. Tremeear 1 103
Vagrancy—Living on the avails of prostitution. By W. J. Tremeear 30 339
What are criminal attempts. By W. J. Tremeear 25 8
CRIMINAL TRIAL—
When adjourned or postponed. By W. J. Tremeear 18 223
CROWN, THE—By A. H. F. Lefroy, K.C. 40 366
As a common carrier. By Charles Morse, K.C. 35 285
CY-PRES—
How doctrine applied as to inaccurate descriptions. By H. A. Youdin 8 96
DAMAGES—
Appellate jurisdiction to reduce excessive verdict. By W. J. Tremeear 1 386
Architect's default on building contract—Liability. By W. J. Tremeear 14 402
Parent's claim under fatal accidents law—Lord Campbell's Act. By W. J. Tremeear 15 689
Property expropriated in eminent domain proceedings—Measure of compensation. By W. J. Tremeear ... 1 508
DEATH—
Parent's claim under fatal accidents law—Lord Campbell's Act. By W. J. Tremeear 15 689
DEEDS—
Construction—Meaning of "half" of a lot. By W. B. Laidlaw 2 143
Conveyance absolute in form—Creditor's action to reach undisclosed equity of debtor. By W. J. Tremeear.. 1 76
Effectiveness of a conveyance executed under a power of attorney after the death of the constituent, where the power provides that it shall not be revoked by the death of the constituent. By E. Douglas Armour, K.C. 59 369
DEFAMATION—
Discovery—Examination and interrogations in defamation cases. By W. J. Tremeear 2 563
Repetition of libel or slander—Liability. By W. J. Tremeear 9 73
Repetition of slanderous statements—Acts of plaintiff to induce repetition—Privilege and publication. By W. J. Tremeear 4 572

DEFINITIONS—
Meaning of "half" of a lot—Lot of irregular shape. By W. B. Laidlaw 2 143
DEMURRAGE—
Average and reciprocal. By A. MacMurchy, K.C. 54 16
DEMURRER—
Defence in lieu of—Objections in point of law. By W. J. Tremeear 16 517
DEPORTATION—
Exclusion from Canada of British subjects of Oriental origin. By A. H. F. Lefroy, K.C. 15 191
DEPOSITIONS—
Foreign commission—Taking evidence ex juris. By W. J. Tremeear 13 338
DESERTION—
From military unit. By W. J. Tremeear 31 17
DISCOVERY AND INSPECTION—
Examination and interrogatories in defamation cases. By W. J. Tremeear 2 563
DIVORCE—
Annulment of marriage. By A. B. Morine, K.C. 30 14
DIVORCE LAW IN CANADA—
By John Allen, K.C., Dept. Att'y. Gen'l. for Man. 48 7
By C. S. McKee 62 1
DOMINION INCOME WAR TAX—
Duties imposed by 57 4
DONATION—
Necessity for delivery and acceptance of chattel. By W. J. Tremeear 1 306
DOWER—
Conveyances to defeat. By E. Douglas Armour, K.C... 55 259
EASEMENTS—
Dedication of highway to public use—Reservations. By A. D. Armour 46 517
Reservation of, not implied in favour of grantor. By A. B. Morine, K.C. 32 114
EASEMENTS OF WAY—
How arising or lost. By I. Freeman 45 144
EJECTMENT—
Ejectment as between trespassers upon unpatented land —Effect of priority of possessory acts under colour of title. By W. J. Tremeear 1 28
ELECTRIC RAILWAYS—
Reciprocal duties of motormen and drivers of vehicles crossing tracks. By J. A. Couch 1 783
EMINENT DOMAIN—
Allowance for compulsory taking. By Charles Morse, K.C. 27 250
Damages for expropriation—Measure of compensation. By W. J. Tremeear 1 508
ENGINEERS—
Stipulations in contracts as to engineer's decision. By W. J. Tremeear 16 441
EQUITY—
Agreement to mortgage after-acquired property—Beneficial interest. By W. J. Tremeear 13 178
Fusion with law—Pleading. By W. J. Tremeear 10 503
Rights and liabilities of purchaser of land subject to mortgages. By R. A. Ingersoll 14 652

ESCHEAT—
Provincial rights in Dominion lands. By Charles Morse, K.C. 26 137
ESTOPPEL—
By conduct—Fraud of agent or employee. By W. J. Tremeear 21 13
Plea of ultra vires in actions on corporate contract. By C. B. Labatt 36 107
Ratification of estoppel — Holding out as ostensible agent. By W. J. Tremeear 1 149
EVIDENCE—
Admissibility—Competency of wife against husband. By W. J. Tremeear 17 721
Admissibility—Discretion as to commission evidence. By W. J. Tremeear 13 338
Criminal law—Questioning accused person in custody. By W. J. Tremeear 16 223
Deed intended as mortgage—Competency and sufficiency of parol evidence. By C. B. Labatt 29 125
Demonstrative evidence—View of locus in quo in criminal trial. By W. J. Tremeear 10 97
Examination of testimony—Use of photographs. By A. S. Osborn, New York 47 9
Extrinsic—When admissible against a foreign judgment. By R. J. Dowdall 9 788
Foreign common law marriage. By J. A. Couch 3 247
Meaning of "half" of a lot—Division of irregular lot. By W. B. Laidlaw 2 143
Opinion evidence as to handwriting. By W. J. Tremeear. 13 565
Oral Contracts—Statute of Frauds—Effect of admission in pleading. By W. B. Laidlaw 2 636
Sufficient to go to jury in negligence actions. By C. E. T. FitzGerald 39 615
EXECUTION—
What property exempt from. By R. J. Dowdall 17 829
When superseded by assignment for creditors. By W. J. Tremeear 14 503
EXECUTORS AND ADMINISTRATORS—
Compensation — Mode of ascertainment. By W. J. Tremeear 3 168
EXEMPTIONS—By R. J. Dowdall 16 6
What property is exempt. By R. J. Dowdall 17 829
EXPROPRIATION—
Compensation for lands injuriously affected but not taken for railway purposes. By A. D. Armour.... 60 325
FALSE ARREST—
Reasonable and probable cause—English and French law compared. By G. C. Papineau-Couture 1 56
FALSE PRETENCES—
The law relating to. By W. J. Tremeear 34 521
FIRE INSURANCE—
Insured chattels—Change of location. By J. A. Couch.. 1 745
FISHING RIGHTS IN TIDAL WATERS—
Provincial power to grant. By A. H. F. Lefroy, K.C. .. 35 28
FOOD—
Liability of manufacturer or packer of food for injuries to the ultimate consumer who purchased from a middle man. By C. E. T. FitzGerald 50 409

FORECLOSURE—
Mortgage—Re-opening mortgage foreclosures. By W. J. Tremeear 17 89

FOREIGN COMMISSION—
Taking evidence ex juris. By W. J. Tremeear 13 338

FOREIGN JUDGMENT—By R. J. Dowdall 9 788
Action upon. By W. J. Tremeear 14 43

FORFEITURE—
Contract stating time to be of essence—Equitable Relief. By J. A. Couch 2 464
Remission of, as to leases. By W. J. Tremeear 10 603

FORGERY—By W. J. Tremeear 32 512

FORTUNE-TELLING—
Pretended palmistry. By W. J. Tremeear 28 278

FRAUDULENT CONVEYANCES—
Right of creditors to follow profits. By J. A. Couch 1 841

FRAUDULENT PREFERENCES—
Assignments for creditors — Rights and powers of assignee. By W. J. Tremeear 14 503

FREEHOLD ESTATES—
Grants of, in futuro. By E. Douglas Armour, K.C. 55 276

GAMING—
Automatic vending machines. By W. J. Tremeear 33 642
Betting house offences. By W. J. Tremeear 27 611
Offence of aiding and abetting club in keeping common gaming house. By W. J. Tremeear 62 158

GIFT—
Necessity for delivery and acceptance of chattel. By W. J. Tremeear 1 306

GUARANTEES AND THE STATUTE OF FRAUDS—
By J. D. Falconbridge 55 1

HABEAS CORPUS—
Procedure. By W. J. Tremeear 13 722

HANDWRITING—
Comparison of—When and how comparison to be made. By W. J. Tremeear 13 565
Law relating to. By A. S. Osborn, New York 44 170

HIGHWAYS—
Defects—Notice of injury—Sufficiency. By R. J. Dowdall 13 886
Defective bridge—Liability of municipality 34 589
Duties of drivers of vehicles crossing street railway tracks. By J. A. Couch 1 783
Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways. By J. Ellenbogen 9 490
Liability of municipality for defective highways or bridges. By I. Freeman 46 133
Private rights in, antecedent to dedication. By A. D. Armour 46 517
Unreasonable user of. By A. B. Morine, K.C. 31 370

HOMICIDE—
CRIMINAL responsibility for negligence in motor car cases. By W. J. Tremeear 61 170

HUSBAND AND WIFE—
Foreign common law marriage—Validity. By J. A. Couch 3 247
Property rights between husband and wife as to money of either in the other's custody or control. By R. A. Ingersoll 13 824
Wife's competency as witness against husband—Criminal non-support. By W. J. Tremeear 17 721
INCOME WAR TAX ACT—
Dominion—Duties imposed by 57 4
INFANTS—
Disabilities and liabilities—Contributory negligence of children. By I. Ellenbogen 9 522
INJUNCTION—
When injunction lies. By R. J. Dowdall 14 460
INSANITY—
Irresistible impulse — Knowledge of wrong — Criminal law. By W. J. Tremeear 1 287
INSURANCE—
Effects of vacancy in fire insurance risks. By F. J. Laverty, K.C. 46 15
Exact moment of the inception of the contract. By F. J. Laverty, K.C. 44 208
Fire insurance—Change of location of insured chattels. By J. A. Couch 1 745
On mortgaged property. By J. D. Falconbridge 44 24
Policies protecting insured while passengers in or on public and private conveyances. By F. J. Laverty, K.C. 44 186
INTEREST—
That may be charged on loans by banks. By C. E. T. FitzGerald 42 134
INTERPLEADER—
Summary review of law of. By I. Freeman 32 263
INTERPRETATION—
Statutes in pari materia. By W. J. Tremeear 49 50
INTOXICATING LIQUORS—
The Ontario Temperance Act. By J. C. McRuer 61 177
JUDGMENT—
Actions on foreign judgments. By R. J. Dowdall 9 788
Actions on foreign judgments. By W. J. Tremeear 14 43
Conclusiveness as to future action—Res judicata. By W. J. Tremeear 6 294
Correction of, after pronounced by Exchequer Court. By Charles Morse, K.C., D.C.L. 62 59
Enforcement—Sequestration. By W. J. Tremeear 14 855
JUSTIFICATION—
As a defence on criminal charge. By W. J. Tremeear.. 42 439
LANDLORD AND TENANT—
Forfeiture of lease—Waiver. By W. J. Tremeear 10 603
Lease—Covenant in restriction of use of property 11 40
Lease—Covenants for renewal. By J. A. Couch 3 12
Municipal regulations and license laws as affecting the tenancy—Quebec Civil Code. By G. C. Papineau-Couture 1 219
Law of obligation of tenants to repair. By C. B. Labatt and H. H. Donald 52 1

LAND TITLES—
Torrens system—Caveat—Parties entitled to file caveats —"Caveatable interests." By W. J. Tremeear 7 675
Torrens system—Caveats—Priorities acquired by filing. By R. A. Ingersoll 14 344
Torrens system — Mortgages — Foreclosing mortgage made under Torrens system—Jurisdiction. By R. A. Ingersoll 14 301
By possession. By E. Douglas Armour, K.C. 56 135

LAW OF TUGS AND TOWAGE—By H. B. Robinson 49 172

LEASE—
Covenants for renewal. By J. A. Couch 3 12

LIBEL AND SLANDER—
Church matters. By W. J. Tremeear 21 71
Examination for discovery in defamation cases. By W. J. Tremeear 2 563
Repetition—Lack of investigation as affecting malice and privilege. By W. J. Tremeear 9 73
Repetition of slanderous statement to person sent by plaintiff to procure evidence thereof—Publication and privilege. By W. J. Tremeear 4 572
Separate and alternative rights of action—Repetition of slander. By W. J. Tremeear 1 533

LICENSE—
Municipal license to carry on a business—Powers of cancellation 9 411

LIENS—
For labour — For materials — Of contractors — Of sub-contractors. By R. L. Reid, K.C. 9 105

LIMITATION OF ACTIONS—
Trespassers on lands—Prescription. By E. Douglas Armour, K.C. 8 1021

LOTTERY—
Lottery offences under the Criminal Code. By W. J. Tremeear 25 401

MALICIOUS PROSECUTION—
Principles of reasonable and probable cause in English and French law compared. By G. C. Papineau-Couture 1 56
Questions of law and fact—Preliminary questions as to probable cause. By W. J. Tremeear 14 817

MANDAMUS—By A. D. Armour 49 478

MANSLAUGHTER—
Criminal responsibility for negligence in motor car cases. By W. J. Tremeear 61 170

MARKETS—
Private markets—Municipal control. By G. C. Papineau-Couture 1 219

MARRIAGE—
Foreign common law marriage—Validity. By J. A. Couch 3 247
Void and voidable—Annulment. By A. B. Morine, K.C. 30 14

MARRIED WOMEN—
Separate estate—Property rights as to wife's money in her husband's control. By R. A. Ingersoll 13 824

MASTER AND SERVANT—
Assumption of risks—Superintendence 11 106
Employer's liability for breach of statutory duty—Assumption of risk. By W. J. Tremeear 5 328
Justifiable dismissal—Right to wages (a) earned and overdue, (b) earned, but not payable. By F. B. Kenny 8 382
When master liable under penal laws for servant's acts or defaults. By W. J. Tremeear 31 233
Workmen's compensation law in Quebec. By W. J. Tremeear 7 5

MECHANICS' LIENS—
Enforceability against property of married woman under a contract made with her husband. By C. B. Labatt 52 200
Percentage fund to protect sub-contractors. By W. J. Tremeear 16 121
What persons have a right to file a mechanics' lien. By R. L. Reid, K.C. 9 105

MINES AND MINERALS—
Taxation of in organised municipalities in Ontario. By J. E. Irving 62 625

MISDEMEANOUR—
Commitment for—Right to bail. By W. J. Tremeear 50 633

MONEY—
Right to recover back—Illegality of contract—Repudiation. By W. J. Tremeear 11 195

MORATORIUM—
Postponement of Payment Acts, construction and application. By I. Freeman 22 865

MORTGAGE—
Assumption of debt upon a transfer of the mortgaged premises. By I. Freeman 25 435
Equitable rights on sale subject to mortgage. By R. A. Ingersoll 14 652
Discharge of as re-conveyance. By M. L. Hayward 31 225
Land titles (Torrens system)—Foreclosing mortgage made under Torrens system—Jurisdiction. By R. A. Ingersoll 14 301
Limitation of action for redemption of. By J. D. Falconbridge 36 15
Necessity for stating yearly rate of interest. By A. B. Morine, K.C. 32 60
Power of sale under statutory form. By C. E. T. Fitz-Gerald 31 300
Re-opening foreclosures. By W. J. Tremeear 17 89
Without consideration—Receipt for mortgage money signed in blank. By E. Douglas Armour K.C. 32 26

MUNICIPAL CORPORATIONS—
Authority to exempt from taxation 11 66
By-laws and ordinances regulating the use of leased property—Private markets. By G. C. Papineau-Couture 1 219
Closing or opening streets. By J. Ellenbogen 9 490
Defective highway—Notice of injury. By R. J. Dowdall 13 886
Drainage—Natural watercourse—Cost of work—Power of Referee. By J. M. Pike, K.C. 21 286

Highways—Defective—Liability 34 589
License—Power to revoke license to carry on business. 9 411
Power to pass by-law regulating building permits. By R. J. Dowdall 7 422

NEGLIGENCE—
Animals at large. By A. B. Morine, K.C. 32 397
Defective premises—Liability of owner or occupant—Invitee, licensee or trespasser 6 76
Duty to licensees and trespassers—Obligation of owner or occupier. By W. J. Tremeear 1 240
Evidence sufficient to go to jury in negligence action. By C. E. T. FitzGerald 39 615
Highway defects—Notice of claim. By R. J. Dowdall 13 886
Homicide by negligent act. By W. J. Tremeear 56 5
Negligent driving, contributory, of children 9 522
Ultimate. By C. E. T. FitzGerald 40 103

NEGLIGENCE OR WILFUL ACT OR OMISSION—
Within the meaning of the Railway Act. By A. B. Morine, K.C. 35 481

NEW TRIAL—
Concurrent motions for, under Criminal Code, sec. 1021, and on case reserved. By W. J. Tremeear 57 127
Judge's charge—Instruction to jury in criminal case—Misdirection as a "substantial wrong"—Cr. Code (Can.) 1906, sec. 1019. By W. J. Tremeear 1 103

OBLIGATION OF TENANTS TO REPAIR—
By C. B. Labatt and H. H. Donald 52 1

ONTARIO TEMPERANCE ACT—
By J. C. McRuer 61 177

PAROL EVIDENCE—
Competency and sufficiency of deed intended as a mortgage. By C. B. Labatt 29 125

PARTIES—
Irregular joinder of defendants—Separate and alternative rights of action for repetition of slander. By W. J. Tremeear 1 533
Persons who may or must sue—Criminal information—Relator's status. By W. J. Tremeear 8 571

PATENTS—
Application of a well-known contrivance to an analogous use is not invention. By Russel S. Smart 38 14
Construction of—Effect of publication. By Russel S. Smart 25 663
Expunction or variation of registered trademark. By Russel S. Smart 27 471
Manufacture and importation under Patent Act. By Russel S. Smart 38 350
New combinations as patentable inventions. By Russel S. Smart 43 5
New and useful combinations—Public use or sale before application for patent. By Russel S. Smart 28 636
Novelty and invention. By Russel S. Smart 27 450
Prima facie presumption of novelty and utility. By Russel S. Smart 28 243
Utility and novelty—Essentials of. By Russel S. Smart. 35 362
Vacuum cleaners. By Russel S. Smart 25 716

PENALTIES AND LIQUIDATED DAMAGES—
Distinction between. By C. E. T. FitzGerald 45 24

PERJURY—
Authority to administer extra-judicial oaths. By W. J. Tremeear 28 122

PHOTOGRAPHS—
Use of—Examination of testimony on the facts. By A. S. Osborn, New York 47 9

PLEADING—
Effect of admissions in pleading—Oral contract—Statute of Frauds 2 636
Objection that no cause of action shewn—Defence in lieu of demurrer. By W. J. Tremeear 16 517
Statement of defence—Specific denials and traverses. By W. J. Tremeear 10 503

POSSESSION—
Title by. By E. Douglas Armour, K.C. 56 135

POWER OF ATTORNEY—
Effectiveness of a conveyance executed under a power of attorney after the death of the constituent, where the power provides that it shall not be revoked by the death of the constituent. By E. Douglas Armour, K.C. 59 369

PRINCIPAL AND AGENT—
Holding out as ostensible agent—Ratification and estoppel. By W. J. Tremeear 1 149
Signature to contract followed by word shewing the signing party to be an agent—Statute of Frauds. By J. A. Couch 2 99

PRINCIPAL AND SURETY—
Subrogation—Security for guaranteed debt of insolvent. By R. J. Dowdall 7 168

PRIVITY OF CONTRACT—
As affecting the liability of a manufacturer of food for injuries to the ultimate consumer. By C. E. T. FitzGerald 50 409

PRIZE FIGHTING—
Definition—Cr. Code (1906), secs. 105-108. By W. J. Tremeear. 12 786
Profits a Prendre. By C. E. T. FitzGerald 40 144
Provincial powers to grant exclusive fishing rights. By A. H. F. Lefroy, K.C. 35 28

PUBLIC POLICY—
As affecting illegal contracts—Relief. By W. J. Tremeear 11 195

QUESTIONED DOCUMENT AND PROOF OF HANDWRITING—
Law of. By A. S. Osborn, New York 44 170

REAL ESTATE AGENTS—
Compensation for Services. Agent's Commission. By J. A. Couch 4 531

RECEIPT—
For mortgage money signed in blank. By E. Douglas Armour, K.C. 32 26

RECEIVERS—
When appointed. By R. J. Dowdall 18 5

REDEMPTION OF MORTGAGE—
Limitation of action. By J. D. Falconbridge 36 15

RENEWAL—
Promissory note—Effect of renewal. By J. A. Couch.. 2 816
Lease—Covenant for renewal. By J. A. Couch 3 12

SALE—
Of goods—Acceptance and retention of goods sold. By C. E. T. FitzGerald 43 165
Of goods—Representations, conditions and warranties. By J. D. Falconbridge 58 188
Part performance — Statute of frauds. By W. J. Tremeear 17 534

SCHOOLS—
Denominational privileges—Constitutional guarantees. By A. H. F. Lefroy, K.C. 24 492

SEDITION—
Treason—Law of. By James Crankshaw, K.C. 51 35

SEQUESTRATION—
Enforcement of judgment. By W. J. Tremeear 14 855

SHIPPING—
Collision of ship. By B. Gordon 11 95
Contract of towage—Duties and liabilities of tug owner. By J. A. Couch 4 13
Liability of a ship or its owner for necessaries. 1 456

SLANDER—
Repetition of—Liability for. By W. J. Tremeear 9 73
Repetition of slanderous statements—Acts of plaintiff inducing defendant's statement — Interview for purpose of procuring evidence of slander—Publication and privilege. By W. J. Tremeear 4 572

SOLICITORS—
Acting for two clients with adverse interests. By J. A. Couch 5 22

SPECIFIC PERFORMANCE—
Grounds for refusing the remedy. By R. J. Dowdall.. 7 340
Jurisdiction—Contract as to lands in a foreign country. By J. A. Couch 2 215
Oral contracts—Statute of Frauds—Effect of admission in pleading. By W. B. Laidlaw 2 636
Sale of lands—Contract making time of essence—Equitable relief. By J. A. Couch 2 464
Vague and uncertain contracts. By A. B. Morine, K.C. 31 485
When remedy applies 1 354

STATUTE OF FRAUDS—
Contract—Signature followed by words shewing signing party to be an agent. By J. A. Couch 2 99
Oral contract—As affected by admissions in pleading. By W. B. Laidlaw 2 636

STATUTES—
In pari materia—Interpretation. By W. J. Tremeear.. 49 50

STREET RAILWAYS—
Reciprocal duties of motormen and drivers of vehicles crossing the tracks. By J. A. Couch 1 783

SUBROGATION—
Surety—Security for guaranteed debt of insolvent—Laches—Converted security. By R. J. Dowdall.. 7 168

SUMMARY CONVICTIONS—
Notice of appeal—Recognizance—Appeal. By W. J. Tremeear 19 323
Amendment of. By W. J. Tremeear 41 53
TAXES—
Exemption from. 11 66
Powers of taxation—Competency of provincial Legislature. By Lawrence Jones 9 346
Taxation of poles and wires. By C. Sinclair 24 669
Taxation of minerals and mineral lands in organised municipalities of Ontario. By J. E. Irving 62 625
TENDER—
Requisites. By W. J. Tremeear 1 666
TIME—
When time essence of contract—Equitable relief from forfeiture. By J. A. Couch 2 464
TITLE—
By possession. By E. Douglas Armour, K.C. 56 135
TOWAGE—
Duties and liabilities of tug owner. By J. A. Couch.. 4 13
TRADE MARK—
Arbitrary word as name of new article. By Russel S. Smart 56 154
Distinction between trade mark and trade name and the rights arising therefrom. By Russel S. Smart .. 37 234
Passing off similar design—Abandonment.By Russel S. Smart 31 602
Persons aggrieved within the meaning of the Trade mark and Design Act. By Russel S. Smart 57 220
Registrability of surname as. By Russel S. Smart .. 35 519
Registrability of surname as. By Russel S. Smart.... 61 361
Registration of a general trade mark with a limitation. By Russel S. Smart 56 9
Rights as between two parties who use a trade mark concurrently. By Russel S. Smart 51 436
Rights of purchaser buying from American alien property custodian. By Russel S. Smart 55 85
Trade name—User by another in a non-competitive line. By W. B. Laidlaw 2 380
TRADE NAME—
Name of patented article as trade mark. By Russel S. Smart 49 19
TREASON—
Sedition. By James Crankshaw, K.C. 51 35
TRESPASS—
Obligation of owner or occupier of land to licensees and trespassers. By W. J. Tremeear 1 240
Unpatented land—Effect of priority of possessory acts under colour of title. By W. J. Tremeear 1 28
TRIAL—
Preliminary questions—Action for malicious prosecution. By W. J. Tremeear 14 817
Publicity of the Courts—Hearing in camera. By R. J. Dowdall 16 769
TUGS—
Liability of tug owner under towage contract. By J. A. Couch 4 13
Duty of a tug to its tow. By H. B. Robinson 49 172

ULTRA VIRES—
Law of. By C. B. Labatt 36 107
UNFAIR COMPETITION—
Using another's trade-mark or trade-name—Non-competitive lines of trade. By W. B. Laidlaw 2 380
VENDOR AND PURCHASER—
Contracts—Part performance—Statute of Frauds. By W. J. Tremeear 17 534
Equitable rights on sale subject to mortgage. By R. A. Ingersoll 14 652
Payment of purchase money—Purchaser's right to return of, on vendor's inability to give title. By R. A. Ingersoll 14 351
Sale by vendor without title—Right of purchaser to rescind. By J. A. Couch 3 795
Transfer of land subject to mortgage—Implied covenants. By A. B. Morine, K.C. 32 497
When remedy of specific performance applies 1 354
WAGES—
Right to—Earned, but not payable, when. By F. B. Kenny 8 382
WAIVER—
Of forfeiture of lease. By W. J. Tremeear 10 603
WASTE—
Law of obligation of tenants to repair. By C. B. Labatt and H. H. Donald 52 1
WILFUL ACT OR OMISSION OR NEGLIGENCE—
Within the meaning of the Railway Act. By A. B. Morine, K.C. 35 481
WILLS—
Ambiguous or inaccurate description of beneficiary. By H. A. Youdin 8 96
Compensation of executors—Mode of ascertainment. By W. J. Tremeear 3 168
Substitutional legacies—Variation of original distributive scheme by codicil. By E. Douglas Armour, K.C. 1 472
Words of limitation in. By C. E. T. FitzGerald 31 390
WITNESSES—
Competency of wife in crime committed by husband against her—Criminal non-support—Cr. Code sec. 242A. By W. J. Tremeear 17 721
Medical expert. By W. J. Tremeear 38 453
WORKMEN'S COMPENSATION—
Quebec law—9 Edw. VII. (Que.) ch. 66—R.S.Q. 1909, secs. 7321-7347. By W. J. Tremeear 7 5

DOMINION LAW REPORTS

AN ABRIDGMENT OF COMPANY LAW OF CANADA.

By

H. H DONALD, OF THE TORONTO BAR.

COMPANIES GENERALLY.

(1) Advantages of Incorporation.

(2) Power of creating Companies.

(3) Rights of Holding Land and effect of Mortmain Acts according to recent decisions.

(4) Application of Dominion Companies Act.

INCORPORATION.

(1) Letters Patent. Application for to include

- (a) The name of the company.
- (b) The names of the applicants.
- (c) The objects of the company.
- (d) The nature of the company.
- (e) The capital stock and how it is divided.
- (f) Special clauses.
- (g) The names of the provisional directors.
- (h) The head office of the company.

(2) Companies which may be incorporated under the Act—

- (a) Public companies.
- (b) Private companies.
- (c) Companies without share capital.
- (d) Existing companies.

(3) Supplementary Letters Patent.

- (a) Changing the name.
- (b) Extending the objects of the company or amending its charter.
- (c) Increasing or decreasing the capital stock of the company.

(4) Advertising the charter.

(5) Fees—schedule as laid down according to sec. 24 of the Act.

ORGANIZATION.

(1) Formation of the company.

(2) Prospectus and its requirements.

(3) Promoters and their liability.

ANNOTATION

(4) Directors, their powers, duties and liabilities.
  (a) Meetings.
  (b) Calls.
(5) Shares.
(6) Shareholders, their rights and liabilities.
  (a) Meetings.
  (b) Voting.
(7) Commencement of business.

CORPORATE EXISTENCE.

(1) Powers and duties of the company.
  (a) Corporate contracts.
(2) By-laws.
(3) Borrowing, mortgages and debentures.
  (a) Bonds.
  (b) Debenture stock.
  (c) Floating charge.
  (d) Registration.
(4) Annual meetings and financial statements.
(5) Dividends.
(6) Auditors.
(7) Annual returns.

TERMINATION OF CORPORATE EXISTENCE.

(1) Forfeiture of charter.
(2) Winding-up under the Dominion Winding-Up Act.
(3) Proceedings under Bankruptcy Act.

COMPANIES GENERALLY.

(1) ADVANTAGES OF INCORPORATION.

By far the largest part of present-day business is carried on by incorporated companies of limited liability, and this proves the advantage of doing business in this manner as compared with the old partnership.

The company is a legal person and is distinct from its shareholders, the ownership of the undertaking and its assets are vested in the organisation, as a legal entity and not in the shareholders. The company carries on business and the ownership of its property remains in the company no matter how its shareholders may change or vary from time to time.

The members of a company, called its shareholders, are liable to the public or creditors of the company, only for the amount they have agreed to pay to the capital fund of the company, and their possible loss is limited to that extent.

A company is managed by a Board of Directors, as a rule people of business experience and sagacity *who must be elected by the shareholders.* The business of the company is in their hands and is conducted along well-defined lines requiring the mature consideration of the affairs of the company at directors' and shareholders' meetings, and necessarily complying with certain statutory provisions—restricting the organisation to certain powers, and directing certain things to be done.

A company has greater facilities than an individual as regards the securing of capital and further wide powers of borrowing being allowed by statute.

Briefly, the advantages of an incorporated company over an unincorporated company or partnership are:—

(1) Limited liability of the investor. That is the amount of his or her subscription to the capital fund of the company.

(2) The corporation exists until the termination or forfeiture of its charter or until it is wound up. The changes in its personnel do not affect its power of carrying on business.

(3) The business methods are systematised. There is good management and a restriction of powers by charter or by by-laws of the company passed by the directors and approved by the shareholders.

(2) POWER OF CREATING COMPANIES.

A company may be incorporated under the Dominion Companies Act, or under any of the Provincial Companies Acts. Under sec. 92 of the British North America Act, 1867, the Provincial Legislatures have power to pass a Companies Act authorising the formation of companies with provincial objects —and these companies must have a license from any other Province in which they carry on business under the Extra Provincial Corporations Act of that Province. *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96; *C.P.R.* v. *Ottawa Fire Ins. Co.* (1908), 39 Can. S.C.R. 405.

The Dominion can incorporate a company with capacity to carry on business throughout Canada and, as has been recently decided in the Privy Council, a Province cannot "interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion." Before this decision and the *John Deere Plow* case, a company incorporated under the Dominion Companies Act, before doing business within a Province, had to apply for and obtain a provincial license, and in default of doing so, became liable to a fine, and was incapable of suing in the

ANNOTATION Courts of the Province. *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353 (annotated), [1915] A.C. 330.

(3) RIGHTS OF HOLDING LAND.

But a company incorporated under the Dominion Companies Act can be prevented from acquiring and holding land in a Province until the requirements of a general Mortmain Act have been complied with. *Great West Saddlery* case and Consolidated Appeals, 58 D.L.R. 1, [1921] 2 A.C. 91.

In February, 1921, this decision was handed down and stated that it is within the competence of a Provincial Legislature to enact a general Mortmain Act, and this statute or any severable provision in any other statute restricting the powers of corporations incorporated outside the Province to acquire and hold real estate within the Province, will over-ride sec. 29 A of the Dominion Companies Act, which authorises a company incorporated under the Act to hold land anywhere in Canada.

In the Province of Ontario there is a Mortmain Act of General Application, and according to the *Great West Saddlery* case, a Dominion company is in no better position than any other company desiring to hold or acquire land in the Province, and must take out the license required by the Act before doing so.

In the same case, it was held that the provisions referring to mortmain in the statutes of Manitoba and Saskatchewan were not severable from the other provisions of the statutes, and so were held of no effect in these Provinces, as the statutes themselves were *ultra vires* of the respective Legislatures. But at the same time, the Privy Council held that it is within the power of the other Provincial Legislatures to require all extra-provincial companies to obtain a license under the Provincial Mortmain Acts in order that they may acquire and hold land in the Province.

No doubt all other Provinces will follow this decision, and pass a Mortmain Act of general application, making it necessary for a Dominion company to have to obtain a license in each Province of the Dominion if it wishes to acquire or hold land therein.

But it seems more advantageous to incorporate under the Dominion Act, especially if the business of the company is to be carried on in more than one Province, and the question of fees must be considered. Again whether the company is doing business throughout Canada or abroad, being incorporated under the Dominion Act unquestionably gives prestige to the company.

On the other hand, should the applicants be desirous of form-

ing a company to do business within the limits of one Province only, there seems to be no doubt of the advisability of incorporation in that Province.

ANNOTATION

Briefly, although the Provincial Companies Acts may confer upon companies capacity to do business outside the limits of the incorporating Province, (*Bonanza* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566), power to exercise that capacity must be given by extra-provincial authority, whereas in view of the recent decision the Dominion can confer power and capacity to carry on business throughout Canada, and any company desirous of doing business in more than one Province or abroad, should, other things being equal, seek incorporation under the Dominion Companies Act.

(4) APPLICATION OF THE DOMINION COMPANIES ACT.

Companies may be incorporated by a Special Act, Letters Patent, or Memorandum of Association.

The last method is in vogue in the Provinces of Nova Scotia, British Columbia, Saskatchewan and Alberta.

Under the Dominion Act and in the other provinces of Canada, a company may be incorporated by special Act or letters patent.

It is only possible to deal with the Dominion Act in this article with an occasional reference to a provincial statute.

The Act is divided into five parts—the first of which applies to the great majority of companies incorporated under the statute, and is of greatest importance.

Part one applies to all companies incorporated under it, all companies incorporated under the Companies Act, R.S.C. 1886, ch. 119, and all companies incorporated under the Companies Act, 1902. R.S.C. (1906), ch. 79, sec. 2, and amendments.

Part two, secs. 121-122, applies to all companies incorporated by special Act of the Dominion of Canada after June 22, 1869, except railway companies, banks, loan or insurance companies.

The special Act constitutes the charter, the Act is published in the statutes, and is notice of the incorporation to all persons dealing with the company.

The company is, of course, governed by this part, except where the clauses of this part are expressly varied in its charter.

When the special Act conflicts with this part, the intention of the legislation must be carefully considered. Companies under this part are subject to the doctrine of *ultra vires* and any such Acts are null and void and cannot be ratified. See Annotation on Estoppel, 36 D.L.R. 107.

Part three applies to loan companies, but has in reality been

superseded by the Loan Companies Act, 1914, ch. 40, and now only applies to companies incorporated before that date.

Part four applies to British loan companies incorporated according to the laws of the Parliament of the United Kingdom for the purpose of lending money.

Part five applies to British and foreign mining companies.

Under Dominion Companies Act, joint stock companies are generally incorporated by letters patent, and it is essential that the petition be properly prepared.

The validity of the incorporation may be questioned if—

(1) The necessary number of incorporators having a proper status as required by the Act have not signed the petition.

(2) The purposes of the organisation are wholly outside the Act under which incorporation has been sought.

(3) There is fraud or misrepresentation in the application for incorporation.

(4) The purpose for which the company is formed is illegal. *La Banque D'Hochelaga* v. *Murray* (1889), 15 App. Cas. 414, *Hardy* v. *Pickerel* (1898), 29 Can. S.C.R. 211.

INCORPORATION.

(1) LETTERS PATENT.

An application for letters patent is made by virtue of sec. 7 of the Act.

Forms to be found in the schedule to the Act.

In making an application under part one of the Act for letters patent, the Petition, as it is called, must contain.

(a) The name of the company.

(b) The names of the applicants or petitioners.

(c) The objects of the proposed company.

(d) The nature of the company.

(e) The capital stock and how it is divided.

(f) Special clauses.

(g) The names of the provisional directors.

(h) The head office.

(a) In applying for incorporation, it is advisable to write the secretary of state or the provincial secretary as the case may be, submitting the proposed name, and asking if the same is unobjectionable to the Department.

The Department has a complete list of the names of all companies incorporated and will, on request, hold the name proposed for a reasonable time for the use of the applicant, if it is not objectionable or does not conflict with an existing corporation.

It is well known that the words "Kings," "Queens," "Crown," and such like, are objectionable unless the proposed

company is to take over the business of an organisation having the right to use any of these names before prohibition of the same had been directed.

The Department will find that any name conflicting with the name of an existing company is objectionable, but see *John Palmer* v. *Palmer McLellan Shoe-Pack Co.* (1917), 37 D.L.R. 201, (annotated, p. 234), 45 N.B.R. 8. If the applicant can shew to the satisfaction of the Department that the company in question has been wound up, the proposed name will be reconsidered.

In case of a contest respecting names, which companies claim are conflicting, the Department decides the same in a summary manner, unless the matter involves serious questions of law, when it will be referred to the Courts.

(b) The names, occupations and places of residence of the applicants must be set out in full, and the applicants should be of the full age of 21 years.

(c) The proposed objects of the company and powers desired are next set out.

When a company is to be formed for the purpose of acquiring an existing undertaking, a paragraph embodying this purpose usually precedes the paragraph setting out the main purpose or object of the proposed company.

As a rule the main purpose or object of the company is set out in the first paragraph and this paragraph controls the construction of all that follow, and all other purposes or objects set out in the succeeding paragraphs are merely an adjunct to the primary object contained in the first paragraph, for the company may not abandon its main purpose and carry out the secondary objects only.

Under the Dominion Companies Act, it is essential to set out in full in the petition, the purposes and objects of the proposed company. On the contrary in some of the Provinces the practice is merely to set out one or two general objects in the petition, owing to the fact that some of the Provincial Companies Acts, (*e.g.*, Ontario Companies Act, R.S.O. (1914), ch. 178, sec. 23) by certain of their provisions give very wide implied powers to companies applying for incorporation under these statutes.

The Courts have recently implied unlimited powers to incorporated companies.

The *Bonanza* case (*Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566, decided that a company had the capacity of a natural person to carry on business—and following this decision, the Appellate Division of the Supreme Court of Ontario, held that a company is unrestricted as to the nature of the business it may carry on. *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280, 42 O.L.R. 105.

ANNOTATION

It is submitted that though the powers of the company may be unlimited, the directors are bound by the objects and purposes set out in the charter and cannot exceed the same or bind the company without the authority of the shareholders; and if such were not the case, there would be little use in setting out the purposes and objects of the company in the charter, for although the proposed shareholders might know the nature of the organisation in which they are investing their capital, they would not know for what purposes such capital was to be used, if there were no restriction whatever on the nature of the company's business.

(d) Companies may have shares with or without par value, or may be incorporated without share capital.

The last-mentioned are created for charitable, patriotic or similar purposes, as detailed in sec. 7 A, and cannot be carried on for profit or gain.

Of the companies with share capital, there may be shares with par value of $1.00 or any amount the applicants may desire. However, it is essential that all shares, both preference and common, be of the one denomination. The usual par value of shares in industrial corporations is $100, in mining corporations, $1.

A company having shares without par value has been authorised by the Amending Act of 1917, ch. 25 (now sec. 7 B). Such shares are usually sold at a rate fixed by the charter or by a by-law of the company.

(e) The proposed amount of capital stock, the par value of the shares, and the number of shares must be set out in the petition.

A memorandum of agreement or stock book in duplicate must be signed by each applicant under seal, shewing the amount of stock taken out by each applicant and the amount paid thereon, and how paid must be shewn. It is always well to have applicants pay cash in full for this stock forthwith.

The petition must be verified as to the sufficiency thereof by affidavit or declaration of one of the petitioners, and each signature must be witnessed, and it is also essential that the witness subscribes his or her signature as witness to the signatures on the memorandum of agreement and stock book, and take the necessary affidavit of execution.

Capital may be raised by—

(1) Bonds or debentures.

(2) Preference shares.

(3) Common shares.

Authority to issue bonds or debentures should not appear in the company's charter. This is contrary to departmental

practice, as express authority to issue such securities is given by sec. 69 of the Act, and the procedure is laid down in that section which governs the authorisation and issue of such bonds and debentures.

Preference shares have preferential rights over common shares. The nature of such rights are many, and as a rule certain restrictions are imposed on this class of shares.

Usually the preferences shares are preferred as to dividends and as to the distribution of assets in winding up or any other division of the same. These shares do not as a rule carry voting rights as long as the dividends thereon continue to be paid, and may be (if provided for in the terms of the issue) redeemed out of accumulated profits, so reducing the capital of the company.

It is essential to study the peculiar characteristics of the proposed company, in order to determine the exact nature and particular kind of preference shares, which will be suitable. There are many provisions which may be made applicable to preference shares, and the applicants may choose the nature of the restrictions or benefits they desire to place on such shares.

The issue of preference shares may be provided for in the charter or by by-law.

If set out in the application, all terms of the issue must be described fully, as would be done should such shares be authorised by by-law.

Or, the directors may pass a by-law creating preferred shares, and such by-law must be approved by three-quarters of the shareholders present at a meeting called for the purpose, and which shareholders must represent at least two-thirds in value of the stock of the company.

It has been contended that 2/3 in value fixed by the statute is to be computed upon the total amount which has been called and paid, but this is not the correct meaning.

The measure of value of the stock for voting purposes is not determined by what has been paid up. It seems to be clear that the statute contemplates the power to vote before the stock is paid up, and the shareholders shall vote on such shares as they have, provided they are not in arrears for calls.

The unanimous approval in writing of the shareholders obviates the necessity of calling a meeting for this purpose. *Manes Tailoring Co., Ltd.* v. *Willson* (1907), 14 O.L.R. 89.

It is essential that a company should have common shares, and whether other classes of securities should be authorised depends on circumstances, and the views of the organisers of the

ANNOTATION concern. The common shares may be in such denomination, as the applicants desire from a minimum of $1. These shares must be sold at not less than par, except in the case of mining companies, which are allowed to do so by a special statute. The issuing of common shares as bonus to the purchasers of preferred stock or bonds is illegal, although this is done by many organisations through the issue of common shares to a trustee for certain assets, and the transfer by the trustee of these shares to the purchasers of preferred stock or bonds.

The company may only issue the amount of capital stock fixed by the charter, and if the directors wish to issue further stock, they must obtain authority by supplementary letters patent to do so.

(f) Under the Act, it is provided that what may be done by by-law may be included in the charter, and under this section special clauses may be introduced. Such clauses included in the charter cannot be repealed or amended by the directors of the company in the way that an ordinary by-law can be repealed or amended.

It is necessary to apply for supplementary letters patent in order to effect such a repeal or amendment, and a by-law of the directors approving such application requires confirmation by shareholders holding two-thirds in value of the shares of the company.

The insertion in the charter of special clauses is one way whereby the rights of the minority of shareholders may be protected. For rights of minority shareholders see *Dominion Cotton Mills Co.* v. *Amyot and Brunet,* 4 D.L.R. 306, [1912] A.C. 546.

There are many methods whereby the minority may be overborne by the majority. Such as non-payment of dividends, payment of excessive salaries, etc., and these may be guarded against to some extent by special clauses in the charter. On the insertion of these clauses in the application, it must be remembered that these may prove cumbersome or obnoxious, and they can only be changed by supplementary letters patent.

(g) The provisional directors are named in the petition. They must number not less than three, and may be any greater number. They have all the authority of directors, and may pass by-laws for the subsequent organisation and generally carry on the business of the company until others are appointed in their stead.

They may pass a by-law to be approved by the shareholders authorising a change in the number of directors—*Sovereen, et al* v. *Whitside* (1906), 12 O.L.R. 638—as named in the charter,

and a copy of such by-law must be filed with the Department.

It is preferable to have the number of directors remain the same.

The head office of the company is named in the petition, and must be in Canada, and the company must have an office in the place where its chief place of business is in Canada.

(h) The statute provides that the company may change its chief place of business by by-law passed by the directors and confirmed by a vote of the shareholders holding two-thirds in value of the capital stock of the company. Notice of the change must be given to the Department and published in the *Gazette*.

(2) COMPANIES WHICH MAY BE INCORPORATED UNDER THE ACT.

Under the Act, companies are divided into four classes, public, private, without share capital, and existing companies.

(a) Public companies which offer shares to the public for subscription are required to file a prospectus according to the terms of the statute, and companies which do not issue prospectus, are required under the statute to file a statement in lieu of prospectus. ((1917) ch. 25, sec. 43 A.B. and C.)

(b) A private company does not require to file either a prospectus or a statement in lieu of prospectus.

Under the Dominion Companies Act, this is the only advantage given to a private company, but there are many other advantages given a private company under the Companies Acts of several of the Provinces, and companies incorporated under these Acts are relieved from certain restrictive provisions of the same which apply to public companies.

In applying for a charter and designating the proposed company as a private company, it is necessary to set out in the application—

(1) A restriction as regards the transfer of shares, the usual one being that all transfers shall be subject to the approval of the board of directors.

(2) A restriction limiting the number of shareholders, with the exception of employees, to fifty.

(3) A restriction providing that the company shall not offer shares or securities of any kind to the public for subscription.

In addition, it is necessary that the words "Private Company" appear all the way through in the application, and further, that these words be printed or lithographed on the stock certificate and also embossed on the corporate seal.

There are many instances where it will be advantageous to applicants to consider thoroughly the advantages which are offered to them in making their organisation into a private company.

ANNOTATION

If a private company desires to become a public company, there is provision in the statute to do so, although it will be necessary, as in the case of all amendments of the charter, to apply for the issue of supplementary letters patent. (Sec. 43 C (4)). *Leiser* v. *Popham Bros.* (1912), 6 D.L.R. 525, 17 B.C.R. 187.

(c) By an amendment to the Dominion Companies Act (1917), 7 & 8 Geo. V, ch. 25, now sec. 7 A of the present Act, an application may be made for the creation of a corporation to carry on in more than one Province of Canada, without pecuniary gain, objects of a national, patriotic or charitable nature.

The applicants must be over 21 years old, and the application must set forth the name of the proposed organisation, its purposes, the location of its chief office, and the names of its proposed directors or trustees, who shall number not less than three and not more than fifteen.

The application shall be accompanied by a memorandum of agreement in duplicate, setting out by-laws or regulations of the corporation.

These shall provide for—

(1) Conditions of membership.

(2) Particulars of meetings, voting at the same, and repealing or amending by-laws.

(3) Appointment or removal of trustees, officers, etc., and their powers.

(4) Appointment of auditors and audit of accounts.

(5) Withdrawal of members.

(6) A corporate seal and certifying documents of the corporation.

By-laws or reguiations set out in the letters patent cannot be repealed or amended except by supplementary letters patent. *Murphy* v. *Moncton Hospital* (1917), 35 D.L.R. 327, affirmed 36 D.L.R. 792, 44 N.B.R. 585.

Any by-laws or regulations not so embodied in letters patent may be repealed or amended by proper authority, but must have approval of the secretary of state before acted upon.

Any corporation previously incorporated under authority of any Act of the Parliament of Canada for any of the objects mentioned in this section may apply under the amendment to the Act for letters patent, and on granting of the same the provisions of Part 1, applying to corporations under this section, shall apply to the corporation as then constituted.

As in all corporations without share capital, there is no restriction on commencement of business; it is not necessary to place the word "limited" after the name of the corporation,

no prospectus or statement in lieu thereof is required, but provision must be made in the by-laws for auditing accounts and the fees as called for in sec. 24 must be paid.

(d) According to secs. 14-20 existing companies may be incorporated. When the letters patent are issued, all the rights, property and obligations of the former company shall be transferred to the new company.

The secretary of state may, in any letters patent issued under this part of any subsisting company, name the first directors of the new company, and the letters patent may be issued to the new company by the name of the old company or by another name.

Existing companies incorporated under any general or special Act may be incorporated under this part.

Liability of the shareholders to creditors of the old company shall remain as at the time of the issue of the letters patent.

In all proceedings for incorporation of chartered companies it is necessary to file with the secretary of state a certified copy of the charter or Act incorporating company, designate where principal office is to be situated, and give the name of manager or agent of the company.

Such company to which such letters patent have been granted, when so required, shall make a return to the secretary of state of names of shareholders; the amount of its paid-up capital; the value of its real and personal estate held in Canada.

In default of making the said return within three months, the letters patent may be cancelled.

Notice of issue of such letters patent shall be published in the Canada *Gazette*.

(3) SUPPLEMENTARY LETTERS PATENT.

After incorporation, a company may by supplementary letters patent:

(a) Change its name.

(b) Amend the objects and purposes set out in the letters patent or any special clauses included therein.

(c) Subdivide its shares, and increase or decrease its capital stock.

The practice, in all cases, is to apply to the Department by petition asking for the required amendments of the charter, and the Department will entertain in one application a petition for all the desired changes, so that the letters patent may be amended, the capital increased, and the name changed in the one application and at the same time.

(a) Sec. 22. The name of a company may be changed after incorporated by the secretary of state, at the instance of the company, by supplementary letters patent or at the instance of a

ANNOTATION company incorporated or unincorporated, whose rights may be prejudiced. *Canadian National Investors, Ltd.* v. *Canadian National Estates, Ltd.* (1911), 1 W.W.R. 87.

A company not incorporated under the Dominion Act will receive the same consideration as one that is.

The practice of the complaining organisation is to write to the Department lodging the complaint. When, if necessary, an appointment with the minister for discussion will be arranged, and if matters cannot be adjusted, the complainant must apply for an injunction restraining the use of the objectionable name; and leave himself in the hands of the Court. *John Palmer* v. *Palmer-McLellan Shoe-Pack Co.* (1917), 37 D.L.R. 201, (Annotated, p. 234), 45 N.B.R. 8.

In all applications for supplementary letters patent, it is necessary to have a proper petition signed by the directors of the company setting out what is desired, and sealed with the corporate seal.

There must be a statutory declaration of execution, and affidavits or declarations verifying the signatures of the petitioners, and the truth of the facts in the petition. A detailed list of documents required is in Departmental Instructions.

When the petition is being made to change the name of the company, the shareholders should, at a special meeting called for the purpose, pass a resolution authorising the change of name and a petition therefor; and the calling of the meeting and a copy of the resolution passed should be set out in the petition.

(b) Sec. 34. On application for extension of objects or amendments of the charter, a similar resolution must be passed by the shareholders, but in this case, the vote must represent at least two-thirds in value of the issued shares of the company; owners must signify their approval at the meeting.

The petition must contain particulars of the meeting and a copy of the resolution, and must be properly verified, and the directors may apply for supplementary letters patent at any time within six months after the passing of the resolution.

The application to extend or amend the objects of the company must not change or alter the general character of the company, otherwise the same will not be approved.

(c) Sections 51-57. An application for subdivision of shares or increase or decrease of capital must be initiated by the directors, who pass a by-law which must be submitted to the shareholders at a meeting called for this particular purpose, and at such meeting approved by a 2/3 vote in value of the issued capital stock of the company, as in the case of an applica-

tion for extension of objects or amendment of the letters patent. *Courchene* v. *Viger Park Co.* (1915), 23 D.L.R. 693, 24 Que. K.B. 97.

It will be noticed that the rights of the minority shareholders are protected to some extent by requiring a 2/3 vote in value of the issued shares to make any changes in the objects, charter, shares, or capital stock.

An application for an increase of capital will not be considered until 90% of the authorised capital is issued and 50% paid thereon.

There are two classes of reduction of capital to be considered:

(1) Where there is no reduction of liability, and no repayment to the shareholders.

(2) Where there is a reduction of shareholders' liability, or a repayment to shareholders.

In the former case, the procedure is similar to that required for an increase of capital.

In the latter, the procedure is governed by the amending Act of 1917, ch. 25, and additional requirements are necessary, which may be found in detail in sec. 54 of the statute.

(4) ADVERTISING THE CHARTER.

Advertisement of the issue of letters patent or supplementary letters patent is inserted in the Canada *Gazette* in case of companies incorporated under the Dominion Companies Act, and in the *Gazette* of the Province where companies are incorporated under provincial statutes.

(5) FEES.

A marked cheque, bank draft or money order must accompany the petition. A schedule of the fees as found in sec. 24 of the Act follows. Similar rules apply to petitions for supplementary letters patent.

Tariff of fees, under the provisions of Section 24 of The Companies Act as amended by Section 6 of The Companies Act Amendment Act, 1917.

LETTERS PATENT AND SUPPLEMENTARY LETTERS PATENT.

When the proposed capital of the company is $50,000 or less	$100 00
When the proposed capital is more than $50,000 and not more than $200,000	100 00
and $1 for each $1,000 or fractional part thereof in excess of $50,000.	
When the proposed capital is more than $200,000 and not more than $500,000	250 00
and fifty cents for each $1,000 or fractional part thereof in excess of $200,000.	

ANNOTATION

When the proposed capital is more than $500,000 and twenty cents for every additional $1,000 or fractional part thereof.	400 00
For Letters Patent to any company under Section 7A added to The Companies Act by Section 4 of The Companies Act Amendment Act, 1917 (other than a company incorporated for charitable purposes only)	100 00
For Letters Patent to any company incorporated for charitable purposes only (other than a war charity when there shall be no fee)	25 00
For Letters Patent to a company under Section 7B added to The Companies Act by Section 4 of The Companies Act Amendment Act, 1917, when no amount at which shares may be sold is set out in the Letters Patent, then the amount of each share shall be fixed at $100 and the fee payable shall be according to the foregoing tariff upon the capital stock calculated on the total amount of such shares either at the price set forth in the Letters Patent or at the fixed sum of $100 as the case may be.	
For Supplementary Letters Patent increasing the capital of a company the fee to be according to the foregoing tariff, but on the increase only, that is, the fee to be the same as for the incorporation of a company with capital equal to the increase.	
For Supplementary Letters Patent changing the name of a company	50 00
For Supplementary Letters Patent for other purposes	100 00

FOR FILING RETURNS.

For filing returns under Section 106 of The Companies Act as amended by Section 13 of The Companies Act Amendment Act, 1917, the fee payable upon each return shall be as follows:—

When the capital stock of the company is $200,000 or less	$ 5 00
When the capital stock of the company is more than $200,000, but not more than $500,000	10 00
When the capital stock of the company is more than $500,000, but not more than $1,000,000	25 00
When the capital stock is more than $1,000,000 and $1 on each $1,000,000 in excess of the first million, but not exceeding $50 in all.	25 00

For filing return from a company having shares without nominal or par value, the fee payable shall be calculated upon the capitalization of such company shown in such return.

For filing return from a company incorporated for charitable purposes (other than a war charity when there shall be no fee) 1 00

For filing return from any company incorporated under Section 7A added to The Companies Act by Section 4 of The Companies Act Amendment Act, 1917 (other than a company incorporated for charitable purposes only) 2 00

CERTIFICATES OF REGISTRATION, ETC.

For each Certificate of Registration or Deposit of any prospectus, notice or agreement or other such document filed for that purpose under the provisions of The Companies Act or The Companies Act Amendment Act, 1917 .... 1 50

ORGANISATION.

(1) FORMATION OF THE COMPANY.

If the application for letters patent is sufficient and satisfactory to the Department, it is customary to advise the applicants at once through their solicitors, and the letters patent follow on as soon as they are ready. The next step is to proceed with the organisation of the company.

It is well to procure as soon as possible the necessary minute and record books, a register for transfer of stock, share certificates and a corporate seal.

If the company is a private one, care must be taken to see that the words "Private Company" appear on the share certificates, and are embossed on the corporate seal.

A meeting of the provisional directors, as named in the letters patent, should be called as soon as convenient. This meeting is called by the notice of the provisional directors, and signed by one of them, usually the first named director in the letters patent.

At this meeting, one of the directors acts as chairman, and reads the letters patent to the meeting, when on motion they are approved and adopted. Then a motion is made and carried to allot the shares subscribed for by the incorporators to them. These shares are called up in full and should be paid for in cash. This, as a rule, concludes the business of the meeting, which adjourns. Notice of the meeting may be waived by signature of the provisional directors to a waiver thereof.

The chairman sends out a notice signed by him to the incorporators calling a meeting of them at once, and stating therein what the meeting is for.

1. Organisation.
2. Election of permanent directors.

ANNOTATION

3. The passing of by-laws for the general conduct of the company's business, including a general borrowing by-law.

4. The transaction of such other business as may be necessary.

The notice should be ordinarily a fourteen-day notice, but the same may be waived by the signatures of the incorporators to a waiver. This waiver of notice is usually set out at the end of the meeting, and must be signed by those waiving notice.

When the meeting assembles, the first step is to confirm and ratify the acts of the provisional directors—the election of directors next takes place by ballot.

Normally the provisional directors are elected the first permanent directors of the company, and then the meeting adjourns.

Immediately afterwards the permanent directors hold their first meeting. They discuss and pass general by-laws for the conduct of the company's business, and usually a general borrowing by-law (subsequently the latter may be repealed or amended to suit the company's bankers). It is well, also, to consider passing a by-law authorising the company to purchase shares of other companies. These by-laws are numbered "one," "two" and "three" respectively.

If the letters patent do not provide for the issue of preference shares, and it is desired to create and issue these shares, a by-law providing for the creation and issue of preference shares, and the terms and details of the same is passed at this stage.

These by-laws and the acts of the directors are then confirmed and ratified by the meeting of shareholders which re-assembles for this purpose, and adjourns.

As a rule companies are formed for the purpose of acquiring certain property, and issuing shares in payment therefor. The acquisition of the property by the company, and the issue of shares to the vendors or their nominees as fully paid-up shares is authorised by the first permanent directors, who call a meeting to consider the proposed transfer, approve of the same according to an agreement between the vendors and the company, and the agreement is submitted to be confirmed and ratified by the shareholders.

When the property in question has been acquired, the directors call a meeting and resign one by one in favour of the persons who are to be the actual and continuing directors of the company. Each director, as he resigns, transfers the share of stock held by him to his successor, who takes his place on the Board.

In a private company, remember that each transfer of stock requires the approval of the Board of Directors.

The usual qualification of a director prescribed by the by-laws

of the company, is the holding of one share, and it is unnecessary to allot further shares to the incoming directors.

The general by-laws should provide that the directors may appoint officers for the coming year by resolution, and the new Board appoints officers for the ensuing year. It is usual also to name the company bankers and auditors and to fix the salary of the latter, and the meeting then adjourns.

It is a common practice, when a company is being incorporated for the purpose of taking over a particular business or property from an individual or individuals, to set out the proposal in a clause which will take its place as one of the objects of the company.

A company, however, may not make a contract until it is incorporated and organised, and it is not bound on incorporation and organisation to carry out an agreement of this nature arranged previously on its behalf. However this may be carried out through a trustee or by means of an agent.

On acquisition of property, a by-law should be passed authorising the purchase, and a contract of sale and purchase must be considered and approved.

This by-law should provide for its submission to the shareholders; the execution of the contract by the proper officers of the company and the payment of the consideration and allotment of shares (if they form part of the consideration), and on confirmation and ratification by the shareholders, and the execution and delivery of the conveyances or transfers of the property to be acquired.

A director interested in any sale of property to the company should make full disclosure of his interest, and refrain from voting for or against acquisition by the company.

The assets of a business to be taken over, or value of property to be acquired may be fixed at any price to suit the vendors, and unless the consideration is grossly inadequate, or there is fraud or misrepresentation shewn, the Courts will not interfere.

The company's bankers will require the borrowing by-law of the company to be amended so as to comply with the bank's form, and will also require authority as to signatures or cheques, and other bills of exchange. Whether or not other by-laws are passed at this time depends largely on the nature of the company in process of organisation.

If the company is a private company, it is not necessary to proceed any further with questions of organisation, but if it is a public company, the very important question of a prospectus or notice in lieu thereof must be dealt with at once if the shares and securities of the company are to be marketed and the organisation must proceed further.

ANNOTATION

Too much attention cannot be paid to the importance of having all of the incidents of organisation prepared thoroughly while waiting for the issue of letters patent. Much valuable time may be saved at this stage of a company's existence.

(2) PROSPECTUS.

A prospectus is any circular, advertisement or other intimation which offers to the public for subscription the shares or other securities of a company. Its object is to put before the potential investor full particulars as to the nature and purposes of the company.

All companies offering their securities for public subscription must issue a prospectus, or before the first allotment of shares or debentures, may file a statement in lieu thereof (sec. 43 C), Form No. F in schedule to Companies Act Amendment Act, 1917.

A private company need not issue a prospectus or file a statement, but if changed into a public company by supplementary letters patent, must do so (sec. 43 D).

The statute provides that the prospectus must be dated and signed by the directors or proposed directors.

A signed original must be filed with the Department, and must shew on the face of it that it has been filed. An original should also be filed with the provincial secretary of the Province in which the company is selling shares before the prospectus is issued.

The requirements of a prospectus are:

1. The contents of the letters patent, the names of the signatories to the petition for incorporation, and the number of shares subscribed for by each; as well as the number of founder's shares.

2. The number of shares necessary to be held by a director in order that he may qualify as such, and the remuneration of the directors.

3. The names, addresses and occupations of the proposed directors.

4. The conditions under which the directors may proceed to allotment.

5. The number and amount of shares and debentures which, within the preceding two years, have been issued as fully or partly paid-up, otherwise than in cash and the consideration therefor.

6. The names and addresses of the vendors of any property acquired or proposed to be acquired by the company.

7. The purchase price of such property.

8. The amount of the preliminary expenses (estimated).

9. The amount paid or intended to be paid within the two preceding years to any promoter.

10. The nature of and parties to every material contract to be taken over or proposed to be entered into by the company.

11. The names and addresses of auditors.

12. Full particulars of directors' interest in property to be acquired by the company.

13. Voting rights of the several classes of shares.

If the requirements of the statute are not complied with, the company and those responsible for the issue of the prospectus shall be liable to a fine as provided for in the particular section.

It is essential that on preparation of the prospectus, care is taken to comply with the specific requirements set out. Further care should be taken to see that statements contained in the prospectus are true. Serious consequences are liable to ensue through untrue statements. Persons responsible for untrue statements in a prospectus are liable therefor; and the statute places the onus on the directors and promotors of the company and of shewing their good faith and the fact that they had reasonable grounds for believing the statements contained in the prospectus to be true.

Apart from the statutory remedy, any person misled by untrue statements in a prospectus may sue for the rescission of his contract to take shares, and in addition may claim damages for fraud.

The action for rescission of the contract should be brought against the company.

Plaintiff must establish that the untrue statement was material and that he acted upon it and sustained damage as a result. However, he does not need to prove that the misstatement was made wilfully or with intent to deceive. *Petrie* v. *Guelph Lumber Co.* (1885), 11 Can. S.C.R. 450.

The plaintiff in an action for deceit should sue the individuals responsible for the fraud. The company may also be made liable if the relation of principal and agent can be established between the company and the fraudulent agent. *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, at p. 326.

To succeed in an action for deceit, the plaintiff must shew that he acted upon the faith of the misstatement and sustained loss. In addition, our Courts have held in *Petrie* v. *Guelph Lumber Co., supra,* that he must prove clearly that there was fraudulent misrepresentation on the part of those responsible for the prospectus.

The plaintiff may combine a claim for damages and rescission

ANNOTATION of contract in the one action. *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q.B. 504 (C.A.).

The repudiation by the purchaser of his contract to take shares must be done within a reasonable time, and before winding up or bankruptcy of the company.

A concealment may amount to a fraud if such concealment implies a falsehood.

Directors are liable in damages for false statements in a prospectus unless they honestly believed the same to be true or made the statements on the authority of an expert.

They are not liable to subsequent purchasers of shares unless prospectus was sent direct to them by the company.

A subscriber for shares who inspects the statement filed by a company in lieu of prospectus may, if it contains false statements, cancel his subscription, but has no remedy for damages against the company or the directors under sec. 43 D.

Following a practice adopted in some of the American States, in Manitoba, Saskatchewan and Alberta, a company may not sell any shares or securities unless the plan of flotation has been approved by the Department.

It is a question whether or not this affects a company incorporated under the Dominion Companies Act.

(3) PROMOTERS AND THEIR LIABILITY.

The word "Promoter" is defined in the Dominion Companies Act, 43D, sub-sec. 5.

Lord Cockburn, in *Twycross* v. *Grant* (1877), 2 C.P.D. 476, at p. 541, stated "A promoter is one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose."

The statute sets out the liability of the promoter with regard to untrue statements in the prospectus.

The consideration to promoter must be set out in the prospectus.

The promoters stand in a fiduciary relationship to the companies they promote. *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Buff Pressed Brick* v. *Ford* (1915), 23 D.L.R. 718, 33 O.L.R. 264.

Promoters selling their own property to the company or making profits out of their dealings with the company should make full disclosures of the transactions and should provide the company with an independent board of directors. *Gluckstein v. Barnes*, [1900] A.C. 240; *Fire Valley Orchards* v. *Sly* (1913), 17 D.L.R. 3, 20 B.C.R. 23.

A company is not liable to a promoter for services rendered or expenses incurred by him in promoting the company before

its incorporation, unless after incorporation the company expressly agrees with him to allow such expenses or such other facts exist from which the Court can infer a new contract to reimburse him for his services. *Van Hummell* v. *International Guarantee Co.* (1913), 10 D.L.R. 306, 23 Man.L.R. 103.

A promoter must not commit a fraud upon a company in matter of supposed assets to be turned over to it—he may be made a contributory on winding up. *Re Winnipeg Hedge & Wire Fence Co.* (1912), 1 D.L.R. 316, 22 Man. L.R. 83.

(4) DIRECTORS—Secs. 72-79.

The affairs of the company are managed by a Board of Directors, and all powers given to the company by charter are exercised by these individuals sitting as a Board subject to any statutory restrictions. They have full power to deal with assets of the company, as they see fit, to pass by-laws and generally carry on the company's business. *Hovey* v. *Whiting* (1887), 14 Can. S.C.R. 515.

The duties of the directors having the nature of those of a trustee cannot be delegated.

The directors of a company must number three, but there is no statutory limit as regards a maximum number. In order to qualify as a director, a person must have shares in his name or must be a beneficial shareholder of stock in the company and must not be in arrears for calls. If he parts with his or her stock, the statute does not expressly say that he or she shall cease being a director. See *Lucas* v. *North Vancouver* (1913), 12 D.L.R. 802, 18 B.C.R. 239.

It is usual to appoint such officers from the personnel of the Board of Directors, as the nature of the business may require, and their respective duties are usually defined by by-laws of the company.

The qualifications of a director, in addition to those laid down by the statute, are normally set out in the by-laws of the company, and care should be taken to provide proper by-laws in this respect to meet the particular needs of the company.

The provisional directors as set out in the charter, act as directors until superseded by permanent directors, usually the real backers of the organisation, who then take hold and carry on the business.

It must be remembered that the number of directors cannot be changed from the number set out in the charter, except by by-law of the Board approved by a 2/3 vote in value of stock represented at a meeting of the shareholders called for this purpose; and the number of directors authorised by such by-law and that number only must be elected.

ANNOTATION

It is usual for the remuneration of directors to be fixed by by-law, whether it be what is known as directors' fees or for instance, the salary of the managing director; and such by-laws setting out the remuneration, whether as directors or officers, as passed by the directors, must be approved of by the shareholders; otherwise the directors cannot claim any emoluments. *Cook* v. *Hinds* (1919), 44 D.L.R. 586, 42 O.L.R. 273.

Under the Act directors are liable personally in the following cases:—

1. On loans to shareholders, out of company funds, which is forbidden by statute. *Henderson* v. *Strang* (1919), 48 D.L.R. 606, 45 O.L.R. 215; *Allen* v. *Hyatt* (1914), 17 D.L.R. 7.

2. On declaration of dividends when the company is insolvent. The statute does not allow the capital of the company to become impaired, and directors allowing any impairment are personally liable for all losses. *Northern Trust Co.* v. *Butchart* (1917), 35 D.L.R. 169.

3. On allowing transfer of shares not fully paid up to persons incapable of paying for same. Shares should not be transferred until fully paid up. *Re Ontario Fire Insurance* (1915), 23 D.L.R. 758.

4. For six months wages to clerks, etc., whilst acting in the capacity of directors. *Reuckwald* v. *Murphy* (1916), 28 D.L.R. 474, 32 O.L.R. 133.

5. On commencing business before 10% of capital is paid up. The statute does not specify the necessity for actual cash consideration. *French* v. *Desbarats* (1912), 1 D.L.R. 136.

The election of directors must be regular, if not, the election may be set aside at the instance of a shareholder or shareholders suing in the name of the company, and all acts of the Board are irregular.

But a shareholder who participates in the benefit of illegal acts by the Board cannot sue. *Birney* v. *Toronto Milk Co.* (1902), 5 O.L.R. 1.

As long as a quorum of directors remain in office, casual vacancies in the Board may be filled by them.

Ordinarily, it is the duty of a director to give his whole ability and business knowledge to the best interests of the shareholders who place him in a position of trust.

Under the Act directors are indemnified in any actions against them arising out of the proper execution of their office as directors, unless costs are incurred through their own default or neglect.

There is no duty or obligation on their part to pledge their own credit for the benefit of the company.

No director shall vote at a directors' meeting in respect of any contract or arrangement in which he is interested. *Wade* v. *Kenrick* (1905), 37 Can. S.C.R. 32.

Although sales by directors to themselves of properties may be validated by a resolution of the shareholders.

(a) There is no statutory quorum of a meeting of directors—such a quorum may be fixed by by-law and such is usually a majority of the directors. *Re D. & S. Drug Co.* (1916), 31 D.L.R. 643.

Directors may meet anywhere they may agree upon.

Directors are representative of the company, and vote at directors' meetings as individuals and not in respect to such shares of the company as they may hold.

A directors' meeting may be called at any time or at stated intervals, such as monthly or fortnightly, as is the case in the larger corporations—such as the banks, trust companies, etc.

(b) By sec. 58 at least 10% of the value of the allotted shares shall be called during the first year of the company's existence and subsequently the directors have power to make calls at such times, places and in such instalments as the letters patent, or by-laws of the company might require.

The nature of the call is usually determined by by-law, and a reasonable notice as to time and place of payment.

The amount and where payable must be given, and must include all shareholders without discrimination. The call must not favour one set of shareholders and burden others or the Court may intervene.

The directors making a call must be properly elected and duly qualified. The call must be made by resolution at a proper and regular meeting of the Board, and the resolution should specify all particulars of the call to be made, and these matters should be set out in the minutes of the meeting.

A shareholder is liable to the company on a call, if he transfers his stock after the call is made, and until registration of the transfer, both transferor and transferee are liable.

A shareholder must pay calls on his stock as and when they are made. If the calls demanded are not met, the directors may direct that his stock be forfeited or may proceed against him in the name of the company for the amount due with interest in any Court of competent jurisdiction.

(5) SHARES—Secs. 45-49.

Under the statute all companies except those incorporated for purposes other than gain, are limited by shares.

The shareholders are admitted to membership in the company,

ANNOTATION by reason of holding certain shares, and their liability rests on those shares of the capital stock which they hold.

The obligation of the shareholders is to pay to the company the amount owing in respect to shares held by them, and this obligation is one that may be enforced by the company.

Shares may be sold for money, money's worth, services or goods. They may be paid for in cash or according to certain terms or by transferring certain property to the company or by performing certain services for it.

It is usual, when property is acquired by or services rendered to the company, to issue (according to agreement) fully paid-up shares to the vendor of the property or the performer of the services. The property or the services being the consideration for the issue of the shares, and the Court will not inquire into the value of the consideration in these cases, unless the same is grossly inadequate or unless the agreement under which the shares are issued is impeached for fraud or misrepresentation. *Re Ottawa Fire Ins. Co.* (1907), 14 O.L.R. 387.

Ordinarily shares are divided into two classes:—

(1) Preferred;

(2) Common.

Companies selling securities abroad also issue what are called share warrants, which are documents calling for shares transferable on delivery.

The share warrants are issued when authorised by charter. They are somewhat similar to bonds. The terms of the issue are indorsed on the warrants, and dividend coupons, numbered consecutively, are attached thereto, stating the amount of the dividend and the place where the same may be cashed; when notice is received by mail or an advertisement appears stating that the dividend corresponding to the number on the coupon will be paid.

As a rule the share warrants do not carry voting rights, but under the terms of issue provision is made for the procuring of voting certificates by the holders before a general meeting which entitle the owners to vote their shares at that meeting.

A company may also issue debenture stock, which is divided into shares, and is governed by the terms of its issue (by by-law). This stock does not carry voting rights, and is more in the class of a mortgage security, so will be referred to under the heading of debentures.

Preferred shares are what the name implies, preferred over the ordinary shares of the company in certain particulars. They may be created by charter or by by-law.

If the former, the full details of the proposed issue must be

set out in the letters patent, and if the latter, the directors must pass the necessary by-law to be subsequently confirmed and ratified by three-quarters vote of the shareholders present at a meeting and holding 2/3 in value of the issued stock of the company.

The writer is of the opinion that if feasible, application should be made for the creation of preferred shares in the petition for letters patent. The terms of the issue should be set out in the charter.

It is usual to grant certain preferences to this class of shares, and at the same time impose certain restrictions.

As a rule, these shares are preferred as to dividends which are cumulative and as to distribution of the company's assets on a division or upon winding up—or provision may be made for their redemption within a certain period at a premium or otherwise.

On the other hand, the rate of dividend is usually fixed, and the shares do not carry voting rights as long as the dividend is paid, and perhaps for a fixed period thereafter. The terms of the issue must be set out in full in the prospectus of the company, and full details are printed or lithographed on the share certificates themselves.

There are innumerable provisions that may be made with reference to the issue of preference shares, and the creators of the company must fix the terms that they deem most advantageous.

Every company must have common shares, although to-day nearly all organisations of any size have both classes. The creation and issue of preferred shares is optional.

The common shares carry the voting power in the company as long as the preferred dividends are paid, and the interest on any outstanding bonds or debentures is kept up—and those desiring to retain or to exercise control in the management of the company hold the majority of this stock, and are careful to keep it.

On the formation of a new company, control or a majority of the common shares is issued to the real backers of the organisation or their nominees.

Common shares are sometimes given as a bonus to the subscribers for preferred stock or bonds; usually this is done by means of a trustee and not actually by the company.

Both common and preferred shares have a par value to be set out in the letters patent,—although by the Amending Act of 1917 the common shares may have no par value, the preferred must have.

A person may become a shareholder:

ANNOTATION

1. By signing memorandum of application for incorporation. An original incorporator on signing the memorandum or stock book, becomes by so doing a shareholder. No allotment or entry on the register is necessary, but allotment is made and payment in full is usually directed by the provisional directors. *Patterson* v. *Turner* (1902), 3 O.L.R. 373.

2. By applying to the company for an allotment of shares. This is the ordinary method of getting shares in a new company, and the contract is not complete until a notice of allotment is received, unless the offer is made under seal. *Re Provincial Grocers, Ltd.; Calderwood's* case (1905), 10 O.L.R. 705; *Hill's* case (1905), 10 O.L.R. 501.

3. By transfer of shares from a shareholder, which transfer must be registered in a book kept by the company for that purpose, and is not deemed of any effect with respect to the company until registered.

This does not apply to shares listed on a stock exchange when a certificate endorsed in blank is accepted and may be transferred from person to person.

The transfer books are closed for a certain number of days before payment of a dividend, and no registrations can be made during that time. *Re Wiarton Beet Sugar Co.; Freeman's* case (1906), 12 O.L.R. 149.

4. By transfer on death or insolvency of the shareholder. The executor, administrator, authorised trustee or liquidator, as the case may be, takes the shares in trust and their rights or liabilities.

5. By estoppel, when a person prejudices his interest by attending meetings or acting as a director.

A company may not deal in, hold or own its own shares, but may hold shares in other corporations if authorised to do so by its charter or by by-law passed by the directors and confirmed and ratified by the shareholders. The original incorporators are the first shareholders of the company.

A person desiring to obtain shares in the organisation does so by subscription.

A contract to take shares is of the same nature as an ordinary contract. There is—

(1) The offer by the subscriber.

(2) The acceptance by the company.

(3) Allotment by resolution of the directors.

(4) Notice of allotment sent out to the subscribers by the secretary.

(5) Consideration—the payment made for the shares.

Should the applicant pay cash and the shares be delivered,

the contract is completed; on the other hand, should the applicant offer to pay say 10% cash, and the remainder in instalments when the company calls the same, or at certain fixed dates, the contract is executory and the promises are binding.

Contracts to take shares may be on certain terms and conditions, and if the company has knowledge of those terms and accepts the subscription, it is bound by them and must observe them.

Share certificates are issued by the company to its shareholders in accordance with its by-laws affecting such issue, and the issue of a certificate *prima facie* binds company as to number of shares stated therein and amount paid thereon—unless company can prove that no authority for the issue of such certificate was given to the person responsible for the issue of the same.

A shareholder in any public company has the right to transfer fully paid-up shares, but the transfer does not bind the company until the same has been registered in the share register of the company which is kept for that purpose. It is possible for the transfer of shares to be restricted by charter.

In private companies this is one of the principal clauses in the companies' charter, and one of the conditions of the incorporation is a clause requiring all transfers of stock to be approved of by the Board of Directors.

The directors should refuse to transfer shares not fully paid up, but if they do so, and the shares are transferred to persons of insufficient means, the directors may be held liable for the amount paid on such shares. *Re Ontario Fire Insurance* (1915), 23 D.L.R. 758.

Usually a form of transfer is endorsed on the certificate, and when more than one transfer is made of the same shares, the first to be registered has priority.

On a transfer of shares, the company takes in the old certificate, cancels it, and issues a new one to the transferee. Care should be taken that the certificate of transfer is genuine, and it is as well where there is any doubt to notify the transferrer and enable him to protect himself by denying the validity of the transfer, if necessary.

Shares are transferable only on the books of the company, and only the person appearing as the owner on the books is entitled to the rights of a shareholder. A transferee can acquire such rights only on registration.

On the death or insolvency of a shareholder, the shares held by him will automatically pass into his estate, and be dealt with by the executor, administrator, authorised trustee or liquidator, as the case may be. It is well to remember that a trustee holding

ANNOTATION

stock in trust should always see that the *cestui que trust's* name is on the register of the company. *Clarkson* v. *McLean* (1918), 42 O.L.R. 1; *Re British Cattle Supply Co., Ltd.; McHugh's* case (1919), 16 O.W.N. 62, affirmed 16 O.W.N. 206.

A person may become a shareholder by estoppel if he acknowledges his rights as one, or by his conduct accepts any privileges as such.

(6) RIGHTS AND LIABILITIES OF SHAREHOLDERS.
Secs. 38-42.

A share carries with it certain rights and liabilities while the company is a going concern and in its winding-up.

A shareholder is not responsible for any act, default or liability of the company or for any other thing connected with the company beyond the amount unpaid on his shares of the capital stock. He is liable to the creditors of the company in this amount, but only after a judgment against the company has been returned unsatisfied. *Grills* v. *Farah* (1910), 21 O.L.R. 457; *Turner* v. *Cowan* (1903), 34 Can. S.C.R. 160.

Trustees holding stock for a named person are not personally liable, but the estate is liable as if the testator or intestate were living. *Clarkson* v. *McLean* (1918), 42 O.L.R. 1.

As to the pledging of stock, see *Wilson* v. *B.C. Refining Co.* (1915), 22 D.L.R. 634, 21 B.C.R. 414.

Should the company be placed in liquidation, the legal owner of the shares is liable to be placed on the list of contributories. *Re Empire Accident Co.* (1913), 10 D.L.R. 782, affirmed 11 D.L.R. 847.

The executor, trustee, guardian, etc., shall represent stock held by lien and shall vote the same at the meetings of the company. *Rose* v. *Rose* (1915), 22 D.L.R. 572, 32 O.L.R. 481.

A shareholder who subscribes for stock in the company is liable on his contract according to the terms as soon as the same has been accepted by notice of allotment.

If he desires to repudiate his subscription for stock he may always do so, before acceptance of the same by the company, but on notice of allotment, he must take steps to repudiate at once on the grounds of misrepresentation and fraud, or on any other grounds sufficient to set aside the ordinary simple contract. *Lynde* v. *Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178; *Robert* v. *Montreal Trust* (1918), 41 D.L.R. 173, 56 Can. S.C.R. 342.

The repudiation should be by action against the company, and should be commenced before a winding-up or receiving order. *Re Western Canada Fire Ins. Co.* (1915), 22 D.L.R. 19, 8 Alta. L.R. 348.

ANNOTATION

If the shareholder has paid part of his subscription, he is liable to be called for the balance in such amounts and at such times as the directors may decide in their notice of call, unless his contract sets out certain terms which the company has agreed to by its acceptance of the same.

On non-payment of calls by a shareholder, his shares may be forfeited by the company, in which case he ceases to be liable thereon, or the company may take action against him and recover the amount due.

On a winding-up order, all arrears due on stock in the company becomes due at once, and the shareholders go on the list of contributories for the unpaid amounts due on the shares standing in their respective names.

The shareholders have the right to attend all meetings of the company and vote the stock standing in their respective names. They participate in the profits of the company by way of dividends as these are declared by the directors, and should by their votes see that the property and funds of the corporation are not diverted from their original purpose.

(a) There must be an annual meeting of the shareholders held once a year.

The time and date of this meeting may be fixed by Act, charter or by-law. Otherwise it must be held on the day named in the statute (sec. 105); that is the 4th Wednesday in January of each year.

A special meeting may be called by the directors at any time for any particular purpose, or if the shareholders who hold one-quarter part in value of the subscribed stock of the company desire, they may, by notice setting out the particular business to be discussed, call a special meeting. Notice of the meeting should be in accordance with the by-laws of the company, or if no provision is made therefor, by a 14 days' notice published in a paper at the place where the head office of the company is. Notice of the annual meeting need only say that it is such a meeting, unless some special business is to be transacted, in which case a reference to this business must be made in the notice.

Where special business is to be transacted, it is essential that the notice set out clearly what the meeting is to be held for. If a by-law is to be approved or a resolution is to be passed, the notice must say so. It is important also that the notice be given to all shareholders according to the by-laws of the company and that the method authorised thereby be complied with.

Once the meeting has been called, it cannot be postponed, it must convene and adjourn, and only the business referred to in the notice of the meeting may be transacted. A quorum of

Annotation

shareholders is provided for by the general by-laws. By-laws of the company provide for proxies, and impose such limitations as may be necessary. As a rule only shareholders may act as proxies, but many other restrictions may be laid down. It is usual to give proxies in favour of directors or large shareholders where the organisation is a large one—so as to retain the management.

(b) Each holder of common stock is entitled to one vote for each share held unless otherwise provided by by-law. The preferred shareholders are restricted as regards voting according to the terms of the issue.

On a vote at the meeting, the chairman first calls for a show of hands on the question, each shareholder counting for one vote only—but if a poll is demanded, it is held according to the by-laws of the company—each shareholder voting on his shares. The voting is not necessarily held by ballot except in the election of directors, but scrutineers are appointed to look after the poll, and the chairman fixes the time and place according to the by-laws of the company.

The ordinary rules of debate are followed at shareholders' meetings. Each shareholder may discuss the business before the meeting. Each question must be properly put and voted on after discussion, and meeting closed or adjourned in order.

Sometimes shareholders agree to have all their interests in what is known as a pooling agreement or to transfer their shares to trustee under a "Voting Trust Agreement." The object of both these agreements is practically the same, to insure proper management, and carrying on of the company's business free from any interference. The stock of the shareholders is voted all together by the trustee or their nominees at all meetings of the company.

It is usual for these agreements to be for a fixed period of time, and during that period the shareholders in question have nothing whatever to do with the management of the company.

The trustees as a rule issue receipts or certificates of a particular kind to the shareholders, who may or may not dispose of the same according to the terms of the trust agreement. Of course, any dividends that may be paid go to the holders of the voting trust certificates, the real owners of the shares.

At the expiration of the period stated in the trust agreement, the shares are re-transferred to their real owners. These agreements are often put into effect in the case of new companies which are not on a strong financial basis, and this procedure has proved very satisfactory.

It is laid down in the Act, secs. 89-90, that certain books shall

be kept by the company having reference to directors, shareholders' shares, and the transfer of the latter. A detailed list may be found in the sections themselves.

According to sec. 91 these books must be kept open for inspection of shareholders and creditors of the company and their personal representatives, and such persons may make any extracts therefrom.

(7) COMMENCEMENT OF BUSINESS.

The Act provides that the company shall not commence operations or incur any liability until 10% of its authorised capital shall have been subscribed and paid for. There is a proviso in some of the provincial statutes requiring a company to obtain a certificate from the department before commencing business operations.

There is nothing in the Act which requires this amount to be paid in to the treasury in cash, and any reasonable consideration will be sufficient to support a plea of payment. *Larocque* v. *Beauchemin*, [1897] A.C. 358.

But the fact that a company commences business before the statutory requirements have been complied with does not relieve a shareholder from his liability for shares subscribed for by him. *Re Western Canadian Fire Ins.* (1914), 19 D.L.R. 170.

The particular section of the Act does not refer to a company having shares of no par value.

The amount with which a company of this kind may commence business must be carefully considered.

If no preference shares are authorised, then the amount necessary before commencing business must be set out in the charter, and usually is the amount produced by each share at $5 or some multiplė of $5—if preference shares are authorised, they must be of a specific denomination and the amount necessary to commence business will be the amount of the preference shares plus the amount produced by the shares without par value at $5 or a multiple of $5 each.

Each particular case must be considered in fixing this amount; and it must be remembered that the capital must not be depleted below this amount—it would be well to consider carefully all particulars as to capital necessary, as the amount of capital necessary before business operations can be started must be set out in the charter, and so cannot be changed except by supplementary letters patent.

CORPORATE EXISTENCE.

(1) POWERS AND DUTIES OF COMPANY—Secs. 28-33.

Companies incorporated under part one (1) of the Act have a status resembling that of a corporation at common law.

ANNOTATION

The *Bonanza* case holds that a company has the status of a legal person and "in the absence of statutory restriction added to what is written in the charter" is not governed by the doctrine of *ultra vires*. It is also held that express provisions in the companies' charter do not remove the capacity of a company as a common law corporation, although restrictions or prohibition in the statute under which the company is incorporated must be observed. *Bonanza* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566. See *Re Dominion Marble Co.* (1917), 35 D.L.R. 63, 23 Rev. de Jur. 578.

The general powers of the company are laid down in the statute by virtue of which the company exists, the letters patent authorising the company to do business, and any supplementary letters patent altering, or amending the same. However, see *Edwards* v. *Blackmore* (1918), 42 D.L.R. 280, 42 O.L.R. 105.

As already mentioned in applying for incorporation under this part, it is essential to set out fully in the petition the objects of the company and the powers desired to further the same. The Dominion Act does not give the wide statutory powers set out in sec. 23 of the present Ontario Act. R.S.O. 1914, ch. 178, sec. 23, and amendments.

The objects which a company may pursue must be ascertained from its charter, and the powers to be exercised in furtherance of the same must be conferred by the charter or must be derived by reasonable implication therefrom or be incidental thereto. *Union Bank* v. *McKillop* (1915), 24 D.L.R. 787, 51 Can. S.C.R. 518; *Fire Valley Orchards* v. *Sly* (1914), 17 D.L.R. 3, 20 B.C.R. 23; *Re Lands and Homes of Canada* (1919), 44 D.L.R. 325, 29 Man.L.R. 173; *Columbia Bithulitic Co.* v. *Vancouver Lumber Co.* (1914), 20 D.L.R. 954; (1915), 21 D.L.R. 91.

In addition to general statutory powers, and those set out in and conferred by charter, the directors by the Act are given power to enact by-laws creating and issuing preference shares, borrowing money, alloting stock, declaring dividends, and authorising a change in the charter of the company, such as repeal or amendment of any of the objects thereof (except the main purpose of the company) or the increase of the capital stock. The directors also have power by by-law to provide for the general regulation of the company's management of the organisation. They may further repeal, amend or re-enact any such by-laws.

(a) The general rule is that no company is bound by any contract which is not made under its corporate seal. In matters of every day occurrence, a seal is not necessary, and when trading companies enter into such agreement in the ordinary course of

business, they will be bound. *Richardson* v. *Urban Mutual Fire Ins. Co.* (1916), 28 D.L.R. 12, 26 Man. L.R. 372; *Foster* v. *British Colonial Fire Ins. Co.* (1917), 37 D.L.R. 404, 28 Man. L.R. 211.

Unless by statutory requirements the contract requires a seal, and the company in the ordinary course of business and at a regular meeting, calls for work to be done or goods to be supplied, and the work is done and the goods supplied and the same is accepted by the company. The company should pay although there is no written contract or seal affixed thereto. *Gowans Kent* v. *Assiniboia Club* (1915), 25 D.L.R. 695, 8 S.L.R. 344; *Brandon* v. *Saskatoon* (1912), 5 D.L.R. 754, 5 S.L.R. 250.

A company is not bound on an executory contract unless germane to the purpose of its creation if it is not under seal. *Sun Electrical Co.* v. *McClung* (1913), 12 D.L.R. 758.

A corporation is liable for goods acquired on *ultra vires* contract, though not on the contract itself, and must pay or make restitution. *Trades Hall Co.* v. *Erie Tobacco Co.* (1916), 29 D.L.R. 779, 26 Man. L.R. 468.

Persons dealing with a company incorporated by special or general Act or by deed or memorandum of association, are presumed to have knowledge of the same and the powers conferred thereby, but for the purposes of making a contract need not necessarily inquire into the regularity of the internal proceedings unless they desire to do so.

Further, anyone who deals with an agent or officer of the company is not required to satisfy himself that the agent or officer has authority to act for the company, and that he is within the scope of that authority in making this particular contract. *McKnight Construction Co.* v. *Vansickler* (1915), 24 D.L.R. 298, 51 Can. S.C.R. 374.

The general rule is that acts of the agent or officer within the scope of his apparent authority will bind the company always provided that the other party to the contract had not notice of the defective appointment or limitations of the agent's authority. *Doctor* v. *People's Trust Co.* (1914), 16 D.L.R. 192, 18 B.C.R. 382; *Vancouver Engineering Works* v. *Columbia* (1914), 16 D.L.R. 841.

The agent or officer may, under certain circumstances, be held personally liable. *Dutton* v. *Marsh* (1871), L.R. 6 Q.B. 361.

When the president undertakes on behalf of himself and the company to do certain things, but signs only in the name of the company, the written document may be regarded as a record only, and he is personally liable. *Wood* v. *Grand Valley R.R.* (1915), 22 D.L.R. 614, 51 Can. S.C.R. 283.

Contracts not in the ordinary course of business, though auth-

ANNOTATION orised by vice-president, are not binding on the company if not under seal. *Whaley* v. *O'Grady* (1912), 1 D.L.R. 224, reversed 4 D.L.R. 485.

Implied powers may, under ordinary circumstances, be presumed to be in authority of general manager, but not a subordinate officer. *Hedican* v. *Crow's Nest Pass Lumber Co.* (1914), 17 D.L.R. 164, 19 B.C.R. 416.

A note given by an officer of the company is not necessarily that of the company. *Lindsay-Walker* v. *Hilson* (1916), 27 D.L.R. 233, 26 Man. L.R. 206.

The general manager has not power to sell all the assets of the company as a going concern. *Picard* v. *Revelstoke Saw Mill Co.* (1913), 12 D.L.R. 685, 18 B.C.R. 416.

And where it is reasonable to presume that parties to contract knew that Board of Directors must ratify the same, an agreement by general manager or vice-president is not binding on the company without ratification. *Dickson Co. of Peterborough* v. *Graham* (1913), 9 D.L.R. 813.

The manager or managing director is usually appointed by Board of Directors to look after general business of the company.

The contracts made by the company's agent on its behalf are binding on the company if the agent is within the scope of his authority and the contract is not *ultra vires* of the powers of the company as laid down in its charter, and further, in general accordance with the powers of the agent, as given to him by the by-laws of the company. *Scottish Canadian Canning Co.* v. *Dickie* (1915), 22 D.L.R. 890, 21 B.C.R. 338.

But the agent is personally liable if his authority is non-existent or defective, or if he does not disclose the fact that he is acting as agent for the company.

If the powers of the agent are not referred to in by-laws of the company, the power may be implied from various circumstances and the company will be bound by his acts, but as it is generally necessary for directors to employ agents, certain authority is usually given under the by-laws of the company, and if the agent acts within his authority, the company is bound unless there is anything in the governing act or the charter of the company limiting the authority of the company, its agent or officers.

A company is also liable for the acts of its agents, and the natural consequences of the same when done by them in the ordinary course of the company's business. *Whaley* v. *O'Grady* (1912), 4 D.L.R. 485, 22 Man. L.R. 379.

A corporation is liable for the acts of its agents while in the ordinary course of the company's business, but is not liable for

ANNOTATION

the unauthorised acts of its agents or acts done outside of the business of the corporation.

A corporation may be held liable for false imprisonment under an order of its agent having authority to do so—and may be held liable for libel.

The Courts do not as a rule interfere in the internal management of companies. *Burland* v. *Earle*, [1902] A.C. 83; *Toronto Brewing and Malting Co. v. Blake* (1882), 2 O.R. 175.

If a company has done something without the sanction of the majority of the shareholders which the majority may sanction afterwards or might have done regularly and legally, and the company is in substance entitled to do it—the Court will not restrain the doing of the act by injunction, when a proper meeting can be called to remedy matters.

Under certain circumstances actions are brought by shareholders in the name of the company.

(1) A sale by directors to one of themselves.

(2) An alleged irregular election of directors.

(3) An accounting of directors' profits.

(4) By a minority shareholder when the defendant was the majority shareholder.

A "one-man" company is a legal entity and cannot be held to be the agent of the shareholder. *Rielle* v. *Reid* (1899), 26 A.R. (Ont.) 54.

A shareholder shall not be liable in action by a creditor for the amount unpaid on his shares before an execution against the company has been returned unsatisfied in whole or in part. *Grills* v. *Farah* (1910), 21 O.L.R. 457.

(2) BY-LAWS.

By-laws are expressly authorised by the Act. They must be legal and must not constitute a fraud; the company may not either by charter or otherwise deprive itself of the right to pass, amend, alter or repeal the same. A by-law may be defined as "a rule or statute of the company which covers a series of actions." A resolution deals with one particular matter. So a by-law is passed to authorise the purchase of stock in other companies, and a resolution is passed to allot stock to certain subscribers therefor. These definitions are general, as for instance it is only by by-law that the action of increasing or decreasing the capital stock of the company may be authorised.

By-laws are passed by the directors, and the shareholders do not as a rule have any authority in this respect. Certain by-laws may be passed by the directors for the general management of the company and must be confirmed or ratified by the shareholders in general meeting, but in many other instances the

ANNOTATION by-laws initiated by the directors must be confirmed and ratified by the specified number of shareholders at a special meeting called for the purpose before becoming operative.

The Dominion Companies Act, sec. 80, sets out the subjects upon which the directors may pass by-laws, and there is also subjects set out in secs. 78-88 of the Act, varying these provisions as may suit the needs of the company, for if no provision is made for variation or amendment, the sections of the Act prevail. For example, according to sec. 88, a shareholder shall, at a shareholders' meeting, have one vote for each share held; but when a company issues a preference stock these particular shareholders are usually restricted by the terms of the preferred issue, the terms of which are set out in and authorised by by-law.

It has been said that the "by-laws of a corporation are always obligatory on all the members, and each member is bound to take notice of them for everyone within the scope of the by-laws is considered as having given his consent to them."

The shareholders of the company and the company have a contractual relation which is embodied in the governing act, the letters patent, the by-lays and the share certificate. This contractual relation is not fixed and it may be varied in the manner provided by these instruments. *Canada National Fire Ins. Co.* v. *Hutchings,* 39 D.L.R. 401, [1918] A.C. 451.

It would appear from this case and Ontario decisions that a by-law limiting the transfer of shares in a public company is incompetent. *In re Imperial Starch Co.* (1905), 10 O.L.R. 22; *In re Good and Jacob Y. Shantz* (1911), 23 O.L.R. 544.

There does not appear to be any clause in the Act which defines a by-law or states upon whom and to what extent it is binding.

It has been held that by-laws bind only shareholders and those who have actual knowledge thereof. *Montreal and St. Lawrence Light and Power Co.* v. *Robert,* [1906] A.C. 196.

The result of the decisions seems to be that public documents (such as the letters patent) bind all parties dealing with the company, but that the internal or private documents which do not require to be filed in public offices bind only the shareholders and those who have actual notice of them. Consequently by-laws and resolutions of the directors and shareholders which do not require publication in the *Canada Gazette* bind the members of the company only.

It is quite different in the case of a corporation under sec. 7 A —in that instance the proposed by-laws and regulations must be filed with the application and subsequent amendments must be filed for approval of the Department. A stranger may satisfy

himself as to the powers of the corporation by a perusal of these documents, which may be seen by searching the files of the Department.

It is quite possible then for a stranger to enter into a contract with the company which is not in accordance with its by-laws, for instance, according to the by-laws of the company, certain requisitions laid down for execution of a contract may not have been complied with, but if the contract appears on its face to be regular, and the stranger has no notice of the necessary formalities, the contract is binding upon the company.

Public documents under the Act are described as the Act itself, the letters patent, supplementary letters patent and by-laws required to be published in the *Gazette*, any other by-laws and documents which are not open to the public for inspection are known as internal or private documents.

(3) BORROWING, MORTGAGES AND DEBENTURES.

All joint stock companies upon organisation pass what is known as a "General Borrowing By-law," which appears as "By-law No. 2" of the organisation, and is usually in the form desired by the bankers of the company. This by-law must and always is confirmed and ratified by the shareholders.

Under sec. 69 of the Dominion Act, a company may borrow money, issue bonds, debentures, etc., for the amount so borrowed, and may mortgage or pledge its assets for that purpose.

The directors of the company must pass a by-law for any mortgage or issue of bonds or debentures, which by-law must be sanctioned by a vote of 2/3 in value of the allotted stock of the company at a meeting of shareholders called for that purpose.

According to the Ontario Act, it would appear that the power to borrow will depend largely upon the objects specified in the letters patent of the company, and it can no longer be contended that its powers are conditional upon the passage of a by-law. But if a by-law is enacted, it must be properly confirmed by the shareholders by a vote of 2/3 in value of the allotted stock at a special meeting.

It has also been held in Alberta that a trading company has implied power to give security for existing debts. *Barthels, Shewan & Co.* v. *Winnipeg Cigar Co.* (1909), 2 Alta. L.R. 21.

(a) Reverting to the Dominion Act, it is against Departmental Practice to provide for the issue of bonds and debentures in the charter or letters patent.

Specific powers to give a mortgage on real or personal assets or to make an issue of bonds or debentures are given to companies by sec. 69.

An issue of bonds or debentures may be secured by a mortgage

ANNOTATION given to trustees to secure the debenture holders or by a floating charge.

Debentures are usually issued by series; and in denominations of $100, $500 or $1,000. They are secured by mortgage on the assets of the company in the form of a trust deed or bond mortgage made in favour of a trust company, and state what they are on their face. They have coupons attached calling for payment of interest at a certain rate and payable at stated times; and provide for redemption on a fixed date and at a particular place or places.

They are usually payable to bearer, but they may be registered as to principal, and in the case of Government loans, as to interest also.

Irredeemable debentures may be issued, and debentures may be pledged before issue, redeemed and then issued. A pledge is not considered an issue.

DEBENTURE STOCK.

(b) Debenture stock is borrowed capital consolidated into one mass for the sake of convenience.

The Act appears to provide for its creation by by-law. It is usually only redeemable on winding up or in default of payment of interest. Debenture stock certificates commonly bear coupons as in the case of debentures. The trust deed creating the stock is itself a security by way of charge on the assets. The stock certificates may be transferred in the same manner as a debenture. In the case of debenture stock, however, a certificate is usually transferred in any amount, and a single certificate is issued for the aggregate amount of the person's holdings if desired.

Debenture stock, while commonly perpetual or irredeemable, may be terminable or redeemable at a given time. Debenture stock holders are not in any sense shareholders of the company, and have no votes or any part in the control of its affairs so long as the interest on their securities or the securities themselves are not in default.

(c) A floating charge may be created upon the property, both present and future of the company. *Johnston* v. *Wade* (1908), 17 O.L.R. 372.

A clause in a debenture, such as "the company hereby charges all its assets, real and personal of every kind and description, including its uncalled capital," is sufficient to create a floating charge.

It is an equitable charge on the assets for the time being of a going concern; it attaches to the subject charged in the varying condition it happens to be from time to time. It is of the essence

of such a charge that it remains dormant until the undertaking ceases to be a going concern.

A company having created a floating charge may, notwithstanding, create specific mortgages ranking in priority to it, and specific mortgages are not affected by notice of the floating charge.

A floating security may be said to cease to float and become a specific charge whenever the business ceases to be a going concern, as, for instance, when the company executes an assignment for the benefit of its creditors or a winding-up order was made. The document may, of course, be drawn so that the charge shall cease to float upon the contingency of an execution being issued or the principal and interest falling in arrears. *Johnston* v. *Wade*, 17 O.L.R. 372.

So long as a company is a going concern, bond holders whose bonds are a general charge on the undertaking, have no right, even though interest is in arrears, to seize, take or sell or foreclose any part of the property of the company, but their remedy is to appoint a receiver.

The words "guaranteed by the capital and assets of the company invested in mortgages on real estate" have been held to be sufficient to create a general charge.

(d) Mortgages or charges created by a company after January 1st, 1918, which are:—

(1) Mortgages or charges for the purpose of securing any issue of debentures.

(2) Mortgages or charges on the uncalled share capital of the company.

(3) Floating charges on the undertaking or property of the company; must be delivered to the secretary of state for registration under the Act within 30 days after their creation, or the same are void as against the liquidator or any creditor of the company.

Certain prescribed particulars of the mortgages or charges must be filed together with an original duplicate of the mortgages themselves, and the filing of the duplicate and the particulars constitutes registration under the Act. The Court has power to extend the time for filing under sec. 69D.

Mortgages made out of Canada must be registered, as well as mortgages made in Canada, but covering foreign property.

When the mortgages have to be transmitted by post some distance, a reasonable extension of the 30-day period for filing is granted.

All foreign mortgages must be properly verified before regis-

ANNOTATION

tration—and certified to by the representatives of the Government in the foreign country.

The mortgages are registered in a register kept by the Department for this purpose, and full particulars of the same are entered there, and are open to inspection on payment of prescribed fees.

If the mortgages or charges cover the issue of a series of debentures or bonds, it is necessary under the Act to give the following particulars:—

(a) The total amount secured by the whole series;

(b) The dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined;

(c) A general description of the property charged;

(d) The names of the trustees, if any, for the debenture holders.

The deed containing the charge must also be filed, but if there is no such deed, a copy (properly certified) of one of the debentures in the series is accepted by the Department, although the Act calls for the filing of an actual debenture.

If commission is payable to a broker or a discount allowed on the debentures, full particulars of such commission or discount should be filed, although neglect to do so does not make the debentures invalid.

The certificate of the Department shall be conclusive evidence of registration under this section; and the company shall cause a copy of every certificate so given to be endorsed on every debenture secured by such mortgage or charge.

Any person interested therein, other than the company, may register the necessary particulars which are required under this section even though it is the duty of the company to see that this is done.

Copies of the mortgages, charges, or debentures must be kept on the file at the head office of the company, where they are open to public inspection.

When a receiver is appointed under sec. 69B, 1917, ch. 25 (An Act to amend the Companies Act), 14 days' notice of the appointment must be given to the Department. The receiver must file a statement of his accounts every 6 months, and shall have the privilege of paying employees and others having priority out of the moneys in his hands.

There are heavy penalties named in the Act for non-compliance with the provisions as to notice of mortgages.

The trustee can proceed to enforce his rights by action, but a more common method is for the individual debenture holder to

bring an action on behalf of himself and all other debenture holders against trustee and the company—although he may sue on his own behalf and join all the other debenture holders as defendants.

The relief sought in the action is commonly the appointment of a receiver and manager, and for a sale of the property covered by the trust mortgage. *Fellowes* v. *Ottawa Gas Co.* (1869), 19 U.C.C.P. 174; *Smith* v. *Port Dover and Lake Huron R. Co.* (1885), 12 A.R. (Ont.) 288.

(4) Annual meetings—Sec. 105.

An annual meeting of the shareholders is required to be held on the 4th Wednesday of January in each year, according to the statute, unless some other day is provided by the by-laws. The business of the annual meeting is according to the provisions of the Act.

The meeting is called to order by the president, who reads the notice sent to the shareholders calling the meeting.

The by-laws as a rule provide that ordinarily the president shall preside at the annual meeting, or if they do not, the meeting may elect a chairman and a secretary.

The secretary of the company will act as secretary of the meeting.

The report of the Board of Directors is then presented, followed by the balance sheet of the company made up to date, not more than four months previous to the meeting, which shews a general account of the income and expenditure for the financial period ending with date of the balance sheet; the report of the auditors; any additional information required by the charter or by-laws of the company.

There is then discussion of the directors' report and financial statement, and these are approved by the shareholders.

Then the election of directors and appointment of auditors takes place, after which the meeting adjourns.

The balance sheet, as submitted, indicates the minimum required by the section. It is well to give more information with reference to the various parts of the company's business and to shew as accurately as possible a true statement of the affairs of the company.

Care must be taken in the preparation of this sheet in order to place a proper valuation on the assets of the company.

Buildings, plant and machinery may, under unusual circumstances, increase in value; but good business methods require a percentage of the cost to be written off each year for depreciation.

The directors are agents and trustees for the company, and should keep accurate accounts in order to protect both the company and themselves personally.

ANNOTATION

The profit shewn in the balance sheet should be the same as is shewn in the profit and loss account. It is that account which may be distributed as dividends.

(5) DIVIDENDS.

The directors of the company have power to declare dividends out of the earnings of the company by by-law under sec. 80 of the Act.

While, according to the provisions of sec. 81, it would appear necessary to have this by-law approved by the shareholders, a general by-law is usually passed on organisation which authorises the Board to declare dividends when the position of the company is such as to warrant such payments, and the shareholders having approved of this by-law, the directors may then act in their discretion as the occasion demands.

By sec. 70, no dividend shall be declared that will impair the capital of the company, the exception of course being a mining or lumber company, where capital is invested in wasting assets, and dividends are usually declared according to the actual net profits of the year's business.

A payment of dividends out of capital cannot be authorised by by-law or approved by a general meeting, and the directors who authorise the same are jointly and severally liable.

By sec. 71—if a shareholder is in arrears for calls on his shares or moneys are due by him to the company, the directors may deduct these amounts from the dividends payable to such shareholder. Dividends may be declared by the directors whenever the financial position of the company is such as will warrant the payment out of the moneys involved, for a dividend once declared is a debt of the company, and must shew as such on its balance sheet. Dividends may be payable yearly, half-yearly, quarterly or monthly, or at such times as the directors may decide.

On preferred issues of stock they are usually cumulative, and full particulars as to rate and date of payment are printed or lithographed on the share certificate; but on common stock such is not the case.

On declaration of a dividend the transfer books of the company are usually closed for a specified number of days prior to payment in order that the cheques may be mailed to the proper parties. A dividend on declaration is usually payable in cash and there is no provision in the Act for a dividend payable in shares of the company. There are many cases where a stock dividend is declared and the ordinary procedure is to declare a dividend and arrange with the shareholders by obtaining a proper power of attorney, to have each shareholder subscribe

for the new shares and pay for the same with his dividend cheque. It is possible for a shareholder to refuse to subscribe, and demand payment in cash.

The declaration of dividends is a question of internal management, a discretionary power of the directors, and the shareholders have no right to demand payment of dividends, nor can they compel the directors to declare the same. A dividend need not be continued, but may be passed at any time in the discretion of the Board.

There is no reason why a joint stock company while a going concern should divide the whole of its profits amongst its shareholders. The proportion of the net earning to be distributed amongst the shareholders and the proportion to be retained are questions of internal management.

The Court will not interfere in these matters, nor will it say whether the undivided balance shall be retained to the credit of the profit and loss account, or carried to the credit of a reserve fund, or appropriated to any other use of the company.

The shareholders must decide these questions subject to the charter and by-laws of the company.

If the company should acquire a reserve fund, it has power to invest this fund, and is not restricted to use the fund in its own business. The directors may select the securities for investment subject to the control of a general meeting.

(6) AUDITORS.

The Act, sec. 94A, provides for the appointment of auditors and their remuneration, and sec. 94B details their powers and duties. They should be appointed at the annual meeting of the company and hold the appointment until the next annual meeting.

Only the retiring auditors may be appointed unless proper notice of the nomination of a new auditor or auditors is forwarded to the retiring auditors and all shareholders prior to the meeting.

The remuneration is fixed by the shareholders at the annual meeting.

The secretary of state may make an appointment of auditors on application of a shareholder, if none are appointed at the annual meeting.

By virtue of sec. 92 the Secretary of State may at any time order the inspection by properly appointed inspectors of any organisation.

This inspection may be made on application of a shareholder, as required by this section, and the inspectors, who are appointed by the Department.

ANNOTATION

(7) ANNUAL RETURNS.

Every company having share capital must file with the Department before June 1 in each year an annual summary as of March 31 previous and specifying in detail the particulars required and set out in sec. 106, sub-sec. (1).

The summary must be signed by the president and manager, or if these are the same person, the president and secretary of the company, and shall be verified by their affidavits.

The summary shall be forwarded to the Department in duplicate with an affidavit proving that the copies forwarded are duplicates.

The company defaulting to file such return and each director or manager permitting default shall be liable to a fine under this section to be recovered by summary conviction.

The duplicates shall be endorsed by the Department with the date of the receipt thereof at the Department, and shall be returned to the company for purposes of record.

The duplicate endorsed in this manner, shall be *prima facie* evidence that such summary has been filed as required.

A certificate from the Department that such summary has not been filed shall be *prima facie* evidence that requirements of this section have not been complied with.

A company failing to file the summary as required for three years may lose the right to use its name solely, and the name may be given to another company after notice given to the defaulting company by the Department.

A company organised after March 31 in any year need not file a return until the next year.

Certain parts of sub-sec. 1 and the remainder of this section apply to corporations under sec. 7A.

TERMINATION OF CORPORATE EXISTENCE.

(1) FORFEITURE OF CHARTER—Section 27.

A company may forfeit its charter.

(a) For non-user for 3 consecutive years—or where the company does not commence operations for 3 years after incorporation.

(b) Forfeiture of franchise and judgment for dissolution obtained in a proper judicial proceeding.

(c) By winding up or bankruptcy.

(d) By special legislative enactment.

(e) By expiration of the fixed period of time set out in its charter. If the company by its charter or the Act creating it, is incorporated for a certain length of time only, on the expiration of that period it ends.

6. By failure of an essential part of the corporate organisation

in such manner that it cannot be restored. This instance of forfeiture will apply to a corporation under sec. 7A. When the trustees die or resign, and their places are not filled.

(2) WINDING UP UNDER THE DOMINION WINDING-UP ACT.

(*R.S.C. 1906, ch. 144 and amendments.*)

The Act applies to insolvent banks, insurance companies, loan companies, building societies and trading corporations, being in the nature of insolvency law.

It further applies to all corporate bodies of the nature mentioned in it, whether incorporated under Provincial or Dominion charter.

Under the Act—Section 3—a company is deemed insolvent

(a) If it is unable to pay its debts as they become due.

(b) If it calls a meeting of its creditors for the purpose of compounding with them.

(c) If it exhibits a statement showing its inability to meet its liabilitites.

(d) If it has otherwise acknowledged its insolvency.

(e) If it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of any of its property with intent to defraud, defeat or delay its creditors or any of them.

(f) If with such intent, it has procured its money, goods, chattels, land or property to be seized, levied on or taken under or by any process of execution.

(g) If it has made any general conveyance or assignment of its property for the benefit of its creditors, or if being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or the main part of its stock in trade or assets, without the consent of its creditors, or without satisfying their claims.

(h) If it permits any execution issued against it under which any of its goods, chattels, land or property are seized, levied upon or taken in execution to remain unsatisfied till within 4 days of the time fixed by the sheriff or proper officer for the sale thereof, or for 15 days after such seisure. *In re Outlook Hotel Co.* (1909), 2 S.L.R. 435, insolvency can only be established in winding-up proceedings in the manner provided by the Act.

A company is deemed unable to pay its debts as they become due whenever a creditor, to whom the company is indebted in a sum exceeding $200, then due has served on the company in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due and the company has for 90 days, in the case of a bank and for 60 days in all other cases next succeeding the service of the demand, neglected

ANNOTATION

to pay such sum or to secure or compound for the same to the satisfaction of the creditor. *Re Ewart Carriage Works Ltd.* (1904), 8 O.L.R. 527.

When the debt was not due when the demand was made, held that non-payment was not evidence of insolvency within the meaning of the section.

The winding-up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding-up. *Bank of Hamilton* v. *Kramer-Irwin Co.* (1912), 1 D.L.R. 475.

The Winding-up Act comes under the head of insolvency law. *Shoolbred* v. *Clarke* (1890), 17 Can. S.C.R. 265.

The provisions of the Act do not apply to a company incorporated under the Ontario Company Act, unless such company is shewn to be insolvent. *Re Cramp Steel Co. Ltd.* (1908), 16 O.L.R. 230; *Re Empire Timber Lumber & Tie Co.* (1920), 55 D.L.R. 90, 48 O.L.R. 193.

The Ontario Winding-up Act does not apply to a company where application is made to wind up on the ground of insolvency because local Legislatures have no jurisdiction in matters of bankruptcy or insolvency. *Re Iron Clay Brick Mfg. Co., Turner's case* (1890), 19 O.R. 113.

The winding-up of the business of a company commences from the time of the service of the notice under sec. 5, and under sec. 84. A landlord's claim to be paid preferentially for over due rent after such service is invalid. *Fuches* v. *Hamilton* (1884), 10 P.R. (Ont.) 409.

Service of a winding-up petition must be real substantial service.

A company incorporated by the Legislature of Ontario may be put into compulsory liquidation and wound up under the Dominion Winding-up Act. *Shoolbred* v. *Clarke* (1890), 17 Can. S.C.R. 265.

The Dominion Winding-up Act applies to incorporated trading companies doing business in Canada wheresoever incorporated. *Allen* v. *Hanson* (1890), 18 Can. S.C.R. 667.

A foreign corporation doing business in Canada under a license of the Dominion Government is subject to the provisions of the Dominion Winding-up Act, in so far as its assets situate within the Dominion of Canada are concerned. *Re The Stewart River Gold Dredging Co., Ltd.* (1912), 7 D.L.R. 736.

Re Breakwater Co. (1915), 22 D.L.R. 294, 33 O.L.R. 65, Middleton, J., held that the winding-up in Ontario was in no sense ancillary to the proceedings in the foreign Court; the assets in the hands of the Ontario liquidator should be distributed

among all the creditors of the company *pro rata*—there was no warrant in the statute for giving preference to the claims of creditors residing in Canada.

Contrast this judgment with *Allen* v. *Hanson* (1890), *supra.*

Section 7. This Act does not apply to building societies which have not a capital stock or to railway or telegraph companies.

A creditor may petition, and even if he is secured he may petition though he may have a lien for the full amount of his claim. *Re Strathy Wire Fence Co.* (1904), 8 O.L.R. 186.

An assignee, a legal or equitable or *bona fide holder* of a debt may petition, but the real and beneficial owners of the debts should join in the petition of proof—an assignment of debts for the purpose of bringing a petition is not looked on with favour. *Re People's Loan, etc., Co.* (1906), 7 O.W.R. 253.

An order will not be made where it is shewn there are no assets which the liquidator can receive. *Re Ocean Falls Co.* (1913), 13 D.L.R. 265; *Re Manitoba Commission Co., Ltd.* (1913), 9 D.L.R. 436, 23 Man. L.R. 477.

A Winding-up order may be made.

(a) Where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved.

(b) Where the company, at a special meeting of shareholders called for the purpose, has passed a resolution requiring the company to be wound up.

(c) When the company is insolvent.

(d) When the capital stock of the company is impaired to the extent of 25% thereof—when shewn to the satisfaction of the Court that the lost capital will not likely be restored within one year.

(e) When the Court is of the opinion that for any other reason it is just and equitable that the company be wound up.

As has already been stated, a provincially incorporated company must be shewn to be insolvent before coming within the provisions of this section. *Re Cramp Steel Co., Ltd.* (1908), 16 O.L.R. 230.

The Dominion Parliament may enact that a company, if in process of voluntary liquidation, pursuant to a resolution adopted by its shareholders, may be brought under the provisions of the Winding-up Act on the petition of any shareholder, although not actually insolvent, since such voluntary proceeding is to be regarded as a species of insolvency. *Re Colonial Investment Co.*

ANNOTATION *of Winnipeg* (Decision 2) (1914), 15 D.L.R. 634, 23 Man. L.R. 871.

Where the subject matter of the business for which the company was incorporated has disappeared, the Court may order the company to be wound up. *Re Hamilton Ideal Mfg. Co., Ltd.* (1915), 23 D.L.R. 640, 34 O.L.R. 66; *Re Dominion Trust Co. and Boyce and McPherson* (1918), 43 D.L.R. 538, affirmed (1919), 49 D.L.R. 698, 59 Can. S.C.R. 691.

Application may be made by

(a) Company or

(b) Shareholder, company or creditor for at least ($200).

Company or creditor for at least ($200).

(c) Except in the case of banks and insurance corporations, by a shareholder holding shares in the capital stock of the company, to the amount of at least $500 in the other cases mentioned in the said section by a shareholder holding shares in the capital stock of the company to the amount of at least $500.

Application is made by petition to the Court in the Province where the head office of the company is situated, or if there is no head office in Canada, then in the Province where its chief place of business is situated.

Except in cases where such application is made by the company, 4 days' notice of the application shall be given to the company before making of the same. The notice need not be 4 clear days. *Re Arnold Chemical Co.* (1901), 2 O.L.R. 671.

A person intending to apply for a winding-up order of a company gives 4 days' notice to the company of his application, and at the expiration of that time presents his petition, verified by affidavit, for such order to the Court. Notice of the time and place of the presentation of the petition should be served on the company along with the petition and affidavits. If an order winding up the company is made, the order appoints an interim liquidator, and after notice to creditors a meeting is called and a permanent liquidator is appointed to wind up the company. *In re Steel Co. of Canada* (1884), 17 N.S.R. 49.

The petition must be drawn so as to come within the section, and must allege facts sufficient to justify a winding-up order. The Court has discretion in granting the order, and may decide in favour of an assignment for the benefit of creditors. Costs are usually given out of the estate to the petitioner if successful, and also to the company on the motion for the order.

Four days' notice of an application for a winding-up order may be dispensed with by the consent of the company. *Great West Supply Co.* v. *Installations, Ltd.* (1913), 15 D.L.R. 896—

but see *Re Farmers Bank* (1910), 22 O.L.R. 566, as to who has power to consent to dispense with notice.

The petitioner must disclose the facts required by the Act in order to shew insolvency. *Re Grundy Stove Co.*, 7 O.L.R. 252. Unless or until rules of procedure are made under sec. 134 of the Act, the rules of practice in force in the relative provinces are made applicable by sec. 135. *Re Belding Lumber Co., Ltd.* (1911), 23 O.L.R. 255.

The directors of the corporation are compellable witnesses for examination under sec. 135 of the Act supplemented by Con. Rules (Ont.) 489, 491, 492. *Re Baynes Carriage Co.* (1912), 7 D.L.R. 257.

The affidavit should be made by the petitioner.

The affidavits in support of the petition must bring it strictly within the words of the section.

A petition on the ground of an impairment of the capital stock must be accompanied by evidence apart from the affidavit to the petition. *Re A Company* (1917), 34 D.L.R. 397, 27 Man. L.R. 540.

The Court has a discretion which may be exercised in refusing or granting a winding-up order. If the proceedings are deemed to be unnecessary, the winding-up order will be refused. *In Re The Strathy Wire Fence Co.* (1904), 8 O.L.R. 186.

The objection that a second application for a winding-up order under the Winding-up Act cannot be made after the first application has failed, on the ground that the matter is *res judicata*, does not apply where on the second application it appears that the parties are not the same and the material urged in favour of the second application is different, although the purpose of this application is similar to that of the former. *Re Manitoba Commission Co., Ltd.* (1913), 9 D.L.R. 436, 23 Man. L.R. 477; *Re Estates, Ltd.* (1904), 8 O.L.R. 564.

The result of a winding-up order is that the company ceases to carry on business and the liquidator takes over all the company's assets.

The winding-up order takes effect retroactively as of the date of service of the notice of motion. So that the winding-up of the business of the company is to be deemed to commence at that time. *Bank of Hamilton* v. *Kramer-Irwin* (1912), 1 D.L.R. 475.

The liquidator is the only person entitled to deal with the assets of the company, after the winding-up order is made. *Richards* v. *Producers' Rock and Gravel Co.* (1914), 17 D.L.R. 588, 20 B.C.R. 109.

Two orders are made, one directing the company to be wound

ANNOTATION

up, and the other appointing a provisional liquidator and referring the matter to the Master-in-Ordinary, who appoints the permanent liquidator and takes all necessary steps in connection with the winding-up.

The provisional liquidator files an affidavit proving the assets of the company, and gives a bond usually for double their value; the referee appoints a day for a meeting of all the shareholders, creditors, etc., after having duly advertised the same, and at this meeting, a permanent liquidator is appointed. *Shoolbred* v. *Clarke* (1890), 17 Can. S.C.R. 265.

Section 3. The liquidator may carry on the company's business, and the powers of directors cease on the appointment of the liquidator.

It is usual to have all proceedings against the company stayed pending a settlement of the creditors' claims. But under special circumstances leave may be given to proceed with an action. *Re B.C. Tie and Timber Co., Ltd.* (1909), 14 B.C.R. 204.

But where it is shewn that proper relief may be obtained in the winding-up proceedings, leave will be refused. *Re Pakenham Pork Packing Co.* (1903), 6 O.L.R. 582.

A judgment obtained after a winding-up order has no force or effect. *Keating* v. *Graham* (1895), 26 O.R. 361.

SECURED CLAIMS—Section 78.

Detailed instructions as to filing of claims, valuing security, and ranking as an ordinary creditor for the balance of claim, if any, may be found in this section.

A landlord cannot claim his rent to be preferred unless he has distrained for the same or a bailiff has been put in possession before the making of the winding-up order. *Fuches* v. *Hamilton* (1884), 10 P.R. (Ont.) 409.

There is nothing in the Act or the Assessment Act which makes taxes a preferred claim. Upon winding up of a company the municipal corporation may recover by distress or sale before the order is made, otherwise it must rank as an ordinary creditor.

WAGES—Sect. 70.

All arrears of wages due to clerks or other persons in and having been in company's employment previous to winding-up order, are preferred over other creditors; this preference applies to three months' wages only.

FEES AND EXPENSES OF LIQUIDATOR—Section 92.

The liquidator has priority for his remuneration and expenses over all other claims. *Keyes* v. *Hanington* (1913), 13 D.L.R. 139, 42 N.B.R. 190; *Welland Hotel & Beauchamp* v. *City of Montreal* (1921), 56 D.L.R. 411, 58 Que. S.C. 430.

A sale by the liquidator to the directors of the company of a

portion of the assets of the company is valid as the fiduciary relations of the directors to the company, cease on the winding-up order. *Chatham National Bank* v. *McKeen* (1895), 24 Can. S.C.R. 348.

The liquidator represents all classes of creditors in the winding up, and it is not necessary to obtain authority from the Court to recover the company's assets by action. But the Court may assent to the bringing or defending of an action—the liquidator being in fact an officer of the Court, and when litigation is commenced by him in the name of the company, he cannot be ordered personally to pay the costs of it.

And when the liquidator brings an action, the adverse party has no right to examine for discovery an officer of the insolvent company. But in the case of an assignment for the benefit of creditors, an examination of the debtor in an action against the assignee has been allowed. *Garland* v. *Clarkson* (1905), 9 O.L.R. 281.

This rule cannot be said to apply to officers of corporations. *Bank of Toronto* v. *Quebec Fire Ins. Co.*, 18 P.R. (Ont.) 41; *Perrins, Ltd.* v. *Algoma Tube Works, Ltd.* (1904), 8 O.L.R. 634.

The liquidator represents the creditors only because he represents the company, and the creditor's claims are to be enforced through the company.

The power to sell the assets of the company is vested in the liquidator, but the proceeds are governed by the ordinary Court practice. The method thought to be most advantageous to the estate is decided upon at an inquiry when the various methods are discussed and then the property is offered for sale by the mode adopted.

The sale when carried out must be approved by the Court. *Re Canada Woollen Mills, Ltd.* (1905), 9 O.L.R. 367.

On sale of the assets, the liquidator signs and seals as liquidator and also attaches the seal of the company.

The proceedings should be conducted by solicitors who have no connection with the company to be wound up. As they are disinterested and their services will not be divided by the assertion of antagonistic claims.

Every shareholder or applicant for shares who has received notice of allotment, or who has partly paid for his subscription, becomes liable forthwith for all moneys unpaid upon the making of a winding-up order.

The onus of proof that a person is a shareholder or not and liable to contribute to the assets of the company, is upon the

ANNOTATION liquidator. *Re Canadian Tin Plate Decorating Co.* (1906), 12 O.L.R. 594.

But if it is shewn that the alleged contributory has been treated in the company's books as a shareholder, the onus is shifted. *Re Provincial Grocers, Ltd., Hill's* case (1905), 10 O.L.R. 501.

The ordinary defences raised by alleged contributories are:—

1. That subscription was induced by fraud.

2. That there is no binding contract.

3. That shares were transferred and registered, or if they were not registered, it was the fault of the company.

4. Shares paid for—cash, property or services.

5. Shares forfeited before winding-up order.

In the first instance, proceedings must be taken before the winding-up order is made to be effectual. *Stephens* v. *Riddell* (1910), 21 O.L.R. 484.

The shareholder cannot claim fraud or misrepresentation after order is made.

In the second instance, a person signing the memorandum of agreement or stock book on application for incorporation, is liable for the stock subscribed, and no further act of the directors is necessary.

Under the Dominion Act the directors must prescribe the mode of allotting stock by by-law, while under the Ontario Act there does not seem to be any direct provision requiring the directors to actually allot the shares. *Re Pakenham Pork Packing Co.; Higginbotham's case* (1906), 12 O.L.R. 100, the rule is that

"In order to impute to a person a contract to take shares, something like a contract must be established or something shewn which prevents him from saying there is not a contract."

When a subscriber applies for stock on condition and the company accepts his application, that condition has been agreed to by the company and must be carried out, otherwise the subscriber is not liable for his stock. *Re Lake Ontario Navigation Co.* (1910), 20 O.L.R. 191.

If the alleged contributory can shew that he repudiated his contract before it was accepted by the company, he is not liable.

The directors of the company should not allow the transfer of shares which are not fully paid up, but if this is done the liability of the shareholder in most cases terminates by a valid transfer of his stock on the books of the company.

Shares may be paid for in money or money's worth, and if the company has accepted a valid contract for property or services of value to be paid for in shares, the consideration will

not be questioned by the Courts. *Hess Manufacturing Co.; In re Sloan's* case (1895), 23 Can. S.C.R. 644.

A company may have power to forfeit shares for non-payment of calls, and if such calls are not paid when due, and notice of forfeiture given, the alleged contributory has a good defence.

A scheme must be initiated or recommended by the liquidator and approved by the Court. *Re Sun Lithographing Co.* (1893), 24 O.R. 200.

A compromise may be passed by 3/4 vote in value of the creditors at a properly constituted meeting, and must be sanctioned by the Court.

A compromise suggested by a contributory must satisfy the liquidator who makes an agreement embodying the terms and obtain the Court's approval.

It is possible, but very rare, to compromise with and pay a dividend to a creditor before a decision is reached as to the general dividend.

Inspectors are not appointed as a rule unless the estate in liquidation is a large one, and the winding up appears complicated, requiring special knowledge in order to facilitate the same.

The inspectors are in a fiduciary position as regards the disposal of the assets. *Taylor* v. *Davies* (1918), 41 D.L.R. 510, affirmed (1919), 51 D.L.R. 75, [1920] A.C. 636.

The practice is to allow the liquidator a commission on the *corpus* distributed by him, such commission being paid when the same is distributed, and he is also allowed a reasonable annual allowance for care and management. The proper commission is 5% of the receipts and disbursements of the *corpus* of an estate, exclusive of an allowance for care and management, but the Court may allow a lump sum to the liquidator which will cover all his fees and expenses. *Re Farmers Loan* (1904), 3 O.W.R. 837.

The liquidator passes his accounts the same as an administrator would do, upon notice to all interested parties. After the accounts are passed, the dividend is declared and the liquidator proceeds to pay the dividend to all creditors whose claims have been admitted or proved. He then produces vouchers to the Court shewing payment of the dividend, and obtains the cancellation of his bond and his discharge from the Court.

BANKRUPTCY.

A Bankruptcy Act following the Imperial Statute was passed by the Dominion Parliament in 1920.

Under the Act, "Corporation" includes any company incorporated under any Dominion or Provincial Statute, or any com-

Annotation

pany which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance, trust, loan or railway companies.

Bankruptcy law has been adopted with the object of the expeditious and economical administration of the debtor's estate, and distribution of his assets, as well as the release of the debtor from his creditors, provided that he has surrendered all his assets, and has not been guilty of any misconduct.

Three methods for the distribution of the debtor's assets, and the administration of his estate, are provided for by the Act.

(1) The making a bankrupt of the debtor by a receiving order on application to the Court by a creditor.

(2) The execution by the debtor of an authorised assignment.

(3) A composition, or extension made by the debtor with his creditors in writing, which has the approval of the creditors and the Court.

As has already been stated, only certain classes of companies come within the jurisdiction of the statute, and where such is the case, this Act shall apply, and the Winding-Up Act shall not, except by leave of the Court, extend or apply to a debtor corporation as defined by this Act.

In all cases of winding-up other than insolvency, the Winding-Up Act will apply as before.

As yet the practice under the sections respecting authorised assignments, compositions and extensions with the creditors, has been very limited, and their actual effect is yet to be determined. *Re N. Brenner & Co.* (1921), 58 D.L.R. 640, 49 O.L.R. 71; *Re Lindners Ltd.* (1921), 20 O.W.N. 46; *Re Defoe-Wilson Ltd.* (1921), 21 O.W.N. 42.

Under sec. 3 of the Act a debtor committing an act of bankruptcy within the meaning of the section, may on application of a creditor to the Court, be declared a bankrupt, and a receiving order is granted. *Re St. Thomas Cabinets Ltd.* (1921), 61 D.L.R. 487.

The order automatically vests all property of the debtor company in an "authorised trustee" (defined in the Act), who is named in the order, and this is free from any action whatsoever, except one on the part of a creditor who is secured, to realise on his security. *Re Rockland Chocolate, etc. Co.* (1921), 61 D.L.R. 363; *Re Reeve Dobie* (1921), 20 O.W.N. 368.

On the making of the order, the trustee goes into possession of all the assets of the company, and prepares a statement of its affairs, showing the assets and liabilities, and particulars of all

claims against the company. The trustee advertises the bankruptcy of the company, and advises all creditors of a creditors' meeting to be held at a future date, and also asks that all claims against the company be submitted and proved.

At the creditors' meeting, the trustee submits the statement of the company's affairs, and the creditors confirm the trustee in his position or appoint another trustee, and also two or more inspectors to act with the trustee in the realisation and distribution of the assets of the company. The officers (or some of them) of the bankrupt concern, usually attend this meeting, and give such information as the creditors desire with reference to the company's affairs, and such officers may at the discretion of the trustee or the inspectors be examined for discovery.

The inspectors assist the trustee in the realisations of the company's assets; the various methods of sale are discussed, and a decision arrived at; the necessary advertising is done, and the assets of the company are disposed of to the best advantage. *Re N. Brenner & Co.*, 58 D.L.R. 640, 49 O.L.R. 71.

The inspectors also assist the trustee with regard to the payment or otherwise of any claims against the estate of the company, and the creditors are bound by the trustees' decisions, though authority is given by statute to appeal. *Imperial Bank v. Barber* (1921), 59 D.L.R. 523.

The rights of secured creditors such as mortgagees of specific property or lien holders must be considered by the trustee in conjunction with the inspectors; these rights may be found in detail in sec. 46 of the Act. *Re Rockland Chocolate*, 61 D.L.R. 363.

When the assets of the estate have been realised, the trustee consults with the inspectors as to the distribution of the same.

Under secs. 51-52 of the Act (and amendments) there are certain preferred claims, such as the landlord, fees and wage-earners, and the trustee's expenses. *Re Auto Experts, Ltd.*, (1921), 59 D.L.R. 294, 49 O.L.R. 256.

The rights of the Dominion or Provincial Governments, or any municipality for payment of taxes are not interfered with by sec. 51. *Re F. E. West & Co., Ltd.* (1921), 62 D.L.R. 207; *Re Harrison* (1922), 21 O.W.N. 430.

These claims must be first approved of and paid, including the fees of the inspectors.

If the estate of the debtor company is a large one, there may be several dividends passed by the inspectors, approved of by the creditors, and paid by the trustee, from time to time as the assets of the estate are realised. But in a great many cases, when the company is a small one, and the assets may be realised

Ont.
S.C.

upon in a short space of time, it is usual for the trustee to draw up a first and final dividend sheet shewing the expenses, the preferred claims, and the balance available for distribution among the ordinary creditors, striking the rate of the dividend.

The inspectors must approve of the dividend sheet, and it is then sent out to the creditors for their approval. Should there be no objection on their part, the trustee pays the dividend.

Provision is made in the Act for the discharge of the trustee who applies to the Court, shewing that the estate is wound up, and asking to be relieved.

The Court may grant or refuse discharge, as it may be advised.

SAPERA TOBACCO Co. Ltd. v. THE ROYAL BANK OF CANADA.

Ontario Supreme Court in Bankruptcy, Orde J. March 11, 1922

BANKRUPTCY (§III—25)—ASSIGNMENT TO BANK OF EXISTING AND FUTURE BOOK DEBTS—REGISTRATION OF INSTRUMENT NOT REQUIRED IN ONTARIO — ASSIGNMENT UNDER BANKRUPTCY ACT — RIGHT ACQUIRED BY TRUSTEE—BANKRUPTCY ACT 1919, CH. 36, SEC. 30, AS AMENDED BY 1921 (CAN.), CH. 17, SEC. 25.

There is no provision in Ontario for the registration of an assignment by a company to an incorporated bank as collateral security of existing and future book debts, and such assignment being valid without registration, its validity cannot be affected by sec. 30 of the Bankruptcy Act, as amended by the Act of 1921 (Can.), ch. 17, sec. 25, which applies only when there is a provincial Act requiring registration.

[See Annotations, Bankruptcy Law in Canada, 53 D.L.R. 135; 59 D.L.R. 1.]

MOTION before Orde, J., in Chambers to determine the validity of an assignment of existing and future debts made by the insolvent to the Royal Bank as collateral security.

Norman A. Keys, for the trustee.

D. Inglis Grant, K.C., for the Royal Bank.

ORDE, J.:—This motion brings up for decision a question which I understand has been the cause of great doubt and difficulty in the transaction of banking business since the coming into form of the Bankruptcy Act. The Royal Bank of Canada took from the Sapera Tobacco Co., on September 11, 1920, an assignment of all book accounts and debts then due or accruing due or thereafter to become due, to the company, as collateral security for all present or future indebtedness of the company to the bank. The company made an assignment under the Act on May 30, 1921.

The trustee contends that under sec. 30 of the Act the assignment by the company to the bank of its book debts is void. The assignment in question is undoubtedly an assignment of the company's existing or future book debts, or in other words, a general assignment of book debts within the meaning of sec. 30. But whether or not the section is applicable here depends upon

Ont.

S.C.

SAPERA TOBACCO CO. LTD. v. THE ROYAL BANK OF CANADA.

Orde, J.

a careful analysis of it in both its original and its amended form. As originally framed, it provided that "Where a person ....makes an assignment to any other person of his existing or future book debts or any class or part thereof, and is subsequently adjudicated bankrupt............the assignment of book debts shall be void against the trustee............unless there has been compliance with the provisions of any statute which now is or at any time hereafter may be in force in the province wherein such person resides, or is employed in such trade or business as to registration, notice and publication of such assignments." Then follows a proviso excepting assignments of specified book debts. By the Act of 1921, (Can.) ch. 17, sec. 25, a new section was substituted for this, but the only changes were the omission of the words "to any other person" in the second line, and the insertion of certain words, which are immaterial here, referring to the date of the presentation of the petition in bankruptcy or of the making of the authorised assignment.

The omission of the words "to any other person," in the amended section, must be considered in the light of the definition of the word "person" in para. (aa) of section 2, as amended by 1921 (Can.), ch. 17, sec. 5.

The first definition was as follows: "(aa) 'Person' includes corporations and partnership." By the amended paragraph "(aa) 'person' includes a firm or partnership, an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic and the heirs, executors, administrators or other legal representatives of a person, according to the law of that part of Canada to which the context extends."

Paragraph (k) of sec. 2, which defines "corporation," excludes incorporated bank from the definition.

It must be manifest that unless the provisions of the Act in which the words "person" and "corporation" are used, are framed with extreme care and with an eye constantly fixed upon the effect of these definitions, the incidental use of one of these words may lead to some unexpected results, which the draftsman or Parliament possibly never intended. Whether the words "to any person" in the second line of sec. 30, as originally passed, were really intended by virtue of the definition of "person" and "corporation" to exempt chartered banks from the effect of sec. 30, may be open to doubt. If banks were exempted, then the exemption would apply even in those Provinces which require the registration of general assignments of book debts for their validity. It is argued that the omission of the

Ont.
S.C.
SAPERA TOBACCO CO. LTD. v. THE ROYAL BANK OF CANADA.
Orde, J.

words "to any other person" in the amended section of 1921 indicates an intention to apply the amended section to banks. But it is really immaterial whether banks were intended to be exempted by the original section or not. In its amended form there is nothing whatever in the language of the section to indicate that banks are to be exempt if the provisions of the section are otherwise applicable in the particular Province in which the transaction arises.

The bank contends,1st, that as there is no law in the Province of Ontario which requires any "registration, notice and publication" of general assignments of book debts, the section does not apply to this Province at all, and 2nd, that so far as this case is concerned, the assignment in question, having been taken on September 11, 1920, before the amending Act of 1921 was passed, comes within the original section 30, which, according to the bank's contention, exempts incorporated banks, and is not affected by the amendment which it is contended has no retroactive operation.

The important question for determination is the first one, namely, whether the section applies to the Province of Ontario at all. The trustee argues that the section is intended to invalidate all general assignments of book debts unless registered, and that in any Province which, like Ontario, has no law requiring registration, all general assignments of book debts must be void until the Province sees fit to pass a law for their registration. For the bank it is argued that this is not the intention of the section at all, but that it is only in the case of failure to comply with the Provincial law, if any, for the time being as to registration that the assignment is invalid, and that the section does not invalidate assignments which, by reason of the absence of any Provincial law requiring registration, do not require registration for their validity.

When it is suggested that a statute, or any other document whose meaning is open to any doubt, intends something which is not plain from its language, it is not an unfair test, in the search for its meaning, to ask whether the draftsman, having clearly before him the accomplishment of the purpose suggested, would have used the language he did, if that was his object. Here it is difficult to understand how any draftsman deliberately intended to invalidate all general assignments or book debts, except in those Provinces in which there was provision for the registration of such assignments, could have framed the section either in its original or in its present form. It would have been so simple a matter, after the sweeping avoidance of all general assignments, to have added words to this effect, "But the fore-

Ont.

S.C.

Sapera Tobacco Co. Ltd. v. The Royal Bank of Canada.

Orde, J.

going provision shall not apply in any Province in which there is a statute requiring registration of such assignments, if the assignment in question is registered in compliance therewith."

Counsel for the trustee refers to the debate in Parliament in 1921, when the amended section was passed, for the purpose of shewing that the legislators understood that the section had this meaning. But it is elementary that in construing the meaning of a statute, regard must not be had to what was said in Parliament about it, though light may sometimes be thrown upon the scope of a statute by looking at what Parliament was doing contemporaneously, and at the history of the statute itself. 27 Hals., p. 141, para. 260, and cases there cited.

One of the strongest arguments raised by the trustee was that if the general assignment of book debts is to be considered as already void for failure to register under the particular Provincial statute applicable, sec. 30 is entirely unnecessary as it carries the matter no further. There is much force in this argument, but it is open to some criticism. It might well be that in some Provinces registration might be necessary to protect the assignee against subsequent purchasers or mortgagees for value, but might not be necessary as against the debtor himself or his creditors or an assignee in insolvency. And in such cases sec. 30 may have the effect, because of the presence of Provincial machinery making it possible to register, of requiring the assignee of the book debts to register if he desires protection upon the subsequent bankruptcy of the assignor.

The draftsman of sec. 30 has taken as his model sec. 43 of the English Bankruptcy Act of 1914, the language of which is followed almost verbatim throughout the section. The variance occurs in the passage referring to registration, and it is largely because of the effort on the part of the draftsman to deal with the question of registration by using part of the language of the English section when the circumstances required entirely different language, that the difficulty now arises. The English Act avoids a general assignment of book debts unless it is registered "as if the assignment were a bill of sale" and the section goes on to provide that the provisions of the Bills of Sale Act, 1878, with respect to registration of Bills of Sale shall apply accordingly. Now here was a positive enactment passed by a legislative body having complete jurisdiction over the whole field of legislation, which added a general assignment of book debts to the category of instruments requiring registration under a registration law already in existence. Our parliament has not attempted to do that. Constitutionally it might not have the

Ont.
S.C.
SAPERA TOBACCO CO. LTD. v. THE ROYAL BANK OF CANADA.
Orde, J.

power to require Provincial officials to accept for registration instruments not already registrable under Provincial law. There is in sec. 30 no positive enactment such as appears in the sec. 43 of the English Act, making some registry law applicable. The reference to registration appears only as the exception to the declaration that all general assignments of book debts shall be void, and is comprised in the clause commencing with the word "unless." All general assignments shall be void "unless" what? "Unless there has been compliance with the provisions of" *any* Provincial statute as to registration, &c. How can this be construed as having any other meaning than that in order that the assignment may be valid, there must be compliance with any Provincial statute as to registration "if any such there be." To hold that the section makes registration a *sine qua non* of validity, is giving to the enacting words of the section a much wider effect that in my opinion they will naturally bear. In Ontario, a general assignment of book debts does not require registration for its validity. If sec. 30 has the sweeping effect suggested by the trustee, then because of the absence of any statute in this Province requiring registration with which the assignee of the book debts can comply, it is impossible to make a valid general assignment of book debts at all. Is it to be presumed that Parliament intended this? Surely it requires legislation of a distinct and positive character to invalidate instruments which, according to the existing law of the Province, are clearly valid without registration. The operative part of the section now under consideration is contained in one sentence, and its natural and ordinary meaning is simply this, that it is necessary, in order to hold a general assignment of book debts against the trustee in bankruptcy, that there shall be compliance with such Provincial statutes as require registration, and no more. The question is not wholly free from doubt, and I understand that the opinions of counsel have differed on the point, but I am unable to come to any other conclusion than the one indicated. Having this view, it seems unnecessary to consider the other questions raised by the bank, though, if my decision should be reversed by a higher Court, the other points must be determined because of their bearing upon the particular circumstances of this case.

I hold, therefore, that the general assignment of book debts to the bank in the present case was valid. The bank's costs of this application, which I fix at $50, should be paid out of the insolvent estate.

Quaere whether the said amendment of 1921, by omitting the words "to any other person" indicates an intention to apply the amended section to banks.

ROSS v. DUNSTALL.
ROSS v. EMERY.

Can.
S.C.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 11, 1921.

Negligence (§ IB—15)—Sale of fire-arm by manufacturer—Latent defect making it dangerous—Knowledge of manufacturer of defect—Failure to warn purchaser—Injury owing to defect—Liability of manufacturer—Arts. 1522, 1527, Que. C.C.

A manufacturer who sells either directly or through his agents a firearm which contains latent defects in its construction of which the manufacturer must be presumed to have knowledge and which makes it dangerous to a purchaser belonging to a class which the manufacturer must have known would become users of the article, and such manufacturer fails to warn the purchaser of the defect and to instruct him in the proper way of using the article in order to avoid injury, such manufacturer is liable under arts. 1522 and 1527 of the Quebec C.C. for injuries to the purchaser caused by such hidden defect.

[*George* v. *Skivington* (1869), L.R. 5 Ex. 1, 39 L.J. (Ex.) 8, followed; *Ross* v. *Dunstall, Ross* v. *Emery* (1920), 29 Que. K.B. 476, affirmed. See Annotation 56 D.L.R. 5.]

Appeals from the Quebec Court of Appeal (1920), 29 Que. K.B. 476, in actions for damages for injuries caused by latent defects in rifles sold to the plaintiffs by the defendant. Affirmed.

F. Roy, K.C., for appellant.

A. C. Dobell, K.C., *J. A. Gravel*, K.C., for respondent.

Davies, C.J.:—For the reasons stated by my brother Mignault, in which I fully concur, I am of opinion that both the appeals and the cross-appeals in these two cases should be dismissed with costs.

Ross v. Dunstall.

Idington, J.:—I am of the opinion that this appeal should be dismissed with costs. And the cross-appeal, which raises no question but the measure of damages which for many long years has in numerous cases uniformly been held to be a matter we should not meddle with, must be dismissed with costs.

Ross v. Emery.

Idington, J.:—For the reasons assigned by the trial Judge and the Judges constituting the majority in the Court of Appeal, (1920), 29 Que. K.B. 476, I am of the opinion that this appeal should be dismissed with costs.

Having regard to the jurisprudence of this Court, for many years past, in refusing to interfere with the assessment of damages when no principle of law is violated in the actual determination of the amount, I would dismiss the cross appeal herein.

Duff, J.:—Negligence is clearly, I think, established in fact. The rifle, when the parts were assembled in a certain way—

Can.
S.C.
Ross v. Dunstall; Ross v. Emery.
Duff, J.

which to any eye but the expert eye might readily appear to be the right way—was a highly dangerous instrument. So much so, indeed, that when discharged in such circumstances injury to the holder of the rifle was almost certain to follow.

These rifles were sold without warning—that is to say, were put into commercial circulation with the reasonable probability that some of them would come into non-expert hands, where they would be received without warning and under the risks arising from the circumstances mentioned. There is sufficient evidence to support a finding that competent and careful inspection and testing must have revealed the existence of these risks to the appellant, and I agree with the Courts below that such is the proper conclusion.

Is the appellant responsible? I can see no reason for holding that such responsibility does not arise from the very terms of Art. 1053 unless it can be successfully contended that responsibility in such circumstances is limited to that arising from the contract of sale. I see no reason for such a limitation of the effect of the article mentioned. I cannot understand why a delictual responsibility towards those with whom the negligent manufacturer has no contractual relation may not co-exist with contractual responsibility towards those with whom he has.

This is said to be inconsistent with the decisions of the English Courts. But it is not, I think, inconsistent with *George* v. *Skivington* (1869), L.R. 5 Ex 1, 39 L.J. (Ex.) 8, 18 W.R. 118, which appears to be sufficient to support the proposition that a manufacturer is responsible if he negligently manufactures and puts into circulation a mischievous thing which is or may be a trap to people using it. *George* v. *Skivington* has no doubt been adversely commented upon, but it has not been considered by any Court competent to override it and it has been applied widely in the American Courts. See *MacPherson* v. *Buick Motor Co.*, (1916), 111 N.E. 1050.

Whatever be the state of the English law the principle of *George* v. *Skivington* is, in my opinion, a principle of responsibility which by force of art. 1053 C.C. (Que.) is part of the law of Quebec.

ANGLIN, J.:—The facts of these two cases sufficiently appear in the reports of the Dunstall case in the Superior Court (1920), 58 Que. S.C. 123, and of both cases in the Court of King's Bench (29 Que. K.B. 476), and in the judgments of my brothers. They raise the very important question of the liability under the law of Quebec of the manufacturer of a firearm, placed by him on the market for general sale, which, though faultless in material and workmanship, causes injury to a purchaser (either from the

manufacturer himself or his agent or from a merchant dealing in such goods) owing to a latent and unusual source of danger inherent in its design, to give warning of which no steps have been taken by the manufacturer. The existence of the source of danger in the Ross rifle—that it will fire when its bolt is unlocked—is indisputable. Its latent character is fully established so much so that the manufacturer claims to have been himself unaware of it. While probably discernible by an expert and unlikely to be the cause of injury to a person who knows of it, it is apt to escape the notice of an ordinary user of a sportsman's rifle,—even if somewhat experienced—as happened in each of these cases, without his being chargeable with any fault in the nature of temerity, carelessness or inattention.

No such hidden source of danger is to be found in such well-known makes of bolt-action rifles as the Mauser, Lee-Enfield, Lebel, Mannlicher, Nagant and U.S. Springfield, none of which can be fired unless the bolt is securely locked. It was not shewn to be present in any other make of rifle than the Ross.

There is evidence given by Power, formerly a foreman in the appellant's factory, that this source of danger was in fact brought to the appellant's attention in 1914. But as the manufacturer, he should, in my opinion, not be heard to say that he was not or should not have been aware of it. 3 Pothier, Vente, No. 213: S. 1873, 2.179; 2 Troplong, Vente, No. 574.

There is also uncontradicted evidence given by Blair, a Government expert, that the danger might have been eliminated by a very simple change in design. That being the case, if such change would neither materially affect the user of the rifle nor interfere with the "straight pull," its characteristic feature—and, while there is no direct evidence to that effect, in the absence of any suggestion in the record that it would, I deem it, a fair inference—I have little difficulty in accepting the conclusion that the fact that the Ross Sports Rifle could be fired while the bolt was in a wrong position and unlocked and nothing to indicate that fact was apparent to the ordinary user, constituted a latent defect in its design.

I assume that the rifles were properly assembled when they left the appellant's factory, and that the bolts became subsequently disarranged—not improbably while in the hands of the respective plaintiffs.

The trial Judge found that the existence of this source of danger constituted a defect in the rifle which entailed responsibility on the manufacturer for resultant injuries. Three "considerants" of his judgment read as follows (58 Que. S.C. 127, translated):—

Can.
S.C.
Ross v. Dunstall; Ross v. Emery.
Anglin, J.

"Considering that the said accident was not caused by any defect in the materials used or in the workmanship, but by a defect in the model of the rifle itself and of the mechanism of the bolt;

Considering that the said defect consists in the fact that the parts which compose the movable bolt of the said rifle are susceptible of being put out of place by handling without the change being sufficiently evident to any one who is not an expert, and in the fact that the bolt so put out of place is susceptible of being put in place and closed, and the rifle cocked without the said bolt being locked to the barrel of the rifle, a condition of things not outwardly visible, and especially in the fact that the rifle, apparently full cocked, may be fired with the result that the bolt is forced back by the concussion, becomes loose and strikes the person firing in the face with great force.

Considering that, apart from any contractual liability, the public sale and distribution of a defective weapon constitutes a quasi-offence for which the author is responsible for the damage which results."

In the Court of Appeal, 29 Que. K.B. 476, while the judgments holding the defendant liable were sustained, the damages awarded to the plaintiff Dunstall were reduced from $11,060 to $8,560, and those awarded to the plaintiff Emery from $10,000 to $5,482. The respondents have both cross-appealed against these reductions in the amounts of their respective recoveries. These cross-appeals may be disposed of on the short ground that neither case is of the very exceptional class in which this Court feels justified in interfering on the ground of gross and palpable excess or inadequacy with the quantum of damages fixed by the provincial appellate Court.

The failure of the appellant to take any reasonable steps to insure that warning of the latent danger of the mis-placed bolt—whether it did or did not amount to a defect in design—should be given to purchasers in the ordinary course of the sporting rifles which he put on the market in my opinion renders him liable to the plaintiffs in these actions. His omission to do so was a failure to take a precaution which human prudence should have dictated and which it was his duty to have taken and as such constituted a fault which, when injury resulted from it to a person of a class who the manufacturer must have contemplated should become users of the rifle, gave rise to a cause of action against him.

The cases fall within the purview of art. 1053 C.C. (Que.). Taking no steps to warn purchasers of the rifle of its peculiar hidden danger was "neglect" and "imprudence" on the part

Can.

S.C.

ROSS v. DUNSTALL; ROSS v. EMERY.

Anglin, J.

of the defendant (whether his knowledge of it was actual or should be presumed) which caused injury to the plaintiff in each instance. If his failure to make an effort to give such warning was due to ignorance of the danger, such ignorance may well be deemed "want of skill" (*imperitia*) under the circumstances.

The principle of the case in D. 1869.2.195, cited for the respondents, where a doctor attending a child who failed to notify its nurse of the contagious character of the disease with which it was afflicted, and which she contracted, was held liable to her, may be invoked. Purchasers of the Ross rifle were entitled to rely on the skill and prudence of its manufacturer as the nurse was on that of the doctor. Another case, reported in the Court of Cassation in S. 1899.1.371, and in the Court of Appeal in D. 1894, 2.573, may also be referred to where failure to warn the purchaser of a bicycle of the danger, owing to weakness in the tubing forming the post, of raising the handle bar of the bicycle too high, was indicated as a ground of liability on the part of the manufacturer-vendor, the purchaser having been injured because the tubing in the post broke.

The responsibility of the manufacturer where he has himself sold to the plaintiff, either directly or through an agent, for injuries occasioned to the purchaser by hidden defects in the thing sold is clearly covered by arts. 1522 and 1527, C.C. (Que.). All the authorities have followed Pothier in regarding him as a person who is legally presumed to know of such defects (Pandectes Francaises, Rép. vbo. Vices Redhib, Nos. 337-40; Guillouard, Vente, No. 462), and this presumption applies in favour of sub-purchasers as well as the original vendees. It puts the manufacturer who is ignorant of latent defects in the same plight as if he knew of them.

There is good authority for the proposition that this contractual or quasi-contractual responsibility extends to sub-purchasers of his products from merchants to whom the manufacturer has supplied them, whether directly or through the intervention of wholesale dealers. Baudry-Lacantinerie (Saignat) Vente, No. 432; Guillouard, Vente, No. 452; S. 1891, 2, 5. But it is perhaps not so clear that it also covers unusual latent sources of danger not amounting to defects.

I therefore prefer to rest my opinion in favour of the plaintiffs on art. 1053, C.C. (Que.), (S. 1879, 1, 374). The defendant's failure to take steps to warn purchasers of his rifles of the hidden danger peculiar to them, that they would fire when the bolt appeared to be locked but was in fact unlocked, I regard as an imprudence or neglect within the purview of that article and

Can.
S.C.
Ross
v.
Dunstall;
Ross
v.
Emery.
Anglin, J.

therefore actionable. Sourdat, Resp. vol. 1, Nos. 668, 670, 675, 680.

While English law is not applicable to these cases, I incline to think that under it the defendant would likewise be liable—at all events if he knew of the latent danger of his rifle—and probably if he did not. Reference may be made to the very recent edition (1921) of Clerk & Lindsell on Torts, pp. 445, 469, 471-5; 25 Hals. para. 293, at p. 163; 21 Hals., para. 638, at pp. 371, 372, & para. 686, at pp. 408, 409, *White* v. *Steadman*, [1913] 3 K.B. 340, 82 L.J. (K.B.) 846; *Bates* v. *Batey & Co.* [1913] 3 K.B. 351, 82 L.J. (K.B) 963; *Cavalier* v. *Pope*, [1906] A.C. 428, 75 L.J. (K.B.), 609, and *Parry* v. *Smith* (1879), 4 C.P.D. 325, at p. 327, 48 L.J. (C.P.) 731, 27 W.R. 801. In *Blacker* v. *Lake & Elliott* (1912), 106 L.T. 533, Hamilton and Lush, JJ., held knowledge by the manufacturer of the defect or condition creating the danger essential to render him liable to a sub-purchaser from his vendee of an article not ordinarily of a dangerous character, even though it must have been in contemplation that such a resale should take place. *George* v. *Skivington* (1869), L.R. 5 Ex. 1, 39 L.J. (Ex.) 8, 18 W.R. 118, the well-known case of the deleterious hair wash, where the contrary was held, is treated as virtually overruled. Lush, J., in *White* v. *Steadman*, however, indicates that in his view the decision in *George* v. *Skivington* might have been supported if it had been put upon the ground that the defendant had failed to take ordinary care to avail himself of his opportunity of knowledge of the danger of the ingredients composing his hair wash. With respect, it seems to me that ground of liability, though not expressed, is fairly implied in the judgments delivered in the Court of Exchequer. *Thomas* v. *Winchester* (1852), 6 N.Y. 397, cited with approval in *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640, at p. 646, 79 L.J. (P.C.) 13, and the opinion of Matthew, L.J., in *Clarke* v. *Army & Navy Co-operative Society*, [1903] 1 K.B. 155, at p. 168, 72 L.J. (K.B.) 153, may also be looked at in this connection. *George* v. *Skivington* is still cited as an authority in Clerk and Lindsell's recent book at p. 472. I find it difficult to reconcile the decision in *Blacker* v. *Lake & Elliott* with the classical passages in the judgment of Brett, M.R., in *Heaven* v. *Pender* (1883), 11 Q.B.D. 503, at p. 509, 52 L.J. (Q.B.) 702:—

"Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person

Can.
S.C.
Ross v. Dunstall; Ross v. Emery.
Brodeur, J.

or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

The duty of a manufacturer of articles (such as rifles), which are highly dangerous unless designed and made with great skill and care, to possess and exercise skill and to take care exists towards all persons to whom an original vendee from him, reasonably relying on such skill having been exercised and due care having been taken, may innocently deliver the thing as fit and proper to be dealt with in the way in which the manufacturer intended it should be dealt with. The manufacturer of such articles is a person rightly assumed to possess and to have exercised superior knowledge and skill in regard to them on which purchasers from retail dealers in the ordinary course of trade may be expected to rely. From his position he ought to know of any hidden sources of danger connected with their use. The law cannot be so impotent as to allow such a manufacturer to escape liability for injuries—possibly fatal—to a person of a class who he contemplated would use his product in the way in which it was used caused by a latent source of danger which reasonable care on his part should have discovered and to give warning of which no steps have been taken.

I agree with the Judges of the Court of King's Bench, 29 Que. K.B. 476, and the Superior Court, 58 Que. S.C. 123, that the respondents' actions are not prescribed.

I would dismiss both the appeal and the cross-appeal, with costs.

BRODEUR, J. (dissenting):—These two cases, which had been joined for the purpose of evidence, have been separately argued before us; but as the facts in each case are almost identical, and the same questions of law arise, we can decide both cases at once. The facts are as follows:—

The appellant, Sir Charles Ross, is the maker of a rifle commonly known as the "Ross Rifle." The defendants, who are amateur hunters, purchased each one of these rifles. Before using them, however, they had to oil them, and for this purpose it was necessary to take out some parts of the bolt. When they came to put these parts together again they did not sufficiently shove in and lock the bolt, so that later, when they used the rifle to fire at game, the bolt, through the action of the cartridge, left the breach, struck them in the face and severely injured them. Hence the action for damages against the maker, claiming that the accidents were caused by his negligence and that the rifles had a latent defect.

The maker sets up that these accidents were due to want of

Can.

S.C.

Ross v. Dunstall; Ross v. Emery.

Brodeur, J.

skill on the part of the plaintiffs Dunstall and Emery, and that the rifles had no latent defect.

The Superior Court, presided over by Dorion, J., 58 Que. S.C. 123, decided that the accident (see pp. 127 et seq.) "was caused not by any defect in the materials used or in the workmanship but by a defect in the model of the rifle itself, and of the mechanism of the bolt,..............and that apart from any contractual liability, the public sale..............of a defective weapon constitutes a quasi-offence for which the author is responsible for the damages which result."

The Superior Court ordered Ross to pay $11, 060 in the Dunstall case, and $10,000 in the Emery case.

The Court of King's Bench, 29 Que. K.B. 476, found that there was liability on Ross' part, but reduced the damages, saying that the amount allowed was excessive.

The defendant appeals from these judgments and asks that the actions be dismissed.

The plaintiffs Dunstall and Emery have cross appealed, asking that the judgments of the Superior Court be restored.

Upon these cross-appeals we have not deemed it necessary to hear the defendant. It is the jurisprudence of this Court that we rarely interfere in the case of judgments fixing damages, unless there has been a wrong application of a principle of law. In the present case, the Appellate Court deemed it proper to reduce the damages, and, indeed, I think the amounts awarded by the Superior Court were excessive.

The Appellate Court wisely exercised the discretion allowed it on the merits; upon the question of liability, more interesting points of law present themselves. The actions are apparently based on a contractual fault, namely, upon the fact that the thing sold had a latent defect.

The lower Courts found in the facts of the case not only a contractual fault, but a quasi-offence or a delictual fault.

It is of sufficient importance to state the exact argument on this point, for the two faults do not lead to the same consequences, and are not subject to the same method of inquiry.

The first question, then, is whether the facts in the case constitute a delictual fault. In other words, does the non-execution of a contractual obligation involve the liability of the debtor from the delictual point of view?

All the commentators of the Code Napoleon, who had written on the matter up to the time of codification, with about four exceptions, were of the opinion that in a case where there is a contractual fault, you cannot apply the liability resulting from offences and quasi-offences: Aubry & Rau, vol. 4, para. 446, p.

755, 4th ed.; Larombière, art. 1382, nos. 8 & 9; Laurent, vol. 16, nos. 213-230, vol. 20, no. 463; Demolombe, vol. 8, nos. 472, 477; Sourdat, article on liability, vol. 1, no. 6; Saleilles, article on obligations under the German Code, nos. 330, *et seq.* Huc. vol. 7, no. 95, and vol. 8, nos. 424 *et seq*; Sainctectettes Liability and Warranty; Fromegeet, on Fault as the Cause of Liability, Parès, 1891; Baudry-Lacantinerie, vol. 4, no. 2865; Sauzet, Revue Critique, 1883, p. 616; Labbé, notes in Sirey, 1885-2-33, 1886-4-25, 1886-2-42, 1889-4-1; Glasson, Civil Code and the workman question, pp. 30-32; Dallory, Supplement, under "Responsabilité," no. 57; Ranard de Card, France Judiciaire, vol. 15-1-97; Colin and Capitant, vol. 2, p. 368 (1915).

According to these writers, therefore, there are two kinds of faults, namely, contractual fault, if the debtor does not perform his obligation arising from an agreement, or performs it improperly, and the delictual fault, namely, that which consists in causing detriment to another, detriment other than that which arises from a contractual obligation.

Our Civil Code, Que., articles 1070 *et seq.*, has laid down the liability resulting from contractual fault, and, in articles 1053, *et seq.*, it has fixed the liability which results from offences and quasi-offences. It has therefore shewn, in an obvious manner, the rules which should guide us in the case of contractual fault and in the case of delictual fault. If there is an agreement between the parties, then we should fix their liability in accordance with the provisions of the chapter which deals with the effect of obligations; and if there has been no such agreement, then we must determine the liability according to the provisions of the chapter which deals with offences and quasi-offences.

In the last 30 years in France a different opinion has been expressed by Mr. Lefebvre, a little known author, who has claimed that there was only a single liability, namely, that which resulted from delictual fault (Revue Critique, 1886, p. 485).

Was it the influence of the German doctrine which made itself felt in this opinion of Mr. Lefebvre? In short, the German doctrine means that there are no contractual faults in the civil law, but that the delictual fault is the only one which exists, and on which liability is based. (See Saleilles, articles on obligation under the German Code, nos. 530, *et seq.*).

This opinion of Lefebvre has been followed in a limited form by Desjardins, Revue des Deux Mondes, 1888, p. 362, and by Grandmoulin, two little known authors, and by Planiol, a great authority which one cannot contradict. We find Planiols' opinion in his work on the Civil Law, vol. 2, no. 911, 1st ed., and in his note in Dallory, 1896-2-457. These latter authors do not say

C.A.
S.C.
Ross v. Dunstall; Ross v. Emery.
Brodeur, J.

like Lefebvre, that there are only delictual faults, but that the existence of a contract does not necessarily exclude the quasi-delictual liability, and that the quasi-delictual liability cannot find its application when in the non-execution or in the faulty execution of the contract there appears a delictual element.

It is a doctrine that we meet with in the judgments of the lower Courts, which laid down that a fault may be, at the same time delictual and contractual.

For my part, I cannot accept this doctrine of Lefebvre and Planiol. If our Code had wished to set up the unity of a fault, it would have contented itself with art. 1053; but it has, on the contrary, laid down the attributes of faults, as much by arts. 1053, *et seq.*, as by arts. 1070, *et seq.*, and then we have recourse to arts. 1070, *et seq.* each time that it is a question of damages resulting from the non-execution of a contract.

The latest authors who have written on the matter are Colin and Capitant, who are the best authorities in France. They succeeded Planiol in the chair of law at Paris, and their opinion is fully accepted, not only in University circles, but also at the Bar and on the Bench. The following is what they lay down at p. 368 of vol. 2 of their work, published in 1915:—

"This distinction, which forms one of the fundamental and elementary ideas of our Private Law, has been thoroughly fought out in the last twenty years. Naturally, indeed, the lawyers who see in the fault which constitutes a civil offence the lack of a pre-existing obligation give a definition which applies equally as well to the fault of the contractual debtor. But this new doctrine has not destroyed the classical proposition of the "quality of faults." It exists without any influence upon practice. Observe what the differences actually are which distinguish the two faults. The contractual fault consists, as we have seen, in the fact on the part of the debtor of not having executed the obligation to which he was bound by the contract with his creditor. The delictual fault consists in doing injury to another, an injury other than that which results from the non-execution of an obligation, and that either from willfulness and intention to harm or from merely lacking the precautions which prudence should inspire in a careful man.

To the first, the classical lawyers have often attached the corollary that there is a difference in degree between the reprehensible fault of the debtor and that of a delinquent. The debtor would answer only for his slighter fault (*culpa levis in abstracto*). The delinquent would answer even for his very slightest fault (*in lege aquilia culpa levissima venit*). We have observed that we must think of this claimed gradation. In a

contractual matter there is fault actually from the moment that the debtor has broken his contract, and has not carried out all that he solemnly agreed to do. The law, in this matter, enacts the liability upon the simple fact. It is only in a delictual matter that one can compare, as the Romans did, the concrete acts of the defendant with these which one might expect from an attested type of a prudent and careful man."

Next, they point out that the most important difference between the contractual faults and the delictual fault is in the *onus probandi*.

Our Quebec Code being for the most part inspired by authors favourable to the quality or the division of the fault, it seems to me reasonable to follow them, and to diverge from this German principle which, on this point, like many others, does not seem disposed to follow the generally accepted principles of modern civilisation. I find, therefore, that the lower Courts have erred in deciding that a fault may be at the same time contractual and delictual.

Now, we must examine the contractual obligations of the appellant. We are met with a contract of sale, and we must look into the contract, as into the obligations which go with it, the principles which must guide us. We must see whether the vendor has violated the implied provision of the contract which required him to warrant his purchaser against latent defects in the article.

What is a latent defect? Art. 1522 of the Civil Code tells us that it is a defect which renders the thing sold useless for the purpose for which it was intended.

Article 1523 informs us that the vendor is not liable for defects which are patent and of whose existence he might himself be aware.

In the present case the rifle sold was not useless for the purpose for which it was intended; on the contrary, it was a finished rifle which had been duly patented and which had the advantage of firing more rapidly than those which are on the market. The hunter, in handling the bolt, has only to make a movement, namely, to shove it forward, and then the bolt locks itself without requiring the closing movement which is necessary for the other rifles. One sees at once the great advantage which an invention like that can produce. Saving of time and movement count for a great deal in the success of the hunter or of the soldier.

But it is necessary that the assembling of both parts of the bolt be properly done. If these two parts are improperly joined,

Can.
S.C.
Ross v. Dunstall; Ross v. Emery.
Brodeur, J.

then the closing does not take place and an accident happens as in the cases before us.

The defendants evidently had not the necessary knowledge for joining the parts. They were proud of their acquaintance with old models and took a great deal of trouble to oil the bolt and barrel of the rifle. They evidently disturbed the pin which enters the centre of the cylinder, and in re-assembling the parts they did not give it the necessary length to enable it to penetrate sufficiently and then close automatically. Then, in firing the rifle, the bolt, which was not closed, recoiled, and caused the accident of which the respondents complain.

The question of liability which presents itself is whether the vendor of a dangerous weapon, which is perfect in itself but whose parts were improperly put together by the purchaser, and then caused an accident, is liable for such accident. In other words, has he sold an article affected with a latent defect?

The question is one of considerable interest, for with our industrial development the decision which we are going to give may be of great importance. Every day there are put on the market automobiles, gasoline engines and electric motors, which, if put in the hands of competent persons, offer no great danger, but if they are driven, repaired or put together by the first comer they may cause serious accidents. Perfect mechanisms are put on sale every day, but before handling them the purchaser should inform himself of the way to handle them. The vendor has fulfilled his obligation from the moment that the thing sold is not unsuited to the use to which it is put.

Major Blair, who has been the expert witness of the plaintiffs, tells us himself how accidents happen: "It is owing to the bolt having been assembled with the sleeve in the wrong position, in such a position that the sleeve of the bolt was unable to travel forward on the bolt itself and lock the lugs. It is not then a defect in the article sold which caused the accidents, but the accidents were due to the fact that the parts of the rifle were improperly assembled, and that was done by the plaintiffs themselves. The evidence shews that when the rifles left the factory they were properly assembled.

The same witness tells us: "Q. What have you to say regarding a rifle that could have its bolt assembled in the wrong way and yet fire? A. Well, in the hands of one unacquainted with its mechanism, in the hands of the every-day individual, I would have to say that there was danger. Q. Would you call that a faulty design? A. In my opinion it would be a fault in design." He is asked "Q. Would you consider it a dangerous defect? A. I would in the hands of a person who did not know whether it

was rightly or wrongly assembled; there would be danger of his getting it into action in a wrong manner which would, if he did so, of course, be dangerous to the firer." . . . . "Q. I am asking you whether there is anything from the external point of view in the rifle to shew that that rifle is assembled in the wrong way? A. To one who knows it, yes; to one who does not know it, there is not; in my opinion, there is not."

The opinion of this expert is not corroborated; on the contrary, the other experts who were heard do not appear to chime in with his ideas. But even taking his opinion, I say that the defendant should not be held liable, because, according to art. 1523, the vendor is not bound by defects, of which the purchaser might himself know the existence.

Pothier, Sale, no. 207, speaking of defects which cannot be seen, says: "and when even he (the purchaser) could not have known of the defect, he cannot be heard to complain of the wrong he suffers from the contract, for it is by his own fault that he suffers; he must examine the thing before buying it, or have it examined by someone else, if he has not the knowledge himself. Now, a wrong that a person suffers by his own fault is not a wrong of which the law should take cognizance."

Baudry-Lacantinerie, at no. 418, Sale, after quoting this passage from Pothier, says: "The ignorance of the purchaser would not therefore be sufficient in order that the defect be considered as latent, so far as he is concerned, if it was obvious to a person acquainted with the thing in question."

A man should not attempt to touch machines which are dangerous or liable to become so, unless he has thorough knowledge of their mechanism.

But they say: this mechanism could have been made so perfect that even an unskilled person could not have put it together wrongly. It seems to me that such a requirement goes outside the provisions of the law. The vendor is not bound to protect his purchaser, against the latter's imprudence. He is only bound to deliver an article which will not be unsuitable for the purpose for which it is intended. "The mere absence of certain qualities" is said by Aubry and Rau, 4th ed., vol. 4, p. 387, "of which the article sold may be found lacking in does not constitute a natural defect which would give rise to a redhibitory action."

It is equally so with respect to damages, for the latter can only be claimed if a redhibitory action can be brought. (Arts. 1526, 1527).

If the purchaser considers it a proper thing to take a piece of mechanism apart and put them together improperly, he has only himself to blame if an accident happens: Is the vendor

Can.
S.C.
Ross v. Dunstall; Ross v. Emery.
Mignault, J.

required to furnish an education to his purchaser? I do not hesitate to say that he is not. It is, however, this obligation which the lower Courts have imposed on him. This has been based on a judgment reported in Dallory, 1894-2-573, respecting a bicycle. But in the latter case the accident was due to the weakness of the steering tube, which had been hidden from the observation of the purchaser. In that case there was a latent defect. Consequently the agreement might be cancelled unless the vendor informed the purchaser of the latent defect. But in the present case there is no latent defect in the model of the rifle or in the mechanism of the breech.

In a judgment reported in Dallory, 1857-1-65, it was decided by the Court of Cassation that a vendor is not liable for a defect with respect to which two things sold separately by him to the same purchaser may be affected by the way in which they are brought together or matched, if such matching is done by the purchaser himself; that a vendor cannot be blamed for not having informed the purchaser, by circular or otherwise, under what conditions the object in question should be put together, such an obligation not arising under any law.

To sum up, I am of the opinion:—

1. That under the circumstances of the present case, the only fault which can be imputed to the defendant is a contractual fault and not a delictual fault; 2. That there was no latent defect in the rifle sold to the plaintiffs; 3. That the vendor was not bound to teach his purchaser how to put together the articles which he sold him.

For all these reasons, the appeals should be sustained with costs, and the cross-appeals dismissed with costs.

MIGNAULT, J.:—In these two cases, which present virtually the same question of civil responsibility, we have had the advantage of two arguments, the case of *Ross* v. *Dunstall* having been argued in February, and that of *Ross* v. *Emery* in May.

The accident of which the two respondents complain occurred in a similar manner, through the backfiring of a sporting rifle manufactured by the appellant, and each of the respondents lost the use of his right eye, besides suffering other injuries to the head and face. In the case of Dunstall, however, the rifle was purchased in Minneapolis from dealers in firearms who had themselves procured it from the selling agents of the appellant. In the other case, the respondent Emery bought the rifle directly from the appellant.

This difference in circumstances has given rise to the suggestion that the liability in the Dunstall case is delictual, and in the Emery case, contractual. In my opinion, whether the civil re-

sponsibility incurred proceeds from a contract or rests on a *quasi-délit*, matters very little in this case. Indeed, there is perhaps some ground for the pungent criticism which Mr. Planiol, vol. 2, nos. 873 and following, makes of the generally admitted distinction between *la faute delictuelle* and *la faute contractuelle*, which, in the opinion of the author, "*n'a ni sens ni raison d'être.*" It is obvious that no civil responsibility can exist without a *faute*, and *faute* is defined as "un manquement à une obligation préexistante." (Planiol, No. 863). Whether this obligation be one imposed by a law or by a contract, and cases can easily be conceived where there is an obligation imposed by law together with one created by a contract, the result, generally speaking, is the same, in the sense that the person in fault is obliged to indemnify the person aggrieved to the extent of the injury suffered. Therefore, if the appellant was guilty either of a delictual or of a contractual fault, and if this fault caused the injuries complained of, there can be no question as to the civil liability which he has incurred for the damages suffered by the respondents. And while no doubt the Code deals separately with the two kinds of responsibility (see article 1053, and following in the case of *délits* and *quasi-délits*, arts. 1070 et seq., with regard to obligations generally, and arts. 1522 et seq., as to the sale of things having latent defects), and while these articles may be referred to accordingly as they apply to one or the other of the judgments in question on these appeals, I do not apprehend that the practical result of one rule or of the other, as applicable to the cases under consideration, will be in any way different.

The rifle, the back-firing of which injured the two respondents, is called the "Ross Straight Pull Rifle." Without attempting any too technical description of this rifle, I may say that to be safely fired the bolt of the rifle must be locked. This bolt is contained in a bolt carrier or sleeve and is turned by spiral projections around it which acts in spirally cut grooves inside the bolt carrier. To lock it, the handle on the bolt carrier is forced straight forward. This turns the bolt and lugs about one quarter of a revolution and the lugs are locked into grooves in the extension of the barrel. When the assembled bolt is removed for cleaning the rifle or other purposes, the bolt may easily be slipped back into the wrong spiral groove, bringing the lugs against the end of the bolt carrier about in line with the handle. In this condition the bolt may be returned to its place in the rifle, and have the appearance of being locked, but as the lugs have not turned to the locking position, the rifle is not locked. If then it be fired, and it can be thus fired, the bolt is thrown

Can.
S.C.
Ross v. Dunstall; Ross v. Emery.
Mignault, J.

back in the face of the user. In other rifles with a bolt action, such as the Mauser, Lee-Enfield, Lebel, Mannlicher, Nagant, U. S. Springfield, the rifle cannot be fired until the bolt is locked.

In so far as any defect has been charged against the Ross rifle, it lies in the fact that the bolt may be improperly assembled and appear to the user to be locked, and that although it be really not locked, the rifle can nevertheless be fired in this unlocked position, with the result of throwing back the bolt in the face of the user. There is no doubt whatever in my mind that it is because the respondents in using the rifle improperly assembled the bolt that they suffered the injuries which gave rise to their actions. When the rifle is properly used and the bolt is locked in position, no such accident is possible. I do not think therefore, although the trial Judge so found, 58 Que. S.C. 123, that there is a defect in the design *qua* design of the rifle, for it contains a properly constructed locking device, and it was never intended that it should be fired in an unlocked position, but there is a possibility that the user, unless he be properly instructed as to the locking of the bolt, may assemble it in the wrong way and be deceived by the appearance of the rifle into thinking it properly locked. And the danger is that, unlike other types of bolt action rifles, the Ross rifle can be fired although the bolt is unlocked, with the consequence that the user, if he aims the rifle in the ordinary way from the shoulder, will be injured, as were these respondents.

The evidence is that these rifles, and there was a military as well as a sporting rifle, were inspected at the factory by Government inspectors, that they were fired several times with a charge heavier than the usual one in order to test their strength of resistence, and that no rifle was put on the market except with the bolt properly assembled. To prevent rust, the gun was heavily oiled and the purchaser was warned to wipe it out thoroughly before using it. No warning was given of the possibility of wrongly assembling the bolt, and the danger that the rifle might be fired with the bolt in an unlocked position was not pointed out to users of the rifle. Certain instructions with respect to cleaning the gun accompanied each rifle, but no instructions as to the manner of assembling the bolt were given to purchasers. Indeed the appellant does not appear to have imagined that an accident like the one in question was possible.

The troops of the Canadian expeditionary force stationed at Valcartier to the number of some 30,000 were all armed with the Ross rifle. I think it sufficiently appears that no accident such as the one in question occurred there, although the rifle

was fired thousands of times, but no doubt the troops were carefully instructed as to the use of the rifle. In fact, besides the case of these two respondents, the only other instance testified to is that of one Leonard in 1896, where the bolt is shown to have been thrown back in the face of the user through being improperly assembled in the rifle.

The question now is whether the appellant is liable in damages for the reason that, although he manufactured and sold a rifle with a properly constructed locking device, these respondents were injured because they improperly assembled the bolt in the rifle and were deceived by the general appearance of the rifle into thinking that the bolt action was properly locked? Or perhaps the question should be stated thus, and this appears to be the ground chiefly insisted on by the respondents, is the appellant liable because the rifle constructed by him could be fired in an unlocked position?

It is important to mention that both these respondents were experienced in the use of firearms, but, when injured, were using the Ross rifle for the first time. As I have said, the circumstances that one of the respondents purchased the rifle directly from the appellant and the other through a dealer who had obtained it from the selling agents of the appellant, does not alter the responsibility of the latter if through the violation of a contract or by reason of the mere negligence of the appellant either of the respondents suffered injury.

The principles governing civil responsibility are very familiar. In the absence of any contractual relations between two persons, the one is liable towards the other, if, being *doli capax*, he has caused him damage by his fault, whether by positive act, imprudence, neglect or want of skill (art. 1053 C.C. Que.) This fault may be an act of commission or of omission, and however slight the negligence may be it engenders civil responsibility where it is productive of injury to another. In the case of the sale of a thing with a latent defect, the usual remedy is the rescission of the sale or a diminution of the price. A distinction is made between the case where the defect was unknown to the seller and where it was known to him; in the former case the price and the expenses of the sale only can be demanded, in the latter, the seller is obliged to pay all damages suffered by the buyer (arts. 1527, 1528 C.C. Que.). Knowledge of the defect is either actual or presumed, for, according to art. 1527 C.C. (Que.), the seller is obliged to pay damages in all cases in which he is legally presumed to know the defects.

The authors, and chiefly Pothier (Vente No. 212, and following, Obligations, No. 163) explain that the seller is legally pre-

Can.
S.C.
Ross v. Dunstall; Ross v. Emery.
Mignault, J.

sumed to know the defects when the thing sold is one in which the seller usually deals, or one manufactured by him. The mere dealer is generally allowed to rebut the legal presumption of knowledge by shewing that in fact it was impossible for him to discover the defect, but the manufacturer is not listened to when he pleads ignorance of the defect, for he is held to have guaranteed the product created by him as free from latent defect, *spondet peritiam artis*, and, as Pothier observes, his ignorance of the defect in the thing manufactured by him is in itself a fault. *Imperitia culpae annumeratur.*

The appellant here manufactured the rifle and knowledge of any latent defect in it must therefore be imputed to him.

Consequently it is not material in these cases to discuss the nature of the presumption, either *juris tantum* or *juris et de jure*, mentioned by art. 1527. If ignorance of a latent defect is in itself a fault, in the case of the manufacturer who sells a thing manufactured by him, it becomes unnecessary to determine whether the presumption of knowledge of this defect can be rebutted by him, for, even if he could rebut it and establish his ignorance, he would nevertheless be in fault, so that whether the appellant knew or did not know that his rifle could be fired in an unlocked position is immaterial if this be a latent defect of the rifle manufactured by him.

After due consideration, I have come to the conclusion that the possibility of the rifle being fired in an unlocked position, when to the ordinary and even cautious user the bolt action would appear to be locked, is a latent defect of the Ross rifle entailing the civil liability of the appellant as its manufacturer for the damages incurred by the respondents. I have been careful to say that I do not consider the design of the rifle defective, as a design, for a properly constructed locking device was provided, but there was a hidden and undisclosed danger, and this certainly was a defect in the rifle and a latent one, as an inspection of the rifle locked or unlocked shews. That such a defect might have been detected by an expert is no reason to hold the defect to be other than latent, or to free the appellant from liability, for it suffices that a reasonably prudent user could be deceived by the appearance of the rifle into thinking that it was properly locked and ready to fire. And to put on the market without proper instructions or warning such a rifle —whether the liability be contractual or delictual, is a fault for the consequences of which the appellant must be held liable.

There is an instructive case in Dalloz, 1894, 2, 573, where the cour d'appel of Bruges held, in 1893, as follows (translated):

"The weakness of the steering tube of a bicycle, being hidden

from the observation of the purchaser and, moreover, not being able to be estimated without technical knowledge, constitutes a latent defect of such a kind as to cause the cancellation of the sale and to introduce the question of damages to the purchaser.

The vendor would plead in vain that the breaking of the steering tube was caused by the purchaser raising it too high, or that it was caused by ignorance, if he had neglected to inform his purchaser of the nature of the mechanism and parts of the machine."

The note to this decision contains the following observation:—

"Moreover, the award of damages to the purchaser would be justified, in the present case, on another point by the fault committed by the vendors in not informing the purchaser upon the mechanism of the machine and of the dangers which certain parts of the machine presented."

I have no intention to hold that every manufacturer or vendor of machinery must instruct the purchaser as to its use, or that the purchaser, who without sufficient knowledge attempts to operate machinery, is to be indemnified for the damage resulting from his ignorance, but where, as here, there is a hidden danger not existing in similar articles, and no warning is given as to the manner to safely use a machine, it would appear contrary to the established principles of civil responsibility to refuse any recourse to the purchaser. Subject to what I have said, I do not intend to go beyond the circumstances of the present case in laying down a rule of liability, for each case must be disposed of according to the circumstances disclosed by the evidence.

The respondent, Emery, claims that when the rifle was sent to him the bolt had been improperly assembled; that he fired it in the condition in which he had received it—it was only fired some three years after its receipt—and that consequently the appellant is liable for the accident. The finding of the trial Judge is adverse to this contention and I do not base my conclusions on it.

The appellant's plea of prescription is not made out, for prescription certainly cannot run before the injury was incurred and these actions were served within the year of the accident. Were this a redhibitory action claiming annulment of the sale, it would possibly be a fatal objection that the respondent Emery allowed the rifle to remain in his possession for 3 years without firing it. But, as I take it, his action can stand, notwithstanding the contractual relations between the parties, upon art. 1053, as well as upon arts. 1527, 1528 C.C. (Que.). The former article is applied every day in the case of passengers injured while travelling on railway carriages, although a contract is made

Can.

E.C.

between them and the railway company for their transportation. And I cannot assent to the broad proposition that where the relations between the parties are contractual there cannot be an action *ex delicto* in favour of one of them. Very much depends on the circumstances of each particular case.

I would, therefore, dismiss the two appeals with costs.

The cross-appeals of both respondents against the reduction, by the Court of King's Bench, 29 Que. K.B. 476, of the damages allowed by the Superior Court, 58 Que. S.C. 123, in my opinion, cannot be entertained. The practice of this Court, except in very exceptional cases, is not to allow appeals which put in question the quantum of damages assessed by the Courts below. For that reason I would not interfere with the judgment of the Court of King's Bench. The cross-appeals should be dismissed with costs.

Appeals dismissed.

ATT'Y-GEN'L OF BRITISH COLUMBIA v. ATT'Y-GEN'L OF DOM. OF CANADA.

Exchequer Court of Canada, Cassels, J. February 25, 1922.

CONSTITUTIONAL LAW (§IA—20)—CONSTRUCTION OF STATUTES—IMPORTATION OF ALCOHOLIC LIQUORS BY A PROVINCE FOR SALE—1921 (B.C.), CH. 30—B.N.A. ACT 1867, SEC. 125—"TAXATION"—CUSTOMS DUTIES—EXEMPTION.

The Government of the Province of British Columbia in the exercise of its powers of control and sale of alcoholic liquors under the Government Liquor Act, 1921 (B.C.), ch. 30, cannot import such liquors into the Province for the purposes of sale without paying customs duties thereon to the Dominion of Canada.

2. The provisions of sec. 125 of the B.N.A. Act 1867, exempting the lands or property of Province from "taxation" do not enable any Province to import into Canada goods for the purpose of carrying on a business or trade free of any customs duty chargeable on such goods.

ACTION by the Crown in right of the Province of British Columbia to have it declared that it could import liquor into Canada for purposes of sale pursuant to the provisions of Government Liquor Act (being ch. 30, 1921, of the statutes of that Province) without paying the customs dues imposed by the Crown in right of the Dominion of Canada upon the importation thereof, under and by virtue of the Customs Act of Canada. Case now heard before the President, at Ottawa.

J. W. de B. Farris, K.C., and *Eugène Lafleur*, K.C., for plaintiff.

E. L. Newcombe, K.C., and *C. P. Plaxton*, for defendant.

CASSELS, J.:—This case was argued before me on December 19, 1921. There was no evidence adduced. It was stated

by Mr. Lafleur that the question was one of law. Mr. Lafleur states: "It is a test case to decide whether the importation of liquors by the Province of British Columbia are liable to customs and excise duties."

On the opening of the case, I suggested that the other Provinces should be represented on the hearing. Mr. Lafleur informed me that he had communicated with the Attorney-General's office in Quebec, and the reply was that while he, the Attorney-General, was very much interested in the question and considered the advisability of intervening in the case, subsequently a telegram was received from him stating that on consideration the Quebec Government had determined not to intervene at this stage of the case.

There seems to be little dispute in regard to the facts as stated in the pleadings. Counsel for British Columbia objected to one statement, which reads as follows:—

"That in pursuance of the requirements of the said Act as amended, and in particular of sec. 25 thereof, there was delivered to the Collector of Customs and Excise at Victoria, B.C., by His Majesty as represented by the Province of British Columbia, or by the Liquor Control Board at Victoria, B.C., or by an officer of the Government of the Province of British Columbia, acting for or on behalf of His Majesty, as so represented, as consignee of the said case of whiskey (hereinafter referred to as 'the importer') an invoice of the said case of whiskey, containing the information required by paragraph (a) of said sec. 25 of the Customs Act, and thereupon a bill of entry on Customs form 'B.16—amended' covering entry of small collections for home consumption' was made out in conformity with paragraph (b) etc."

Mr. Lafleur stated that this was not quite an accurate statement of what occurred, that in fact there was no such invoice at all delivered in pursuance of the Act. There was an invoice delivered when a claim was made for the delivery of the goods, and this invoice was attached to the claim in order to identify the goods.

Whether this difference is material or not, the statement of the facts as stated by Mr. Lafleur was conceded by Mr. Newcombe.

The case was very fully and ably argued by counsel for both sides, and if I err in the conclusions that I have arrived at, it certainly is not attributable to any lack of assistance on the part of counsel.

As stated by Mr. Lafleur in the quotation which I have referred to, the case before me is brought as a test action, and on the argument it was argued both by Mr. Newcombe, and by Mr.

Can.

E.C.

ATT'Y-GEN'L OF BRITISH COLUMBIA v. ATT'Y-GEN'L OF DOMINION OF CANADA.

Cassels, J.

Lafleur in reply, on broad grounds, namely, the right of the Province of British Columbia to import spirits from Great Britain and to become practically the sole vendors of the spirits in the Province of British Columbia.

The legislation of the Legislative Assembly of British Columbia is contained in the statute of 1921, ch. 30. This legislation has been held to be *intra vires* by the Board of the Privy Council in the case of the *Canadian Pacific Wine Co.* v. *Tuley*, 60 D.L.R. 520, [1921] 2 A.C. 417. It also had been held to be within the powers of the legislature by Clement, J., in the case of *Little* v. *Att'y-Gen'l of British Columbia* (1921), 60 D.L.R. 355. These cases set out the provisions of the statute of British Columbia which, as I have stated, practically give to the Province the sole right to import for sale, and to sell spirits, etc., within the Province of British Columbia.

As I have mentioned, the case was argued before me on broad lines. On reading over the statement of claim, the allegation is that James Patterson, the duly appointed Purchasing Agent under the Government Liquor Act, acting in pursuance of the provisions of the said Act, and in the name and on behalf of His Majesty the King in the right of the said Province, purchased in Great Britain one case of Johnnie Walker Black Label Whisky, which was shipped from Glasgow and consigned to the purchaser His Majesty King George V in the right of the Province of British Columbia, etc.

While, as I have stated, the broad question as to the right of the Province to import for the purposes of sale, as provided by the statute, is intended for the consideration of the Court, it is open to the contention that the pleadings only deal with one case of whisky imported for governmental purposes. I, therefore, directed a notice to be served on counsel for both parties suggesting that either the pleadings should be amended so as to cover the broader question, namely, whether British Columbia importing wholesale for the purpose of becoming the sole vendors as provided by the statute, could so enter into the trade and procure the whisky from Great Britain free of Customs dues as contended by the Province.

Pursuant to my suggestion, the following admission of facts has been filed, signed by counsel for the Attorney-General of British Columbia:—

"It is hereby admitted, for all purposes of this action, that the case of Johnnie Walker 'Black Label' Whisky, which was purchased and consigned to His Majesty King George V in the right of the Province of British Columbia, care of Liquor Control Board, Victoria, B.C., as alleged in par. 1 of the Statement of

Claim filed herein, was so purchased and consigned to meet the requirements of the Government liquor stores established in British Columbia under the Government Liquor Act, ch. 30, of the Statutes of British Columbia, 1921, and for the purpose of sale at said Government liquor stores pursuant to the provisions of the said Act."

The contention of counsel for British Columbia is that under sec. 125 of the B.N.A. Act of 1867, which reads: "No lands or property belonging to Canada or any Province shall be liable to taxation." Notwithstanding the fact that whisky and other liquors were imported by the Province not for their own governmental purposes, but for the purposes of trade, they are entitled to import without payment of the customs dues imposed by the Dominion. The question is one of very grave importance

If the decision is in favour of the Province, and any Province is to be at liberty to import any goods without payment of customs dues, then the Province can enter upon any trade of any description. They might import, for illustration, harvesting machinery from the United States, and escaping payment of customs dues, undersell Canadian manufacturers. The practical effect would be if the Province chose to avail themselves of this alleged right, that the revenues of the Dominion requisite for the purpose of carrying on the Government of the Dominion might be depleted to such an extent as to render it impossible for the Dominion to meet the heavy obligations cast upon them under the terms of the Confederation Act. It certainly is a startling proposition put forward for the first time since Confederation, 1867.

The distribution of legislative powers between the parliament of the Dominion and Provincial legislatures, are set out in secs. 91 and 92 of the B.N.A. Act, 1867. By sub-sec. 2 of sec. 91, of the Dominion is assigned exclusively: The Regulation of Trade and Commerce; and by sub-sec. 3: "The raising of Money by any Mode or System of Taxation."

To the Provincial Legislatures, by sec. 92, sub-sec. 2, "Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes."

Section 118 provides for large sums to be paid yearly by Canada to the several Provinces for the support of their governments and legislatures, and it is unnecessary to repeat that the Dominion have to raise very large sums of money.

The secs. 122, 123 and 124 of the B.N.A. Act of 1867, are important, more particularly sec. 124, which provides that: "Nothing in this Act shall affect the right of New Brunswick to levy the lumber, dues, etc."

Can.

E.C.

ATT'Y-GEN'L OF BRITISH COLUMBIA v. ATT'Y-GEN'L OF DOMINION OF CANADA.

Cassels, J.

Section 146 of the B.N.A. Act provides for the admission of other Colonies, and amongst those named is the Province of British Columbia.

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies . . . (including British Columbia) to admit those Colonies or Provinces, or any of them, into the Union, ... on such Terms and Conditions in each Case as are in the Addresses expressed, and as the Queen thinks fit to approve . . . ."

On May 16, 1871, an Order of Her Majesty in Council admitting British Columbia into the Union was passed:

"And from and after the 20th July, 1871, the said Colony of British Columbia shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore recited Addresses."

Referring to the Address of British Columbia, sec. 7 provides:—

"It is agreed that the existing customs tariff and excise duties shall continue in force in British Columbia until the railway from the Pacific Coast and the system of railways in Canada are connected, unless the Legislature of British Columbia should sooner decide to accept the tariff and excise laws of Canada. When customs and excise duties are, at the time of the union of British Columbia with Canada, leviable on any goods, wares or merchandizes in British Columbia, or in the other Provinces of the Dominion, those goods, wares and merchandizes may, from and after the Union, be imported into British Columbia from the Provinces now composing the Dominion, or into either of those Provinces from British Columbia, on proof of payment of the Customs or Excise duties leviable thereon in the Province of exportation, and on payment of such further amount (if any) of Customs or Excise duties as are leviable thereon in the Province of importation. This arrangement to have no force or effect after the assimilation of the Tariff and Excise duties of British Columbia with those of the Dominion."

Sub-section 3 of sec. 2 of the Customs Act, R.S.C. 1906, ch. 48, as enacted by ch. 15, sec. 1, of the Statutes of Canada, 1917, reads as follows:—

"The rates and duties of customs imposed by this Act, or the customs tariff or any other law relating to the customs, as well as the rates and duties of customs heretofore imposed by any customs Act or customs tariff or any law relating to the customs enacted and in force at any time since the first day of

July, one thousand eight hundred and sixty-seven, shall be binding, and are declared and shall be deemed to have been always binding upon and payable by His Majesty, in respect of any goods which may be hereafter or have been heretofore imported by or for His Majesty, whether in the right of His Majesty's Government of Canada or His Majesty's Government of any province of Canada, and whether or not the goods so imported belonged at the time of importation to His Majesty; and any and all such Acts as aforesaid shall be construed and interpreted as if the rates and duties of customs aforesaid were and are by express words charged upon and made payable by His Majesty:

Provided, however, that nothing herein contained is intended to impose or to declare the imposition of any tax upon, or to make or to declare liable to taxation, any property belonging to His Majesty either in the right of Canada or of a province."

While it may be true that customs duties may be described as taxes in a broad sense, I do not think that at the time of Confederation it was ever considered or intended under the words contained in sec. 125, "No lands or property belonging to Canada or any Province shall be liable to taxation," that a Province should be at liberty to procure spirits, etc., for the purpose of sale without payment of the customs dues.

Elmes, on the Law of Customs, at p. 4, states as follows:— "There is a distinction to be observed between taxes and duties although both taxes and duties as commonly understood are embraced in the generic term taxes."

In *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, at 583, 56 L.J. (P.C.) 87, Lord Hobhouse, pronouncing the judgment of the Board of the Privy Council, in discussing the frame of the Quebec Act, uses the following language, referring to the tax imposed in the case before the Board:—

"It is not like a customs' duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded."

There are very strong cases in the Supreme Court of the United States, and also in the Commonwealth of Australia, cited by counsel on the argument before me. In the case of *Brown* v.

Can.
E.C.
ATT'Y-GEN'L OF BRITISH COLUMBIA v. ATT'Y-GEN'L OF DOMINION OF CANADA.
Cassels, J.

State of Maryland (1827), 12 Wheaton 419, Marshall, C.J., at p. 437, uses the following language:—

"An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed."

In *United States* v. *Perkins* (1896), 163 U.S. 625, Brown, J., was dealing with a case in which the facts were that one Merriam had devised and bequeathed all his estate, both real and personal, to the United States Government, and the question was whether personal property bequeathed by will to the United States was subject to an inheritance tax. On pp. 628, 629, he quotes from the Court of Appeals in Maryland the following language:—

"Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing, property................to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are, consequently, wholly within the discretion of the General Assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent. into the treasury of the State. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

And at p. 630:—

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

South Carolina v. *United States* (1905), 199 U.S. 437. In the head note, at p. 438 of this case, it is stated as follows:—

"A State may control the sale of liquor by the dispensary system adopted in South Carolina, but when it does so it engages in ordinary private business which is not, by the mere fact that it is being conducted by a State, exempted from the operation of the taxing power of the National Government."

While it may be that the decisions of the Supreme Court of the United States are not binding upon this Court, they are entitled to very great weight, and Brewer, J., who delivered the judgment in this case (*South Carolina* v. *United States*) had a high reputation as a Judge. On pages 454, 455, he states as follows:—

"The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co.*, No. 1, 170 U.S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable, other States may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. There is a large and growing movement in the country in favour of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State, by taking into possession these public utilities, lose its republican form of government? We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty

Can.

E.C.

ATT'Y-GEN'L OF BRITISH COLUMBIA v. ATT'Y-GEN'L OF DOMINION OF CANADA.

Cassels, J.

it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues, in other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Marshall, C.J., in *M'Culloch* v. *Maryland*, 4 Wheaton, p. 431, for a complete answer."

I quote this language as I think it is pregnant with common sense, and very applicable to the present case.

At p. 457, he uses the following language, quoting Nott, C.J.: "Moreover, at the time of the adoption of the Constitution, there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plant of a body politic to take up the work of the individual or body corporate. .... Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power could have been placed among Madison's Amendments."

Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government, meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it."

At p. 461 Brewer, J., uses the following language:—

"These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

At p. 463 he again states:—

"It is reasonable to hold that while the former may do noth-

ing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the Nation."

The Board of the Privy Council have used very similar language in two cases, *Farnell* v. *Bowman* (1887), 12 App. Cas. 643, 56 L.J. (P.C.) 72, and *Att'y-Gen'l of the Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192, in which the Board indicate their views, *viz.*, that if a State chooses to embark upon private business in competition with other traders, they should be liable just as other persons engaging in trade.

The case of *Att'y-Gen'l of New South Wales* v. *Collector of Customs* (1908), 5 Com. L.R. 818, and the case of *The King* v. *Sutton* (1908), 5 Com. L.R. 789, deserve very close consideration. They are powerful pronouncements by able Judges. I agree with the Attorney-General for British Columbia in his statement before me as to the difference between taxation and a tax. As the Attorney-General states, 'I am not relying very strongly upon that phase of the argument.' He thinks the distinction is rather subtle and thin, so do I.

After very carefully considering all the cases referred to by counsel, and a good many others, I have formed the opinion that if the Province of British Columbia import goods for the purpose of carrying on a business or trade, they must pay the customs dues charged by the Dominion for the privilege of importing such goods. I think it would startle anyone who has any knowledge of the manner in which business has been carried on in the Dominion and the Provinces for the last 50 odd years, if such a claim as that put forward could be sustained.

The Attorney-General suggested that the customs dues might still be imposed on the purchasers from the government of British Columbia. I fail to see how that is feasible. If the goods are admitted duty free, they are duty free in the hands of the purchaser from the importer. It would practically be impossible to collect customs dues from each individual purchaser of a bottle of whisky.

Another question strongly pressed upon me by Mr. Newcombe was that under the rule applied of *ejusdem generis*, the word property in sec. 125 of the B.N.A. Act should be limited to property of a kind similar to lands. I was referred by Mr. Newcombe to the cases set out in Maxwell on the Interpretation of Statutes, 6th ed., p. 574. There are a large number of cases cited, some of which come very near supporting his contention. The words of sec. 125 are, "Lands or Property." The word "lands" embrace the whole genus, and the word "property" has a much more extensive meaning than the word "lands."

Can.

Ex. C.

ATT'Y-GEN'L OF BRITISH COLUMBIA v. ATT'Y-GEN'L OF DOMINION OF CANADA.

Cassels, J.

The case of the *Sun Fire Office* v. *Hart* (1889), 14 App. Cas. 98, 58 L.J. (P.C.) 69, 37 W.R. 561, was an appeal from the Court of Appeal for the Windward Islands. The condition in the policy of insurance was that it should not apply to any portion of the subject of insurance which should, by reason of some act done after its date without the consent of the insurers, be exposed to increased risk of fire, or removed to a building or place other than that described in the policy; second, that the insurers might terminate it by notice if "by reason of such change, or from any other cause whatever," they should desire to do so. Lord Watson, who delivered the judgment of the Board, used the following language, at pp. 103, 104:—

It is a well-known canon of construction, that where a particular enumeration is followed by such words as "or other," the latter expression ought, if not enlarged by the context, to be limited to matters ejusdem generis with those specially enumerated. The canon is attended with no difficulty, except in its application. Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter, and context of the clause under construction. In the present case it appears to their Lordships to be no room for its application. The theory which the ruling of the presiding Judge and its affirmance by the majority of the Court of Appeal, proceeds, appears to be this, that the words "by reason of such change" are equivalent to an enumeration of certain particular changes or causes specified in the preceding condition; and that the following words, "or from any cause whatever," must be confined to causes ejusdem generis with these. The antecedent context does not contain a mere specification of particulars, but the description of a complete genus, if not of two genera. The first of these is any and every act done to the insured property whereby the risk of fire is increased."

The judgment of the Court below was reversed.

In Beal on Legal Interpretation, 2nd ed., pp. 311 and 312, it is stated, if the particular words exhaust the whole genus, the general words must refer to some larger genus.

It was also argued before me by Mr. Newcombe that if the Province of Alberta owned lands, say situate in the Province of Saskatchewan, the Province of Saskatchewan would have the right to tax these lands. It is not necessary to determine this point, and I prefer not to pass any opinion upon it until the case arises.

I think, under the circumstances of this case, it being a test case, there should be no costs to either party.

Judgment accordingly.

NESBITT v. McCARTNEY.

Alta.

App. Div.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 17, 1922.

SPECIFIC PERFORMANCE (§ID—26)—SALE—CORPORATE SHARES—OFFER—ACCEPTANCE—REASONABLE TIME—LACHES ON PART OF PURCHASER'S NOMINEE IN COMPLETING—REPUDIATION BY PURCHASER.

Where an offer to purchase shares in an incorporated company has been made and the person making the offer has stipulated the manner in which the transaction is to be completed in the event of its being accepted, and the offer is accepted within a reasonable time, the purchaser cannot repudiate the transaction on account of laches on the part of his nominee in completing the transaction. What is a reasonable time for the acceptance of the offer depends on the nature of the particular offer and the circumstances of the case.

[*Boyle's* case (1885), 54 L.J. (Ch.) 550, referred to. See Annotation on Company Law, 63 D.L.R. 1.]

APPEAL from the judgment of Harvey, C.J., dismissing an action for specific performance of an agreement for the purchase of capital stock in an incorporated company. Reversed.

G. F. H. Long, for appellant.

C. S. Blanchard, for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—This is an appeal from the judgment of Harvey, C.J., dismissing the plaintiff's action for specific performance of an alleged agreement for the purchase by the defendant from the plaintiff of ten shares of the capital stock of Medicine Hat Pump and Brass Manufacturing Co., Ltd., on the ground that the defendant's offer to purchase the shares was not accepted within a reasonable time. No time was mentioned within which the offer should be accepted. I think the law is well settled that in such a case the offer expires at the end of a reasonable time. What is a reasonable time depends largely on the nature of the particular offer and the circumstances of the case. It is necessary that the acceptance of the offer be communicated within such reasonable time.

The head office of the company is at Medicine Hat. The plaintiff, who is a farmer, resided at Whitla during the early part of the negotiations and later at Coaldale, both places being at a considerable distance from Medicine Hat. The defendant, who appears to have been substantially interested in the company, resides at Cedar Rapids, Iowa, and his son Roy is the manager of the company and resides at Medicine Hat.

The negotiations commenced in the fall of 1920, when both parties were at Medicine Hat attending a shareholders' meeting of the company. The plaintiff, at the request of the defendant, accepted the position of director of the company upon the de-

Alta.
App. Div.
NESBITT v. McCARTNEY.
Clarke, J.A.

fendant's promise to take care of a certain number of his shares which he desired to sell. Whereupon the plaintiff signed a transfer in blank and left his share certificate at the office of the company, but no terms of sale were agreed upon at that time.

Shortly after the shareholders' meeting, the plaintiff wrote to the defendant, and receiving no reply, wrote him again on December 13, 1920, urging him to arrange for the shares by the 24th of that month, as the plaintiff owed a note to the bank, maturing on that date.

The defendant does not appear to have replied to either letter direct, but on December 28, 1920, he wrote to his son as follows:

"I wrote you yesterday that I would write you to-day, but it has got so late in the day I will put it off until to-morrow morning. However, I want to say this, that if Nesbitt wants Canadian money at par in Canada, that is what he paid for his stock, I will send him a draft for it.

Now, the draft I send him will pay $1,000 at the bank. Now this $1,100 certificate he has, have Percy make out two new certificates, one for $1,000 payable to me, and the other for $100 payable to him, so that he will be in the clear as an officer of the Medicine Hat Pump & Brass Manufacturing Co. I want him to own that $100 unencumbered.

Make out both certificates and have Bennet sign them as president and forward them here and Geo. E. McDonald will sign them as secretary, and I will return him the $100 certificate as made out to him with a draft to cover the $1,000 one.

The reason I am writing you to-day is so as to get this Nesbitt matter cleaned up.

Now if he doesn't want par, the same as he paid for his stock, advise me by return mail and then I will write you the other letter."

The son did not communicate this offer to the plaintiff. He says he held it in abeyance until such time as Mr. Nesbitt should accept the offer. He did not know whether or not a copy of it had been sent to Nesbitt.

The plaintiff being unaware of the offer made in the letter to the son, and having received no reply to his letters to the defendant, wrote to McDonald, the secretary of the company, who procured from the defendant a copy of the letter of December 28 and sent it direct to the plaintiff. The evidence as to the date of the receipt of this letter by the plaintiff is not very clear, but I judge it was about the last of January, a month later than the date of the letter to the son. The defendant evidently considered this letter contained an offer to the plaintiff, for in his letter of June 6, 1921, to Mr. Bell, the plaintiff's solicitor, he

says:—"Now I offered to take this stock at par, Canadian funds, —along the first of the year or the latter part of last year," and his delivery of the copy of the letter to McDonald to be sent to the plaintiff a month after he considered the offer was made, is pretty strong evidence that he did not consider time as important. On February 7, shortly after receiving the letter from McDonald, the plaintiff went to the company's office, and the son being absent, he left the letter and the share certificate, which was taken from the safe, with the bookkeeper, Percy Ortner, referred to in the letter of December 28. He states that he had accepted the agreement and left the letter with Ortner to have the agreement carried out. The son, on his return, found these papers on his desk with a memo. from Ortner that plaintiff had called in regard to them, but he says he did not consider that was an acceptance and wanted something in writing. He did not communicate with the plaintiff, who, after waiting till March 1, telephoned to the son and asked him to rush the matter through. He says the son replied that he would, but the son says that he told the plaintiff he had no authority to transfer the shares for the reason that so long a time had elapsed, and that he would take the shares with him to Cedar Rapids, as he was making a trip in April. The plaintiff, however, on the same day wrote to the defendant direct as follows:—

"I have just been talking to Roy over the phone to-day and find out these shares have not been forwarded to you yet. This was a surprise to me as I had left word after receiving copies of your instructions and proposals *re* the matter.

Roy informed me to-day he would attend to the matter at once. I am writing this to let you know I had accepted your offer, and also that I appreciated it very much, as I am aware that times are not very happy for investments. I will be glad when this is cleared up, as I am sure needing the money."

The defendant did not reply to this letter.

After two later letters to the son, the latter finally replied, returning the share certificate and stating that McDonald, the secretary, was the proper man to transact the business. The plaintiff afterwards took the certificate back and left it at the office of the company and then consulted his solicitor, Mr. Bell, who wrote to the defendant and received a reply dated June 6, in which he says:—

"I gave him instructions to have the stock sent here and I would send New York for it, but they delayed getting the stock properly signed for over two, three or four months, and I decided that I could not use it. Now I haven't any money at the present time. I have invested what surplus money I had in

Alta.
App. Div.
NESBITT v. MCCARTNEY.
Clarke, J.A.

interests here in the States. . . . ."

There is no objection that the acceptance was late, but that there was delay in forwarding the stock; and in a later letter to the plaintiff, June 27, the defendant says:—"Now of course, you know the old saying, 'What is everybody's business is nobody's business.' I would have taken over your stock that time up until April 1 . . . ."

It is quite apparent that at this time the defendant's complaint was in reference to the forwarding of the papers rather than the date of acceptance of his offer. I think that there was at latest an unqualified acceptance on March 1 which, under the circumstances, was within a reasonable time after the offer; also, that if the acceptance could have been objected to as too late, whether or not the defendant was bound in law to have made the objection upon the receipt of the plaintiff's letter of March 1, yet his silence affords pretty strong evidence that he did not consider the acceptance to be too late. In *Boyle's* case (1885), 54 L.J. Ch. 550, at p. 553, 33 W.R. 450, Kay, J., discussing this question, says:—

"A man makes an application for shares. He never withdraws that application. After a considerable delay the allotment is made. He has a perfect right to say 'Your delay has been so long that I will not have the shares.' But if he does not say that, if he says nothing, is there no contract? No case has held that. If he lies by and says nothing, of course that leaves him at liberty to accept the allotment if the company prospers, and to repudiate if it turns out unsuccessful. He cannot do that. He must do the one thing or the other. His non-withdrawal of his application leaves him under the necessity of saying 'I will not accept the shares.' Otherwise, if he says nothing, his conduct may amount to condonation of the delay which has taken place."

I do not think the plaintiff is responsible for the delay in completing the transfer by registration, and the issue of new certificates. The usual rule in cases of shares listed on the Stock Exchange seems to be that the duty is upon the transferee to procure the registration. It does not appear that the shares in question were listed, but the defendant, by his offer of December 28, directed how the transfer should be effected. All the plaintiff was to do was to sign the transfer and deliver the certificate to the son, which he did. I do not think he can be held answerable for the laches of the son, who was the nominee of the defendant.

Much stress was laid by the defendant, through his counsel, upon the fact that the fluctuation in exchange between Canada

and the United States rendered time an essential element in the transaction, but it does not appear that the defendant so considered it. If he did, I think he would have so stated. It appears from the evidence of Mr. Elliott that on January 2, 1921, a few days after the offer was first made, the rate was 15-5/8% to 17-3/8%, and had dropped to 11-1/4% on January 27, which was about the date the offer was renewed, and this was the lowest point between December, 1920, and March 7, 1921. It is fair to assume that if the defendant regarded the exchange as material he would have withdrawn his offer instead of repeating it when exchange was at its lowest point.

There is no suggestion that there was any fluctuation in the price of the shares so as to render time material or that they were on the market at all.

I think the appeal should be allowed with costs, the judgment below set aside and judgment entered for the plaintiff adjudging that the agreement be specifically performed and that all parties, including the plaintiff, do concur in all steps that may be necessary and proper for causing the said 10 shares to be duly registered in the name of the defendant in the register of the company, and that the defendant pay to the plaintiff $1,000 with interest from April 1, 1921, at 5% per annum, with liberty to apply to a Judge of the Supreme Court if any difficulty arises in connection with the transfer and registration. The defendant should pay the costs of the action.

Appeal allowed.

PACHAL v. MARKHAM and MYERS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 6, 1922.

EXEMPTIONS (§IIA—12B)—HOMESTEAD—PURCHASE OF—INITIAL PAYMENT MADE BY WIFE—OTHER PAYMENTS MADE BY HUSBAND—TITLE TO PROPERTY PUT IN WIFE'S NAME—INSOLVENCY OF HUSBAND—EXECUTION AGAINST—RIGHT OF CREDITORS AGAINST HOMESTEAD—R.S.S. 1909 CH. 142, SEC. 37—LAND TITLES ACT R.S.S. 1920, CH. 67, SEC. 150 (2)—CONSTRUCTION.

While the amendment to the Land Titles Act R.S.S. 1920, ch. 67, sec. 150 (2), has the effect of invalidating a conveyance of a homestead made without consideration by a husband who is an execution debtor, to his wife since May 1st, 1918, it cannot be applied retrospectively so as to effect transactions which were legitimate and valid at the time they were made, and prior to the coming into force of this section a debtor was entitled to dispose of his exempt property as he thought fit because an execution did not attach to such property.

APPEAL by defendants from the trial judgment in an action brought to set aside a transaction by which the title to certain

Sask.
C.A.
PACHAI
v.
MARKHAM
AND
MYERS.
Haultain, C.J.S.

property was put in the wife's name, as being a fraud on her husband's creditors. Reversed.

P. H. Gordon, for appellant.
No one *contra*.

HAULTAIN, C.J.S.:—By a written agreement, dated February 29, 1916, one Seth Myers agreed to sell, and the appellant, Mrs. Laura Ann Markham, agreed to buy lot 15 in block 3 in the townsite of Theodore for the price of $1,250. Of this amount, $600 was paid by Mrs. Markham, and the balance by her husband, the appellant, Claude L. Markham. The whole of the purchase money was finally paid up in April, 1917, and title to the lot was issued to Mrs. Markham on April 10, 1917.

Since its purchase in 1916, the lot in question has been the homestead of the appellants within the meaning of the Homestead Act, and, as found by the trial Judge, it is worth less than $3,000. The respondent having obtained judgment against the appellant, Claude Markham, in September, 1919, in a certain action brought by him, issued execution in January, 1920, for $7,363.75.

The statement of facts agreed upon by counsel bears out the finding of the trial Judge that Markham was, at all times material to this action, in insolvent circumstances and unable to pay his debts in full. The present action was brought to set aside the transaction by which title to the property in question was put in Mrs. Markham's name as being a fraud on her husband's creditors.

The trial Judge found in favour of the plaintiff in the following terms:—

"There will be judgment for the plaintiff declaring that the transfer of the said land and the certificate of title issued to the defendant Laura Ann Markham are void as against the plaintiff and other creditors of the defendant, Claude L. Markham, and that the defendant, Laura Ann Markham, holds the said land in trust for the defendant Claude L. Markhom, and that the plaintiff's execution issued against the defendant Claude L. Markham is a lien against the said land subject to the lien of the defendant Laura Ann Markham for $600. The plaintiff will be entitled to his costs against the defendants the Markhams."

The transaction in question was completed in April, 1917. At that time and subsequently up to May 1, 1918, the property, being the homestead of the appellants, would not have been affected by any execution. Even if the title to the property had been in Claude Markham's name, he could have transferred it to his wife free from any execution against him filed in the Land

Sask.

C.A.

PACHAL
v.
MARKHAM
AND
MYERS.

Lamont, J.A.

Titles Office. *Fredericks* v. *North-West Thresher Co.* (1910), 3 S.L.R. 280; (1911), 44 Can. S.C.R. 318.

As the property was free from seizure under execution, the transfer by Markham to his wife, though voluntary and without consideration, could not have been set aside, as being in fraud of his creditors. *Sims* v. *Thomas* (1840), 12 Ad. & E. 536, 113 E.R. 916, 9 L.J. (Q.B.) 399; *Meunier* v. *Doray* (1905), 2 W.L.R. 231; *Bank of Upper Canada* v. *Shickluna* (1863), 10 Gr. 157.

These cases decide that the Statute of Elizabeth (13 Eliz., ch. 5), which is practically re-enacted by R.S.S. 1909, ch. 142, sec. 37 (now R.S.S. 1920, ch. 204, sec. 1) does not extend to property which, at the time of the alleged fraudulent conveyance, was not subject to the payment of debts or liable to be taken in execution.

The transaction in question was, therefore, unimpeachable under the law as it stood up to May 1, 1918. On that day the Land Titles Act, 1917, ch. 18, came into force. That Act altered the law with regard to executions against land and provided that, after the receipt of the copy of the writ by the registrar, the writ should bind and form a lien and charge on all the lands of the debtor, including lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution, with the proviso that nothing therein contained should be taken to authorise the sheriff to sell any lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution. (Sec. 149 (2)).

If the transaction in question had been carried out after the statute of 1917 came into force, there can be no doubt that the respondent would have been entitled to the judgment appealed from. *Advance Rumely Thresher Co.* v. *Bolley* (1920), 55 D.L.R. 308, 13 S.L.R. 447. But it was completed under an earlier and different state of the law and was absolutely valid and unimpeachable under that law, and cannot be affected retrospectively by later legislation. *Sims* v. *Thomas* and *Bank of U.C.* v. *Shickluna, supra.*

The appeal should therefore, in my opinion, be allowed with costs, the judgment below set aside, and judgment entered for the defendants, dismissing the action with costs.

LAMONT, J.A.:—In this case the parties have agreed as to the facts. These are briefly as follows:—In 1913 the defendant, Claude Markham, purchased a hotel in Theodore which was subject to a mortgage. In March, 1916, the hotel was burned down, and certain insurance monies were received by the plaintiff and applied on the mortgage. These monies were not sufficient to satisfy the mortgage, and, the balance not being paid, the

Sask.
C.A.
PACHAI v. MARKHAM AND MYERS.
Lamont, J.A.

plaintiff brought action and obtained a judgment against Claude Markham, and in January, 1920, issued execution thereon for $7,363.75. Prior to this, namely, on February 29, 1916, lot 15 in block 3, Theodore, had been purchased in the name of Laura Ann Markham for $1,250, under an agreement of sale, and she had paid out of her own money the first instalment of $600 thereon. Subsequently, Claude Markham paid balance of the purchase price, and on April 10, 1917, title to the said lot was obtained in the name of Laura Ann Markham. A house was evidently built on the lot, for it is admitted that the said lot has been the homestead of the Markhams since 1916, and that they still occupy it. Not being able to realise upon his execution, the plaintiff in March, 1921, brought action against Markham and his wife, to have her title to the said lot declared null and void against the plaintiff and all other creditors of Claude Markham, and for a declaration that the lot was the property of Claude Markham and that the plaintiff's execution attached thereto. The trial Judge found that the property in question was the home of the Markhams, that it was exempt from seizure to the extent of $3,000, and that the value thereof was less than $3,000. He, however, found that Claude Markham was the real purchaser and that his wife had contributed $600 to the purchase price, and he held that the transfer and certificate of title in the name of Laura Ann Markham was void as against the plaintiff and other creditors of Claude Markham, and declared that the wife held the property in trust for her husband subject to a lien thereon in favour of herself for $600.

The defendants now appeal, and in their notice of appeal, among other grounds, they set up: (1) That the trial Judge erred in finding that Claude Markham was the real purchaser of the lot; and (2) That he should have found that the lot in question, being the homestead of the Markhams and occupied by them, was exempted from the operation of the execution.

In dealing with the first of these grounds, we are confronted with the difficulty that we have not the evidence before us and, therefore, cannot pass upon it. If, however, nothing more appeared in the evidence than is set out in the statement of facts agreed to, namely, that the agreement for the lots was taken in the name of Mrs. Markham, that she made the first payment of $600 out of her own money, and that her husband paid the balance, the presumption, in my opinion, would be that the lot was the property of the wife.

In *Scheuerman* v. *Scheuerman* (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625, Idington, J., said:—

"The lands I will assume, as the trial Judge has found as a

fact, were bought with respondent's money, but the conveyance taken to the appellant when his wife.

Under such a naked state of facts the presumption of law would be that she received same by way of advancement. In short she, in law, thereby became the owner unless proven by other facts she was a trustee."

In order to determine whether or not the property in question was exigible under the plaintiff's execution, it is necessary to consider the following statutory provisions: (1) The Exemptions Act, R.S.S. 1920, ch. 51, which provides as follows:—

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

10. The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of there thousand dollars."

(2) The Land Titles Act, R.S.S. 1909, ch. 41, sec. 118, as amended by sec. 17 of ch. 16 of the statutes of 1912-13, which set out the effect of the writ of execution as follows:—

"17.—(2) Such writ shall bind and form a lien and charge on all the lands of the execution debtor situate within the judicial district of the sheriff who delivers or transmits such copy as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal from and only from the time of the receipt of a certified copy of the said writ by the registrar for the registration district in which such land is situated."

This provision was repealed by the Land Titles Act, 1917, ch. 18, which came into force on May 1, 1918, and the following substituted therefor:—

"149.—(2) Such writ shall from and only from the receipt of a certified copy thereof by the registrar for the land registration district in which the land affected thereby is situated bind and form a lien and charge on all the lands of which the debtor may be or become registered owner situate within the judicial district, the sheriff of which transmits such copy, including lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution, but subject, nevertheless, to such equities, charges or incumbrances as exist against the execution debtor in such land at the time of such receipt.

Provided that nothing herein contained shall be taken to authorise the sheriff to sell any lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution."

Prior to the amendment of the Land Titles Act in 1912-13,

Sask.

C.A.

PACHAL
v.
MARKHAM
AND
MYERS.

Lamont, J.A.

it had been established by the Supreme Court of Canada in *North-West Thresher Co.* v. *Fredericks* (1911), 44 Can. S.C.R. 318, that an execution did not attach to property exempt from seizure under the Exemptions Act, and that the debtor was entitled to dispose of such property as he saw fit. The effect of the amendment of 1912-13 came before the Court *en banc* for judicial determination in two cases: *Union Bank* v. *Lumsden Milling Co.* (1915), 23 D.L.R. 460, 8 S.L.R. 263, and *Foss* v. *Sterling Loan* (1915), 21 D.L.R. 755; 23 D.L.R. 540, 8 S.L.R. 289, and it was held that the amendment did not have the effect of rendering exempt properties liable to seizure, but that an execution in respect of the property to which it did attach constituted a lien or charge upon the land to the same extent as if the debtor had charged it under his hand and seal. That amendment, therefore, did not make any change in the law as laid down in *North-West Thresher Co.* v. *Fredericks, supra,* in respect of the right of an execution debtor to dispose of this exempt property.

Section 149, sub-sec. (2) of the Land Titles Act, which came into force on May 1, 1918, did alter the law, by providing that an execution should form a lien and charge on all lands of which the debtor may be or become registered owner, including lands declared by the Exemptions Act to be free from seizure.

Prior to the coming into force of that section, a debtor, as I have already pointed out, was entitled to dispose of his exempt property as he thought fit, because an execution did not attach to such property. Therefore, even if we assume that the defendant Claude Markham was the real purchaser of lot 16, and that he purchased the lot in his wife's name, and even if he had paid for it entirely himself, he was, up to May 1, 1918, entitled to transfer it to his wife and she could take it freed from any execution existing against him. As his wife became the registered owner prior to that date, the execution, in my opinion, never attached to the lot, for when Mrs. Markham became the registered owner it could not have been made available for the creditors of Claude Markham even if it had been standing in his name. Had the transfer been made after the coming into force of sec. 149 (2), a different result would follow, for since that enactment was passed, although the home of the debtor and his family cannot be sold to satisfy an execution against the debtor, it is available as a security therefor. *Advance Rumely Thresher Co.* v. *Bolley* (1920), 55 D.L.R. 308.

The appeal, in my opinion, should be allowed with costs, the judgment below set aside, and judgment entered for the defendants, with costs.

TURGEON, J.A.:—The facts in this case are admitted by counsel. During and for some time prior to the year 1916, Claude Markham, the defendant husband, was indebted to the plaintiff as mortgagor of a certain piece of property. On February 29, 1916, Laura Ann Markham, the defendant's wife, entered into an agreement for sale with the defendant Myers for the purchase from Myers of lot 15 in block 15 in the townsite of Theodore, the purchase price being $1,250. At this time, Claude Markham was possessed only of a small sum of money and no other assets, and was unable to pay his mortgage debt to the plaintiff. Laura Ann Markham paid to Myers $600 of her own money on account of the purchase price of lot 15, and the balance was paid by Claude Markham. Title was acquired by Laura Ann Markham on April 10, 1917. In May, 1919, the plaintiff sued Claude Markham under his mortgage, and on September 12, 1919, he obtained judgment against him for $8,430.72. The mortgaged property was sold under this judgment and the proceeds credited to Markham. Execution was issued against him for the balance ($7,363.75) and registered in the Land Titles Office in January, 1920.

From the time lot 15 was purchased in 1916 down to the present, it has been the homestead of the Markhams within the meaning of the Exemptions Act (ch. 51, R.S.S. 1920).

The trial Judge held that, under these circumstances, the transaction whereby Laura Ann Markham became the owner of the land was fraudulent on the part of the Markhams as against the creditors of Claude Markham. He declared the said lot 15 to be held by Laura Ann Markham in trust for her husband, and that the plaintiff's execution formed a lien against the land in favour of the plaintiff, subject to the wife's lien for the $600, paid by her on account of the purchase price.

With all deference, I am of opinion that the trial Judge is in error, and that his judgment must be reversed.

At the time (April, 1917) the title of this homestead was acquired by Laura Ann Markham, partly by means of her husband's money, land covered by the Exemptions Act was totally free from the operation of writs of execution, and could not be the subject of a fraudulent assignment within the meaning of the Act respecting Fraudulent Transfers (ch. 204, R.S.S. 1920). (*North-West Thresher Co.* v. *Fredericks* (1911), 44 Can. S.C.R. 318; *Advance Rumely Thresher Co.* v. *Bolley* (1920), 55 D.L.R. 308; *Sims* v. *Thomas*, 9 L.J. (Q.B.) 399).

By an amendment to the Land Titles Act, which became effective on May 1, 1918, the law respecting executions was

Que.

C.S.P.

changed. The amended section is as follows (see R.S.S. 1920, ch. 67):—

"150.—(2) Such writ shall from and only from the receipt of a certified copy thereof by the registrar for the land registration district in which the land affected thereby is situated, bind and form a lien and charge on all the lands of which the debtor may be or become registered owner situate within the judicial district, the sheriff of which transmits such copy, including lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution, but subject, nevertheless, to such equities, charges or incumbrances as exist against the execution debtor in such land at the time of such receipt.

Provided that nothing herein contained shall be taken to authorise the sheriff to sell any lands declared by the Exemptions Act to be free from seizure by virtue of writs of execution."

Since the date of this new provision in the Land Titles Act, a transfer of his homestead by a husband to his wife, without consideration, is void as against the husband's creditors, for the reasons given in *Advance Rumely Thresher Co.* v. *Bolley*, *supra*.

But while the amendment in question has the effect of invalidating a conveyance of a homestead made without consideration by a husband, who is an execution debtor, to his wife since May 1, 1918, it cannot, in my opinion, be applied retrospectively so as to affect transactions which were legitimate and valid at the time they were made, as was the transaction in this case.

I would allow the appeal with costs. *Appeal allowed.*

JOBIN v. DROLET.

Quebec Court of Sessions of the Peace, Choquette, J. March 14, 1922.

OBSTRUCTING JUSTICE (§I—1)—MUNICIPAL ELECTION—AGENT OF CANDIDATE DETAINING VOTER—CANDIDATE OPENING DOOR AND TELLING VOTER TO GO—CRIMINAL CODE SEC. 169—CONSTRUCTION—PEACE OFFICER—MEANING OF.

An agent of one of the candidates at a municipal election is not a peace officer within the meaning of sec. 169 of the Criminal Code, and a candidate who upon being informed by such agent that a voter in a polling booth is his prisoner, opens the door of the booth and tells the voter to go, cannot be convicted of obstructing a peace officer in the execution of his duty.

PROSECUTION of accused under sec. 169 of the Criminal Code for obstructing a peace officer in the execution of his duty. Dismissed.

Paul Drouin, K.C., for plaintiff.

Hector Laferté, K.C., and *R. DeBlois*, for defendant.

CHOQUETTE, J.S.P.:—Defendant is accused under sec. 169, Cr. Code, of having wilfully obstructed a peace officer in the execution of his duty, defendant absolutely denying the accusation.

On February 20 last, during the polling hours for the municipal election in the city of Quebec, a woman, entering a poll for a ballot in the name of Mrs. Bourassa, was sworn and voted. The plaintiff, who was representing one of the candidates, told this woman that she had perjured herself, not being Mrs. Bourassa well known to him, and he asked that a policeman be sent for to arrest her, and that the door be locked.

The clerk of the poll went for a police officer, and returned after a short time, saying that one was coming.

Before this policeman arrived, the defendant Drolet, who was a candidate in the election, passing that poll, saw some electors there, and upon asking them if they had voted, they answered him that the door was locked. Immediately he knocked at the door, and the returning officer opened it; Drolet at once asked all those who were there: "What is going on here?" Jobin answered, and pointing to the woman said: "*she is my prisoner*, and I have sent for a policeman," or something like that; nothing was said by the returning officer or his clerk, and Drolet immediately opened the door and told the woman to go.

These facts were proven by the returning officer and his clerk, who did not know that woman, both swearing that when Drolet sent her out, the door was open, the returning officer adding that Drolet did not push him, the clerk saying the same thing, so did the defendant. But the returning officer added that when the woman was out, and Drolet left the door, he asked him if he had a right to do that. Drolet said: "Well, you will see," or words to same effect. A few days after, Drolet was summoned before this Court.

It is clearly proven by Drolet that he did not know the woman, did not speak to her, did not know that she was arrested, that he was informed by nobody that she was arrested except by Jobin, who told him that she was *his prisoner*. Moreover, the woman identified by Jobin swore: that she never went to the poll, did not know Jobin nor Drolet, and was never sworn. So Jobin is very strongly contradicted on every point.

Jobin swore that Drolet had roughly pushed away the returning officer who was at the door, and that the returning officer told him after Drolet had left that his arms were sore, and they would be black, because Drolet had squeezed his arms very roughly. Jobin is the only one to say that, and all the others

Que.
C.S.P.
JOBIN v. DROLET.
Choquette, J.

swore the very contrary, and especially the returning officer himself.

At the argument, the plaintiff's attorney said: that his case was proven, especially that Drolet was informed that the woman was arrested, and he had then to be convicted under sec. 169, Cr. Code.

The defendant's attorney naturally pleaded the very contrary, and relied upon the evidence to shew that Drolet being a candidate, acted in good faith according to sec. 105 of the Act of Incorporation of the city of Quebec in asking the woman to clear the poll, as the clause says: "that every voter must leave the polling booth immediately after having registered his vote." It is true that by art. 120 of the said charter, the president of the polling booth has the power to maintain order and preserve peace therein, and if an offence is committed under his eyes, or proven by the oath of a witness sworn by him, he can have the party arrested. But nothing of the kind was done; there was no arrest, and the charge must be dismissed.

Rendering his judgment, the Judge said that to declare a person guilty, under art 169 Cr. C., it must be proven that he has really resisted or wilfully obstructed an officer of the peace in the execution of his duty.

In this instance, if the woman had been detained by the returning officer himself, pending the arrival of a policeman, even if Drolet had been informed by the returning officer that she was going to be taken away by a policeman on account of her having illegally voted or perjured herself, and that after that, Drolet had told the woman to go out, he would condemn him; but it is not because an agent of an opposing candidate in the polling booth says that a party is his prisoner, no real information to Drolet that there was going to be one, without corroboration of any kind from the officer in authority and his evidence completely contradicted on all points by several witnesses, that it can be said that defendant had wilfully obstructed a peace officer; under the circumstances he did not hesitate to dismiss the case.

Action dismissed.

YOUNG v. NORTHERN LIFE ASSURANCE Co. OF CANADA.

British Columbia Supreme Court, Clement, J. March 16, 1922.

INSURANCE (§IIIF—146)—PROMISSORY NOTE GIVEN FOR PREMIUM DUE—NOTE PAID AFTER DEATH OF ASSURED—CLAUSE IN POLICY AS TO REINSTATEMENT—EVIDENCE OF INSURABILITY NECESSARY—RIGHT OF BENEFICIARY.

An insurance policy contained the following clause: "Reinstatement if within the first two years that this policy is in force, default be made in the payment of any premium due, or obligation given settlement therefor, then this policy shall *ipso facto* become void, but it may be reinstated within two years from the date of lapse upon the production of evidence of insurability satisfactory to the company and the payment of all overdue premiums and any other indebtedness to the company under the policy." Held that the giving of a note for the amount of premium due was an "obligation given in settlement" of the premium, but that payment of the note after the death of the assured of which the company had no notice, could not entitle the beneficiary to recover, it being impossible to produce evidence of insurability, a necessary condition to reinstatement, under the policy.

[*McGeachie* v. *North American Life Ins. Co.* (1893), 23 Can. S.C.R. 148, referred to.]

ACTION by a widow on a policy of insurance on the life of her husband. Action dismissed.

A. C. Brydone-Jack, for plaintiff.

F. G. Crisp, for defendant.

CLEMENT, J.:—The late F. C. Young was drowned on May 17, 1921, and his widow brings this action on a policy of insurance which her husband had taken out in February, 1919. The premium for the third year was payable on February 20, 1921, or in any case (allowing for the 30 days of grace) on or before March 22, 1921. For this premium, a note was given which fell due on May 13, 1921. This note was, in my opinion, an "obligation given in settlement" of the premium within the meaning of the condition hereinafter quoted; it was not paid at its maturity; but on May 19, 1921, the plaintiff paid the amount of the note to the defendant company's agent in Vancouver, who gave her the usual official receipt. The insured, as I have found, had died two days before, of which fact the defendant company's agent had no knowledge. The policy provides as follows:—

"9. *Reinstatement*—If, within the first three years that this policy is in force, default be made in the payment of any premium due, or obligation given in settlement thereof, then this policy shall, *ipso facto,* become void, but it may be reinstated within two years from the date of lapse, upon the production of evidence of insurability satisfactory to the company and the payment of all overdue premiums and any other indebtedness to

N.S.
S.C.

the company under the policy, together with compound interest at the rate of six per cent. per annum."

The situation, then, on May 19, 1921, was this, that the policy had become void, subject to possible re-instatement on proof of continued insurability. Such proof was, of course, out of the question. The official receipt given to the plaintiff on May 19, 1921, has printed on the back in red ink a copy of the condition I have above quoted, so that, in my opinion, no question of waiver can possibly arise, particularly as the agent in Vancouver sent to the plaintiff on the very same day a request for evidence of insurability, enclosing a form for signature by the insured and by a medical examiner. On this, of course, nothing was or could be done.

On these facts it appears clear that the plaintiff cannot recover. See *McGeachie* v. *North American Life Ins. Co.* (1893), 23 Can. S.C.R. 148. To my mind it borders on the nonsensical to suggest that the defendant company knowingly shouldered a liability for $2,000 in return for a relatively small premium, and, without knowledge, no question of waiver can arise.

The action is dismissed with costs.

Action dismissed.

MATHESON v. MURRAY.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Chisholm, J. March 14, 1922.

NEW TRIAL (§IIIA—10)—TRESPASS TO LAND—INJUNCTION—INCONSISTENT ANSWERS BY JURY—IMPOSSIBLE TO INTERPRET MEANING.

When it is impossible for an Appellate Court to give any consistent meaning to the answers returned by a jury to questions submitted to them by the trial Judge, and it can only conjecture what was in the minds of the jury when answering the questions, the Court will set them aside and order a new trial as to the issues covered or intended to be covered by such questions and answers.

[See also *Matheson* v. *Murray* (1919), 46 D.L.R. 264, 52 N.S.R. 522.]

APPEAL from the judgment of Mellish, J., in favour of plaintiff in an action claiming damages for trespass to land and an injunction to prevent further acts of trespass.

J. McG. Stewart, for appellant.

E. M. Macdonald, K.C., and *T. R. Robertson,* K.C., for respondent.

HARRIS, C.J., agrees with CHISHOLM, J.

RUSSELL, J.:—I am of the opinion in this case that the deeds in proof, if executed by the late Angus Matheson, must have been intended for some purpose other than that of conveying an absolute interest in the land, and possibly for the purpose of

securing what was due from Matheson to Murray. The jury has found that the deeds were not given for this purpose, and if this answer involved the consequence that they must have been given for the purpose of an absolute conveyance of the land, I should have to say that the answer must be set aside as unreasonable. Fortunately the consequence suggested does not necessarily follow from the answer.

The fourth answer is not attacked. It is fortunately harmless. The fifth is reconcilable with the fourth in the manner suggested by the trial Judge, but is nevertheless absurd. It could only be regarded as sensible if the third question had been answered in the affirmative. The sixth answer is harmless. The seventh should probably be set aside as inconsistent with any reasonable view of the evidence under any fair interpretation of the answer.

My decision would be that this answer should be set aside and that the judgment should be for the plaintiff, the appeal being dismissed with costs.

Ritchie, E.J., agrees with Chisholm, J.

Chisholm, J.:—This case now comes to this court for the second time. On the first trial, Longley, J., decided in favour of the plaintiff. The defendant appealed, and this Court being equally divided, the appeal was dismissed (1919), 46 D.L.R. 264, 52 N.S.R. 522. On further appeal to the Supreme Court of Canada, a new trial was ordered. The second trial was had before Mellish, J., with a jury. Nine questions were submitted to and answered by the jury. Upon these findings the trial Judge directed judgment to be entered in favour of the plaintiff.

The defendant appeals from this judgment, and moves that the action be dismissed, and also moves that the eighth finding of the jury be set aside; and the defendant moves to set aside the first, second, third, fifth, sixth and seventh findings of the jury.

An old man, the late Angus S. Matheson, of Scotsburn, in the County of Pictou, who is described as a somewhat peculiar person, unmarried, of considerable intelligence, with a local reputation for knowledge of the law, owned three lots of land, one a lot of 7½ acres, on which he resided, another of about 80 acres adjoining the above, and known as the Henderson lot, and another a wood lot, some miles distant at Plainfield in the same county.

In 1879, he mortgaged the Henderson lot to his brother, John A. Matheson, to secure payment of $250. In December, 1891, John A. Matheson called in this loan; the mortgage was realised, and Angus S. Matheson gave a mortgage covering the same lot and to secure the same amount of money to one William Murray, a neighbour and friend, and father of the defendant.

N.S.
S.C.
MATHESON v. MURRAY.
Chisholm, J.

In the following year Angus S. Matheson executed two deeds purporting to convey in fee simple to said William Murray the three lots owned by the grantor, the deed dated May 7, 1892, covering the homestead and Henderson lots, and the deed dated May 18, 1892, covering the Plainfield lot. The deeds were not recorded in the Registry of Deeds at Pictou until February 18, 1916, and March 16, 1916, respectively. On August 10, 1903, a release of the mortgage to William Murray was recorded.

William Murray died on March 13, 1908; Angus S. Matheson died February 13, 1916. After the deeds were executed, Matheson continued to live on the homestead lot under circumstances which are related in considerable detail by the witnesses called by the respective parties. He died intestate and administration of his estate was taken by his brother. The lands were sold under a license issued in the Probate Court, and were purchased by the plaintiff in this action, who claims damages for trespasses alleged to have been committed upon the lands by the defendant. The latter justifies as one of the heirs of William Murray who died intestate.

The release of mortgage of June 26, 1903, is as follows:—

"Know all men by these presents, that I, William Murray of Elmfield, in the County of Pictou, farmer, the mortgagee named in a certain indenture of mortgage bearing date the 8th day of December in the year of our Lord, 1891, made between Angus S. Matheson, of Scotsburn, in the County of Pictou, farmer, of the one part, and the said William Murray of the other part, and duly registered in book 101, p. 89, of the books for the registry of deeds for the County of Pictou; for and in consideration of the sum of $250 to me paid by the said Angus S. Matheson at or before the ensealing and delivery of these presents, the receipt whereof in full payment and satisfaction of the said mortgage and of the bond or obligation therein mentioned and herewith delivered up to be cancelled do hereby acknowledge, have remised, released and forever quit claim and by these presents do remise, release and forever quit claim unto the said Angus S. Matheson, his heirs, executors, administrators and assigns the said bond or obligation and all such sum or sums of money as are therein mentioned to be due and payable unto me the said William Murray, my executors, administrators or assigns.

And also, all the estate, right, title, interest, claim, property and demand at law or in equity which I the said William Murray under and by virtue of said mortgage or otherwise now have or hereafter may or can have, of, in to, upon or out of the lands and premises and the appurtenances thereof, in and by said indenture of mortgage conveyed situate at Back Meadows,

Rogers' Hill, in the County of Pictou, and in said mortgage particularly described.

To have and to hold, the said lands and premises unto said Angus S. Matheson, his heirs and assigns, to his and their only proper and absolute use, benefit and behoof forever freed and absolutely discharged from the said mortgage.

In witness whereof, I, the said William Murray, have hereunto my hand and seal subscribed and set this 26th day of June, in the year of our Lord, 1903.

Signed, sealed and delivered
in the presence of
(Sgd.) Chas. E. Tanner.

(Sgd.) William Murray.
(L.S.)

With respect to this release, the trial Judge decides that it operated as a conveyance to Matheson of any interest Murray might have in all or any of the three lots, however created; and he construes the words "or otherwise" in the release so as to cover whatever interest in the lands, if any, Murray may have acquired by the two deeds from Matheson. It is with deference that I express a different opinion. I think the Judge gives a meaning to the words "or otherwise" which cannot be maintained. The release is prepared on a printed form, and the form is endorsed "Release of Mortgage." The words "or otherwise" are in print. I am of opinion that what was in the contemplation of the parties was the release of the mortgage and that only, and that the rule of interpretation laid down by Lord Westbury in *Directors of London & South Western Ry. Co.* v. *Blackmore* (1870), L.R. 4, H.L. 610, at p. 623, 39 L.J. (Ch.) 713, 19 W.R. 305, is apt in this connection:—

"The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."

Lord Hardwick, L.C., in *Ramsden* v. *Hylton* (1751), 2 Ves. Sen. 304, at p. 310, 28 E.R. 196, says:—

"If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties intended to be released."

And again, in *Lampon* v. *Corke* (1822), 5 B. & Ald. 606, 106 E.R. 1312, Best, J., says at p. 611:—

"If a party give a general release, it will undoubtedly extend to all debts then due. . . . But that must be understood of a release without any previous recital qualifying its operations.

N.S.
S.C.
MATHESON v. MURRAY.
Chisholm, J.

If there be introductory matter, that will qualify the general words of the release."

Durgin v. *Busfield* (1874), 114 Mass. 492, holds that when a mortgagee has an interest in mortgaged premises other than his interest as mortgagee, an assignment of the mortgage in common form passes only his interest as mortgagee and not his entire estate, and *Barnstable Savings Bank* v. *Barrett* (1877), 122 Mass. 172, decides that when a mortgagee derives an independent title to the mortgaged premises by an assignment to himself of a subsequent mortgage therein, a discharge of the original mortgage, written upon it, whereby he "releases and forever quit-claims" all his right, title and interest in and to "the within described premises" passes only his interest in that mortgage, and not his entire interest.

The questions submitted to the jury, and their answers thereto, are as follows:—(1) Did Angus S. Matheson execute the deeds mentioned in Q. (3)? Yes. (2) Did Angus Matheson deliver these deeds to William Murray? Yes. (3) Were the deeds from Angus S. Matheson to William Murray, dated May 7, 1892, and May 18, 1892, respectively, intended by the parties thereto to be effective merely as security for what might be owing by Matheson to Murray? No. (4) If not so intended, was it intended by the parties thereto that they should become operative only on the death of Matheson? Yes. (5) Was it the intention of the parties to these deeds that William Murray should get an interest in the lands before Angus Matheson's death? Yes. (6) Was it agreed between William Murray and Angus Matheson that Angus Matheson should live on the property and farm part of it? Yes. (7) Did William Murray pay to Angus Matheson the consideration money mentioned in the deeds in whole or in part? Yes. (8) Did Angus S. Matheson occupy the properties in question as exclusive owner from the time he acquired the same until his death? Yes. (9) What damages, if any, did the owner of the lands sustain by reason of the acts complained of between October 20, 1916, and May 14, 1917? $15.

On these findings, as already stated, the trial Judge ordered judgment in favour of the plaintiff.

The first three findings among others are attacked by the plaintiff as being against the weight of evidence, and being such findings as viewing the evidence reasonably the jury should not have found. As to those numbered 1 and 2, there is ample evidence to support them, and evidence that is not contradicted. The evidence is all one way as respects the execution and delivery of the deeds. Kenneth Murray testified to such execution and

N.S.
S.C.
Matheson
v.
Murray.
Chisholm, J.

delivery. But, it was contended, that there is no corroboration of his evidence as required by the Evidence Act, R.S. N.S. 1900, ch. 163, sec. 35. There is other material evidence to corroborate the evidence of Kenneth Murray. In addition to the acts of ownership claimed to have been performed by the Murrays, we have the deeds which speak for themselves. John A. Matheson's evidence, if not an admission of the genuineness of his brother's signature, is very nearly so. Goodwill Clarke testifies that he got one of the deeds from William Murray. D. W. Mackay testifies to an admission made about 1910 by Angus Matheson that he (Matheson) could not sell the Plainfield lot because the Murrays owned it, and a year later to a similar admission as to the homestead lot and the Henderson lot. Clarence Mackay gives similar testimony. Daniel Murray says Matheson told him that the property was so fixed that his brother John A. Matheson could "get no catch on it"; and Alex. H. Murray's evidence is to the same effect. There is, in my opinion, sufficient corroboration to satisfy the requirements of the statute, and I do not think these two findings ought to be set aside.

Findings No. 3 and No. 7 were dealt with together by counsel. As to No. 3, the answer is based upon a consideration of the whole course of dealing between the parties; there is evidence to support the finding, and I do not think it can be held that the finding is one which could not properly be made by the jury. As to the finding No. 7, there is in support of it the acknowledgment contained in the deeds and that furnished evidence upon which a jury could make a finding that there was some consideration. I see no ground for setting aside this finding. Findings Nos. 4, 5 and 6 will be considered later. Finding No. 8 is attacked by defendant. The question and answer are:—

"(8) Did Angus J. Matheson occupy the properties in question as exclusive owner from the time he acquired the same until his death? A. Yes."

The jury are asked whether Matheson occupied the land in the quality of exclusive owner. It would be improper to ask the jury who was the owner in a case where title is in issue for that is a question of law to be decided by the Judge, on facts found. To ask if a party is the exclusive owner, in such a case, makes it, I think, a degree more objectionable. To ask if he acted as exclusive owner adds the defect of vagueness to the other objections. If it was meant to ask the jury whether Matheson occupied or lived on the lands to the exclusion of the Murrays, it should, I think, be put in such or similar terms; and if answered in the affirmative, the finding would be open to the attack made upon it by the defendant. I prefer to set it aside

N.S.
S.C.
MATHESON
v
MURRAY.
Chisholm, J.

for the reasons that will be mentioned in considering findings Nos. 4, 5 and 6.

No. 4 is not attacked by either party. It must, however, be considered in connection with Nos. 5 and 6. In No. 5 the question and answer are:—

"(5) Was it the intention of the parties to these deeds that William Murray should get an interest in the lands before Angus Matheson's death? A. Yes."

With respect to this question, the trial Judge instructed the jury:—"This is the same question over again. Counsel for defendant wanted me to put it in that form."

And in his opinion, filed after the verdict was returned, the Judge observes:—

"The answer to the fifth question, which was put at the suggestion of defendant's counsel, must, if possible, be reconciled with the previous answer which I think is fully justified by the evidence. In order to so reconcile it, we must, I think, conclude that the jury meant, in answer to the fifth question, that the "interest" therein mentioned was not an interest or estate in land as lawyers would understand it, but such an interest as a party would have, or might think he had, in property devised to him by a testator who was not yet dead."

If this question is Q. 4 over again, it does not add anything to, or subtract anything from, the case. If it raises the question whether Murray's rights as grantee in the deeds were to become operative at once, then the answer is in conflict with the answer to question 4, which is not attacked by either party. Reading findings numbered 4, 5, 6 and 8 together, as they must be read, it is difficult, if not impossible, to give them a consistent meaning. We can only conjecture what was in the minds of the jury in answering them. Where the findings are so difficult to interpret, when to interpret them at all we have to enter the realm of speculation, I think the findings ought not to be allowed to stand. I would, therefore, set aside findings 5, 6 and 8, and 4 also, which, though not attacked by either party, is so bound up with these others that it should not be allowed to stand and restrict the findings of another jury. In my view, there ought to be a new trial of the issues dealing with the operation of the deeds and the occupancy of the lands described in the said deeds; in other words, that the findings numbered 1, 2, 3, 7 and 9 should stand and that there should be a new trial as to the issues covered or intended to be covered by those numbered 4, 5, 6 and 8.

As already stated, the case has now been tried twice, and the costs occasioned by two trials, two appeals in this Court, and one appeal to the Supreme Court of Canada, far exceed the value

of the lands in dispute, and it is desirable that there should be an early end to the litigation. This is more likely to be achieved by limiting the area of the questions to be submitted to the jury at the next trial, in the manner I have indicated; and I think it is in the interest of the parties that the matter should go to the jury, confined to the essential matters in dispute.

Counsel will be heard on the question of costs when the rule is moved for.

HUEY v. DOODY.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Grimmer, J. September 23, 1921.

CONTRACTS (§ VIIB—425)—REMODELLING OF PUBLIC BUILDING—TENDERS—SPECIFICATIONS—SUB-CONTRACT BY CONTRACTOR OBTAINING CONTRACT—SPECIFICATIONS SUBMITTED TO SUB-CONTRACTOR INCOMPLETE—INSTRUCTIONS BY CONTRACTOR TO DO THE WORK AND "I WILL SEE YOU PAID"—CONSTRUCTION—LIABILITY—STATUTE OF FRAUDS—EVIDENCE.

Where a contract has been tendered for and accepted for the repair of a building according to specifications which are before the parties at the time the contract for the work is signed, but the contractor in sub-contracting for a portion of the work submits incomplete copies of the specifications to the sub-contractor who bases his tender on such incomplete specifications and who upon discovering that additional work is required, according to the original specifications, complains to the contractor who instructs him to do the work and he will see him paid, and the sub-contractor completes the work, the contract which is entered into between the parties is not a guarantee but an original promise on which the contractor is liable and which does not fall within the Statute of Frauds.

[See Annotation on Contracts, 14 D.L.R. 740.]

APPEAL by defendant from a County Court judgment in an action to recover the amount of extra work done by the plaintiff in repairing a public building. Affirmed.

D. Mullin, K.C., for appellant.

J. F. H. Teed, for respondent.

The judgment of the Court was delivered by

GRIMMER, J.:—This action was tried in the County Court of the City and County of Saint John, before Armstrong, J., with a jury, and was brought to recover the sum of $129 for work and labour alleged to be done by the plaintiff for the defendant under the following circumstances:—

The Department of Militia and Defence had procured what was formerly known as the Deaf and Dumb Institute in the Parish of Lancaster, in the City and County of Saint John, and being desirous of remodelling and making some addition thereto, asked for tenders for the work. Specifications were prepared

N.B.
App. Div.
HUEY v. DOODY.
Grimmer, J.

and typed, but were not altogether complete, there being certain spaces left which apparently were intended to be filled in. The work required to be done consisted of carpenter work, masonry, painting, plumbing and heating. The defendant is a master plumber and contractor, and being desirous of tendering for the work, attended at the office of Capt. Aubrey B. Blanchard, who then commanded the engineering corps, M.D. No. 7, headquarters at Saint John, and procured several copies of the specifications. The plaintiff is a painter by trade, and was asked by the defendant to tender for the proposed painting, and for that purpose he handed him one copy of the specifications he had procured as stated. This did not call for the whitening of the ceilings or removal of paper from the walls of certain rooms, which were covered by the contract, and alabastining such walls. This work, however, as a matter of fact, was called for by pen and ink interlineation in some of the specifications, but was not in the one handed by the defendant to the plaintiff. The plaintiff estimated the work called for under the head of painting in the specification handed to him, and tendered for it at $390. The defendant having procured figures on the other branches, *viz.*, mason and carpentry work, and having himself estimated on the plumber's work, tendered for the work called for in the specifications at $5,128, which tender, however, was later increased to $5,353. The original tender is as follows:—

"J. H. Doody, Saint John, N.B.
Contractor. Oct. 29th, 18.

Steam and Hot Water Engineering,
Sanitary Supplies and Specialties,
16 Canterbury Street.

Dept. Militia & Defence.

I hereby agree to do all the work in connection with changes to be made in the Deaf & Dumb Institution West St. John, according to plans & specifications, for the sum of $5,128.00, Five Thousand One Hundred And Twenty Eight Dollars.

J. H. Doody.

Carpenter work, $2,073; masonry, $1,000; painting, $390; Plumbing heating, $1,665.

Enclosed please find certified check for 10% of tender."

The tender was accepted, and Capt. Blanchard, acting for the Department, signed a contract for the work which was to be done according to the specifications signed by the parties, but it appears that none of the specifications were either signed or initialed by the parties. Having obtained the contract, the plaintiff and defendant proceeded with the work, and when the plaintiff came to the painting he discovered that the ceilings

were to be whitened, the paper removed and the walls of certain rooms calcimined. He called the defendant's attention to the contract, telling him that this was not covered, and there is evidence that the defendant told him to go ahead and "I will see you paid." It appears further the plaintiff told the defendant he would hold him responsible, and on another occasion he was told to go ahead and it would be all right and he, the defendant, would see him paid. The work was proceeded with, and eventually completed. In January, 1919, the defendant sent to the Department of Militia and Defence an account in which he claimed extras, and among them $148.50 for the painting. This came before Capt. Blanchard, who looked up the specification for the work and discovered that the so-called extras for painting were covered by the original specifications of which Doody had produced to him a copy shewing that the extras claimed for as painting were included therein, and he thereupon refused to recognize the defendant's claim in this respect. Doody thereupon, or at least shortly after, on February 3, accepted payment of the sum of $723, apparently as a final settlement of his claims against the Department of Militia and Defence, and gave the following receipt and release, *viz.*:—

"In consideration of cheque 7452 to the amount of seven hundred and twenty-three dollars and fifty cents ($723.50), balance due me on contract and extras for work done in the Deaf and Dumb Institute building at West Saint John, I hereby relinquish all further claims both for myself and on behalf of any of my sub-contractors for work done in the Deaf and Dumb Institute building at Saint John, either for contract or for extras, and agree to accept this amount as a final settlement.

(Signed) J. H. Doody.

(Signed) H. C. Parker, witness.
Saint John, N.B.
3/2/9."

Having failed in his efforts to obtain payment, the plaintiff brought this action against the defendant, who set up as a reply thereto that the plaintiff's contract was with the Department of Militia and Defence, and that it only was responsible. Further, that any orders for extras had been given in writing as required by his contract with the Department.

On the trial the plaintiff and defendant left certain questions to the jury, which, with their answers, read as follows: "Questions by plaintiff—1. Did the plaintiff perform the work for the value of which he brings this action? Yes. 2. Was such work part of his original contract with the defendant? No. 3. Was such work part of defendant's original contract with the military

N.B.
App. Div.
HUEY
v.
DOODY.
Grimmer, J.

authorities. Yes. 4. Did the defendant prior to or about the time the plaintiff began work, tell the plaintiff to go ahead and do the work he was sued for and he would see him paid, or to that effect? Yes. 5. Did the defendant, after Captain Young had a talk with plaintiff on the occasion when the plaintiff, defendant, Young and Hennessey were present, tell the plaintiff to go ahead and he would see him paid? Yes. 6. Did the military authorities waive the provision in the specification and order and recognise claims for extras without order for same being given in writing? Yes. 7. What is the value of the extra work claimed for in this action? $148.50. 8. Did the defendant at any time tell the plaintiff to go ahead with the work and he would see him paid, or to that effect? Yes.

Question by defendant—1. Was the contract made verbally between Capt. Young and James Huey for extra work? No."

Upon these answers the Judge ordered a verdict to be entered for the plaintiff. This the defendant afterwards moved before him to set aside and for a new trial, but after hearing the argument an order was made and the application refused, and it is from this application that the appeal is now taken.

The defendant relies in his appeal upon the following grounds:—1. Improper admission of evidence. 2. Improper rejection of evidence. 3. Mis-direction. 4. Non-direction. 5. A point of law. 6. Verdict against evidence.

In respect to the first, the objection is that the original specification, which was admitted in evidence was improperly received, in that it was not identified by the signatures as required by the contract. The evidence, however, very plainly discloses that at the time the contract was made the original specification was lying upon the table and was considered by the defendant, several copies of which had previously been given to him. It was not claimed nor shewn to be possible for the defendant or anyone else to have any other specification which could in any way be the original, but on the contrary, the defendant himself relied upon a copy of the specification which was put in evidence as No. 8 as being a correct copy, and this has in it an interlineation requiring the whitening of the ceilings for which this action was brought. I am, therefore of the opinion that this objection must fail.

In respect to the improper rejection of evidence, that which was offered was hearsay, and under all the rules of evidence would be clearly inadmissible, and the Judge was, therefore, right in rejecting the evidence.

The defendant has raised twelve separate objections to certain sentences or portions of sentences of the charge of the Judge to

the jury, in relation to the specifications on which the plaintiff based his tender being different from that forming part of the contract which the defendant signed. It appears from the evidence of the defendant himself, however, that changes were made in the tender based on the specifications he received from the Department, and there is evidence, exs. 2 and 3, and by the latter the amount of the tender was increased, as previously stated, from $5,128 to $5,353. Grounds 1, 2 and 3 of these objections may be considered together and if the contention is correct there never was any contract between the defendant and the Department, because there was no copy of specification signed by either of the parties. This contention surely cannot prevail, because in the first place the defendant could not make any contract unless he had specifications. The contract throughout requires the work to be done according to the specifications, and unless the defendant had access to and considered the specifications, he could not under any circumstances prepare or be in a position to make a tender for the work that was required to be done. Then an examination of the bills in evidence which the defendant rendered from time to time, recognise an existing contract, work to be done according to the specifications, and it clearly appears in evidence that specifications were upon the table and were considered at the time the contract was signed, and there is no evidence whatever that the specification referred to by the contract was other than that which was put in evidence, and the jury by their answer so found it.

Numbers 4 and 5 may also be considered together, as they refer to a letter purporting to be signed by the plaintiff and addressed to one Capt. Young. The letter was offered in evidence, subject to objection of plaintiff's counsel. It had not been signed by the plaintiff or by the defendant, and the plaintiff testified it was not such a letter as he had dictated nor was it proved that it was. It would appear to have been better if the Judge of the County Court had rejected the letter, but having admitted it, I am satisfied that he properly charged the jury as to its legal effect, and there was no mis-direction in this respect.

There is nothing in the sixth objection.

As to the seventh and ninth, it appears that during the progress of the trial, counsel for the defendant sought to impress upon the jury that the question at issue in this case was whether or not the plaintiff had a cause of action against the defendant, or whether his claim should have been against the Department of Militia and Defence. This having been raised, the trial Judge directed the jury that they had nothing whatever to do with any claims the plaintiff might have against the Department, that the

Man.

C.A.

only issue was as to the claim made by the plaintiff against the defendant, and that they had nothing whatever to do with any claim which could be made against the Department, and in this I agree that he was correct.

There is nothing in the 8th, 10th or other objections, and these grounds, therefore, fail.

I am also of the opinion there is nothing in the point of non-direction. The point of law is admitted to be based upon the assumption that there was a verbal contract between the Department as represented by Young, the overseer of the work, and the plaintiff, for the performance of extra work and that the defendant was a guarantor only and, therefore, not liable because the terms were not in writing. In reply, the plaintiff alleges that there was no contract in fact ever entered into between the Department and himself, and the jury have found that there was no such contract. There is also evidence that the statement by Young to the plaintiff to go ahead was made after the defendant had instructed the plaintiff to do the work and that he would see him paid. Also, the work for which the action was brought was part of the work which the defendant had, by his original contract, agreed and undertaken to do and so far as he was concerned was, therefore, not an extra, and I am of the opinion that the contract which was actually entered into between the plaintiff and the defendant was not a guarantee, but was an original promise on which the defendant is liable and which does not fall within the Statute of Frauds. I am satisfied the findings of the jury are amply supported by the evidence, and any other finding would, in my opinion, have been such as reasonable men could not properly make, and I am, therefore, of the opinion that this appeal must be dismissed with costs.

Appeal dismissed.

BILSLAND v. BILSLAND.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Metcalfe, JJ.A. March 2, 1922.

CONSTITUTIONAL LAW (§IA—20)—DIVORCE—RIGHT OF APPEAL FROM KING'S BENCH DECISION—B.N.A. ACT, SEC. 92 (14)—COURT OF APPEAL ACT R.S.M. 1913, CH. 43—KING'S BENCH ACT R.S.M. 1913, CH. 46—CONSTRUCTION.

In the absence of Dominion legislation, the Court of Appeal for Manitoba has jurisdiction to hear appeals from the Court of King's Bench in divorce actions. This jurisdiction is derived from sec. 92 (14) of the B.N.A. Act under which the Provincial Legislature has power to provide for appeals in divorce actions and by the Court of Appeal Act, R.S.M. 1913, ch. 43, which gives the Court of Appeal jurisdiction to hear appeals from every judgment or decision of a single Judge of the Court of King's Bench, this provision being wide enough to include appeals in divorce actions.

Man.

C.A.

BILSLAND v. BILSLAND.

Perdue, C.J.M.

[*Scott* v. *Scott* (1891), 4 B.C.R. 316, and *Brown* v. *Brown* (1909), 14 B.C.R. 142, not followed; *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956; *Walker* v. *Walker*, 48 D.L.R. 1, [1919] A.C. 947, applied. See Annotations, Divorce Law in Canada, 62 D.L.R. 1; 48 D.L.R. 7.]

APPEAL by petitioner from a judgment of the King's Bench in an action for dissolution of marriage. Affirmed.

H. V. Hudson, for appellant.

E. Browne-Wilkinson, for defendant, respondent.

L. J. Carey, for defendant, co-respondent.

John Allen, K.C., for Attorney-General for Manitoba.

PERDUE, C.J.M.:—The petitioner in this case, a husband, applies for a dissolution of the marriage between himself and his wife, the respondent, on the ground of her adultery with one Reimar, who is added as a co-respondent. The respondent by her answer denies the charges of adultery, and alleges that the petitioner himself committed adultery with persons unknown, that he was guilty of cruelty towards her, that he expelled her from their house, and has refused to provide for and maintain her ever since, and that by his conduct he conduced to the alleged adultery, if any, which she does not admit. By way of cross-petition she prays: (1) for a dissolution of the marriage; (2) for the custody of her children; (3) costs of the proceedings; (4) further and other relief. The co-respondent filed an answer denying the charges of adultery, and claiming condonation of, and connivance at, the improper acts alleged.

The petition and cross-petition were tried before the Chief Justice of the Court of King's Bench, and he refused to grant the relief claimed by either and dismissed both. From this judgment the petitioner appeals.

At the opening of the argument on the appeal, counsel for the respondent raised the objection that no appeal lay in this Court from the decision of a single Judge in a divorce suit. Mr. Allen appeared for the Attorney-General of Manitoba and the argument on the preliminary objection was heard.

Counsel for the respondent relied mainly upon two decisions of the Supreme Court of British Columbia: *Scott* v. *Scott* (1891), 4 B.C.R. 316, and *Brown* v. *Brown* (1909), 14 B.C.R. 142. In both of these cases it was held that the Full Court of the Supreme Court of British Columbia possessed no jurisdiction to hear appeals in divorce matters. Begbie, C.J., in giving the judgment of the Court in *Scott* v. *Scott,* proceeded upon the following line of reasoning, at p. 319:—

"Now, an appellate jurisdiction can only be given by a competent Legislature. The Colonial Legislature, previous to

Man.
C.A.
BILSLAND v. BILSLAND.
Perdue, C.J.M.

Confederation in 1871, while the colony was still autonomous, had admittedly made no express provision on the subject; neither has the Dominion Parliament since 1871. The Provincial Legislature, indeed, has declared that an appeal shall be to the Full Court here from all decisions of a single Judge. But since Confederation all matters concerning divorce are expressly reserved to the Dominion Parliament; and the Provincial Legislature, in purporting to give appellate jurisdiction, must be presumed to have contemplated such matters only as were within its own power, and not such matters as were expressly removed from its regulation. And even if the power of appeal . . . had been since Confederation expressly conferred on us by the Provincial Legislature, the gift would manifestly be illegal."

With respect, I would say that if the above reasoning and conclusion are correct, the Full Court would have no power to hear appeals in actions on bills of exchange or promissory notes, which are subjects of Dominion jurisdiction in the same manner as is divorce. If the same line of reasoning is correct, no appeal would lie to the Full Court or any provincial Appellate Court in an action against a Dominion railway company or in respect to any of the subjects enumerated in sec. 91 of the B.N.A. Act. Appeals in actions of the above nature have always been entertained in provincial Appellate Courts, where there is no Dominion legislation to the contrary.

In *Brown* v. *Brown, supra,* the Full Court of British Columbia followed the decision in *Scott* v. *Scott.* Irving, J., who gave the judgment of the Court, referred to the introduction of the law of divorce into that Province by the proclamation of November 19, 1858. He says, at p. 145:—

"It established what for convenience we may term the jurisprudence of divorce. But it by no means follows that it introduced all the machinery designed by the framers of the Imperial statute to carry out that jurisprudence as it was proposed to be carried out in England."

He points out that at the date of the proclamation the Court in existence in that colony consisted of only one Judge, and there was until 1871 a law-making power which had jurisdiction to amend the law introduced by the proclamation. He then goes on to say:—

"Having regard to the fact that there was in 1858 no Court to which an appeal could be taken, it seems to us to be an impossible contention to support that, because the jurisprudence was applicable to the Colony, a right of appeal, when there was no Appellate Court, was also applicable."

It appears to me that the Judges who decided *Scott* v. *Scott*

and *Brown* v. *Brown* did not pay sufficient regard to sub-head 14 of sec. 92 of the B.N.A. Act, which confers upon the Legislature in each Province jurisdiction to make laws in relation to the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts."

Under sec. 101 of the same Act, the Parliament of Canada may provide for the establishment of additional Courts for the better administration of the laws of Canada. Parliament has not created a Divorce Court. The administration of the law of divorce, where it is in force in a Province, is therefore left to the Provincial Court having jurisdiction to apply that law: *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, 88 L.J. (P.C.) 165. If it is provided in the constitution of the provincial Court that the trial of the case shall take place before a single Judge in the first instance, and that his decision shall, on the application of either party, be re-heard and varied or reversed by the Full Court, this, it appears to me, would be within the powers conferred by sec. 92 of the B.N.A. Act. This right of appeal will apply even where the matter in litigation arose under one of the subjects included in sec. 91 of the B.N.A. Act, except criminal law, if there was no Dominion legislation already occupying the field. This conclusion may, I think, be drawn from the decisions of the Privy Council in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for Canada*, [1894] A.C. 189, 63 L.J. (P.C.) 59, (dealing with provincial legislation in regard to voluntary assignments for the benefit of creditors); *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31, 63 L.J. (P.C.) 25; *G. T. Ry. Co.* v. *Att'y-Gen'l for Canada*, [1907] A.C. 65, 76 L.J. (P.C.) 23.

In *Walker* v. *Walker*, 48 D.L.R. 1, [1919] A.C. 947, 88 L.J. (P.C.) 156, the Judicial Committee of the Privy Council held that the Divorce and Matrimonial Causes Act, 1857 (Imp.), ch. 85, introduced a substantive law of divorce which was part of the law of England as it existed on July 15, 1870, and that this law was made part of the substantive law of Manitoba by the Dominion Statute, 1888, ch. 33, sec. 1. It was also held in the same case that the Court of King's Bench, under the King's Bench Act, R.S.M. 1913, ch. 46, had jurisdiction to administer the law of divorce so introduced by the Dominion statute above mentioned.

In *Board* v. *Board, supra*, it was held by the Privy Council, following *Walker* v. *Walker*, that the English Divorce and Matrimonial Causes Act, 1857, had been introduced into the

Man.
C.A.
BILSLAND.
v.
BILSLAND.
Perdue, C.J.M.

Province of Alberta by virtue of the Dominion Act, 1886, ch. 25. The right of divorce had, before the setting up of a Supreme or Superior Court of Record in Alberta, been introduced into the substantive law of the Province. Their Lordships were of opinion that, in the absence of any express and valid legislative declaration that the Court was not to exercise jurisdiction in divorce, that Court was bound to entertain and to give effect to proceedings for making the right operative.

The Court of King's Bench for Manitoba is bound, under the authority of *Walker* v. *Walker* and *Board* v. *Board* to administer the English law of divorce introduced into that Province. The practice and procedure in divorce cases in England may be followed (the King's Bench Act, sec. 11), or the Judges may, under sec. 53 of the King's Bench Act, make rules for regulating the practice and procedure in such cases.

The right of appeal is, however, a matter of substance, and must be conferred by express enactment: *Att'y-Gen'l* v. *Sillem* (1864), 10 H.L. Cas. 704, 11 E.R. 1200, 10 Jur. 466, 12 W.R. 641; *Colonial Sugar Refining Co.* v. *Irving*, [1905] A.C. 369, 74 L.J. (P.C.) 77. We find that enactment in sec. 48 of the King's Bench itself, R.S.M. 1913, ch. 46. That section is as follows:—

"48. Save as provided in the next preceding section, every rule, order, verdict, judgment, decree or decision, made, given, rendered or pronounced by a judge of the court, may be set aside, varied, amended or discharged on appeal, upon notice by the Court of Appeal."

Prior to the creation of the Court of Appeal in 1906, the appeal provided in the above section was to the "Court *en banc*"; R.S.M. 1902, ch. 41, sec. 98. That is to say, the decision of the Judge who tried the case in the first instance might be set aside, varied or discharged by the other Judges of the Court sitting as the Court *en banc*. This was part of the constitution of the Court of King's Bench and was within the capacity of the Legislature of the Province. This power of re-hearing the decision of a single Judge was passed over to the Court of Appeal on the formation of that Court.

The Court of Appeal Act, R.S.M. 1913, ch. 43, continues the Court of Appeal as theretofore created. Section 6 is as follows:—

"6. The Court of Appeal shall be vested with and shall exercise all the rights, powers and duties which immediately prior to the twenty-third day of July, 1906, were held, exercised and enjoyed, under and by virtue of 'The King's Bench Act,' or any other statute of this Province or of the Dominion of Canada, by the Court of King's Bench sitting in banc and as a

court of appeal from the judgment, decision, order or decree of a single judge, or verdict of a jury, or of a Surrogate Court judge or of a County Court judge, or verdict of a County Court jury.

(2) All applications for new trials and all appeals of the nature of those which, before the said twenty-third day of July, 1906, were heard and disposed of by or before the Court of King's Bench sitting in banc shall be brought before and heard and disposed of by the Court of Appeal, and the Court of King's Bench shall not have or exercise any appellate jurisdiction.

(3) Nothing in this section shall be construed so as to take away the jurisdiction of the said Court of King's Bench to sit in banc for the hearing and disposition of any matters other than appeals or applications for new trials which may come or be brought before it."

The Judges of the Court of Appeal are *ex officio* Judges of the Court of King's Bench and possess all the powers of the Judges of the last-mentioned Court (sec. 5).

The Court of Appeal was created by the Legislature of the province of Manitoba pursuant to the powers given by sec. 92, sub-sec. 14, of the B.N.A. Act, and the Judges of the Court are appointed by the Governor-General of Canada: The B.N.A. Act, sec. 96. I would take the liberty of quoting and adopting the remark made by Viscount Haldane, during the argument of *Walker* v. *Walker*:—

"It is within the competence of the Province to set up an Appeal Court. As we know, the Dominion Executive nominates the judges, but it is for the Province to set up the Court. Why should not they say the Court is to entertain every kind of appeal?"

The statutes of the Province say that there shall be an appeal to the Court of Appeal from every judgment or decision of a single Judge of the Court of King's Bench. Clearly, this covers a judgment in a divorce proceeding, if the Provincial Legislature has power to grant such appeal.

Criminal law and the procedure in criminal law cases are exclusively within the powers of the Dominion Parliament which has enacted a Criminal Code and Procedure, and made provision for appeals in criminal cases (secs. 1007-1025). Decisions under these powers afford no aid in the present case.

The English law of divorce introduced into Manitoba by the Dominion statute of 1888 was that existing on July 15, 1870. The Judge Ordinary was empowered by the Act of 1860, ch. 144 (amending the Act of 1857), to hear all matters arising in the Court including petitions for dissolution and nullity, and in these

Man.
C.A.
BILSLAND v. BILSLAND.
Cameron, J.A.

an appeal was given from the Judge Ordinary to the House of Lords by the Act of 1868, ch. 7, sec. 3. This appears to have been the condition of the law as regards appeals on July 15, 1870.

The spirit and intention of the English law was that there should be an appeal from the decision of a single Judge in dissolution and nullity. An appeal to the House of Lords from a Judge of the Court of King's Bench for Manitoba is not feasible. By the constitution of our Courts all appeals from such Judge in civil cases must be made to the Court of Appeal. It appears to me that in order to carry out the spirit and intention of the English law of divorce so introduced into the law of Manitoba, there should be provision made for an appeal from the decision of a single Judge to an Appellate Court. I have come to the conclusion that, in the absence of Dominion legislation on the subject, the Legislature of the Province has power to provide for such appeal. I would, therefore, overrule the preliminary objections without costs.

As to the merits of the case, I agree with the judgment pronounced by the Chief Justice of the Court of King's Bench, and would dismiss the appeal with costs.

CAMERON, J.A.:—The important question of the right of appeal to this Court is here raised by the counsel for the co-respondent. It is argued that there can be no right of appeal from a decision on a petition for dissolution of marriage to this Court in addition to, or in substitution for, the right of appeal to the House of Lords given by the Divorce and Matrimonial Causes Act, ch. 85, 1857 (Imp.). When first presented, this contention seemed to me to be entitled to weight, especially as it has the support of decisions in the British Columbia Courts. The discussion on the argument before us and further consideration have, however, convinced me that the objection to the jurisdiction of this Court is not well taken. It seems to me impossible to read the decisions of the Judicial Committee of the Privy Council in *Walker* v. *Walker*, 48 D.L.R. 1, [1919] A.C. 947, and *Board* v. *Board*, 48 D.L.R. 13, [1919] A.C. 956, without being led to the conclusion that they involve the conclusion that this Court has appellate jurisdiction in divorce proceedings. To hold otherwise would point to the conclusion that the Court has no jurisdiction in actions arising out of matters which are within the ambit of the powers of the Dominion Parliament under the B.N.A. Act, a contention that cannot be seriously maintained.

I think the right of appeal in divorce matters given by the Dominion Act of 1888 must be taken as one to be worked out in accordance with the legislation and conditions existing in

this Province. The substantive law giving a right of appeal would not be effective without a tribunal to enforce it, and the jurisdiction accrues when the tribunal is created. The right to appeal and the procedure by which that right is made effective are clearly distinguishable. The Dominion Act of 1888, in so far as it introduced the English divorce law into this Province, must be read with the provisions of the B.N.A. Act and with those of our own provincial legislation. These considerations are, in my opinion, borne out by the decisions referred to and the numerous other authorities cited on the argument.

I have read the judgments of the other members of the Court and agree with their conclusions.

FULLERTON, J.A.:—This appeal is from the judgment of the Chief Justice of the Court of King's Bench dismissing a petition for dissolution of marriage.

Counsel for the respondent takes the point by way of preliminary objection that this Court has no jurisdiction to hear an appeal in a divorce matter. In support of this position he cites the cases of *Scott* v. *Scott*, 4 B.C.R. 316, decided by the Full Court of British Columbia in 1891, and *Brown* v. *Brown*, 14 B.C.R. 142, decided by the same Court, though composed of different Judges, in 1909. These cases undoubtedly held that the Full Court of British Columbia had no jurisdiction to hear appeals in divorce matters.

The view taken by both Courts was that as "marriage and divorce" is within the exclusive competence of the Dominion Parliament under the B.N.A. Act, provincial legislation in purporting to give appellate jurisdiction, must be presumed to have contemplated such matters only as were within its own power. In other words, the Courts evidently took the view that a Court established by the Province could not give effect to rights conferred by Dominion legislation.

It appears to me that the language of the Privy Council in the cases of *Walker* v. *Walker*, 48 D.L.R. 1, and *Board* v. *Board*, 48 D.L.R. 13, if not the actual decisions themselves, makes it clear beyond question that the objection taken to the jurisdiction of this Court is not tenable.

In the *Walker* case, the Privy Council held that the Divorce and Matrimonial Causes Act, 1857 (Imp.), ch. 85, enacted a substantive law of divorce which by virtue of (1889) Can., ch. 33, sec. 1, is in force in this Province, and that the Court of King's Bench had jurisdiction to administer that law. The point taken regarding the jurisdiction of the Court was not that the Legislature of Manitoba had no power to clothe the Court of King's Bench of Manitoba with jurisdiction over divorce, but that it

Man.

C.A.

BILSLAND v. BILSLAND.

Fullerton, J.A.

had not done so. Viscount Haldane, who delivered the judgment, said on this point (48 D.L.R. 1, at p. 6):—

"A further point has, however, been raised by the appellant. It is that the Dominion Parliament, even assuming that it introduced new substantive law on the subject, had committed no jurisdiction to the Courts of Manitoba to apply such law, and that the Legislature of Manitoba had not, when constituting its Supreme Court, endowed it with power to do so."

His Lordship then refers to the words of the jurisdictional clauses of the King's Bench Act, R.S.M. 1913, ch. 46, and holds them sufficiently wide to confer the jurisdiction.

In the *Board* case the words "conferring jurisdiction on the provisional Courts" were by no means clear. The same law Lord, delivering the judgment of the Privy Council in this case, after holding that the words used were sufficient, went on to say (48 D.L.R. 13) at pp. 17, 18:—

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

By sec. 92 (14) of the B.N.A. Act, the Provincial Legislature is given exclusive power to make laws in relation to

"the administration of justice in the province, including the constitution, maintenance and organisation of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts."

Under this power the Provincial Legislature, in the year 1906, by ch. 18 (Man.) constituted "The Court of Appeal" and gave it jurisdiction to hear appeals from "every rule, order, verdict,

Man.

C.A.

BILSLAND v. BILSLAND.

Fullerton, J.A.

judgment, decree or decision, made, given, rendered or pronounced" by a Judge of the Court of King's Bench.

Upon what ground can it be urged that because a judgment herein involves divorce law the jurisdiction of the Court is excluded?

If the Provincial Legislature has power to constitute the Court of King's Bench and give it jurisdiction to try divorce petitions, it would seem to follow as a matter of course that it has power to constitute a Court of Appeal and give it jurisdiction to hear appeals from judgments rendered in such proceedings. I can see no possible argument against such a conclusion. Almost daily the Court is hearing appeals from judgments involving substantive law enacted by the Dominion Parliament. The Bills of Exchange Act, R.S.C. 1906, ch. 119, the Bank Act, R.S.C. 1906, ch. 29, and the Railway Act, R.S.C. 1906, ch. 37, are familiar examples. Take for example the Bills of Exchange Act. It contains no provision authorising a provincial Court to try actions or hear appeals, but it could not be seriously suggested that the jurisdiction of the Court of Appeal is excluded in such matters. Divorce legislation stands on no different plane, both being substantive law enacted by the Dominion Parliament. Doubtless the Dominion Parliament might pass legislation saying that there should be no appeal from a decree in a divorce matter, but in the absence of any such legislation, I am clearly of opinion that an appeal lies.

It was said that the Divorce and Matrimonial Causes Act, 1857, ch. 85, provides for an appeal to the House of Lords, but this provision manifestly is inapplicable in this Province. The Divorce and Matrimonial Causes Act did two things: (1) it enacted a substantive law of divorce and matrimonial causes; and (2) it created a new Court and provided for an appeal from that Court. The Dominion statute, 1888, ch. 33, only introduced the law of England in so far as applicable to this Province. The substantive law contained in the Divorce and Matrimonial Causes Act was applicable but clearly the portion of that Act which referred to the Courts was quite inapplicable, and in consequence was not introduced. Any appeal, therefore, must be created by the Province under sec. 92, sub-sec. 14 of the B.N.A. Act.

I would overrule the objection taken to the jurisdiction of this Court.

In so far as the merits of the appeal are concerned, I can see no reason for interfering with the judgment of the Chief Justice.

I would dismiss the appeal with costs.

Man.
C.A.
BILSLAND v. BILSLAND.
Dennistoun, J.A.

DENNISTOUN, J.A.:—The jurisdiction of this Court to hear any appeal in a divorce proceeding having been challenged, it is necessary to pass upon the point before dealing with the merits of the case, which were argued subsequently.

Counsel for the Attorney-General of the Province appeared and strongly supported the jurisdiction of the Court.

The Attorney-General for Canada was not represented, though duly notified.

In my view, this Court has jurisdiction to hear appeals in divorce matters, and that view is founded upon two grounds:—

(1) That the substantive law of England relating to divorce, which was introduced into Manitoba as of the year 1870, by the Dominion statute of 1888, ch. 33 (*Walker* v. *Walker*, 48 D.L.R. 1), included a right of appeal to which effect would be given so soon as there was constituted in the Province a Court with general appellate jurisdiction (*Board* v. *Board*, 48 D.L.R. 13).

In 1888, when the Dominion Act referred to introduced the English law of divorce into Manitoba, there existed in this Province the Court of King's Bench, to which was entrusted the administration of justice in respect to the enforcement of that law. The Court, as then constituted, had the general jurisdiction of a Superior Court to try causes and to hear appeals. Causes were tried before a single Judge with or without a jury, and appeals were heard before the Full Court sitting *en banc*.

Subsequently, in the year 1906, there was substituted for the Court of King's Bench *en banc* in so far as general appellate jurisdiction was concerned, the Court of Appeal as it now exists. The constitution of a provincial Court to exercise general appellate jurisdiction is a matter which is peculiarly within the jurisdiction of the Province (the B.N.A. Act, sec. 92 (14)), and until the Dominion has set up Courts of its own and deprived the provincial Courts of jurisdiction in respect to matters within the exclusive competence of the Dominion, it is necessary to hold that such provincial Courts are authorised to administer justice in respect to Dominion rights, or to affirm that bare rights have been created and no machinery whatsoever provided for their enforcement.

The Court of King's Bench has jurisdiction to try divorce cases under the ruling of the Judicial Committee in *Walker* v. *Walker*, *supra*, and the Court of Appeal has general appellate jurisdiction under the Court of Appeal Act, ch. 43, R.S.M. 1913, sec. 6, the appellate jurisdiction of the Court of King's Bench being taken away by the same section. Appeals which

were formerly heard by the Court of King's Bench *en banc* must now be heard by this Court of Appeal. If the Court of King's Bench sitting *en banc* had jurisdiction to hear divorce appeals, the Court of Appeal has that jurisdiction now, for sec. 48 of the King's Bench Act expressly says so.

It appears very clearly that the divorce law as it existed in England in 1870, included a right of appeal. *Vide* 1857, ch. 85, secs. 9, 10, 55 and 56, as amended by 1858, ch. 108, sec. 17; and further by 1860, ch. 144, secs. 1 and 3; 1868, ch. 77. That right of appeal may be summarised as follows:—

(1) There was a right of appeal to the House of Lords from the judgment of the Judge Ordinary in dissolution and nullity cases.

(2) There was a right of appeal to the Full Court from the judgments of the Judge Ordinary in all other cases, and the decision of the Full Court was final.

Was that right of appeal a matter of substantive right or was it a matter of procedure only? If it were a matter of substantive right, it was part of the law of divorce which was introduced into Manitoba in 1888.

It is well settled that a right of appeal is a matter of substance. It must be conferred by legislative authority. It does not exist in the nature of things.

In *Att'y-Gen'l* v. *Sillem* (1864), 10 H.L. Cas. 704, 11 E.R. 1200, 10 Jur. 446, 12 W.R. 641, Lord Westbury, L.C., says at pp. 720, 721:—

"The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given, must both be bound, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. . . . A power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction."

Colonial Sugar Refining Co. v. *Irving*, [1905] A.C. 369, 74 L.J. (P.C.) 77; *Doran* v. *Jewell* (1914), 16 D.L.R. 490, 49 Can. S.C.R. 88.

The substantive right of appeal is part of the same law which gives a right of divorce. The right of appeal exists, and this Court possesses the necessary appellate jurisdiction to make that right operative. It is not a question of the jurisdiction of the Provincial Legislature to give a right of appeal. The right of appeal is as much a part of the law which was brought into force in this Province as is the right of divorce itself.

Man.
C.A.
BILSLAND v. BILSLAND.
Dennistoun, J.A.

If this Court cannot entertain appeals in divorce suits, the only remedy of a dissatisfied suitor is an appeal by leave to the Privy Council, which in the vast majority of cases would be equivalent to a denial of the right altogether.

In *Board* v. *Board, supra,* Lord Haldane, referring to the right to divorce which had been introduced into the Province of Saskatchewan before the setting up of a Superior Court, says (48 D.L.R.) at pp. 17, 18:—

"If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court."

(2) The Dominion Parliament having introduced into Manitoba the law of divorce, which deals with a civil right, without making any express provision as to the enforcement of that right, the administration of justice relative thereto, falls to the Province under sub-head 14 of sec. 92, of the N.B.A. Act, until the Dominion takes further legislative action in respect to the matter, and ousts the jurisdiction of the Superior Courts of Manitoba. While the field is clear the Province may freely make laws in relation to the administration of justice in respect to the enforcement of civil rights of both provincial and Dominion origin. *G.T.R. Co.* v. *Att'y-Gen'l for Canada,* [1907] A.C. 65, 75 L.J. (P.C.) 23.

Clement, J., in his book on the Canadian Constitution, at p. 545, says:—

"The better view would appear to be that, given a law creating a right to divorce or judicial separation, the administration of that law would be part of the administration of justice in the Province, and would *prima facie* fall to provincial Courts constituted under provincial legislation—subject always, of course, to the power of the Dominion Parliament to constitute additional Courts under s. 101, and to regulate procedure in divorce cases, if so disposed." This view is referred to with approval by Martin, J., in *Sheppard* v. *Sheppard* (1908), 13 B.C.R. 486, at p. 519.

Mr. Lefroy, in Canada's Federal System, at p. 552, puts it this way:—

"It comes, then, to this, that though the provinces alone have general jurisdiction over the administration of justice in the province by virtue of No. 14 of section 92, the Dominion parliament may deal with the matter, so far as is necessary to the complete and effectual exercise of one of its own enumerated

powers; but, of course, in the absence of such Dominion legislation, the power to legislate remains in the province."

Lord Dunedin has crystallised the decisions of the Judicial Committee on the subject in a sentence:

"First, that there can be a domain in which provincial and Dominion legislation may overlap; in which case neither legislation will be *ultra vires* if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." *G.T.R. Co.* v. *Att'y-Gen'l for Canada,* [1907] A.C. 65, at p. 68.

Causes of action which have been created by Dominion statutes, such as the Railway Act, the Bank Act, the Bills of Exchange Act and other Acts which will be recalled, are now tried in Provincial Courts of both original and appellate jurisdiction. In my view, the right to divorce is in exactly the same position. If the right of appeal be denied in one case, it should be denied in all.

In all these cases a bare right of action having been created and left to the King's Courts for enforcement, it becomes the duty of the Provincial Courts, so long as they are the only Courts available, to apply existing remedies for the enforcement of such rights. *Ubi jus ibi remedium.* They are the King's Courts established by the Province under the authority of the B.N.A. Act, and until Dominion Courts are established and jurisdiction withdrawn from such Provincial Courts and expressly committed to other Courts, the former have the fullest jurisdiction in respect to the administration of all the law which exists, no matter whence its source of origin.

It must be noted that these general remarks are not to include criminal law, for by sec. 91 (27), such law, including the procedure in criminal cases, is expressly reserved to the Dominion and the Dominion has occupied the field. *Reg.* v. *Eli* (1886), 13 A.R. (Ont.) 526; *Reg.* v. *McAuley* (1887), 14 O.R. 643; *Rex* v. *Carroll* (1909), 14 B.C.R. 116; *Reg.* v. *Beale* (1896), 11 Man. L.R. 448; *Rex* v. *Harvie* (1913), 9 D.L.R. 432, 18 B.C.R. 5. Moreover, bankruptcy law and Exchequer Court cases have been specifically withdrawn from the Provincial Courts, and committed to Dominion Courts, constituted and controlled by Dominion legislation.

Similar action may possibly be taken in respect to the administration of divorce law by Dominion Divorce Courts, but until such Courts are constituted, the Superior Courts of this Province are charged with the duty of administering that law as part of the general body of law which falls to their care.

Can.

Ex. C.

R. G. LONG v. THE KING.

Lord Kenyon, C.J., in *Birkley* v. *Presgrave* (1801), 1 East 220, at p. 226, 102 E.R. 86, put it that:—

"If the law confer a right it will also confer a remedy. When once the existence of the right is established, the Court will adapt a suitable remedy, except under particular circumstances where there are no legal grounds to proceed upon."

The right to rehear a case and correct error is in my view within the jurisdiction of the Province as part, and a most essential part, of the administration of justice within that Province, and it must be presumed that the Dominion Legislature intended that right to be exercised, or there would have been express legislation to the contrary.

The Courts of the Province of British Columbia have taken the view that there is no right of appeal in divorce matters: *Scott* v. *Scott*, 4 B.C.R. 318; *Brown* v. *Brown*, 14 B.C.R. 142. The circumstances under which the Courts of that Province received jurisdiction direct from England were different from those under which the law was introduced into this Province by the Dominion Legislature. Moreover, we have now the opinions of the Judicial Committee in *Walker* v. *Walker* and *Board* v. *Board* to guide us. For these reasons it is unnecessary to consider the conclusions arrived at by the Judges of British Columbia for whose opinions I have great respect.

I would affirm the appellate jurisdiction of this Court in divorce matters, but upon the merits I would dismiss this appeal with costs, as I am in complete agreement with the views of the Chief Justice of the King's Bench who tried the case, and refused the prayer of the petitioner.

METCALFE, J.A., concurs in the judgment of the Court.

Appeal dismissed.

R. G. LONG v. THE KING.

Exchequer Court of Canada, Cassels, J. January 27, 1922.

BAILMENT (§III—28)—CONTRACT—OBLIGATION OF CROWN AS BAILEE—REASONABLE CARE—TORT—CONTRACTUAL RELATIONSHIP.

By a contract under seal, entered into between the suppliant and the Crown, suppliant agreed to deliver a certain number of gauntlets for the use of the R.C.M. Police, equal in every respect to the sample submitted by them. These were delivered, and upon examination, a large proportion thereof were rejected as not up to sample.

The rejected gauntlets were marked with an ordinary lead pencil mark, easily removed, and shipped back to suppliant, who returned them to Ottawa because so marked. This mark was removed by the employees of the Crown and in some instances the surface of the leather was injured in the process.

Can.
Ex. C.
R. G. LONG v. THE KING.
Cassels, J.

Held: That the Crown in the right of the Dominion of Canada may be liable as a bailee, and that after the rejection of the gauntlets herein it became an involuntary bailee, liable only for want of reasonable care. Its employee having chosen to erase the marks in question it became liable for whatever damage arose by reason of the way in which the erasing was done. *Brabant & Co. v. The King*, [1895] A.C. 632, 64 L.J. (P.C.) 161, 44 W.R. 157, applied. That as in this case the damage arose out of something done by an officer and servant of the Crown under a contract, the Crown was liable to make good any damage arising out of its contractual relations with the subject.

PETITION of right on behalf of suppliant herein seeking to recover from the Crown the sum of $1,858.41 with interest as compensation for the damage done to the gauntlets delivered by them to the Crown and rejected by the Crown.

Harold Fisher, K.C., and *L. P. Sherwood*, for the suppliant.

E. F. Newcombe and *H. H. Ellis*, for respondent.

CASSELS, J.:—This is a petition of right on behalf of R. G. Long Co., Limited, a corporation having its head office in the City of Toronto. It is necessary to refer to some of the allegations set out in this petition. It alleges that by a contract under seal, dated July 19, 1920, entered into between the suppliant and His Majesty, represented therein by the Honourable the President of the Privy Council of Canada, the suppliant agreed to deliver free of all charges, at the Royal Canadian Mounted Police Store House at Ottawa, 1,000 pairs of brown leather gauntlets equal in every respect to an accepted sample submitted by your suppliant, and His Majesty agreed to pay to the suppliant $3.50 for every pair of gauntlets accepted in accordance with the conditions in the said contract contained. The 4th allegation is:—

"That His Majesty, by his servants, returned to your suppliant 529 pairs of the gauntlets so delivered, but the said gauntlets were found by your suppliant to have, whilst in possession of His Majesty, been so defaced by markings of blue crayon or some similar substance as to be rendered valueless and unsaleable. That your suppliant, therefore, refused to accept the said gauntlets and returned the same to His Majesty. That subsequently, His Majesty's servants, in undertaking to remove the said markings, so injured the substance and destroyed the colour of the said gauntlets, that they remain of no substantial commercial value."

And the suppliant claimed the sum of $1,858.41, with interest.

In this petition the right of the Crown to reject the number of gauntlets in question does not seem to have been disputed. The ground of complaint is that the gauntlets so rejected had been so defaced and injured while in the possession of the Crown as to entitle the suppliant to damages. The damages being

Can.
Ex. C.
R. G. LONG
v.
THE KING.
Cassels, J.

claimed as at the value of the contract price for these 500 odd pairs of gauntlets.

The case came on before me for trial at Ottawa, on November 10, 1921. It was proved before me beyond reasonable doubt that the rejected gauntlets were not up to the sample, and were not in accordance with the terms of the contract. It was shewn, however, that instead of these gauntlets being marked with a blue crayon or some similar substance so as to be rendered valueless and unsaleable, the mark was made with an ordinary lead pencil which could be easily removed, as shewn by the witness Hackett, when one of the marks was removed within the space of a minute or so in my presence. The rejected gauntlets were shipped back to the petitioner at this time. Had the petitioners acted as they should have acted, they could easily have removed these pencil marks which would have left the gauntlets in the same state as when they were shipped to Ottawa. Instead of that, however, they returned them to Ottawa, and according to the evidence of the witnesses for the Crown, the pencil marks were erased and the gauntlets returned.

At the trial three or four samples of gauntlets, which were claimed to have been injured, were produced to me, shewing that in the process of removing the marks, some slight injury had been done to the surface of the leather of which the gauntlets were made. I was not satisfied to determine the case on these samples, and directed that all the gauntlets that were rejected should be sent to Ottawa, and the gauntlets examined in my presence. Two large boxes of gauntlets were opened on January 13, 1922, and an examination was made on that day, and on the following day, January 14. It appeared that in box Number 1, 331 pairs of gauntlets were examined. Of these 331 pairs of gauntlets, I found that 226 pairs showed no appreciable indications of damage or injury; 105 pairs were selected by the counsel for the petitioner for further examination. I think it is quite clear that while, with a minute scrutiny, some of these 105 pairs had the appearance of having been injured in the process of removing the pencil-mark, it would have been an easy matter to have restored the gauntlets to their original condition when first received by the Mounted Police.

In the other box, 183 pairs of the gauntlets were examined, and 116 pairs were placed aside for further examination.

It was conceded before me that the Crown can be held liable as bailee, and I think this concession is in accordance with the law. This was so determined in the case of *Brabant & Co.* v. *The King,* [1895] A.C. 632, 64 L.J. (P.C.) 161, 44 W.R. 157.

Can.
Ex. C.
R. G. LONG v. THE KING.
Cassels, J.

It was contended by Mr. Newcombe on behalf of the Crown that if any injury was done to the gauntlets, it was in the nature of a tort, and the Crown would not be liable for tort committed by its officers or servants. My opinion is, while in the ordinary case between subject and subject, an action might have been brought in tort, nevertheless in this case the obligation of the Crown rests upon a contract, and the Crown is liable to make good any damage arising out of its contractual relations with the subject.

After the examination which I have referred to on January 13 and 14, I desired to have Hackett recalled with the view of enabling me to arrive at the quantum of damage. I am of opinion that the damage was trifling. But, I wished to be assisted in arriving at the measure of damage. I, therefore, suggested that Mr. Hackett should be recalled, and that he should go over these gauntlets which had been put aside for further examination, and I appointed the Monday following for this purpose. I thought, as I stated, that the alleged defacement could be removed at very slight expense, but on Monday I was notified by counsel for the petitioner that they declined to appear or to agree upon any examination by Hackett or by any other person, and they claimed the right to have the matter left as it was left at the trial with the subsequent examinations to which I have referred. On this state of facts, any further investigation ceased, as I could not take upon myself to have Hackett or any other person assist me in the matter of arriving at the amount of damages that should be allowed.

In my opinion, after a fairly exhaustive examination of the authorities, I think the Crown, after the rejection of the gauntlets, became what Bailey, J., in the case of *Okell* v. *Smith* (1815), 1 Starkie 108, described as an involuntary bailee, and they were only liable for want of reasonable care. Benjamin on Sales, 6th ed., p. 889, may be looked at.

The Crown having chosen to erase these marks, and there being some slight damage, I think they are liable, but the damage is trifling. I think that if the petitioners are allowed the sum of $50 that it will be more than ample to have covered any damage to these rejected gauntlets.

I, therefore, allow the petitioner the sum of $50, and under the circumstances of the case, I think there should be no costs to either party.

Judgment accordingly.

Alta.

App. Div.

UNITED GRAIN GROWERS v. McRAE AND RUR. MUN. OF LITTLE BOW.

Alberta Supreme Court, Appellate Division, Scott, C.J., Beck and Hyndman, JJ.A. March 14, 1922.

LIENS (§I—2)—FOR THE PRICE OF SEED GRAIN—MUNICIPAL DISTRICTS SEED GRAIN ACT 1918 ALTA., CH. 10—CONSTRUCTION—ENFORCEMENT OF LIEN—MUNICIPAL DISTRICTS ACT 1911-12 ALTA., CH. 3—APPLICATION.

A purchaser of land under an agreement for sale where there is no evidence to show that he was not in the occupation of the land at the time of making an application for and receiving an advance with which to purchase seed grain, is a "farmer therein resident" within the meaning of the Act, notwithstanding that he has leased the premises on the same day as that on which the advance is made, and the crop grown by the tenant is subject to the lien under sec. 8 of the Act.

While the provisions of the Municipal Districts Act 1911-12 Alta., ch. 3, secs. 305 and 306, are made available for the collection of the moneys out of the land and goods, affected, such remedy is in addition to and not exclusive of the common law remedy and the municipality having a lien is entitled at any time the crops are available to enforce it by seizure and sale and in case there happened to be no crop or it was disposed of in such a way as to deprive them of their lien then the provisions of the Municipal Districts Act are available.

APPEAL from the order of Ives, J., who dismissed an appeal from the Master in Chambers, dated May 13, 1921, allowing the appellant to interplead herein.

A. M. Sinclair, K.C., for appellant.

Legh Walsh, for respondent.

The judgment of the Court was delivered by

HYNDMAN, J.A.:—The facts may be summarised as follows: On or about May 15, 1920, one Welsh applied to the said municipality, under the provisions of the Municipal Districts Seed Grain Act, 1918, ch. 10, for an advance with which to purchase seed grain. He represented that the seed was required for sowing on the s.w. 1/4 13-11-22 w.4, the property of one Annie Bradley, Welsh, being the purchaser thereof, under an agreement of sale. Miss Bradley gave her formal required consent to the advance. As a result Welsh was supplied with seed grain to the value of $276.85, and executed the following document, which was duly registered, in acknowledgment thereof.

"Exhibit 'D'—Form B. (Section 10).

LIEN.

I, Ray L. Welsh, of the Municipal District of Little Bow No. 98 in the Province of Alberta, farmer, having obtained an advance of seed grain from the said municipal district to the value of two hundred seventy-six and 85/100 dollars, for which I have this day given said municipal district my promissory

note, payable on demand, with interest at the rate of seven per cent. per annum, which said seed grain is to be sown on s.w. section 13, township 11, range 22, west of the 4 meridian in said province, hereby agree that the said amount and interest shall be and remain a lien and charge upon all crops grown upon the said lands during the current year, and shall also be a charge upon said lands.

Signed at Barons, in the Province of Alberta, the 15th day of May, A.D. 1920.

J. A. Gow. R. L. Welsh.
(Witness sign here). (Borrower sign here).
Make two of these: sec.-treas. to retain one;
send the other to the Land Titles Office within thirty days.
(Endorsement).

Copy of document registered as 2120 C. W. on June 15, 1920.
Land Titles Office, Calgary."

This is in accordance with the form prescribed by the Act.

In December, 1920, said Welsh notified the municipality that the grain grown upon the said land was stored in the elevator of the United Grain Growers at Nobleford in the name of the said McRae. Inquiries revealed the fact that the grain had been shipped to the Fort William elevator of the said company, and the secretary-treasurer of the municipality notified the United Grain Growers of the lien of the respondent.

Upon the receipt of such notice the Grain Growers applied as a stakeholder to the Court for leave to interplead, respecting the moneys in its hands as the proceeds of the grain and upon the return of the originating notice both parties agreed that the matter should be decided summarily by the Master.

It appears that McRae occupied the land under an undated lease from Welsh, but which, apparently, was made the same day as the advance.

By this lease, Welsh agreed in consideration of the sum of $365 "value received," to deliver to the appellant "one-half of all crops grown on the S.W. 1/4 13, 11, 22 W4 for the year 1920." It was further agreed by the parties to this lease that McRae could harvest all the crop, and that he would pay for half the twine, threshing and hauling expenses; the said Welsh agreeing to pay the other half of these expenses.

The said crop was to be equally divided at threshing time. The lessor also agreed to refund to the lessee all monies (*sic*) which might be incurred in seeding operations over and above the said sum of $365.

Appellant first objects that the defendant never had a lien under sec. 8 of the Act, inasmuch as the advance was not made

Alta.
App. Div.
UNITED GRAIN GROWERS v. MCRAE AND RUR. MUN. OF LITTLE BOW.
Hyndman, J.A.

to a person being a "farmer therein resident," and the advance cannot be said to have been made to "a tenant" as the advance was in fact made to Welsh. I cannot see upon what ground this can be upheld, as it seems clear that Welsh was the equitable owner of the land under agreement with the registered owner, and there is nothing to shew he was not in occupation of the land at the time of the advance. The municipality surely cannot be held responsible for what took place subsequently between Welsh and other parties such as McRae. The latter would be bound by the lien, it having been obtained in the regular way and registered in the manner prescribed by the statute.

The second objection is that the municipality is not liable, there being no evidence that the demand note required by sec. 10 was not produced and definitely proved. As to this, I cannot see upon what ground the appellant can reasonably object. The note was not produced, it is true, but ex. "D" admits that such note was given, and there is no evidence to the contrary effect. Even had a note not in fact been given, I do not see that it would make any serious difference. In my opinion, sec. 10 is directory only for the protection of the municipality, and is merely additional to the security of the lien.

The document, ex. "D," is what creates the lien on the crops, and not the giving of the note.

The point which was chiefly relied on at the argument was that if the municipality ever had a lien, that proceedings should have been taken in accordance with sub-sec. 3 of sec. 10, which reads:—

"(3) It shall be the duty of the secretary-treasurer to enforce any such lien on behalf of the municipal district if the full amount of principal and interest due under the demand note be not paid prior to December 31 of the year in which the note is given; and the remedies provided by the Municipal Districts Act for the collection of taxes, with costs, by distress or suit shall be available for the collection of the said indebtedness at any time after the date herein mentioned."

or, under sec. 11, sub-sec. (1), which enacts:—

"11. Any sum which may be owing by any person to a municipal district upon a promissory note given in payment of an advance of seed grain under the provisions of this Act and under the authority of a by-law passed hereunder shall, whether such sum has been demanded or not, be deemed to be and shall be a special rate assessed upon such person in respect of the land upon which such seed grain was, according to the application or promissory note or lien agreement given therefor, intended to be sown and upon such land, and shall from the time of the

Alta.

App. Div.

UNITED GRAIN GROWERS v. MCRAE AND RUR. MUN. OF LITTLE BOW.

Hyndman, J.A.

making of the seed grain advance for which such note was given, be a charge upon such land, and the council of the municipal district is hereby authorised and empowered to take all proceedings by declaration of charge, foreclosure or otherwise necessary to realise said special rate, with costs, at any time after the thirty-first day of December of the year in which the charge was created."

It is contended that any lien created by the Act is only enforceable under the provisions of the said Act as contained in the above sections, that the Act itself does not provide any procedure for enforcing the lien except as set forth in the sections referred to and the municipality is, therefore, limited, in enforcing its rights to the provisions of secs. 305 and 306 of the Municipal Districts Act, 1911-12, ch. 3.

If this contention is correct, then there is no right or power in the municipality to take any steps or proceedings to enforce its claim of lien until after December 31 of the year in which the advance was given. This would mean that, after the harvesting of the crop, the borrower is given an entirely free hand to deal with and dispose of the crop as he sees fit, and the municipality and other parties concerned (such as an owner who has consented to the advance as Miss Bradley did in this case) must stand by and see a possibly dishonest borrower ship out the whole of the crop with the intention of defrauding his creditors and the lienholder. That surely cannot have been the intention of the legislature when providing for a lien against all the crops grown on the land, for the seeding of which the advance was made.

Whilst the machinery for collection of the moneys out of the land and goods affected under the Municipal Districts Act is made available, I do not think it is exclusive of the common law remedy which the municipality would have, once a lien is created, but is in addition thereto.

It seems to me, therefore, that the municipality having such lien was entitled at any time the crops were available, to enforce it by seizure and sale, or in case there happened to be no crop or it was disposed of in such a way as to deprive them of their lien, then the provisions of the Municipal Districts Act is made available.

A further point remains, that is, the grain having been disposed of to the Grain Company, can the proceeds be followed and attached.

The grain being subject to the lien, McRae's interest therein was charged therewith and he, in fact, became a trustee to the extent thereof.

Sask.
C.A.
FREEBURG v. FARMERS' EXCHANGE BANKERS & WEYBURN SECURITY BANK.

In 13 Hals., p. 159, sec. 192, it is said:—

"As between *cestui que trust* and trustee and persons claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruits of such property, whether in its original or in its altered state, continue to be subject to or affected by the trust. (*Pennell* v. *Deffell* (1853), 4 DeG. M. & G. 372, C. A. *per* Turner L. J. at p. 388). Upon this rule is based the doctrine of following trust property................Hence if property has been sold, whether rightfully or wrongfully, the *cestui que trust* can take the proceeds of sale if he can identify them. There is no distinction between a rightful and a wrongful disposition of the property as regards the right of the beneficial owner to follow the proceeds."

There is no question as to the origin of the grain in this case, it being admitted that it was grown on the land in question, so that identification is complete.

The grain having been converted into money by McRae himself, the question of the method which the municipality should have adopted to realise upon the grain does not arise.

The conclusion, in my opinion, therefore, must be that the proceeds of the grain upon which the municipality had a good and valid lien being identified, they must be held to stand in the place and stead of the grain itself, and consequently subject to the respondent's claim.

The appeal should be dismissed, with costs on the District Court scale.

Appeal dismissed.

FREEBURG v. FARMERS' EXCHANGE BANKERS AND WEYBURN SECURITY BANK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

SUBROGATION (§VIII—35)—TWO PARTIES OWNERS OF LAND—ONE PARTY MORTGAGING THEIR UNDIVIDED INTEREST—SALE OF LAND FOR TAXES —REDEMPTION—RIGHT OF PARTY REDEEMING TO LIEN IN PRIORITY TO MORTGAGE.

The plaintiff and the defendants, the Farmers' Exchange Bankers, are the registered owners of certain land. The Farmers' Exchange Bankers gave a mortgage of their undivided interest in the land to the defendant, the Weyburn Security Bank, the municipal taxes on the land were not paid and the land was sold by the municipality, in order to protect her interest in the land the plaintiff was compelled to pay the whole of the tax purchaser's claim, together with other expenses, and later paid the municipality the taxes for 1920.

Sask.
C.A.
FREEBURG v. FARMERS' EXCHANGE BANKERS & WEYBURN SECURITY BANK.
Turgeon, J.A.

The Court held that the plaintiff was entitled to a lien upon the land for one-half of the amount expended by her to redeem the land and pay the 1920 taxes, but as she was partly to blame for the non-payment of the taxes she was only entitled to priority over the mortgage to the extent of one-half of the monies paid by her on account of the taxes, leaving out of consideration all other items of expense occasioned by her delay and that of her co-owners.

[See Annotation on Subrogation, 7 D.L.R. 168.]

APPEAL by defendants from the trial judgment (1921), 61 D.L.R. 79, 14 S.L.R. 342, in an action claiming a lien on certain property in priority to a mortgage. Affirmed, but amount reduced.

M. A. Miller, for appellants.

E. F. Collins, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—The respondent and the defendants, The Farmers' Exchange Bank, are the registered owners of the north-east quarter of section 35, in township 7 and range 3, west of the third meridian. On July 31, 1917, the Farmers' Exchange Bankers gave a mortgage upon their undivided interest in the land to the defendant, the Weyburn Security Bank. This mortgage was registered in the proper Land Titles Office on September 31, 1917. The municipal taxes upon the land were not paid and the land was sold in due course by the municipality, and the tax sale purchaser acquired the right to have the title to the land transferred to him free from all incumbrances, unless it was redeemed by payment to the registrar of land titles before the time limited by the Arrears of Taxes Act (ch. 103, R.S.S. 1920), of the amount paid by the tax sale purchaser, plus a penalty to him of 10%, and other items of expense enumerated in sec. 50 of the Act. The amount paid by the tax sale purchaser would include the taxes due to the municipality at the time of the sale. The respondent, being desirous of saving her interest in the land and being unable to do so unless she paid the whole of the tax sale purchaser's claim, together with the other expenses, redeemed the land by paying this amount, which amounted to $260.58. Later, she paid to the municipality the sum of $79.25 for the taxes for the year 1920. The issue of this appeal is between the respondent and the appellant mortgagees, who dispute the respondent's right to a lien upon the land taking priority of their mortgage, for one-half of the monies expended by her as above set over in order to prevent the land being lost.

The trial Judge found in favour of the respondent, and, in my opinion, his judgment is right in principle, although I think

Sask.
C.A.
FREEBURG v. FARMERS' EXCHANGE BANKERS & WEYBURN SECURITY BANK.
Turgeon, J.A.

it should be reduced in amount for reasons which I will state later on.

The right in equity of persons, not being mere volunteers, to a lien upon property for money expended by them upon such property is laid down in the following language in volume 37 of the Encyclopaedia of Law and Procedure, at p. 443:—

"A person, who, in order to protect his own interests or rights in property, is compelled to pay an existing obligation against the same, such as a mortgage or other lien, is entitled to be subrogated to the rights of the creditor whose debt he paid and to the lien of the encumbrance discharged; and he thereby becomes an equitable assignee and may keep the mortgage alive and enforce the lien for his own benefit............... The same rules apply where one having an interest in land discharges the lien of a judgment or decree thereon, and although the lien is lost at law, equity will keep it alive until the obligation impressed upon the legal title in favour of the payer is met."

The rule set out above arises out of the adoption in equity of the civil law doctrine of subrogation. One of its objects is to prevent one person from benefiting without cost to himself by the act of another done under compulsion on his behalf and to his advantage and to that other person's loss or expense. It was held in the case of *The Queen* v. *O'Bryan* (1900), 7 Can. Ex. 19, that the doctrine of subrogation is part of the law of Nova Scotia, and it was applied in Ontario in the case of *Abell* v. *Morrison* (1890), 19 O.R. 669. In my opinion equity will apply the doctrine to the case before us, because, undoubtedly, the respondent here did at her own expense, and in order to save her own interest in the land, confer a great benefit upon the appellants by preserving their mortgage, which would have disappeared entirely from the land if the tax sale purchaser had not been paid off. It would be most inequitable, in my opinion, to allow the appellants to enjoy the full benefit of the sacrifice she was compelled to make without being called upon to furnish her proper compensation.

But what is proper compensation? The trial Judge allowed the respondent one-half of the full amount paid by her to the registrar of land titles upon the redemption. After careful consideration, I have come to the conclusion that this amount is excessive, in respect of the mortgagees, although it is proper as against the co-owner. It must be borne in mind that she is partly to blame for the delay in paying the taxes on the land which brought about the tax sale and occasioned the expenses chargeable upon the redemption, in addition to the original amount of the taxes. Had she taken steps to pay these taxes

Sask.
C.A.
FREEBURG v. FARMERS' EXCHANGE BANKERS & WEYBURN SECURITY BANK.
Turgeon, J.A.

earlier, these extra expenses would not have been incurred, and her co-owners, the mortgagors, were no more bound to take these steps than she was herself. She seeks relief in equity, but will equity relieve her, even in part, for the payment of sums of money which never would have become payable had she exercised greater diligence? I think not. No diligence on her part could have prevented taxes being imposed upon the land yearly, and in my opinion she had the right to pay the whole of these taxes, as she did subsequently to the redemption for the year 1920, and to claim a lien upon the land for so doing, but I do not think she ought to be put in a better position as against the mortgagees than if she had done so.

Now, as to the nature of the lien which the respondent should have against the land, it is evident that the language of the rule of subrogation cannot be applied literally to this case as it is given in the text-books. The tax sale purchaser's right, which the respondent extinguished, was to have the land transferred to him free of all incumbrances; the right of the municipality, in case the taxes for 1920 had not been paid, would have been to proceed to a tax sale under the provisions of the statute. These remedies should not, I think, in the first case, and cannot in the second case, be given to her. But equity will not be defeated by a mere difficulty of procedure, and will create its own lien in order to protect her. I think, therefore, that the trial Judge was right in ordering that the respondent have a special lien against the land for one-half of the amount expended by her to redeem the land and to pay the taxes of 1920, but, in variation of his judgment, I think that such lien should have priority over the appellants' mortgage to the extent of one-half of all monies paid by her on account of taxes only, leaving out of consideration all other items of expense occasioned by her delay and that of her co-owners. The items of account are not before us, so the exact sums to be paid in the formal judgment will have to be ascertained to the satisfaction of the registrar. The amount of the lien against the interest of the Farmers' Exchange Bankers in the land will remain as provided in the judgment, but the amount of the lien to take priority of appellants' mortgage will be reduced in accordance with the above directions.

Judgment accordingly.

Que.

K.B.

REX v. SILESKI.

Quebec Court of King's Bench, Appeal Side, Martin, Greenshields, Guerin, Tellier, and Rivard, JJ. Montreal, June 28, 1921.

1. EVIDENCE (§VIII—674)—CONFESSIONS AND ADMISSIONS—WARNING BY ARRESTING OFFICER—SUBSEQUENT STATEMENT TO MAGISTRATE AND OTHER PERSON IN AUTHORITY — PROOF THAT STATEMENT MADE VOLUNTARILY.

The fact that the arresting officer duly warned the prisoner in respect of any statement the latter might make, does not dispense with the necessity for a magistrate or other person in authority receiving a statement from the prisoner again warning the prisoner that any statement he might make could be used against him at the trial. It is not to be assumed that the statements made to others in authority were voluntary because of the warning by and voluntary statement to the arresting officer.

2. EVIDENCE (§VIII—670) — STATEMENT BY ACCUSED TO PERSON IN AUTHORITY—PRISONER'S PROTESTATION OF INNOCENCE WITH ACCOMPANYING STATEMENT OF FACTS—NECESSITY OF WARNING IF STATEMENT TO BE USED TO SHEW GUILT.

The rule requiring proof that a statement made by the accused to a person in authority was made voluntarily applies not only to admissions of guilt but to protestations of innocence accompanied by assertions or admissions of circumstances having a material bearing on the question of guilt and to be used against him at the trial.

APPEAL by defendant from a conviction for murder.

Beauchamp and Elliott, for the accused.

J. A. Parent, for the Crown.

MARTIN, J.:—I concur in the views expressed by Mr. Justice Greenshields in his notes of judgment herein and would quash the conviction and order a new trial for the reasons stated by him.

GREENSHIELDS, J.: — At the March term of the Court of King's Bench (Crown Side) held in the district of Ottawa the accused was convicted of the crime of murder. The learned trial Judge granted a stay of execution upon the application of counsel for the prisoner, and proceeded to state a case for the consideration of this Court. Two questions of law were by the learned Judge reserved for consideration: 1. Was there error in law in admitting as evidence statements made by the prisoner to the witnesses, Victor Phaneuf, Regis Clement and T. Godman? 2. Was there error in law on the part of the presiding Judge, occasioning substantial wrong or miscarriage, in failing to instruct the jury as to the difference between manslaughter and murder in the premises?

I shall dispose of the second question reserved at once. As a general rule, where a jury is by law permitted to find altern-

ative verdicts, the trial Judge should direct the jury as a matter of law, that this could be done. In the case of murder, it is most desirable that the trial Judge should instruct the jury as to the difference between murder and manslaughter, and tell the jury, in law, that a verdict of manslaughter might be rendered. At the same time, a failure to do so does not render null a conviction for murder. In the present case, taking the Judge's charge as a whole, I do not believe that there was a miscarriage of justice by reason of the non-direction of the trial Judge. The murdered men were shot to death, and even though the proof would go to establish that there had been a fight or quarrel, I would not quash the verdict because the trial Judge did not, in so many words, tell the jury that they might find a verdict of manslaughter. I should answer the second question in the negative.

The first question is more difficult, and is entitled to more consideration. Perhaps no part of the criminal law, during the last century, has received more attention from members of the Bench and Bar than that dealing with the admissibility or inadmissibility of so-called confession, statements or declarations made by a suspected or accused person, or a person in custody charged with the commission of an offence.

It is elementary that there is a well defined dividing line between a confession of guilt made by an accused, and a statement or declaration made by the same person. As far back as Lord Hale a confession was known and called a "Conviction." Hawkins calls it "The highest conviction that can be made." There was no question of evidence. It was treated as a mere matter of recording a man as guilty because he had confessed.

A statement or declaration made by an accused, on the other hand, far from being an admission of guilt, might be an emphatic denial of all knowledge of or participation in a crime.

When, however, one or other is offered in evidence by the Crown to establish the guilt of a prisoner, the rule of law governing their admissibility or rejection does not greatly differ, as was pointed out by an eminent Judge, who said:

We take it that the admission of a fact or of the bundle of facts from which guilt is directly deducible, or which within or of themselves import guilt may be denominated a confession; but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts

Que.
K.B.
REX
v.
SILESKI.
Greenshields, J.

admitted involve a crime and these import guilt, or, as put by Mr. Wharton, "I am guilty of this," and this imports the admission of all the acts constituting guilt.

A prisoner may make a declaration or statement which may contain a denial of guilt, but according to the rule of law, if any of such statement or declaration is allowed to go to the jury, the whole must go, and in such statement or declaration there may be found admissions which are inconsistent with innocence, though in another part of the statement innocence may be vigorously asserted. By way of illustration: A prisoner may deny guilt, and at the same time may assert in support of his denial, that at the time when and place where the crime was committed, he was far from the scene. If the Crown succeeds in bringing him, by other proof, to the scene of the crime, when and where committed, his denial would operate to his prejudice.

Many reasons might be given why Criminal Courts, in considering the admissibility of statements or declarations, have applied practically the same rule as that governing confession, even when the statement or declaration does not contain a clear admission of guilt.

The question with which I am dealing furnishes a fair illustration of what I mean. The statements or declarations made by the prisoner to the three witnesses, Phaneuf, Godman and Clement, far from admitting guilt, contain a clearly stated denial of participation in the crime. There is found in these statements an admission that the prisoner was present at the scene of the murder.

The prisoner's statement, made to the witness Clement, a Provincial detective, and a person in authority, contains the following admissions: (a) That the prisoner was at the scene of the murder; (b) That certain clothes in the possession of the Crown and produced at the trial belonged to him, the prisoner; (c) That there were blood stains on these garments; (d) That the blood was that of a chicken which the prisoner had killed.

The Crown conclusively proved by the testimony of Dr. Derome, that the blood stains on the clothes were those of a human being. Without the statement of the accused admitted in evidence, no proof of the ownership of the clothes was made. So too, the statement of the prisoner as to the source and origin of the blood stains, being in direct contradiction with the testimony of Dr. Derome, no doubt seriously prejudiced the jury against him.

Que.
K.B.
REX
v.
SILESKI.
Greenshields, J.

Upon full consideration of the whole matter, my opinion is that the prisoner was convicted upon the testimony of the witness, Clement, proving statements or declaration made to him by the prisoner.

I have made these preliminary observations to lead up to the statement, that in answering this question I think we ought to apply the same rules as to the admissibility of the testimony that we would apply if the statements or declarations could be called a "confession."

The rule of law controlling the proof of a prisoner's guilt by an admission of his own statement has been stated and restated in one form or another from time almost immemorial and *ad nauseam*. I take one stated by the Privy Council in *Rex* v. *Ibrahim*, [1914] A.C. 599, 83 L.J.P.C. 185, 24 Cox C.C. 174. Lord Sumner in that case said:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by the person in authority."

If a person is suspected of or charged with the commission of a crime, he may voluntarily, without menace or threat, without promise or inducement, talk as to him seems best. It is recognised, however, that when a person in authority proceeds to question a prisoner in his custody, or before him, the very fact that he is a person in authority puts upon him the obligation of warning the prisoner of the danger of making any statements; that he has nothing to hope or fear if with that knowledge he does make statements which may be used against him..

I come to a consideration of the facts in the present case. The prisoner was taken in custody by one Phaneuf, and from the time he was taken in custody Phaneuf was a person in authority so far as the prisoner is concerned. Phaneuf was the Chief of Police in the town of Kippewa, in the neighbourhood where the murder was committed. The arrest was effected in the city of Ottawa, some distance from Kippewa. It was made on the 11th of August. It would appear that Phaneuf warned the prisoner. I have no doubt that the warning, so far as Phaneuf was concerned, fulfilled the requirements of the law. After this warning the prisoner made statements to Phaneuf. These statements were made in the city of Ottawa on the 11th of August. The trial

Que.
K.B.
REX v. SILESKI.
Greenshields, J.

Judge permitted proof to be made by Phaneuf of these statements. They did not contain an admission or confession of guilt. Emphatic denial of participation in the crime, on the contrary, is found.

It would appear that Phaneuf kept the prisoner in custody in Ottawa until the 15th of August. He then took him, as a prisoner, charged with murder, to Kippewa. Arriving there he took the prisoner before one Godman, a Justice of the Peace, having territorial jurisdiction in that place. The magistrate, or Justice of the Peace, proceeded to receive statements from the prisoner. No warning was given to the prisoner by Godman. Phaneuf was present. The prisoner's statement was reduced to writing. The prisoner was asked to sign, and did sign the written statement, and the magistrate took the prisoner's solemn declaration, having the same effect as an oath to the truth of the statement. [Note (a).] The learned trial Judge, notwithstanding the prisoner's objection, admitted proof of the statement; permitted the production of the statement, and its contents were read to the jury.

The learned Judge in his stated case says:

"Counsel for the defence objected to the production of this document but the same was allowed to be produced inasmuch as the accused had been previously warned by Chief Phaneuf at the time of his arrest on the 11th of August."

The statement did not greatly differ from what had been previously made by the prisoner to Phaneuf. It amounted to a corroboration of the previously made statement, but was reinforced by the sanctity of the prisoner's oath.

I am of opinion that the magistrate was a person in authority. I am of opinion that the Crown should have established the fulfilment of the condition necessary before being permitted to establish the statements made to the witness Godman, and before being permitted to produce and read to the jury the solemn declaration made by the prisoner.

If after a prisoner is arrested, and when in custody, and after being warned by the person who effected his arrest, he makes statements to that person, and the Crown wishes to obtain corroborative proof, and brings the prisoner before another person, being a person in authority, my opinion is that the law requires that that other and second person should warn the prisoner that any statements made by him might be used against him at his trial. I do not wish to be understood to

(a) See Canada Evidence Act, R.S.C. 1906, ch. 145.

hold that if a prisoner wishes to make a solemn declaration before a magistrate, and asks him to witness his solemn declaration, and voluntarily does so, that it may not be used against him.

So far as the stated case shows, the chief of police Phaneuf, took the prisoner to Godman for the very purpose of obtaining what was obtained. To give judicial sanction to such a practice, in my opinion, would not only be dangerous, but in conflict with the well established and recognised rules of law in such cases governing.

But there is more. Some time previous to the 21st of August, one Clement, a provincial detective, employed upon the case, and being a person in authority, found certain clothes, a pair of trousers and a vest. He believed them to be the clothes of the prisoner, and worn by him at the time of the murder. He found on these clothes what he believed to be blood stains. His belief was correct. Quite properly, and as part of his duty, he took possession of the clothes. He delivered them to an eminent analyst, Dr. Derome, for the purpose of ascertaining if possible the nature of the blood with which the clothes were stained. The analysis satisfied the doctor that it was human blood. He so reported. After having got this information, on the 21st of August, the detective Clement paid a visit to the prisoner, and alone with him questioned him. He gave no warning to the prisoner, and the prisoner made statements. This is what the trial Judge has to say about it in his stated case:

"Secondly: Detective Regis Clement of the Provincial Police swore that he first saw the accused on the 21st of August, 1920, when he had a conversation with the accused concerning the crime, and that he did not put the accused on his guard previous to questioning him. It was brought out in evidence that the accused was warned by Clement on the 22nd of August, when he was taken into his custody. The defence objected to the evidence of the conversation which took place on the 21st, but the Court ruled that it should be admitted, inasmuch as the accused had already been warned by Phaneuf on the 11th of August."

It would appear that up to the 22nd of August, the prisoner was in the custody of Phaneuf, but on the latter date Clement questioned the accuser about the clothes and about the blood stains on the clothes. The prisoner admitted the clothes belonged to him. He was questioned as to the blood stains, and called upon to explain their presence, he, apparently, gave the first explanation that came to his mind. He said the blood was

Que.
K.B.
REX v. SILESKI.
Greenshields, J.

that of a chicken which he had killed. Clement got all he wanted. He got what he went for, and in my opinion, as I have already stated, he got a verdict of guilty against the prisoner. I am not so sure that he did not come within what the celebrated Judge Hawkins said in the case of *The King* v. *Histed* (1898), 19 Cox C.C. 16.

Questions put by the police to a prisoner tending to elicit incriminating answers, should be rejected, if there is any reason to believe that a trap was being laid for the prisoner.

In the case of *Reg.* v. *Male* (1893), 17 Cox C.C. 689 at 690, Mr. Justice Cave said:

"The law does not allow the Judge or the jury to put questions in open Court to prisoners, and it would be monstrous if the law permitted a police officer to go, without any one being present to see how the matter was conducted and put the prisoner through an examination and then produce the effect of that examination against him. Under these circumstances a policeman should keep his eyes shut and his ears open."

Another English Judge said:

"The practice of questioning prisoners by policemen and thus extracting confessions from them is one which is strictly reprehensible. It ought not to be permitted."

I must respectfully disagree with the finding of the learned trial Judge, that because Phaneuf had warned the prisoner on the 11th of August, that warning availed to permit the prisoner's statement to go to the jury at his trial. Clement warned him on the 22nd of August. It would seem to me a case of locking the door after the thief had accomplished his purpose. There is no doubt whatever, in my mind, that Clement was a person in authority at the time, within the meaning of the law.

Says Stephens, 1 Digest of the Law of Evidence, p. 33:

"The prosecutor, officers of Justice (having the prisoner in custody) magistrate and other persons in similar positions are persons in authority."

In my opinion, there can be no doubt of the serious prejudicial nature of Clement's testimony. There is no doubt the jury would accept the testimony of Dr. Derome as to the nature of the blood stains. The denial of the accused, or the statement of the accused in contradiction would necessarily militate against him. When a Court finds that evidence has been illegally admitted, the question of the extent to which a jury may have been influenced offers no serious difficulty. From the very

nature of the matter, in most cases, it would be most difficult, and in some, utterly impossible, to estimate with any accuracy what the effect would be on the minds of any one of twelve men. See the remarks of Sir Charles Fitzpatrick in the case of *Allen* v. *The King* (1911), 44 Can. S.C.R. 331, 18 Can. Cr. Cas. 1.

See also the remarks of an English Judge in the case of *Rex* v. *Fisher*, [1910] 1 K.B. 149, 79 L.J. (K.B.) 187, 22 Cox C.C. 270.

Any number of cases where similar holdings were clearly laid down could be found.

Upon the whole, I should answer the first question as follows: That there was error in admitting as evidence statement made by the prisoner to the witness Regis Clement and to the witness T. Godman; that there was error in law in permitting the production and reading of the statement or solemn declaration signed by the prisoner in the presence of the witness T. Godman. I should quash the conviction and order a new trial.

GUERIN, J.:—I am of opinion that this Court should quash the conviction and order a new trial.

TELLIER, J.:—I would quash the conviction and order a new trial for the reasons expressed by Mr. Justice Greenshields.

New trial ordered.

Formal judgment was entered as follows:—

JUDGMENT. "Having heard the counsel for the prisoner upon his appeal from a conviction rendered against him on a charge of murder at the March term of the Court of King's Bench, Crown Side, holden at the City of Hull, in the district of Hull and particularly upon the questions reserved by the trial Judge for the opinion of this Court, which questions were two in number, and were as follows:—

(1) Was there error in law in admitting as evidence statements made by the prisoner to the witness Victor Phaneuf, Regis Clement and T. Godman?

(2) Was there error in law on the part of the presiding Judge occasioning substantial wrong or miscarriage in failing to instruct the jury as to the difference between murder and manslaughter in the premises?

"Having heard the Crown by its counsel; and having read the case stated by the learned trial Judge, and upon the whole deliberated;

"It is by the Court of Our Sovereign Lord the King now here considered;

Alta.
App. Div.
ROAN v. QUINN AND MADDEN.
Scott, C.J.
Stuart, J.A.

"As to question one: There was error in law in admitting as evidence statements made to the witness T. Godman; there was in like manner error in law in admitting statements made by the prisoner to the witness Regis Clement;

"As to the second question:

"Considering all the facts and circumstances disclosed by the proof, the failure on the part of the presiding Judge not to further and more clearly point out to the jury the difference between murder and manslaughter was not an error in law occasioning substantial wrong or miscarriage;

"It is accordingly adjudged, and finally determined that the said appeal be allowed; that the conviction against the prisoner be quashed and set aside, and is quashed and set aside, and a new trial ordered to be held according to law, and it is ordered that an entry hereof be made of record in the Court of King's Bench, Crown Side, in and for the district of Ottawa."

ROAN v. QUINN AND MADDEN.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 17, 1922.

EVIDENCE (§IIK—311)—EXCHANGE OF LANDS—CONTRACT AS TO—ACTION FOR BREACH—CONTRACT RELIED ON TO SUPPORT CLAIM—DOCUMENT PRODUCED CONTAINING MATERIAL ALTERATION—BURDEN OF PROOF ON PARTY PRODUCING TO PROVE THAT ALTERATION MADE WITH CONSENT OF DEFENDANTS.

On the production of a contract for the exchange of two parcels of land, in an action for breach of contract it appeared that the phrase "subject however to the approval of the present holder of title" had been struck out by a red ink line being run through it. The plaintiff swore that this alteration had been made some weeks after the signing of the agreement by one of the defendants in his presence. The defendants both swore that they had nothing to do with the alteration and never knew of it until they afterwards saw it in the solicitor's office, and had never consented to it. The Court held that the alteration was material and that the burden lay upon the plaintiff who produced it and who relied upon it to support his action to prove that the alteration had been made with the consent of the defendants and as he had failed to do so he could not succeed in his action.

APPEAL by the defendants from a judgment at the trial, awarding the plaintiff $900 damages for breach of a contract for the exchange of two certain parcels of land. Reversed.

W. S. Ball, for respondent.

A. M. Sinclair, K.C., and *H. W. Church*, for appellant.

SCOTT, C.J., concurred with STUART, J.A.

STUART, J.A.:—On February 18, 1920, the parties entered into a written contract in the following terms:—

"Milk River, Alta., Feby. 18th, 1920.

This is to certify that we undertake to sell to James Roan of Milk River, Alta., a certain tract of land comprising approximately 30 acres joining the south-east quarter of section twenty-two (22) (2-16) and on the north side of the Milk River (river) at a consideration of the transfer of lot number five (5), block number twelve (12) in the original townsite of Milk River, subject to a mortgage of $300 in favour of J. A. Jochem and accrued interest, but otherwise free of other encumbrances. Upon completion of said transfer we agree to sell the above described land to James Roan for the above consideration, subject, however, to the approval of the present holder of title and on a contract for the full purchase price, deducting therefrom the sum of $250 to be construed as a loan, payable at any time within 2 years with interest at 10% per annum.

(Sd.) James Roan.

(Sd.) W. J. Quinn.
Wm. Madden.

It will be observed that the exact description of the land is not given in this document with respect to either parcel. The plan number is not given of the town lot. But the parcels referred to were well known to all parties at the time and were fully identified by admissible extrinsic evidence.

The last clause of the document is somewhat obscure in meaning, but at the trial it was well understood that what the parties intended was that the defendants should pay in full for the farm land and then convey or assign it to the plaintiff, and in addition make him a loan of $250. And in any case, these matters are immaterial in the view I take of the case.

The fact was that the defendants did not own the so-called 30-acre piece. It did in fact contain 40 acres and belonged to the Alberta Railway and Irrigation Co., now absorbed by the C.P.R. Co. At the time of the agreement, the title of the company had been in error beclouded in the Land Titles Office by the registration against it of certain seed grain liens granted to the Crown by one Kiesone, an adjoining owner, with respect to his own lands, although he was in no way interested in the parcel in question.

When the document above quoted was produced from the plaintiff's possession at the trial, it appeared that the phrase "subject however to the approval of the present holder of the title" had been struck out by a red ink line being run through it. The plaintiff swore that this alteration had been made some weeks after the signing of the agreement by the defendant Quinn in his presence. The defendants both swore that they had

Alta.

App. Div.

ROAN v. QUINN AND MADDEN.

Stuart, J.A.

nothing to do with the alteration, and never knew of it until they afterwards saw it in the solicitor's office, and had never consented to it.

The trial Judge did not make any finding upon this clear issue of fact. He said:—

"As to the alteration by erasure in red ink in the agreement produced here, I must confess that I cannot find out who did it, but I am not prepared to hold that it is material or that the words erased were material after ascertaining the condition as to title, the ignorance on the part of the interested parties in the clause as to who was the owner of the land to which the clause was to apply. The words are not apt where nothing was known as to ownership."

With very much respect, it seems to me, that the words erased were extremely material. It expresses clearly a condition upon which alone the defendants were to be bound to obtain title for the plaintiff. If the "present holder" of the title did not approve, that is if his consent could not be obtained, the defendants would not be bound. This is the plain meaning of the document.

"A material alteration is one which affects the contract or any rights or remedies under it." Leake on Contracts, 6th ed., p. 591.

Now the rule is well settled that "the party producing a written agreement which appears to have been altered in any material part is required to explain the alteration so far as is necessary to support the issue which it is produced to prove." Leake, p. 595.

Hals., vol. 10, p. 431, says:—

"A writing which is intended to be under hand only can be altered by erasure or interlineation or otherwise before it is signed, but it lies upon the party who puts the instrument in suit to explain the alteration and show when it was made.

An alteration in a material part of an instrument under hand made by or with the consent of one party thereto, but without the consent of the other party, makes the instrument void to this extent, that the party responsible for the alteration cannot enforce the instrument against a party not responsible."

The cases cited fully support these statements of the law.

It follows that the burden lay upon the plaintiff, who produced the writing, from whose possession it came and who relied upon it, to support his action, to prove that the alteration had been made with the consent of the defendants. This the plaintiff failed to do. The trial Judge, although adopting the plaintiff's evidence against that of the defendants upon other

issues where they were in direct conflict, and although he expressed much displeasure at the conduct of the defendants, and in my opinion rightly so, nevertheless was not prepared to accept as fully credible and conclusive the plaintiff's statement in regard to the circumstances under which the erasure was made. This means that the plaintiff failed to satisfy the burden that the law cast upon him in such a case.

For these reasons, I am of opinion that the appeal must be allowed, with costs to be taxed under column 2, and the judgment below set aside. If it were clear that the plaintiff had suffered as much damage as he claimed, I should have been inclined to suggest a new trial. But it seems to me very doubtful whether the plaintiff suffered any very serious damage at all. At the trial the plaintiff was still living on the property which he blames the defendants for not getting for him, although it was a year and a half after the agreement and a year after the action was begun. I think he should have explained, when he was seeking damages, how he happened to be still there, so that there could be a clearer perception of the damages he had really suffered. He made no suggestion that he would soon have to vacate.

It is true that the property which the defendants were to take from the plaintiff was foreclosed by a mortgage, and the plaintiff lost it. But the plaintiff does not seem to have made any effort to get the defendants to protect it for him, even assuming they were bound to do so. Nor does it appear that they were ever even informed of the foreclosure proceedings.

I think it desirable that the litigation should end rather than be protracted by a new trial, even if that were a possibly proper result where the property involved is of such small value.

But the defendants were, in my opinion, guilty of great misconduct in not making any really serious attempt to carry out the bargain they entered into. They had given up all attempt to get the property which they had agreed to get for the plaintiff long before they ever heard of the alteration in the contract. If they had honestly striven to perform the obligation which they undertook, there would never have been any trouble at all for they, on their own admission, were able to get the property for $400 cash. The erroneous registration of the liens might have caused a little delay, but the cost of it would have all fallen upon the C.P.R. or at least not upon the defendants.

I would, therefore, direct judgment to be entered, dismissing the action without costs.

BECK, J.A.:—I think there should be a new trial on the broad ground that the trial was unsatisfactory. That this is a good

Sask.
C.A.
HEAD-PATRICK v. PATRICK.

ground for ordering a new trial is established by the decision of the Supreme Court of Canada in *Keiser* v. *Kalmet* (1911), 47 Can. S.C.R. 402, *reversing* the decision of the Supreme Court of Alberta in *Kalmet* v. *Keiser* (1910), 3 Alta. L.R. 26. The note of the decision of the Supreme Court of Canada in the Digest of Canadian Case Law, 1911-1914, Col. 2034, says that the decision of the Alberta Court was *affirmed*. The decision was in fact *reversed*. In the Court below I dissented and was of opinion that on the broad ground that the trial was unsatisfactory, there should be a new trial. There seems to be no other ground upon which the Supreme Court of Canada could have directed a new trial. The further history of the case is that the plaintiff, who had succeeded at the trial, though the defence was that he was guilty of forgery and perjury, left the country and the new trial never took place. This perhaps affords some confirmation of the rightness of the ultimate decision.

In the present case the question of the alteration of the document which furnished the basis for the rights of both parties was stated by the trial Judge to be immaterial, and he did not decide it. Nevertheless, he finds in favor of the plaintiff. This, if, as I think, the law as stated by my brother Stuart, is correct, would apparently be the wrong conclusion. I fear the Judge had not his mind directed to the law upon the point. There are other points upon which more light could easily be obtained, and I think that a new trial would assist a Judge in coming to a conclusion upon the whole case arrived at with a full sense of having ascertained the truth. A conclusion of this character cannot be reached upon the evidence as it now stands.

I would, therefore, direct a new trial. As to costs, I would direct all costs to be taxed upon column 2 of the schedule of costs and, as was done by the Supreme Court of Canada in *Keiser* v. *Kalmet*, direct that all costs to date abide the result.

HYNDMAN and CLARKE, JJ.A., concur with STUART, J.A.

Appeal allowed.

HEAD-PATRICK v. PATRICK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon, and McKay, JJ.A. March 6, 1922.

DIVORCE AND SEPARATION (§VA—46)—ALIMONY—ACTION FOR JUDGMENT —FAILURE TO MAKE PAYMENTS—EXECUTION FOR ARREARS NOT BARRED BY STATUTE OF LIMITATIONS.

The Courts of Saskatchewan do not look to the English Divorce and Matrimonial Causes Act, 1857, ch. 85, for their practice in alimony actions, and where a judgment has been obtained for payment of alimony at stated periods, the practice for enforcing such

Sask.

C.A.

HEADPATRICK v. PATRICK.

Haultain, C.J.S. Lamont, J.A.

judgments is the same as for enforcing payments decreed to be made in any other cause or action, and execution will issue for arrears of payments, if the Statute of Limitations has not barred the recovery.

[See Annotation on Divorce in Canada, 62 D.L.R. 1.]

APPEAL from the judgment of Embury, J., dismissing an appeal from the local master, giving the plaintiff leave to issue execution for arrears of alimony. Affirmed.

W. A. Doherty, for appellant.

V. R. Smith, for respondent.

HAULTAIN, C.J.S.:—I agree that under the special circumstances of this case, the plaintiff should be allowed to recover the arrears of alimony in question. There is here, in my opinion, as in England, a discretion as to arrears. In England the power to grant alimony in matrimonial causes other than suits for dissolution of marriage, is inferentially given by sec. 6 of the Matrimonial Causes Act, 1857, ch. 85, by which certain jurisdiction of the Ecclesiastical Courts was transferred to the Divorce Court. In the exercise of that jurisdiction the Court is required by sec. 22 of the Act "to proceed and act and give relief on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief."

The Ecclesiastical Courts gave alimony from year to year, and, except under special circumstances, would not enforce arrears beyond one year. *Wilson* v. *Wilson* (1830), 3 Hag. Ecc. 329, 162 E.R. 1175 (in note to *De Blaquiere* v. *De Blaquiere*); *Robinson* v. *Robinson* (1728), 2 Lee 593, 161 E.R. 451; *Kerr* v. *Kerr*, [1897] 2 Q.B. 439, 66 L.J. (Q.B.) 838, 46 W.R. 46, per Vaughan-Williams, J. Absence of the husband from the country is stated in *Wilson* v. *Wilson* as a good ground for departing from the ordinary rule.

LAMONT, J.A.:—This is an appeal from an order permitting the plaintiff to sign execution for arrears of alimony for the 6 years extending from June, 1908, to June, 1914, under a judgment of Newlands, J., delivered January 9, 1908 (1 S.L.R. 44). By that judgment alimony was granted to the plaintiff, and a reference was made to the local registrar to compute the amount. The amount was fixed at $160 a year, payable $80 every six months. An application was then made to the local master to have the registrar's report confirmed. The local master confirmed the report and directed that the plaintiff have judgment against the defendant for the amount so found by the registrar. The defendant paid the alimony due June 7, 1908, but made no further payments, and the plaintiff now

Sask.
C.A.
HEAD-PATRICK v. PATRICK.
Lamont, J.A.

desires to have execution for the arrears above mentioned. The local master gave her leave to issue execution, and on appeal to Embury, J., his order was confirmed. From Embury, J.'s decision an appeal is now brought to this Court.

I entirely agree with the decision appealed from, and for the reasons given by the Judge. The chief grounds on appeal urged upon us were:—(1) That there was no judgment upon which execution could issue; (2) If there was, it was not a final judgment, and execution can only issue to enforce a final judgment; (3) That as payments of alimony were intended for the wife's support and not to be hoarded, arrears of alimony can only be recovered for a short period, usually one year; and (4) That payments of alimony in this Province can be enforced only in accordance with the practice and procedure as it existed in England on January 1, 1898.

That there was a judgment upon which execution could be issued for the payments as they became due, must, I think, be accepted. The judgment of Newlands, J., together with the report of the registrar, if properly entered in the records of the Court, would, in my opinion, constitute a judgment sufficient for the purpose of issuing execution. The local master having given the plaintiff leave to issue execution, the defendant, in order to have that leave set aside on the ground that there was no judgment, would have to show that judgment had not been entered. This has not been done. There being a judgment for alimony payable in the sum of $80 every six months, these half-yearly payments, under our practice, become a debt due from the defendant to the plaintiff as each instalment becomes payable, although they may not constitute a debt under the English practice. In England, there is no separate right of action for alimony. The granting of alimony by the English Courts is only incidental relief granted in suits for restitution of conjugal rights or judicial separation, and the practice to be followed is that laid down in the Divorce and Matrimonial Causes Act. In this Province we do not look to that Act for our practice or procedure. *Sewell* v. *Sewell* (1919), 49 D.L.R. 594, 13 S.L.R. 44.

Our practice for enforcing payments of alimony due under a judgment is the same as for enforcing payments decreed to be made in any other cause or matter. *Harris* v. *Harris* (1896), 3 Terr. L.R. 416.

A judgment for the payment of certain sums on specified dates as alimony is, in my opinion, a final judgment on which the plaintiff may issue execution for each such payment as the same becomes due, if unpaid. Where, however, this is not done

and the arrears are allowed to accumulate, the rule in England is that the Courts allow the wife to recover the arrears for a short period only, one or two years, on the principle that alimony is given to a wife for her maintenance and not to be hoarded. I do not say that cases may not arise in which the Court, where its assistance must be obtained, might not refuse assistance except on condition that the wife would not accept a smaller sum than is due for arrears. That, however, would only arise in a case where the wife could properly be charged with "hoarding." In a case like the present, where the defendant, after the decree, moves to a foreign country and it is not shewn that he had any property here exigible under execution, I am at a loss to understand how a wife can be charged with hoarding. It cannot be hoarding on her part to do without that which she is unable to obtain. That the plaintiff managed to exist without receiving the alimony awarded is not, in my opinion, sufficient to justify the Court in relieving the defendant from the consequences of the order awarding alimony, and, as the Statute of Limitations has not barred the recovery, leave should be given the plaintiff to issue execution.

The appeal should be dismissed with costs.

TURGEON, J.A.:—I agree that this appeal should be dismissed with costs.

MCKAY, J.A.:—I concur in the result.

Appeal dismissed.

JOHNSTON v. ALBERTA FOUNDRY AND MACHINE Co.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 16, 1922.

DAMAGES (§IIA—83)—PURCHASE OF TRACTOR—PURPOSE FOR WHICH PURCHASED MADE KNOWN—FAILURE TO DO WORK REQUIRED—PURCHASER UNDER AGREEMENT TO DO WORK—NECESSITY OF HIRING WORK DONE—MEASURE OF COMPENSATION.

Owing to the failure of a tractor to do the work for which it was purchased, the plaintiff had to hire certain breaking done at a cost of $5.50 per acre, which he had agreed to do for a tenant. The trial Judge assessed the damages at the difference between the cost to the person doing this work and the amount which plaintiff paid him and this on the assumption that it would have cost the plaintiff $3.50 an acre to do the work if he had been able to use the tractor in question. Upon appeal the Court held that the trial Judge had not given sufficient weight to the circumstance that the machine used to do the work was a very much larger and heavier one than the one in question, and that the cost of operating the tractor in question would have been only $2 or $2.25 an acre, and increased the damages by $1 an acre.

Alta.

App. Div.

JOHNSTON v. ALBERTA FOUNDRY AND MACHINE CO.

Stuart, J.A.

APPEAL by defendant from the trial judgment in an action for damages for breach of contract to put a tractor in order so that it would do the work for which it was purchased. Appeal dismissed but damages increased.

A. M. Sinclair, K.C., for appellant.

C. S. Blanchard, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—I think this appeal should be dismissed with costs and the cross appeal allowed. Taking the facts as found by the trial Judge, what happened was this:—The plaintiff was proposing to buy a tractor from one Kimball, who had bought it from the defendant, but had not paid for it in full. Before buying it plaintiff told the defendant's agent, Parrish, that he was proposing to buy it and that he would do so if the defendant would put it in good working order. Parrish agreed to do so.

There can be no doubt that the purchase of the machine by the plaintiff from Kimball and his entering into this obligation towards Kimball, a third party, was a consideration moving from the plaintiff sufficient to support the defendant's promise. See Leake, 6th ed., p. 439.

Moreover, I am for my part unable to see that the trial Judge went substantially wrong in identifying the meaning of the two accounts of the conversation in question.

Then as to remoteness of the damages, it seems to me to be clear that when the defendant knew, as it did, what the tractor was to be used for that spring, *viz.*: the ploughing of land, it is immaterial that they may not have known the particular circumstances which made the plaintiff specially need to plough certain land.

But there is a cross-appeal by the plaintiff asking for an increase in the amount of damages. The notice of cross-appeal is not in the appeal book, but that there was a formal cross-appeal is clear from the appellant's factum, in which it is specifically referred to.

It appears from the evidence that the plaintiff wanted the tractor to do a certain piece of breaking on his own land which he had agreed to do for a tenant. The area was 148 acres. The plaintiff was obliged, owing to the failure of the tractor in question to work properly, to hire one Claude Johnson to do the breaking at a charge of $5.50 an acre. And he also hired Johnson to break for himself an additional area of 27½ acres at $5 an acre. Claude Johnson testified that his operating cost in doing this work was $3.50 an acre. The trial Judge assessed the damages at the difference between the cost to Claude Johnson of doing this work, and the amount which the plaintiff paid

him, and this upon the assumption that it would have cost the plaintiff $3.50 an acre to do the work if he had been able to use the tractor in question.

But the plaintiff contends that there was an error in this assessment, because Claude Johnson had used a very large tractor, much larger than the plaintiff's, and because the evidence of the plaintiff and his other witnesses shewed clearly that the cost of operating the tractor in question would only have been $2 or $2.25 an acre.

Referring to Claude Johnson's evidence as to cost, the trial Judge said: "This is the only direct evidence I have as to the cost, and I am going to accept it." In adopting this evidence as his guide, I think the trial Judge did not give sufficient weight to the circumstance that Claude Johnson's machine was a very much larger and heavier one than the machine in question. It is true that the evidence of the witnesses Wolf and Beierlin amounted to only an estimate but that estimate at any rate related to the only cost that was really material, *viz.*, the cost to the plaintiff if he had operated the machine which was in question in the action. The plaintiff's evidence, it is also true, related to the cost of operating another machine owned by him at the same time, and apparently a smaller one. But the witnesses Wolf and Beierlin had had considerable experience, and I see no satisfactory ground for disregarding their evidence, which alone was directed to the really material point.

I cannot, therefore, see how we can avoid acceding to the plaintiff's contention, at least to some extent. He was willing to allow the cost at $2.25 an acre. It would be fair, I think, to estimate the cost at $2.50, and thus to add $1 an acre to the amount of the damages allowed.

As to the radiator, the matter is not clear enough, in my opinion, to justify us in interfering, and the judgment with respect to that should not be disturbed.

The appeal will be dismissed with costs, and the cross-appeal allowed without costs, and the judgment will be increased by $175.50 to $512.75.

Appeal dismissed.

REX v. HERRON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

CRIMINAL LAW (§IVG—136)—CONVICTION BY POLICE MAGISTRATE—SEC. 285C OF THE CRIM. CODE—APPEAL TO DISTRICT COURT JUDGE—DISMISSAL OF APPEAL BY JUDGE—SUSPENSION OF SENTENCE—JURISDICTION.

Sask.
C.A.
REX
v.
HERRON.
Haultain, C.J.S.

A District Court Judge in Saskatchewan has no jurisdiction on dismissing an appeal from a conviction by a police magistrate for an offence under sec. 285c of the Criminal Code (1921 ch. 25, sec. 3) to release the convicted person on suspended sentence.

APPLICATION on the part of the Attorney-General for Saskatchewan for a writ of certiorari.

The facts and circumstances are fully set out in the judgments following.

H. E. Sampson, K.C., for the Attorney-General.

No one *contra*.

HAULTAIN, C.J.S.:—The accused was convicted by the police magistrate for the City of Saskatoon of a first offence under sec. 285c of the Criminal Code (1921, ch. 25, sec. 3), and sentenced to 7 days' imprisonment. The section in question is in the following terms:—

"Every one who while intoxicated drives any motor vehicle or automobile shall be guilty of an offence and liable upon summary conviction for the first offence to a term not exceeding thirty days..........."

The accused appealed to the District Court.

The District Court Judge, who heard the appeal, dismissed the appeal; but, instead of sentencing the accused at once to any punishment, directed that he be released on his entering into a recognisance with one surety in the sum of $500 to appear and receive judgment, and in the meantime to keep the peace and be of good behaviour.

Application is now made to us on behalf of the Attorney-General for a writ of certiorari on the following grounds:—

"1. There is no jurisdiction to suspend sentence upon a conviction for an offence under sec. 285c of the Criminal Code.

2. That the District Court Judge having affirmed the said conviction made by the magistrate, has no jurisdiction on appeal to vary the sentence imposed by the magistrate."

As to the first ground: Section 1081 of the Criminal Code provides that in any case in which a person is convicted before any Court of any offence punishable with not more than 2 years' imprisonment, the Court may, under certain circumstances, instead of sentencing him at once to any punishment, suspend sentence. The language of this section is very broad—"before any Court of any offence," but the word "Court" is, in my opinion, given an exclusive meaning by sec. 1026. That section is in the following terms:—

"1026. In the sections of this part relating to suspended sentence, unless the context otherwise requires, 'Court' means and includes any superior Court of criminal jurisdiction, any

Sask.
C.A.
REX
v.
v.
HERRON.
Haultain, C.J.S.

Judge or Court within the meaning of Part XVIII, and any magistrate within the meaning of Part XVI."

Part XVIII refers to speedy trials of indictable offences, and for the purposes of that part "Judge" means, in this Province, a District Court Judge (sec. 823, vi.), and "Court" means the District Court Judge's Criminal Court. By sec. 824 the Judge sitting on any trial under Part XVIII for all the purposes thereof and proceedings relating thereto, or connected therewith, is constituted a Court of record, and in the Province of Saskatchewan such Court is called the District Court Judge's Criminal Court.

Under Part XV, which relates to summary convictions by justices of the peace, an appeal is given, in Saskatchewan, to "the district court at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose." (sec. 749 (f)).

It is quite plain that the District Court referred to in sec. 749 is not the District Court Judge's Criminal Court mentioned in sec. 824.

I am, therefore, of opinion that the District Court referred to in Part XV is not a "Court" within the meaning of secs. 1026 and 1081, and that, consequently, in hearing and determining appeals from summary convictions that Court has no power to suspend sentence under sec. 1081.

I am further of opinion that the provisions of sec. 1081 do not apply to proceedings under Part XV. The powers conferred by that section can, in my opinion, only be exercised in this Province by: 1. The Court of Appeal and the Court of King's Bench. 2. The District Court Judge's Criminal Court created for the speedy trial of indictable offences. 3. By police magistrates and other persons coming within the definition of "magistrate," on the summary trial of indictable offences under Part XVI.

As to the second ground: Section 751 gives the Court full discretion after hearing the matter appealed to "make such order as seems meet to the Court," and sec. 754 provides that after hearing and determining upon the merits the charge or complaint upon which the conviction appealed from has been made, the Court may confirm, reverse, or modify the decision of the justice, or may make such other conviction or order in the matter as the Court thinks fit.

Under sec. 751, *if the appeal is dismissed and the conviction is affirmed*, the Court will order the appellant to be punished according to the conviction. But there is nothing in the language of sec. 751 to limit the discretion in 754 to confirm, modify, or

Sask.
C.A.
REX
v.
HERRON.
Lamont, J.A.

reverse, or make such other conviction or order as the Court thinks fit.

In England, under similar statutory provisions, Quarter Sessions can sustain the conviction on the merits but alter the sentence. See *The Queen* v. *Justices of Surrey* (1892), 61 L.J. (M.C.) 200; *Demer* v. *Cook* (1903), 67 J.P. 206.

In view of my opinion on the first ground, this question does not arise on this application.

Application granted.

LAMONT, J.A. (dissenting):—Section 285c of the Criminal Code makes it an offence for a person to drive an automobile while intoxicated, and subjects the offender, upon summary conviction, upon a first offence, to a term not exceeding 30 days and not less than 7 days. The accused was convicted of this offence and sentenced to 7 days' imprisonment. He appeals. An appeal from a summary conviction in this Province lies to the District Court (sec. 749). The District Court Judge affirmed the conviction, but released the accused on suspended sentence. The question to be determined in this application is: Had the Judge of the District Court power to suspend sentence?

The power to release on suspended sentence a person convicted of an offence under the Code is given by sec. 1081, which reads as follows:—

"In any case in which a person is convicted before any Court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the Court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognisance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

2. Where the offence is punishable with more than two years' imprisonment, the Court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender."

Section 1026 defines what is meant by "Court" in sec. 1081. It reads:—

"In the sections of this part relating to suspended sentence, unless the context otherwise requires, 'Court' means and in-

cludes any Superior Court of Criminal Jurisdiction, any Judge or Court within the meaning of Part XVIII. and any magistrate within the meaning of Part XVI."

Turning to Part XVIII., we find "Judge" defined as follows:—

"823. In this Part, unless the context otherwise requires, a(a) 'Judge' means and includes,

(vi.) in the provinces of Saskatchewan and Alberta a Judge of the Supreme Court of the province or of any District Court."

And "magistrate" within the meaning of Part XVI., is defined as follows:—

"771. In this Part, unless the context otherwise requires,—

(a) "magistrate' means and includes,

(iv.) in the Provinces of Saskatchewan and Alberta, a Judge of any District Court or any two justices, or any police magistrate or other functionary or tribunal having the powers of two justices and acting within the local limits of his or its jurisdiction."

If we substitute for the term "Court" in sec. 1081 the persons and tribunals which that term by these definitions is declared to mean, we have, so far as this Province is concerned, the section reading as follows:—

"In any case in which a person is convicted before any Superior Court of Criminal Jurisdiction or a Judge of the Supreme Court or of any District Court, or any two justices of the peace or any police magistrate or other functionary or tribunal having the power of two justices of the peace acting within the local limits of his or its jurisdiction, *of any offence* punishable with not more than two years' imprisonment . . . . the said Superior Court of Criminal Jurisdiction or Judge of the Supreme Court or Judge of the District Court or two magistrates . . . . may, instead of sentencing him . . . . direct that he be released, etc."

A perusal of the section as thus extended would seem to establish the right of a District Court Judge to suspend sentence where a person is convicted before him of any offence under the Code, unless the statute expressly makes sec. 1081 inapplicable.

For the Crown, however, it was argued that we are not entitled to take the definition of "Judge" given in Part XVIII. and substitute this definition for the word "Court" in sec. 1081, but that to the definition we must add the words "trying cases under this Part," and that it is only when a Judge is trying cases under Part XVIII., and when a magistrate is trying cases under Part XVI. that they can exercise the power of suspending

Sask.
C.A.
REX
v.
HERRON.
Lamont, J.A.

sentence. In other words, the contention is that the right to release on suspended sentence can only be exercised in case of a conviction made by a Superior Court of Criminal Jurisdiction or made under Parts XVIII. and XVI.

The answer to this argument seems to me to be, that, had such been the intention, parliament would have said so directly, and that, instead of the elaborate definition of "Court" set out above, sec. 1081 would have provided that in case of a conviction by a Superior Court or under Parts XVIII. or XVI., the Court convicting should have the right to release on suspended sentence. That this simple and obvious method was not adopted indicates to my mind that parliament was not endeavoring by sec. 1026 to define the classes of cases in which upon conviction sentence might be suspended, but was designating the tribunals which were to be entrusted with the discretionary power of suspending it.

Having designated the tribunals, the Code proceeds to declare that if a person is convicted before any one of them *of any offence*, the power to suspend sentence might be exercised.

The chief difference in result between the acceptance of the interpretation sought to be placed upon the section by counsel for the Crown and the one I have indicated, is, that by the adoption of the view of counsel for the Crown a District Court Judge, while entitled to exercise the power of suspending sentence in case of a conviction under Parts XVI. or XVIII., could not exercise it in case of a conviction in an appeal from a summary conviction, although if the appeal was from a conviction in a summary trial under sec. 797 he could suspend the sentence, because, in that case, the conviction would be under Part XVI.

I cannot conceive of any good reason why parliament should entrust to a Judge of the District Court the discretionary power of suspending sentence when he sits in appeal by virtue of sec. 797 and deny to him the same right when he sits in appeal from a summary conviction.

Another difference, if we adopt the view urged on behalf of the Crown, would be, that, while a magistrate convicting an adult on a summary trial of an indictable offence under Part XVI. could suspend sentence, the same tribunal could not suspend sentence if a juvenile offender were convicted before him of an indictable offence under Part XVII. If there is one class of cases in which I would expect parliament to authorise the exercise of the clemency embodied in suspending sentence, it is in reference to juvenile offenders convicted under Part XVIII.

As I have already pointed out, the object of sec. 1026, in my opinion, was to designate the tribunals which were to be en-

trusted with the exercise of the discretionary power of suspending sentence. That power has not been given to one justice of the peace, but, in my view, it has been given to two justices of the peace sitting together and constituting a Court under the Code, and to every tribunal or functionary exercising the jurisdiction of two justices of the peace or any superior jurisdiction, irrespective of the Part under which the conviction is made, and it was so given because it was thought that two justices of the peace, or anyone exercising the jurisdiction of two justices of a superior jurisdiction, could be safely entrusted with the exercise of this discretionary power. Had it been intended to restrict its exercise to cases where the conviction was by a Superior Court of Criminal Jurisdiction or under Parts XVIII. and XVI., I do not think we would have found the wide language which appears in sec. 1081, which provides for its exercise "in case a person has been convicted *of any offence.*"

In my opinion, the District Court Judge was entitled to release the accused on suspended sentence. This application should, therefore, be dismissed.

TURGEON, J.A.:—This is an application on the part of the Attorney-General for an order for the issue of a writ of certiorari in the above case.

The respondent was convicted by a justice of the peace on August 2, 1921, and sentenced to a term of 7 days' imprisonment for an offence against sec. 285e of the Criminal Code of Canada, which is as follows:—

"285e. Every one who while intoxicated drives any motor vehicle or automobile shall be guilty of an offence and liable upon summary conviction for the first offence to a term not exceeding thirty days and not less than seven days, for a second offence for a term not exceeding three months and not less than one month, and for each subsequent offence for a term not exceeding one year and not less than three months."

I may say that the conviction in this case was for a first offence.

The respondent appealed against this conviction under the provisions of Part XV. of the Criminal Code to the District Court Judge of the Judicial District of Saskatoon. The appeal was heard by the District Court Judge on October 24, 1921. The Judge confirmed the conviction, but ordered that the sentence be suspended.

It is contended on behalf of the Attorney-General that the District Court Judge had no power to make such order of suspension. I agree with this contention.

Sask.
C.A.
REX
v.
HERRON.
Turgeon, J.A.

In my opinion, the only authority under which any Court in Canada, dealing with a case coming within the provisions of the Criminal Code has power to release a convicted person on suspended sentence is contained in sec. 1081 of the Code, the first sub-section of which is as follows: (See Judgment of Lamont, J.A., p. 166).

This sec. 1081 is contained in Part XX. of the Code. Sec. 1026 in this Part XX. defines the word "court" as follows: (Cited in judgment of Lamont, J.A., pp. 166-7).

It will be noted that this definition does not refer to a justice of the peace sitting under the summary conviction provisions of Part XV., or to a District Court Judge sitting in appeal from such justice of the peace. This Part XX. of the Code is enacted specially for such matters as punishments, fines, restitution of property, the suspension of sentences, etc. It appears clear to me that had it been the intention of parliament to empower justices of the peace and District Court Judges, when acting under Part XV., to suspend sentences, a reference to them would have been made in sec. 1026. Many thousands of justices of the peace in all parts of Canada are dealing with summary convictions daily, and parliament must certainly have had this in mind when enacting sec. 1026. It is true that sec. 1026 defines the word "Court" to mean certain Courts particularly designated, *unless the context otherwise requires*, but I can find nothing in the context of sec. 1081 to require a different or an extended interpretation to be put upon the word "Court" than is given in sec. 1026. Moreover, Part XV. itself sets out specific cases (*e.g.* in secs. 729, 733 and 748) where a Justice of the Peace exercising jurisdiction under its provisions may extend leniency, or, instead of sentencing the accused to imprisonment or to the payment of a fine, may allow him to furnish recognisance for his good behaviour. This confirms me in the view that the omission to include in sec. 1026 justices of the peace and District Court Judges within the meaning of Part XV. was intentional. In my opinion, therefore, a District Court Judge hearing an appeal from a summary conviction and exercising the powers conferred upon him by secs. 751 to 754 of the Code, has no more right to release a convicted person on suspended sentence than has the justice of the peace who tried the case in the first instance. He may modify the sentence imposed, by virtue of the powers conferred upon him by sec. 754, but that is a different matter. In other words, he may, in my opinion, make any disposition of the case which the Justice might have made, but he cannot go beyond that.

The order should be granted for the issue of the writ. There should be no costs of this application.

McKAY, J.A., concurs with HAULTAIN, C.J.S.

Application granted.

MACKAY v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Shaw and Lord Phillimore. February 14, 1922.

PUBLIC WORKS (§II—12)—ACQUISITION OF LAND BY CROWN—PUBLIC WORKS ACT, R.S.B.C. 1911, CH. 189, SEC. 3—ORDER IN COUNCIL NECESSARY BEFORE CONTRACT CAN BE ENFORCED.

An agreement for the sale of land to His Majesty as represented by the Minister of Public Works for British Columbia, for a purpose within the provisions of the Public Works Act, R.S.B.C. 1911, ch. 189, sec. 3, cannot be enforced when not founded upon an Order in Council.

[*Re Mackay and The Public Works Act* (1921), 58 D.L.R. 332, affirmed.]

APPEAL by plaintiff from the judgment of the Court of Appeal of British Columbia, (1921), 58 D.L.R. 332 affirming the trial judgment in an action to enforce an agreement of sale of lands to His Majesty as represented by the Minister of Public Works for British Columbia. Affirmed.

The judgment of the Board was delivered by

VISCOUNT HALDANE:—This appeal arises out of proceedings taken in the Supreme Court of British Columbia (1921), 58 D.L.R. 332, in order to enforce an award. The appellant alleges an agreement, expressed to have been made between The King in right of the Province, represented and acting by the Minister of Public Works, and the appellant, dated August 23, 1916, under which certain lands in the city of Vancouver, on the recital of the Lieutenant-Governor in Council of the Province had deemed it necessary to acquire them, were contracted to be sold by the appellant to the Sovereign, at a price to be determined by arbitration. Under this agreement, the award sought to be enforced was made. Since then the Government of the Province has changed, and the new Ministers have refused to advise the agreement to be carried out, alleging among other things, that there was no evidence that its execution had been authorised by the Lieutenant-Governor in Council, or that it was sealed with the seal of the Department of Public Works.

By sec. 3 of the Public Works Act, R.S.B.C. 1911, ch. 189, of the Province (amended in 1914) the Lieutenant-Governor in Council may acquire and take possession, for and in the name

Imp.

P.C.

MACKAY v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

Viscount Haldane.

of His Majesty, of lands for purposes which would include those in controversy, and all contracts for so acquiring them are to be valid. By sec. 37 the Minister, in this case the Minister of Public Works, is to have power to enter into any contract required for carrying out the provisions of the Act, but no such contract is to be binding on him unless signed by him and sealed with the seal of his Department.

After the award had been made, the appellant's solicitors wrote to the then Premier of the Province, requesting payment of the amount of the award, which had been properly made, so far as its form was concerned. The then Premier, who was still in office but was about to resign, replied that, so far as his Government were concerned, they were satisfied with the award, and would recommend it to their successors for payment of its amount, but that, being an out-going Government, they were not in a position to place before the Lieutenant-Governor a special warrant for payment. He agreed, however, to pay a share of the expenses of arbitration already incurred.

A little later on the appellant presented a Petition of Right for payment of the amount awarded, but the new Government refused the Petition on the ground that there was no record that the execution of the agreement to purchase had been authorised by the Lieutenant-Governor in Council, and that the agreement was not sealed with the seal of the Department of Public Works, nor had there been any accepted plans for the construction of the public works for which the land was said to have been required.

On January 19, 1920, the submission to arbitration was made a rule of the Supreme Court of the Province, and the present proceedings were commenced to enforce the award. Gregory, J., dismissed these proceedings, on the ground that the agreement did not constitute a submission to arbitration. It is, however, unnecessary to enter into this question, if the Court of Appeal, to which the case was carried, were right in a further reason for which they dismissed the appeal. The Chief Justice, Galliher and Eberts, JJ.A., held, McPhillips, J.A., dissenting, that no agreement could be validly made by the Minister of Public Works, unless an Order in Council had first been passed providing for the acquisition of the land, and that the appellant had failed to prove that any such Order in Council had been passed. Macdonald, C.J.A., 58 D.L.R. 332, at p. 333, said that, although it had been suggested that the transaction had the approval of the Cabinet, there was no suggestion that it had the assent or had

even been brought to the notice of the Lieutenant-Governor. McPhillips, J.A., held that an Order in Council was not a condition precedent to the making of a binding agreement; that the agreement contained a well-constituted submission to arbitration; that the Crown was, in the circumstances, estopped from denying the validity of the agreement and the award.

With the view of McPhillips, J.A., as to the Order in Council not being required, their Lordships are unable to agree. Under sec. 3 of the Public Works Act, it is only the Lieutenant-Governor in Council to whom power to enter into such a contract as that before them is given. The character of any constitution which follows, as that of British Columbia does, the type of responsible Government in the British Empire, requires that the Sovereign or his representative should act on the advice of Ministers responsible to the Parliament, that is to say, should not act individually, but constitutionally. A contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorised it, either directly or under the provisions of a statute. It follows that in the present case, no such contract could have been made, unless sec. 3 authorised it. If authority be wanted for this proposition, it will be found in *Churchward* v. *The Queen* (1865), L.R. 1 Q.B. 173, and in the decision of this Board in *Commercial Cable Co.* v. *Government of Newfoundland*, 29 D.L.R. 7, [1916] 2 A.C. 610, 86 L.J. (P.C.) 19. The vital preliminary question is, therefore, one of fact; was an Order or Resolution passed by the Lieutenant-Governor in Council authorising the contract?

It was contended before their Lordships that it ought to be presumed that an Order in Council had been passed, so as to satisfy the provisions of the statute. But it appears from the affidavit of the Deputy Provincial Secretary that all Orders in Council, made by the Lieutenant-Governor in Council, are recorded in his office, and that no such Order authorising the acquisition of the land in question is to be found. Moreover, all the Judges in the Court of Appeal appear to have regarded no such Order as having been made, and it does not appear that this was disputed before them. Under these circumstances, their Lordships must hold that no such Order nor any Resolution amounting to it, existed, and it is accordingly not necessary to enter upon the point made as to the seal. If so, this ends the case. For the mere assent of the Ministers of the day to the contract could not, as has already been pointed out, under a

Sask.

K.B.

constitution, such as that of British Columbia, make the contract a legally binding one, and accordingly the basis on which the claim under the arbitration proceedings was rested, disappears.

Their Lordships would humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the hearing before this Board. No costs appear to have been given in the Courts below, and it is therefore unnecessary to deal with these costs.

Appeal dismissed.

NORTHERN LUMBER Co. v. SHEPITKA, C.P.R. Co. et al.

Saskatchewan King's Bench, Bigelow, J. January 21, 1922.

PARTIES (§ IIA—65)—ACTION UNDER MECHANICS' LIEN ACT, SASK.—REGISTERED OWNER JOINED AS PARTY — NO RELIEF CLAIMED AS AGAINST HIM—ORDER STRIKING OUT.

In an action to realise a lien under the Mechanics' Lien Act, R.S.S. 1920, ch. 206, the registered owner is not a necessary party where there is no allegation that he is an owner under the Act and no relief is claimed against him.

APPEAL by plaintiff from an order of a District Court Judge striking out the registered owner of the land as a defendant in an action claiming a lien under the Mechanics' Lien Act, R.S.S. 1920 ch. 206. Affirmed.

E. B. Jonah, for appellant.

P. H. Gordon, for respondent, C.P.R. Co.

BIGELOW, J.:—This is an action claiming a lien under the Mechanics' Lien Act, R.S.S. 1920, ch. 206. The statement of claim alleges that the defendant, the Canadian Pacific Railway Co. (which I will hereafter refer to as "the company") is the registered owner of a certain quarter section of land; that the defendant Shepitka is the owner within the meaning of the Act; that Shepitka contracted for lumber and building material, which was used in constructing buildings on a portion of the land; that the plaintiff furnished the same; and the plaintiff claims judgment against Shepitka for the amount of a lien against the said land and buildings and an order for sale.

The company moved before the District Court Judge to be struck out as a defendant. The District Court Judge granted the motion, and from his order the plaintiff appeals.

The question in short is whether in an action to realise a lien on land under the Act the registered owner is a necessary party, where there is no allegation that he is an owner under the Act, and no relief is claimed against him.

"Owner" is defined in sec. 2, sub-sec. 6 of the Act as follows:—

"6. 'Owner' extends to and includes any person, firm, asso-

ciation, body corporate or politic having any interest or estate in the lands upon or in respect of which the work or service is done or materials are placed or furnished at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished."

Section 4 of the Act gives a lien to a person supplying materials, etc., *for any owner.*

Mr. Jonah argues that this is an action *in rem,* and therefore it is necessary to join the registered owner as a party defendant. But by sec. 7 of the Act, the lien shall attach *upon the estate or interests* of the owner as defined by this Act, in the erection, building, land, etc. The lien would not attach to the interest of the registered owner unless the materials were furnished at his request and upon his credit or on his behalf or with his privity or consent or for his direct benefit. In this case the lien would only attach upon Shepitka's interest in the land.

There were ample reasons under the old Mechanics' Lien Act, R.S.S., 1909, ch. 150, for joining the registered owner as a party. Section 7, sub-sec. 3 of that Act provided:—

"In case the land upon or in respect of which any work or service is performed or upon or in respect of which materials are placed or furnished to be used is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service or by the furnishing or placing of materials, the lien under this Act shall be entitled to rank upon such increased value in priority to the mortgage or other charge."

Section 13, sub-sec. 2 of that Act provided that:—

"In case of an agreement for the purchase of land and the purchase money or part thereof is unpaid, and no conveyance made to the purchaser, the purchaser shall for the purpose of this Act and within the meaning thereof be deemed a mortgagor and the seller a mortgagee."

So that under the old Act the lienholder would have priority over the vendor to the extent of the increased value; and where priority was claimed on account of this increased value, it was necessary to join the vendor as a party. That section, however, was repealed in 1913.

It will be observed here that there is not even any allegation that Shepitka holds by agreement from the company. The only

Sask.

K.B.

NORTHERN LUMBER CO. v. SHEPITKA.

Bigelow, J.

allegation in the statement of claim is that Shepitka is the owner of the land.

The plaintiff cites the case of *Abramovitch* v. *Vrondessi* (1913), 11 D.L.R. 352, 23 Man. L. R. 383, in which the Referee in Manitoba said, in his judgment, at p. 353, "I am satisfied that in an action to realise the claim of lien on the land, the person who is the owner of the land at the time of the commencement of the action is a necessary party to it."

"The owner" in that quotation, I gather from the rest of the report, means the registered owner.

Looking at the Manitoba Act that was in force at the time of that decision, R.S.M. 1902, ch. 110, I find in sec. 5, sub-sec. (b):—

"(b) In case the land upon or in respect of which the work is done, or materials or machinery are placed, be incumbered by a mortgage or other charge existing or created before the commencement of the work or of the placing of the materials or machinery upon the land, such mortgage or other charge shall have priority over a lien under this Act to the extent of the actual value of such land at the time the improvements were commenced."

The vendor under the Manitoba Act is also regarded as in the same position as a mortgagee. I would agree with that decision if the lienholder in that case was claiming priority over the vendor above the "actual value" of the land. It does not appear from the report whether that was so or not, but if it was not so, I would not agree with the decision.

In *British Columbia Timber & Trading Co.* v. *Leberry*, (1902), 22 C.L.T. 273, the unpaid vendor of land was joined, and the action against him was dismissed with costs, as no relief was claimed or would be recovered against him. See also *Anderson* v. *Godsal*, (1900), 7 B.C.R. 404, and the cases referred to in the District Court Judge's judgment.

There is no claim against the registered owner here, and the lien can only attach upon the interest of Shepitka in the land, and I cannot see how the company is a necessary or proper party. The appeal is dismissed with costs.

Appeal dismissed.

QUEBEC LIQUOR COMMISSION v. LESSARD.

Que.

S.P.

Quebec Court of Sessions of the Peace, Choquette, J.S.P. March 24, 1922.

CONSTITUTIONAL LAW (§IA—20)—QUEBEC ALCOHOLIC LIQUOR ACT—QUE. STATS. 1921, CH. 22—CONSTRUCTION—VALIDITY.

The Quebec Alcoholic Liquor Act, Que. Stats. 1921, ch. 22, is perfectly constitutional having been passed by the Provincial Parliament within the limit of its jurisdiction within the meaning of paras. 8, 15 and 16 of sec. 92 of the British North America Act.

[See Annotation, Ontario Temperance Act, 61 D.L.R. 177.]

INTOXICATING LIQUORS (§IIIC—65)—QUEBEC ALCOHOLIC LIQUOR ACT—ILLEGAL SALE BY HOUSEKEEPER — LIABILITY OF OWNER UNDER ART. 91.

Evidence of the illegal sale of liquor by the housekeeper of the person accused, even though without his knowledge, and while he was away from the premises, and although she keeps the money obtained from the illegal sale for her own use, is a breach of the Quebec Alcoholic Liquor Act, Que. Stats. 1921, ch. 22, art. 91, for which the owner of the premises is liable.

INDICTMENT under the Quebec Alcoholic Liquor Act Que. Stats 1921, ch. 22 for having without being the holder of a permit, sold in the city of Quebec, alcoholic liquors in contravention of the said Act.

L. Roy, K.C., for plaintiff.

Alleyn Taschereau, for defendant.

CHOQUETTE, J.S.P.:—The defendant appeared, pleaded not guilty, and after the hearing was closed, moved through his attorney that the indictment be quashed for the following among other reasons:—1. That it was not proved that the Liquor Commission was authorised to prosecute the defendant under the said Act: 2. That the presiding Judge was without jurisdiction to hear and decide the said case, because the penalty prescribed in the complaint was imprisonment, that the Provincial Government was not entitled to state what constituted a crime, to consign to jail, etc., and that notice of the present motion was given to the Attorney General.

The attorney for the complainant replied and asked for judgment on the ground that the above reasons were unfounded in law, that the Alcoholic Liquor Act was within the jurisdiction of the Provincial Government, that the charge was proved and that the defendant should be condemned.

Adjudicating, in the first place, upon the said motion, the Court decides that in view of many precedents and particularly paras. 8, 15 and 16 of sec. 92 of the B.N.A. Act, 1867, the Liquor Act is perfectly constitutional, having been passed by the Provincial Parliament within the limits of its jurisdiction, and that therefore the said motion must be rejected.

Que.
S.P.
QUEBEC LIQUOR COMMISSION v. LESSARD.
Choquette, J.S.P.

Adjudicating upon the merits, considering that it has been proved that several persons have had drink in the defendant's premises, that this drink was sold them by a person in his employ, namely, his housekeeper who is living and lived continuously with him, that she received payment for the drink, the defendant must be found guilty, according to art. 91 of the said Liquor Act, notwithstanding that this woman swore that the defendant knew nothing about the matter, being away on that day and that she had kept the money for herself.. This art. 91 enacts:

"The proof that such offence has been committed by any person in the employ of such owner, lessee or occupant or present on sufference in the establishment of such owner, lessee or occupant, shall be conclusive proof that such offence was committed with the authorisation and under the direction of the said owner, lessee or occupant."

It is true that the defendant swore that he was away on the day that the drink was sold, as also did his housekeeper; but their depositions cannot destroy what the Act calls conclusive proof and not a simple presumption.

The defendant is therefore condemned to imprisonment for one month and costs, and in default of paying the costs to a further two months imprisonment.

British North America Act, 1867, sec. 92, paras. 8, 15, 16; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, 53 L.J. (P.C.) 1; *Attorney General for Ontario* v. *Attorney General of Canada*, [1896], A.C. 348, 65 L.J. (P.C.) 26; *Brewers Association* v. *Att'y Gen'l of Ontario*, [1897], A.C. 231, 66 L.J., (P.C.) 34; *Sulte* v. *Corp'n of City of Three Rivers* (1883), 11 Can. S.C.R. 25.

In the case of *McNutt*, (1912), 10 D.L.R. 834, 47 Can. S.C.R. 259, 21 Can. Cr. Cas. 157, Supreme Court judgment, it was held that when the Provincial Legislature passed statutes within the limits of the powers assigned to the Province by the British North America Act, it may include provisions of a criminal character under the authority of sub-sec. 15 of sec. 92.

Att'y-Gen'l of Manitoba v. *Manitoba License Holders Ass'n*, [1902], A.C. 73, 71 L.J., (P.C.) 28, 50 W.R. 431. Briefly, by virtue of paras. 8, 15 and 16 of sec. 92 of the B.N.A. Act, interpreted according to the above cited jurisprudence, the Provincial Legislature has the right:—

A. To pass laws prohibiting the sale of alcohol within the limits of the Province; B. To pass laws granting licenses for

the sale of alcohol and the manufacture of beer; C. To create a commission which would have general charge over the sale and regulation of alcoholic liquors; D. To impose a fine or imprisonment, to create offences, provided always that these laws be of a merely local nature and within the territorial limits of the Province.

DETROIT FUSE AND MANUFACTURING Co. v. METROPOLITAN ENGINEERING Co. of CANADA LTD.

Exchequer Court of Canada, Audette, J. February 21, 1922.

PATENTS (§ V—50)—FOR INVENTION—THE PATENT ACT, R.S.C. 1906, CH. 69, SEC. 24—SURRENDER OF PATENT—RE-ISSUE—EFFECT OF SURRENDER ON JUDGMENT BASED ON ORIGINAL PATENT—CONTEMPT OF COURT—PRACTICE.

A judgment had been obtained in this Court by consent declaring Canadian letters Patent, No. 160043, valid as between the above mentioned parties, and that the defendant had infringed certain claims thereof. The usual injunction against further infringement was also granted. Subsequently plaintiff obtained a re-issue of patent, alleged to contain everything that the original did and something more. More than 6 years after judgment, plaintiff moved to commit the president and manager of defendant company for contempt of Court in disobeying the terms of the judgment.

Held: 1. That the judgment had not been served upon the officers against whom the contempt proceedings were taken, the application must be dismissed.

2. Applications for Court process involving the liberty of the subject are taken *strictissimi juris*, and all conditions or requirements antecedent to the right to obtain such process must be strictly fulfilled and satisfied.

3. A judgement, for infringement of a patent for invention that has been subsequently surrendered and a re-issue obtained, is inoperative and cannot be enforced by process of contempt after the surrender of the original patent.

[See Annotations on Patents, 43 D.L.R. 5, 27 D.L.R. 450.]

MOTION by plaintiffs for an order to commit the president and manager of the defendant for contempt of Court in disobeying the terms of a judgment pronounced herein on October 9, 1915. The grounds upon which the motion was launched appear in the reasons of the judge who heard the same.

G. F. Henderson, K.C., for plaintiff.

R. C. H. Cassels, for defendant.

AUDETTE, J.:—This is a motion made on behalf of the plaintiff for an order that the president and manager of the defendant company be committed to jail, by reason of their contempt of the judgment pronounced herein on October 9, 1915.

Applications of this nature which involve the freedom and the liberty of the subjects of the Crown, are matters *strictissimi*

Can.
Ex. C.
DETROIT FUSE AND MANUFACTURING CO. v. METROPOLITAN ENGINEERING CO. OF CANADA, LTD.
Audette, J.

juris, requiring the utmost strictness in procedure and which the Court will be jealous to observe and maintain.

A preliminary step in all such proceedings is the proof by affidavit of the service of the judgment relied upon and which is alleged to have been held in contempt. See Oswald on Contempt of Court, 3rd ed., pp. 210 *et seq.*, and cases therein cited.

There is no evidence of such service. Upon that ground and that ground alone the application must be dismissed.

My decision in the matter needs go no further. However, I was asked by counsel for the respective parties to pass upon the other questions raised in this argument. To exhaust all these questions would carry me too far afield, but, with reluctance, I will, however, accede to the desire of both parties, and express an opinion upon the question of the re-issue of the patent,—a question of interest and moment to the parties,—with the view of avoiding further costs and multiplying litigation. *Dudgeon* v. *Thomson* (1877), 3 App. Cas. 34.

The judgment *a quo* is one obtained by consent whereby it was, *inter alia*, held that the Canadian Letters Patent of Invention No. 160,043 were good, valid and subsisting as between the parties herein and that the defendant infringed claims 7, 8, 10, 11, 12, 14 and 15 thereof and finally granting the usual injunction.

However, since the pronouncing of this judgment, which does not appear to have been served upon the defendant, the plaintiff has sought and obtained a re-issue of the above-mentioned patent.

Section 24 of the Patent Act, R.S.C. 1906, ch. 69, dealing with re-issue, reads as follows, viz.:—

"24.—Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention, for any part or for the whole of the then unexpired residue of the term for which the original patent was, or might have been granted.

2. In the event of the death of the original patentee or of his having assigned the patent, a like right shall vest in his assignee or his legal representatives.

3. Such new patent, and the amended description and specification, shall have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if the same had been originally filed in such corrected form before the issue of the original patent.

4. The Commissioner may entertain separate applications, and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a re-issue for each of such re-issued patents."

From the perusal of that section it will be seen that Patent No. 160,043, mentioned in the said judgment has been *surrendered* and that a *new* patent has been issued with a description and specification materially amended and changed. The language is different, the distribution of the claims is different and there is something added thereto. Counsel for the plaintiff in answer to questions by the Court stated, in analysing the new patent, that it contained everything that was in the original patent and a little more; that the re-issue embodied the claims or clauses of the original patent, but numbered and distributed in a different way, not word for word the same, but covering everything.

Giving effect to what appears to be the plain language of the statute, the new, the re-issued patent, would seem to have taken the place of the original one which from the issue of a new patent disappears and is replaced by the re-issue. The original patent being extinguished from the date of the re-issue, the judgment that was obtained by consent upon the original could only be said to be an accessory to such patent. If the original patent is the principal—the objective of the judgment—the judgment, being only an accessory thereto, must disappear and be extinguished when the patent goes and must thereby become inoperative, therefore a commitment for want of observance of the same could not at this stage issue.

The general similarity of the patent law between the Canadian and the American statutes—as stated by Patterson, J., in *Hunter* v. *Carrick* (1884), 10 A.R. (Ont.) 449 at p. 468, will be a justification to seek support upon that ground from the American authorities. In *Allen v. Culp* (1897), 166 U.S. 501 at p. 505, it was held that "when a patent is thus surrendered (for a re-issue) there can be no doubt that it continues to be a valid patent until *it is re-issued, when it becomes inoperative*." See also Walker on Patent, 3rd ed. 214 *et seq.*

The same principle obtains in England. "It is a complete

Can.

S.C.

answer," says Frost, Patent Law, 2nd ed., p. 597, "to a motion for committal for breach of a perpetual injunction restraining infringements of a patent to shew that . . . since the injunction was granted, the specification has been amended and so the injunction has become inoperative." See also *Dudgeon* v. *Thomson*, 3 App. Cas. 34.

The motion is dismissed with costs.

Motion dismissed.

PETERSON v. BITZER.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Brodeur and Mignault, JJ. October 11, 1921.

CONTRACTS (§ IE—80)—VENDOR AND PURCHASER—ORAL AGREEMENT—MEMORANDUM IN WRITING—SUFFICIENCY—STATUTE OF FRAUDS.

A memorandum of agreement and a cheque in the following words: "Kitchener, Ont. December 29th 1919. Received from Clayton Peterson the sum of $100 on deposit for house at No. 62 St. George Street—$1,400 payable 1st May 1920, and balance of $2,300 on five year mortgage (s'g'd) Adeline Bitzer: Kitchener Ont., December 29 1919, To Canadian Bank of Commerce, Waterloo Ont. Pay to the order of Mrs. Adeline Bitzer $100 one hundred dollars deposit on 62 St. George Street at purchase price of $3800—$1400 payable May 1st 1920 and assume a 5 yr. Mtg. of $2300, (s'g'd) C. Peterson," is a sufficient memorandum of the whole bargain to satisfy sec. 5 of the Statute of Frauds R.S.O. 1914 ch. 102 although the cheque has not been endorsed or cashed. The absence from the memorandum of terms which are implied by law does not render the contract incomplete, and the time for completion in the absence of any stipulation is the time from which the purchaser is liable to the payment of interest and is entitled to be given possession, and where there is no stipulation that the mortgage money is not to bear interest, the balance of the purchase money is to bear interest, and the mortgage for it is to bear interest from its date until its maturity at the legal rate of interest under the Interest Act, R.S.C. 1906, ch. 120, sec.3.

[*Peterson* v. *Bitzer* (1920), 57 D.L.R. 325, reversed.]

APPEAL from the judgment of the Supreme Court of Ontario, Appellate Division (1920), 57 D.L.R. 325, 48 O.L.R. 386, reversing the decision of Masten, J., in an action for specific performance of an alleged agreement for the sale by the defendant and the purchase by the plaintiff of a house property in Kitchener. Reversed.

G. F. Henderson, K.C., and *Hattin* for appellant.

McKay, K.C., for respondent.

DAVIES, C.J.:—For the reasons stated by Meredith, C.J.O., in his dissenting opinion in the Appeal Court of Ontario (First Division), in which I fully concur, and to which I have nothing useful to add, I would allow this appeal with costs here and in

Can.

S.C.

PETERSON v. BITZER

Idington, J.

the Appellate Division and restore the judgment of the trial Judge.

IDINGTON, J. (dissenting):—The appellant sued for specific performance of an agreement contained in the following:—

"Kitchener, Ont., Dec. 29, 1919.

Received from Clayton Peterson the sum of one hundred dollars, on deposit for house at 62 St. George St., $1,400 payable May 1st, 1920, and balance of $2,300 on 5 year mortgage.

Adeline Bitzer."

The respondent, besides denying such an agreement as appellant sets up, pleads the Statute of Frauds.

The trial Judge finds as a matter of fact that the rate of interest was not mentioned or discussed. And I may add from a perusal of the evidence that the question of interest was never spoken of by any one until some time after above foundation for this suit.

The fact seems conclusively established by the evidence of appellant wherein he spoke as follows:—"Q. Was there any discussion then as to interest on the mortgage? A. No, there was not. Q. The memorandum which is Ex. 1 here, does that contain all that was discussed at that day? A. Everything."

And more than that it was some days later when having realised that they had not discussed about the driveway to the lot, the size of the lot and the rate of interest, he sought out respondent's son, who had been present at the signing of said receipt (and in fact wrote it as appellant dictated it), and pretends that the son assented to the change he desired made in the receipt.

The said son admits appellant's visit to him where he was working, but denies that he assented to any of such changes, and further says that appellant wished him to insert words in the receipt to cover said points. This he properly refused to do and said he would tell his mother what appellant said.

It seems to me highly probable that this is the correct version of what transpired on that occasion, especially as no more passed between them until a month later when the said son, on behalf of respondent, tendered back to the appellant the cheque which had never been used or indorsed by respondent.

That cheque reads as follows:—

"Kitchener, Ont., Dec. 29, 1919.

To Canadian Bank of Commerce (Name of Bank)

Waterloo, Ont. (Branch)

Pay to the order of Mrs. Adeline Bitzer, $100.00 (one hundred dollars), deposit on 62 St. George St., at purchase price of

Can.
S.C.
PETERSON v. BITZER.
Idington, J.

$3,800.00, $1,400.00 payable on May 1st, 1920, and assume a 5-year mortgage of $2,300.00

C. Peterson."

It is attempted to strengthen appellant's case under the above receipt as a compliance with the requirements of the Statute of Frauds by insisting that both must be read together.

If she had used or indorsed this cheque of course that would be a fair argument. Inasmuch as she did neither, the cheque, in my opinion, cannot be read as part of what she is presumed to have bound herself by in writing.

In all the cases relied upon herein by appellant in that regard, none as I read them have gone so far.

And in any event it does not help the case made by the receipt, in any regard except to indicate that it was a purchase of the property that was involved.

Both read together in any way one may desire do not cover the terms of interest.

I most respectfully submit that without a word said in the bargaining as to interest, a vital part of every bargain of the kind, the Court cannot read into this receipt or into both documents taken together, a provision as to interest—either to provide for interest or the rate of interest.

No case is cited that ever went so far and I venture to think that until this none is to be found so naked as this now presented.

Interest at the statutory rate is implied in many cases determining the sum payable as damages.

But this is of an entirely different character and under a statute that requires the essential features of the bargain to be set forth in a writing binding the party sought to be held liable.

To say that a mortgage necessarily implies the legal rate of interest would surprise many people in some parts of our Dominion where the vendor generally looks for a good deal more than 5% per annum upon balances of unpaid purchase money.

Nay more, I venture to think if we so decided we would enable dishonest men desiring to take advantage of vendors to act upon this receipt as a model, and try to cheat the unwary vendor out of the difference between 5 and 6, 7 or 8% per annum.

It is to be observed as said elsewhere that the receipt (by omitting the word "purchase") does not shew that it is for any purchase and hence cases cited such as *Hughes* v. *Parker* (1841), 8 M. & W. 244, 151 E.R. 1028, 10 L.J. (Ex.) 297, shewing the

purchase is *primâ facie* that of the fee simple, relied upon by the trial Judge, are not applicable.

And again, the help got from the cheque if it had been so incorporated therewith as it might have been either by indorsement thereof, or an express reference thereto in the receipt, must have regard to the assuming of a mortgage. The only existent mortgage possibly referred to, was that to Magdalena Clemens which bore interest at 5½%, payable semi-annually. And that mortgage happens to be for only $2,000.

One argument might have been raised that as no interest was named the mortgage was to be one without interest, which is by no means an unheard of thing.

Unfortunately for appellant he recognised the omission and says he arranged with young Bitzer for a 6% rate. And in light of that and other features of the case the Courts should not enforce such a claim by directing specific performance.

Yet it is worth while turning the light that way as a means of shewing what change is involved in reading into a contract which is required by law to be in writing something not there but clearly omitted by mistake which would be another ground for refusing specific performance.

There are other features of the case which present difficulties of a kind like unto the interest question, but one such (fatal as I hold) seems to me enough to deal with at such length.

I may in parting from this case point out how the common sense of the appellant led him to realise the mistakes he had made, and need for amending the contract, so called.

And when the alleged contract was repudiated how far beyond what is usual took place in making a tender of deeds and mortgages.

If indeed the case is so clear on the alleged legal authorities and principles of law involved, why did it require so many alternative tenders and such length of exposition in making clear what the tender as made really meant?

I think the appeal should be dismissed with costs.

DUFF, J. (dissenting):—I think this appeal should be dismissed. I agree for the reasons given by Ferguson, J.A., that the cheque cannot be looked at and that being so there are essential terms of the contract which are not mentioned in the document relied upon as a memorandum.

BRODEUR, J.:—The receipt of $100 signed by Mrs. Bitzer on December 29, 1919, and handed over to the plaintiff, Peterson, is a document which contains all the essential terms of a con-

Can.

S.C.

PETERSON v. BITZER.

Brodeur, J.

tract for the sale of the property therein mentioned. The parties, property and price are all included. If it was simply an option, as contended by the respondent, it would have been written in a different way. This Court which had to construe lately an almost similar document in the case of *McKenzie* v. *Walsh*, (1920), 57 D.L.R. 24, 61 Can. S.C.R. 312, came to the conclusion that such a receipt complied with the requirement of the Statute of Frauds.

The receipt in the present case did not specifically mention that the money was paid for the purchase of a property as in *McKenzie* v. *Walsh*. But the price stipulated could not apply to a lease of the property. Besides, the cheque which was given by the appellant to the respondent for $100, which was accepted and kept for some time by Mrs. Bitzer, was more explicit in that respect than the receipt itself since it specified that it was given for a purchase price.

The two documents, namely, the cheque and the receipt, could be read together. *Doran* v. *McKinnon* (1916), 31 D.L.R. 307, 57 Can. S.C.R. 609; *Stokes* v. *Whicher*, [1920] 1 Ch. 411.

In the last case of *Stokes* v. *Whicher*, [1920] 1 Ch. 411, the document signed by the vendor did not contain the purchaser's name. But as a cheque had been given by the purchaser for the deposit stipulated in the document, it was held that the documents and the cheque could be read together to ascertain the purchaser's name and form a sufficient memorandum to satisfy the Statute of Frauds.

It is contended by Mrs. Bitzer that the document did not contain any date at which possession was to take place.

May 1, 1920, was stipulated as the date at which the cash payment was to be made and at the same time a mortgage was to be given for the balance of the purchase price. In the absence of a contrary intention appearing possession should take place at that date. The date of payment of the purchase money may be regarded as the date of completion. 25 Hals. para. 625.

It is contended also by the respondent, Mrs. Bitzer, that there is no stipulation as to the interest on the mortgage.

A mortgage agreement generally provides for interest. But this is not necessary, for a mortgage whether legal or equitable carries interest although not expressly reserved. *Thompson* v. *Drew* (1855), 20 Beav. 49, 52 E.R. 521.

As to the rate to be paid, our Dominion statute, ch. 120, R.S.C. 1906, sec. 2, provides that if no rate is fixed by the agreement the rate shall be 5%.

Alta.

App. Div.

WILSON v. CRISTALL.

For these reasons, I would allow the appeal and restore the judgment of the trial Judge with costs of this Court and of the Court below.

MIGNAULT, J.:—For the reasons given by Meredith, C.J.O., which are perfectly satisfactory to me and in which I express my respectful concurrence, I would allow this appeal with costs here and in the Appellate Division, and restore the judgment of the trial Judge.

Appeal allowed.

WILSON v. CRISTALL.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. January 7, 1922.

PRINCIPAL AND SURETY (§ IB—12)—MORTGAGE ON LAND PURCHASED—SPECIAL CLAUSE—SIGNED BY SURETY—MORTGAGE PAYABLE IN INSTALMENTS—EXTENSION OF TIME FOR PAYMENT OF FIRST INSTALMENT—RELEASE OF SURETY AS TO FIRST INSTALMENT—LIABILITY AS TO OTHER INSTALMENTS.

The defendant who had no interest in mortgaged property and was not named as a mortgagor in the mortgage, executed the mortgage which contained this clause. "I . . . hereby join in the execution of this mortgage and agree to be bound by the terms, covenants and conditions hereof and do hereby guarantee payment of the same according to the terms hereinbefore set forth." The Court held that the form of the covenant sufficiently indicated that the defendant had executed it as a surety and upon the evidence it was clear that such was his position to the knowledge of all parties.

Upon the maturity of the first instalment of principal of $2000, the time for payment was extended for three months, and the mortgagee accepted therefor a promissory note from the mortgagor payable three months after date. Upon the maturity of this note a portion of the principal was paid and a renewal note accepted for the balance for a further period of three months, and two further renewal notes for the balance of this instalment were given each for a period of three months, these extensions of time were given without the knowledge or consent of the surety; the Court held that they had the effect of discharging him in respect of the first instalment, and interest thereon, and that the two payments made by the surety for interest after the maturity of the mortgage did not revive his liability for this instalment, but that the discharge of the surety from the first instalment was not sufficient to discharge him from the liability for later ones.

[*Eyre* v. *Bartrop* (1818), 3 Madd. 221, 56 E.R. 491, distinguished; *Croydon Commercial Gas Co.* v. *Dickinson* (1876), 1 C.P.D. 707; *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495, followed.]

APPEAL by defendant (surety) from the judgment of Ives J. in favour of the plaintiff against both the surety and the principal debtor in an action upon a covenant in a mortgage. Varied.

C. C. McCaul, K.C., for appellant.

N. D. Maclean, K.C., for respondent.

Alta.
App. Div.
WILSON v. CRISTALL.
Hyndman, J.A.

SCOTT, C.J., and STUART, J.A., concur with CLARKE, J.A.

BECK, J.A., concurs with HYNDMAN, J.A.

HYNDMAN, J.A.:—I concur in the conclusion of law arrived at by my brother Clarke with regard to the effect of the extension of time given the defendant Shugarman by the plaintiff. In my opinion the only other serious ground of defence open to the defendant is that of estoppel based on the letters and statements of the firm of Short, Cross & Co., given or sent the defendant which, if good, would make defendant liable for $3,500, principal instead of $7,500.

A careful examination of the evidence, however, raises a strong doubt in my mind against the defendant's right to rely on that defence.

"Estoppel" has been defined by Lord Denman in *Pickard* v. *Sears and Barrett* (1837), 6 Ad. & El. 469, at p. 474, 112 E.R. 179, thus:—

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

The word "willfully" is equivalent to "voluntarily," per Pollock, C. B., in *Cornish* v. *Abington* (1859), 4 H. & N. 549, at p. 555, 157 E.R. 956, 28 L.J. (Ex.) 262.

It will be noticed that the foundation of the doctrine rests upon the idea of the party being induced to act upon the faith of the statement and changing his position in consequence thereof, and if unable to reply on the act of the other party would suffer damage. There must be (1) faith in the statement which actuated defendant to alter his position, and also (2) by reason thereof damage or prejudice was suffered. *Rolt* v. *Griese & Wood* (1915), 25 D.L.R. 740, 8 S.L.R. 336.

"It must be found that the defendant by his declaration, act or omission, intentionally (*i.e.* voluntarily) caused or permitted another person to believe a thing to be true, and to act upon such belief." (See Caspersz on Estoppel, 4th ed., p. 75, sec. 64).

In Cababe on Estoppel at p. 78 it is stated:—

"The phrase usually employed to express the rule here referred to is that there must have been an "alteration of position," and vague though this is, yet it is probably impossible to adopt any expression that will indicate what is meant with greater clearness and precision, provided that it be always borne in mind that the alteration of position must be one *for the worse.*"

Apparently there must be evidence that the defendant was in fact prejudiced; mere surmise is not sufficient (per Beck, J.,

in *Cels* v. *Railway Passenger Ass'ce Co.* (1909), 11 W.L.R. 707-712).

It follows then as a consequence of these authorities that it is upon the defence to prove affirmatively that the erroneous statement complained of was relied and acted upon, and secondly, that by reason of such reliance he altered his position prejudicially.

The examination for discovery of defendant Cristall, if taken literally, would prove fatal to his contention, for he expressly says that his understanding of the amount owing was not because of the statement from Short & Co., but because Shugarman himself told him so. Again in his evidence at trial, while not saying so expressly, faith in Shugarman's word seems to have been quite as important in his mind, if not more so, than the solicitor's account. It may be, however, that notwithstanding this, circumstances might still bind the plaintiff.

It is not necessary to shew that the misstatement was the sole cause of his acting as he did. See Ewart on Estoppel, p. 146. *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459 at p. 481, 55 L.J. (Ch.) 650.

There remains, therefore, to consider whether or not the defendant was influenced to do, or omit to do, anything because of his belief in the misstatement referred to and which worked to his prejudice. His evidence in that respect is brief, very general and not in any way specific.

There is no definite proof that had he not been misled he would have done anything more than "bring pressure" and "that Shugarman was doing well in the junk business." There is no satisfactory evidence to the effect that he really did refrain from bringing pressure or that had he done so he might reasonably expect that Shugarman was in such a financial position as to be able to satisfy the claim. In short, did he prove that he lost some chance to avoid his loss? I am not satisfied that sufficient evidence was given on this point to justify the conclusion that he refrained from taking action and that he lost a chance to protect himself.

I would, therefore vary the judgment of the Judge as set out in the reasons of my brother Clarke, and I also agree with the latter's disposition of the costs.

CLARKE, J.A.:—This is an appeal by the defendant Cristall from the judgment of Ives, J., in favour of the plaintiff against both defendants in an action upon a covenant in a mortgage.

The defendant Shugarman did not defend and the issue is between the plaintiff and the defendant Cristall.

The grounds of appeal are:—1. That the trial judge erred

Alta.

App. Div.

WILSON v. CRISTALL.

Clarke, J.A.

in holding that the appellant was liable as a principal debtor and not merely as a surety or a guarantor. 2. That the appellant was discharged from liability by reason of an extension of time for payment given to the principal debtor. 3. That there was no consideration for the appellant's covenant. 4. That in any event the plaintiff is estopped from recovering against the appellant more than $3,500 and interest in respect thereof.

The mortgage sued upon was given upon property purchased by defendant Shugarman from the plaintiff to secure a portion of the purchase price thereof.

The mortgage is dated April 1, 1913, and is payable in instalments of $2,000 on April 1, 1914; $2,000 on April 1, 1915, and $4,000 on April 1, 1916, with interest at 7% *per annum*. The appellant had no interest in the mortgaged property and he was not named as a mortgagor in the mortgage, but he executed it and it contained this clause:—

"And I, Abraham Cristall, of the City of Edmonton, in the Province of Alberta, gentleman, hereby join in the execution of this mortgage and agree to be bound by the terms, covenants and conditions hereof and do hereby guarantee payment of the same, according to the terms hereinbefore set forth."

The whole purpose of the appellant joining in the mortgage was to secure its payment upon the request of Shugarman and of the plaintiff's son, who was transacting the plaintiff's business—it was not his debt.

In giving judgment at the conclusion of the trial the Judge said:—

"In my opinion the draftsman of the mortgage who prepared the clause making the defendant Cristall a party was careful to make it clear that he became a party as a principal debtor and not as a surety."

I am unable to agree with this conclusion.

In *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195, at p. 200, 46 L.J. (Ch.) 335, Jessel, M. R., says:—

"Whoever is liable to pay the debt of another, whether for value, as in the case of the broker who receives a commission for incurring liability, or gratuitously, as between himself and the person originally or primarily liable, is a surety; and I can understand no definition of surety which will not include a person in that situation."

It appears to me that the form of the appellant's covenant in the mortgage sufficiently indicates that he executed it as a surety and upon the evidence it is clear that such was his position to the knowledge of all parties.

That the form of the transaction is not the test is exemplified by the case of *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586, 63 L.J. (Ch.) 890.

The next question is, Was the appellant discharged from liability by reason of the extension of time? Upon the maturity of the instalment of principal of $2,000 on April 1, 1914, the time for payment was extended for 3 months and the plaintiff accepted therefor a promissory note from Shugarman, payable 3 months after date. Upon maturity of this note $500 was paid on account of principal and a renewal note accepted for the balance of $1,500 for a further period of 3 months and there were two further renewal notes for the $1,500, each for 3 months. The last renewal matured in April, 1915, and is still unpaid. These extensions of time were given without the knowledge or consent of the appellant, and I think it is clear upon the authorities that they had the effect of discharging the appellant in respect of the first instalment of $2,000, and interest thereon. The extensions of time were unconditional. The mortgage contained no term entitling the plaintiff to extend the time for payment so that the appellant's agreement to be bound by all the terms of the mortgage does not make him a consenting party to the extensions—and there was no reservation of rights against the surety.

Although the point was not raised on the appeal, I have considered a question arising on the evidence of the effect of two payments made by the appellant. After the maturity of the mortgage the appellant made two payments on account, *viz.*, $325.90 on May 1, 1917, and $250.75 on August 9, 1918, being the last payments made on the mortgage.

In *Mayhew* v. *Crickett* (1818), 2 Swans. 185, 36 E.R. 585, Eldon, L.C., held that if after a surety has been discharged by the act of the creditor he makes a promise to pay, he cannot object to that as a promise without consideration. The promise is valid, not as the constitution of a new, but the revival of an old debt. It was assumed that the surety when he made the new promise had in all probability knowledge of all the circumstances of the case.

This decision was followed in *Smith* v. *Winter* (1838), 4. M. & W. 454, 150 E. R. 1507, 8 L.J. (Ex.) 34, and in *Phillips* v. *Foxall* (1872), L.R. 7 Q. B. 666, at pp. 676, 677.

Quain, J., in referring to the two cases just mentioned, says:—

"It is well established that a surety, after he has been discharged from his contract by the act of the creditor, may revive his liability by a subsequent promise or assent."

In all of these cases it was assumed or found that at the time

Alta.
App. Div.
WILSON v. CRISTALL.
Clarke, J.A.

of the new promise the surety had knowledge of the facts which operated to discharge him. It is difficult to understand the ground of these decisions, whether it is the new promise founded on the consideration of the pre-existing debt as in cases under the Statute of Limitations or waiver of the right to object to the extension, amounting to an agreement to the act, which would otherwise effect a discharge. I would think the latter is the true ground for, by the discharge the liability as well as the remedy is gone, so that the cases under the Statute of Limitations are inapplicable.

I think it very doubtful if a payment alone after the discharge would revive the liability, certainly not where payment is made without full knowledge of the facts which effect his discharge.

In Australian Annual Digest, 1906-7-8, at p. 326, reference is made to a case of *A. Tyree* v. *Syman*, 9 N.Z.Gaz. L.R. 90 (New Zealand), holding that "payment on account by the surety does not preclude him from setting up defences of matters of law, as that time had been given," and the cases cited in 32 Cyc., pp. 163 and 164 favour the same conclusion.

My conclusion is that the payments made by the appellant, which were for interest, did not revive his liability for the instalment in question for, even if payment would have such effect, knowledge of the extension on the part of the appellant at the times of payment is not shewn—and in any event under the circumstances as hereinafter mentioned, the payments should not be treated as made in respect of the first instalment and therefore can be no admission of liability in respect of it.

I have now to consider the effect of the extension of time for the first instalment upon the surety's liability for the remaining instalments.

The mortgage contains the following clauses bearing upon the question which, for convenient reference, I shall number 1, 2, 3 and 4.

1. "That if default shall be made in any payment of interest or principal or any moneys hereby secured or any part thereof, then and in such case the whole money hereby secured shall at the option of the mortgagee become due and payable in like manner and to all intents and purposes as if the time herein mentioned for payment of such money had fully come and expired; provided that no notice of the exercise of such option need be given to the mortgagor."

2. "Provided that the mortgagee shall not be bound to accept payment of the principal moneys before the time or times hereinbefore limited for the payment thereof."

3. "That on any default in payment of any moneys hereby

secured, or any part thereof, or in the observance or performance of any covenant on the part of the mortgagor to be observed or performed, the said mortgagee shall without notice have the right and power to enter into possession of said lands, and with or without such entry, and whether in or out of possession to collect the rents and profits thereof and to make any lease of the said lands or any part thereof and on such conditions as the mortgagee shall think proper, and that the power of sale contained or implied herein may be exercised before or after and subject to such demise or lease."

4. "That the mortgagee may at the discretion of the mortgagee, at all times, release any part or parts of the said lands, or any other security for the moneys hereby secured, either with or without any consideration therefor and without being accountable for the value thereof or for any moneys except those actually received by the mortgagee, and without thereby releasing any other of the said lands, or any of the covenants herein expressed or implied."

As long ago as 1795 in *Rees* v. *Berrington*, 2 Ves. 540, 30 E.R. 765, fully annotated in vol. 2, White & Tud. L.C. (1912), 571 at p. 575, Loughborough, L.C., stated the rule of equity which has been followed ever since, in the following words:—

"It is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him, you must let him judge whether he will give that indulgence contrary to the nature of his engagement."

Without some qualification of this rule, it may be argued with much force that the plaintiff has by the transactions relating to the first instalment, without consulting the appellant, released him from his entire obligation. She has, during the extended periods, barred herself from exercising the option under clause 1, of accelerating the payment of the later instalments and from taking possession under clause 3 and proceeding to realise upon her security at a time when presumably the mortgaged property might have realised sufficient to satisfy the debt, or from proceeding to judgment against the principal debtor at a time when presumably the debt might have been realised; but for the extension the surety could have paid off the first instalment and perhaps collected the amount from the debtor, leaving a smaller obligation upon him at the maturity of the later instalments—with perhaps a greater probability of then realising it than if the whole debt remained unpaid.

Alta.
App. Div.
WILSON v. CRISTALL.
Clarke, J.A.

In *Mortgage Insurance Corp., Ltd.* v. *Pound* (1895), 64 L.J. (Q.B.) 394, after discussing other reasons for relieving the surety, Wright, J., says, at p. 396:—

"Next, the security to which the defendants (sureties) had a right to look seems to have been altered, I apprehend that under the scheme it is not competent for the plaintiffs or defendants to insist on immediate realisation of the freeholds and other assets of Martiny (Limited), and it is of course possible that they may be of less value in 1900 than in 1893."

In *Bonser* v. *Cox* (1841), 4 Beav. 379, at pp. 382, 383, 49 E.R. 385, Langdale, M.R., says:—

"I do not think that it is material to enquire in what way the surety contemplated benefit or protection to himself by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say I will be surety to you for payment of such a sum, provided you have it secured by the bond of the principal debtor but I will not be your surety upon any other terms."

In *Polak* v. *Everett* (1876), 1 Q.B.D. 669, where book debts held in security were released, the surety was held to be discharged *in toto* although such book debts would not have realised the whole amount guaranteed.

It remains to consider the particular application of these principles to the facts of this case.

In *Eyre* v. *Bartrop* (1818), 3 Madd. 221, 56 E.R. 491, it was decided that by giving time to the principal debtor, the grantee of an annuity exonerates the surety from past, as well as future arrears. In addition to extending the time for some of the payments on account of the annuity, the terms of the original agreement relating to the redemption of the annuity were altered. In giving judgment Leach, V.-C., said, at p. 225:—

"It could not be denied that if by any arrangement between the creditor and the debtor, the situation of the surety is altered, that he is thereby discharged; but it is said that the situation of the surety is here only partially altered during the five years; and that in respect of subsequent payments it remains the same. I am of opinion, however, that the deed of January, 1810, and the agreement of February, 1815, and the change in the terms of the redemption, have either directly, or by their consequences, wholly altered the situation of the surety and that he is thereby wholly discharged."

This case came under consideration before the Common Pleas Division in *The Croydon Commercial Gas Company* v. *Dickinson* (1876), 1 C.P.D. 707. The facts in the latter case were that D. contracted with a gas company to take from them tar and

ammoniacal liquor, and to pay for each month's supply within the first 14 days of the ensuing month after the account rendered "unless the company should by writing, signed by their secretary, allow a longer time for payment." The defendant became surety for the performance of the contract by D. On August 3, an account was delivered for the July supply; and after the 14 days had expired, *viz.*, on the 21st, the secretary of the company, without the knowledge of the surety, sent D. a letter inclosing a promissory note at a month for the amount with a request that he would sign and return it. D. signed the promissory note and returned it to the secretary, who kept it.

Held, that assuming this to be a giving of time by "writing signed by the secretary" within the meaning of the agreement, being after breach, the surety was released; and that once released, he was not liable in respect of debts contracted in respect of subsequent months' supplies. Brett, J., says, at p. 714:—

"It seems somewhat strange that there is so little authority to be found upon this subject; but I am inclined to think that the true doctrine is laid down in the case to which we have been referred of *Eyre* v. *Bartrop,* 3 Madd. 221, and again at p. 715:—

"Two cases have been relied upon as shewing that, as the contract was to be fulfilled at different times, the case may be dealt with as if there were different contracts, and though absolved as to one payment, the sureties may still be liable in respect of the others. Those cases are *Skillett* v. *Fletcher*, L.R. 1 C.P. 217, and *Harrison* v. *Seymour*, L.R. 1 C.P. 518. Those, however, were cases where the sureties undertook to guarantee the fulfilment of separate contracts, and not the fulfilment of one contract at separate times. They afford no authority that, in a case like the present, where there is one contract to be fulfilled at different times, the surety may be absolved as to the one period and still held liable as to the others."

On appeal to the Court of Appeal (1876), 2 C.P.D. 46, 46 L.J. (C.P.) 157, this decision was reversed. It was held affirming the judgment of the Common Pleas Division, that, time having been thus given for the payment of the amount due for July the sureties were discharged as to that amount; but reversing the judgment of the Common Pleas Division, not as to the amounts due for August and for September; the contract being separable, and the position of the sureties as to those amounts not being affected by the giving time for payment of the amount due for July. Kelly, C.B., says at p. 49:—

"It has been contended by Mr. Smith that there was but one

Alta.
App. Div.
WILSON v. CRISTALL.
Clarke, J.A.

contract and that therefore if time was given in respect of one performance under it, that operated as a discharge of the whole contract. But although in one sense it was one contract, yet, in effect, it was as much three several contracts as if it had been created by three separate instruments. In each month the account was made out and the debtor failed to pay."

Bramwell, J.A., says at p. 50:—

"I can see no reason why, there being two debts, the giving of time for the payment of one should release the surety from his liability as to the other."

And Amphlett, J.A., says, at pp. 51, 52:—

"If I could see that the position of the surety was in any way altered as to the payments to be made in August and September, I should not be very nice to ascertain whether the alteration was to his detriment or not. The rule is that when time is given or the position of the surety has been altered by the dealings of the principals, the surety is discharged. That must, however, be taken with certain limitations, that is to say, if it depends upon inquiry, the Court will not go into that inquiry, and unless the fact is self-evident, the Court will not consider the question. And of course the rule will not be applicable where the change cannot be otherwise than advantageous to the surety. . . . . Here it seems to me that what was done in the way of giving time for the July payment cannot affect the position of the surety as to the subsequent payments. In fact the only way in which it could be argued was that in July the payment not being made at the proper time, there was a larger demand upon the principal debtor when the subsequent instalment became due. The answer to that is that the position of the debtor is the same as if there had been no demand at all in July, and then in September there would be the same accumulation of payments, and yet it would be impossible to say that the surety was damaged by the indulgence being given."

What Leach, V.-C., said in *Eyre* v. *Bartrop, supra,* was that if there had been no change as to the subsequent payments in the position of the surety that would be a good answer; but then he said that that was not the fact and that the deed had altered the position of the surety. That case, therefore, does not bear out the judgment of the court below."

The *Croydon Gas* case is cited with approval in *Holme* v. *Brunskill* (1877), 3 Q.B.D. 495, 47 L.J. (Q.B.) 610. Brett, L.J., says at p. 509:—"The doctrine of the release of suretyship is carried far enough and to the verge of sense, and I shall not be one to carry it any further."

I think, upon the authority of the *Croydon* case, it should

be held that the discharge of the surety from the first instalment is not sufficient by itself to discharge him from the later ones.

In considering whether or not the surety has been in any way prejudiced in his rights concerning the mortgage security or in respect of the acceleration clause in the mortgage by the extension of the time for payment of the first instalment, considerable assistance may be derived from the following statement of the law by A. L. Smith, L.J., in *Rouse* v. *Bradford Banking Co.*, [1894] 2 Ch. 32, at p. 75:—

"It has long since been established that, if a creditor contracts with a principal debtor and a surety, and afterwards by a binding contract with the principal debtor he gives time to him without the consent and knowledge of the surety and without reserving his rights against the surety, the surety is discharged. Different reasons, given by different Judges, for this will be found in the books; but I apprehend that the main reason is that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, and that when he has paid it off he is at once entitled in the creditor's name to sue the principal debtor; and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his assent."

And also from the following statement of the law by Anglin, J., in *North Western National Bank of Portland* v. *Ferguson* (1918), 44 D.L.R. 464, at p. 471, 57 Can. S.C.R. 420:—"I fully appreciate the inflexibility of the rule that any material alteration in the terms of a guaranteed contract made by the principals without the guarantor's assent will discharge him and that a binding agreement for extension of time without reservation of rights will always be deemed such a variation because it disables the guarantor, should he be minded, to discharge the principal debtor's obligation and seek recoupment from him or to compel him to do so himself, from immediately proceeding against him. The right of the surety to be subrogated to all the means at the disposal of the creditor is, as it has been said, one of the highest equity, and any act by which it is curtailed will, to the extent of the injury inflicted, be a defence. *Wilson* v. *Brown* (1881), 6 A.R. (Ont.), 87, 90. 'It has been the law of the Court for many years that a surety is entitled to come into equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved.' *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, [1909] 2 Ch. 401,

Alta.
App. Div.
WILSON v. CRISTALL.
Clarke, J.A.

406. But that right accrues only upon the maturity of the debt."

I am unable to see in the light of these authorities that the appellant was prejudiced in respect of the later instalments by the extension. The plaintiff, under clause 2, was entitled to refuse payment until the maturity of the respective instalments, and was not required to accelerate them, though she had an option to do so. She had a right to hold her mortgage as an investment for its full term, receiving interest as provided in the mortgage. The appellant's agreement binds him to these terms. The principal debtor had no right, without the plaintiff's consent, to pay before maturity, and it follows that the appellant could not have required him to pay before maturity, nor was the appellant entitled to pay before maturity so as to recover from the principal debtor before maturity. So I conclude that except as to the first instalment the second ground of appeal fails.

The third ground also fails. It was argued very faintly and practically abandoned, during the argument.

The fourth ground requires some consideration.

The plaintiff late in 1915 placed this mortgage amongst other securities in the hands of her solicitors, Short, Cross & Co., for their attention.

In the bookkeeping the mortgage clerk in the solicitors' office by mistake entered in the mortgage account credits for $2,500 on July 3, 1914, and $2,000 on Oct. 7, 1914, thus reducing the principal to $3,500. In fact only $500 was paid on July 3, which reduced the note of $2,000, given on April 1, 1914, for the instalment then due, to $1,500, and a renewal note for the $1,500 was given, dated April 4. In some way the clerk credited the $500 and afterwards added the amount of the first note, making the credit $2,500. On October 7, a payment of $31.25 for interest on the July note then maturing was paid and a further renewal given for the $1,500, but no further payment was made, yet in some way a credit entry of $2,000, on account of principal appears in the account on that date. In July, 1914, only $1,500, represented by the note was overdue for principal after payment of the $500, and no further payment of principal would mature till the following April (1915). On December 18, 1915, the solicitors wrote to Shugarman and the appellant stating a balance of $5,500 owing on the mortgage. On December 15, 1917, after the maturity of the whole mortgage, the solicitors wrote to the appellant advising the balance owing for principal was $3,500, and enclosing a statement shewing the two credits of $2,500 and $2,000.

The appellant says that in 1916 or 1917 Shugarman told him he had reduced the mortgage to $3,500.

I find no evidence that at any time the plaintiff or her solicitors intimated to Shugarman that the balance was $3,500. Such was not the fact. The correspondence between Shugarman and the plaintiff and her solicitors shews no indication of any such belief on his part. In his letter to the solicitors of December 22, 1915, in answer to the solicitors' letter of December 18, 1915, stating the balance to be $5,500, he raises no such contention. At that time if the mortgage had been reduced to $3,500 no principal would be due and the instalments overdue would have been overpaid by $500, yet in his letter Shugarman says:—"I am very sorry that I cannot send you at least a part of the principal but it is impossible for me to do so. You are aware of the way business is in and has been for the past year or more."

If Shugarman told the appellant he had reduced the mortgage to $3,500 he was guilty of a gross fabrication, for there was no possible ground for such a statement.

The appellant is a cousin of Shugarman and I gather from the evidence he had an intimate knowledge of his affairs. He was surety for him in another transaction. He knew that in 1914 or 1915, Shugarman, being financially involved, made a sale under the Bulk Sales Act, 1913 (Alta.) ch. 10, and the creditors only received a dividend of 10%; in addition Shugarman also owed money to the appellant for which he was pressing him. All the circumstances are so inconsistent with the appellant's statements that he believed Shugarman had reduced the mortgage to $3,500 and that he suffered from any representation to that effect, that I am compelled to reject his evidence in that respect. I am bound to think that he is seeking to take advantage of a probable error in order to escape his liability.

My conclusion is that the plaintiff is entitled to recover against the appellant for principal $6,000 with interest computed according to the terms of the mortgage reckoned from April 1, 1914, less the following payments, which I think he is entitled to the benefit of, the others being applicable to the first instalment of $2,000, from which the appellant is relieved:—

1915, April 2, $200; 1915, Aug. 18, $226.60; 1916, Sept. 15, 4-5 of $200, $160.

This payment was made by Shugarman on interest generally. I think it should be apportioned in the ratio of 6,000 to 1,500 or 4 to 1, 1-5 being in respect of $1,500, the balance owing on the first instalment and the remaining 4-5 in respect of the remaining $6,000; 1917, May 1, $325.90; 1918, Aug. 9, $250.75; total, $1,163.25, and the judgment below should be varied accordingly.

Sask.
K.B.

If the parties fail to agree upon the amount it will be settled by the Registrar of the Court at Edmonton on settling the judgment of this Court—in other respects the judgment will be affirmed.

The appellant has gained substantial relief and should have the costs of this appeal to be taxed on the scale of column 4 of the tariff, and set off against the judgment.

Judgment below varied.

BONTEX IMPORTING Co. v. PANAR.

Saskatchewan King's Bench, Bigelow, J. December 22, 1921.

PRINCIPAL AND AGENT (§ IID—26)—AUTHORITY TO AGENT TO PURCHASE CERTAIN KINDS OF GOODS—PURCHASE BY AGENT OF GOODS NOT WITHIN THE CLASS—PRINCIPAL REPUDIATING GREATER PART OF GOODS BUT RETAINING A SMALL PART—ACCEPTANCE OF GOODS—LIABILITY OF PRINCIPAL—SALE OF GOODS ACT, R.S.S. 1920, CH. 197, SEC. 34.

A retail merchant gave an agent authority to purchase goods for him in the following words "I hereby authorize . . . to purchase for me merchandise on or about $3000 as per arrangements. I agree to pay . . . 10% above invoice cost of purchases made for me." The words "as per arrangements" were explained to be verbal instructions as to the kind of goods he was to buy. The agent bought certain goods which did not come within the description of the goods which he was authorised to buy. The principal repudiated the contract and returned most of the goods, but kept a part of them to the value of a small amount which was owing to him by the vendor. The Court held that by keeping a part of the goods he did an act in relation to them which was inconsistent with the ownership of the seller, and that therefore under sec. 34 of the Sale of Goods Act, R.S.S. 1920, ch. 197, he accepted the goods and ratified the sale made by the agent on his behalf.

ACTION to recover the price of goods sold and delivered to the defendant by the plaintiff. Judgment for plaintiff.

H. L. Jordan, K.C., for plaintiff.

F. F. MacDermid, for defendant.

BIGELOW, J.:—In December, 1920, and January, 1921, the defendant was a merchant in Saskatoon. One Solotoy was a wholesale dry goods jobber in Winnipeg. On December 15, 1920, Solotoy was going east to Toronto to purchase goods, and defendant gave Solotoy authority in writing to buy goods for him as follows: (Ex. P1).

"Winnipeg, Dec. 15th, 1921.

I hereby authorize Mr. Solotoy to purchase for me merchandise on or about $3,000.00, as per arrangements. I agree to pay Mr. Solotoy 10% above invoice cost of purchases made for me.

(Signed) S. Panar."

The words "as per arrangements" were explained by both

Solotoy and defendant to mean that defendant gave Solotoy verbal instructions as to the kind of goods to buy for him, namely, silk and serge dresses, coats of all descriptions, men's dress shirts and men's suits. There was evidence that Solotoy made a note of these instructions on a separate piece of paper. Exhibit P1 was signed in Winnipeg, and it seems suspicious that Solotoy's note limiting his authority was made on notepaper of the Hotel Carls-Rite, of Toronto. (See Ex. B on examination for discovery). No explanation was given of this, and I find it difficult to believe Panar when he says that Ex. B above was attached to Ex. P1, when he signed P1 in Winnipeg. This point, however, is not material in view of my opinion of the result of what took place afterwards.

Solotoy went to the plaintiff's place of business in Toronto on December 22, 1920, and bought certain goods which do not come within the above descriptions, to the value of $1,383.46, and paid plaintiff $500 of defendant's money on them. His explanation is that although he had no authority to buy these particular goods, they were a bargain, and he thought defendant could use them.

Again it is difficult to understand, if he did not have authority to buy these particular goods, why he did not wire defendant and ascertain, as he could very quickly have done, whether defendant wanted these particular goods.

The goods were shipped at once by express, and Solotoy advised defendant by letter. What date the goods arrived is not clear, but on December 27 the defendant wired Solotoy to Montreal:—

"The Bontex Company knitted goods cannot use. Have not arranged with you to buy any knitted goods or shoes, only white-wear. Why not send wire before purchasing other lines than we arranged for you to buy, as you did with dresses. Do not buy anything further before wiring for advice. Advise what to do with Bontex Importing goods."

On December 28, 1920, defendant wired plaintiff to express at once 25 coats. These coats had been referred to in Solotoy's letter to defendant. The coats were shipped to defendant, and the value of same was $439.36. Defendant kept the coats, and of the first shipment kept 5 1/6 dozen nightgowns to make up in value the $500 plaintiff had belonging to him, and returned the rest of the goods some time in January.

On January 18, 1921, defendant wrote plaintiff this letter:—

"With regard to your letters in connection with goods returned, we have been in communication with Mr. Solotoy and thought that he would probably have seen you in this connection.

Sask.
K.B.
BONTEX IMPORTING CO. v. PANAR.
Bigelow, J.

The goods which you shipped were not up to the standard which we expected from his advice, and we therefore returned them on his advice, as at the same time we had purchased some coats from you, we kept out 5 1-6 doz. nightgowns at $19.50 which less the express which we paid of $38.44 will balance of the account of $500.00 which was paid you, and in this way we thought to save you the trouble of refunding the money."

It will be observed that in this letter defendant does not deny Solotoy's authority to buy, but says, "the goods were not up to the standard which we expected from his (Solotoy's) advice, and we therefore returned them."

I am almost inclined to decide that Solotoy had ample authority from defendant to buy these goods, but perhaps I am not justified in coming to that conclusion on account of the suspicious circumstances referred to above, as against the direct and positive evidence of both Solotoy and the defendant.

This action is brought for the value of the goods alleged to be sold and delivered, and the defence is that Solotoy never had any authority to buy.

Assuming that Solotoy had no authority, the case resolves itself into the question whether the defendant ratified the sale by keeping part of the goods.

In Bowstead's Law of Agency, 5th ed., p. 59, the law is stated:—"The ratification of an act or transaction may be express or implied. A ratification will be implied whenever the conduct of the person in whose name or on whose behalf the act or transaction is done or entered into is such as to show that he intends to adopt or recognize such act or transaction in whole or in part."

The cases cited by plaintiff do not seem to assist. *Bristow* v. *Whitmore* (1861), 9 H.L. Cas. 391, 11 E.R. 781, 31 L.J. (Ch.) 467, 9 W.R. 621, 8 Jur. (N.S.) 291, merely decided that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burdens. In *Cornwal* v. *Wilson* (1750), 1 Ves. Sen. 510, 27 E.R. 1173, an agent bought goods at a greater price than authorised. The defendant refused the contract, but disposed of the goods (apparently all of them), treating them as his own. It was held that the agent was entitled to recover. No case has been cited to me clearly in point where, as here, the principal repudiated the contract and returned most of the goods, but kept part of the goods to the value of what was due him from the vendor.

Sec. 34 of the Sale of Goods Act, R.S.S., ch. 197, is in part as follows:—"The buyer is deemed to have accepted the goods

when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller."

I am of the opinion that by keeping part of the goods he did an act in relation to them which is inconsistent with the ownership of the seller; and therefore, under this section, he accepted the goods, and in doing so he ratified the sale made by Solotoy on his behalf, and that he is therefore liable.

The plaintiff will have judgment for the amount claimed, $1,322.82, and costs.

Judgment for plaintiff.

BARTHELMES v. BICKELL.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, and Mignault, JJ. December 9, 1921.

CURRENCY (§ I—1)—PURCHASE AND SALE OF AMERICAN STOCKS IN NEW YORK—EMPLOYMENT OF TORONTO BROKER ACTING THROUGH NEW YORK AGENT—BALANCE DUE TO CUSTOMER ON CLOSING ACCOUNTS—RIGHT TO BE PAID IN UNITED STATES FUNDS.

A firm of brokers carrying on business in Toronto and New York through their agents there, cannot in the absence of a special agreement with the customer, discharge itself from liability to such customer, who has engaged its services in the purchase and sale of American stocks in New York by paying him when their dealings end the balance due to him in Canadian funds, without any allowance for exchange upon the admitted balance upon New York where the transactions all took place.

[See *Quartier* v. *Farah* (1921), 19 O.W.N. 499; *Barthelmes* v. *Bickell* (1921), 20 O.W.N. 254, reversed (1920), 19 O.W.N. 97, restored.]

APPEAL from the judgment of the Supreme Court of Ontario (1921), 20 O.W.N. 254, in an action against a firm of brokers to recover the difference in value between Canadian and United States currency in respect of sum payable by defendants to the plaintiff. Reversed and judgment of Middleton, J. (1920), 19 O.W.N. 97, restored.

Slaght, K.C., for appellant.

DAVIES, C.J.:—The dealings between the parties were those of principal and agent requiring full accounting and were not in any sense those of vendor and purchaser which might give rise to the presumption of local currency being contemplated by the parties in the discharge of the agent's accountability.

I cannot think, therefore, that it would be possible for the broker's company, in the absence of any special agreement permitting it to do so, to reserve to itself and to withhold from its

Can.
S.C.
BARTHELMES v. BICKELL.
Davies, C.J.

customer the plaintiff the premiums of exchange upon New York upon the admitted balance due such customer. The benefit of such exchange it seems to me legally belonged to the broker's principals and should not, on any principle I know of, be retained by the brokers or agents in addition to their ordinary charges.

The trial Judge (1920), 19 O.W.N. 97, so found and awarded the plaintiff the sum of $10,103.35.

There is no dispute about the correctness of the amount allowed if the right of the plaintiff to be paid in the equivalent of American currency on the balance due him is correct.

The Appellate Division (1921), 20 O.W.N. 254, by a majority of three to two allowed the appeal and dismissed the action. The Chief Justice of Ontario, with whom Maclaren, J., concurred, seems to have based his judgment upon what he held to be "not an unfair inference" under the facts as proved, that the plaintiff, the now appellant, had acquiesced in foregoing his claim to exchange as to the transactions before July, 1919, in consideration of his broker's promise to allow the premiums in regard to future transactions.

I am quite unable to draw or to accept any such inference or acquiescence, or that any such compromise ever was reached between the parties. Hodgins, J.A., who concurred in allowing the appeal and dismissing the action did so, however, upon an entirely distinct ground of an agreement or arrangement between the defendants and their New York agents, to which he assumed the plaintiff was a party and bound by, under which "Canadian speculators might deal in New York market in stocks on margin under circumstances which would obviate the necessity of their remitting money between Toronto and New York or *vice versa*. . . . .

That method consisted in maintaining by Miller & Co. of a deposit in the Standard Bank in Toronto consisting of a large amount of money. The results of the purchases and sale of stock in New York were communicated by Miller & Co. to the appellants, who were then authorised by Miller & Co. to draw for the benefit of their clients upon the funds in the Standard Bank, paying in this way their Canadian customers any profits that had been made in trade in New York. This also involved the advantage of enabling buying and selling to be done by clients in Toronto upon the credits of the appellants in New York and not upon their own individual credit, and also upon the basis of Canadian dollars, any losses being charged to the appellants. When this arrangement was made, apparently the difference in

exchange was nil or trifling. It is said to have been 1 per cent. when the respondent's transactions began."

I am quite unable to see how a private arrangement made between the Toronto brokers and the defendants and their New York agents, Miller & Co., can be invoked to prejudice the plaintiff in his dealings with the brokers in Toronto, unless indeed there was proof of his knowledge of such an agreement and acquiescence in it. Of such proof, however, I have found none, and in its absence I cannot see how the private agreement between the Toronto brokers and their New York agents could affect plaintiff's rights in his dealings with his agents or brokers in Toronto.

I am in full accord with the dissenting judgments of Magee and Ferguson, JJ.A., 20 O.W.N. 254, and for the reasons given by them which to me are perfectly satisfactory and convincing, I would allow this appeal with costs here and in the Appellate Division and would restore the judgment of Middleton, J., the trial Judge, 19 O.W.N., 97.

IDINGTON, J.:—This appeal raises the question of whether or not a man employing a Toronto broker to operate for him in New York and make such investments there as the investor may from time to time direct to be made, is entitled to demand and receive in New York the net profits made therefrom, less usual commission the broker is entitled to.

The trial Judge, Middleton, J., held that the appellant having been a very successful investor in that way was entitled to recover from the respondents, who were his brokers, acting through New York agents, his full measure of profits and to a New York cheque therefor, if payment to be made by cheque, and could not be deprived of his exact measure of profits in New York, where earned and held when the account was closed.

The respondents tried to substitute for the New York cheque or draft, to which the appellant was entitled, a cheque on a Canadian bank nominally for the same sum, but leaving over $10,000 of said profits in the hands of respondents' New York agents.

Respondents tried an appeal to the Appellate Division of the Supreme Court of Ontario, and were successful in obtaining by a majority of three to two a reversal of the trial Judge's judgment. Hence this appeal here.

I am so clearly of the opinion that the trial Judge was, upon his finding of facts, right in his law that I fear to prolong the discussion lest I add to the confusion of thought.

Yet I may say that the appellant, a stranger at the time to the respondents, opened his operations by expressly directing

Can.
S.C.
BARTHELMES v. BICKELL.
Idington, J.

an investment to be got in New York and giving a $3,000 cheque by way of security for the venture.

Because that cheque was on a Canadian bank, though not a word passed as to the rate of exchange or cost of cashing the cheque or its proceeds in New York, it is contended that the basis was in law thus laid for returning it, and the profits of many dealings with which it had only a remote connection, in depreciated Canadian paper currency and justifying the retention of $10,000 of legitimate profits lying in the hands of respondent's New York agents.

I cannot assent to any such proposition as being based on law.

I can conceive of such a system as the respondents and their New York agents adopted being the basis of a contract with clients when adopted by them, or any of them choosing to be bound by the operations of such terms of agency.

But any such exceptional system would not bind their clients unless clearly brought home to the minds of such as retained them, and their assent, either expressly or impliedly, got thereto.

So far from that being the case herein it is exceedingly doubtful from the evidence when this sysfem was first adopted by the respondents, and clearly never had been brought home to the mind of appellant until July, 1919, when first set up to him.

As to the question of fact resting thereon, I am bound by the judgment of the trial Judge unless I can find some substantial fact entitling me to rest a dissenting conclusion upon, which I confess I cannot.

Indeed I am, after a perusal of the evidence of the witnesses for respondents thus brought in question, decidedly of the opinion that the trial Judge correctly appreciated the value thereof.

But for that finding, and my concurrence therein, I might be bound to accept and act upon another appreciation of the facts so far as bearing upon the later transactions.

The result is that in my view of the facts throughout there never existed any basis for the pretensions of the respondents to appropriate the profits of the appellant, or any part thereof, to meet the risks incidental to the operation of its peculiar system.

It is stated in argument that many Toronto brokers acted upon the same system, but proof thereof is very scant and, as a universal well-known custom of the market binding on all dealing therein, is very far from being proven.

And when we turn from the abstract to the concrete, there is an illustration given in the offer through other agents to

claim specific delivery in New York of the securities in question therein refused by the respondents and its agents, which I assume was intended as a means of testing the actual contentions of the respondents.

That refusal was unjustifiable. Indeed it is attempted to be met by an explanation which may be correct, that the refusal was the result of a mistake.

But if respondents' contentions be correct, there was no need for such an explanation for it was part of its rights flowing from the contention set up, if well founded, that any return of New York profits must be answered only by a return of Canadian paper currency, nominally of the same number of dollars as held in New York agents' hands.

In line with such a mode of thought, it is rather curious to find in respondents' factum reliance placed upon sub-sec. 3 of sec. 15 of the Currency Act, 1910 (Can.), ch. 14, dealing with the coinage in circulation in Canada.

If this had been taken as the basis of what is in question instead of the depreciated paper currency, we might have found something to rest upon for another view than I take.

If the depreciated nominal value of a dollar had been in fact the converse of what it is and very acutely so at the time in question in favour of Canada as against that in New York, I suspect the respondents would stoutly have resisted what they now contend for herein as being most unjust, and quite properly so.

In other words, if the American dollar had been worth only seventeen per cent. less than the Canadian in paper currency, and the present appellant had demanded profits based on such a depreciated American dollar and demanded such Canadian dollars worth so much more, I fancy we would have heard a very justifiable outcry against such an unreasonable demand, even if the business had begun as this is said to have begun.

I think this appeal should be allowed, and the judgment of the trial Judge restored with costs here and below.

DUFF, J.:—*Prima facie* the appellant is entitled to call upon his agents, the respondents, to account for all profits arising through the employment of funds placed by him in their hands for the purpose of trading in shares on his account. This presumptive right of the appellant could only be displaced by proving either an agreement to the contrary or a custom governing the relations of the parties and modifying that presumptive right.

Express agreement to the contrary was negatived by the trial Judge, and that hypothesis may be discarded. The facts from

Can.
S.C.
BARTHELMES v. BICKELL.
Anglin, J.

which we are asked to infer such an agreement by conduct are, in my opinion, altogether too meagre to support that conclusion. As to custom, I agree with Ferguson, J., that a custom such as that relied upon as between brokers in Toronto and New York, assuming it proved, could not affect the appellant's right unless at least he had knowledge of it, and this is not asserted.

ANGLIN, J.:—For the reasons assigned by the trial Judge and by Magee and Ferguson, JJ.A., in the Appellate Divisional Court, I am, with respect, of the opinion that this appeal should be allowed and the judgment of Middleton, J., restored.

The relationship of the parties—that of broker and client—*prima facie* entitles the plaintiff to recover the moneys for which he sues. The broker cannot profit from his client's transactions beyond the usual brokerage commission unless he establishes some special agreement, express or implied, or some custom of the market on which he is employed to deal for the client, so well defined and establishel that the latter may properly be taken to have contracted subject to it, which entitles him to whatever additional gain he claims. The evidence in this record, in my opinion, does not establish anything of the kind.

The admitted balance of over $62,000 standing to the plaintiff's credit in February, 1920, when his account with the defendant was closed, was the outcome of transactions on the New York market in American stocks. The plaintiff's profits were all earned in New York and were received there by the defendants' correspondents in United States currency. No reason has been shewn why he should not receive the full benefit of the moneys thus obtained on his behalf.

The evidence credited by the trial Judge—and in my opinion the more credible—is that if Barthelmes wished at any time during the period of his dealings with the defendants to obtain delivery of shares in which he was "long" he would have been required to pay for them in United States funds. Why should he be denied the corresponding right of being paid on the same basis? The matter in issue has been so fully discussed, however, in the judgments in which I have already expressed my concurrence that I cannot usefully add to them.

The only circumstance in evidence that would seem to be at all inconsistent with the plaintiff's claim is that although he made his original deposit of $3,000 with the defendants in Canadian funds he was given credit for that entire amount in the first account rendered by them to him of the transactions carried on in his behalf on the New York market. The New York discount on Canadian funds at that time is said to have been 1%. It is quite possible, however, that the defendants

Can.
S.C.
BARTHELMES v. BICKELL.
Mignault, J.

were willing to waive their right to debit the plaintiff with the amount of this comparatively small discount, $30, in order to secure his custom. Indeed, I am not at all certain that at that time the difference in exchange was not generally ignored in business transactions in Canada. I do not find in this single circumstance—and there is nothing else in the evidence pointing in that direction—enough to warrant the defendants asserting a right to retain exchange amounting to 17% on upwards of $62,000 profits made in New York on the plaintiff's account at a time when such exchange was certainly taken into account in other business transactions.

MIGNAULT, J.:—The appellant claims that he is entitled to be paid in United States money a substantial balance standing to his credit on certain purchases and sales of United States securities made for him on the New York Stock Exchange by the respondents who were his brokers in Toronto, and who, through their agents, Miller & Co., stock brokers and members of the New York Stock Exchange, purchased and sold these securities on behalf of the appellant. When the account, which had lasted some 2 years, was closed on February 7, 1920, the balance to the appellant's credit was $62,445.62. The appellant contended that this sum being really United States money, he was entitled to the value of the exchange, which was then 17%. The respondents paid him this $62,445.62 in Canadian money under reserve of his right to claim the value of the exchange This action was taken to recover this exchange, and the trial Judge, Middleton, J., gave the appellant judgment for $10,105.73, deducting from the appellant's balance the sum of $3,000 which he had paid in Canadian money as a margin when he opened his account in January, 1918. In the Appellate Division this judgment was reversed by Meredith, C.J.O., and Maclaren and Hodgins, JJ.A., and the appellant's action was dismissed, Magee and Ferguson, JJ.A., dissenting. From the latter judgment the appellant appeals.

The main facts of the case were thus stated by the trial Judge, 19 O.W.N. 97, at pp. 97, 98:—

"The defendants were brokers carrying on business in Toronto. In June, 1918, the plaintiff began trading with them as his brokers, in the purchase and sale of stock, the transactions being almost entirely on the New York Exchange. The trading continued until February, 1920, when the account was closed by the payment of the amount admitted by the defendants to be due and the handing over of a few shares, the only stock purchased then remaining unrealised, reserving to the plaintiff the right to put forward the claim for exchange."

Can.
S.C.
BARTHELMES v. BICKELL.
Mignault, J.

During this period many transactions had taken place, and the course of dealing had generally been profitable to Barthelmes, although on individual transactions he had made a loss. His $3,000 had grown to approximately $60,000.

The way in which the business was carried on by Bickell & Co. was that they had an arrangement with Miller & Co., of New York, to purchase and sell for them upon their instructions. An account was kept with the Standard Bank at Toronto, and when Bickell desired to make a purchase, a deposit was made to the credit of this account. On a sale being made, Miller would instruct the transfer to Bickell's credit of any balance that might be payable. No money was sent to New York for individual purchases, and no money was sent from New York for individual sales, and it was arranged that exchange should not be payable as between Miller and Bickell with respect to any of their transactions. The amount involved would not be great because, while the volume of trade would no doubt be very large, the balance ultimately payable either by Miller to Bickell or *vice versa* would be comparatively small. The effect of this arrangement, however, was that the profits which might be made by one customer in respect to his individual trading would be set off against the loss payable by another, and the result would be that an arrangement, perfectly fair as between Miller and Bickell, might be exceedingly unfair as between the Toronto brokers and an individual customer. If the individual customer lost on the transaction so that money would have to be sent to New York, I can see no reason why that customer should not be called upon to pay the exchange incident to the remitting of funds to New York to pay his loss. On the other hand, if a customer made on a transaction, I can see no reason why he should not receive the New York funds, with the incidental advantage by reason of the depreciation of Canadian currency."

In my opinion the arrangements between the respondents and Miller & Co., which were entered into for their mutual convenience, are without effect on any rights which the appellant may have against the respondents. The evidence is that the respondents transmitted by wire the appellant's orders to Miller & Co. in New York, where they were attended to by the latter. But these orders were not ear-marked so to say, no mention being made of any particular client, but they were sent on with others, and no doubt Miller & Co., in dealing with gains and losses, offset the one against the other, any settlement with the respondents being of the difference one way or another in the day's trading. It is evident that with the large volume of

transactions between the firms, and the settlement of differences which of course varied from the credit to the debit side, the question of exchange was not important. No doubt also the respondents required fresh margins from unsuccessful customers but naturally did not demand any margin outside of the original one from those who, like the appellant, were fortunate in their speculations. If the transactions in question were real ones they were merged into a large number of other transactions, the respondents of course keeping track of those effected by each of their customers. Miller & Co. made the purchases and sales on the stock market in New York and used the stock certificates, all the purchases being on margin, to finance the transactions with their bankers.

No special bargain was entered into between these parties when the account was opened, and the appellant, when he made the first purchase of 100 shares of United States Steel, paid the respondent $3,000 in Canadian money as margin. In July, 1919, there was some conversation between the appellant and Mr. Cashman, one of the respondents, the appellant claiming that he was entitled to the value of the exchange, which Mr. Cashman disputed, but apparently he offered to allow exchange on future transactions, if the account was closed and a new one opened, and if the appellant accepted his then balance, some $40,000, in Canadian funds, which he refused to do. The trial Judge found that this conversation was followed by a continuation of trading without any change in the rights of the parties, the delay being a mere truce and not an abandoning of any right.

The evidence would have been more complete and satisfactory if the testimony of the member of the firm of Miller & Co., with whom the respondent dealt, had been obtained. As the record stands, the different transactions entered into and which involves a very large amount, are shewn by the monthly statements, 17 in number, which were produced at the trial.

When the account opened, New York exchange was only 1%. On December 1, 1919, it was 4¾%, and it rapidly increased so that, when the account was closed, it stood at 17%. By reason of this rapid rise, the arrangement between the respondents and Miller & Co. was cancelled early in January, 1920, and subsequently exchange was exacted on money sent to New York. Whether or not the appellant was aware of this new arrangement is one of the facts in dispute.

Generally, the course of dealing between the appellant and the respondents, as demonstrated by the monthly statements, shewed an apparent adverse balance against the former. But inasmuch as the appellant was "long" as to a considerable

Can.
S.C.
BARTHELMES v. BICKELL.
Mignault, J.

amount of securities which stood to his credit in the respondents' or their New York agents' hands, but on which a margin only had been paid, the sale of these securities at the market price then prevailing would change this adverse balance into a substantial profit. Or the appellant could, if he preferred, say at the end of any month, pay the balance due on the purchase price of these securities—that is to say the adverse balance mentioned in the monthly statement—and demand delivery of the stock certificates. Whether he would be required to pay this adverse balance in Canadian or United States funds is a point on which Mr. Cashman made two diametrically opposed statements. The trial Judge preferred Mr. Cashman's first answer to the plain question put to him, that the payment of the balance of the purchase price would have to be made in New York funds. It is hard to believe that any sane broker would have accepted Canadian money at par to be sent to New York. If he had done so, he would have been obliged to make up himself the amount of exchange, for obviously New York money would have to be provided. What had already been paid, to wit, the margin furnished, came out of moneys which the appellant had to his credit in New York, for otherwise he would have been called upon to supply the necessary margin, which never happened after he had furnished the initial margin of $3,000.

It is not necessary to examine the monthly statements in detail, and it will suffice to consider the two last ones. Looking at the statement for December, 1919, it begins by an apparent adverse balance carried over from November of $168,330.94, which, with a charge of $932.86 for interest, made the debit amount on December 31, $169,263.80. On the credit side is the sum of $60,367.50, sale price of 500 shares of U.S. Rubber at 121, so that the apparent net adverse balance for the month was $108,896.30. However, the appellant was "long" on 1,200 shares of rubber, 100 shares of U.S. Steel, and the amount of $250 in liberty bonds. Of course, the apparent adverse balance would be more than wiped out by the sale of these securities as shewn by the statement for January, when they were all sold with the exception of the liberty bonds. Or, if the appellant had desired, on December 31, to take delivery of these securities, the balance payable in New York, in New York funds, I take it, would be the above adverse balance of $108,896.30.

Examining now the statement for January, 1920, we find the appellant charged with the purchase of 100 shares of rubber at 125 and 100 shares of the same stock at 124, to wit $12,530 and $12,422.50. These sums, with the adverse balance of $108,896.30 from December, make the total sum of $133,848.80 on the debit

side. During January the appellant sold 1,400 shares of rubber and 100 shares of steel, the sale price of which, with a dividend of $125 on his steel stock, netted him the total sum of $200,997.50, so that, after wiping out the amount standing to his debit, the appellant had a balance in his favour of $67,148.70, and was "long" with $250 in liberty bonds.

The appellant closed his account on February 7, 1920. He had purchased on February 3, 400 shares of steel and 100 shares of rubber. These he sold on February 6, at a loss, so that, as he was charged a New York premium of $623.08 on $3,748.00, his net loss, there was, on the debit side, $54,893.08, and, on the credit side, with $72.50 for adjustments for September, the sum of $117,338.70, leaving a balance in his favour of $62,445.62, which the respondents paid him in Canadian funds, under reserve of his right to claim the premium on New York funds if he was legally entitled to it.

Now it appears by all the monthly statements that the appellant never took delivery of any of the stocks said to have been actually purchased for him (he asserts that at the end he was refused delivery), but settled on the basis of the difference between the purchase and sale prices, being fortunate enough to realise a very handsome profit.

If we could take the appellant as being a speculator on an expected rise of the market after the purchases said to have been actually made for him, but of which he had no serious intention of taking delivery, his profits or loss being the difference between the purchase and sale prices, inasmuch as his speculation was made in Toronto, although the respondents say it was carried out in New York by actual purchases and sales, it seemed to me on my first consideration of the case that, as it is not shewn that the respondents made any profit on the exchange—which profit they of course could not keep—their only obligation was to pay the appellant the ultimate difference in his favour in Canadian money.

My difficulty, however, on further consideration, is that although, like the trial Judge, I have very serious doubts whether any real purchases and sales were made, still I must decide this case on the basis that it is common ground with both parties, who no doubt wished to bring themselves within the rule laid down in *Forget* v. *Ostigny* ([1895] A.C. 318, 64 L.J. (P.C.) 62, 43 W.R. 590,) that all these transactions were actually carried out by the respondents, and their agents, Miller & Co., on the New York market. After the initial advance of $3,000 in Canadian money, all the purchases were financed in New York by means of moneys here standing to the appellant's credit in

Alta.

App. Div.

New York, so that the amount charged as paid on account of the purchases was paid in New York funds, notwithstanding the respondents' assertion that Miller & Co. were credited with it in their bank account in Toronto. The final balance due to the appellant when he closed his account was a balance remaining to his credit in New York, where the sale price of his stocks was paid, and not in Toronto. This being the case, the appellant is entitled to this balance in New York funds, just as he would have received New York money, and exactly the same amount of it, had he taken delivery of these stocks in New York, after paying in New York funds what was necessary to complete their purchase, and had then sold them in New York on the dates when they were sold for him on the instructions of the respondents. And if it is true, as asserted by the respondents, that Miller & Co. received in Toronto and in Canadian money the margin paid on account of stocks bought for the respondents' clients—but the facts here shew that they must have used moneys standing to the appellant's credit in New York to make purchases for the latter—they would profit to an easily calculable extent by the exchange, if they could pay in Canadian money what they had received in New York funds for the sale of the appellant's securities.

As a consequence I have come to the conclusion that, on the state of facts admitted and indeed asserted by the respondents, the appellant is right in contending that the balance due to him should be paid in New York funds. I would therefore allow the appeal with costs here and in the Appellate Division, and restore the judgment of the trial Judge.

Appeal allowed.

McDOUGALL v. GARIEPY.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Ives, Hyndman and Clarke, JJ.A. February 4, 1922.

INDEMNITY (§I—1)—AGREEMENT TO GUARANTEE DEBT TO BANK—BOND TO INDEMNIFY TO EXTENT OF ONE THIRD OF AMOUNT FOR WHICH ULTIMATELY LIABLE—PAYMENT OF INDEBTEDNESS TO BANK—NO SETTLEMENT OF ACCOUNTS—LIABILITY UNDER INDEMNITY BOND.

By agreement in writing the plaintiff with ten other persons jointly and severally guaranteed to and agreed with the Imperial Bank of Canada that its customer Edmonton Portland Cement Co. would pay to the bank all moneys which might at any time be due to the bank according to the terms of the agreement. This was a continuing guarantee and limited to $100,000 each. The bank gave the plaintiff notice that it required him to pay the $100,000 with interest pursuant to the guarantee and some time afterwards the plaintiff obtained from the defendant a bond "to share to the extent of one third with him (the plaintiff) in any amount for which he may be found ultimately liable to the bank

Alta.

App. Div.

McDougall v. Gariepy.

Stuart, J.A.

under the terms of the guarantee" not exceeding $40,000. The plaintiff paid his indebtedness to the bank the sum paid being placed in a special account, and not to the company's indebtedness to the bank. The Court held, Beck and Hyndman, JJ.A., dissenting, that the payment made by the plaintiff to the bank being placed in a special account was in no way an adjustment of accounts between the bank and the plaintiff as guarantor, and it being impossible to determine the ultimate liability until the company's account with the bank was closed, the plaintiff was not entitled to recover from the defendant under the indemnity bond.

Appeal by way of stated case upon admissions of fact and referred to the Appellate Division by order of Hyndman, J., in an action to recover under a bond of indemnity given to the plaintiff by defendant. Action dismissed.

S. W. Field, K.C., for appellant.

H. H. Parlee, K.C., and *G. G. Dunlop*, for respondent.

Stuart, J.A.:—I agree with my brother Clarke in this case. The bond given by Gariepy is clearly a bond of indemnity against loss. Even if there should be held to be a difference in meaning between the two phrases in the condition of the bond, viz., the phrase "which the said McDougall may ultimately suffer" and the phrase "for which he..............may be found liable" (and a reference to the words of the recital makes me lean very strongly to the view that there should be no real difference in their interpretation) still, nevertheless, it remains the fact that the antecedent of the relative in each case is the phrase "all loss costs, charges, damages and expenses," and against these there is but an indemnity agreement. So that even assuming such a difference in meaning, still Gariepy only agrees to *indemnify* McDougall against a one-third part of all the loss, costs, charges, damages and expenses for which McDougall shall be found liable. In other words, he agrees only to recoup McDougall for the loss he suffers on account of being found liable to a certain amount. And until it is shewn to what extent McDougall has really suffered a loss or been damaged by the liability found to exist against him, I do not see how any judgment for any sum of money can be entered in his favour against the defendant. Neither do I see that the plaintiff can yet get a declaratory judgment in the terms of the second paragraph of the prayer of the claim because any amount which the plaintiff may have paid or may hereafter have to pay to the Imperial Bank is not, for the reasons given, the true measure of his loss or damage.

In Cyc., vol. 22, pp. 90,91, it is said "A distinction has been made in numerous decisions between a contract of indemnity against a liability and a contract to indemnify or save harmless

Alta.
App. Div.
McDOUGALL
v.
GARIEPY.
Beck, J.A.

from the consequences (damage or loss) of such liability, it being very generally held that in the former case the cause of action is complete when the liability is established, although payment of the liability or actual damage arising therefrom is not shewn; whereas, in the latter case, no right of action accrues until actual damage or loss has been sustained."

And on p. 88 it is said: "Where, however, the contract is not a mere contract to indemnify and save harmless but a contract to save from a legal liability or claim the legal liability and not the actual damage sustained is the measure of the damages."

These passages suggest to my mind a possible distinction in this case. If the bond of Gariepy had been given to McDougall immediately upon the execution of the guarantee agreement with the bank, I am inclined to think much could have been said in favour of the view that the measure of loss or damage sustained by McDougall would be the amount of his liability to the bank and that, especially when he had paid that liability, he should have been entitled to recover on the bond from Gariepy. But, as my brother Clarke points out, the bank had made its claim, stating the amount of McDougall's liability some months before the bond sued upon was given. This is one of those surrounding circumstances which may be taken into consideration in interpreting the words of an instrument. In face of the fact that the bank had already stated the amount of McDougall's liability of the fact that the amount of it was apparently then known to McDougall, the bond is still drawn so as to merely indemnify against "loss, damage and expense," which McDougall may "ultimately suffer," or for which he may be found liable. If it had been intended to indemnify against a liability already fixed, surely the instrument would have been differently drawn.

No doubt McDougall has suffered or will suffer some loss, but it seems to me impossible to say that the amount thereof should be fixed at $100,000, or at any particular sum.

I agree in the disposition of the case proposed by my brother Clarke.

BECK, J.A. (dissenting):—I have had the advantage of reading the opinions of the other members of the Court.

The bond—Gariepy to McDougall—*recites* an intention that Gariepy shall "share to the extent of one-third with McDougall in any amount for which McDougall may be ultimately found liable to the bank"; and *declares the obligation* of Gariepy to be an obligation to indemnify McDougall against one-

Alta.

App. Div.

McDOUGALL v. GARIEPY.

Hyndman, J.A.

third part of all loss, costs, charges, damages and expenses which McDougall "may ultimately suffer or for which he may be found liable to the bank" under his guarantee to the bank.

Then follows a clause restricting the obligation of Gariepy, as it would otherwise exist. McDougall cannot recover against Gariepy *until* the bank has demanded payment from McDougall *and* such demand has been satisfied, *and* McDougall has made reasonable efforts to enforce contribution by suit against such of those from whom he is entitled to contribution as Gariepy directs him to proceed against by a notice to be given 15 days after Gariepy has been notified that, "satisfaction has been made by McDougall to the bank"; *or until* the expiration of one year from the date of satisfaction by McDougall to the bank; whichever of these alternatives shall first happen.

The bank no doubt was entitled to demand payments from McDougall from time to time, and not necessarily only once, for the whole amount of his indebtedness to the bank. But it seems reasonably clear that it was the intention of this bond that Gariepy should be not liable to pay McDougall anything until McDougall had satisfied his full liability to the bank—a liability limited to $100,000—and therefore unaffected with regard both to McDougall and Gariepy by the fact that the bank still claims an additional $60,000 from the company.

I now revert to the words: "May ultimately suffer or for which he (McDougall) may be found liable to the bank." I think that, though it is not strict grammatical construction, the word ultimately is intended to be carried into the second branch of the sentence; but that the idea intended to be conveyed by the word "ultimately" is the idea, which I have already suggested, of the final total amount as contrasted with partial payments on account. Furthermore, the clause refers to the amount of McDougall's liability—not generally—but *to the bank*. That liability has, it seems to me, been settled as to its amount, and has also been satisfied. The fact that McDougall, or by way of subrogation, Gariepy, may in the future get something by way of a refund does not affect the liability *of the bank*.

In the result, I therefore agree with the conclusion reached by my brother Hyndman.

IVES, J.A., concurs with CLARKE, J.A.

HYNDMAN, J.A. (dissenting):—This is the second action brought in respect of the matters in issue, and comes before the Court by way of a stated case.

The former action was tried by me, and after hearing argument, I dismissed same on the sole ground that it was prema-

Alta.
App. Div.
McDOUGALL
v.
GARIEPY.
Hyndman, J.A.

ture, the "year" hereinafter referred to, not having elapsed at the date of the statement of claim.

The year having since expired, the parties again brought action and agreed on certain facts which they embodied in the stated case herein, which, at the suggestion of both parties, I referred to this Division as it was certain that it would in any event, later, reach here.

The material facts are set out in the judgment of my brother Clarke, and it is therefore unnecessary to repeat them.

There does not appear to be any doubt but that the contract is one of indemnity and not of guaranty or suretyship. Indemnity springs from contract, express or implied, and is distinguished from guarantee and suretyship in that the engagement is to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person, and is not, as in guarantee or suretyship, a promise to one to whom another is answerable. It is an original and not a collateral undertaking. (See 22 Cyc., p. 80.)

"In construing contracts of indemnity, the ordinary rules of construction employed in the interpretation of contracts generally are applicable. Indemnity contracts, like other contracts, are to be expounded as to effectuate the intention of the parties." (22 Cyc., pp. 84, 85.)

The case is not by any means easy of solution, but it seems to me there are two salient points upon which the whole case depends: (1) Has the plaintiff satisfied the bank within the meaning of the defendant's bond or agreement, and (2) Assuming such satisfaction, and a year to have elapsed, is the defendant liable for one-third of such liability to the bank, or only for the loss which the plaintiff may "ultimately suffer," as and when the same may be determined in the future?

Dealing with Question No. 1: At the time of action brought, plaintiff had not actually paid the demand of the bank in full, in cash, although he has since done so, but he did make an arrangement by giving cash and notes which appear to have been treated and accepted as in satisfaction of their claim. The liability under the guarantee agreement, to my mind, thereafter became changed into one upon the promissory note, a new form of claim altogether. In short, the liability became paid, or at least settled by the giving and accepting of the note. (See *Bidder* v. *Bridges* (1887), 37 Ch. D. 406; 7 Hals., 442.)

I have no hesitation in coming to the conclusion that the plaintiff had legally satisfied the bank's demand against him as surety for the Cement company within the meaning of the agreement, and the defence as to this ought to fail.

Coming now to the second phase of the case: As I understand

the argument of the defence, it is that this defendant was to indemnify the plaintiff against one-third of the amount (not exceeding $40,000) which the plaintiff might ultimately lose or suffer under his agreement with the bank, and that it has not yet been determined what that ultimate loss is, and the plaintiff cannot recover or take any proceedings until after the expiration of one year from the satisfaction by the plaintiff to the bank, of the amount which is found to be ultimately suffered.

It seems to me there is apt to be some confusion due to the expressions "ultimate loss" and "liability." [See judgment of Clarke, J.A., *post* p. 226.]

It must be noted that the bond renders the obligor liable for a share of the ultimate loss which plaintiff may suffer, or, for which he may be *found liable to the bank*. The term is not restricted to ultimate loss, but is in the alternative, namely, "the ultimate loss" or "liability to the bank." The happening of either one of these conditions should entitle the plaintiff to maintain his action.

It seems to me that one of these conditions has arisen, namely, the bank demanding settlement, such settlement having been made, as also a year since such settlement having elapsed.

To hold that no action can be brought until the ultimate loss is ascertained, to my mind, would render the bond for all practical purposes, nugatory, for it is almost impossible to say when such ultimate loss can or will be ascertained. Strictly speaking, ultimate loss means "exact" ultimate loss. With the large number of co-sureties and collateral securities held by the bank it might, and probably would take years, to sue and finally realise as against them.

This situation surely cannot have been the intention of the parties.

In my view, the substance of the agreement is that the plaintiff under his guarantee to the bank became liable to the extent of $100,000 and interest when called upon by the bank, and, if such demand was satisfied (not necessarily paid in cash) after the expiration of a year therefrom, the plaintiff is entitled to call upon the defendant for contribution to the extent of one-third thereof.

The placing of the money in a special account cannot alter or effect the situation in any practical way, but in any event this course was provided for in the bank's contract, of which the defendant had notice before rendering himself an indemnitor to the plaintiff.

Neither can the fact that plaintiff has made no efforts to enforce contribution from his co-sureties make any difference

Alta.

App. Div.

McDOUGALL v. GARIEPY.

Clarke, J.A.

as no demand in writing or otherwise was made by the defendant as provided for in the instrument.

A careful consideration of the interpretation which I have stated ought to be put upon the bond seems to be entirely fair, businesslike, and reasonable.

The plaintiff undertook to provide certain financial benefits for the Cement company which was the consideration moving the defendant to execute the bond. The plaintiff having furnished such consideration, his liability to the bank having become established, and payment or satisfaction made, the defendant is called upon only after the expiry of a year from the date of such satisfaction to indemnify the plaintiff to the extent of the amount provided for in the bond.

There still remaining about $60,000 due to the bank, it of course is not at present required to assign the securities which it holds. But if and when it is paid in full, it will as a matter of law, be bound to do so. In that event, should anything be realised upon such securities, the defendant will be entitled to participate therein in proportion to his liability to the plaintiff, namely, one-third.

The question as to the correctness of the bank's claim, and its treatment or care of certain of the securities held by them, I do not think fall within the stated case, and I refrain from expressing any opinion thereon.

Upon the facts embodied in the stated case, I would answer the question in the affirmative, that the plaintiff is entitled to judgment for one-third of the amount of the settlement made by him with the bank, limited, however, to the sum of $40,000.

In view of all the circumstances, I think there should be no costs to either party.

CLARKE, J.A.:—This matter comes before the Court by way of a case stated for its opinion upon admissions of fact, and referred to the Appellate Division by order of Hyndman, J.

The plaintiff's claim is to recover from the defendant $39,055.35 and interest thereon under a bond of indemnity given to him by the defendant, bearing date August 8, 1916, and alternatively for a declaration that the defendant is liable to indemnify the plaintiff for any amount which he has paid or may hereafter pay to the bank under the terms of the plaintiff's guarantee to the bank. The material facts are as follows:

By agreement in writing bearing date July 8, 1912, the plaintiff, with 10 other persons, jointly and severally guaranteed to and agreed with the Imperial Bank of Canada that its customer, Edmonton Portland Cement Co., Ltd., would pay to the bank all moneys which might at any time be due to the bank

from the said customer as more fully set forth therein, and the agreement contains the following provisions:—

"4. This guarantee shall be in addition and without prejudice to any other securities negotiable or otherwise which the bank may now or hereafter possess in respect of any moneys intended to be hereby secured, and the bank shall be under no obligation to marshal in favour of the undersigned any such securities, or any of the funds or assets the bank may be entitled to receive or have a claim upon, and the bank may at its absolute discretion, and without diminishing the liability of the undersigned vary, exchange, renew, release, modify, refuse to complete, or to enforce or assign, all or any judgments, specialities, or other securities or instruments, negotiable or otherwise, and whether satisfied by payment or not, and the bank shall not be liable for any neglect with reference thereto.

6. This shall be a continuing guarantee, and shall not be discharged or affected by the death of all or any of the undersigned and shall secure any ultimate balance that shall remain owing to the bank including all indebtedness incurred up to and inclusive of the expiration of three months after notice of revocation hereof signed by the guarantor, revoking, or his representatives, shall have been given in writing to the general manager of the bank.

7. Notwithstanding that the liability of one or more of the undersigned or his estate shall cease by notice of revocation or otherwise, this guarantee shall continue to be operative as to the other or others, and his and their representatives, until determined in like manner by him or them.

8. The bank shall not be bound to accept payment of the sum hereby guaranteed until the bank has exhausted all other sources for collection of the said indebtedness, or if the bank shall accept payment of such sum hereby guaranteed it shall not be bound to credit the same upon the said indebtedness, but may keep the same to the credit of a special account bearing interest at the rate of three per cent. per annum until the said other sources have been exhausted, and the ultimate balance ascertained.

10. Upon default in payment of any sum owing by the customer to the bank at any time, the bank may treat the whole of the indebtedness as due and payable, and may forthwith collect from the undersigned the amount hereby guaranteed, and place the amount so collected to the credit of such special account.

14. The amount of the liability of the undersigned hereunder shall not exceed the sum of one hundred thousand dollars each, and interest thereon at the rate of six per cent. per annum from the time of payment being required."

Alta.
App. Div.
McDOUGALL
v.
GARIEPY.
Clarke, J.A.

On March 21, 1916, the bank gave notice to the plaintiff in writing that the customer's present liability amounted to $140,000, with interest from March 3, 1915, and required the plaintiff to pay to the bank $100,000 pursuant to the said guarantee, with interest thereon at the rate of 6% *per annum* from the service of the notice.

It does not appear whether or not like notices were given to the plaintiff's co-guarantors.

On August 8, 1916, the defendant gave his bond to the plaintiff in the penal sum of $40,000, which, after reciting the said agreement of July 8, 1912, and that for a certain consideration therein mentioned it had been agreed that the defendant should give his bond to the plaintiff "to share to the extent of one-third with him in any amount for which he may be ultimately found liable to the said bank under the terms of the said guarantee agreement," contained the following condition and qualifying clause:—

"Now therefore, the condition of this obligation is such that if the above bounden Joseph H. Gariepy, his heirs, executors and administrators do and shall at all times save, defend and keep harmless and duly indemnify the said John A. McDougall, his heirs, executors, administrators and assigns, of, from and against a full one-third part of all loss, costs, charges, damages and expenses which the said McDougall, his heirs, executors, administrators or assigns, or any of them, may ultimately suffer or for which he or any of them may be found liable to the said bank under and by virtue of the said guarantee agreement, dated the 8th day of July, 1912, then his obligation shall be void, but otherwise shall be and remain in full force and effect, subject to the following provisoes:—

The right of the said John A. McDougall to recover against the said Gariepy under this bond shall not be operative until the said bank has demanded payment from the said McDougall under the said guarantee bond, and such demand has been satisfied, and not until the said McDougall has made reasonable effort to enforce contribution by suit against such other guarantors under the said guarantee bond to the Imperial Bank of Canada, or against any other person or persons liable to contribute against whom the said McDougall may have right of action in respect of the said guarantee bond to the said bank, as the said Gariepy may by notice in writing (to be given to the said McDougall within fifteen days after the said Gariepy has been notified that satisfaction has been made by the said McDougall to the said bank) require him to do, or until the expiration of one year from the date of such satisfaction by the said McDougall to the said bank, whichever event shall first happen:

provided, however, that the said McDougall shall not be required to bring any such action against any such guarantor or person liable to contribute as aforesaid, unless nor until the said Gariepy shall enter into a bond with the said McDougall conditioned to indemnify the said McDougall against one-third of the costs, charges and expenses incurred by the said McDougall in any such action."

On February 21, 1918, the bank wrote to the plaintiff referring to the demand made on March 21, 1916, and stating that on and after May 1, 1918, the bank would look for regular payments from him under the guarantee. The plaintiff paid the bank $1,000 on account of the guarantee on May 1, 1918.

As a result of negotiations between the plaintiff and the bank, the plaintiff wrote to the bank the following letter, accompanied by the cheque and note referred to:—

"November 12, 1919.

G. R. F. Kirkpatrick, Esqre.
Dear Sir:—

re *Edmonton Portland Cement Company, Ltd.*

In reply to your letter of the [illegible]2nd ulto. with statement enclosed re my liability as guarantor in connection with the above account with interest calculated at 5% from the 1st March, 1916. I would like to point out to you that the interest should be calculated from the 21st March, 1916, as per your letter to me of that date and also of February 21st, 1918, this making a difference of $287.67 and leaving the amount due the bank by me, as guarantor, on the 1st of Sept. 1919, $116,166.03.

I therefore beg to enclose you herewith my cheque for $166.03 and my note for $116,000.00 at six months from Sept. 1st, 1919, with interest at 5% and I will on the 1st March, 1920, pay the interest on the whole amount and pay $5,000.00 on the principal when I will give you a new note for the balance at the same rate of interest for another six months and at the expiration of that period I will pay the interest on the whole amount and pay another $5,000.00 on the principal and do the same at the end of another six months, but paying the whole amount off on or about the 1st September, 1921.

It is understood you are to accept this settlement in full satisfaction of my liability to you as guarantor for the Company reserving your full claim against the Company and any other sureties and securities held also that you are to discount the note for $116,000.00 and place the proceeds in a Collateral Account to be applied on the debt as and when you think proper. It is also understood when your claim against the Company is repaid in full at the rate of 7% per annum, I am to receive

Alta.
App. Div.
McDougall v. Gariepy.
Clarke, J.A.

from you an assignment of your rights against the Company and of the securities which you hold.

Yours truly, J. A. McDougall."

The statement referred to as accompanying the bank's letter of October 22, 1919, is as follows:—

"2C-7-25597

Mr. J. A. McDougall,
In account with
Imperial Bank of Canada,
Edmonton Branch.

Date.	Particulars.	Dr.	Cr.	Balance.
	Re *Edmonton Portland Cement Co. Ltd.*			
1912				
July 8	Guarantee		100000	
	Interest $100,000 at 5% per annum from 1st Nov. 1916 to 1st May, 1918		10835.62	
1918				
May 1	A/c Guarantee		1000.	
	Interest $99,000 at 5% per annum from 1st May, 1918 to 1st Sept. 1919		6618.08	Dr.116453.70
	Balance due		116453.70	
		$117453.70	$117,453.70 "	

* * * * *

On November 13, 1919, the plaintiff's solicitors advised the defendant that the bank had demanded payment from the plaintiff under the terms of his guarantee and that he had satisfied the demand and called upon the defendant for payment of one-third of $117,166.03 stated to be the amount of the indebtedness, as of September 1, 1919.

The plaintiff has paid to the bank the following sums in addition to the said sum of $1,000, *viz.*:—
October 24th, 1919: $166.03; February 5th, 1920: $7,890.00; September 7th, 1920: $7,843.40; March 10th, 1921: $7,671.80; September 10th, 1921: $103,587.25; total, $127,158.48, which include the total amount of the promissory note given by the plaintiff to the bank referred to in the above correspondence. These amounts are standing in the bank's books to a collateral account, and it does not appear that they have been credited upon the customer's indebtedness to the bank guaranteed by the plaintiff.

If so credited, there would remain a balance due to the bank of approximately $60,000.

The bank held and still holds other securities for the payment of the customer's indebtedness, the nature and amount of which are not stated.

The defendant made no reply to the letter of November 13, 1919, demanding payment from him, and gave no notice to the plaintiff to take action against any person, and did not enter into any bond to indemnify the plaintiff against the costs of any action which he might bring.

The plaintiff has not made any efforts to enforce contribution by suit against any of the other guarantors or against any other person or persons.

The action was commenced on June 15, 1921.

The defendant admits the making of the bond sued upon, but denies that any liability to pay has yet arisen.

Much of the difficulty in working out a present adjustment of the rights and liabilities of the parties arises from the form of the guarantee held by the bank.

As I understand it, upon any default in payment of any sum owing by the customer to the bank, the bank may treat the whole indebtedness as due and payable, and forthwith collect from the guarantors the amount guaranteed, which I think means the amount at the time owing by the customer limited to $100,000 for each guarantor (clause 10). It is not incumbent upon the bank to apply the amount so collected in payment of the indebtedness, but may keep the same to the credit of a special account, bearing interest at 3% *per annum* until the bank has exhausted all other sources for collection of the indebtedness and the ultimate balance has been ascertained (clause 9); the guarantee being a continuing one, I see nothing to prevent the bank from making further advances to the customer after the guarantor's payments have been made and placed in the special account, or to prevent the bank again and from time to time, upon any future default, calling in further payments up to the amount of any increased indebtedness of the customer, limited to the maximum liability of the guarantors and placing and keeping them in the special account, so long as the customer chooses to continue its account with the bank or until the expiration of 3 months after notice of revocation by the guarantor (clause 6). So that until the account be closed, either by termination or by revocation, it seems impossible to ascertain the ultimate balance for which the guarantors may be liable to the bank. The case does not disclose whether or not the account is still active, but assuming that it is not, and is only open for the purpose of liquidation, clause 4 of the guaranty presents a

Alta.
App. Div.
McDOUGALL v. GARIEPY.
Clarke, J.A.

further difficulty in arriving at the ultimate balance. Admittedly there are outstanding in the hands of the bank securities available for the reduction of the customer's indebtedness. Until these are realised, the ultimate balance cannot be ascertained, and under the provisions of clause 4 the bank may in its absolute discretion refuse to enforce or assign its securities so that unless and until by voluntary payments, or the bank's voluntary action, or perhaps action on the part of the customer, these securities be realised upon, there seems to be no way of arriving at the ultimate balance as between the bank and the guarantors.

The payment made by the plaintiff as guarantor, and placed in a special account, seems to me to be no more than substituting the special account for the covenant in the guarantee agreement. It still remains a security and is in no way an adjustment of accounts between the bank and the guarantor.

Turning now to the defendant's bond, the condition is that he will indemnify (not guarantee) the plaintiff against a full one-third part of all loss, costs, &c., which the plaintiff may (1) ultimately suffer, or (2) for which he may be found liable to the bank under and by virtue of the guarantee agreement. In this condition must be found the whole measure of the defendant's liability. It is clear that the plaintiff has not ultimately suffered any loss. For all that appears there may be no ultimate balance owing to the bank, for which the guarantors are liable. In which event the money to the credit of the special account contributed by the plaintiff will be returned to him with interest. And I do not think the alternative words in the condition "or for which he may be found liable to the said bank" create any greater or different liability. The liability of the guarantors to the bank is for the ultimate balance owing, and the amount for which the defendant may be found liable is only such ultimate balance after the account is closed and the securities realised upon. It is clear from the recital in the bond that it is only the ultimate liability that the defendant is to contribute to. In order to accede to the plaintiff's contention it would be necessary to hold that the above-quoted words in the condition refer to the $100,000 paid by the plaintiff and placed in the special account. I do not think that is the correct interpretation. If such were the intention, one would expect that the condition would have provided for payment by the defendant of one-third of the $100,000 and interest thereon, for it had been already demanded by the bank in the notice of March 21, 1916. It is evident something more was to be done before the amount for which the plaintiff should be found liable to the bank should be ascertained, and that something has not yet been done. My opinion, therefore, is that there has been no breach in the con-

dition of the bond, which is sufficient to dispose of the action in favour of the defendant. If the taking of accounts were all that prevented the ascertainment of the ultimate balance, I would endeavour if possible, even by straining a point, to direct a reference for that purpose, so that there might be an end of the matter, but as more is to be done than the taking of accounts before the ultimate balance can be ascertained under the terms of the guarantee, namely, the closing of the account and the realisation of securities, I cannot see any way to give the plaintiff any relief in this action.

Even if the ultimate balance owing to the bank were ascertained, I think the clause following the condition in the bond ties the plaintiff's hands at the present time. Under it the plaintiff's right to recover is not operative until the bank has demanded payment from the plaintiff, under the guarantee bond, and such demand has been satisfied. Having regard to what I have said as to the extent of the defendant's liability, I am inclined to think, though not free from doubt, that this demand refers to the ultimate balance, and the satisfaction thereof. If so, no such demand has yet been made and I think it cannot be said to be satisfied when the account is still open and unsettled, nor do I think the time is ripe for proceedings to enforce contribution against the plaintiff's co-guarantors. In addition to the fact that the amount of their liability has not been ascertained, they are not entitled, under the terms of the guarantee agreement, to compel the bank to receive payment from them, and the plaintiff cannot, therefore, compel them to make such payment.

The defendant has 15 days after satisfaction has been made by the plaintiff to the bank of the ultimate balance to require the plaintiff to proceed against his co-guarantors for contribution. This period of 15 days has not, in my view of the matter, commenced to run, nor has the year elapsed or even commenced from the date of satisfaction during which the right of the plaintiff to recover against the defendant under the bond is inoperative.

I think nothing can be done but to dismiss the action with costs. *Action dismissed.*

McDOUGALL v. GARIEPY.

Alberta Supreme Court, Scott, J. February 4, 1922.

PRINCIPAL AND SURETY (§IB—10)—MORTGAGE SIGNED AS SURETY—SURETYSHIP CONTRACT—CHANGE IN SECURITY WITHOUT PRIVITY OF SURETY—RELEASE OF SURETY.

Where a surety has signed a mortgage in pursuance of an agreement to indemnify the mortgagee against a portion of the loss which might be sustained by reason of the advance; the taking of additional security without the knowledge of the surety, for

Alta.

S.C.

a further advance, and the wiping out of a security in which the surety was interested, and foreclosure by another mortgagee of a property which is worth more than the mortgagee's claim against it under an agreement to which the surety was not a party and which vested in such mortgagee the whole of the assets of the mortgagor company, and failure to make certain collections according to the terms of the suretyship agreement are sufficient to relieve the surety from liability.

[*Wilson* v. *Cristall* (1922), 63 D.L.R. 187, applied.]

ACTION on a mortgage. Dismissed.

S. W. Field, K.C., for plaintiff.

H. H. Parlee, K.C., and *G. G. Dunlop*, for defendant.

SCOTT, J.:—The mortgage was given pursuant to an agreement between the parties dated July 28, 1916, which recited that the plaintiff had agreed to advance the Edmonton Cement Co. the sum of $75,000, payable 2 years from date with interest at 8% *per annum*, payable half yearly, and that the defendant had agreed to indemnify the plaintiff against a one-third share of any loss which might ultimately be sustained by him in connection with such advance, and that as security for such indemnity the defendant had executed the mortgage in question. The agreement provided that, notwithstanding that the mortgage was absolute in its terms, it was truly given as security only for the one-third share of any loss which the plaintiff might ultimately sustain in connection with such advance and the defendant therein covenanted that he would at all times fully indemnify the plaintiff against all loss, costs, charges and expense which he might suffer, incur or become liable for by reason of the nonpayment of such advance to the company, and interest thereon. The plaintiff thereby covenanted and agreed to use all reasonable efforts to secure repayment thereof. It was also thereby agreed that the agreement should not in any way prejudice, hinder, delay, or affect any other securities that the plaintiff then had or might thereafter acquire in respect of the moneys secured by the mortgage.

A company known as the Edmonton Portland Cement Co. was possessed of a cement plant which was subject to a mortgage to one McDonald for about $300,000. That company went into voluntary liquidation about February, 1915. A new company was then incorporated under the name of the Edmonton Cement Co., for the purpose of acquiring the property of the former company, the shareholders of the new company being practically identical with those of the former company, and in the liquidation proceedings its property was sold to the new company subject to the McDonald mortgage.

Upon acquiring the property the new company decided to remodel the plant, the estimated cost thereof being $75,000. As there were not sufficient funds for the purpose in the treasury

application was made to McDonald to advance the amount. He refused to make the allowance, but he offered to advance the amount to the plaintiff (who was then a director of the new company) to enable him to make the advance. The plaintiff then agreed to make the advance upon receiving certain securities, among which were the mortgage in question and a mortgage from one Jackson, the president of the new company, for $40,000.

It appears from the minutes of the proceedings of the new company that at a meeting of its shareholders, held on September 21, 1916, the secretary reviewed the negotiations with the plaintiff for the loan of $75,000, and stated that he desired security in the form of a promissory note of the company, and a charge upon the manufactured product of the company to the extent of 15 cents per barrel of 350 pounds, such charges to be subject to the prior charge of McDonald. A resolution was then passed, which, in so far as it is material to this action, is as follows:—

"And whereas John A. McDougall of the City of Edmonton has agreed to advance to this company the sum of $75,000 for two years with interest at eight per cent. per annum in such installments as may be called for by this company upon the terms set forth in a certain agreement which has been submitted to and approved by this meeting.

Now it is hereby resolved that, in pursuance of the agreement and in consideration of the said sum of $15,000 now paid by the said John McDougall to this company on account of said loan, this company do forthwith give to the said John A. McDougall its promissory note of $75,000, dated the 1st day of September, 1916, payable two years after date with interest, as well after as before maturity at the rate of eight per cent. per annum, and do forthwith execute under seal the said agreement for the re-payment of the said sum of $75,000, or such part thereof as may be advanced by the said John A. McDougall, with interest at eight per cent. per annum, payable half yearly as aforesaid, and giving collateral security to the said John A. McDougall by way of charge upon all the manufactured product of the company, present and future, and agreeing to pay to the said John A. McDougall the sum of fifteen cents for each and every barrel (of 350 lbs.) of cement as the same is sold or otherwise disposed of."

The plaintiff states that the agreement referred to in the resolution was never reduced to writing, and it was merely a verbal one submitted to the meeting at which the resolution was passed.

Early in 1915 the new company proceeded to make the con-

Alta.
S.C.
McDOUGALL v. GARIEPY.
Scott, J.

templated changes in the plant. During the progress of the work it was found that the cost thereof would be $350,000, instead of $75,000, and that the company would require to borrow a further sum of $275,000 to complete the work, and a further sum of $33,000 for running expenses. The plaintiff and McDonald advanced these sums to the company, the $275,000 in equal shares and of the $37,000 the plaintiff advanced $4,000 and McDonald $31,000. By way of security for the repayment of these advances with interest and also for the repayment of the first advance of $75,000 made by the plaintiff the company on September 15, 1917, under the authority of a resolution of a meeting of its shareholders held on that date, created a charge in their favour upon all its property, present and future. In the document creating the change it was provided that it should be additional to and without prejudice to all or any other securities held by them or either of them or their rights against any surety.

The new company began to operate the plant in May, 1918, and continued to operate it during portions of that year, and of the years 1919 and 1920. The product was at the rate of from 400 to 600 barrels per day. In 1920 the product was about 150,000 barrels. The company appeared to have ceased operations in the fall of 1920, as it was found that the plant was being operated at a loss instead of at a profit.

For some years before the commencement of this action the new company was trying to sell the plant but was unable to find a purchaser. The plaintiff states that it ought to sell for $1,000,000, but that the company was willing to sell for an amount sufficient to satisfy McDonald's claim against the old company as well as the advances of $75,000 made by the plaintiff and of $275,000 and $33,000 made by him and McDonald jointly.

On December 19, 1919, McDougall commenced an action against the old and new companies and the plaintiff for the sale or foreclosure of the company's properties under the securities held by him. On June 11, 1921, pursuant to an agreement in settlement of the action entered into by the parties thereto, McDonald obtained a judgment vesting in him the whole of the assets of the new company free and clear of all claims, incumbrances, liens and interests of any of the parties to the action. This defendant was not a party to that settlement nor was he consulted respecting it.

The plaintiff was a director of the new company during the whole of the time it was carrying on its operations. He and one Cooper, who also was a director and was McDonald's representative on the board, appear to have had sole charge of the company affairs with the approval of the other directors.

The plaintiff never made any effort to collect from the company anything on account of the 15 cents per barrel to which he was entitled under the charge obtained by him. He gives as his reasons for not doing so that the money was needed to operate the plant, and that McDonald would not have stood for it and would have closed down the plant.

Under his agreement with the defendant, the plaintiff was bound to make all reasonable effort to collect this 15 cents per barrel from the company. If it had been collected it would have been sufficient to satisfy the greater portion, if not, the whole of the moneys for the repayment of which the defendant was liable as surety. He was, therefore, vitally interested in its collection. The plaintiff never consulted him as to the course which should be taken with respect to that charge. In view of the plaintiff's conduct respecting it, I entertain serious doubt whether it was not such as to relieve the defendant from his liability as surety.

In my opinion, however, the conduct of the plaintiff respecting the additional security for the repayment of the $75,000 which he received under the resolution of the company of September 6, 1919, was in itself sufficient to relieve the defendant from his contract of suretyship. It may be that, if the plaintiff had permitted McDonald to proceed to judgment in the usual manner and obtain a judgment for sale or foreclosure, the defendant would not have had any ground of complaint but consenting, without notice to him, to the wiping out of a security in which he was interested and to the foreclosure by McDonald of a property which the evidence shews was worth more than his claim against it, was an act of which the defendant had every reason to complain.

In *Wilson* v. *Cristall* (1922), 63 D.L.R. 187 at p. 193, Clarke, J.A. quotes the following from the judgment of Lord Loughborough in *Rees* v. *Berrington* (1795), 2 Ves. 540, 30 E.R. 765:

"It is the clearest and most evident equity not to carry on any transaction without the privity of him [the surety] who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact *his* affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

I am also of the opinion that the plaintiff must fail by reason of his action being prematurely brought. The defendant's contract was to indemnify the plaintiff against the loss which he might ultimately sustain in respect of his advance of $75,000 to the company and that at the time the action was commenced such ultimate loss had not been ascertained or determined.

I dismiss the action with costs, an[d] dismiss counterclaim without costs.

Sask.

C.A.

WAYNE v. BALLANTYNE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon, and McKay, JJ.A. January 30, 1922.

MONEY IN COURT (§I-1)—MEANING OF—ORDER MADE FOR PAYMENT OUT—ORDER NOT ACTED UPON—PERSON ENTITLED TO MONEY BECOMING EXECUTION DEBTOR IN SUBSEQUENT ACTION—APPLICATION BY SHERIFF FOR PAYMENT OUT TO HIM—CREDITORS' RELIEF ACT, R.S.S. 1920, CH. 54, SEC. 8.

The fact that an order has been made for payment out of money in Court to the party entitled to it, does not make it any the less money in Court when through various devices the order has not been acted upon, and where before actual payment out the party entitled becomes an execution debtor the sheriff is on application entitled to payment of such money under sec. 8 of the Creditors' Relief Act, R.S.S. 1920, ch. 54, to be applied in satisfaction of such execution.

APPEAL by the sheriff on behalf of an execution creditor from a District Court judgment holding that certain money in Court, but for which an order for payment out had been made, was not properly in Court so as to entitle the sheriff to it under sec. 8 of the Creditors' Relief Act, R.S.S., 1920, ch. 54. Reversed.

P. H. Gordon, for appellants; *D. Fraser*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—In December, 1919, the plaintiff brought this action. On April 18, he issued and served a garnishee summons on one Swaby, who in pursuance thereof paid into Court $370. On August 16, 1920, the plaintiff obtained judgment against the defendant for $200 and costs. On August 21, the Imperial Bank, which had brought an action against the plaintiff Wayne and one H. R. Summers, obtained from the Judge of the District Court an order forbidding the payment out of the monies paid into Court by Swaby, except upon notice to the bank. On December 27, an appeal against the plaintiff's judgment having been dismissed, he obtained an order directing payment out to him of sufficient of the monies in Court to satisfy his judgment. An appeal was taken from this order, and a stay of proceedings obtained. This appeal was dismissed on February 8,1921. In the meantime, on February 5, the bank had obtained judgment against Wayne and Summers, and on the same day they obtained another order forbidding the payment out of the monies in Court to the plaintiff without notice to the bank. The bank also issued execution on its judgment and placed the same in the sheriff's hands. On February 14, the sheriff applied to have the monies in Court paid out to him, under the provisions of the Creditors' Relief Act. At the same time the plaintiff applied to set aside the stop order and to have the monies paid to him, as directed by the order of December 27, 1920. The District Court Judge

held that as the order of December 27 had directed the payment out of the monies to the plaintiff sufficient to satisfy his judgment, the sum requisite for that purpose could not properly be said to be in Court so as to entitle the sheriff to obtain it under the Creditors' Relief Act, R.S.S. 1920, ch. 54. The sheriff now, on behalf of the bank, appeals.

Section 8 of the Creditors' Relief Act reads as follows:—

"8. Where there is in any court a fund belonging to an execution debtor and to which he is entitled, the same or a sufficient part thereof to pay the executions in the sheriff's hands may on application of the sheriff or any party interested be paid over to the sheriff and the same shall be deemed to be money levied under execution within the meaning of this Act."

That there was a fund in Court belonging to the debtor Wayne when the sheriff made his application, is in my opinion, beyond dispute. The money was actually in Court, and the debtor Wayne had in his possession an order directing payment out to him. That the fund had been kept in Court by various devices which should not have prevailed, does not, in my opinion, alter the fact that it is still a fund in Court belonging to the debtor. Had he assigned it, different considerations would apply; but he did not assign it, it is still his, and the sheriff holds an execution against him. Under these circumstances, I can see no reason why it should not be made available for his debts.

I would allow the appeal with costs, set aside the judgment below, and direct that the monies in Court, or a sufficient part thereof, to satisfy the executions in the hands of the sheriff, should be paid over to him, under sec. 8 above quoted.

Appeal allowed.

TODD v. POTVIN.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 3, 1922.

STATUTES (§IIA—95)—SOLDIER SETTLEMENT ACT, 1919 (CAN.), CH. 71—CONSTRUCTION—AGREEMENT OF OWNER TO PAY AGENT COMMISSION ON SALE OF LAND—PASSING OF ACT—AGENT GETTING IN TOUCH WITH PURCHASERS—SALE OF LAND TO BOARD—SUBSEQUENT SALE TO PARTIES PROCURED BY AGENT—RIGHT TO COMMISSION.

The Soldier Settlement Act, 1919 (Can.), ch. 71, prohibits a real estate agent from collecting any commission on the sale of land purchased by the Soldier Settlement Board, although an agreement to pay commissions was entered into with the owner prior to the passing of the Act and the land was subsequently sold by the Board to parties which the agent was instrumental in procuring to make the purchase.

[*Upper Canada College* v. *Smith* (1920), 57 D.L.R. 648, 61 Can. S.C.R. 413, distinguished.]

Alta.
App. Div.
TODD
v.
POTVIN.
Stuart, J.A.

APPEAL by defendant from a judgment in favour of the plaintiff for a commission on the sale of land. Reversed.

P. G. Thompson and *J. W. G. Morrison*, for appellant.

S. S. Cormack, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—This is an appeal by the defendant from a judgment in favour of the plaintiff for $579.40 as a commission on the sale of lands.

The plaintiff is a real estate agent at Kitscoty. On April 23, 1919, the defendant gave the plaintiff a written "listing" of three parcels of land consisting of two distinct half sections and a separate quarter section. The material parts of the document are as follows:—

"I hereby authorize James M. Todd to sell for me the following lands (describing them) .... and I agree to sell at the following terms, to wit, $30 per acre with cash payment of at least one-third .... This authority of selling shall cease to exist only after I have given written notice of withdrawing this land from the market. .... In the event of any sale or exchange of the herein described property taking place either directly or indirectly through your assistance, I hereby agree to pay in cash to the said James M. Todd a commission of 5% per acre (*sic*) on the sale price. This being in consideration of services rendered."

On July 7, 1919, there came into effect the Dominion Statute, 1919 (Can.), ch. 71, cited as the Soldier Settlement Act, 1919. By this statute the Soldier Settlement Board, which had been constituted under a previous Act, but which under that previous Act had power merely to loan money to returned soldiers, was given for the first time power to buy land and secure title in its own name and to resell the same to returned soldiers.

By section 61 of the statute it is enacted as follows:—

"(1) No person, firm or corporation, shall be entitled to charge or collect as against or from any other person, firm or corporation any fee or commission or advance of price for services rendered in the sale of any land made to the Board whether for the finding or introducing of a buyer or otherwise.

(2) No person, firm or corporation shall pay to any other person, firm or corporation any such fee or commission or advance of price for any such services.

(3) The Board may require of any person, firm or corporation from whom it purchases land or who is in any manner interested therein, the execution of an affidavit in Form E in the schedule to this Act."

Without quoting further from the statute, it may be stated

Alta.
App. Div.
TODD v. POTVIN.
Stuart, J.A.

that the form of affidavit provides for an oath that no commission or fee has been collected or charged. The statute also provides that if it is shewn that any fee or commission has been collected, the Board may recover it by action from the person receiving it, and also that any person guilty of a breach of any provision of the Act shall be liable to fine and imprisonment.

Prior to July 7, the plaintiff had made several efforts to sell the land for the defendant. He had associated with him one Ross, a real estate agent in Edmonton, who spent some money in advertising. It seems fairly clear from the evidence, however, that the plaintiff and Ross did not get in touch with the three soldiers who eventually took the land until after July 7. Certainly it was not until about July 12 or 13 that the three soldiers went down to Kitscoty and decided to take the land. They then had to return to Edmonton to negotiate with the Soldiers' Settlement Board, and, as they then thought, not knowing of the change in the law, for a loan from the Board. When they came to negotiate with the Board there was difficulty about the price. The Board sent its chief inspector, one Lundy, down to Kitscoty to inspect the land, and he there and then secured an option from the defendant in the name of the Board. About a month, or possibly some months later, the Board paid for the land and the defendant gave a transfer to the Board. The inference from the evidence is that the same three soldiers bought the land from the Board, no doubt on terms, and went into possession.

The chief defence relied upon was the prohibitory clause of the statute above quoted. Certainly in view of the possible penalty which the defendant might incur if he paid the commission, one cannot very well blame him for raising a defence under the statute.

The answer which is made to the statute by the plaintiff—an answer adopted by the trial Judge—is that the statute is not retroactive, and the case of *Upper Canada College* v. *Smith* (1920), 57 D.L.R. 648, 61 Can. S.C.R. 413, is relied on. But with much respect, I confess my inability to understand how any question of retroactivity can arise here at all. The prohibition of the statute applies only to a sale to a specific purchaser which the statute itself at the same moment brings into existence. The statute nowhere prohibits a fee in respect of any sale made to any person to whom, before the statute, a sale might have been made. It is left open to the plaintiff to sell to all the world, including even the three soldiers, if they were prepared to buy and pay on their own account. It is only with respect to the specially created purchaser that the statute forbids the payment

Alta.
App. Div.
TODD v. POTVIN.
Stuart, J.A.

by the vendor of a commission. Obviously such a case is completely distinguishable from *Upper Canada College* v. *Smith*, where the prohibition was general.

The real test of the case seems to depend on the questions: (1) Was there ever, before the dealings with the Board, such a sale to the three soldiers as would entitle the plaintiff to recover his commission; (2) Was the sale, evidently made to the Board, in substance a sale to the soldiers to such an extent as to take the case out of the statute?

With regard to the first, it is true that the evidence shews that on July 13 or thereabout, the soldiers had decided to buy the land, but it is also clear from the evidence that their doing so was subject to their succeeding in getting a loan from the Board, as they then thought they would have to do. They never were in a position to buy on their own account entirely. When they went to the Board to get their loan they found that the Board was not, owing to the new statute, loaning money any more. So that obviously there never was a sale to the soldiers which would entitle the plaintiff to his commission unless the eventual sale to the Board itself can be so interpreted.

But to adopt such an interpretation would seem to me to render the enactments of the statute absolutely nugatory. Assuming it to be true, as was apparently contended at the trial, that the Board never buys land except when a particular soldier applies to secure it and that the Board does really buy merely in order to resell to the soldier, nevertheless it is to the Board that the vendor actually sells the land. And it was obviously just because the Board was intending to buy land to be resold at once to returned soldiers that the prohibition of a fee of commission was enacted. The evident purpose of the enactment was to get the land for the soldiers as cheaply as possible and also, perhaps, to prevent possible scandal in the operations of the Board.

Nor do I think the plaintiff has any serious cause for complaint if he loses a commission in this case. By the statute a possible purchaser, financially strong, was suddenly created. Instead of pursuing his efforts to sell to all the other possible purchasers who were previously and were still open to him, he resold to this new purchaser who appeared on the scene. It is unfortunate, perhaps, that he failed to know that he could not get a commission in case of such a sale, but that impossibility, as I have pointed out, was due to the very statute which created the new possible purchaser. I can see no ground upon which the Court could properly relieve him from the consequences of this mistake. And in view of the fact that he did get a com-

mission paid him, no doubt in ignorance of the statute, in respect of one of the pieces of land which would certainly go far to recoup him for expenses at least, if not leave him something in addition, I cannot say that he had much justification in the face of the statute, when he learned of it, in entering upon this litigation.

I would allow the appeal with costs, and dismiss the action with costs. *Appeal allowed.*

THE KING v. KARSON*.

Exchequer Court of Canada, Audette, J. January 25, 1922.

TAXES (§ VII—230)—SPECIAL WAR REVENUE ACT, 1915, AS AMENDED BY 1921 (CAN.), CH. 50—EXCISE TAX ON SALES BY MANUFACTURERS —INTERPRETATION—"MANUFACTURER."

Defendants were carrying on a confectionery and cafe business in Ottawa on May 10, 1921, when the Act 1921 (Can.), ch. 50, amending the Special War Revenue Act, 1915 (Can.), ch. 8, came into force. In the interests of their business they were manufacturing candy as stated below. By such legislation, an excise tax of 3% was imposed on sales and deliveries by manufacturers, etc. Defendants occupied two stories of a commercial building. On the first floor they had a factory with modern plant and equipment for the manufacture of candy in large quantities, with a capacity in excess of that required for the period in question. In this factory they manufactured candy which was sold by retail to consumers. The staff of employees in the factory varied according to the demands of the season and the trade. The sale of the candy by retail to consumers took place in their store on the ground floor of the building occupied by them, where they sold a varied assortment of candies, ice-cream, lunches and soft drinks to consumers. It was proved that during the period in question the total trade of the defendants amounted to $65,000 a year, of which one-fifth represented the sale of candy manufactured by them. The defendants had taken out a sale tax license and a manufacturer's tax license for the fiscal year 1920-21 and paid the tax for that year; but did not renew the licenses and failed to pay the tax for the current fiscal year.

Held: That the defendants were "manufacturers" within the meaning of the Special War Revenue Act, 1915, as amended as aforesaid. [*The King* v. *Pedric and Palen* (1912), 59 D.L.R. 315, 21 Can. Ex. 14, distinguished]. (2) That it is the plain and literal meaning attaching to the word "manufacturer" that should govern in construing the statute; and that when it is proved, as it was here, that the sense in which the people engaged in the trade accept a word corresponds with its literal meaning, the construction of the statute is freed from difficulty. The literal construction of the word is also supported where it is not shewn that the framers of the Act had any intention of departing from the meaning of the term in question as generally accepted. (3) That the construction of a statute should not be obscured by assuming complexities of administration that may never arise. Reasonableness must be attributed to the officials who administer the law when hardships arise; and in such matters the Courts must deal with actualities and not remote possibilities.

*Leave to appeal to Supreme Court of Canada refused.

Can.
Ex. C.
THE KING.
v.
KARSON.
Audette, J.

INFORMATION by the Attorney-General of Canada to recover a certain excise tax.

W. D. Hogg, K.C., and *F. D. Hogg*, for plaintiff.

T. A. Beament, K.C., for defendants.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it is sought, *inter alia*, to have an account taken of all confectionery and candy, etc., manufactured and sold by the defendants from May 10, 1921, and for the payment upon the same of the Tax on Sales payable under the provisions of sec. 19 BBB of the Special War Revenue Act, 1915 (Can.), ch. 8, as amended by 1921, (Can.) ch. 50. This latter amendment came into force on May 10, 1921.

As a prelude to the consideration of the present controversy, it is well to state that the present case is distinguishable and must be distinguished from the *Pedric* case (1921), 59 D.L.R. 315, 21 Can. Ex. 14—a case recently decided by me and cited at Bar,—for the obvious reasons that the facts are materially different, and further, that the law has since been amended and changed.

The defendants, Peter Karson and William Karson, were on May 10, 1921, carrying on the business of confectioners and candy manufacturers, on Sparks St., in the city of Ottawa.

On July 6, 1921, the defendants dissolved their partnership, and William Karson continued the business alone on Sparks St., while Peter Karson started a similar business on Rideau St., in the city of Ottawa.

Under the provisions of this sec. 19 BBB, 1921 (Can.), ch. 50, a section too lengthy to be here recited, it is, among other things, enacted that upon "sales by manufacturers to retailers or consumers, etc., etc., the excise tax payable shall be three per cent., etc." The section furthermore provides for the manner in which this tax shall be levied.

Now, the nature of the business carried on at 200 Sparks St., which is the subject of the present controversy, consists of a retail store on the ground floor, where candies of almost every kind, ice cream, lunches, soft drinks are sold, including the operation of a soda fountain. However, besides this specific retail trade, the defendants have a candy factory on the second floor of this Sparks St. establishment, where their candy is manufactured in large quantities and thereafter is sold through their retail store on the ground floor.

They have in the factory on the second floor a considerable and improved plant or equipment for such manufacture, with a staff of employees varying from time to time, as required by the season and the trade.

Can.

Ex. C.

The King. v. Karson.

Audette, J.

The defendants were in possession of a Sale Tax License and Manufacturer's Tax License for the fiscal year 1920-21, but have failed to renew the same for the current fiscal year, and have failed to pay to the Crown the statutory taxes.

The evidence discloses that their plant is capable of manufacturing much more than they actually did manufacture. The evidence also discloses that in the course of his examination in the present case, Peter Karson frankly admits that his firm *manufactures* candy and states how they *manufacture* the same; that the Bunnell factory, in the city of Ottawa, with a very much smaller plant and machinery, selling to retailers, etc., but not retailing its goods, takes out the license and pays the tax. Furthermore, that the Ardis Co., on Sussex St., with a plant almost equal in quantity but with less improved and modern appliances than those of the defendants, like the Bunnell factory, takes out the license and pays the tax.

It has further been established that large manufacturers, such as the "Laura Secord" concern, having extensive factories in Montreal and Toronto, yet selling and retailing their goods also take out a license and pay the tax. Moir & Company of Halifax, Goodwin & Co. of Montreal, Eaton Co. of Toronto, also manufacture their own candy and retail it in their own stores, take out licenses and pay the statutory tax. The evidence shews, too, that there are other firms, manufacturing in a similar manner and retailing also in a similar manner, that take out the license and pay the tax.

Discrimination alone would not of itself be a sufficient reason to make them liable. It is quite true that the fact that all these concerns carry on a similar business to that of the defendants and pay tax, will not of itself be a reason to exact the tax from the defendants if the law does not make them liable therefor; but this fact goes to shew what is the custom of the trade and how traders understand the word "manufacturer" as used in our statute. It is the meaning attaching to the word "manufacturer" in its plain and literal sense that should govern us in construing the statute, and when it is proved, as it was here at the trial, that the sense in which the people in the trade accept it corresponds with that literal sense, the construction of the statute is freed from difficulty.

It is also to be observed that there is nothing to shew that the framers of the Act had any intention of departing from the meaning of the term in question as generally accepted. See in this connection 24 Hals., p. 619.

Much stress has been laid by the defendants on this difficulty in collecting the tax when selling from 10 cents worth of candy

Can.
Ex. C.
THE KING.
v.
KARSON.
Audette, J.

at a time, and therefore trying to shew the impossibility of complying with the requirements of the statute, in that when selling 10 cents worth of candy, they would have to collect at least one cent, equal to 10% of the sale. This argument lacks in soundness. Indeed, taking the sale of candies for the sum of $100,000.10, can it be said the tax cannot be levied because on the last 10 cents, at least 10% would have to be collected? Under our Canadian currency, we have no coins smaller than one cent, and that has to be collected when a fraction thereof is collectable. Stating the proposition is solving it.

It is futile to becloud so clear a case of construction by assuming complexities that need never arise in the practical administration of the Act. The Courts must deal with actualities and not remote possibilities in deciding cases before them, involving the construction of statutes. Reasonableness must be attributed to the officials who administer the law when hardships arise. The defendants were wise in the course they first pursued in taking out a license and paying the tax for 1920-21; they have seen fit to risk the consequences of a departure from that course the following year, and must therefore accept the full burden of that risk.

I have no hesitancy in reaching the conclusion that the defendants are "manufacturers" selling to consumers, and that they are liable to pay the above mentioned tax. They have a factory, they manufacture candies and they sell them to consumers, thus necessarily coming within the ambit of the section.

Having found the defendants liable, the next question is that of fixing the amount collectable. At the opening of the trial, when a general statement of the case was made, it was understood that the Court was to decide the question of liability and that there would be a reference to take account. However, as the case proceeded, it was elicited both on behalf of the defendants and on behalf of the Crown that the sale of candy so manufactured by the defendants represented one-fifth of their total trade of $65,000 for the year. Under the circumstances, I fail to see the necessity of going to the expenses of a reference to establish a fact which is proved by both sides respectively, and I will accept that ratio and mode of operating in arriving at the amount of the tax.

Therefore there will be judgment ordering and adjudging the defendants liable to pay this above manufacturer tax of 3%, and if there is any difficulty in arriving at the actual amount of the condemnation, leave is hereby reserved to apply to the Court for further direction in respect of the same.

The liability of the defendant Peter Karson is limited to the period between May 10, 1921, to July 6, 1921.

The whole with costs in favour of the Crown.

Judgment accordingly.

Re HAMAR; Ex parte McGUINTY & Co.

Saskatchewan King's Bench, MacDonald, J. November 10, 1921.

Judgment (§IVB—230)—Of sister province—Foreign—Simple contract debt—Limitations of actions.

An Ontario judgment is regarded as a foreign judgment in the Courts of Saskatchewan, and creates a simple contract debt and not a specialty debt, and the statutes of limitation applicable to a simple contract debt may be set up in answer to any action on such foreign judgment.

Appeal from the disallowance by the authorized trustee of the estate of the bankrupt of the claim of M. McGuinty & Co. against said estate. Affirmed.

A. C. Ellison, for McGuinty & Co.

E. S. Williams, for the authorised trustee.

MacDonald, J.:—The claim is founded upon a judgment recovered in the Supreme Court of Ontario on November 10, 1914, the said judgment having been entered in default of appearance by the defendant the bankrupt herein. The authorized trustee disallowed the claim on the ground that the Court granting the judgment had no jurisdiction, as the bankrupt was then resident and domiciled beyond the jurisdiction of the Court, and, secondly, that the judgment debt was barred by the Statute of Limitations of the Province of Saskatchewan.

Considerable argument was had before me as to whether the Supreme Court of Ontario had jurisdiction to grant the said judgment, but, in the view I take of the case, it is not necessary for me to enter into that question, because, even if the Supreme Court of Ontario had jurisdiction, its judgment must in the Courts of this Province be regarded as a foreign judgment, and, a foreign judgment is regarded as creating a simple contract debt between the parties, and not a specialty debt, the liability of the defendant arising on an implied contract to pay the amount of the foreign judgment, and the statutes of limitation applicable to a simple contract debt may be set up in answer to any action on such foreign judgment. 6 Hals. p. 281, para. 417.

A debt barred by the statutes of limitation not provable. *Ex parte Dewdney; Ex parte Seaman* (1808), 15 Ves. Jun. 479, 33 E.R. 836; *Ex parte Roffey* (1815), 2 Rose 245; 2 Hals. p. 202, para. 325.

Alta.

App. Div.

Here, the claim is, therefore, barred by the Statute of Limitation, and the appeal must be dismissed with costs.

Appeal dismissed.

PAISLEY v. LOCAL IMPROVEMENT DISTRICT No. 399.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, McCarthy and Clarke, JJ.A. December 17, 1921.

MUNICIPAL CORPORATIONS (§IIG—241)—LOCAL IMPROVEMENT DISTRICT—DIVERSION OF WATER BY — INJURY TO ADJOINING LAND—LIABILITY.

In the absence of express statutory authority to that effect, a local improvement district is not authorised to divert water by means of ditches or otherwise from its natural course into or upon adjoining lands, and is liable in damages for any resulting injury to such lands or the crops thereon, unless it can shew that the injury could not be avoided.

[*Farnell* v. *Parks* (1917), 38 D.L.R. 17, referred to. See Annotation on Municipal Corporations, Drainage, 21 D.L.R. 286.]

APPEAL by defendant from the trial judgment (1920) 56 D.L.R. 221, awarding the plaintiff damages in an action for damages for injuries to property caused by a faulty drain and to compel defendants to carry the water to a proper outlet. Affirmed.

A. A. McGillivray, K.C., and *S. J. Helman*, for appellant.

N. D. MacLean, for respondent.

SCOTT, C.J.:—This is an appeal from the judgment of Walsh J. (1920), 56 D.L.R. 221, awarding the plaintiff damages for the diversion of water to and upon his lands by the defendant and directing that the defendants carry such waters to a proper outlet so that same shall no longer flood the plaintiff's lands.

The plaintiff alleges that in the Spring of 1913 and in subsequent years the defendant diverted water from its natural course to and upon his lands causing damage thereto, that in November, 1915, he commenced an action against the defendant to recover for such loss and damage, that about December, 1915, the parties agreed in writing whereby the defendant paid the plaintiff $482.24 for the damages sustained by him with costs and undertook to remove the cause of damage as soon as possible in the spring of 1916, that the defendant refused and delayed to carry out its undertaking and that in consequence thereof the plaintiff's lands have sustained further damage from such water. He claimed damages for the wrongful acts complained of and on order for the specific performance of the agreement by the removal of the cause of damage.

The defendant denied that it diverted any water to the plain-

Alta.
App. Div.
PAISLEY
v.
LOCAL
IMPROVEMENT
DISTRICT
No. 399.
Scott, C.J.

tiff's lands or that it entered into the agreement referred to. Among other defences raised by it are that, if any such agreement was made, it was made without authority, that the defendant had not any existence as a legal entity at the time the agreement was entered into or at the time of the acts or omissions complained of, that it was not under seal and that it was not made with respect to any object or in pursuance of any power which the defendant possessed.

I will first deal with the issue raised as to whether the defendant was a legal entity at the time of the acts complained of.

The defendant was a Local Improvement District legally constituted under the Local Improvement Act (Alta.) 1907 (ch. 11). Under that Act the only mode of constituting a district was by order of the Lieutenant-Governor in Council. By an amendment passed on February 16, 1912, (ch. 4, sec. 23, 1911-1912) all the local improvement districts then existing were disorganized and declared to have ceased to exist from and after the second Monday in December, 1912 and provision was made for the winding up of the districts so disorganized and the distribution of their assets and liabilities among the different townships comprised within their limits. That amendment further provided, in effect, that districts thereafter constituted should be constituted by order of the Minister of Municipal Affairs instead of by order of the Lieutenant Governor in Council.

On December 23, 1912, the Lieutenant Governor in Council made an order constituting Local Improvement District No. 399 with the same territorial limits as the disorganized district bearing that number. It does not appear that any order of the Minister of Municipal Affairs constituting such new districts was ever made. He appears to have entertained the view that the authority to constitute it was still vested in the Lieutenant Governor in Council, as, in his letter to that body of December 19, 1912, he recommended that certain local improvement districts, including No. 399, should be constituted.

No steps were taken to wind up the affairs of the former district No. 399 under the amendment of 1911,12. On the contrary, the order in council of December 23, 1912, was accepted and treated as a reconstitution of the former district as was undoubtedly its intention. The assets and liabilities of the old district were treated as those of the new and the latter was treated as a *de facto* district up to the trial of this action in October, 1920, a period of nearly 8 years. During all that time the new district was carried on as one which had been legally

Alta.
App. Div.
PAISLEY v. LOCAL IMPROVEMENT DISTRICT No. 399.
Scott, C.J.

constituted. Councillors were elected periodically, taxes were imposed, levied and collected each year, public works were undertaken and completed and liabilities incurred. In view of these facts it might have been open to question whether the defendant should be permitted to escape a liability which it would have been subject to if it had been legally constituted. It is, however, unnecessary to consider that question as by sec. 3 of ch. 24 of 1921, the order of the Lieutenant Governor in Council of December 23, 1912, was ratified and confined and the defendant district declared to have been thereby lawfully constituted from the date thereof.

The plaintiff is the owner of the n.e. quarter of sec. 17, township 39, range 26, west of 4th meridian, adjoining the north boundary thereof is the s.e. ¼ of section 20 in the same township, which is owned by one Simpson. There is a road allowance between these quarter sections and also on the east side of Simpson's quarter. Sometime prior to 1915 the defendant graded a roadway along the east side of Simpson's lands and on the road allowance between his lands and the plaintiff's and constructed ditches at the sides thereof.

The evidence clearly establishes that there is a well defined natural water course in which water flows from the east into a small slough on the road allowance, near the north east corner of Simpson's lands. The natural flow of the water is through the slough into a natural and well defined water course upon Simpson's lands leading from the slough, the waters from which flowed through his lands and passed out near the south west corner thereof. At the point where the water left the slough and again entered the water course there is an artificial dam or embankment which prevented the water from further following the water course and was evidently placed there for that purpose. It is not shewn when or by whom it was constructed but its object and effect points to the conclusion that the work was done either by Simpson or by some former owner of these lands.

When the roadway was graded an earth causeway was built across the slough and a culvert placed therein to permit the water to flow thereunder but it was removed some years later, thus preventing the water following its natural channel.

When the roadway was constructed a ditch was made leading from the slough along the roadway to the north west corner of plaintiff's lands and from thence westward along the north side of the roadway to a point about midway of the north boundary of plaintiff's lands. There a culvert was constructed under the roadway which caused the water from the ditch to

flow upon and over those lands. The effect of the construction of this ditch and culvert was to divert water from its natural course through the slough and over Simpson's lands to the plaintiff's lands.

In the year 1915 or prior thereto the plaintiff brought an action against the defendant for damages caused by this diversion of water. While the action was proceeding two members of defendant's council wrote the plaintiff's solicitors offering on behalf of the council to pay the plaintiff $422.24 in satisfaction of his claim for damages and undertaking to have the ditch carried westward from the culvert and to have the latter removed early in the spring of 1916. In reply thereto, the plaintiff's solicitors wrote the defendant's secretary, stating that the plaintiff would accept that amount upon condition that the settlement be made promptly and that the council would agree to remedy and remove the cause of damage as early in the spring of 1916 as climatic conditions would permit. To this letter the secretary replied enclosing a cheque for the amount agreed upon and stating that the council would undertake to remove the cause of damage as soon as possible in the spring of 1916.

Early in 1916 the defendant closed up the culvert through which the water flowed upon plaintiff's lands and extended the ditch farther west from that point but this had not the effect of stopping the flow of water upon them. At certain seasons in each year up to the trial of the action in October, 1920, the ditch overflowed its bank, causing the water to flow over the roadway at the point where the culvert had been placed and upon and over the plaintiff's lands.

It was contended on behalf of the defendant that it was authorized to construct the roadway and that the construction of the ditch was necessary in order to secure the necessary drainage thereof.

In the absence of express statutory authority to that effect a local improvement district is not, in my opinion, authorized to divert water by means of ditches or otherwise from its natural course into or upon adjoining lands which would cause damage thereto.

In Farnham on Waters at p. 912 the author states what, in my view, is the correct principle, as follows:—

"In the ordinary case there is no reason why, with even ordinary care a municipal corporation which has gathered the water from its streets into gutters should not conduct it to a natural outlet without any injury to anyone and the failure to do so is such clear evidence of negligence that it should be

Alta.

App. Div.

PAISLEY v. LOCAL IMPROVEMENT DISTRICT No. 399.

Stuart, J.A.

required to shew that the injury could not be avoided in order to relieve itself from liability."

In the case at Bar the defendant has failed to shew that the injury to the plaintiff could not have been avoided. I see no reason why the water which passed through the slough could not have been made to flow in its natural channel through the slough and over Simpson's lands by constructing a culvert at the slough and by removing the dam on Simpson's lands. That the defendant could have entered thereon for that purpose was held in *Farnell* v. *Parks* (1917), 38 D.L.R. 17, 13 Alta. L.R. 7.

I entertain considerable doubt whether the evidence discloses that there was an agreement between the plaintiff and the defendant which the latter was bound to perform but, apart from the question of the existence of any such agreement, it is clear that the plaintiff is entitled to a judgment directing that the defendant shall remove the cause of damage.

The damages awarded the plaintiff do not appear to me to be excessive. They extended over a period of five crop seasons and must be presumed to have included the damages sustained up to the date of the trial (See Rule 193 and *Hole* v. *Chard Union*, [1894] 1 Ch. 293, 63 L.J. (Ch.) 469. It is not, in my opinion, a case in which damages should be assessed in one lump sum for all time. If the defendant finds it advantageous to procure a right to flood the plaintiff's land, that is a matter for negotiation with him or for legislation.

Regarding the objection to the form of the mandatory order. I think it is objectionable, if interpreted to mean that the defendant is required to continue the present road ditches so as to carry the diverted water through those ditches to a sufficient outlet for there may be, and probably are, formidable obstacles in the way. But it is not necessary to carry the water through these road ditches. It can be restored to its natural and proper course, which can be done as already indicated, by removing the obstructions improperly placed therein, which would be a compliance with the order. But in order to save any doubt which may arise from the form of the order I would vary that clause of the judgment by striking out the words "do carry to a proper outlet the water that it carries through its ditches so that the same shall no longer flood or do" and substituting therefor the following words "be and it is hereby restrained from permitting further water to flow through the ditches constructed by it so as to cause."

I would dismiss the appeal with costs.

STUART, J.A.: — I concur in the judgment of the Chief

Sask.

C.A.

Justice, and, with one slight reservation, in the reasons given therefor. I desire to reserve for further consideration the question whether or not the right to remove an obstruction such as seems to have been placed on Simpson's lands interfering with the natural flow of the water should be dealt with upon the principles applicable to nuisances. As at present advised and without thinking it necessary to explore the point completely, I should be inclined to think that the right of removal suggested should be found in the law relating to water courses. Halsbury, vol. 28, p. 429 deals with obstructions to water courses and I find no reference there to a right of entry and removal. I do not say that this right does not exist, but I merely hesitate to find the right as being part of the law of nuisances. In any case I think the point is immaterial to the present decision, because even if the defendant could not without legal process have obtained the removal of the obstruction that circumstance, in my opinion, would give it no right by its own act to throw the water on the plaintiff's land.

Beck, McCarthy, and Clark, JJ.A., concur with Scott, C.J.

Appeal dismissed.

McKAY v. McDOUGALL.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. November 28, 1921.

Land titles (§IV—40)—Adverse claims—Two different purchases of same property under different agreements for sale—Equities equal — Registration of caveat by one before other acquires better title to call for real estate—Rights and liabilities.

Where two purchasers of the same property have equal equities under different agreement for sale, and one protects his right by the registration of a caveat before the other acquires a better right than he to call for the legal estate, the equity of the one who has registered the caveat will prevail.

[*McKillop & Benjafield* v. *Alexander* (1912), 1 D.L.R. 586, 45 Can. S.C.R. 551, referred to. See Annotations on Land Titles, 7 D.L.R. 675, 14 D.L.R. 344.]

Appeal by plaintiff from the judgment of MacDonald, J., in an action for specific performance. Reversed.

A. R. Tingley, K.C., for appellant.

P. G. Hodges, for respondents.

The judgment of the Court was delivered by

Lamont, J.A.:—The facts of the case are as follows:—On October, 31, 1919, one McClellan, who was the registered owner of Lot 11, Block 365, Regina, sold the same to the defendants McDougall, under an agreement in writing, for $6,300, payable $500 cash and the balance in monthly instalments of $150 each.

Sask.
C.A.
MCKAY
v.
MCDOUGALL.
Lamont, J.A.

On June 21, 1920, the defendants McDougall verbally agreed with the plaintiff to sell him the said lot for $6,500, for which the plaintiff paid $100, and was to receive possession July 15. On June 22, about noon, the defendants McDougall, through their agents, verbally agreed to sell the said lot to the defendant Rusconi for $6,550. On the evening of the same day the defendants McDougall executed a formal agreement of sale of the said lot in favour of the plaintiff, by which agreement they agreed to sell to the plaintiff who agreed to purchase "property known as lot 11, block 365, which is included in your agreement with Reginald C. McClellan for the sum of $6,500, and the purchaser R. G. McKay agrees to buy your equity in the property and take over the balance of your agreement making payments to R. G. McClellan as the payments are therein set out."

On June 22 the defendant Rusconi made a deposit of $1,550, and the defendants McDougall executed in his favour a formal agreement of the same lot. On June 30 the plaintiff registered a caveat against the lot to protect his purchase. On July 3 Rusconi paid the balance of the purchase money to the agents Smith and Hodgerts, through whom he purchased. These agents paid McClellan the amount still unpaid under his agreement with the McDougalls, and on July 6 received from him a transfer of the lot, which was registered and the title issued to Rusconi, but subject to the plaintiff's caveat.

The plaintiff by this action seeks to enforce his rights under his agreement with the McDougalls. The question is, had the plaintiff, at the time he registered his caveat, a better equity than the defendant Rusconi?

The plaintiff's oral agreement was first in time. If the written agreement between himself and the McDougalls was simply a memorandum in writing of his verbal agreement, he would seem to have the better equity by reason of the agreement being prior in time.

It was, however, contended that the plaintiff's written agreement was not a memorandum of his oral agreement but a new agreement, embodying different terms. The difference between the two, it was contended, was (1) that under the oral agreement possession was to be given on July 15, while in his written agreement it was to be given on July 10, or sooner if possible, and (2) that under the oral agreement the price was stated to be $6,500, while in the written agreement the plaintiff, although he was to pay $6,500 in all, was to pay the McDougalls their equity in cash and pay the balance to McClellan.

Sask.
C.A.
McKAY
v.
McDOUGALL.
Lamont, J.A.

in accordance with the terms of the agreement with the McDougalls, which was to be assigned to him.

In reference to these contentions, the trial Judge held as follows:—

"There is therefore a difference as to the date when possession is to be given between the memorandum signed by Mrs. McDougall on June 21—which I must infer contains as far as it goes terms of the oral agreement entered into on said date—and the formal agreement entered into on June 22.

In the written agreement, the plaintiff agrees to pay to defendants McDougall their "equity" in the property and to take over the balance of their agreement, making payments to R. C. McClellan as the payments are therein set out at the rate of interest specified in the agreement; it provides that all adjustments of insurance, taxes, and interest will be made as of July 1, 1920, or the date on which possession is given to the plaintiff, and that the agreement will hold good and be operative until the defendants McDougall assign to the plaintiff their agreement with McClellan. The evidence does not shew that these terms were any part of the oral agreement of June 21. It therefore follows that the agreement of June 22 cannot be said to be merely a memorandum in writing of the agreement orally made on June 21."

It is quite true that the evidence does not shew that the plaintiff made an offer in express words for the interest simply which the McDougalls had in the land. His offer was $6,500 for the property. But the evidence (which was not included in the appeal book but was extended and a copy has been furnished us) does disclose that, at the time the plaintiff made his offer, he knew that the McDougalls had purchased under an agreement from McClellan and that they were paying for the property at $150 per month. That it was understood at the time that his offer was accepted that he was to pay the McDougalls their equity and take an assignment of their agreement, appears to me to be quite clear, for the plaintiff in his evidence stated that "when Mr. Lennox came over and said that my offer was accepted, I understood that I was to pay out Mrs. McDougall and take over her contract." This is corroborated by the evidence of Mr. Lennox, who was agent for the McDougalls, through whom the sale to the plaintiff was effected. Lennox testified that in the forenoon of June 21 he saw Mrs. McDougall, when she accepted the plaintiff's offer. Again, in the afternoon, when he received the plaintiff's cheque for $100, he telephoned to her that he had received the deposit.

Sask.
C.A.
McKAY
v.
McDOUGALL.
Lamont, J.A.

In one of these interviews, the evidence is not quite clear which, Lennox says, "I asked Mrs. McDougall what her equity was, because he was buying her equity and taking over the agreement."

It is, therefore, in my opinion, abundantly established that, although the plaintiff's offer was a sum of $6,500, it was clearly understood between himself and the McDougall's agent, Lennox, that he was to pay the McDougall's equity in cash and take over their contract with McClellan. The written agreement signed by the parties on June 22 was, therefore, only the verbal agreement of the preceding day reduced to writing, for the difference as to the time when possession was to be given is not material.

The plaintiff, in my opinion, has established a valid verbal agreement made on June 21 and reduced to writing the following day. He had, therefore, a valid agreement which was prior in time to that of the defendant Rusconi. His rights under that agreement the plaintiff protected by a caveat before the defendant Rusconi had acquired a better right than he to call for the legal estate. Both the plaintiff and Rusconi had verbal agreements for the sale of the property from the same vendors, which agreements had been reduced to writing. Their equities were thus equal at the time the plaintiff registered his caveat. The equity being equal, the plaintiff's, being first in time, will prevail. *McKillop & Benjafield* v. *Alexander* (1912), 1 D.L.R. 586, 45 Can. S.C.R. 551.

The appeal, in my opinion, should be allowed with costs, and the judgment below set aside and judgment entered in favour of the plaintiff for specific performance, with costs against the defendants McDougall and Rusconi. There will be reference to the local registrar to compute the amount which the plaintiff under his agreement would have had to pay the McDougalls and subsequent amounts falling due under the agreement between them and McClellan. Upon paying these amounts, together with the interest thereon at 8% and any taxes which Rusconi may have paid into Court within 30 days, the plaintiff will be entitled to an order for possession and his agreement will then be in good standing. The defendant Rusconi having paid the McDougalls their equity and McClellan the balance of the purchase money, will, if he so desires, be subrogated to the position of these parties, and will be entitled to the moneys paid into Court by the plaintiff and all unpaid payments under the plaintiff's agreement. He is, in my opinion, entitled to be registered as owner, subject to the caveat, until the plaintiff has paid for the property in full.

As against the defendant Boyle, the plaintiff is entitled to a judgment for possession.

Appeal allowed.

GRIFFIN v. CAPE BRETON ELECTRIC Co.

Nova Scotia Supreme Court, Harris, C.J., Russell and Mellish, JJ. December 10, 1921.

Carriers (§IIK—215)—Child on street car—Car stopping in usual place—Child injured while alighting—Negligence of carrier—Contributory negligence of passenger—Evidence—Finding of jury not justified by—Appeal.

Where the finding of the jury as to the negligence of the defendant in an action for damages for injuries received while alighting from a street car was not justified by the evidence, the injury being caused by the plaintiff's own contributory negligence in alighting while the car was in motion for which the defendants were not responsible, and after which it was impossible for the defendants to have avoided the accident in any way. The Court reversed the decision of the trial judge and dismissed the action.

[*British Columbia Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, distinguished. See Annotation on Ultimate Negligence, 40 D.L.R. 103.]

Appeal from the judgment of Chisholm, J., in favour of plaintiff, an infant suing by her next friend, in an action to recover damages for injuries sustained in consequence of the negligent operation of one of the defendant's electric cars. The negligence complained of was allowing plaintiff to step off the car while it was in motion. The defence was contributory negligence on the part of the plaintiff in stepping off the car before it stopped. The jury found that notwithstanding such contributory negligence defendant company could have avoided the accident by the exercise of reasonable care.

S. Jenks, K.C., and *John MacNeil*, for appellant.

T. R. Robertson, K.C., and *Finlay McDonald,* K.C., for respondent.

Harris, C.J.:—The plaintiff, a girl 11 years of age, at the time of the accident, sues the defendant company for damages for injuries received by her in alighting from a car on the defendant's electric street railway.

The particulars of negligence given by plaintiff were:—1. That while the plaintiff was in the act of alighting from the car the car was started before she had reached the ground causing the plaintiff to be violently thrown to the ground. 2. The said car was started while the plaintiff was in the act of alighting owing to the negligence and carelessness of the servants of the said company. 3. That while the car was in motion the plaintiff, a child of tender years, was permitted to stand in the vestibule of the car and to alight therefrom.

N.S.
S.C.
GRIFFIN v. CAPE BRETON ELECTRIC CO.
Harris, C.J.

After all the evidence had been taken plaintiff's counsel was allowed by the trial Judge to add a further ground, viz.: that the defendant company was guilty of negligence in that the car did not stop at Atlantic Hotel.

On the trial, the evidence of the plaintiff was to the effect that as she was in the act of alighting from a stationary car, the car was started, and she was thrown to the ground and injured. The case for the defendant company was that the plaintiff jumped from the car while in motion.

The trial Judge put certain questions to the jury, which, with their answers, are as follows:—

"Q. 1. Did the defendant company's car come to a stop between the time the plaintiff left her seat and the time she alighted? A. The car did not stop. Q. 2. Was there negligence on the part of the defendant company? A. Yes. Q. 3. If there was negligence on the part of the defendant company, in what did the negligence consist? A. In allowing the child to step off the car while in motion. Q. 4. Was there negligence on the part of the plaintiff, which contributed to the accident? A. Yes. Q. 5. If there was contributory negligence on the part of the plaintiff, in what did such contributory negligence consist? By stepping off the car before it stopped. Q. 6. If the plaintiff was guilty of contributory negligence could the defendant company have nevertheless averted the accident by the exercise of reasonable care? A. Yes. Q. 7. If the plaintiff is entitled to recover, what amount is she entitled to? A. $2,000."

On these findings the trial Judge granted an order for judgment for the plaintiff. His decision is as follows:—

"In this case the jury found that the defendant company was negligent in allowing the plaintiff to step off the car while it was in motion, and they found contributory negligence on the part of the plaintiff in that she stepped off the car before it stopped. The jury also found that notwithstanding the contributory negligence of the plaintiff, the defendant company could nevertheless have averted the accident by the exercise of reasonable care. The plaintiff, according to the evidence of McIntosh, a disinterested witness, walked out upon the platform, stood for a few moments, and then stepped off before the car had stopped.

There was no means of averting the accident after the plaintiff stepped off, and the jury finding that the defendant company could have averted the accident, had in mind, I take it, that that could have been done by preventing the plaintiff coming upon the platform whilst the car was still in motion."

Taking that view, and without discussing the questions of

initial negligence, ultimate negligence, etc., and whether the same act of negligence has been charged up twice against the defendant company, I think sufficient authority will be found in the case of *British Columbia Electric R. Co.* v. *Loach*, 23 D.L.R. 4, 20 C.R.C. 309, [1916] 1 A.C. 719, affirming 16 D.L.R. 245, 19 B.C.R. 177; it entitles the plaintiff to the order for judgment asked for.

Counsel intimated that an appeal would be taken; and there will be a stay pending the disposal of the appeal.

There is an appeal by the defendant company from the order for judgment and also a motion to set aside the findings or answers to questions numbered 2, 3, 6, and 7, and the defendants ask for judgment on the findings or alternatively for a new trial.

There was no notice of motion by way of cross appeal.

The first question that arises for determination is as to whether on the findings judgment should have been entered for the plaintiff or defendant company.

Many cases were cited to us on the argument, as to the liability in cases of contributory negligence, including that of the Privy Council in *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, all of which, as well as many others, I have carefully examined and considered. In the preface to the 5th Edition of the Law of Torts by Sir John Salmond, the writer says: "No more baffling or elusive problem exists in the law of torts" than that of the true nature of the rule as to contributory negligence.

I do not think there is anything in the decision of the Privy Council in *B.C. Electric R. Co.* v. *Loach* affecting this case. The answer to the 6th question is not understandable in view of the 3rd and 5th findings. I should think it beyond question that after the plaintiff stepped off the moving car it was impossible for defendants to have averted the accident in any way. The 3rd and 5th findings make it clear, I think, that the last act, and the one which directly led to the accident, was the act of the plaintiff herself, and as I understand the authorities the plaintiff is thereby precluded from recovering, and with deference I think the trial Judge should have dismissed the action and entered judgment for the defendant company.

On the argument counsel for the plaintiff asked leave to give notice of cross appeal in order to raise the question that the charge of the trial Judge on the question of contributory negligence was incorrect, because it contained no reference to the fact that the degree of care required of the plaintiff was not necessarily the same as that required of an adult, but only

N.S.

S.C.

GRIFFIN v. CAPE BRETON ELECTRIC CO.

Harris, C.J.

such reasonable care as was to be expected from a child of her age, intelligence and experience. The Court reserved the question as to whether or not the leave should be granted and meantime allowed counsel to argue the point. It should be explained that this case was first tried before Ritchie, J., with a jury in 1920, and the jury then found the defendant company negligent in allowing the child to stand in the vestibule while the car was in motion, and they also found that the plaintiff by the use of ordinary care could have avoided the accident. On these findings the trial Judge entered judgment for the plaintiff and on appeal a new trial was ordered. I have examined the printed cases on both appeals and find no reference in either charge to the age, intelligence, experience or capacity of the plaintiff as being factors to be considered by the jury in connection with the question of contributory negligence.

I am informed by both the trial Judges that the matter was not discussed or referred to by counsel on either trial nor was any objection made to the charge or any request made by counsel for any instruction on the point in question.

It is not suggested that the trial Judge in the last trial misdirected the jury by stating the wrong rule, but that he omitted to call the attention of the jury expressly to these factors. I think the proper direction would have been to have told the jury that only such reasonable care was required from the plaintiff as was to be expected from a child of her age, experience and intelligence. But the plaintiff's counsel said nothing about the matter and did not ask to have the jury so instructed, and he does not cross appeal or in any way raise the question until he feels driven to do so on the argument of the appeal.

In *Nevill* v. *Fine Art and General Ins. Co.*, [1897] A.C. 68 at 76, 66 L.J. (Q.B.) 195, Lord Halsbury, L.C., said:—

"When you are complaining of non-direction of the Judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect."

I think that principle applies to this case. It has been suggested that the case is one of misdirection and not mere non-direction. I do not agree with this, but even on the assumption that it is to be treated as one of misdirection, I think the plain-

tiff is not entitled to a new trial on this ground because no substantial wrong or miscarriage was occasioned.

The plaintiff was before the Court and gave her evidence and the jury had an opportunity of seeing her and judging of her intelligence, age and experience and from her evidence. She was 11 years of age at the time of the accident, and testified that she was accustomed to ride on the cars and she says that she knew that when she wanted to get off the car that she should ring the bell or press the button. It was the plaintiff's conduct which the jury was considering in questions 4 and 5, and it must be assumed that her age, her experience and her intelligence were all factors fully considered by the jury in that connection. Under the circumstances I do not think any substantial wrong or miscarriage was occasioned, and as there have been two trials of the case without any mention of the question now raised, I do not think it is in the interest of justice that we should grant plaintiff leave to give notice of cross appeal and thus enable her to set it up on a third trial. There must be an end some time to litigation and counsel cannot, as Lord Halsbury put it, stand aside and let all the expense be incurred and get a new trial simply because of their own neglect. They have had two trials and two occasions to raise this question and it is now too late to do so.

I would allow the appeal from the order of the trial Judge and dismiss the action, both with costs.

It is unnecessary to consider the defendant's motion to set aside the findings of the jury in answer to the 2nd and 3rd questions.

RUSSELL, J., concurred.

MELLISH, J.:—This is an action for negligence. The plaintiff, an infant, was a passenger on the defendant's tram car in the City of Sydney and the statement of claim alleges that she was carried from James St. to Laurier St. and that owing to the defendant's negligence she was thrown off the car when attempting to alight. The particulars of the negligence delivered in pursuance of defendant's demand are:—(a) That the car was started while the plaintiff was alighting and (b) That while the car was in motion the plaintiff was permitted to stand in the vestibule of the car and alight therefrom.

The action was tried before Chisholm, J., with a jury, who found that there was negligence on the part of the defendant company in allowing the plaintiff to step off the car while in motion; that there was negligence on the part of the plaintiff which contributed to the accident in stepping off the car before it was stopped, but that the plaintiff could nevertheless have

N.S.
S.C.
GRIFFIN v. CAPE BRETON ELECTRIC Co.
Mellish, J.

averted the accident by the exercise of reasonable care, although they do not say in what way.

On these findings judgment was given by the trial Judge in favour of the plaintiff for $2,000, the amount found by the jury, on the authority of *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4.

It is to be noticed that the evidence of the plaintiff does not give Laurier St. as the destination of the plaintiff as alleged in the statement of claim.

On the other hand, plaintiff swears that she wished to alight at Atlantic Hotel, the next station before Laurier St., and that she so notified the conductor before reaching Atlantic Hotel, that the car nevertheless was not stopped at Atlantic Hotel, but some distance beyond and before reaching the Laurier St. stop, that she attempted to alight while the car was so stopped and that while she was in the act of so doing the car started throwing her down.

The conductor was pressed on cross-examination by plaintiff's counsel as to whether or not the plaintiff had not told him that she wished to alight at Hankard Street, which was the same stopping place as Laurier St. This is significant in view of the allegations in the statement of claim before referred to. The conductor did not remember such a request but says he first saw the girl (the plaintiff) after passing the Atlantic Hotel when she got up from her seat and came out on the vestibule of the car with the apparent intention of alighting at the Laurier St. stop. The plaintiff, as the evidence except her own shews, and the jury finds, got off the car while it was in motion, after it passed the Atlantic Hotel and before it reached the Laurier St. stop. If the plaintiff had been negligently carried past the stopping place for which she had given notice it might be a circumstance for consideration in determining whether she was guilty of contributory negligence in alighting from the moving car, as well as the question whether the company was negligent in allowing her to alight. But no such initial negligence on the part of the defendant had been alleged or expressly found. On the other hand, unless the jury was prepared to find that plaintiff had notified the conductor that she wished to stop at the Atlantic Hotel, I do not think their finding as to defendant's negligence justified by the evidence. These considerations, especially in view of what is hereafter said, are perhaps immaterial.

With deference, I do not think the *Loach* case applicable here, the general rule being that "when an accident happens

through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care,'' this case in the application of this rule seems to decide that no one will be allowed to say that he have this last opportunity who had previously negligently disabled himself from taking advantage of it at the proper time. The contributory negligence of the defendant was in alighting from the moving car. After defendant knew of this they had no chance, and under no known circumstances could have had any chance, of avoiding the accident.

I have, therefore, concluded that in view of the finding as to contributory negligence the judgment cannot stand.

Counsel for the plaintiff, however, argued that if we disturbed the judgment appealed from, we should set aside the findings as to contributory negligence and order a new trial.

I cannot agree to this. The case has been twice tried and on both trials the plaintiff has been found guilty of contributory negligence, and if, in determining the question, the jury did not have the advantage of special directions dealing with the plaintiff's tender years, nevertheless, negligence was properly defined to the jury and they had all the facts before them.

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

Appeal allowed.

McMILLAN v. CANADIAN PACIFIC R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. November 28, 1921.

Conflict of laws (§ IE—106)—Master and servant—Servant domiciled in Ontario—Accident in Ontario—Action in Saskatchewan—Jurisdiction of Court—Right of action in Ontario taken away by Workmen's Compensation Act.

The Courts of Saskatchewan have no jurisdiction to entertain an action for damages for personal injuries received by an employee, which injuries were caused by the negligence of a fellow employee, where the plaintiff was domiciled in the province of Ontario and his injuries were received there. The Workmen's Compensation Act of Ontario having expressly taken away any right of action which existed in favour of an employee injured under similar circumstances, and given the employee a right to compensation by the Board constitute by that act in lieu thereof, the Saskatchewan Courts are without jurisdiction to entertain an action although by the laws of Saskatchewan the plaintiff would have a right of action in that province if the injuries had been received there.

Appeal by plaintiff from the judgment of the trial Judge (1920), 56 D.L.R. 56, dismissing an action for damages for injuries received in the course of his employment caused by the negligence of a fellow servant. Affirmed.

Sask.
C.A.
McMillan v. Canadian Pacific R. Co.
Haultain, C.J.S.

D. Campbell, for appellant.

O. H. Clark, K.C., for respondent.

Haultain, C.J.S.:—The appellant, at the time of the accident in question in this case, was a resident of Ontario and was employed by the respondent company as locomotive fireman. While so employed at or near Rainy River, in the Province of Ontario, he was severely injured as the result of an accident caused by the neglect of a fellow servant.

The appellant brought the present action in this Province against the respondent and the action was dismissed with costs after trial by Bigelow, J., with a jury.

The only question involved in this appeal may be stated as follows: Has a person who has been injured in the Province of Ontario through the negligence of a fellow servant, acting in the course of his employment, a good cause of action in this Province against the employer for such injury?

This question involves the consideration of the conditions which must be fulfilled in order to sustain an action in this Province for a wrong alleged to have been committed in a foreign country.

In the first place it must be shewn that the act complained of would have been actionable if it had been done in this Province. There can be no doubt that that condition is fulfilled in the present case. In this Province the master's common law liability for the wrongful act of his servant is not allowed to be modified by the defence of common employment. The King's Bench Act (R.S.S. 1920, ch. 39, sec. 26 (14).

In the second place, the act complained of must not only be actionable in this Province but not justifiable by the law of Ontario.

Prior to the passing of the Workmen's Compensation Act (Ont.) 1914, ch. 25, the appellant would have had no right of action against the respondent for the act complained of here, as, up to that time, the doctrine of common employment was part of the law of Ontario. At that time, therefore, I am of opinion that the facts of this case would not have supported an action in this Province. The case of *M. Moxham* (1876), 1 P.D. 107, 46 L.J. (P.) 17, seems to be absolutely in point. In that case damage was caused by a British ship to a pier at some point in Spain. A suit in Admiralty was brought in England against the ship and her owners. The answer of the defendants alleged that the pier was part of the land of Spain, and that, by the law of Spain in force at the place and time of the collision, the master and mariners and not the ship or her owners was or were liable for the damage. It was held by the

Court of Appeal (James, Mellish and Baggallay, JJ.A.) that the answer, if proved, would afford a good defence to the action. James, L.J., at p. 20 (46 L.J. (P.)) says:—

"If I take my servant abroad with me to drive my carriage I do not take the maxim *respondeat superior* with me. That being so, it is admitted for the purposes of this case that by the law of Spain, where a servant commits a wrongful act of this sort, the wrong is not imputed to the superior."

In the same case Mellish, L.J., says, at pp. 20, 21:—"Then Mr. Benjamin says, that, although if the act is innocent or excusable by the law of the country where the act is done, proceedings will not be entertained in this country, yet where the act is not an innocent or excusable act, but a wrongful act by the law of the foreign country, as well as wrong by our law, that English law may be applied in determining which of certain persons is responsible for that wrongful act. But I think this is not a sound distinction. There is a well recognised distinction between questions of substantive law and questions of procedure, and no doubt, if in so applying the English law, we were merely following the procedure of the tribunal in which the substantive law applicable to the case was being enforced, the contention would be well founded. But whether or not a certain person is responsible for an act is not a question of adjective but of substantive law. It is nothing less than a question, so far as that person is concerned, of whether a wrong has been committed at all. The case of *The General Steam Navigation Company* v. *Guillou* (1843), 11 M. & W. 877, 152 E.R. 1061, is an authority on this point in the defendant's favour. For these reasons, I am of opinion that the Courts in Spain would have been bound to apply Spanish law to the case, and that, as by Spanish law, the defendant would not be liable, he had committed no wrong for which he can be rendered liable in this country, although the act was one for which, by a principle of English law, he might have been made responsible if it had been committed in this country."

The following remarks of Baggallay, J.A., in the same report, at pp. 21, 22, are also very much in point:—

"The principles applicable to such cases as the present were clearly laid down in the case of *Phillips* v. *Eyre*—Firstly, that the act complained of must be of such a character that it would have been actionable if committed in England; secondly, that the act must not be such as would have been justifiable by the law of the place where it was committed. Applying those principles to the circumstances before us, it appears to me that that portion of the answer which alleges the non-liability of

Sask.

C.A.

McMILLAN v. CANADIAN PACIFIC R. Co.

Haultain, C.J.S.

the defendant by the law of Spain, affords, if proved, a defence to the action, and ought not to be struck off the record."

In the last mentioned case (*Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, 10 B. & S. 1004, 40 L.J. (Q.B.) 28) Willes, J., in discussing the difference between the effect of foreign laws which touch the procedure for enforcing a right and not the right ittself, says at p. 29 (L.R. 6 Q.B.) :—

"As to foreign laws affecting the liability of parties in respect of bygone transactions, the law if clear that if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of the ordinary statute of limitations, such law is no bar to an action in this country, but if the foreign law extinguishes the right, it is a bar in this country equally as if the extinguishment had been by a release of the party or an act of our own Legislature. . . . So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every Court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation *ex delicto* to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. Therefore an act committed abroad, if valid and unquestionable by the law of the country where it is done, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless it is by force of some distinct independent legislation, superadding a liability other than and besides that incident to the act itself."

The following passage from the judgment of the Judicial Committee of the Privy Council in *Canadian Pacific R. Co.* v. *Parent*, 33 D.L.R. 12, 20 C.R.C. 141, 23 Rev. Leg. 292, [1917] A.C. 195, 86 L.J. (P.C.) 123, may also be quoted in confirmation of the view above expressed, at pp. 17, 18 (33 D.L.R.) :—

"It follows that, as the statute law of Ontario, the Province where the accident occurred which caused Chalifour's death, did not confer on any one claiming on his account a statutory right to sue, there was, as far as Ontario is concerned, no other right. For in Ontario the principle of the English common law applies, which precludes death from being complained of as an injury. If so, on the general principles which are applied in Canada and this country under the title of private international law, a common law action for damages for tort could not be successfully maintained against the appellants in Quebec. It is not necessary to consider whether all the language used by the English Court of Appeal in the judgments of

Machado v. *Fontes,* [1897] 2 Q.B. 231, was sufficiently precise. The conclusion there reached was that it is not necessary if the act was wrongful in the country where the action was brought, that it should be susceptible of civil proceedings in the other country, provided it is not an innocent act there. This question does not arise in the present case, where the action was brought, not against the servants of the appellants, who may or may not have been guilty of criminal negligence, but against the appellants themselves. It is clear that the appellants cannot be said to have committed in a corporate capacity any criminal act. The most that can be suggested is that, on the maxim *respondeat superior,* they might have been civilly responsible for the acts of their servants."

Upon the foregoing authorities I am, therefore, of opinion as stated above, that up to the time of the coming into force of the Ontario Workmen's Compensation Act, 1914, ch. 146, the act complained of in this case would not have been "susceptible of civil proceedings" in this Province. It falls within the class of acts so variously defined and characterised as justifiable, innocent, excusable, unquestionable, etc., etc., in the cases referred to.

Where the doctrine of common employment prevails, there can be nothing wrongful, blameworthy or unjustifiable imputed to the master for a tort of his servant, for which, under the principle of *respondeat superior,* he only has a "vicarious responsibility" which has been, as has been said, imposed upon him by "a fictitious extension of the principle *qui facit per alium facit per se.*" Salmond Jurisprudence, 6th ed., 375.

It now remains to consider how far, if at all, the condition of the parties as it would have been immediately prior to the Ontario Workmen's Compensation Act has in any way been affected or changed by that Act.

The sections of the Act which relate to the question under discussion are as follows:—

"2.—(1) In this Act:—(a) "Accident" shall include a wilful and an intentional act, not being the act of the workman and a fortuitous event occasioned by a physical or natural cause.

4. Employers in the industries for the time being included in Schedule 2 shall be liable individually to pay the compensation.

13. No action shall lie for the recovery of the compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board.

Sask.
C.A.
McMILLAN v. CANADIAN PACIFIC R. CO.
Lamont, J.A.

15. The right to compensation provided for by this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependants are or may be entitled against the employer of such workman for or by reason of any accident which happens to him while in the employment of such employer, and after the day named by proclamation as mentioned in section 3, and no action in respect thereof shall thereafter lie.

60.—(1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court and no preedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any Court."

The liability thus created is not to pay damages for a wrongful act, but compensation for an accident. The right to compensation is founded on accident simply, not on negligence or any other actionable wrong. The act complained of in this case was the act of a fellow servant which, by the law of Ontario, is neither wrongful or unjustifiable so far as the employer is concerned, and in regard to which the employer may justly be said to be innocent or excusable. The accident which happened in this case was an unseen event which neither of the parties has occasioned or could prevent. The mere fact that the employer is liable to pay compensation for such an *accident* does not, in my opinion, attach any character of wrongfulness or unjustifiableness or guilt (as opposed to innocence) to the *act* upon which an action in this Province, founded entirely on tort, can be supported. The gist of the action is negligence, the ground for compensation is the accident.

For these reasons I would dismiss the appeal with costs.

LAMONT, J.A.:—The plaintiff was a locomotive fireman in the employ of the defendant company. He was domiciled and working at Rainy River in the Province of Ontario. While engaged in his employment there, the cab of the locomotive upon which he was riding was struck by some coaches of the defendants which were running down an inclined track, and he was severely injured. The collision was caused by the failure of one of the defendant's switchmen to properly set the brake

on the coaches. Although the accident took place in the Province of Ontario, the plaintiff brought this action for damages in this Province. The trial Judge held that the action was not maintainable, "because the plaintiff was domiciled in Ontario at the time of the accident and the Ontario statute gave the Board under the Workmen's Compensation Act exclusive jurisdiction in the matter in question." From that decision this appeal is brought.

The question we have to determine is, have the Courts of this Province jurisdiction to entertain an action for damages for personal injuries received by an employee, which injuries were caused by the negligence of a fellow employee, where the plaintiff was domiciled in the Province of Ontario and his injuries were received there?

The rule which governs cases of this kind is that laid down by Willes, J., in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, at pp. 28, 29, as follows:—

"As a general rule in order to found a suit in England for a wrong alleged to have been committed abroad two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

Machado v. *Fontes*, [1897] 2 Q.B. 231, 66 L.J. (Q.B.) 542, 45 W.R. 565; *Carr* v. *Fracis Times Co.*, [1902] A.C. 176, 71 L.J. (K.B.) 361, 50 W.R. 257.

The wrong complained of in this case was the negligence of the plaintiff's fellow servant in failing to properly set the brakes on the coaches. If that wrong had been committed in this Province it undoubtedly would have been actionable. The first of the above conditions is therefore satisfied.

Then, was such act justifiable by the law of Ontario?

In *Machado* v. *Fontes*, *supra*, Rigby, L.J., explained what was meant by "justifiable." He said (p. 235):—

"It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shewn by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act

Sask.
C.A.
McMillan v. Canadian Pacific R. Co.
Lamont, J.A.

must be 'justifiable' by the law of the place where it was done."

In that case it was held that, where the act complained of could be made the subject matter of criminal proceedings in the foreign country, it could not be characterised as innocent or "justifiable."

An act is innocent in a foreign jurisdiction if it is permissible by the law existing there, and it is permissible where its performance does not expose the doer thereof to any penalty or liability.

In *C.P.R. Co.* v. *Parent*, 33 D.L.R. 12, 20 C.R.C. 141, 23 Rev. Leg. 292, [1917] A.C. 195, a man domiciled in Quebec, while travelling on the appellant's railway in charge of cattle, was killed in Ontario by the negligence of appellant's servants. The widow brought an action for damages in Quebec. It was held she could not recover. The head note in that case, in part, reads as follows:

(3) that upon the principles of private international law, the defendants were under no common law liability in Quebec since they were neither civilly nor criminally liable in Ontario.

Applying these principles to the case at Bar, it is clear that the act complained of did not, according to the law of Ontario, expose the defendants in their corporate capacity to any criminal liability. If anyone was criminally liable, it was the fellow servant whose negligence caused the collision.

Then, did the act expose the defendants to any civil liability?

Under the law of Ontario as it existed at the time of the collision herein complained of, the plaintiff had no right of action whatever against the defendants. Any right of action which formerly existed in favour of an employee injured under similar circumstances was expressly taken away by the Workmen's Compensation Act 1914, and in lieu thereof the injured employee was given a right to compensation by the Board constituted by that Act. Section 15 of the Act reads as follows:—

"15. The right to compensation provided for by this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependants are or may be entitled against the employer of such workman for or by reason of any accident which happens to him while in the employment of such employer . . . and no action in respect thereof shall thereafter lie."

In enacting this provision the legislature of Ontario was

legislating upon a subject over which it had legislative jurisdiction. Apart, therefore, from the provisions of the Workmen's Compensation Act, the law of Ontario gave the plaintiff no remedy for the injuries he had received, nor did it expose the defendants to any liability, civil or criminal, for the negligence of their employee in not securely setting the brakes on the coaches. That negligence, even although "unjustifiable" so far as the employee guilty of it was concerned, was, so far as the defendants were concerned, as justifiable and as innocent as if they had not in any way been connected with the collision.

We have now to consider whether or not the provisions of the Workmen's Compensation Act exposed the defendants to any liability as a consequence of the act complained of. For the plaintiff it was argued that as the defendants were not under a liability to provide the compensation awarded by the statute, the act complained of could not be considered as a justifiable one in Ontario.

The fundamental principle of the Act is that the compensation is payable without regard to any negligence or other fault on the part of the employer or anyone for whom he is responsible,and is paid according to a predetermined and fixed scale. A Board is created for the carrying out of the provisions of the Act. It has exclusive jurisdiction to examine into, hear and determine all questions arising under Part 1 (with which alone we are concerned). The decision of the Board is final, and from it there is no appeal unless the Board itself consents to reconsider the matter. Compensation is payable by the Board out of a fund to which employers contribute, either individually or in groups. Employers under Part 1 are divided into two classes; in the first class (schedule 1) is included the great body of manufacturers and contractors, and those engaged in lumbering and mining industries. The second class (schedule 2) consists chiefly of the railway, steamship, telegraph and telephone companies, municipal corporations and public utility commissions. The first class contribute to the accident fund, but are not liable individually to pay the compensation. Employers of the second class are individually liable to pay the compensation, but all claims under schedule 2 are dealt with as those under schedule 1, and all money must be paid to the Board, or according to its order, except that, in certain cases, where disability does not last longer than a month, the employer may settle with his employee direct. The scheme of the Act, therefore, is, that the injured employee is entitled to compensation,

Sask.
C.A.
McMillan v. Canadian Pacific R. Co.
Lamont, J.A.

not as damages payable for any wrongful act done by an employer or those for whom he may be answerable, but as "insurance against fortuitous injury." It is true that employers in schedule 2 are individually liable to pay the compensation, but it is not compensation for the act complained of in this action, namely, the negligence of a fellow employee because it is payable irrespective of the existence of any negligence.

In *C.P.R. v. Workman's Compensation Board*, 48 D.L.R. 218, [1920] A.C. 184, Viscount Haldane, in giving the judgment of the Privy Council, referring to the right to compensation in that case, said at p. 222 (48 D.L.R.):

"This right arises, not out of tort, but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the province who so contracts should possess it as a benefit conferred on himself as a subject of the Province."

And later, in dealing with the Merchant Shipping Act, he said at p. 223:

"It was further contended for the respondents that s. 503 of an Imperial statute, the Merchant Shipping Act, 1894, invalidated the provision in question made by the Provincial Legislature, on the ground that the Imperial statute had conferred a civil right from which the Province could not derogate. Upon this they desire to point out that whether the expression 'damages' in the section applies to a liability such as that under consideration, a liability not of the shipowner, but of the Board, is more than doubtful. For the taxation complained of in the present case is imposed with the object of establishing an institution which shall provide insurance benefits for persons whose contract of employment arises within the Province, and it is not directed to the very different purpose of making the employer directly compensate his workman by way of damages for injury arising out of what has not the less to be proved as a tort because it may have happened, in the language of s. 503, without his actual fault or privity."

From those remarks, I take it, that in the opinion of their Lordships the payment of compensation under the Workmen's Compensation Act was in no sense to be considered as a payment of damages for the wrongful act which caused the employee's injuries. If that is so, the wrongful act complained of in this action did not expose the defendants to any civil liability whatever under the law of Ontario. It was, therefore, a justifiable or excusable act in that jurisdiction.

In *The M. Moxham*, 1 P.D. 107, James, L.J. in the course of his judgment uses these words at p. 111:

Sask.

C.A.

McMillan v. Canadian Pacific R. Co.

Turgeon, J.A.

"It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimised by a subsequent Act of the legislature, then this Court will take into consideration that state of the law; that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here."

For these reasons I am of opinion that the conclusion of the trial Judge was right, and that the plaintiff's action does not lie. The appeal should, therefore, be dismissed with costs.

TURGEON, J.A.:—The appellant was a locomotive fireman in the employ of the defendants and was injured on November 12, 1918, by the negligence of a fellow-workman, a switchman.

At the time of the accident the plaintiff was domiciled in Ontario, and the accident occurred in that Province. The facts of the case show that the accident was one which would throw no liability upon the defendants under the law of Ontario as it exists in cases not coming within the purview of the Ontario Workmen's Compensation Act, as it is a case where, outside that Act, the doctrine of common employment would apply.

The plaintiff brought a common law action in this Province, the defendants being located here as well as in Ontario, and contends that the case should be adjudicated upon in the same manner as if the accident had occurred here.

In this Province the doctrine of common employment does not obtain, having been abolished by statute (The King's Bench Act, R.S.S. 1920, ch. 39, sec. 26, Clause 14). It is contended, therefore, that the case comes within the rule laid down in the authorities, the effect of which is that the action will lie in this Province if it is founded upon an act which would be actionable if it had taken place here, and which is not justifiable by the law of the country where it did take place. (*Phillips* v. *Eyre* (1870), L.R. 6 (Q.B.) 1; *Machado* v. *Fontes*, [1897] 2 Q.B. 231).

By the law of Ontario as it stood before the enactment of the Workmen's Compensation Act, no action would have lain against the defendants under the circumstances of this case. No breach of duty which would exclude the application of the doctrine of common employment is alleged against them as was the case in *Ainslie Mining Co.* v. *McDougall*, (1909), 42 Can. S.C.R. 420. The claim against them is for an act done by one of their servants to a fellow servant. Outside the Workmen's Compensation Act, the plaintiff would be met by the fact that the injury he suffered was the result of the negligence of a fellow servant, and that the risk of such negligence was:

Sask.
C.A.
McMILLAN v. CANADIAN PACIFIC R. Co.
Turgeon, J.A.

"One of the natural and necessary consequences of his employment and must be included in the risks which are to be considered in his wages."

In other words, his contract with his employer placed such risk upon him. (*Morgan* v. *Vale of Neath R. Co.* (1865) L.R. 1 Q.B. 149, 35 L.J. (Q.B.) 23, 14 W.R. 144).

The effect of the Ontario Workmen's Compensation Act is not, in my opinion, far-reaching enough to remove the application of the common employment doctrine in its entirety and to make this act an act of the employers not justifiable in Ontario, and, consequently, actionable in this province. The Workmen's Compensation Act of Ontario is not as complete in its language and as sweeping in its consequences as the Saskatchewan enactment above referred to. The Ontario Statute, dealing with certain classes of employment only, of which the employment in question here is one, provides compensation to all workmen so employed for personal injuries suffered through accidents arising out of their employment and in the course thereof and (in cases other than death or serious disablement) not attributable solely to the serious and wilful misconduct of the workmen. All accidents are covered, whether caused by a fellow-workman or not, whether arising through negligence or not, and contracting out of the statute is prohibited; but on the other hand the amount of the compensation is limited. This Act therefore introduces a condition into all contracts of employment, binding upon the employer and which he must bear in mind in the pursuit of his business, and which a special body, known as the Workmen's Compensation Board, is appointed to enforce and administer. If the plaintiff in this case had sought a remedy in tort in Ontario, the courts would have granted him none; he would have had to apply to the Board, relying upon his contract of employment with the defendants and the happening of the accident in the course of such employment. No question of tort or of an "unjustifiable act" of the defendants would have arisen. Under such circumstances I agree with the trial Judge that no action can be maintained by the plaintiff in this Province.

I would dismiss the appeal with costs.

Appeal dismissed.

BARCLAY v. HOLMES.

Alta.

App. Div.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Ives, Hyndman and Clarke, JJ.A. December 29, 1921.

Costs (§ II—26)—Taxation of—No action brought—Application for to be made to Supreme Court Judge—Legal Profession Act, Alta. stats. 1907, sec. 59, ch. 20.

Although sec. 59 of the Legal Profession Act, Alta Stats. 1907, ch. 20, which gives the right to a member of the society to sue for fees due to him before rendering it, may, when taken with sec. 23 of the District Court Act, give a right of suit in the District Court if the amount claimed is within the prescribed limit and although in such a suit the Judge of the District Court might make an ordinary order of reference as in any other suit; and although, if there is no defence, the plaintiff might possibly properly apply to the Judge of the Court in which the action was pending for an order for taxation before judgment could be entered, nevertheless it is clear that where no action is brought and the solicitor applies for an order for taxation this application must be made to a Supreme Court Judge.

Appeal by clients against an order of Morrison, Co.Ct.J., dismissing a motion by way of appeal from an order of Mr. Blain, Master in Chambers, in Edmonton, whereby the Master referred a certain bill of costs to the clerk of the Court for taxation. Reversed.

J. A. Clarke, for appellants.

L. T. Barclay, for respondent.

Stuart, J.A.:—It appears that on May 5, 1921, Mr. Blain made an order upon the *ex parte* application of the solicitors, that the bill of costs in question should be referred to the clerk to be taxed and that the appointment for the taxation might be served on the clients by registered mail. There was also an order for payment of the bill as taxed. It appears that the appointment was sent by registered mail, but by a misunderstanding between the clients and the solicitor whom they consulted about it over the telephone, no one appeared for the clients on the taxation.

On May 27, 1921, Mr. Blain, upon the application of the clients, made an order giving leave to appeal from his order referring the bill to taxation.

Then some peculiar things occurred. The solicitor who got this leave to appeal served a notice of motion by way of appeal, returnable "before the presiding Judge in Chambers at Edmonton." The notice was entitled, as all the previous documents had been, "In the District Court, District of Edmonton." This seems to have been done because the amount claimed in the bill was under $600.

The solicitor acting for the clients, however, went to a Supreme Court Judge, while the solicitors went to a District

Alta.
App. Div.
BARCLAY v. HOLMES.
Stuart, J.A.

Court Judge. The clients' solicitor acted, as he said, upon the idea that all matters of taxation of solicitors' bills of costs should come before a Superior Court Judge. The Supreme Court Judge, seeing how the papers were entitled, sent the clients' solicitor away on the ground that he had come to the wrong place. So Dubuc, Co.Ct.J., before whom the solicitors went, made an order on June 6, dismissing the appeal with costs. Then when the mistake was brought to the attention of Dubuc, Co.Ct.J., he discharged his order and directed the matter to come up on next Chamber day. On that day Morrison, Co.Ct.J., made an order dismissing the appeal from the Master, and this is the order now appealed from.

The head of the firm of Barclay & Barclay and Mr. Clarke, now acting for the clients, had been in partnership, and some, at least, of the matters for which charges were made in the bill of costs in question were dealt with by that partnership. There was some attempt in this appeal, as there was also below, to bring up matters of dispute between the two legal partners. But with disputes of this kind we do not need to concern ourselves here.

The parties seem to have overlooked almost entirely the real point upon which this appeal must be decided. Mr. Clarke did apparently have the point in mind when he went to a Supreme Court Judge.

In my opinion, all the proceedings before the Master and the District Court Judges were nullities and based on a misapprehension as to the position of barristers and solicitors in this Province and as to the proper authority to review and examine their dealings with their clients. The Legal Profession Act of 1907, which incorporated the Law Society, enacts (sec. 6) that the Judges of the Supreme Court of Alberta shall be the visitors of the Society. Then, under the caption "Disciplinary" it is enacted (sec. 51) that "all barristers and solicitors shall be officers of the Supreme Court of Alberta, and the said Court and any Judge thereof shall possess and may exercise the same powers and jurisdiction over and in respect of such barristers and solicitors as was possessed by the Supreme Court of Judicature in England or a Judge thereof over and in respect of solicitors of the said last-mentioned Court prior to the passing of the Solicitors Act, 1888."

Then, although sec. 59, which gives the right to a member of the Society to sue for a bill before rendering it, may, when taken with sec. 23 of the District Court Act, give a right of suit in the District Court if the amount claimed is within the prescribed limit, and although in such a suit the Judge (*i.e.* of

the District Court) might make an ordinary order of reference as in any other suit; and although, if there is no defence, the plaintiff might possibly properly apply to the Judge of the Court in which the action was pending for an order for taxation before judgment could be entered, nevertheless it seems clear that where no action is brought and the solicitor applies for an order for taxation, this application must be made to a Supreme Court Judge. Section 60 enacts that where the party chargeable wants taxation, he must apply to a Supreme Court Judge, and there is no limitation as to the character of the business done and sec. 61 also deals with an order upon application of either party. Obviously the statute is treating the solicitor as an officer of the Supreme Court, as it declares him to be, and so it enacts that an order upon the clients' application, or upon his own, for the taxation of his bill must be made to a Judge of that Court. Sec. 67, dealing with the order for the delivery of a bill is similarly worded. This statute was passed in the same session as the District Courts Act, but there is no reference in it to the District Court nor is there any reference in the District Courts Act to the position of barristers and solicitors.

The provisions of the Legal Profession Act, with respect to taxation, are all placed in the Act under a general caption, "Disciplinary," and it is obvious that the intention of the Legislature was that in all matters of discipline and conduct, including the making of charges, of solicitors towards their clients, should be under the control of the Supreme Court Judges only, who are the visitors of the Law Society. This has the additional advantage of convenience because a solicitor's or a barrister's bill may include charges in connection with services of many different kinds, such as conveyancing, appearance in Police Courts, as well as work in both the District and Supreme Courts, and it would be practically very inconvenient to have different disciplinary authorities according to the nature of the work done.

It is to be observed that while the right of a client to get an order for taxation is given by reason of the disciplinary powers of the Court, the right of the solicitor to get his bill taxed is simply, in the first instance, a right to submit himself voluntarily to this disciplinary supervision.

It follows that the mere fact that the amount of the bill is less than $600 has no relevancy so far as an order for taxation, aside from a direct suit in Court to recover the amount, is concerned. This means that the proceedings instituted before the Master, even if otherwise properly instituted, should never have been entitled in the District Court at all and that whatever

Alta.
App. Div.
BARCLAY v. HOLMES.
Stuart, J.A.

power the Master had, if he had any, to order taxation, should have been exercised as a substitute for a Supreme Court Judge.

But the defect in the institution of the proceedings goes much deeper than this. In my opinion a Master in Chambers has no authority to order the taxation of a solicitor and client bill. The powers of the Masters in Chambers are stated by the rules enacted by the Lieutenant-Governor in Council on March 26, 1913, to be such as may be exercised by a District Court Judge when acting as a Local Judge of the Supreme Court under the provisions of the District Court Act, *i.e.* under sec. 42 of that Act. And R. 541 is substantially to the same effect. Section 42 of the District Court Act gives the District Court Judge, in his capacity as "Local Judge of the Supreme Court," jurisdiction to do and perform such things "as he is by statute or Rules of Court empowered to do and perform." There is no further statute dealing with the matter and we must, therefore, look to the Rules of Court to see what a "Local Judge of the Supreme Court" may do. This is to be found in R. 536, and the power given is general subject to certain exceptions by way of exclusion. The first exclusion is: (1) "all matters which by any statute or ordinance are required to be done by a judge."

I do not think this excluding clause is to be confined to matters prescribed by statute to be done out of Court by a Supreme Court Judge as *persona designata*. I think it means that where a statute says that anything, even in an action or proceeding already in Court, is to be done by a Judge of the Supreme Court then it is by such a Judge only that the thing can be done.

There are of course certain Rules of Court, *viz.*: 774 to 783, which refer to taxation as between solicitor and client, but it will be observed upon reading them that, with the possible exception of R. 777 (which, if it were in question here, would possibly need some scrutiny as to its validity), none of them in any way pretend to override the provisions of the Legal Profession Act. They are simply rules of procedure. Some of them perhaps cover the same ground as certain sections of the Act. Some go a little farther in prescribing procedure. Insofar as anything in them is in direct conflict with the Act, which I do not say is the case, I think it must be set aside as invalid. Indeed, I think that wherever the word "judge" is used in R. 774 to 783 it must, in view of the statute, be taken to mean a Judge of the Supreme Court, and no one else.

The consequence of this view is that the whole proceedings were void *ab initio* and that the Master should never have entertained the original application in the first place.

And even if the original order had been made by a Supreme

Court Judge, it would have been quite improper under R. 781. It is only where, *upon the application of the client*, an order has been made for the delivery of a taxable bill, or where an order has been *properly* made, upon the application of the solicitor, for the taxation of a bill that it can include an order for payment. And under the statute the solicitor can only obtain the order for taxation after the expiration of one month from the rendering of his bill and after the omission of the client to apply within the month for an order for taxation. Of course, under sec. 59 of the Act, a solicitor may sue, if he pleases, for the amount of his bill before even rendering it, but then, under the proviso to that section, the costs are left expressly to the discretion of the Judge.

Furthermore, it appears that no notice of the application to Mr. Blain was given to the client, which was undoubtedly wrong. The possibilities of error seem to have been exhausted.

I have a suspicion, however, that the completely mistaken impression as to what could be done and how it should be done under which the solicitors seem to have laboured, prevails also to some extent throughout the profession, because I seem to remember procedure somewhat similar to that adopted here having come under my observation before on several occasions. It is, however, quite impossible under the law for a solicitor to get so summary a judgment against his client as was attempted to be secured in this case.

The consequence is that the whole proceedings will have to be discharged. The appeal should be allowed and all the orders below, including that of the Master, should be set aside. The appellants should have some costs, but not full costs, of the appeal. The appeal book contained long affidavits concerning disputes between the solicitors with which we need not have been troubled at all. I think justice will be done by fixing the costs of the appeal, including all disbursements, at $50.

There should be no costs of the proceedings before the District Court Judges or the Master. Both sides made serious mistakes and apparently the fight is rather between the solicitors than between the respondent's solicitors and the clients.

If any fresh proceedings are begun, it would seem that, in view of what came up incidentally in the case, the question of a dispute of the retainer might have to be considered and the course to be pursued by the clients might depend, to some extent, upon the position they may be advised to take in regard to that matter. The practice in such a case is probably not very well understood, as there has been very little occasion, in this Court, to apply it. In any case, the solicitors should not be allowed

N.S.

S.C.

to fight out their partnership troubles at the expense of the clients.

BECK and HYNDMAN, JJ.A., concur with STUART, J.A.

IVES and CLARKE, JJ.A., concur in the result.

Appeal allowed.

DISTRICT No. 26 UNITED MINE WORKERS OF AMERICA v. DOMINION COAL Co.

Nova Scotia Supreme Court, Ritchie, E.J., Chisholm and Mellish, JJ. January 19, 1922.

INJUNCTION (§ IB—20)—AGREEMENT BETWEEN COMPANY AND EMPLOYEES AS TO WAGES—TERMINATION OF AGREEMENT—NOTICE OF REDUCTION IN WAGES—REFUSAL TO ACCEPT—APPLICATION TO BOARD OF CONCILIATION UNDER INDUSTRIAL DISPUTES INVESTIGATION ACT—APPLICATION FOR INJUNCTION RESTRAINING ENFORCEMENT OF NEW SCHEDULE—SEC. 57 OF ACT—RIGHT OF DOMINION PARLIAMENT TO PASS—APPLICABILITY.

On November 8, 1920, an agreement was entered into on behalf of the defendant companies and their employees fixing the rate of wages, etc., until November 30, 1921, both sides agreeing to meet at Halifax 20 days before the expiration of the agreement for the purpose of arranging a new understanding. The parties met in accordance with the terms of the agreement and it was mutually agreed that the agreement be continued for a period of one month or until December 31, 1921, and that a meeting of representatives be held not earlier than December 15, 1921. At this latter meeting a new schedule of wages was produced which the district union refused to accept, and on December 20, 1921, the companies notified their employees that the proposed schedule would become effective on January 1, 1922, *i.e.*, on the expiration of the agreement. The Court held that assuming that the Dominion Parliament had the right to legislate in a way affecting property and civil rights in the Province as sec. 57 of the Industrial Disputes Investigation Act, 1907 (Can.), ch. 20, did, that the defendants had not given any notice of an intended change or of an intention to alter the conditions of employment within the meaning of the section, and that therefore an interim injuction restraining them from putting into effect their proposed schedule until after the trial of the matters in dispute by the Board of Concilation under the Act could not be granted.

APPEAL from an order of Russell, J., granting an application on behalf of the president and one other official of District 26 of the United Mine Workers of America and of three other persons named as members of the district and employees of the defendants, suing on behalf of themselves and other members of the district or employees of the defendants who wished to join, for a restraining order against the defendants to restrain them from making certain proposed reductions in the wages of employees pending the decision of a Board of Conciliation under ch. 20 of the Acts of 1907. Reversed.

H. McInnes, K.C., and *S. Jenks*, K.C., for appellants.

L. A. Forsyth and *J. A. Walker*, for respondents.

N.S.
S.C.
DISTRICT No. 26 UNITED MINE WORKERS OF AMERICA v. DOMINION COAL CO.
Mellish, J.

RITCHIE, E.J.:—After having given the best consideration of which I am capable to the judgment of my brother Mellish, I am unable to discover any answer to the position taken by him. I therefore adopt his judgment and the reasoning on which it is based. I may add that I have very grave doubt as to the power of the Parliament of Canada to pass the statute on which the application for an injunction is made. The jurisdiction to legislate concerning Property and Civil Rights is, by sec. 92 of the B.N.A. Act, given exclusively to the local Legislature. The right to have wages continue on a certain scale that the plaintiffs contend for is certainly a civil right. The most plausible contention made in support of the statute was that it was *intra vires* as being a law "for the peace, order and good Government of Canada," but in the *Att'y-Gen'l for Canada* v. *The Att'y-Gen'l for Alberta*, 26 D.L.R. 288, [1916] 1 A.C. 588, 25 Que. K.B. 187, Viscount Haldane said at pp. 290, 291:—

"It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of sec. 91 of the B.N.A. Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislature by the enumeration in sec. 92."

However, I am content to rest my judgment on the point dealt with by my brother Mellish.

I would allow the appeal with costs.

CHISHOLM, J., concurs with MELLISH, J.

MELLISH, J.:—The heading and indorsement on the writ of summons herein is as follows:—

"Between District No. 26 of the United Mine Workers of America, Robert Baxter, President, J. B. McLachlan, Secretary-Treasurer of the said District, Silby Barrett, John Joseph McDonald and William Coleman, members of the said District, employees of the defendants herein suing on behalf of themselves and all other members of the said district or employees of the said defendants who may wish to join in this action—Plaintiffs.

and

Dominion Coal Company, Limited; Nova Scotia Steel and Coal Company, Limited; Acadia Coal Company, Limited, all three being bodies corporate under the laws of Nova Scotia—Defendants.

Endorsement of writ.

The plaintiffs' claim is against defendant for a decree that the notice given on or about twentieth December nineteen twenty

N.S.
S.C.
DISTRICT No. 26 UNITED MINE WORKERS OF AMERICA v. DOMINION COAL CO.
Mellish, J.

one by the defendants herein of intended wage reductions and altered conditions in the mines operated by them is illegal as against the plaintiffs herein and an injunction to prevent the same going into effect.''

District No. 26 is an unincorporated body, embracing in its membership the ''union'' employees of the defendant companies.

On November 8, 1920, an agreement was entered into on behalf of the defendant companies and their employees, fixing the rate of wages, etc., as from November 1, 1920, until November 30, 1921, ''both sides to agree to meet in Halifax twenty days before the expiration of this agreement *for the purpose of arranging a new understanding.''*

This is known as the ''Montreal Agreement.'' It was subject to the approval of the Branch of the United Mine Workers of America, known as District 26, a plaintiff herein. This approval was given as appears by a letter dated December 22, 1920, to the representatives of the different companies and signed by Baxter, Pres., and McLachlan, Sec'y of the District Union. On October 29, 1921, there is a letter from Merrill, General Manager of the Dominion Coal Co., to McLachlan, referring to the latter's letter of December 22, 1920, and notifying him that the company's representative would attend in Halifax in conformity with the Montreal Agreement on November 10 ''*for the purpose of arranging a new understanding.''*

The letter points out that conditions are such that the company must in future pay smaller wages or restrict employment to one or two days per week.

The parties, *i.e.* the representatives of District No. 26, and of the companies, met at Halifax in compliance with the Montreal Agreement on November 10, 1921, and on November 11, ''it was mutually agreed that the said agreement be continued for a period of one month additional or until 31st of December, 1921.'' ''It was further agreed that a meeting of the representatives............to be held not earlier than December 15th, 1921.''

This latter meeting was accordingly held at Montreal on December 16, 1921, when the companies produced a new schedule of wages and conditions which the District Union refused to accept, and the modification of which apparently the companies refused to consider.

On December 20, 1921, the companies accordingly notified their employees that the proposed schedule would become effective on January 1, 1921, *i.e.* on the termination of the Montreal Agreement. This schedule provides for the payment of wages at rates 25% less than those of the Montreal Agreement.

N.S.

S.C.

District No. 26 United Mine Workers of America v. Dominion Coal Co.

Mellish, J.

In view of the differences arising at the Montreal meeting on December 16, an application was made on behalf of the employees to the Minister of Labour for a Board of Conciliation under the Industrial Disputes Investigation Act, 1907 (Can.) ch. 20. This was granted by the Minister on December 24.

It is contended by the plaintiffs that by reason of the provisions of said Act the defendants are bound, notwithstanding the facts hereinbefore set out, to go on paying wages at the rate provided under the Montreal Agreement, which is to be considered in force until the dispute has been finally dealt with by the Board and a copy of its report delivered to the parties affected, and that such agreement cannot be terminated except on a thirty days' notice.

A motion was accordingly made on plaintiffs' behalf for an interim injunction restraining the defendants, *inter alia,* from putting into effect their proposed schedule until the trial. Russell, J., who heard the motion, granted the order in these terms. The obvious intention of this order is to compel the companies to pay their employees under the terms of the Montreal Agreement until the trial is concluded, and if the interpretation put on the Act by plaintiffs be correct, until the Conciliation Board has made its report.

This is an appeal from the said decision.

Following is the section of the Act, 1907 (Can.) ch. 20, amd. 1920 (Can.) ch. 29, sec. 5, relied on by the plaintiffs:—

"57. Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours; and in the event of such intended change resulting in a dispute, until the dispute has been finally dealt with by a Board, and a copy of its report has been delivered through the Registrar to both the parties affected, neither of those parties shall alter the conditions of employment with respect to wages or hours, or on account of the dispute do or be concerned in doing, directly or indirectly, anything in the nature of a lockout or strike, or a suspension or discontinuance of employment or work, but the relationship of the employer and employee shall continue uninterrupted by the dispute, or anything arising out of the dispute; but if, in the opinion of the Board, either party uses this or any other provision of this Act for the purpose of unjustly maintaining a given condition of affairs through delay, and the Board so reports to the Minister, such party shall be guilty of an offence, and liable to the same penalties as are imposed for a violation of the next preceding section."

Assuming for the present that the Dominion Parliament has

N.S.
S.C.
DISTRICT No. 26 UNITED MINE WORKERS OF AMERICA v. DOMINION COAL CO.
Mellish, J.

power to legislate in a way affecting, as this section obviously must, "property and civil rights" in the Province of Nova Scotia—a subject which, under sec. 92 of the B.N.A. Act, is assigned exclusively to the Provincial Legislature, it must at least be conceded that such property or rights cannot be destroyed or impaired without clear and unequivocal language. This must be remembered in construing the section in question.

In my opinion, the facts hereinbefore referred to, including any other facts disclosed on the material before us, are insufficient to establish that any of the defendants has violated or is violating or intends to violate the provisions of this section. I do not think either of the defendants gave any notice of an "intended change" or of an intention to "*alter* the conditions of employment" within the meaning of this section.

It was the expressed intention of the parties that existing conditions should terminate on December 31. After that date, unless a previous arrangement was made as provided in the several agreements, it was obviously contemplated by both parties that the conditions of employment should be open and unsettled. There is nothing, I think, in the Act to prevent the parties placing themselves in that position if they so desire. The section of the Act hereinbefore quoted is, I think, dealing with such a change in "conditions" as might arise by the coercive action of either employers or employees and not with such as might arise by reason of the beginning or ending of the operation of such a contract as the Montreal Agreement. The notices given by defendants did not purport to change or alter any existing conditions. What they did propose was a schedule establishing new conditions to cover a period subsequent to the expiry of existing conditions on the date agreed on—a period as to which no conditions of employment had been settled either expressly or by implication. It was open to the employees to accept or reject this proposal, or to go under protest, as they apparently have done, saving any right of redress which may be afforded under the provisions of the Act or otherwise.

Being of this opinion, I think it unnecessary to deal with the other interesting and important questions raised on the appeal. On the ground stated, I think there are no facts before us which would justify the action, and am therefore of opinion, with great deference and respect, that the appeal should be allowed with costs, and the judgment and order appealed from set aside.

Appeal allowed.

Sask.

C.A.

SPRIGGS v. SPRIGGS.

Saskatchewan Court of Appeal, Lamont, Turgeon and McKay, JJ.A. January 16, 1922.

EVIDENCE (§ IVG—421)—TRIAL—DIVORCE ACTION—COPY OF EVIDENCE USED AT FORMER TRIAL—ORDER OF JUDGE IN CHAMBERS AUTHORISING USE—RIGHT OF TRIAL JUDGE TO REJECT.

It is not open to a Judge at the trial to refuse to allow the plaintiff the full benefit of any order made by a Judge in Chambers as to the manner in which the plaintiff's claim is to be proved. Once the order is entered it becomes an order of the Court in a matter over which the Judge in Chambers has jurisdiction and so long as such order remains unreversed the plaintiff is entitled to the benefit thereof.

WRIT AND PROCESS (§ IIC—35)—DIVORCE ACTION—RULES GOVERNING SUBSTITUTIONAL EVIDENCE—JURISDICTION OF LOCAL MASTER TO ORDER.

Under the Saskatchewan rules the practice and procedure in an action for divorce is the same as in an ordinary action and a Local Master has jurisdiction to order substitutional service.

DIVORCE AND SEPARATION (§ II—5)—SASK. RULES—NO APPEARANCE ENTERED OR DEFENCE FILED—NECESSITY OF PROVING CASE AT TRIAL.

The effect of Rule 607 (Sask.) is that in an action under the order relating to Divorce and Matrimonial Causes the plaintiff is compelled to prove his case at the trial, even if no appearance or defence is entered and his allegations are not denied. Rule 112 as to giving notice of trial is not affected and may properly be given by filing in the local Registrar's office.

[See Annotations, Divorce Law in Canada, 48 D.L.R. 7; 62 D.L.R. 1.]

APPEAL from a judgment dismissing the plaintiff's action for divorce (1921), 60 D.L.R. 563. Reversed.

R. Robinson, for appellant; No one, *contra*.

The judgment of the Court was delivered by

LAMONT, J.A.:—The plaintiff and his wife were married in November, 1915. The plaintiff was then a soldier on active service, with temporary leave. On returning from overseas service in 1919, he found that his wife had gone away with one Hunter and was living in adultery with him at Edmonton, and had there a child to him. The plaintiff brought a suit for divorce in the Courts of Alberta. Evidence was taken which shewed facts and circumstances sufficient to justify the granting of the decree. The Alberta Courts, however, dismissed the plaintiff's action on the ground that he was not domiciled in Alberta, but in Saskatchewan. The plaintiff then brought this action. After the trial in Alberta, the plaintiff's wife left Edmonton for parts unknown, and could not be found. Hunter had also disappeared. The plaintiff obtained from the Local Master an order for substitutional service of the writ of summons and statement of

Sask.
C.A.
SPRIGGS
v.
SPRIGGS.
Lamont, J.A.

claim upon the defendants, and such service was effected. No appearance was entered or defence filed. The plaintiff served his notice of trial by filing a copy thereof in the office of the Local Registrar of the Court.

When the matter came on for trial (1921), 60 D.L.R. 563, the trial Judge dismissed the action for the following reasons: (1) Because the Local Master had no jurisdiction to make the order for substitutional service, and (2) because the notice of trial was not sufficient.

The trial Judge also appears to have considered that it was not sufficient on the part of the plaintiff to establish the facts entitling him to a divorce by means of a copy of the evidence given by four witnesses who testified in the Alberta Court. Prior to the trial the plaintiff had obtained from a Judge in Chambers an order giving him leave to use at the trial here a certified copy of the evidence of these witnesses.

In my opinion, it is not open to a Judge at the trial to refuse to allow the plaintiff the full benefit of any order made by a Judge in Chambers as to the manner in which the plaintiff's claim is to be proved. Once the order was entered, it became the order of the Court in a matter over which the Judge in Chambers had jurisdiction. So long as such order remains unreversed, the plaintiff is entitled to the benefit thereof.

The jurisdiction of the Local Master to order substitutional service depends upon the statute and the rules. Section 45 of the King's Bench Act, R.S.S. 1920, ch. 39, provides that Local Masters shall have the jurisdiction, powers and authority assigned to them by the Rules of Court. Rule 620 (now R. 589) gives to a Local Master in regard to actions brought in his judicial district, "all such authority and jurisdiction in respect of the same as under the Judicature Act or these rules may be transacted or exercised by a Judge at Chambers," with certain exceptions therein set out.

In an ordinary action a Judge in Chambers has jurisdiction to order substitutional service. It follows, therefore, that a Local Master has the same jurisdiction, unless the directing of substitutional service comes within the exceptions set out in R. 620, or is taken away by the rules relating to Divorce and Matrimonial Causes.

The trial Judge was of opinion that the granting of the order came within exception (f) to R. 620, which excepts from the Local Master's jurisdiction matters affecting the custody of infants.

With deference, I am unable to see how an application for substitutional service on the plaintiff's wife can properly be

Sask.
C.A.
SPRIGGS v. SPRIGGS.
Lamont, J.A.

termed an application for the custody of the wife's infant child, particularly when the plaintiff refuses to recognise the child as his own and makes no claim to the custody thereof.

Rules 800 (now 595) and 829 (now 625) read as follows:—

"(800) All actions for nullity of marriage, restitution of conjugal rights, jactitation of marriage, judicial separation, or dissolution of marriage, shall be commenced by writ of summons and except as is herein otherwise provided the procedure and practice shall be the same as is provided for actions so commenced in the Court of King's Bench.

(829) No application under this order except those falling within the provisions of rule 800 shall be made to a master, or local master."

Under these rules the practice and procedure in an action for divorce is the same as in an ordinary action, unless special provision has otherwise been made. No special provision having been made as to the service of the writ of summons for divorce, the making of the order for substitutional service, in my opinion, was within the jurisdiction of the Local Master.

The other ground upon which the action was dismissed was, that the notice of trial had been served by filing a copy thereof in the office of the Local Registrar instead of by personal service.

Rule 112 provides:—

"112. When no appearance has been entered for a party all orders, notices, papers, documents in or relating to the action may, unless otherwise ordered by the court or a judge, be served by filing the same or a copy thereof in the local registrar's office."

But Rule 811 (now 607) reads as follows:—

"In an action under this order, a plaintiff shall not be entitled to judgment in default of appearance or defence or on admissions in pleadings; but, in such event, the action shall proceed as if there had been filed and delivered a statement of defence denying all the allegations in the statement of claim."

The order referred to is O. 41 relating to divorce and matrimonial causes.

The effect of R. 811, in my opinion, is, that not only is a plaintiff in an action for divorce not entitled to sign a default judgment, but he is placed in the same position as to proof of his claim as if a defence denying all allegations in the statement of claim had been filed. The plaintiff must prove his case, even if his allegations be not denied. But that, I think, is the extent to which the rule goes. It will be observed that the rule does not say that the action shall proceed as if an appearance containing an address for service had been entered. The rules

Alta.
App. Div.

require that the appearance entered by a defendant, whether he appears personally or by solicitor, shall contain a memorandum of address of the defendant or the solicitor, as the case may be, and if that address is more than 3 miles from the office of the Local Registrar, an address to be called an address for service, not more than 3 miles from the Local Registrar's office. Rules (105 and 106). Where no appearance is entered R. 112 applies.

As R. 811 did not provide that the action should proceed as if an appearance had been entered, that rule, in my opinion, affects the ordinary procedure to the extent only of preventing the plaintiff from obtaining judgment by default, and of compelling him to prove his case at the trial. The notice of trial given was, therefore, sufficient.

The appeal, in my opinion, should be allowed, and usual decree made.

Appeal allowed.

CURTIS v. LANGROCK.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. January 31, 1922.

ASSIGNMENT (§ II—20)—OF INSURANCE POLICY—VERBAL—CONSIDERATION OF MARRIAGE—DEATH OF INSURED—FAILURE OF CONSIDERATION—GIFT—FAILURE OF INSURED TO DIVEST HIMSELF OF LEGAL TITLE—VALIDITY.

The deceased took out a policy of insurance on his life expressed to be payable to his "executors, or administrators or assigns." A premium was to be paid yearly for a period of 20 years from the date of the policy if he should live so long; the insured was accidentally killed a few months afterwards and the plaintiff claimed the insurance moneys on the ground that the policy had been verbally assigned to her. The Court held that if the assignment was in view of the intended marriage between the insured and the plaintiff, it must be held void because of failure of consideration the marriage not having taken place prior to the death of the insured. Neither could it be upheld as a gift, because the donor had failed to divest himself of the legal title to the policy which he might have done by instrument in writing and the gift was therefore incomplete.

APPEAL by defendant from the judgment of Simmons, J., upon an interpleader issue between the parties as to whether moneys payable under an insurance policy is the property of the plaintiff as against the defendant as executor of the estate of the insured. Reversed.

Frank Ford, K.C., for appellant.

G. B. O'Connor, K.C., for respondent.

SCOTT, C.J.:—This is an appeal by the defendant from the judgment of Simmons, J., upon an interpleader issue between the parties.

Alta.

App. Div.

CURTIS
v.
LANGROCK.

Scott, C.J.

On February 23, 1920, the deceased procured from the North American Life Assurance Co. a policy of insurance upon his life the loss thereunder being payable upon his death to his executors, administrators or assigns. He died, unmarried, in August, 1920.

After the death of the deceased, the plaintiff and defendant appear to have respectively claimed the moneys payable under the policy and, by reason of their conflicting claims, the company applied for and obtained an order directing it to pay into Court the amount thereof, less its costs and exchange, that upon such payment it should be discharged from further liability and that the parties should proceed to the trial of the following issue, *viz.*: "Whether the moneys payable by the said Company or any part thereof is the property of the plaintiff as against the defendant.

The plaintiff was married to one Curtis, in 1904. He went overseas. On his return he went to the United States, where he in 1917 applied for and obtained a divorce from the plaintiff on the ground of desertion. She appears to have had notice of his application, but did not oppose it. After obtaining his divorce, he married another woman and is now living in Calgary.

The deceased went overseas in January, 1918. Before leaving, he and the plaintiff were engaged to be married. He returned from overseas in 1919. In July, 1920, she gave instructions to apply for a divorce from Curtis, and the deceased appears to have been assisting her in obtaining it, the understanding between them being that they were to be married as soon as she obtained a legal divorce.

The plaintiff states that in February, 1920, the deceased told her that he was thinking of taking out an insurance policy for her benefit, that she then told him that she would rather he would not do so until they were married, as in a small place like Lacombe (where they were then living), to have her name in the policy would be liable to give people a chance to talk, that he replied that he thought he could take the policy out for her benefit without having her name in it, and that in March, 1920, he brought her the policy, saying to her: "There, Sadie, is a present for you, take it and put it away and take good care of it, for it is all I have to givé you."

Sub-section 7 of sec. 9 of ch. 25 of 1916 (Alta.), the Life Insurance Beneficiaries Act, provides that, where an unmarried man effects the contract of insurance or declares it to be for the benefit of his future wife, but at the maturity of the contract the assured is still unmarried, the insurance money shall be for the benefit of the assured or shall form part of his estate, as the case may be.

Alta.
App. Div.
CURTIS v. LANGROCK.
Stuart, J.A.

In my view, the effect of this provision is that the intention of the assured in effecting the insurance must govern, and it is clear from the plaintiff's evidence that the policy was intended by the deceased to be for the plaintiff's benefit only in the event of her becoming his wife, and that it was delivered to her solely with that intention. I, therefore, cannot see any reason why it should not be deemed to be an insurance within the meaning of that provision or why, in the event of the assured dying unmarried, the moneys payable under it should not form part of his estate.

The Act referred to appears to be intended as a codification of the law of the province relating to life insurance. I can find nothing in it which would prevent the assured taking out a policy for the benefit of a future wife without stating therein that the insurance was effected with that object. In fact, where the policy states that the estate of the assured shall be beneficiary, the Act expressly authorises him, by a declaration in writing, to direct that his future wife shall be the beneficiary. But that is not the only way in which she should be constituted the beneficiary. If it is clearly shewn, as it has been shewn in the present case, that the insurance was effected solely for her benefit as his future wife, the delivery of the policy to her shortly after it was obtained would be sufficient to constitute her the beneficiary, subject, of course, to the condition that the marriage should afterwards take place.

Notwithstanding the fact that when the deceased delivered the policy to the plaintiff, he referred to it as a present, I am of opinion that, in view of the evidence as to the intention of the deceased in effecting the insurance, the delivery of the policy to her should not be treated as a gift, but as a transfer to her in consideration of marriage, and that, as the marriage did not take place, the consideration failed.

The trial Judge gave judgment for the plaintiff with costs. I would allow the appeal with costs, and direct judgment be entered for the defendant in the Court below, with costs.

STUART, J.A.:—In this case, I have had the peculiar advantage of reading the judgments of the other members of the Court before proceeding to consider the matter. And there would seem to be very little left to be said after the full review of the authorities made in those judgments. Upon the interpretation of the various sections of the Insurance Act, 1916 (Alta.), ch. 25, I agree with what is said by my brothers Beck and Clarke.

What we have here is a contract in writing and under seal whereby the North American Life Ass'ce Co. covenanted and agreed with the deceased Langrock, in consideration of an annual

payment or premium of $65.10 to be paid on February 20 in each year during Langrock's life, that, upon his death, and *upon the surrender* of the written contract, called a policy, it would pay to his executors, administrators or assigns the sum of $2,000. And we have a verbal assignment which, if voluntary, was merely a gift of Langrock's rights under this contract to the plaintiff, accompanied by manual delivery to her of the policy, and this at a time when the plaintiff and the deceased Langrock were engaged to be married. Langrock was killed before the marriage took place, and the question is whether the moneys which the Assurance Co. thereupon became bound to pay belong to the plaintiff or to Langrock's executor, the defendant.

There is no evidence to shew that the verbal assignment was other than voluntary. The promise to marry, which, assuming the foreign divorce obtained by her previous husband to have been valid, was also itself valid, had been made long before the policy was secured. It was, therefore, not a consideration which the law recognises, being entirely past. The verbal assignment, therefore, must be looked upon as a gift. Even as a gift it was, as I understand the law, a conditional one, inasmuch at it was made in contemplation of marriage. If the donee had repudiated her contract of marriage before the donor's death, the donor would have been entitled to get back the policy and all his rights under it. But the donee did not repudiate, and there is nothing to shew that the non-performance of the marriage contract was due to any fault of hers. Neither is there anything to shew that the deceased donor intended the gift to take effect only upon the marriage, that is, as a condition precedent. The gift was no doubt subject to a condition subsequent, but that condition subsequent was the repudiation of the marriage contract by the donee, not the non-performance of the marriage on account of his death. Unless this is the case, that is, if the actual marriage was a condition precedent to the effectiveness of the gift, then there would be nothing more to be said and a discussion of the consequences of the absence of consideration would be quite unnecessary.

The problem is, therefore, simply reduced to this, whether a verbal voluntary assignment of Langrock's rights under the contract contained in the policy, accompanied by manual delivery of the policy itself, will be enforced by this Court as against Langrock's legal representatives.

I think it is unfortunate that decisions were ever given (though being given by such Judges as Lord Cairns and Pollock, C.B., they must probably be right), which apparently treated the mere physical paper contract called a policy of insurance, which in

Alta.
App. Div.
CURTIS v. LANGROCK.
Stuart, J.A.

substance is nothing more than the *evidence* of certain rights, as a chattel capable of ownership in itself, and that, too, an ownership distinct from the ownership of the rights of which it was evidence, so that the two ownerships might reside in different persons, although the subject of the one was nothing more than mere evidence of the existence of the subject of the other. An equitable mortgage by way of a deposit of title deeds is more than a mortgage of the deeds; it is a mortgage of the property of which the deeds are the evidence of title. Of course bonds, debentures, and other documents payable to bearer stand in a different position. Theoretically, perhaps, the mere document may be the subject of separate ownership, but I should have preferred a theory or principle which would draw the ownership of the evidence of rights to the ownership of the rights themselves. See *Searle* v. *Law* (1846), 15 Sim. 95, 60 E.R. 553, and comment thereon in *Re Richardson* (1885), 30 Ch. D. 396, at p. 402, 55 L.J. (Ch.) 741, 34 W.R. 286. I do not think, however, that we should be worried about any theory of a gift of the physical document. There can be no doubt that Langrock intended a gift, not of the mere document, but of his rights under it, and that he handed the policy over merely as evidence of those rights. Certainly the plaintiff would have thanked him little for a gift of the piece of paper, if that is all he intended. And the contest here is not over the document, but over the money which the Assurance Co. have paid into Court. We need not, therefore, be concerned with the right to the document, except as that may be involved in the question of the necessary proceedings which would have had to be taken to enforce rights under it.

The objection to the validity of the alleged assignment here seems to be put in two ways. It is said that the Court will not complete an imperfect gift, and it is said that an equitable assignment, if voluntary, will not be upheld. But I think these statements mean at bottom the same thing. I apprehend that what is meant is this: Where the property in question is, in the hands of the donor, capable of having legal estate in it transferred by the donor to the donee, but the donor does not transfer that legal estate in a form which a Court of equity would recognise, will not be enforced if there has been no consideration. This means that if the donor has no legal estate in the property which he can possibly transfer, but has only an equitable estate, being merely a *cestui que trust*, the omission to convey a legal estate cannot be fatal. This was the situation in *Kekewich* v. *Manning* (1851), 1 DeG. M. & G. 176, 42 E.R. 519, 21 L.J. (Ch.) 577, 16 Jur. 625. There the settler was merely a *cestui que trust*. The funds were held by trustees.

She made a settlement in writing, and it was attacked as being purely voluntary. As I read the case, it was because she had done everything that she could do to transfer the property in the form to which alone she was entitled to it, that is, because, so far as she was concerned, the gift was not imperfect but complete, that it was upheld, though voluntary. Then in *In re King; Sewell* v. *King* (1879), 14 Ch. D. 179, 49 L.J. (Ch.) 73, 28 W.R. 344, in which policies of insurance were involved, the donor had written a letter to the trustee of a settlement which he had made of other property, stating that he intended to make a similar settlement of three policies which he enclosed, and agreeing to do so, and adding, at p. 180, "until the settlement is executed, I am to be bound by this agreement in the same manner as if the settlement were actually executed." And this letter was enclosed with another letter in which he said, at p. 181: "The enclosed is the formal letter of assignment previous to a deed and as binding." Hall. V. C., said, at p. 186, "I am of opinion, therefore, that I cannot hold that the assignment is incomplete," and again, at p. 187, "On the contrary, I hold that there was a complete assignment of the policies to the trustee to whom the three policies were handed over, and that the two letters were a complete settlement of the policies mentioned therein." It will be observed that this case was in 1879, after the Act of 1867 (Imp.), ch. 144, which made insurance policies assignable at law. The letters were not in the form of assignment prescribed by that Act, so that the case does in one view seem to support the opposite contention. But it may also be looked upon as one example of an intended creation of a trust.

My conclusion from the authorities is that where the donor can make a conveyance of the property at law and does not do so, but only makes an assignment which equity would otherwise recognise, the Court will not enforce the assignment if it is voluntary. Langrock could have, under the law, made a complete legal assignment, but did not do so. Inasmuch as what he did was voluntary, I am of opinion that it cannot be enforced.

I would allow the appeal, but would agree with the disposition of costs proposed by my brother Clarke, and also with what he proposes as to the $20.

Beck, J.A. (dissenting):—This is an appeal by the defendant against the judgment of Simmons, J., at the trial.

The defendant is the executor of E. H. Langrock, who died August 9, 1920.

On February 23, 1920, the deceased effected an insurance upon his life for $2,000, in the North American Life Ass'ce Co., the insurance moneys being payable to the assured's executors, ad-

Alta.
App. Div.
CURTIS
v.
LANGROCK.
Beck, J.A.

ministrators or assigns. The insurance moneys were paid into Court by the company, the plaintiff claiming them as an assignee of the deceased; the defendant as his executor.

The plaintiff was married to one Curtis in 1904. He went as a soldier overseas and left her in Lacombe. They had before this "parted" under a separation agreement. After returning from overseas he went to the United States and, she says, obtained a divorce from her on the ground of desertion. This was in the summer of 1917. He remarried and at the time of the trial was living in Calgary. The deceased and the plaintiff had known each other for years. He enlisted and went overseas in January, 1918. Before he left, it was agreed between him and the plaintiff that they should be married as soon as she obtained a Canadian divorce. He was discharged from military service in March, 1919. The plaintiff was living in Saskatchewan at that time. Ultimately she returned to Lacombe. He also came to live there. Solicitors were instructed to take proceedings in Alberta for divorce in July, 1920. When the deceased came to live in Lacombe, he lived first with his parents. About May 1, 1920, he went to live with the plaintiff as a boarder, there being also another boarder, named Benton, who remained till very shortly before the death of the deceased.

With reference to the policy of life insurance, the plaintiff says in substance:—

Sometime in February, 1920, the deceased said to the plaintiff that he was thinking of taking out a life insurance policy for her benefit. She told him that she would rather he would not do so until they were married, and that he asked, why? and she said that, in a small place like Lacombe, having her name on a policy would be liable to give people a chance to talk. So then he said he thought he could take the policy out for her benefit without having her name in the policy. Then, about March 16, he came to the house and brought the policy in question. He laid the policy down on the dining table and said: "There, Sadie, is a present for you." The plaintiff says she looked up at him and said "No, I did not do it," referring to having her name on the policy. There were present the plaintiff's brother—McCutcheon—and a friend of his, one Lacey. He turned to them and said: "I would get fits if I had put her name in the policy"; and then her brother asked him what he would get fits for, and he said, "Because she did not want her name in the policy." The deceased spread the policy on the table and asked the two other men to have a look at it. After they had looked it over, the deceased folded it up and put it back in the envelope and handed it back to the plaintiff, saying, "Take that and put it

away, and take good care of it, for it is all I have got to give you." He also gave her the receipt for the first premium. Later he told her he had given a note for the premium. When the note came due he said he was $20 short of enough money to pay it, and she gave him the $20. He subsequently gave her the note. She produced the policy, the receipt and the note and said that they had been in her possession continually from the time she had first received them. McCutcheon and Lacey corroborate what the plaintiff says took place in their presence. The trial Judge expresses himself as having no doubt about the facts as related by McCutcheon and Lacey. He gave judgment declaring the plaintiff entitled to the insurance moneys standing in Court.

The Life Insurance Beneficiaries Act (ch. 25 of 1916 (Alta.)) has been substituted for C.O. 1898, ch. 49.

Sub-section (3) of sec. 6 of the Act reads as follows:—

"(3) The assured may designate the beneficiary by any mode of "declaration" as defined in this Act and may, whether the insurance money has or has not been already appointed or apportioned, from time to time, except as against a beneficiary for value and subject to the provisions of this Act as to preferred beneficiaries, by declaration, appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate."

"Declaration" is defined in sub-sec. (4) of sec. 2 as follows:—

'Declaration' means the designation by the assured of the beneficiary under a policy of insurance or the appointment or apportionment of the insurance money whether such designation, appointment or apportionment is made by the contract of insurance itself or by any instrument in writing, including a will, attached to or endorsed on it or in any way identifying it."

It is quite clear to me that the correct interpretation of the definition of a "declaration" necessitates a declaration in writing and that consequently the plaintiff can establish no claim under the above-mentioned Act. As a matter of fact her claim is not based upon the ground of such a declaration; but upon the ground that the facts proved shew a perfected and complete gift of the policy by way of an equitable assignment; and I have referred to the statute mainly because the defendant's counsel introduced it largely in his argument.

Counsel for the plaintiff placed his case solely on the ground of a gift *inter vivos* and with regard to this ground of claim much discussion was devoted to the questions whether the gift was complete; whether it was effective in law or equity without

Alta.

App. Div.

CURTIS v. LANGROCK.

Beck, J.A.

a legal assignment; whether consideration was not essential to an assignment of a chose in action.

The Act already referred to enacts (sec. 6, sub-sec. (7)) that "nothing in the Act shall restrict or interfere with the right to effect or assign a policy in any other manner allowed by law."

Formerly at law no possibility, right, title, or thing in action could be granted or assigned but in time certain choses in action became assignable even at law, either by custom or by statute; and the assignment of choses in action was recognised in equity, subject to all equities between the assignor and the debtor. See 1 White & Tud., L.C. in Eq., pp. 93, *et seq.*

A policy of life insurance was made assignable at law by an Act of 1867 (Imp.), ch. 144, but independently of that Act was assignable in equity. Ib. pp. 148-150.

It is stated in Bunyon's Life Assurance, 5th ed., p. 232, with a reference to a number of authorities that:—

"*Choses in action*—that is, things of which the owner has not the possession, but only a right to recover them by a suit or action at law, and such is the sum assured, by a policy payable only upon the happening of a particular event—were at law regarded as incapable of assignment; even although by the terms of the policy the sum was made payable to the executors, administrators or assigns of the assured. But an assignee of a *chose in action* at common law was, as a rule, allowed to sue in the name of the assignor, and a *chose in action* has always been assignable in equity."

The recognition in equity of the assignability of choses in action not admitted at law was but an instance of the equitable, juster and more reasonable doctrines of equity overriding those of the common law Courts; and by statute the former must now be accepted, where there is inconsistency, by substitution of the latter.

The provision in the Judicature Act as to assignments of choses in action in no way interferes with the effectiveness of an equitable assignment. *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, at pp. 461-2, 74 L.J. (K.B.) 898, 11 Com. Cas. 1, 4 Hals. pp. 367-8.

If the equitable assignment is perfected between the parties notice to the debtor or other person occupying a like position may be, and probably is, necessary as a preliminary to suit against him, but is in no way essential to the validity or effectiveness of the assignment as between the parties.

This Court is not a fusion of Courts of common law and equity. It was brought into existence—and the same is to be said of its predecessor in the North West Territories—as a Court

Alta.
App. Div.
CURTIS v. LANGROCK.
Beck, J.A.

administering the one body of law consisting of what was formerly administered partly in one Court and partly in another.

There may be, and in some cases are, different methods of procedure, confined, however, as far as now occurs to me, to the question of parties, in actions for the purpose of obtaining the appropriate remedy founded upon, a right based upon equitable principles and in actions to enforce strictly legal rights. In the case of choses in action, the old rules were as follows:—

"Where the assignment is of a *chose in action in equity*, the assignee could sue for it in his own name in the Court of Chancery. Where the assignment was of a *legal chose in action*, the Courts of Law for a long time allowed the assignee to sue in the name of the assignor.

. . . . . .

Equity, however, would interfere with its assistance, if the assignor, being properly indemnified against all costs and charges, refused to allow the assignee to use his name or obstructed him when doing so. An ordinary debt or chose in action before the Judicature Act was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit in equity, the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, partly in order primarily to bind him and prevent him suing at law, and also to allow him to dispute the assignment if he thought fit." (1 White & Tud. L. Cases, p. 140).

The provisions of the Judicature Act relating to assignment of choses in action relate primarily only to procedure, though in certain cases they place the assignee in a better position than he was before. *Tolhurst* v. *Associated Portland Cement Co.*, [1902] 2 K.B. 660, affirmed in part, [1903] A.C. 414; *Brandt's & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, 74 L.J. (K.B.) 898, 11 Com. Cas. 1.

So that in the present case, if there is otherwise a perfected gift of the policy of insurance, the mere circumstances that, in order to have effect given to the gift, it would, in a jurisdiction where there were separate Courts of law and equity, be necessary to take proceedings in a Court of equity and, in this jurisdiction under our system of procedure, necessary to make the donor or his personal representative a party to the action, that is mere procedure and in no way affects the question of the completeness or incompleteness of the gift.

The question then to be decided is whether by the manual delivery of the life policy by the deceased to the plaintiff with

Alta.
App. Div.
CURTIS
v.
LANGROCK.
Beck, J.A.

the intention of making to her a gift of the moneys payable under it was effective as a gift.

The American cases seem distinctly in favor of deciding this affirmatively.

In *Gledhill* v. *McCoombs* (1913), 86 Atl. 247, 45 L.R.A. (N.S.) 26, it is expressly held that a policy of life insurance can be the subject of a gift and that a gift of a policy may be made by mere delivery of the policy without a written assignment. That was a decision of the Maine Supreme Judicial Court. In the course of the judgment, it is said, at p. 248:—

"In view of the overwhelming authority that a policy of life insurance payable to the legal representatives of the assured may be made the subject of a gift, in the same manner as other choses in action, and that such gift may be effected by the mere delivery, without assignment, of the instrument, if accompanied by such words or acts on the part of the donor as indicate a clear intention to give, coupled with the subsequent retention by the donee, it cannot be seriously contended here that, if the necessary elements of fact are proved, the gift was not consummated.

Thus, a valid gift of a negotiable promissory note may be made without endorsement or other writing . . . of a savings bank book unaccompanied by an assignment . . . . ; of unindorsed certificates of stock . . . . ;and of an unassigned life insurance policy . . . This rule of law is recognised by this Court in *Brown* v. *Crafts*, 98 Me. 40, 56 Atl. 213, as follows:—'The delivery of this property was not incomplete by reason of the lack of formal endorsement or assignment of certificates of stock, bonds, or notes. The gift of these choses in action could have been completely executed by a simple delivery, with the intent at once to pass the title.' Delivery with intent to pass the title irrevocably is sufficient.' In such case, of course, *it is the equitable or beneficial interest that passes, while the mere naked legal title* remains in the donor."

An older case, and one in which the matter is discussed at greater length, and which is to the same effect is *Opitz* v. *Karel* (1903), 62 L.R.A., p. 982 (Wisconsin Sup. Court).

In Am. & Eng. Ency. Law, ed. 2, val. 14, tit. "Gifts," pp. 1022, 1023, it is said:—

"In accordance with the general rule that delivery of the property is necessary to perfect a gift, the doctrine has been laid down by an eminent authority that, in the case of the gift of a chose in action, the law requires a written assignment or some equivalent instrument to effect the transfer (2 Kents Commentaries 439) ; and this doctrine seems to be well supported

by both reason and authority, where the chose in action, which is the subject of the gift, is not evidenced by a note, bond, or other instrument itself capable of actual delivery, or where for any reason the actual delivery of such written evidence of the chose in action is impracticable,—for to hold otherwise would be in effect to decide that the owner of such chose in action could not make a gift of it, which would be an unreasonable limitation of his right of property. . . . . But where the chose in action is evidenced by a written instrument, such as a bond, bill, promissory note, or other writing, which is capable of actual delivery, this reason would not hold, and in such case it is well settled that no written assignment is necessary, but that the delivery of the written evidence of the chose in action, made with the intention of transferring the right of property and under such circumstances as would constitute a valid gift of personal property in possession, operates as an equitable assignment of the property represented, and is sufficient to constitute a valid gift thereof.

Life-Insurance Policy—In the *United States* it seems that a valid gift of a life insurance policy may be made by delivery of the policy without any written assignment. In *Great Britain* a written assignment is necessary" (citing *Rummens* v. *Hare* (1876), 1 Ex. D. 169, 46 L.J. (Ex.) 30, 24 W.R. 385; *Howes* v. *Prudential Ass'ce Co.* (1883), 49 L.T. (N.S.) 133 (Lopes J.))

See further pp. 1028-9; 1030.

In English text books one can find the statement made, for instance, in Bunyon's Life Insurance, ed. 4, p. 355, that:—"A *chose in action* such as a policy, cannot, however, be assigned by mere delivery." *Howes* v. *Prudential Co.*, 49 L.T. 133, but at p. 550 the author says of this case:—"This case seems unsatisfactory and at variance with the current of modern decisions."

But in ed. 5, p. 239, a note says:—"See further post p. 245 (apparently a mistake, for p. 371) and (of the case cited): 'in this case Lopes J. held that the assignment must be in writing, *sed quaere*."

At p. 371, note (d), *Howes* v. *Prudential Trust*, has this note appended to it:—"This case, it is conceived, may be supported on the ground that a trust is not to be implied by words of present and imperfect gift, and that *mere* delivery of the policy does not *necessarily* confer a right to the policy moneys."

In Porter on Insurance, ed. 4, p. 340, it is said that "a person to whom it [a policy] has been *simply handed*, without writing, by the assured in his lifetime, cannot recover from the assurers thereon. (*Howes* v. *Prudential, supra; Re O'Hara's Tontine*

Alta.
App. Div.
CURTIS
v.
LANGROCK.
Beck, J.A.

(1857), 30 L.T. (Jo.) 128, 3 Jur. (N.S.) 1145, 6 W.R. 45); but at p. 360 it is said:—

"To constitute such a gift the policy may *simply* be delivered over *with appropriate declarations*, or be assigned in writing or declared to be held by the donor in trust for the donee or directed to be held by a trustee, an insurer or a bailee for a particular purpose."

In 15 Hals. tit. "Gifts," p. 411, it is said that policies of life insurance must be assigned by an instrument in writing, notice must be given to the assurer and the assignment must be stamped. But, first, this statement is said after the statement (p. 409) "that there are three modes by which a gift *inter vivos* can be perfectly made, namely: (1) by deed or instrument in writing; (2) by delivery in cases where the subject of the gift admits of delivery; and (3) by declaration of trust, which is the equitable equivalent of a gift," and (secondly) the only authority cited for the proposition is a statutory enactment, 1867 (Imp.), ch. 144, together with this note, at p. 411:—

"There may, however, be a valid gift of the document constituting the policy without either assignment or notice, though the donee would be unable to recover the money assured by it. *Rummens* v. *Hare* (1876), 1 Ex. D. 169 (C.A.); . . . . See too *Barton* v. *Gainer* (1858), 3 H. & N. 387, where it was held that a gift of a document, securing a debt was good, although the debt itself did not pass."

Of *Rummens* v. *Hare*, Bunyon, ed. 4, p. 549, says:—"The Courts . . . . were careful to say that they decided nothing but the question of the right to the possession of the document and left open the question as to the right to the insurance money."

The subject of gifts *inter vivos* is treated in 12 R. C., pp. 408, *et seq.* In the English Notes, it is said (pp. 429, 430):—

"That a gift of a specialty debt may be completed by the delivery of the document with the intention of making a gift, appears to have been assumed in the judgment of the Court of Exchequer in *Barton* v. *Gainer* (1858), 3 Hurl. & N. 387, 27 L.J. Ex. 390, 4 Jur. (N.S.) 715. The contention, however, there, was that the documents in question were in the form of debentures or mortgages under the seal of a company constituted under Act of Parliament which provided a statutory form of transfer of such mortgages and that without such transfer the property could not have been vested in the donee. The effect of this argument is left open by the judgment, which decides that, at all events, there was no right in the executors of the donor to recover the deeds.

The decision in *Barton* v. *Gainer* was followed by the Court of

Appeal in *Rummens* v. *Hare* (C.A. 1876), 1 Ex. D. 169, 46 L.J. Ex. 30, 34 L.T. 407, 24 W.R. 385, where a policy of life insurance had been delivered with the intention of making a gift. The action was for detention of the policy, and the Court held that, whoever had the right to the money, the executors of the donor had no right to recover the policy from the donee. The judges seem to have thought that the executors had a right to the money, but there was no actual decision upon the point.

It is stated in the report of *Rummens* v. *Hare*, that the provisions of the Act, 30 & 31 Vict., c. 144, ss. 3, 5 (as to the assignment of policies) had not been complied with; and the expressions in the judgment appear to support the view that this circumstance prevented the gift being complete, as a delivery of a specialty with the intention of making a gift, according to the old cases. This view, as there is no actual decision on the point, appears to demand examination."

Several provisions of the Act are quoted, and then the author proceeds, at p. 430:—

"The Act thus gave certain facilities for giving a legal title by the statutory assignment. But it does not expressly say that a title cannot be acquired otherwise than by assignment; on the contrary, it implies that there may still be a "derivative title" otherwise than by assignment. It may therefore well be questioned whether the title acquired by gift of the specialty without any assignment in writing should not be as good after the passing of the Act as before."

In *Re King, Sewell* v. *King* (1879), 14 Ch. D. 179, 49 L.J. (Ch.) 13, 28 W.R. 344, the facts were that a man had made a settlement on his first marriage, and, being a widower, and desiring to marry again, wrote to one of the trustees thereof saying that he desired to make a settlement of six policies on his own life, on the children by the first marriage, and *handed* three to one trustee, and told him that the others were in a bank as collateral security for a loan, but that he would pay off the loan, but made no legal assignment, and no notice was given to the insurers or the other trustee.

Hall V.-C. held (1) that the evidence shewed a complete gift of the six policies; (2) that the person whose duty it was to give notice to the insurers was the trustee and not the donor; (3) that such notice only gave a legal title to sue in the name of the assignee and nothing more.

So that the only cases in England which are cited as authorities for the proposition that there cannot be a gift of moneys to become payable under a life policy by means of a gift of the policy accompanied by appropriate words of gift are *Barton* v.

Alta.
App. Div.
CURTIS
v.
LANGROCK.
Beck, J.A.

Gainer, *Rummens* v. *Hare*, *Re O'Hara's Tontine*, and *Howes* v. *Prudential Ass'ce Co.*

In *Barton* v. *Gainer* (1858), 3 H. & N. 387, 157 E.R. 520, 27 L.J. (Ex.) 390, 6 W.R. 624, the plaintiffs, executors of the donor, failed in an action to detinue for debentures. The Court said, at p. 391:—

"The defendant is clearly entitled to retain these debentures. It cannot be doubted that the testator meant to give them. He intended that she should have the property in the securities, and evidently believed that the possession of the documents would enable her to derive the benefit of them. It *may be* that this cannot be, by reason of the company's act," the latter words being an evident misprint for "The Companies Act."

The foregoing is a quotation from the report in the Law Journal. The report in Hurlstone & Norman—the judgment was evidently given orally—is to the same effect.

In *Rummens* v. *Hare*, 1 Ex. D. 169, 46 L.J. (Ex.) 30, 24 W.R. 385, the Court distinctly disavowed dealing with the question of the beneficial interest in the moneys. It is said, at pp. 171, 172:—

"the intestate could not have claimed to have the document returned to him, nor can his administratrix now claim it. *We have nothing to say as to the money which is secured by it.*"

In this case also the judgment was given orally, and is set out in slightly different terms in the different reports. My quotation is from the authorised report. *Re O'Hara's Tontine* seems to have no bearing on the question.

Howes v. *Prudential Ass'ce Co.* is reported only in the Law Times Reports. The judgment—that of Lopes, J.—was given orally at the close of the argument. During the course of the argument, the Judge said, at pp. 133, 134:—"It is a *chose in action* and there was no assignment in writing. Have you any authority to shew that a *chose in action* can pass in this way?"

Counsel referred to one decision not really in point, and the Judge gave judgment against the validity of the gift with the bald remark, at p. 134:—"There is no authority to shew that a *chose in action* can be assigned in this way."

The authorities already cited shew that the Judge held an incorrect view of the law.

As further authorities in favour of the gift, reference may be made to *Bromley* v. *Brunton* (1868), L.R. 6 Eq. 275, 37 L.J. (C.h) 902, 16 W.R. 1006; *In re Griffen*, [1899] 1 Ch. 408, 68 L.J. (Ch.) 220; *Re Smith; Bull* v. *Smith* (1901), 84 L.T. 835; 17 Times L.R. 588.

In *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57, 59 L.J. (Q.B.) 377, 38 W.R. 588, the Court of Appeal (Lord Esher, M.R., and Fry and Bowen, L.JJ.) held that "a gift of a chattel capable of delivery, made *per verba de presenti* by a donor to a donee, and assented to by the donee, whose assent is communicated to the donor, does not pass the property in the chattel *without delivery*."

Fry, L.J., speaking for himself and Bowen, L.J., examined at great length the history of law of gifts and affirmed the decision in *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551, 106 E.R. 467, against considerable adverse criticism.

That case decided, in the words of Lord Tenterden, C.J., that, by the law of England, in order to transfer property *by gift*, there must be either a deed (or will) or there must be an *actual delivery* of the thing to the donee. It is clear that a gift of a chattel capable of delivery is perfected by delivery. The cases to which reference has been made shew that in the case of choses in action *delivery* of the evidence of the obligation is effective.

Once there is an effective delivery, and consequently a perfect gift, the question of consideration does not arise. A gift is, *ex vi termini*, without consideration.

A recollection that with respect to a gift *inter vivos*, it is essential that there should be either a deed or delivery, will furnish the real distinction between a number of cases which otherwise would seem to be inconsistent.

In *Blakely* v. *Brady* (1839), 2 Drury & Walsh 311 (Ir. 1), it was held that a voluntary assignment of a chose in action was complete and that the fact that it was necessary for the assignee to proceed in the Court of Chancery did not touch the question of its completeness. The Lord Chancellor says, at pp. 325, 326, 327, 328:—

"[The defendant] and in the second place, he relies on this, that is is an assignment of a *chose in action*, and without any valuable or meritorious consideration and that, therefore, it is to be considered as if it rested merely in contract, and is not to be enforced by a Court of Equity.

. . . . . .

The doctrine that a *chose in action* is not legally assignable does not appear to me to be one that a Court of Equity is called on to extend beyond the exact limits to which it has been already carried by distinct authority. The executing or accepting such an assignment, when it is not for the purpose of maintenance or champerty, is not an illegal act, for it is admitted that when there is a valuable or meritorious consideration for it, a Court

Alta.
App. Div.
CURTIS
v.
LANGROCK.
Beck, J.A.

of Equity will even enforce the execution of it. Then if the transaction is not in itself illegal . . . . why is it not to be acted on as a valid and complete transaction between the parties?

Now, in this case, as between the assignor and assignee, the gift is absolute; . . . . .

It is asked why does the Plaintiff come into this Court if the assignment is perfect? The answer is obvious; he comes here because the property '[the legal title]' is in the Defendant to whom the Ecclesiastical Court has granted administration and he is an administrator in trust; . . . . . The law has created the trust."

In *Kekewich* v. *Manning*, 1 DeG. M. & G. 176, 42 E.R. 519, 21 L.J. (Ch.) 577, 16 Jur. 625, a lady entitled absolutely to the reversion in stock, subject to the life interest of her mother therein, which stock was standing in the joint names of herself and her mother, assigned her interest in this stock on her marriage to trustees in trust for herself for life, remainder to her husband for life, and after their decease, in trust for her niece, and for the issue of the marriage and the issue of the niece according to appointment; and in default of issue of the marriage, in trust for the niece. No transfer of the fund took place, but the mother had notice of the settlement. There was no issue of the marriage. It was held by Knight Bruce and Cranworth, L.JJ., that even if the settlement were voluntary as regarded the niece and not supported by the marriage consideration (which point, however, the Court did not decide, the assignment being complete would be enforced by the Court. The present case, said Knight Bruce, L.J., raises the question, often discussed, at pp. 187, 188, 189, "whether an act or intended act of bounty, whether a gift, or a promised or intended gift, was in truth a perfect act, a completed gift, resting neither in promise merely, nor merely in unfulfilled intention, or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention. . . . . It is on legal and equitable principles we apprehend clearly that a person *sui juris*, acting freely, fairly, and with sufficient knowledge ought to have, and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary or howsoever circumstanced. . . . . Suppose stock or money to be legally vested in A, as trustee for B for life, and subject to B's life interest, for C absolutely; surely it must be competent to C in B's lifetime, with or without the consent of A, to make an effectual gift of his' C's interest to D by way of mere bounty, leaving the legal interest and legal title unchanged and un-

Hyndman, J.A.

touched. . . . . If so, can C do this better or more effectually than by executing an assignment to D?"

After making this reference to the foregoing case, it is stated in 2 White & Tud. L.C., ed. 8, p. 869:—"The better opinion is that since this case *Holloway* v. *Headington*, 8 Si. 324; *Edwards* v. *Jones*, 1 My. & C. 226; *Sewell* v. *Moxsy*, 2 Si. N.S. 189; *Ward* v. *Audland*, 8 B. 201; *Beason* v. *B.*, 12 Si. 281, are overruled."

In *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82, at p. 87, 60 L.J. (Ch.) 111, 39 W.R. 113, Lindley, L.J., says that *Kekewich* v. *Manning* is "the leading case" on the question of complete or incomplete voluntary assignments, and adds:—"The fact that notice of the assignment was not given to the debtors did not render the gift incomplete."

Notice, whether of a legal or equitable assignment, is necessary only for the purpose of protecting the assignee against a latter assignment by the assignor. In *Fortescue* v. *Barnett* (1834), 3 My. & K. 36, 40 E.R. 14, 3 L.J. (Ch.) 106, the Court ordered an assignor, who had made a voluntary settlement of a life policy and had subsequently surrendered the policy, to give security for the amount of the policy.

For the reasons indicated, I hold that there was a complete gift of the policy in question to the plaintiff, and, in the result, I would, though on other grounds than put to the trial Judge, affirm his judgment with costs and dismiss the appeal with costs.

HYNDMAN, J.A.:—This is an appeal from the judgment of Simmons, J.

The facts are that the deceased, E. H. Langrock, on February 23, 1920, took out a policy of insurance on his life with the North American Life Insurance Co. for the sum of $2,000, expressed to be payable to his "executors, or administrators or assigns." A premium of $65.10 was to be paid yearly for and during the period of 20 years from the date of the policy if he should so long live. The insured died or was accidentally killed on August 9, 1920, and the plaintiff claimed the insurance moneys on the ground that the policy had been assigned to her. By order, the proceeds were directed to be paid into Court, and an issue was directed "whether the money payable by the company or any part thereof is the property of the plaintiff as against the defendant."

The plaintiff's alleged claim arises under the following circumstances. She married one Curtis in January, 1904. He served overseas during the war, and after his return went to the United States and there obtained a divorce on the ground of desertion only, has since remarried and is living in Calgary.

Alta.
App. Div.
CURTIS v. LANGROCK.
Hyndman, J.A.

No Canadian divorce has been obtained by either Curtis or the plaintiff.

Deceased was also a returned soldier. Before he went overseas, the plaintiff was living at Verwood, Saskatchewan, and the deceased boarded with her. Prior to his departure for France, in January, 1918, there was an understanding between plaintiff and the deceased that they should marry after his return, when the plaintiff succeeded in obtaining a legal divorce. After his return he eventually went to Lacombe, where part of the time he boarded at, and at the time of his death actually lived in the plaintiff's house as a boarder and lodger, and some of his personal belongings, such as clothing, were in her house at the time of the fatal accident.

The plaintiff's evidence is that about March 16, 1920, deceased gave her the policy in question.

"Q. What happened on this occasion? A. He came in with the policy and laid it down on the table, my dining room table, and he said, 'There, Sadie, is a present for you.' . . . . . Q. And what happened after they looked it over? A. After they looked it over, Mr. Edward Harmon Langrock folded it up, put it back in the envelope and handed it to me saying, 'Take that and put it away, and take good care of it, for it is all I got to give you.' Q. Was anything more said at that time about the policy? Is that all that was said? A. I believe so."

This testimony is all which is necessary to enable one to understand the circumstances and nature of the alleged assignment, and makes it abundantly clear that there was no consideration for it (except possibly their future marriage), and that it was in the nature of a gift pure and simple. If such assignment was in consideration or in view of their intended marriage, then it must necessarily be held void because of failure of consideration the marriage never having taken place prior to his death.

The plaintiff is then driven to reliance upon an equitable assignment in favour of a stranger without any consideration to support it.

Now, if the gift had been complete, and nothing further was required to be done by the donor of his estate or no assistance required from a Court of equity to enable the donee to give a good discharge to the insurance company, then doubtless plaintiff ought to succeed.

But, in my opinion, that is not the case here.

Whilst for a long time prior to 1867 Courts of equity would entertain and enforce actions on assignments of policies of insurance, nevertheless at law a policy of insurance was not assignable. In *re Turcan* (1888), 40 Ch. D. 5, 58 L.J. (Ch.)

Alta.

App. Div.

CURTIS
v.
LANGROCK.

Hyndman, J.A.

101, 37 W.R. 70. In that year an Act was passed 1867 (ch. 144), permitting such an assignment, provided such is in writing and notice thereof duly given to the insurance office. (See also 15 Hals., p. 411, par. 817). That still is the law in this Province.

Clearly the plaintiff's action is unenforceable at law and can succeed only on equitable grounds. The question then arises, there being no consideration for this assignment, which consequently gives rise to no action at law, will equity lend its assistance to the plaintiff, being a volunteer, to enable her to recover?

The essential characteristic of a complete gift is that the donor has done all he could do to make the gift complete.

In *Ellison* v. *Ellison* (1802), 6 Ves. 656, at. p. 662, 31 E.R. 1243, Lord Eldon, L.C., said:—"I take the distinction to be, that if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust;* as upon a covenant to transfer stock, etc., if it rests in covenant and is purely voluntary, this Court will not execute that voluntary covenant; but if the party has completely transferred stock, etc., though it is voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by the Court."

In May on Fraudulent and Voluntary Dispositions of Property, ed. 3, ch. 2, at pp. 352, 353, is found the following passage: "In order to establish a complete gift of property, either by a direct transfer to the intended donee, or by a transfer to trustees for him, it must be clearly proved that the donor has done such acts as amount to a conveyance or assignment of the property, so as completely to divest himself of his entire interest and confer that interest either on the donee (who then acquires the beneficial interest in the property) or on the trustees for him." Citing *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11 per Jessel, M.R., at p. 14, 43 L.J. (Ch.) 459, 22 W.R. 584.

Many other authorities are cited and referred to in the chapter referred to in May, *supra,* all tending to establish the principle making consideration an essential prerequisite in cases of incomplete voluntary assignment, and no good purpose can be served by reproducing them here.

As I see it then, in the case at Bar, the legal title to the policy of insurance in question was and always remained vested in the deceased up to the time of his death, and devolved upon his legal representative who still has that legal title.

The intended gift clearly then, was incomplete, in as much as the donor failed to divest himself of the legal title to the policy.

Alta.

App. Div.

CURTIS v. LANGROCK.

Clarke, J.A.

This he might have done and by instrument in writing. The action is one brought on the basis of an assignment, and not as a declaration of trust.

"It is a well-established principle that if a voluntary gift is intended to be effectuated in one way, the Court will not give effect to it by applying another way. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust; for then every imperfect instrument would be made effectual by being converted into a perfect trust." (May in F. & V. D. of P., *supra*, p. 354, and cases there cited).

In view of what I have said therefore, I would allow the appeal and enter judgment in favour of the defendants. I also agree with my brother Clarke as to the repayment of $20 to the plaintiff, and as to the disposition of the costs.

CLARKE, J.A.:—I think it essential to the validity of a "declaration" as defined by sec. 2, sub-sec. 4 of the Life Insurance Beneficiaries Act 1916 (Alta.), ch. 25, that it be in writing.

In *Wilson* v. *Hicks* (1910), 21 O.L.R. 623, affirmed (1911), 23 O.L.R. 496, it was held that an assignment, though in writing, did not operate as such a declaration.

The plaintiff was not named as a beneficiary in the policy nor designated a beneficiary by declaration and, therefore, her only claim can be under an assignment in some other manner allowed by law.

If she has succeeded in establishing such an assignment, with great deference to the views of the Chief Justice, I am unable to agree that she is affected by sec. 9 (7) of the Act—If that sub-section is applicable, so also must be the following sub-sec. 8, which reads as follows:—

"Where an unmarried man or a widower effects or declares the contract to be for the benefit of his future wife, or future wife and children, and the intended wife is designated by name or is otherwise clearly ascertained in the contract, but the intended marriage does not take place, all questions arising on such contract shall be determined as in the case of a beneficiary not belonging to the preferred class."

I think the future wife was clearly designated and ascertained and so not being a beneficiary of the preferred class, although the assured could have diverted the insurance under sec. 6 (3), as he did not do so the plaintiff would at his death be the beneficiary and so entitled to the insurance.

In my opinion, both sub-secs. 7 and 8 are inapplicable where the policy has been assigned, for it is of the very essence of an assignment or a gift that the assignor or donor parts with all

control, if he retains the power to divert the insurance, or if the right of the donee is to be affected by the donor's death prior to marriage, then there is no complete gift or assignment.

The question to be determined is whether or not the policy was assigned to the plaintiff in a manner allowed by law.

Prior to the Act of 1867 (Imp.), ch. 144, it appears that though assignable in equity, a policy was not assignable at law. Under that Act, as well as under the later provisions of the Judicature Act as to assignments of choses in action, policies are assignable in writing and upon notice to the debtor the assignee is entitled to sue for the assigned debt or chose in action in his own name.

There being no written assignment here, the plaintiff gets no benefit from these statutory enactments.

But the door of equity is still open to her if she can establish what amounts to an equitable assignment within the authorities upon that subject.

I shall not attempt to review or analyze the numerous authorities I have examined, but shall give the conclusions I have arrived at.

Delivery of a policy to secure advances or for other valuable consideration constitutes a good equitable assignment. See *Ferris* v. *Mullins* (1854), 2 Sm. & Giff. 378, 65 E.R. 444; *Book* v.*Book* (1901), 1 O.L.R. 86; *Thomson & Avery* v. *Macdonnel* (1906), 13 O.L.R. 653; *Trusts Corp'n* v. *Rider* (1897), 24 A.R. (Ont.) 157.

A valid equitable assignment may be created verbally as well as by writing. *White & Tud's L.C.*, ed. 8 (1910), vol. 1, p. 111; *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848, 54 L.J. (Ch.) 1024, 34 W.R. 2, 5 Asp. M.C. 433.

A valid equitable trust may be created verbally and without any valuable consideration, but an incomplete gift cannot be supported as a declaration of trust. *Milroy* v. *Lord* (1862), 4 DeG. F. & J. 264, 45 E.R. 1185, 31 L.J. (Ch.) 798; *Moore* v. *Moore* (1874), L.R. 18 Eq. 474; *Re Shield, Pethybridge* v. *Burrow* (1885), 53 L.T. 5.

An assignment under the statute will be enforced, though voluntary. *Comfort* v. *Betts*, [1891] 1 Q.B. 737; 60 L.J. (Q.B.) 656, 39 W.R. 595; *Hughes* v. *Pump House Hotel Co.* [1902] 2 Q.B. 190, at p. 197, 71 L.J. (K.B.) 630, 50 W.R. 660; *Fitzroy* v. *Cave*, [1905] 2 K.B. 364, 74 L.J. (K.B.) 829, 54 W.R. 17; *Colville* v. *Small* (1910), 22 O.L.R. 1; *Wilson* v. *Hicks* (1911), 23 O.L.R. 496.

Now comes the difficult question of the effect of a voluntary equitable assignment by parol.

Alta.

App. Div.

CURTIS v. LANGROCK.

Clarke, J.A.

One realises before going far into this question, the truth of the statement in 1 White & Tud., *supra*, at p. 111, "whether consideration is requisite for the validity of an equitable assignment cannot be said to be settled" and the further statement in note (i) on the same page. "It is difficult if not impossible to reconcile the authorities as to consideration in relation to equitable assignments," and reference is made to an article in 16 Law Quarterly Review (1900), at p. 241, in which Mr. Edward Jenks strongly argues in favour of validity, and an article in 17 Law Quarterly Review (1901), at p. 90, where Mr. W. R. Anson replies and reaches the opposite conclusion.

My brother Beck has referred to many of the authorities on the subject to which I would add a few.

Re Richardson, Weston v. *Richardson* (1882), 47 L.T. p. 514, and *In re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408, 68 L.J. (Ch.) 220, seem to favour validity without consideration, but in those cases the judgments were supported by the findings that both the legal and the beneficial interests were vested in the assignee.

In *Donaldson* v. *Donaldson* (1854), Kay 711, 69 E.R. 303, 23 L.J. (Ch.) 788, 2 W.R. 691, V.C. says at p. 718:—

"The question is in every case, has there been a declaration of trust, or has the assignor performed such acts that the donee can take advantage of them without requiring any further act to be done by the assignor; and if the title is so far complete that this Court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him."

In *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, 55 L.J. (Ch.) 741, 34 W.R. 286, it was held that an equitable mortgagee by deposit of a deed, cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed, and Maclennan, J.A., referring to this case in *Trusts Corp'n of Ontario* v. *Rider*, at p. 161, says it merely determined what was well settled before, that a voluntary assignment by parol is not sufficient, for which he cited authorities.

In *Durham* v. *Robertson*, [1898] 1 Q.B. 765, 67 L.J. (Q.B.) 484, Chitty, L.J., says, at pp. 769, 770:—

"In his suit in equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, a party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. This was a fortiori the case where the assignment was by way of security, or by way of charge only, because the assignor had a right to redeem. Further,

the assignee could not give a valid discharge for the debt to the original debtor unless expressly empowered so to do."

The latest word on the question that I have seen, being subsequent to *Brandt's Sons & Co.* v. *Dunlop*, to which I shall presently refer, is *Glegg* v. *Bromley*, [1912] 3 K.B. 474, 81 L.J. (K.B.) 1081, at p. 486, Fletcher Moulton, L.J., says:—

"In olden times before the Judicature Act, such an assignment would not be recognised in law. The parties would have had to go to equity to get it enforced, and equity would not enforce such an assignment if it was voluntary. Therefore, prior to the Judicature Act, you must have shewn that there was some good consideration for it before it would have had any practical operation, and they claim that the same effect must be given to it now. I am not disposed to disagree with them on their view of the law."

And at p. 491, Parker, J., says: "For every equitable assignment, however, there must be consideration. If there be no consideration, there can be no equitable assignment."

If the inability of the equitable assignee to sue in his own name were the only obstacle to the validity of a voluntary equitable assignment, I think it could be got over for is it not pretty well settled that the assignee can sue in his own name, making the assignor a party defendant in order to have him bound, and where it is clear the assignor has transferred his entire interest in the debt, the Court may dispense with his being a party at all, as was done in *Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454, but it is scarcely probable this would be done against the objection of the debtor. See also on the question of actions in the name of the assignee, *Graham* v. *Crouchman* (1917), 39 D.L.R. 284, 41 O.L.R. 22.

I think that apart from the right to sue, an assignee by parol should, in order to make his title complete, have something he can take to the debtor to shew his title before the debtor can be expected to pay. It should not be enough for him to go to the debtor and say, "pay me, your creditor told me I could have your debt to him, and he gave it to me by word of mouth," and if that something is required it cannot be got from the creditor for want of a consideration to support any obligation to give it.

My conclusion is that the rule of equity still prevails which requires a consideration to support a voluntary equitable assignment by parol, and I would not be disposed to vary that rule for the very reasons which led to the passing of the Statute of Frauds and Perjuries. I think it would open up a very dangerous field, and besides, the law in such a matter calls for no

N.S.

S.C.

assistance from equity to prevent injustice. It is the simplest matter to create a beneficiary under the Insurance Act either by insertion of the name in the policy or by subsequent declaration by any writing identifying the policy including a will, and if it is desired to make the benefit irrevocable, it can be done by a very simple writing complying with the Act of 1867 or the provisions of the Judicature Act already referred to.

I am inclined to think also that what occurred in reference to the transfer of the policy was not sufficient proof of an irrevocable assignment apart from the question of consideration. If it is, the plaintiff would be entitled to the insurance, even if she should reject the assured and marry some one else, and in the event of her dying first it would go to her estate.

It has been decided that in case of a gift during an engagement of marriage, the subject of the gift can be recovered from the party who breaks the engagement, so it is not a complete gift. *Robinson* v. *Cumming* (1742), 2 Atk. 409, 26 E.R. 646, followed and approved in *Ryan* v. *Whelan* (1901), 21 C.L.T. 406; *Seiler* v. *Funk* (1914), 32 O.L.R. 99; *Fortier* v. *Brault* (1916), 10 W.W.R. 807.

I see no distinction in principle here, and if it is applicable the gift was not complete and, therefore, unenforceable.

I think it fair, though not perhaps legally enforceable, that the plaintiff should be repaid the sum of $20 paid by her on account of the premium. I do not think that, under the circumstances, the estate should recover costs from the plaintiff. It is highly improbable that the deceased would have effected any insurance to which the estate would be entitled but for the plaintiff, and the estate by an accident gets the money intended for the plaintiff.

I would give the plaintiff $20 of the insurance money, and the balance to the defendant, and would give no costs either of the action or the appeal. *Appeal allowed.*

McNAB v. TOWN OF TRENTON.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J. and Mellish, J. March 14, 1922.

ESTOPPEL (§ IIIG—91)—FIXING BOUNDARIES OF STREET—PURCHASER APPLYING TO TOWN COUNCIL—CHAIRMAN OF STREET COMMITTEE POINTING OUT STREET LINE—ERECTION OF BUILDING—LINE SUBSEQUENTLY CHANGED SO AS TO ENCROACH ON OWNER'S LAND—RIGHT OF COUNCIL TO DENY LINE AS FIRST FIXED—TOWNS' INCORPORATION ACT, R.S.N.S. 1900 CH. 71 — CONSTRUCTION—DAMAGES.

There being some dispute as to the lines of a street, and the **occupants of houses on the street desiring the town to** improve **its condition, the town engaged a surveyor to lay off a** street

50 ft. wide, in accordance with an arrangement with the property owners. The following year, the plaintiff bought a lot on the street and having decided to build on his lot applied to the chairman of the street committee to define the street line; the chairman went to the land and pointed out the line fixed by he surveyor and acting on this the plaintiff erected his building. Subsequently, another owner of land on the street got the town engineer to lay off his property into lots, and then claimed that the south line of the street was south of the line fixed by the surveyor. The plaintiff then went before the council and asked if they intended moving the line of the street, and at this meeting a motion was carried that the street be left at 50 feet as surveyed and defined by the surveyor. The committee subsequently opened up the street 66 ft. wide and moved the line in on the plaintiff's lot some 15 ft. On appeal from the trial judgment dismissing the plaintiff's action for damages for cutting down trees upon his land and other acts of trespass committed thereon, Harris C.J. and Russell J. held that, in the absence of evidence to the contrary, what was done must be presumed to have been done in accordance with the Towns' Incorporation Act, and the town having taken affirmative action and defined the line of a street under the Act authorising it to do so was estopped from denying that it was the true line, and that the town was liable in damages for the trespass. Ritchie, E.J. held that as the Towns' Incorporation Act, R.S.N.S. 1900 ch. 71 sec. 173 provided the method of settling the dispute as to the true line of the street, it was *ultra vires* the council to settle it in any other way, and that it could not be estopped from setting up the true boundary. Mellish, J. held that as the plaintiff's property was bounded by the street in question wherever that might be, he could not take advantage of a mistake on the part of the council as to where the true boundary was.

APPEAL from the judgment of Chisholm, J., dismissing with costs plaintiff's action for breaking and entering plaintiff's land and taking possession of and occupying the same. Affirmed.

E. M. McDonald, K.C., and *T. R. Robertson*, K.C., for appellant.

R. H. Graham, K.C., and *John Doull*, for respondent.

HARRIS, C.J.:—The plaintiff sues the Town of Trenton for damages for cutting down trees upon his land and other acts of trespass committed thereon.

The action arises under the following circumstances:—The Town of Trenton was incorporated under the Towns' Incorporation Act, ch. 82, in 1911. Previous to that the area embraced by the town had been part of the municipality of the County of Pictou.

Many years ago a road had been laid out from Merigomish to the East River, a distance of about 13 miles. In recent years it had fallen into disuse almost altogether. There is nothing in the case to shew when it was first opened or how it became a public way, nor to shew at what width it was originally laid out. There is evidence that on the ground it was only about 30 ft.

N.S.
S.C.
McNAB
v.
TOWN OF
TRENTON.
Harris, C.J.

wide. The *via trita* was under 20 ft. The early statutes referred to throw no light on the question as to the width which it was laid out as we have not the date and do not know which statute applies, and they varied from time to time. There is evidence uncontradicted that the town authorities understood and treated the road as being only 33 ft. wide at the time the town was incorporated. In consequence of the building of the car plant of the Eastern Car Co. in the vicinity, some houses were erected on the land adjoining this road and the part of the road within the town limits was named Duke St. The occupants of these houses complained of the condition of the street and wanted it improved, and the town council, in 1912, asked its street committee to look over the ground, and if possible, have the street widened.

The street committee accordingly attended on the ground and interviewed the owners of the land on each side, who agreed to give a strip on each side sufficient to widen the street to 50 ft. The street committee engaged Mr. McKeen, a surveyor, to lay off the street 50 ft. wide according to the arrangement they had made with all the owners. and he put down monuments and prepared a plan and report to the town council, which was filed with the town clerk and accepted by the town council. The date of this plan is October 11, 1912. Subsequently the town did work on the 50 ft. street.

The plaintiff's evidence is that he bought his lot in the following year; that is 1913, and his deed is dated July 10, 1913. Later, in 1913, the plaintiff having decided to build on his lot, applied to the chairman of the street committee to define the street line. The chairman, accordingly, went to the land and pointed out the line fixed by McKeen as the street line, and acting on this, the plaintiff erected his building.

About the time when plaintiff completed the cellar, Logan, one of the owners of the land on the street, got the then town engineer, Forbes, to lay off his land into lots, and Logan then apparently claimed that the south line of the street was to the south of the line fixed by McKeen. Plaintiff having heard of this contention of Logan's, went before the town council on July 18, 1913, and asked if they intended moving the line of the street, saying if they did intend doing so, he would like it changed before he erected his building.

The minutes of the town council meeting have this record:—

"Trenton, N.S., July 18, 1913.

There was then some discussion in the original breadth of Duke Street.

F. W. Forbes, engineer, stated that examining the record in

Halifax this week, he found that about 1832 Mr. McKay got £5 for opening a road to the shore of the East River 66 ft. wide. Also that the mining association got a right of way to the East River later. Report received. It was then moved by Clr. D. M. McLeod, seconded by Clr. A. J. MacDonald, that Duke St. be left at 50 ft., as surveyed and defined by McKeen last year.

This motion was carried."

Forbes, the engineer, was called on the trial and swore that the reference in these minutes to his report that the road was 66 ft. wide was a mistake and that he had asked the council later to strike it out. He says that the records examined by him did not shew the road to be 66 ft. wide, and that seems clear because no such record was produced at the trial, and it would have been produced if it existed.

The minutes of the town council also shew that the matter of this street was again up for discussion on August 14, 1914, and the following is what is recorded:—

"Trenton, N.S., Aug. 14, 1914.

The proper width of Duke St. was then discussed at length by the several councillors, mayor, engineer and solicitor, after which it was moved by Coun. D. M. McLeod, seconded by J. C. Reid, and passed on motion that the engineer be instructed to lay out Duke St. 50 ft. wide from the railway on the west to the town limits on the east along the lines of Albert McKean survey."

Later apparently, although the date of the holding of the meeting is not given, the matter seems to have come up again in the council, and I give the minutes:—

"Following instructions given me at your last meeting, I have made a survey of Duke St. according to the late Mr. McKean's survey.

To the Mayor and Council, Town of Trenton.

A continuation of Mr. McKeen's line of south side of street will at Maple St., run 2 ft. south of what Mr. S. C. Crooks' deed calls for. Half-way up the hill opposite Mr. J. T. McKay's property 13 ft. south of fence. At Stroud's pasture fence east of his house the line is 19 ft. 3 inches south of fence.

Respectively submitted, Sgd. F. W. Forbes.

It was moved by Coun. McLeod, seconded by J. C. Reid, that this report be accepted. Motion carried."

And, finally, on June 4, 1915, there was a further discussion about the matter and the minutes are as follows:—

"Trenton, N.S., June 4, 1915.

Duke St. was then discussed and breadth of some. It was moved by Coun. Logan, seconded by Coun. J. T. McKay and

N.S.

S.C.

McNAB *v.* TOWN OF TRENTON.

Harris, C.J.

carried on motion that this matter be left to the street committee and engineer. (After some other business) (Same meeting). It was moved by Coun. Logan, seconded by Coun. Crane, that street committee open up Duke St. 66 ft. wide."

Whether the motion "that the committee open up Duke St. 66 ft. wide" was passed by the council does not appear, but the committee did what was suggested and moved the line of the street in on plaintiff's lot some 15 ft., which plaintiff complains destroys the balance of his lot for building purposes and causes him other serious damage, as he had located his building on the lot relying upon the line given him by the town council.

It should be stated that the plaintiff was a member of the town council in 1912, and was also chairman of the street committee which interviewed and arranged with the owners of land in 1912 at the time the McKeen plan was made. He was also mayor of the town in 1914. But there is no suggestion that he was then interested in the land; nor is there anything to suggest that he acted otherwise than in good faith.

The Towns' Incorporation Act, 1918, ch. 4, vests all public streets absolutely in the town and provides (sec. 170) that "the council shall have full control over the same in so far as is consistent with the use by the public of such streets." Section 173 provides:—

"(1) When the committee on streets deems a street encroached upon or encumbered, and in all cases where a doubt or dispute exists as to the true line of a street or as to which side is encroached upon, such committee, after ten days' notice in writing to the persons in possession of the land on both sides of the street where the line is in dispute, or the persons who have caused the encroachment or encumbrance of the time and place at which they will investigate the matter, shall repair to the place where the encroachment or encumbrance is alleged to exist, or the line is in dispute, and there inquire into the facts, and if necessary may then or at a future day have a survey made of the street, and may examine witnesses on oath, to be administered by any member of the committee touching the matter.

(2) Such committee shall, after completing the investigation determine and mark out the true line of the street and direct the same to be opened to the full width of 66 feet, or to any greater or less width to which it has been extended or confined by its dedication, and shall by order in writing direct and cause, all encroachments or encumbrances to be removed to such distance as they determine. Such committee shall not, however, cause to be removed any building permanently erected upon the street; but where such building is found to encroach upon the

street, they shall report the same to the next meeting of the council, and the council shall make such order in respect thereto as is deemed proper."

Sections 174 and 175 provide for the removal of encroachments and the expense of the proceedings. Section 176 provides:—

"In any proceeding, under any of the three next preceding sections, the production of a copy of the order of the committee on streets under their hands, or of the order of the council under the hand of the clerk, shall upon proof of the handwriting be evidence of the order, and of the proceedings on which the order was granted."

Section 177 is as follows:—

"The committee shall cause a record of every investigation and order made by them to be kept, containing the lines of streets by them established, and such record shall be signed by them and returned to the town clerk to be filed in his office."

There is no evidence in the case to show whether 10 days' notice of the proceedings by the street committee was or was not given. In my opinion, it is of no importance because the object of the notice obviously is to bring the parties to the scene and give them an opportunity to object, and, in this case, what took place was that all the owners met and apparently concurred in the view held by the committee and town council that the street was 33 ft. wide, and they all agreed to give the additional land necessary to make it 50 ft. wide. In the absence of evidence that the regular notice *was not given*, it must be presumed that it was given.

See per Shaw, C.J., in *Rutland* v. *County Commissioners of Worcester,* (1838), 20 Pickering (Mass.) 71, at pp. 80, 81; *In re Lafferty* v. *Mun. Council of Wentworth and Halton,* (1851), 8 U.C.Q.B. 232, per Robinson, C.J., at p. 235; *Meisner* v. *Meisner* (1899), 32 N.S.R. 320, and *Taylor* v. *Durno* (1919), 53 N.S.R. 199, 54 D.L.R. 450.

The maxim *amnia praesumuntur rite et solemniter esse acta donec probetur in contrarium,* I think, applies to this case.

It was argued that there was no record of the investigation signed by the commissioners and returned to the town clerk to be filed in his office as required by sec. 177. Again, with regard to this all that can be said is that there is no evidence one way or the other upon the question. No one has said that there was a record signed and filed, and no one has said that there never was any record signed and filed. I do not see why it should be presumed that it was not done. The presumption is the other way. But if we had proof that the record was not signed and

N.S.
S.C.
McNAB
v.
TOWN OF
TRENTON.
Harris, C.J.

filed, it would not render the proceedings *ultra vires.* It would be an irregularity which the town would be estopped from setting up under all the circumstances of this case. I refer not only to those circumstances already discussed, but those later to be referred to. Then sec. 181 provides:—

"(1) Every person intending to build upon or close to the line of the street shall, before digging the foundation, or commencing the building, apply to the town council to cause the line of the street to be defined and laid out, and shall dig the foundation, and erect the building within such line.

(2) Every person who erects a building, or begins digging the foundation, or commences building, on the line of any street without making such application and having the line so ascertained, or who encroaches on the street, shall be liable to a penalty of not less than $40 nor more than $80, and in default of payment to imprisonment for a period of not less than 10 or more than 90 days."

There is no procedure prescribed for the town council to follow in causing the line of the street to be defined and laid out on the ground under this section.

The plaintiff applied first to the chairman of streets and later to the town council, and got the line of the street as that fixed by the survey and plan of McKeen, and he acted on this information. He is entitled, I think, to rely upon that, and the town cannot subsequently question the line so given. I say this, whether the line had or had not been regularly fixed by the previous proceedings, this section confers jurisdiction and power upon the town council to cause the line of the street to be defined and laid out and to give the line to a citizen who desired to build. He cannot build until he gets the line defined by the council, and when he gets it he cannot depart from it. Is it to be said that if the town council gives him the wrong line he is to suffer the loss of removing, perhaps, an expensive building erected within the line thus laid down and fixed by the town council? In these days, citizens of many towns and cities in English-speaking countries are erecting buildings on similar legislation, and unless the bounds fixed are held to be binding on both the town and citizens acting on the faith of the location so fixed, the greatest confusion will result—there must be some finality about the matter.

It is, I respectfully submit, no answer to say that the streets belong to the public, and that it is *ultra vires* the town council to give them away. In this case, as I have pointed out, there is no satisfactory evidence that the original width of the street was more than 30 or 33 ft. and, if so, the town is giving nothing

away. I am not prepared to find that the boundary or line given to the plaintiff is not the correct line of the street after it was widened to 50 ft., and if I could find that a mistake had been made, I think the town, under the circumstances of this case, is estopped from saying that there was a mistake.

The defining and fixing of the street bounds was within the potential capacity of the town council. At most, all that can be said is that there may have been some irregularity about their proceedings in exercising their statutory powers, but that is a vastly different thing from saying that what they did was *ultra vires*. That the line of the street when once fixed is to be held binding both on the town and on the landowners who have acted on the strength of the order fixing them, seems reasonable. Any other rule would lead to intolerable injustice. In *Slee* v. *Corporation of Bradford* (1863), 4 Giff. 262, 66 E.R. 704, the Court restrained a town council by injunction from interfering with the erection of a factory where the plans for the line of the street had been approved by the town authority, and it was sought by the town to change these plans to the prejudice of the landowner.

In *Masters* v. *Pontypool Local Government Board* (1878), 9 Ch. D. 677, 47 L.J. (Ch.) 797, Fry, J., said at pp. 682-3:—

"The case of *Slee* v. *Corporation of Bradford*, 4 Giff. 262, shews that where a local board has by means of plans approved of or otherwise prescribed a line of street and has allowed a landowner to act upon the line so prescribed by them, they cannot afterwards prescribe another line."

As I have said, there is in this case no question of *ultra vires*—the town council, under sec. 181, had full power and authority to fix the line of the street and did so, and the simple question is whether they can change it to the prejudice of the plaintiff after the plaintiff, relying upon the action of the council, has erected his building upon a part of his land different from what he would have selected but for the action of the council. I submit the town cannot do so, at least without resorting to the machinery of the Act to change the bounds of the street and by payment of compensation to the plaintiff and any others affected. There is no pretence that anything of the kind has been done. What the town authorities have done is simply (ignoring the line they fixed and gave to the plaintiff) to enter upon his land, cut down his trees, and otherwise trespass upon his property. This, I do not think, they can do without rendering themselves liable. All that is involved here is the question whether when a town has *taken affirmative action*, and defined the line of a street under the Act authorising it to do so, and where its conduct

N.S.

S.C.

McNAB v. TOWN OF TRENTON.

Harris, C.J.

has been such as to make it unjust or inequitable, for it to repudiate the line given to the plaintiff, the town ought not to be held to be estopped from questioning the line so given to be the true line. In my opinion, the affirmative action taken by the town and acted upon by the plaintiff in good faith, makes it unjust and inequitable for the town to set up its present contentions and the town must be held to be estopped from doing so. It is argued that a town cannot be estopped or bound by acquiesence, but apart from the English cases referred to, there is American and Canadian authority holding otherwise.

In the case of *Township of Pembroke* v. *Canada Central R. Co.* (1882), 3 O.R. 503, the railway company had taken possession of a street and laid down its tracks upon it and used it for five years. The council had never been formally applied to for leave, but had subsequently passed a resolution notifying the railway company to fill up the ditch existing on both sides of the railway, and to put down proper crossings. It was held that the corporation had thereby admitted that the railway company were lawfully in occupation of the highway and could not afterwards object. Osler, J., at p. 509, said:—

"The plaintiffs' case entirely fails, in my opinion, on another ground, that namely, of their acquiesence in the acts complained of. A corporation may be bound by acquiesence as an individual may, *Rochdale Canal Co.* v. *King*, 2 Sim. N.S. 78; *Brewster* v. *The Canada Co.*, 4 Gr. 443. And I see no ground for holding that a municipal corporation is exempted from the rule, although it may be impossible always to enforce it against them so strictly or to the same extent as in the case of other corporations or individuals."

And at p. 510 he quotes Lord Eldon as follows:—"This Court," says Lord Eldon, in *Dunn* v. *Spurrier*, 7 Ves. 235, "will not permit a man knowingly, though but passively to encourage another to lay out money under an erroneous opinion of title, and the circumstances of looking on is, in many cases, as strong as using words of encouragement."

And Osler, J., then proceeds as follows:—"These plaintiffs, in my opinion, stand in that position and, to use the language of the Chancellor in *Brewster* v. *Canada Company*, *supra*, to permit them under the circumstances I have mentioned, to maintain this action, would be contrary to the plainest principles of reason and justice."

In *McDowell* v. *Township of Zone* (1920), 56 D.L.R. 288, 48 O.L.R. 268, Orde, J., held the defendant municipality estopped by its conduct from setting up that the boundaries laid down by the surveyor were not permanent boundaries of

N.S.

S.C.

McNab
v.
Town of
Trenton.

Harris, C.J.

the highway. [See also *Tp. of Zone* v. *McDowell* (1921), 62 D.L.R. 356, 62 Can. S.C.R. 360.]

See also *Rochdale Canal Co.* v. *King* (1851), 2 Sim. N.S. 78, at p. 87, 61 E.R. 270.

In *The People ex rel Beardsley* v. *City of Rock Island, et al,* (1905), 215 Ill. 488, at p. 495, the Court said:—

"It has frequently been decided that the doctrine of estoppel *in pais* is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine. In the exercise of proper diligence the public authorities may prevent encroachments upon public right, and if they do not, any citizen may take the necessary steps to do so, and if there is not only a failure to act by either, but affirmative action by the public authorities with the apparent approval of every one interested, under which the situation is changed and permanent improvements are made, the principles of equity require that the public should be estopped."

There is an interesting note to the case of the *City of Portland* v.*Inman Poulsen Lumber Co.* (1913), 36 American and English Annotated Cases, p. 400.

See also 2 Dillon on Municipal Corporations, p. 1900, *et seq.*

It was, however, argued that plaintiff knew the line of the street was not where it was located by the McKeen survey, and could not set up that the town was estopped. The short answer to this is that there is not a particle of evidence to shew that the plaintiff knew where the line of the street was.

After hearing counsel at great length on the question, I am quite unable to say where the true line of the old road was, and plaintiff is not shewn to have had any knowledge of the documents or surveys put in at the trial upon which the contention is made that the street was more than 33 ft. wide originally and, therefore, that the line fixed by McKeen was within the original lines of the street. Some at least of the surveys, if

N.S.
S.C.
McNAB
v.
TOWN OF
TRENTON.
Ritchie, E.J.

not all of them, as a matter of fact were made after the trouble arose for the purpose of being used as evidence.

There was a contention made on behalf of the town that here the damage to plaintiff was not of such a serious nature as to create an estoppel. I find that plaintiff's deed gives Duke St. as the northern boundary of his lot, which is 72 ft. 6 inches on the Fisher Grant Road, and 70 ft. on the rear. His evidence is that after getting the line of the street fixed, he erected a three-storey building, 30 ft. by 60 ft. within one foot of his south line and located doors on the north side of the building intending to leave a passage way of 10 ft. from the Fisher Grant Road on the north side of his building. This would leave him a lot on the corner of the two streets of about 30 ft. in width and 126 ft. deep upon which to erect another building for himself in connection with his business or to sell for other purposes. He values this corner lot at $1,000. If the street line is moved down 15 ft. on his lot it takes that much off his frontage and practically destroys the lot.

It was suggested that his lot, being bounded by the line of Duke St., would extend 72 ft. 6 inches south from that line wherever it was located, but the evidence shews that the lot adjoining on the south has been sold and plaintiff cannot move his line to the south. If he could do so, he would be left with two narrow strips of land, one on each side of his own building, neither one of which would be of much or any value to him, instead of the corner lot of 30 ft. The only alternative is that he should remove his building 15 ft. to the south and thus save his corner lot. This seems serious enough to bring it within the rule in the application of which regard must be had to the surrounding conditions and circumstances. What would be serious damage to the owner of a corner lot in New York City is relatively just as serious to the owner of a corner lot in the Town of Trenton, although the values in the two cases may be very different.

I think the appeal should be allowed with costs, and judgment entered in the Court below for damages, which I would fix at $100 and costs.

RUSSELL, J.:—I agree.

RITCHIE, E.J.:—This is an action against the defendant town for wrongfully breaking and entering the plaintiff's land, depriving him of the use thereof, and thereby causing damage.

The defence is that the land in question was and is a public street, and that the acts complained of were done in pursuance of the corporate powers of the town.

The question of fact involved at the trial was as to the location

N.S.
S.C.
McNAB
v.
TOWN OF
TRENTON.
Ritchie, E.J.

of the southern line of Duke St. According to the finding of the trial Judge as to the line, the lands in question form part of the street. There is, I think, room for argument on this question; I am not without doubt, but I am not prepared to reverse the finding. The burden of proof is on the plaintiff, and I am not satisfied that the finding is wrong.

If the line laid down by McKeen is the true southern line of Duke St., the plaintiff is entitled to recover, and it is contended that the defendant town has created an estoppel *in pais* against itself which deprives it of the right to contend that the McKeen line is not the true line. If this was a case between two individuals, I would be prepared to hold without hesitation that such an estoppel had been created. All the well-known elements which constitute an estoppel *in pais* are present, but the able argument made by Mr. Doull has convinced me that a municipal council representing the public cannot create an estoppel against itself by virtue of which something will be done which is beyond the powers of the council to do. To ascertain the powers of the council to settle the true line of a street where doubt or dispute has arisen, reference must be had to the statute from which all its powers are derived. I am of opinion that it was *ultra vires* for the council to settle the line by representation or resolution or in any other way than that pointed out by sec. 173 of the Towns' Incorporation Act, R.S.N.S. 1900, ch. 71. I quote the section (See judgment of Harris, C.J., at pp. 310-11).

Statutory machinery is provided for "*all cases* where a doubt or dispute exists as to the true line of a street." I am of opinion that it is beyond the powers of the council to deal with such "a doubt or dispute" in any other way than that which the statute provides. I quote from Craies' Statute Law, at pp. 305, 306, 4th ed.:—

"It was laid down by Lord Esher, M.R., in *R.* v. *Judge of Essex County Court* (1887), 18 Q.B.D. 704,as an ordinary rule of construction, that where the Legislature has passed a new statute giving a new remedy, that remedy alone can be followed. But the phrase 'new' as applied to a statute is either needless or ambiguous. The old distinction between *vetera* and *nova statuta* is obsolete: and 'new' is insensible unless applied to statutes creating rights or remedies unknown to the common law or to previous enactments. And for modern use the rule could perhaps be more accurately laid down thus: In the case of an Act which creates a new jurisdiction, a new procedure, new forms, or new remedies, the procedure, forms or remedies

N.S.
S.C.
McNAB
v.
TOWN OF
TRENTON.
Mellish, J.

there prescribed, and no others, must be followed until altered by subsequent legislation."

The rule to be deduced from the English cases is stated in 13 Hals.' Laws of England, at pp. 379, 380, where it is said:—

"A party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating. Thus, a corporate body cannot be estopped from denying that they have entered into a contract which it was *ultra vires* for them to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what it is its duty to do; and the same principle applies to individuals."

I am not unmindful that some American authority supports the plaintiff's contention, but I must follow the English rule quoted from Halsbury which is applicable to this case, and is, I think, sound in principle. It cannot, I think be the law that a municipal corporation can by creating an estoppel *in pais* against itself do a thing which it is beyond its powers to do. The remaining question is as to whether or not the line has been defined under and by virtue of sec. 173 of the Towns' Incorporation Act.

To decide this question of fact I must, of course, go to the evidence. I do so with every disposition to find support for the plaintiff's contention because I think the action of the town council towards the plaintiff is not to be commended. Careful consideration of the evidence has convinced me that no action was ever taken under this section, and that no such action was ever purported to be taken.

The result is that, in my opinion, the appeal must be dismissed. I think that the town council, by its conduct, misled the plaintiff to his detriment and that, therefore, there should be no costs of the appeal and no costs in the action. To this extent I would vary the order for judgment made by the trial Judge.

MELLISH, J.:—This is an action for trespass by defendants upon land in the town of Trenton, Pictou, claimed by the plaintiff as part of a lot situate on the corner of Main and Duke Sts., and claimed by the defendant as being part of Duke St.

As, in my opinion, the plaintiff's right to the small bit of land in dispute depends wholly upon the question whether the defendant is estopped from asserting its title thereto, it is, I think, of extreme importance to arrive at a correct understanding of the facts. Speaking for myself, after hearing an unusually

lengthy argument, this has been a somewhat difficult task, which I can only hope to have successfully accomplished.

The defendant town was incorporated in the year 1911; previously Main and Duke Sts. were roads of the Municipality of the County of Pictou, and were known as Pictou Landing Road and the Narrows Road respectively.

The plaintiff went to live in Trenton in the year 1900, at which time, according to his evidence, the apparent boundaries of Duke St., on the ground where it opened on Main St. were—on the north side opposite the land in dispute—an old barn on land known as the Muir and later the Porter property, and on the south by a fence. As to this latter boundary, he says, "From the beginning at Pictou Landing Road there was a grove of quite large birch trees, mostly birch, probably in the vicinity of 6 ft. wide; clear field inside, and when I remember it first there was some kind of a fence there, I think probably poles and old slabs when I remember it first." "Q. Was that near the Pictou Landing Road? A. That was right at the road." (Case, pp. 26-27).

The distance between this fence and the Muir barn, as appears from the evidence, was about 66 ft.—a usual width for country roads, and the minimum width which, by statute such roads are assumed to be till the contrary is shewn. (The Public Highway Act, 1917, ch. 3, sec. 41, as amended by 1919, ch. 64, sec. 7). It is true that by sec. 3 of this Act it has no application to highways within the boundaries of an incorporated town, but it clearly applies to that part of the Narrows Road which is not within the town under the name of Duke St., and I think there is a presumption of continuity which *prima facie* rebuts the suggestion that the road was originally wider at one end than the other.

Whatever the width of the roads, its southern boundary on the ground as above noted, was the "pole fence" above referred to which is evidently the same fence as the "log fence" referred to in the evidence of Logan and Strickland and referred to in the decision of the trial Judge. This fence extended over 200 ft. westward from Main St. It was probably necessary to plaintiff's case that his counsel should urge as he did before us that this fence was a "myth," but I am unable to come to any such conclusion. The land south of this fence and up to it seems to have been cultivated and the stones from the cultivated field thrown out in the course of husbandry on the roadway. Between it and the travelled part of the roadway was a wooded strip.

About 18 years before the trial, *i.e.* about the year 1903, a

N.S.

S.C.

McNAB v. TOWN OF TRENTON.

Mellish, J.

wire fence extending some distance westward from Main St. was built outside this wooden fence and 15 or 20 ft. north of it, enclosing this wooded strip in the farm area and cutting it off from the road. In 1912, this fence was removed—possibly in consequence of the proceedings taken by the defendants' street committee, hereinafter referred to. In the year 1912, the plaintiff was a member of the Trenton Town Council and chairman of the street committee. Some of the land north of Duke St. and at or near Main St. was then owned by a Mr. Porter. Upon it new houses had at this time been erected. The occupants of these houses complained of the condition of the street, as the plaintiff says he remembers it; and the street committee, as he states, was requested by the council "to look the ground over, and if possible have it widened, as it was generally supposed at that time it was a 33 ft. street." He further states that the committee went upon the ground and interviewed Mr. Porter, the owner on the northern side, and Mrs. Joseph Fraser, the owner on the southern side, who agreed to a 50 ft. street, to be made by taking a strip 5 to 7 ft. wide off Porter's frontage on the northern side of the road, and the balance from Mrs. Fraser. A surveyor, Mr. McKeen, was engaged to "lay off" the street, accordingly; this Mr. McKeen did locating on the ground the southern boundary of Duke St., where it meets Main St., 50 ft. or less south of the old barn site above referred to and some distance north of the old pole fence. There is no evidence that the strip so given up by Porter was part of Duke St.; on the contrary, the evidence would lead me to the opposite conclusion. On the southern boundary line, as located by Mr. McKeen, Mrs. Fraser erected another wire fence which, however, did not extend as far west as the plaintiff's property, as I understand the evidence. This was in the year 1912. In the year 1913, Mr. Logan, another owner on the northern side of Duke St. of land east of Porter's, had a survey made by the town engineer, Mr. Forbes, dividing his property into town lots, when it was claimed, apparently as a result of this survey, that the true south line of Duke St. was south of the McKeen line. Meantime the plaintiff, who had purchased the southern corner lot on Main and Duke St. from Mrs. Fraser by deed dated July 10, 1913, had commenced to excavate for a building thereon. Having, as he says, heard of this claim to a wider street, he came before the town council, of which he was a member, asking that the line, if it was to be changed, be changed then, rather than after his building went up. This building was being located 5 or 6 ft. south of the old pole fence, of which there were still remains, but, nevertheless, as plaintiff says, was

N.S.
S.C.
McNab
v.
Town of
Trenton.
Mellish, J.

intended to be on the south side of his lot. Accordingly the council on July 18, 1913,—8 days after the date of plaintiff's deed—passed a resolution that the street be "left at 50 ft. as surveyed and defined by McKeen last year." The building was then erected on the original location for which the excavation was being made. In the year 1913, Mr. James Stewart was chairman of the street committee, and before beginning to build plaintiff says he had previously applied to him to define the street line, and that Stewart gave him the southern line of Duke St. as defined by McKeen. On this occasion the McKeen line was pointed out by the plaintiff to Stewart, who assented to it.

Afterward, on August 14, 1914, at a meeting when the plaintiff, who was then mayor, was present, the council passed a resolution instructing the town engineer to lay out Duke St. 50 ft. wide from the railway, which was west of Main St., to the eastern town limits "along the lines" of McKeen's survey. On June 4, 1916, another resolution of the council was moved and seconded "that street committee open up Duke St. 66 ft. wide." It does not clearly appear whether this was carried or not, but in 1917 the council acted as if thereon. Plaintiff says when he purchased from Mrs. Fraser, that Mr. Fraser located the southern boundary of Duke St. on the McKeen line, which it is to be noted was the line defined by the street committee of which plaintiff was chairman in the previous year. In the year 1917, the town cut away the land and cut down trees, etc., in making improvements on Duke St., and on the northern side of plaintiff's said lot, and these are the acts complained of. They were done, it is to be observed, 15 ft. or so north of the old pole fence above referred to, and not on the lot in question, if such fence is to be taken as the true southern boundary of Duke St. where it meets Main St. The trial Judge, as I read his decision, has found this old pole fence to be the true southern boundary of Duke St., and I agree with him.

But it is said that the town is estopped from getting up the true boundary. I cannot come to that conclusion, even assuming that the title to a public highway can be acquired in that way. The plaintiff at the time of the alleged trespasses had no street fence and, in my opinion, there is no evidence of possession or of the right to possession by him of the land in dispute at the time. His land was bounded on the street, wherever that might be. Nothing that was done by the members of the town council (of which body he was a member himself) or by the street committee, of which he was chairman, could alter the street line. I agree with the trial Judge that no proceedings were taken under the statute to define the street boundary—there is no proof that

N.S.
S.C.
McNAB
v.
TOWN OF
TRENTON.
Mellish, J.

it was defined thereunder. (See ch. 71, R.S.N.S. 1900, secs. 173-178.) Indeed, I think the plain inference from the facts proven is that it was not so defined. The very fact that plaintiff went before the town council in the following year, under the circumstances above referred to, leads to the conclusion that, even in his mind, the street committee of the previous year had not defined the street so as to make a binding judgment which could only be altered on appeal to the Supreme Court, as provided by the statute above cited. The proceedings in 1912, if plaintiff's evidence be accepted, rather purport to have been taken under sec. 187 of the Act which provides as follows:—

"When it is proposed by the town council............to widen........ any street............the council shall cause a survey and plan of such street........to be made, and the plan when completed shall be filed in the town clerk's office." (See evidence, p. 29 1.9 to p. 10 1.30; also evidence, McLeod, p. 54 11.1-20).

And the subsequent resolutions of the council are, in my judgment, ineffective to divest the town by abandonment, of any part of the street. The plaintiff obviously knew from the time he came to Trenton that the pole fence already referred to had been a *de facto* southern boundary of Duke St. at the place in dispute. What reasons had he to suppose it was not the correct boundary, or that it was too far south? Are farmers in this Province likely to leave too much land to the highway? This fence was apparently in its exact position from the circumstance that it may have been, and probably was, the boundary line between two adjoining land owners before the road which was afterward named Duke St. was opened—the road being taken off the southern margin of the lands of the northern proprietor. If the plaintiff seeks, as he apparently does, to get this road narrowed by pushing the southern boundary further north, I think he must fail. He may be disappointed, and possibly has been misled by a misapprehension of the rights and powers of the town council and the effect of their resolutions. But the circumstances are such that I cannot conclude that he is in a position to say to the town that it cannot assert its rights over the street that by law is vested in it. If the council was misled or mistaken as to the true southern boundary of the street, I cannot say, on the facts proven, that the plaintiff is in a position to take advantage of such a mistake.

The appeal should be dismissed with costs.

Appeal dismissed.

OBADCHUK v. RUSSNIAK.

Sask.
C.A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

Animals (§ IC—35)—Stray Animals Act R.S.S. 1920 ch. 124—Application of Act—By-law passed in compliance with—Horses on highway in charge of herder—Sudden and unusual action on part of one of horses—Injury to motor car—Liability of owner of horses.

The duty imposed by a by-law passed under the provisions of the Stray Animals Act R.S.S 1920 ch. 124, prohibiting animals from running at large during certain seasons of the year is a duty imposed upon cattle owners towards the proprietors of cultivated land, and not towards the public at large, and it is doubtful if the legislature had in mind at all the presence of horses upon a highway, the title to which is vested in the Crown or if the by-law could be invoked by one who is not a proprietor, but even if so the requirement regarding herding cannot be construed as meaning such a rigorous degree of control as would prevent the animal from jumping or running across the highway, and a farmer driving his horses along the highway and exercising reasonable care cannot be held liable for damages to a motor car caused by a sudden act on the part of one of the horses contrary to its usual habits and nature and which could not be foreseen.

[*Cox* v. *Burbridge* (1863), 13 C.B. (N.S.) 431, 143 E.R. 171, followed; *Health's Garage Ltd.* v. *Hodges*, [1916] 2 K.B. 370, referred to; *Turner* v. *Coates*, [1917] 1 K.B. 321, distinguished. See Annotations on Animals at Large, 32 D.L.R. 397, 33 D.L.R. 423, 35 D.L.R. 481.]

Appeal by defendant from the trial judgment in favour of the plaintiff in an action for damages to plaintiff's motor car, caused by a collision between one of the defendant's horses which he was herding along the highway and the motor car. Reversed.

F. L. Bastedo, for appellant.

D. A. McNiven, for respondent.

Haultain, C.J.S., concurs with Turgeon, J.A.

Turgeon, J.A.:—The respondent was driving his automobile upon the highway in the Rural Municipality of Good Lake between 10 and 11 o'clock in the evening of August 29, 1920, at a speed which, according to his own evidence, was between 18 and 25 miles an hour. The appellant, a farmer, was in the act of driving his six horses from his field to his stables for the night, and was using the highway for that purpose. After putting his horses out of the field he turned to close the fence bordering the highway, which he had opened in order to let them out. While he was so engaged a collision occurred between one of the horses and the automobile, and the respondent brought the action to recover the damages sustained by his

Sask.
C.A.
OBADCHUK
v.
RUSSNIAK.
Turgeon, J.A.

automobile in the collision. The trial Judge found in the respondent's favour, and fixed his damages at $300.

It is alleged against the appellant, in the first place, that his horses—and particularly the horse which figured in the accident,—were running at large at the time of the accident in contravention of a by-law in force in the municipality and passed under the provisions of the Stray Animals' Act (ch. 124, R.S.S. 1920). This by-law prohibited owners of horses from permitting them to run at large between sunset and sunrise from May 15 to December 31 in any year.

Were these horses "running at large" at the time of the accident within the meaning of the Act and the by-law? Although, having regard to the view I take of this case, it may not be strictly necessary for me to determine this question, I think it is advisable for me to go into it.

The Act interprets the expression "running at large" as follows:

"2. (15) "Run at large" or "running at large" means not being under control of the owner either by being securely tethered or in direct and continuous charge of a herder or confined within a building or other inclosure or a fence whether the same is lawful or not;"

The effect of the Act is that if any animal is found running at large it may be distrained and impounded, whereupon the owner may redeem it by paying the costs and charges and the amount claimed for damages done to the distrainor. If not redeemed the animal may be sold and the proceeds employed to pay these amounts, the surplus, if any, being payable to the owner. There is no doubt in my mind that this Act was enacted for the protection of crops, and not for the regulation of traffic upon highways, and in construing the expressions used in the Act, such as "running at large," this consideration must be kept before us.

The law against "running at large" may be brought into effect by the ratepayers of the municipality and for part of the year instead of the whole. The period usually covered by these by-laws is the period during which the running at large might prove injurious to the crops: in the case of the by-law before us the period of restraint is from May to December, and between sunset and sun-rise. Section 6 of the Act provides that the period approved by the ratepayers may be extended or shortened by the muncipal council during the months from September to December inclusive, "according to the progress that is being made with threshing operations, the conditions of pastures, or for other like consideration." In unorganized

areas, where there are no municipal councils, and where action is taken instead by the Minister of Agriculture, sec. 12 states that "in the event of threshing being unduly delayed" the Minister may declare a period during which running at large shall not be permitted.

Animals found running at large are not liable to be distrained and impounded by any citizen, but the right so to distrain and impound them is confined by sec. 15 to "proprietors," and a "proprietor" is defined by sec. 2 sub-sec. 14 to mean the owner of any cultivated land or crop, or stack of grain or hay, etc., or a person acting on his behalf. It is extremely doubtful to me whether the Legislature, in enacting the part of the Stray Animals Act under which the by-law in question was passed, had in mind at all the presence of horses upon the highway. The conditions of traffic upon highways are much the same in one month as in another. Highways are not only used by "proprietors" but by the public generally, the title to them being vested in the Crown by statute, and horses or cattle upon the highway are just as likely to obstruct the passage of a traveller who is not a "proprietor" as of one who is. The duty imposed by the by-law upon cattle owners is, therefore, a duty towards the proprietors of cultivated land, etc., (as set out in sec. 2, sub-sec. 14), and not towards the public at large.

(To avoid a possible misunderstanding, I think I should mention that most of the foregoing does not apply to Part VII of the Stray Animals Act, which contains special provisions concerning stallions over 1 year old, bulls over 8 months old and all animals suffering from infectious diseases. As to those animals the prohibition from running at large is absolute and independent of any by-law, the right to distrain and impound is given to "any person," and the owner of the animal running at large is made liable to a penalty upon summary conviction).

Bearing all this in mind, and assuming for the moment that horses upon the highway come within the provisions of the by-law, we have now to determine whether the appellant's horse was running at large at the time of the accident. By referring to the language of sec. 2 sub-sec. 15 cited above, and applying it to the circumstances of this case, the question to be decided, is whether the horse was "in direct and continuous control of a herder" when the accident occurred.

Now the evidence shows that the appellant had just turned these six horses from the field on to the highway in order to drive them along the highway to his stables. He turned to

Sask.
C.A.
OBADCHUK v. RUSSNIAK.
Turgeon, J.A.

close his gate by adjusting the wires, and while so engaged the collision occurred. It is very hard to tell from the evidence of the appellant just how long this operation of closing the gate lasted. He says it may have lasted 5 or 10 or 15 minutes, or again, he says, it may have lasted one minute. In any event, it appears from his evidence that the horse in question had proceeded about 60 or 70 feet from the gate when the accident happened. We cannot, I think, shut our eyes to the conditions which are well known to prevail in this Province regarding the "herding" of cattle. A "herder" is a man in charge of a number of animals grazing or travelling together. One man, in my opinion, may be the "herder" of more than 6 horses travelling or grazing together and be in direct and continuous control of his herd sufficiently to satisfy the requirements of the Act, assuming, of course, that I have correctly apprehended the object of the (Legislation), without having each horse under such a measure of control that it cannot jump or run or cross a road. The very idea of "herding" in my opinion excludes the probability of any such rigorous degree of control. If at the precise moment that this appellant was closing his gate, and immediately before the accident happened, a "proprietor" had chanced to pass that way, could he have lawfully distrained these horses for running at large in violation of the by-law? In my opinion, he could not, and this, I think, is the test which must be applied in order to ascertain whether or not the appellant was violating the by-law. Upon this question, then, my finding would be that the appellant was not committing a breach of the law when the accident occurred.

But even if I should be wrong upon this question of herding, and still assuming that this part of our Stray Animals' Act applies to horses on highways, I think that the mere finding as a matter of fact that the horses were running at large in violation of the by-law when the collision occurred will not render the appellant liable for the damage suffered by the plaintiff. The well-known case of *Cox* v. *Burbidge* 1863 (13 C.B. (N.S.) 431, 143 E.R. 171, 32 L.J. (C.P.) 89, 11 W.R. 435, which has been approved of and followed through a long line of decisions, is authority, I think, for the view I am expressing here. In that case the defendant's horse strayed upon the highway and kicked the plaintiff. Section 74 of the English Highway Act of 1835, ch. 50, in force at that time, prohibited the straying of horses upon public highways and provided for the impounding of horses so straying. In the course of his judgment in favour of the defendant, Erle, C.J., at pp. 435, 436, says:—

Sask.

C.A.

OBADCHUK
v.
RUSSNIAK.

Turgeon, J.A.

"As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the horse was trespassing: and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff."

Later on at pp. 436, 437, he gives a summing-up of the law on the subject, which I think it is not out of place to quote at length here, despite the fact that it states well-known and well settled principles, as in my opinion it applies very closely to the facts of the case at Bar:

"To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless the scienter can be proved. This is a very familiar doctrine; and it seems to me that there is much stronger reason for applying that rule in respect of the damages done here. The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbor's corn or pasture. For a trespass of that kind, the owner is of course responsible. But, if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has: and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway. I think the ground upon which the plaintiff's counsel rests his case fails. It re-

Sask.
C.A.
OBADCHUK v. RUSSNIAK.
Turgeon, J.A.

duces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more."

Among the many cases in which the decision in *Cox* v. *Burbidge* was considered and approved, I think it well to refer to the case of *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K.B. 370, 85 L.J. (K.B.), 1289, which deals to some extent with the conditions created in recent years by the advent of automobile travelling. In his judgment, Neville, J., expresses himself upon this feature of the case, at p. 382, as follows:—

"There is no doubt that the advent of motor cars has greatly increased the danger resulting from the presence of loose animals on the road owing to the speed at which the cars travel and the difficulty shared by man and beast of avoiding them. It was only yesterday, however, that, as mechanically propelled carriages, the right of motor cars to use the road was subject to conditions which rendered great speed unattainable, and I think that to-day those who use them must take the roads as they find them and put up themselves with such risks as the speed of their cars occasions not only to themselves but to others. The prima facie harmlessness of domestic animals as frequenters of the highway is, I think, established as a legal doctrine."

I take it then that, despite the increased danger which attends both travellers and stray animals on account of the great growth of motor vehicle traffic, the rules to be applied in determining issues between the driver of a vehicle and the owner of an animal in case of a collision upon a public highway have remained unchanged. The owner of an animal of mild nature, such as a horse, is *prima facie* liable only for such damage as the animal is likely to commit if allowed to stray. He is presumed to know that a stray horse will trespass upon the lands of others and damage pastures and crops and kick other horses. But he is not answerable for acts which the animal may do which are contrary to its nature, such, for instance, as the act of a horse kicking a person, unless it can be shown that he knew of the existence of this vicious propensity in the animal, which in reality took it out of the class known as animals *mansuetae naturae*.

The only evidence we have as to how the accident in the case at Bar occurred is that of the respondent himself. He says that he was travelling at a rate of between 18 and 25 miles an hour. The lights of his automobile were burning brightly and he could see the road a considerable distance ahead. The road

Sask.

C.A.

Obadchuk v. Russniak.

Turgeon, J.A.

was clear, no horse or other obstruction being in sight. According to this, then, the horse was to the side of the road and outside the range of his vision. The horse was not in front of him at any time. Suddenly, he says, the horse jumped, (evidently from the side of the road), upon the engine of the automobile, falling in such a position that its hind feet went through the wind shield and almost struck the respondent, who was driving. The horse was so completely on top of the car that it remained in that position and was carried along until the car stopped. We have here a state of facts somewhat similar to the facts in *Heath's Garage* v. *Hodges, supra,* where, in the language of Neville, J., some sheep "charged" a motor car. It cannot be maintained, in my opinion, that such an act by a horse as the respondent describes here is an act in accord with the ordinary nature of a horse. On the other hand, there is no evidence that this horse had ever committed such an act before or that its owner knew that it was accustomed to do such things. In my opinion, we have to do here, to make further use of the words of Erle C.J. in *Cox* v. *Burbidge, supra,* "with a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse." No *scienter* having been proven against the appellant, he cannot be held liable.

Counsel for the respondent cited as an authority against the conclusion at which I have arrived the case of *Turner* v. *Coates,* [1917] 1 K.B. 670, 86 L.J. (K.B.) 321. In that case the animal in question was a young unbroken colt, which was permitted to stray upon the highway in the dark and which, being startled by the light of a bicycle, ran suddenly across the highway and collided with the plaintiff, who was riding the bicycle. But in reality this case was decided in favour of the plaintiff upon the ground that it is the natural propensity of a young, unbroken colt to do what the defendant's colt did, that this propensity in such a colt is well known to exist. I think the facts of that case are clearly distinguishable from those in the case at Bar.

My attention has also been called to the Ontario case of *Patterson* v. *Fanning* (1901), 2 O.L.R. 462. In the first place I must say, with all due deference to the Judges who decided that case, that I think there is a tendency in the comments they make upon the case of *Cox* v. *Burbidge, supra,* to limit unduly the effect of the pronouncements there made by the English Judges. I think there can be no doubt, as will appear from the first quotation made by me in this judgment from *Cox* v. *Burbidge,* that the principles laid down in that case were so laid down upon the assumption of fact that the horse who kicked the plaintiff was either trespassing upon a private road (not

Sask.
C.A.
OBADCHUK
v.
RUSSNIAK.
Turgeon, J.A.

belonging to the plaintiff) or unlawfully at large upon a public highway, the fact as to whether the road was public or private being left undetermined by the evidence. This is borne out, I think, by what appears in the judgments in *Heath's Garage Ltd.* v. *Hodges, supra,* which was decided much later than the Ontario case. I am satisfied, however, from a careful perusal of the Ontario case that it does not really decide anything different from what I am holding in the case at Bar. In this Ontario case the evidence showed that the defendant's horse escaped from his field to the street, and being frightened by a boy, ran upon the sidewalk and knocked down and injured the plaintiff. A by-law of the city of Hamilton, where the accident occurred, prohibited the running at large of horses within the city. Osler, J. at p. 464, makes a distinction regarding the defendant's liability, which I think is applicable to the case before us, between the case of an animal trespassing upon private property, and that of an animal at large upon a street or highway the title to which is in the Crown:—

"It is not necessary, nor is it in my view accurate, to speak of the horses as being trespassers on a street, the whole title to which is in the public, either the Crown or the municipality. That would give the plaintiff no right of action, though it might subject the owner to some form of prosecution by way of indictment for a nuisance or for infringement of the municipal by-law against such animals being allowed to run at large. It is enough to say that they were unlawfully on the street in consequence of the negligence of the owner, and that the damage suffered by the plaintiff was the natural result of, or properly attributable to, such negligence, having been caused by just what horses would be likely to do under the circumstances. The gist of the action is not trespass but negligence, and therefore, in considering whether the defendant is to be liable for the damage, we must see that it is such as might reasonably be expected to follow the negligent act."

As to the result which follows when an animal is a trespasser upon the land of another and causes injury to the other's property, he quotes from Addison on Torts, 6 ed. p. 129, where the author refers to *Lee* v. *Riley,* (1865) 18 C.B. (N.S.) 722, 144 E.R. 629, 34 L.J. (C.P.) 212, 13 W.R. 51 and *Ellis* v. *Loftus Iron Co.* (1874), 44 L.J. (C.P.) 24, L.R. 10 C.P. 10, 23 W.R. 246:—

"Where an animal is a trespasser, it is immaterial that an injury done by it is due to the animal's vice. The owner in such a case is liable for all the damage it may do, whether the damage is such as may reasonably be expected from the nature

Sask.
C.A.
OBADCHUK v. RUSSNIAK.
Lamont, J.A.

of the animal or is due to mischievous propensities of which the owner is ignorant.''

But the case is different when the plaintiff's right is founded not upon the trespass but upon negligence, as was the case in *Cox* v. *Burbidge, supra.*

Then, applying the principles of law as he conceives them to the facts of the case, the Judge says at p. 463, as follows:

''The case is different, in my opinion, from that of a horse biting or kicking a person on the street in such circumstances, the damage was just such as might naturally and reasonably be expected to be caused by horses running along the street uncontrolled.''

He refers to the horses being upon the sidewalk which is appropriated to foot-passengers.

In the view I take of the matter, the case at Bar is not different from, but is in the same class as, ''that of a horse biting or kicking a person on the street in such circumstances.'' The difference affects the doctrine of *scienter*: in the Ontario case the Court held that the facts proved did not raise the question of *scienter*; in my opinion the facts of our case do raise it. I think, therefore, that the appeal should be allowed with costs, and the judgment in favour of the plaintiff upon his claim in the Court below set aside and judgment entered for the defendant dismissing the plaintiff's action with costs.

LAMONT, J.A.:—I concur in the conclusion of my brother Turgeon that this appeal should be allowed and desire only to say that in my opinion where the statute prohibits the running at large of animals the prohibition extends to the highway as well as to other lands. What is meant by running at large is defined by the Stray Animals Act sec. 2 (15). An examination of that definition leads me to the conclusion that a farmer who drives his horses on to the highway through a gate in his field and who remains behind them only long enough to close the gate during which time the horses get only 60 or 70 feet away from the gate, as the evidence shows was the case here, cannot be said to have permitted his horses to run at large upon the highway.

The animals being lawfully upon the highway and there being no evidence of any negligence on the part of the defendant in respect of any duty owing to the plaintiff or any evidence from which it could be inferred that he knew or ought to have known that his horse would be likely to do the act complained of, the defendant cannot be held responsible for the damage done to the plaintiff's automobile.

MCKAY, J.A., concures with TURGEON, J.A. *Appeal allowed.*

Alta.
S.C.

WALKDEN v. WALKDEN.

Alberta Supreme Court, Walsh, J. January 11, 1922.

DIVORCE AND SEPARATION (§IV—41)—ADULTERY—CONDONATION—MEANING OF—PROOF.

Condonation of adultery means a blotting out of the offence so as to restore the guilty party to the position which he or she occupied before the offence was committed, and therefore renders proof of conjugal cohabitation necessary. A husband who upon learning of his wife's adultery determines to punish and not forgive, and whose subsequent conduct is directed to acquiring additional evidence as to her infidelity with a view to punishing her cannot be said to have condoned the previous offences, although there has been no change in his relations to her other than an unexplained abstinence from sexual intercourse.

[*Keats* v. *Keats* (1859), 1 Sw. & Tr. 334, 164 E.R. 754; *Hall* v. *Hall* (1891), 60 L.J. (P.) 73; *Cramp v. Cramp*, [1920] P. 158; *Moran* v. *Moran* (1920), 52 D.L.R. 339, followed. See Annotations, Divorce Law in Canada, 62 D.L.R. 1; 48 D.L.R. 7.]

ACTION for divorce on the ground of adultery, and for damages.

W. C. Fisher, for plaintiff.

T. J. O'Connor, for defendant.

WALSH, J.:—Without discussing the details of the evidence given in this distressing case I find that the female defendant was guilty of the various acts of adultery with the co-respondent sworn to by the plaintiff and his sons.

I had some doubt at the close of the trial as to whether or not the plaintiff's conduct subsequent to the discovery by him of his wife's unfaithfulness amounted to either condonation or connivance. It was partly for that reason and partly in the hope that some way might be found to bring about a reconciliation between these people that I reserved my judgment. I am told now that all hope of the latter is out of the question, and so I must dispose of the case.

The plaintiff's first suspicion of his wife was on the night of August 31 last. He was satisfied from what he saw and heard then that on that night she had committed adultery with the co-respondent. On the following two nights the same thing happened to his knowledge. He continued to live with her, however, until October 6, although after August 31 he never had, as I find, sexual intercourse with her. Except in this respect his treatment of her was in no sense different from that which had prevailed up to August 31. They lived together and slept together. He did not let her know that he was acquainted with her wrong-doing or even allow her to suspect that he was until October 6, the day upon which this action was started, and service of the statement of claim was made. That morning before it was

Alta.
S.C.
WALKDEN v. WALKDEN.
Walsh, J.

served he kissed her. His explanation of this is that it was a goodbye kiss, and I believe him. The commencement of the action came to her as a complete surprise. Even after it was started he and she lived in the same house, but he did not thereafter sleep with her. On September 4 the co-respondent, who was living with these people, wanted to leave the house and go elsewhere to live because of a row which the plaintiff had with him over his familiarity with the plaintiff's young daughter, but the plaintiff begged him not to do so. At another time when the plaintiff talked of going to England he asked the co-respondent to stay on in the house during his absence, but his evidence is not clear as to whether this was before or after August 31.

His excuse for all this is that until the night of October 4 he had no witness but himself to the acts of adultery to which he swore. He realised the futility of charging the guilty pair with their wrong-doing on his own unsupported evidence, much less of instituting proceedings for divorce, for he felt that they would deny it and that his oath would not prevail against theirs, and so he decided to let things run and he encouraged the co-respondent to stay until his sons came home, when they could see for themselves how things were and perhaps be able to witness some act which would supply the needed corroboration of his story. That opportunity came on the nights of October 4 and 5, when his sons witnessed the final acts of adultery, which are in evidence before me. I think that the plaintiff is honest in the reasons given by him for this conduct, and I therefore accept them.

Under ordinary circumstances it would be unnecessary for me to concern myself with the question whether or not the plaintiff by his conduct between the first known acts of adultery in August and September and the final acts in October, condoned the earlier offences, for they could clearly be revived by the later acts of which there has been no condonation. Condonation is said to be the conditional forgiveness of a known matrimonial offence, the implied condition being that no further matrimonial offence shall be committed. In the facts of this case as I find them the former offences were, but for the question of the plaintiff's connivance in these later acts, revived by them. The later offences were, however, clearly brought about by the plaintiff's connivance. Not only did he persuade the co-respondent to remain in his home for the avowed purpose of facilitating the commission of similar acts by the guilty pair when other

Alta.
S.C.
WALKDEN v. WALKDEN.
Walsh, J.

witnesses besides himself might be present, but upon one of the nights in question and in order to give them the desired opportunity he and his son ostensibly left the house, but in reality concealed themselves in the cellar, and when their ears told them that this opportunity was being taken advantage of, they left the cellar and put themselves in a position to give the evidence of wrong-doing, which I have accepted. Under these circumstances I do not think that these later offences can afford the plaintiff any ground of substantive relief or revive the former offences if there was condonation of them. It appears to me necessary, therefore, that I should decide the question of condonation of the earlier acts, for it is upon them alone that the plaintiff in my opinion is entitled to succeed if at all.

The leading authority on the question of condonation is *Keats* v.*Keats* (1859) 1 Sw. & Tr. 334, 164 E.R. 754; 28 L.J. (P. & M.) 57, 7 W.R. 377, the earliest decision on the point under the Act, which has been consistently followed ever since, the Court of Appeal having followed it as late as 1920 in *Crocker* v. *Crocker*, [1921] P. 25. The Judge Ordinary, Sir C. Cresswell, in charging the jury in the *Keats* case said at p. 61 (28 L.J. (P. & M.))

"I have come to the conclusion that condonation means *a blotting out of the offence imputed so as to restore the offending party to the position which he or she occupied before the offence was committed.* The term 'forgiveness' has very often been used as synonymous with 'condonation' but I think that 'forgiveness' as it is commonly current in the English language does not fully express the meaning of 'condonation'. A person may forgive in the sense of not meaning to bear ill will or not seeking to punish, still being far from meaning to restore the guilty party to his original position. A master may forgive a clerk or a servant who has robbed him; he may say 'I forgive you' without having the slightest intention to restore him to the position he had forfeited: I take it that 'condonation' would mean more than that. To use the language of Lord Stowell it is like releasing a debt; it makes it as if the debt had never existed."

This charge was approved on appeal. The Lord Chancellor in giving his judgment in appeal says at p. 79 (28 L.J. (P. & M.)):—

"I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation and that this must be shewn by the reinstatement of the wife in her former position which renders proof of conjugal cohabitation or the restitution of conjugal rights necessary."

Alta.
S.C.
Walkden v. Walkden.
Walsh, J.

Lord Sterndale, M.R., in approving of this judgment in *Crocker* v. *Crocker supra* at p. 35 says: "The Lord Chancellor there meant not that he adopted a meaning of 'conjugal cohabitation' which necessarily involved sexual intercourse, but that he meant the resumption of conjugal cohabitation as to restore the offending party to the same position. . . . . ."

In *Hall* v. *Hall* (1891), 60 L.J. (P.) 73, the condonation relied upon was that the petitioner had slept with his wife on the two nights immediately following the discovery of her infidelity (though he did not have sexual intercourse with her on either occasion) his excuse being that he was so distressed by her disclosures that he hardly knew what he was doing. The presiding Judge in charging the jury after quoting with approval some of the words of the charge in *Keats* v. *Keats, supra*, went on to say (at pp. 73, 74):—

"It really comes to this; that if with full knowledge of his wife's adultery a man nevertheless says 'I shall pass this by, I forgive it; I wish to treat my wife as if it had never happened', if he does that then he bars himself of his remedy. He cannot take that view with regard to his wife and then afterwards for no reason or no sufficient reason, change his mind."

This charge was also approved on appeal. Lindley L.J., after referring to the fact of the petitioner and his wife sleeping together on these two nights said, at p. 74: "The learned Judge did not lose sight of what is the real fact to be got at in such cases. It is forgiveness. And although in ninety-nine cases out of a hundred the fact that the parties slept together after the husband became aware of the wife's adultery would raise a very strong presumption of forgiveness, nevertheless there may be circumstances to rebut that presumption."

Cramp v. *Crmap,* [1920] P. 158, 89 L.J. (P.) 119, is the most recent English case I have been able to find on the subject. In it McCardie, J. exhaustively reviews the authorities. Although the petitioner, the husband, did not forgive his wife, he had sexual relations with her after knowledge of her adultery and the Judge held that condonation must be conclusively presumed from that fact. He took occasion to express his disagreement with the generally accepted definition of "forgiveness." He says, at p. 169:—

"The truth of the matter appears to be that condonation is not conditional forgiveness but a conditional reinstatement of the offending spouse. The word 'forgiveness' in the decisions must I think be regarded as employed in a technical sense with

Alta.
S.C.
WALKDEN v. WALKDEN.
Walsh, J.

the juristic purpose of defining condonation, although I agree that it is frequently used in the judgments in the sense employed by ordinary laymen."

In *Moran* v. *Moran*, (1920), 52 D.L.R. 339, my brother Simmons held under the authority of *Keats* v. *Keats*, *supra*, that condonation had not in the facts of that case taken place.

My difficulty is to properly apply the principle established by these authorities to the facts of this particular case for they differ so entirely from those of any case which I have been able to find. My best conclusion, after the most careful and anxious, thought, is that there has been no condonation. The plaintiff in my opinion never determined to forgive the wife. On the contrary I think that from the first his determination was the other way, to punish and not forgive. There, of course, was no communication to her of an intention to forgive an offence which she did not know he was aware of and which he had decided not to forgive. After all, I think it gets down to the question whether or not his excuse for his conduct is accepted as a true and reasonable one under the circumstances. I would say without hesitation that with his conduct unexplained or explained unsatisfactorily, condonation would be almost conclusively presumed, for I do not see what other presumption could arise in the case of a man who, knowing of three separate and distinct acts of adultery on the part of his wife, lives with her for more than a month after the last of them with no word of complaint uttered by him and no change in his relations towards her other than his unexplained abstinence from sexual intercourse with her. On the other hand, these circumstances are capable of explanation, which, if given, destroys this presumption, and that, I think, is the case here. The fact that so soon as the sons returned the story of their mother's wrong-doing was communicated to them and steps were taken to confirm it at the first opportunity, convinces me that the husband's constraint during the intervening period was due to the cause which he alleges, and destroys any other presumption that might otherwise be drawn from his conduct.

There will be the usual judgment *nisi* to become absolute in six months and an order giving the plaintiff the custody of the infant children until further order. There will be judgment against the co-respondent for $5,000 damages and costs.

Judgment accordingly.

Sask.

C.A.

PERADSKY v. PERADSKY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 14, 1921.

COURTS (§ IA—2)—JURISDICTION IN DIVORCE ACTIONS—FIAT FOR INTERIM ALIMONY—FORMAL ORDER NOT IN ACCORDANCE WITH FIAT—APPLICATION TO AMEND—APPEAL.

Where on an application for defendant's costs in an action by a husband for divorce a Judge of the King's Bench has given his fiat for such costs and it is contended that the formal order does not conform to the fiat but is in excess of it, the proper course is to apply to the Judge of the King's Bench to vary the order in accordance with the terms which he intended to express in the language used by him in the fiat, and not to appeal from the order to the Court of Appeal.

DIVORCE AND SEPARATION (§ VB—52)—ACTION BY HUSBAND—INTERIM ALIMONY—POVERTY OF PARTIES—ORDER FOR PAYMENT BY JUDGE OF KING'S BENCH—APPEAL.

An order for interim alimony of $20 per month made by a Judge of the Court of King's Bench in an action by a husband for divorce will not be interfered with by the Court of Appeal, where the wife is in a state of poverty, although the husband contends that he is working for only his board, lodging, clothing and small spending money, and should not be made to pay on account of his poverty.

[*Secrest* v. *Secrest* (1912), 5 D.L.R. 833, followed. See Annotations on Divorce, 48 D.L.R. 7, 62 D.L.R. 1.]

Appeal from the judgment of Taylor, J. granting interim alimony and costs in a divorce suit. Affirmed.

W. R. Kinsman, for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—In this case the plaintiff (appellant) sued his wife, the respondent in this appeal, for divorce, alleging against her the usual ground of adultery, and the defendant Hydai for damages for enticing the wife away and alienating her affections. On February 16 the wife's solicitor gave notice of an application to be made to a Judge of the King's Bench in Chambers for the following order:—

"1. That the plaintiff pay the said defendant's solicitor the sum of $200 on account of the said defendant's costs of defending the action herein for the said defendant, and give a further sum of $200 as security for the costs of the said defendant, Wasylka Peradsky.

2. That the plaintiff be ordered to pay to the said defendant, Wasylka Peradsky's solicitor the sum of $20 per week for the said defendant Wasylka Peradsky's use as alimony pending action.

3. Such further or other order relative to the payment of interim costs, security for costs and interim alimony."

Sask.
C.A.
PERADSKY.
v.
PERADSKY.
Turgeon, J.A.

This application was heard by Taylor, J., who gave his fiat as follows:—

"April 13th, 1921.

Order to go. Plaintiff pay $200 for allowance for defendant's costs and interim alimony at rate of $20 a month.—G. E. Taylor, J.

Leave to either party to appeal.—G.E.T."

Subsequently the wife's solicitor took out a formal order dated April 15, 1921, the material parts of which are as follows:

"It is hereby ordered that the above named plaintiff do forthwith pay to the defendant Wasylka Peradsky, or her solicitors, the sum of $200 as and for her interim costs and disbursements in connection with this action.

It is further ordered that the defendant do forthwith pay to the plaintiff the sum of $100 as and for arrears of interim alimony since the date of service of the writ of summons upon the defendant up to this date.

And it is further ordered that the said plaintiff do on the 15th day of May, and on the 15th day of each succeeding month thereafter until the hearing or other determination of this action, pay to the defendant, Wasylka Peradsky, or to whom she may appoint at the Town of Canora, in the Province of Saskatchewan, the sum of $20 as and for interim alimony up to the trial of the action and the judgment or other adjudication thereon."

The plaintiff appeals from this order on several grounds, the first of which is that the formal order does not conform to the Judge's fiat but is in excess of it. As to the payment of $200 for costs, he argues that this payment was meant to be made into Court as security for the wife's costs, to be paid out to her upon taxation only. As to the alimony he says that the Judge's fiat intended the alimony to be paid from the date of the fiat only and not retrospectively from the date of the service of the writ of summons. Upon the merits of the application he contends that the plaintiff is not possessed of any property or income and should, for that reason, be allowed to furnish security for the wife's costs instead of making a payment in money and be relieved altogether from the obligation of providing interim alimony.

In so far as the first ground of appeal is concerned, the respondent objects that no appeal lies to this Court, but that the appellant should, instead, have applied to Taylor, J., in Chambers to have the formal order varied in so far as it may not conform to the Judge's fiat.

There is no doubt that this course was open to the appellant

Sask.
C.A.
PERADSKY.
v.
PERADSKY.
Turgeon, J.A.

and, in my opinion, he should have taken it. The terms of the formal order were not settled by the parties, or by the Registrar in the presence of both parties, before the same was taken out. The order was taken out by the respondent's solicitors and the first notice the appellant's solicitors had of its contents was when the order was served on them. An application lay, therefore, to the Judge of King's Bench to have it determined by him whether the order issued was in fact in accordance with the order pronounced. Such an application is not an application for a rehearing which the Judge cannot entertain once the formal order has been taken out, but is merely an application to have the record corrected so as to make it conform to the fiat issued by the judge. (*Re Swire, Mellor* v. *Swire* (1885), 30 Ch. D. 239; 30 W.R. 525; *Preston Banking Co.* v *Allsup*, [1895] 1 Ch. D. 141, 64 L.J. (Ch.) 196, 43 W.R. 231.) There is great doubt in my opinion, whether an objection of this nature to the formal order can be considered to be matter for appeal to be entertained by this Court. In the case of *Hatton* v. *Harris* ([1892] A.C. 547, 61 L.J. (P.C.) 24), judgment had been recovered on a bond for £1,000 conditioned to secure £500 and interest at 6%. A decree was taken out providing that the debt of £500 with interest "until paid" was a charge upon the debtor's lands. This decree should have provided, (although the judgment pronounced said nothing upon the point), but did not provide, that the amount of the charge should not, in any case, exceed in the aggregate the sum of £1,000, the amount of the bond. In the course of years the amount provided for in the formal decree aggregated £1,775, a sum much in excess of the real sum intended to be awarded in the judgment on which the decree was founded. Hatton, who was entitled to the benefit of the decree applied to have this whole sum of £1,775 paid out to him. Objection was taken, and the matter finally reached the Judicial Committee of the Privy Council. It was there held that the Court which had granted the original judgment, or the Court which by the provisions of the Judicature Acts had inherited the powers of that Court, was the proper Court to entertain an application to correct the decree by reducing it to the amount intended to be awarded by the judgment pronounced. At p. 560 of the report, Lord Watson says as follows:—

"When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce.

Sask.
C.A.
PERADSKY.
v.
PERADSKY
Turgeon, J.A.

The correction ought to be made upon motion to that effect, and is not matter either for appeal or for rehearing. The law upon this point was fully and satisfactorily discussed by the late Lord Justice Cotton in *Mellor* v. *Swire*, 30 Ch. D. 239, an authority which appears to me fully to bear out the proposition I have just stated."

However the parties before the Judicial Committee consented to allow the matter to be disposed of by the Committee; this was done and the amount of the decree reduced. Lord Watson has the following to say upon this point at p. 561:

"Seeing, however, that the parties have enabled us finally to dispose of this appeal, it becomes unnecessary to discuss the point farther, or to consider whether the appeal Court, when the case was before it, would have had jurisdiction to correct the decree."

The parties in the case at Bar have not consented to have the matter disposed of by this Court, and, in any event, I think the proper course to pursue is to have it referred to the Judge of King's Bench so that, if necessary, the present formal order may be varied and an order settled in accordance with the terms which he intended to express in the language used by him in his fiat of April 13, 1921. This language is not at all precise, and if we were to give effect to it we should feel constrained, no doubt, considering that it provides for the payment of money, to give it the restricted interpretation contended for by the appellant. But when we bear in mind the wide discretion which the Judge of King's Bench enjoys in the matters involved in the application which was made to him, such an interpretation might well turn out to be unfair to the respondent, in so far, particularly, as the payment of alimony is concerned. I think, therefore, that that part of the case before us which is based upon an allegation of discrepancy between the fiat and the formal order should be referred to the Judge of King's Bench for his consideration.

On the merits of the case, the appellant contends that he should not be made to pay alimony or money for costs on account of his poverty. He states that he is working at farm labour for his father, and that his only remuneration consists of his board, lodging, clothing and small spending money. I may save another hearing of the merits of this case before us by expressing my opinion here that the discretion of the Judge of King's Bench to order the payment of money should not be interferred with for the reasons advanced by the appellant in the material contained in the appeal book. Whatever caution may be exercised in England before an order for alimony

B.C.

S.C.

is made, owing to the fact that failure to comply with the order may entail imprisonment, I agree with the opinion expressed by Beck, J., in *Secrest* v. *Secrest*, 5 D.L.R. 833, that as no such consequences can follow here, different considerations must apply. (ch. 83, 1918-19 (Sask.); Cr. Code of Canada ch. 146, sec. 165). Apparently the appellant is a young, able-bodied man, and I can see no reason why he should not be compelled to make an effort, at least, to furnish some support *pendente lite*, to his wife whom he has accused of adultery, who denies the charge and is defending herself against it, and who is in a state of poverty with her one year old child.

The appeal should be dismissed with costs.

Appeal dismissed.

DAVY v. DAVY.

British Columbia Supreme Court, Murphy, J. January 5, 1922.

DIVORCE AND SEPARATION (§VC—55) — DIVORCE RULES OF BRITISH COLUMBIA—RULE 26—APPLICATION—JURISDICTION OF COURT TO GRANT APPLICATION FOR EXAMINATION OF WITNESSES IN SUPPORT OF PETITION FOR PERMANENT ALIMONY BEFORE THE TRIAL OF THE CAUSE.

Rule 26 of the British Columbia Divorce Rules applies only to proceedings for alimony *pendente lite* in dissolution cases when it is sought to examine witnesses in support of an alimony petition previous to the hearing of the cause. An application under this rule to examine witnesses in support of a petition for permanent alimony prior to the trial of the cause will, therefore, be refused.

[See Annotations on Divorce, 48 D.L.R. 7, 62 D.L.R. 1.]

DIVORCE AND SEPARATION (§VB—52)—DIVORCE ACTION—WIFE PETITIONER—APPLICATION TO COMPEL RESPONDENT TO DEPOSIT A SUM TO SECURE COSTS OF SUIT—JURISDICTION OF COURT TO GRANT.

The Supreme Court of British Columbia has no jurisdiction to grant an application by a wife who is petitioner for divorce that the respondent be ordered to pay into Court a sum of money to secure her costs of suit even though it be shewn that the wife has no separate estate and the husband has means to comply with the order if made.

[*Sharpe* v. *Sharpe* (1877), 1 B.C.R. 25, followed; *Sheppard* v. *Sheppard* (1908), 13 B.C.R. 486, referred to.]

APPLICATION by wife who is petitioner for divorce that respondent be ordered to pay into Court a sum of money to secure her costs of suit. Refused.

APPLICATION under Rule 26 of the British Columbia Divorce rules, by a wife to examine witnesses in support of her petition for alimony prior to the trial of the case. Refused.

Fisher and *Johannsen*, for petitioner.

E. C. Mayers, for respondent.

MURPHY, J.:—Application by wife who is petitioner for di-

B.C.
S.C.
DAVY
v.
DAVY.
Murphy, J.

vorce that respondent be ordered to pay into Court a sum of money to secure her costs of suit. Objection—no jurisdiction to make such order. Admittedly such orders have, at times, been made in the past, but enquiry has failed to show that the point raised was ever argued, much less judicially passed upon by any Judge. Such decisions are not binding, particularly when a question of jurisdiction is raised. See authorities cited in *Rex* v. *Gartshore* (1919), 49 D.L.R. 276, 32 Can. Cr. Cas. 49, 27 B.C.R. 425; and *Watt v. Watt* (1907), 13 B.C.R. 281; *Re Osborne and Rowlett* (1880), 13 Ch. D. 774, at 785, 49 L.J. (Ch.) 310, 28 W.R. 365. Where the wife is respondent and has entered an appearance, although she has filed no answer, the practice is governed by R. 58 of the Divorce Rules, which is taken, word for word, from the Further Rules and Regulations concerning Divorce Practice made by the Judges in England and effective as of January 11, 1860, and is to be found in vol. 29 L.J. (P.), sub-title, Rules and Regulations, p. 11. In 1865, further rules were passed and by R. 158 thereof, a wife who had entered an appearance could have her costs taxed and get a report made by the Registrar to the Court of what was a sufficient amount of money, to be paid into Court, to cover her trial costs. This rule, however, apparently, again dealt only with the case of a wife who was a respondent, since it speaks of her entering an appearance as a condition precedent to its operation. See 35 L.J. (P.). Sub-title Rules and Regulations. This view is strengthened by the fact that on July 14, 1875, this R. 158 was revoked and for the first time, so far as I can ascertain, power is expressly given by the new R. 158 to make such an application as this, where wife is petitioner.

I am indebted to Mr. Mayers, counsel for the respondent, for an exhaustive list of all English decisions on this question of security for costs before trial, reported from 1858 to 1875 when the new rule was passed. There seems to have been but one where wife was petitioner and the suit was for dissolution where such an order seems to have been made, viz., *Hepworth* v. *Hepworth*, 2 Sw. & Tr. 414, 164 E.R. 1057, 30 L.J. (P.) 198, decided in 1861. That case does not deal directly with the question, but a writ of attachment was there directed to issue because the husband (respondent) did not put up security for his wife's costs, as ordered. It seems, therefore, that, in one instance at any rate, such an order as is here asked for was made in the interval mentioned. It is to be noted that in *Hepworth* v. *Hepworth,* the question of jurisdiction is referred to

B.C.
S.C.
DAVY v. DAVY.
Murphy, J.

and the position is taken that the words "or otherwise" in sec. 32 of the Matrimonial Causes Act, 1857, ch. 85, gives such jurisdiction. This decision seems somewhat inconsistent with the decision in *Weber* v. *Weber* (1858), 1 Sw. & Tr. 219 at p. 221, 164 E.R. 701, 6 W.R. 867, where the practice of the House of Lords was imported into the Divorce Court practice, apparently on the ground that there was no jurisdiction otherwise to order security for the wife's costs. She was there a respondent. The argument before me rests on the contention that these words "or otherwise" in sec. 32 gives jurisdiction. If the matter rested there, I would be inclined to proceed with the enquiry as to whether the wife has separate estate and as to the ability of the husband to comply with such order, if made particularly in view of the fact that such orders have been made by our Court in the past. But my intention has been called to the proceedings on March 7, 1877, in *Sharpe* v. *Sharpe*, 1 B.C.R. 25 (set out in *Sheppard* v. *Sheppard*, (1908), 13 B.C.R. 486 at p. 489) heard before all the then Judges of the Supreme Court of British Columbia. There the Chief Justice expressely held the Rules and Regulations of an English Court are not part of the law of England and are, therefore, not in force here. This view must have been concurred in by the two associate Judges for the cause was ordered to stand over until the Court promulgated rules, governing divorce procedure. The point is emphasized by the fact that the same bench on a further hearing ordered the proceedings to be begun *de novo* under the new rules which had been promulgated in the meantime—being, in substance, our present rules—and the previous petition was treated as a nullity. Such a decision cannot be ignored by a single Judge, and, even if it could, the principle on which it is founded was not questioned in argument and, indeed, I think, cannot be questioned. It follows, therefore, that English rules, no matter of what date, have no application to our procedure. Now, even granting that the words "or otherwise" gave jurisdiction to the English Court, that jurisdiction in so far as the matter before me is concerned, was to adopt a certain practice, viz., the practice formerly followed in the Ecclesiastical Courts in cases of judicial separation. I do not see that such practice is of any higher statutory authority than the rules made by the English Judges pursuant to sec. 53 and other sections of the Acts of 1857 ch. 85 and 1858 ch. 108. Both rest on the statute for validity. But, as stated, a bench of three Judges has decided in *Sharpe* v. *Sharpe*, *supra*, that the rules so made are not in force in British Columbia. I fail to see how, in the face of this decision,

B.C.
S.C.
DAVY
v.
DAVY.
Murphy, J.

it can be said—even granting that the Matrimonial Causes Act 1857, imported the former ecclesiastical practice into the English Courts—that such practice is in force in this Province.

Further, when the Judges promulgated the Divorce Rules in 1877 they, as above stated, when dealing under one set of circumstances with this matter of the wife's costs adopted the English Rule of 1860 (our R. 58) but they made no provision for such an application as the present one although they must have had before them R. 158 passed in 1875, which is the present English authority for such applications. It is contended that the circumstances covered by our R. 58 are not the circumstances under which this application is made. I agree, but the fact remains that the one rule was brought into force whereas the English Rule 158, which does not cover the facts at Bar, was not. The decision in *Sharpe* v. *Sharpe*, and the adoption by the Judges of R. 58 of our Divorce Rules and the failure to adopt the English Rule 158, despite its then existence for about two years in England, forces me to conclude that there is no jurisdiction in our Court to make the order asked for, even if it be shewn the wife has no separate estate and the husband has means to comply with the order if made. It is strenuously argued that it is against public policy not to follow the unconsidered practice hitherto adopted and reliance is placed on the language used in this connection in *Sheppard* v. *Sheppard*, *supra*, at p. 520 *et seq*. But, obviously, very different considerations, from the stand-point of public policy, arise in a case where it is sought to have declared nugatory decrees of absolute divorce granted over a long period of years, from those which arise when the point at issue is merely whether or not security for costs shall be ordered to be put up before trial by a husband respondent. The case of *Vernon* v. *Vernon* (1914), 6 W.W.R. 1047, shews that the wife's costs are not payable in any event, but are a matter to be dealt with by the trial Judge. True, it decides that even where the wife is unsuccessful she may in a proper case recover costs from the husband, but the case, I think, is authority for the proposition that the wife's costs are not payable *de die in diem* as they were under the ecclesiastical practice and to that extent supports my view that such practice is not in force in this province. The reason for the rule in the Ecclesiastical Courts is stated to have been the common law principle that the husband on marriage acquired all the wife's property, but that reason has disappeared as a result of the passage of the Married Women's Property Act, 1882-1883, ch. 75.

A conclusive answer to this public policy argument is I think found when it is remembered that it has been decided that a wife in a proper case has the right to pledge her husband's credit to obtain a divorce and that such right is in addition to all provisions in reference to wife's costs under the divorce jurisdiction. *Ottaway* v. *Hamilton,* (1878), 3 C.P.D. 393, 47 L.J. (C.P.) 725, 26 W.R. 783. *Application dismissed.*

MURPHY, J.:—Application under R. 26 of the Divorce Rules by wife to examine witnesses in support of her petition for alimony prior to trial of the cause. The petition herein is for dissolution of marriage. The petition for alimony is for permanent alimony, not alimony *pendente lite*. For the husband it is objected, there is no authority to file a petition for permanent alimony as distinguished from alimony *pendente lite* previous to trial. In England, permanent alimony petitions in dissolution cases can only be filed after a decree *nisi* has been pronounced. But this is owing to a special rule not in force in this Province. The decisions prior to the passing of this rule show that it was the proper practice to file a petition for permanent alimony prior to the hearing. *Vicars* v. *Vicars*, (1859), 29 L.J. (P.) 20, and notes thereto. *Charles* v. *Charles* (1866), L.R. 1 P. & D. 260, 36 L.J. (P.) 17.

Rule 24 is, I think, authority for so doing since it does not distinguish between permanent alimony and alimony *pendente lite*. But the English decisions are also clear that there is no jurisdiction to grant permanent alimony in dissolution cases until a decision to dissolve the marriage has been given. In addtion to cases above cited see *Sidney* v. *Sidney* (1867), 36 L. J. (P.) 73 and *Bradley* v. *Bradley* (1878), 3 P.D. 47, 47 L.J. (P.) 53, 26 W.R. 831. Since this is so I think the proper construction of Rule 26 is to hold that it applies only to proceedings for alimony *pendente lite* in dissolution cases when it is sought to examine witnesses in support of an alimony petition previous to the hearing of the cause. Since the decisions above cited if I understand them aright decide that the Court's jurisdiction to grant permanent alimony or maintenance in dissolution suits arises only after a decision that dissolution is to be granted it is I think at least doubtful that there is jurisdiction to allow witnesses to be examined touching matters with regard to which it may turn out at the hearing the Court has no power to deal. But whether there is or is not jurisdiction it seems unreasonable for a Court to order proceedings involving expense and in their nature peculiarly vexatious which proceedings the Court may never have jurisdiction to take cognizance

N.S.

S.C.

of. In the absence of authorities to the contrary I construe Rule 26 to apply in dissolution cases only to petitions *pendente lite*. Obviously such proceedings would be of a widely different scope from proceedings invoked to establish what should be the amount of permanent provision that should be made for a wife. The application is refused.

Application refused.

Re ALIOTIS and CLIRIS.

Nova Scotia Supreme Court, Harris, C.J., Russell and Mellish JJ. December 10, 1921.

BANKRUPTCY (§IV—39)—BANKRUPTCY ACT AMENDMENT ACT, 1921 (CAN.) CH. 17—CONSTRUCTION—LIEN AGREEMENTS FOR GOODS PURCHASED—RIGHT OF AUTHORISED TRUSTEE TO POSSESSION AND CONTROL—RIGHTS OF LIEN CREDITORS.

By section 6 of the Bankruptcy Act 1919 (Can.) ch. 36, it is only the property of the debtor which passes to or vests in the trustee, and it expressly reserves to a secured creditor the power "to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed." The authorised trustee is not therefore entitled to possession or control of any property covered by respective lien agreements for store fixtures and fittings purchased by the debtor, especially if nothing has been paid on account of such purchases and the bankrupt has no beneficial interest in the property. In any event such creditors have a right to realize their security.

[See Annotations on Bankruptcy, 53 D.L.R. 135, 59 D.L.R. 1.]

APPEALS from the decision and supplementary decision of Chisholm, J., Judge in Bankruptcy for the Nova Scotia Bankruptcy District on questions arising in connection with an assignment under the Bankruptcy Act.

A. W. Jones, for the assignors.

C. J. Burchell, K.C., for the National Cash Register Co.

L. A. Forsyth, for the Halifax Academy of Music.

J. McG. Stewart, for the Canada Permanent Trust Co., assignee.

HARRIS, C.J.:—Aliotis and Cliris formerly carried on business in Halifax and purchased certain fixtures and fittings from J. J. McLaughlin Ltd., and certain other fixtures and fittings from the National Cash Register of Canada, Ltd. Both vendors took lien agreements which were duly registered.

Subsequently a company was incorporated and took over the business formerly carried on by Aliotis and Cliris. This company, known as the Majestic Confectionery Co., was managed by Aliotis and Cliris who were the largest, if not the only shareholders. Aliotis and Cliris and the company subsequent-

ly, on August 8, 1921, made assignments to the same authorised trustee. The lien agreements are not produced and the case does not shew the amount of the lien agreements, but it is stated in the case that there is due to the McLaughlin Co. $5,784.80 and to the National Cash Register Co. $540 under their respective agreements. On the argument I asked the original value of the property and counsel agreed that little or nothing had been paid on the purchases. I therefore propose to deal with the case on the assumption that no beneficial interest in the goods vested in the bankrupts or either of them at the time of the assignments.

The premises occupied first by Aliotis and Cliris and subsequently by The Majestic Confectionery Co. were leased by Aliotis and Cliris from the Halifax Academy of Music and the lease had been assigned by them to the confectionery company which had assumed liability for the rent and also for all sums due or to become due in respect to the fixtures and fittings.

There was rent due to the Academy of Music under this lease at the time of the assignments. Notice had been given under ch. 17, sec. 21, 1921, (Can.) by the McLaughlin Co. and the Cash Register Co. to the authorised trustee of their intention to remove the property covered by their respective lien agreements at the expiration of 15 days from the service of the notices.

The authorised trustee applied to the Judge in Bankruptcy for the opinion of the Court and all the parties interested concurred in submitting to him for decision certain questions, and among others the following:—

2. Whether the authorised trustee is entitled to the possession and control of the property covered by the said lien agreements.

3. Whether the said J. J. McLaughlin Ltd. is entitled to demand and receive possession from the said authorised trustee of the property described in the said lien agreement in favor of the said J. J. McLaughlin Ltd. either forthwith or after the expiration of the said 15 days' notice.

4. Whether the said National Cash Register of Canada Ltd. is entitled to demand and receive possession from the said authorised trustee of the property described in the said lien agreement in favor of the said National Cash Register of Canada Ltd. either forthwith or after the expiration of the said 15 days' notice.

5. Is the said Halifax Academy of Music entitled to receive from the authorised trustee the amount of the said claim for

N.S.

S.C.

RE ALIOTIS AND CLIRIS.

Harris, C.J.

rent set forth in para. 6 hereof, and if so, is the authorised trustee to dispose of the goods and chattels on the said premises covered by the said or other lien agreements or to apply the proceeds of such disposal in whole or in part in payment of such claim for rent. In such event, in what proportion as between the said holders of such lien agreements are the proceeds of such disposal to be resorted to for payment of the said rent.

8. Has the said Halifax Academy of Music any right of distress in respect of the said rent due or accrued due on August 8, 1921.

The Judge in Bankruptcy decided that, "Except to the extent that proceedings are restrained by the Act, a secured creditor claiming property in goods in possession of the trustee is entitled to assert his rights in the same manner in which he could assert them against the assignor, if the assignment had not been made. J. J. McLaughlin Ltd. and the National Cash Register Co., after giving the 15 days' notice provided by the Act, would if the question of the landlord's right to distrain did not intervene, be entitled to proceed to recover their goods. In other words, as between these companies and the trustee, the companies are entitled to the goods. But the landlord, also, has rights. But for the provisions of sec. 52 (1), 1919, (Can.) ch. 36, the landlord could realise his rent by distress. This section takes away that right, but it does not take away his priority. It provides a new way of enforcing his claim. The trustee takes possession of the property of the debtor but he must pay the landlord in priority of other debts an amount not exceeding the value of the distrainable assets, etc. It is pointed out that the trustee shall be entitled to immediate possession of "all the property of the debtor," and that this phraseology does not apply to property of another in possession of the debtor. Although it is not expressed with precision, I think the implication is that the trustee shall take possession of all property in possession of the debtor upon which the landlord might, but for this section, make a distress, and the use of the words "distrainable assets" in the section fortifies this view. The trustee as against the tenant and as against parties claiming goods in the tenant's possession stands, in carrying out the provisions of the section, in the place of the landlord."

From this decision there is an appeal by J. J. McLaughlin Ltd., and National Cash Register Co. of Canada, Ltd., who ask for an order reversing and setting aside the decision of the Judge in Bankruptcy and for a declaration;

(a) That the authorised trustee is not entitled to possession or control of any of the property covered by the respective lien agreements.

(b) That the said J. J. McLaughlin Ltd. is entitled to demand and receive possession from the authorised trustee of the property described in the lien agreement in favor of the said J. J. McLaughlin Ltd., after the expiration of the said 15 days' notice.

(c) That the said National Cash Register Co. of Canada Ltd. is entitled to demand and receive possession from the said authorised trustee of the property described in the said lien agreement in favor of National Cash Register Co. of Canada Ltd., after the expiration of the said 15 days' notice.

On the appeal counsel appeared for the appellants, the Academy of Music and the authorised trustee.

I am unable to see how the authorised trustee can resist the claims of the lien holders to the property. By sec. 6 of the Bankruptcy Act it is only the property of the debtor which passes to or vests in the trustee and it expressly reserves to a secured creditor the power "to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

If, as must be assumed in this case, the assignors or bankrupts had no beneficial interest in the property then nothing passed to the assignee. In any event the creditors have a right to realise their security.

I would therefore answer question 2 in the negative and nos. 3 and 4 in the affirmative.

While the answer to question 5 is perhaps obvious from what has been said, before formally answering it I propose to consider question 8.

The case of *Railton* v. *Wood* (1890), 15 App. Cas. 363, 59 L.J. (P.C.) 84, seems to be conclusive.

There the Privy Council had to consider on an appeal from the Supreme Court of New South Wales a very similar question arising under the Colonial Insolvent Act, 5 Viet. No. 17 of 1841. Section 41 of that Act was the same in effect as our sec. 52 of the Bankruptcy Act. Our sec. 52 reads as follows:—

"(1) Where the bankrupt or authorised assignor is a tenant having goods or chattels on which the landlord has distrained, or would be entitled to distrain, for rent, the right of the landlord to distrain or realise his rent by distress shall cease from and after the date of the receiving order or authorised assignment and the trustee shall be entitled to immediate pos-

N.S.

S.C.

RE ALIOTIS AND CLIRIS.

Mellish, J.

session of all the property of the debtor, but in the distribution of the property of the bankrupt or assignor the trustee shall pay to the landlord in priority to all other debts, an amount not exceeding the value of the distrainable assets, and not exceeding three months' rent accrued due prior to the date of the receiving order or assignment, and the costs of distress, if any.

(2) The landlord may prove as a general creditor for (i) all surplus rent accrued due at the date of said receiving order or assignment; and (ii) any accelerated rent to which he may be entitled under his lease not exceeding an amount equal to three months' rent.

(3) Except as aforesaid the landlord shall not be entitled to prove as a creditor for rent for any portion of the unexpired term of his lease, but the trustee shall pay to the landlord for the period during which he actually occupies the leased premises from and after the date of the receiving order or assignment, a rental calculated on the basis of said lease.''

The question in the Privy Council was between the landlord on the one hand and the mortgagee of goods under a Bill of Sale made by the tenant, in which it was assumed that the amount due and secured was in ''excess of the value of the security and that there was therefore no beneficial interest in the goods vested in the tenant and that the whole property was in the respondent'' i.e., the mortgagee.

It was held that the prohibition against distress contained in sec. 41 of the Act in question ''only applied to a distress upon goods which formed part of the insolvent estate to be administered as assets'' and did not apply to the goods in question which were the goods of a stranger.

The reasons stated by Lord Field who delivered the judgment of the Privy Council seem unanswerable and so far as I can see they all apply here. See also Woodfall on Landlord and Tenant, 20th ed. p. 345.

I would therefore answer question 5 in the negative and No. 8 in the affirmative.

Under the circumstances there should be no costs on the appeal to either party.

RUSSELL, J., concurred.

MELLISH, J.:—The above named parties are assignors under the Bankruptcy Act, 1919 (Can.) ch. 36, and at the time of making such assignment the assignors Aliotis and Cliris were tenants of premises owned by the Halifax Academy of Music and at the date of the assignment there was due to the owner $1,125 for rent.

N.S.
S.C.
RE ALIOTIS AND CLIRIS.
Mellish, J.

On these premises at the time of the assignment there were certain fittings and fixtures held by the assignors under lien agreements with J. J. McLaughlin Ltd. and the National Cash Register Co. of Canada Ltd. respectively. Under these agreements large sums were due by the assignors to both lien holders.

The respective lien holders after the assignment gave notice to the assignee that they claimed the right to possession of the property covered by said agreements. Certain question by way of a stated case were then submitted to the Court for determination involving the right to the possession of this property as between the landlord and the lien holders and the trustee in bankruptcy. The conclusion of the Judge in Bankruptcy was that the trustee in bankruptcy was entitled to the property as against the landlord and lien holders respectively.

An appeal was taken from such decision by the lien holders and on this appeal counsel was heard on behalf of the lien holders, the landlord and the trustee respectively. Apparently no notice of appeal was given by the landlord.

It is, I think, conceded that except for the provisions of sec. 52 of the Bankruptcy Act the trustee could have no right as against the lien holders to this property.

Counsel for the lien holders contended that the effect of this section was to destroy the right of distress as to these goods but at the same time preserve the lien holders' right thereto under the provisions of the Act as to secured creditors. It was suggested to counsel, Mr. Ralston, K.C., in opening that sec. 52 might not be intended to cover the property in question as the section in terms only referred to tenant's goods; then I understood appellants' counsel to adopt the alternative argument that even if the right of distress remains, the trustee nevertheless could not hold the goods as against the lien holder.

Counsel for the landlord, Mr. Forsyth, then cited authority that the view so suggested was the correct one, an authority not cited to the Judge in Bankruptcy.

The conclusion I have reached is that by the assignment none of the rights of the landlord, or of the lien holders as secured creditors, in respect of such property has been affected or destroyed and that there should be an order accordingly.

I agree with Harris, C.J., that there should be no costs on the appeal.

Judgment accordingly.

Sask.

K.B.

Re CARSON.

Saskatchewan King's Bench, MacDonald, J. December 21, 1921.

BANKRUPTCY (§ II—15)—MORTGAGE UNDER SASKATCHEWAN LAND TITLES ACT—PREFERENCE UNDER BANKRUPTCY ACT—VALIDITY—"TRANSFER"—MEANING OF—R.S.S. 1920, CH. 67, SEC. 2 (14)—1920 (CAN), CH. 34, SEC. 31 (1) (2)—CONSTRUCTION.

The word "transfer" in sec. 31 (2) of the Bankruptcy Act 1920 (Can.) ch. 34 is wide enough to cover a mortgage under the Saskatchewan Land Titles Act R.S.S. 1920 ch. 67 sec. 2 (14), notwithstanding that it is provided in the Land Titles Act that a mortgage shall have effect as security but shall not operate as a transfer of the land thereby charged, and where such mortgage has the effect of giving the mortgagee a preference over the other creditors and therefore comes within sec. 31 (2) of the Bankruptcy Act it will be set aside.

[*American-Abell Engine & Threshing Co.* v. *McMillan* (1909), 42 Can. S.C.R. 377, applied. See Annotations on Bankruptcy Act, 53 D.L.R. 135, 56 D.L.R. 104, Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

APPEAL from the disallowance by the trustee of the claim of Robert Carson the elder against the above-named assignor.

J. L. McDouall, for trustee.

P. G. Hodges, for Robert Carson.

MACDONALD, J.:—As to this appeal I can only say there are so many suspicious circumstances connected with the alleged debt in question that I do not think it would be proper for me to decide the same on affidavit evidence. There will therefore be an order for the trial before a Judge of the Court of King's Bench at the next sittings of the Court to be held in and for the Judicial District of Wynyard of an issue as to the amount, if any, in which said John Carson is indebted to Robert Carson the elder. In said issue said Robert Carson will be the plaintiff and the trustee the defendant. The costs of all parties will abide the result of the issue.

Application on behalf of Salter & Arnold Limited, the authorised trustee of the property of John Carson, authorised assignor, to set aside a certain mortgage for the sum of $2,650, dated April 4, 1921, and registered April 13, 1921, given by the said John Carson to Robert Carson the elder, as fraudulent and void against the trustee under the authorised assignment.

MACDONALD, J.:—The said John Carson made an authorised assignment under the Bankruptcy Act, 1919 (Can.), ch. 36, on April 29, 1921. As above stated the mortgage in question was given on April 4, 1921, and, therefore, within three months of the making of the assignment.

Section 31 of the Bankruptcy Act, 1920 (Can.), ch. 34, reads as follows:—

"(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by an insolvent person in favour of any creditor or any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, praying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking, paying or suffering the same, or if he makes an authorised assignment, within three months of the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorised assignment.

(2) If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure, and evidence of pressure shall not be receivable or avail to support such transaction.

(3) For the purpose of this section the expression 'creditor' shall include a surety or guarantor for the debt due to such creditor."

It is quite clear that the mortgage in question has had the effect of giving Robert Carson the elder, the mortgagee, and a creditor of said John Carson, a preference over the other creditors, and therefore, if it comes within sub-sec. (2) of said sec. 31 it shall be presumed *primâ facie* to have been made with a view of giving said creditor a preference over the other creditors whether or not it was made voluntarily or under pressure.

It is argued, however, that a mortgage under the Land Titles Act of Saskatchewan, R.S.S. 1920, ch. 67, sec. 2, sub-sec. 14, is not a "conveyance, transfer, payment, obligation or judicial proceeding" within the meaning of said subsec. (2); that it is a charge within sub-sec. (1), but as the word "charge" is not used in sub-section (2) it cannot be held to be within said subsection.

In my opinion the word "transfer" used in sub-section (2) is wide enough to cover the mortgage in question, notwithstanding the fact that in the Land Titles Act of Saskatchewan it is provided that a mortgage shall have effect as security but shall not operate as a transfer of the land thereby charged.

Sask.
K.B.
RE CARSON.
MacDonald, J.

In *American-Abell Engine & Thresher Co.* v. *McMillan* (1909), 42 Can. S.C.R. 377, it was held that a document which purported to "incumber, charge and create a lien upon" a homestead was a transfer within the meaning of sec. 142 of the Dominion Lands Act, 1906 R.S. (Can.), ch. 55, which provided that:—

"Except as herein provided unless the Minister otherwise declares that every assignment or transfer of homestead or pre-emption right or any part thereof and every agreement to assign or transfer any homestead or pre-emption right or any part thereof after patent obtained, made or entered into before the issue of the patent shall be null and void; and unless the Minister otherwise declares, the person so assigning or transferring or making an agreement to assign or transfer, shall forfeit his homestead and pre-emption right."

Davies, J., says as follows at p. 390:—

"Then on the question upon which Mr. Chrysler seemed chiefly to rely, I cannot doubt that what the statute intended to prevent was, as expressed, any transfer or assignment or agreement to transfer or assign as well as anything which would or could have the legal effect of transferring away from the homesteader and giving to another his rights as such or of having the same done by process of law. In other words, the language used was large enough, in the connection in which it was used, to cover indirect as well as direct transfers and so to cover a charge such as this under which a sale of the homesteader's rights could be decreed and transferred from him by a sale of the lands under the decree. The same word which is here used came under the consideration of the Court of Appeal in England, in the case of *Gathercole* v. *Smith* (1881), 17 Ch. D. 1. At p. 7, James, L.J., says:—

"Now, 'transfer' is one of the widest words that can be used. It appears to me that very word was used by the legislature not only to prevent the incumbent from assigning himself, but for preventing any transfer by operation of law *in invitum*—not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order by an execution creditor, or otherwise transferred."

At pages 9 and 10, Lush, L.J., says:—

"The word 'transferable,' I agree with Lord Justice James, is a word of the widest import, and includes every means by which the property may be passed from one person to another.

. . . Clearly the words 'shall not be transferable at law or in equity' do say that he shall not be at liberty to encumber it either directly by assignment or indirectly by suffering a judgment."

The judgments of Idington, J., and Duff, J., are to the same effect. I am, therefore, of opinion, that the language of said sub-sec. (2) is broad enough to cover the mortgage in question, and the said mortgage will, therefore, be declared void as against the trustee, with costs.

Judgment accordingly.

BISSETT v. TOWN OF BEAUSEJOUR.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Metcalfe, JJ.A. December 28, 1921.

MUNICIPAL CORPORATIONS (§IIG—228)—BY-LAW AS TO ELECTRICITY—AUTHORITY OF TOWN ELECTRICIAN—INSTALLATION OF X-RAY MACHINE—WORK SUPERINTENDED BY ELECTRICIAN—SUBSEQUENT REQUEST TO CHANGE WIRING—REFUSAL TO COMPLY—DISCONTINUANCE OF CURRENT—DAMAGES.

Where the town electrician of a town has under a by-law which is within the powers of the town authority to inspect and re-inspect all overhead or underground and interior wires and apparatus conducting electric current, ... and if found unsafe to notify the person owning, using or operating them to put them in a safe and secure condition . . . such electrician has the right to make any alterations that occur to him and to modify his judgment in regard to wiring connections in order to make them safe, and the fact that the electrician has supervised the putting in of connections for an X-ray machine, does not prevent him from afterwards requiring changes to be made and cutting off the supply of current until such connections have been made, and such action does not make the town liable in damages for cutting off such current.

APPEAL by the defendant from a judgment of a County Court Judge of Manitoba, in an action for damages for being deprived of electric current required to operate an X-ray machine. Reversed.

F. Heap, for appellant.

J. G. Harvey, K.C., for respondent.

The judgment of the Court was delivered by

CAMERON, J.A.:—This action is brought in the County Court of Beausejour by the plaintiff, a duly qualified physician and surgeon, against the Town of Beausejour. It is alleged in the particulars of claim as amended that "on or about April or May 1919 the plaintiff made application to the defendant for supply of all necessary electrical power or energy and wiring to premises of plaintiff required to operate a Victor X-ray machine which the defendant agreed to do. Subsequenty the

M.n.
C.A.
BISSETT v. TOWN OF BEAUSEJOUR.
Cameron, J.A.

defendant installed or supplied wiring and for a time supplied the necessary electrical energy to operate the said machine: that subsequently on or about July 1920 the defendant without reasonable cause and in breach of the said agreement and the duties of a public utility, discontinued the said supply of electrical energy and refused and continues to refuse to supply the same to the plaintiff, well knowing that the said unlawful acts would deprive and would continue to deprive the plaintiff of the use and profits derived or to be derived from the use of said machine, thereby causing the plaintiff loss and damages."

The plaintiff claimed $500 damages.

The defence set up is that the town "Has always been ready and willing to connect the wire when the plaintiff would comply with instructions given to him and in accordance with the by-law of the Town of Beausejour governing same, but the plaintiff has always refused and neglected to do so."

The defendant did not agree or install, as alleged.

Paterson Co. Ct. J., before whom the action was tried gave judgment for the plaintiff for $500 damages and costs. He said he was disposed to think there was an implied contract. He says:

"I am disposed to think here is an implied contract between the parties in such a situation as this case involves. I hold also that defendants must be bound in this case by the actions of their official O'Neil. I do not look on the fact that no application form is in the hands of defendants or whether it was signed, as the fact that the plant was installed by plaintiff and connected up with the defendants' system by themselves was a sufficient compliance with the requirements. Defendants once connected up should give good and valid reasons for cutting the connections and I cannot find that they have done so."

The case really depends on the power and authority of the town electrician O'Neil. To ascertain these it is necessary to look at the statute, the Municipal Electric Light, Gas and Telephone Act, ch. 140, R.S.M., 1913, under which the Beausejour system was established in 1915. Attention is to be given to sec. 3 under which cities, towns and villages are given power to construct or purchase and operate electric light works, gas works or telephone lines. Section 11 provides:

"Every such municipality shall have power from time to time to make, amend, change and enforce all necessary by-laws, rules and regulations for the general maintenance, management or conduct of any such undertaking, the officers and other

persons employed therein, and for the collection of all charges, rents and rates, and to enforce payment of any such rates or rents or charges by shutting off the supply of current or gas or otherwise, or by action or suit before any court of competent jurisdiction."

Section 13 is also important:

"All parties supplied with electric current or gas by the municipality may be required to place and use such style of burners, lamps, dynamos and other appliances for the consumption and use of such current or gas as may be approved of by the municipality."

In accordance with its powers the town council on February 3, 1919, adopted a by-law (which is the city of Winnipeg electric light and power by-law with the necessary changes) as the electric light and power by-law for the town of Beausejour. Prior to that O'Neil had been appointed electrical inspector for the town.

The powers of the electrician are governed by this by-law. Secs. 3, 9, 11 and 13 of the by-law are as follows:—

"3. Every person, firm or corporation who, or which, installs electric wiring or apparatus or alters or adds to any existing wiring or apparatus, or causes or permits the same to be done without having first obtained a permit therefor, shall be liable to a penalty under this by-law of a $50 fine. If the applicant for this permit shall have committed a breach of this by-law in respect of some other wiring or apparatus and such breach shall have continued after notice to remedy same, the city electrician may refuse such application for a permit until such breach shall have been remedied.

9. The said city electrician may at all reasonable times inspect or re-inspect all overhead or underground and interior wires and apparatus conducting electric current for light, heat and power, telephone, telegraph or for any other purpose and when said conductors or apparatus are found to be unsafe, shall notify the persons, firms or corporations installing, owning, using or operating them, to place the same in a safe and secure condition. Any person, firm or corporation failing or refusing to repair, change or remove the same within forty-eight hours after receipt of such notice, shall be liable to a penalty of fifty dollars.

11. If any person, firm or corporation shall install electric wiring or apparatus or connect the same to any source of supply or turn on or use electric current in violation of the provisions of this by-law or of the rules forming a part thereof,

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C.A.
BISSETT v. TOWN OF BEAUSEJOUR.
Cameron, J.A.

said city electrician may cause such current to be cut off and discontinued until the provisions of this by-law and of the said rules are fully complied with.

13. A list of approved material and appliances shall be kept on file at the office of the city electrician. All material used and appliances installed must comply with the requirements of this by-law and meet with the approval of the city electrician."

It is obvious that the powers given the town electrician are extensive. It was patent that the members of the council could not undertake the responsibility of dealing with matters that are peculiarly within the province of the technical expert.

It is the fact that the connections with the plaintiff's X-ray machine had been put in under the supervision of the same electrician who afterwards asked changes to be made therein, but that is not material. The electrician had the right and it was his duty, if need arose, to modify his judgment and make any alterations that occurred to him as necessary in the interest of the public or of individuals.

O'Neil made a report to the council complaining of the plaintiff's place, amongst others, as not complying with the by-laws and regulations of the town. In accordance with that the town clerk wrote the plaintiff, April 12, 1920, asking him to have his electric wiring put in proper shape within ten days. On or about August 15, 1920, the plaintiff's service was cut off by O'Neil. On August 16, 1920, the clerk wrote the plaintiff enclosing printed contract cards for signature. On August 27, 1920, the clerk wrote that certain alterations would have to be made by the plaintiff in the installation of his X-ray machine before the town would "connect up" with the same to give the necessary power. These alterations or additions were three in number. Evidence was introduced and arguments presented that these were unnecessary or ineffective. Evidence was taken at the trial upon this and upon a number of questions which need not be here considered.

The argument was pressed that there was an obligation on the town in this case to continue to furnish power and that there was here a breach of duty. The obligations of municipal corporations in such cases vary according to the statutes creating them. Clearly in the governing Act here no obligation is imposed or intended to be imposed on the town by the Legislature. And it seems clear that no obligation to continue to furnish power is to be implied from the circumstances disclosed by the evidence.

There was a good deal of criticism of the action of the town

electrician as having been arbitrary and unfair. His powers and duties are clearly defined by the by-laws which must be taken as familiar to consumers and intending consumers. His position is, to a certain extent, autocratic and may be capable of being abused, but the council must put its trust in someone who has experience and knowledge of electric power and electric appliances and equipment. It would be simply out of the question for members of a council to attempt to act on their own knowledge. The position of the municipal electrician in such matters is akin to that of an architect in one of the usual forms of building contracts whose decision is made final. In this matter the town electrician, so far as the evidence goes, exercised his best judgment in the interests of all parties and his decision was rightfully adopted by the council. That being the case there is an end of the matter and the plaintiff has no ground of action.

The judgment in favour of the plaintiff must be set aside and the action dismissed with costs of this appeal and in the County Court.

Appeal allowed.

Re SMITH; Ex parte VANCISE.

Saskatchewan King's Bench, MacDonald, J. November 29, 1921.

LIENS (§ I—2a)—LANDLORD AND TENANT—PROPERTY LEASED ON CROP PAYMENT PLAN—THRESHERS' LIEN COVERING ALL GRAIN THRESHED—THRESHERS' LIEN ACT, R.S.S. 1920, CH. 208—CROP PAYMENTS ACT, R.S.S. 1920, CH. 126—CONSTRUCTION—FOLLOWING PROCEEDS IN HANDS OF ASSIGNEE.

Under the Threshers' Lien Act, R.S.S. 1920, ch. 208, sec. 2, the thresher's lien covers all the grain threshed, and there is nothing in the Crop Payments Act, R.S.S. 1920, ch. 126, which takes away this lien even in respect to the share which in an agreement between the parties belonged to the landlord, and if a portion of the grain set apart for the lessor is taken to satisfy the thresher's lien the portion so taken must be made good out of the part of the crop set aside for the lessee, and the lien follows and binds the proceeds in the hands of an elevator man or in the hands of an assignee so long as such proceeds can be properly identified.

[*Goebel* v. *Canadian Bank of Commerce* (1921), 61 D.L.R. 402, 14 S.L.R. 451; *Traders Bank* v. *Goodfallow* (1890), 19 O.R. 299; *Taylor* v. *Plumer*, 3 M. & S. 562; *In Hallett's Estate* (1880), 13 Ch. D. 696, applied.]

APPLICATION to the Court by the trustee for directions.

W. H. McEwen, for the trustee.

S. R. Curtin, for the creditor, W. J. Vancise.

MACDONALD, J.: — Otis V. Smith, the authorised assignor herein held the south half of sect. 13, tp. 17, r. 21, west of the

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K.B.

Re Smith; Ex parte Vancise.

MacDonald, J.

2nd meridian, Saskatchewan, from one Thomas Wilkinson under lease under which the lessor was to receive one-half share, or portion of the crop grown on said land during the said term, and said Smith also held the north-west quarter of sect. 12, tp. 17, r. 21, west of the 2nd meridian, Saskatchewan, from one William Henry Kirkpatrick under lease whereby the lessor was entitled to one-half share, or portion of the crop.

The said Otis V. Smith farmed both said parcels of land in the season of 1921, and employed one W. J. Vancise, the creditor herewith, to thresh for him, and the said Vancise did thresh the grain grown on the said lands for the said debtor at an agreed rate, Mr. Vancise's bill for the threshing so done amounting to $878. The threshing was completed on October 6, 1921.

On the morning of October 20, 1921, before making the authorized assignment to the National Trust Co, the authorised assignee herein, the said Otis V. Smith had an interview with John Nicks of Grand Coulee who owns and operates an elevator at said point to which some of the grain threshed on said land was delivered, and informed the said John Nicks that there was a thresher's lien on the said grain for the threshing so done by W. J. Vancise. At that time, the said John Nicks had already shipped one carload of the said grain, but there remained at his elevator 575 bushels of wheat grown on the south half of said sect. 13, and 1,390 bushels of wheat grown on the north west quarter of said section 12.

The proceeds of the sale of Smith's share of the grain grown on the north west quarter, amounting approximately to $636 is held by the said John Nicks, and has not yet been paid over to any person, and the debtor's share of the grain threshed on the south half of section 13, amounting approximately to $917 is also retained by the said John Nicks.

On October 20, 1921, Otis V. Smith made an authorized assignment under the Bankruptcy Act, 1919, (Can.) ch. 36 to the National Trust Co., authorised trustee, and W. J. Vancise claims payment of his bill of $875 out of said wheat, or proceeds thereof, in priority to the other creditors. His claim is not disputed, except with respect to priority.

It may further be mentioned that on November 5, 1921, Mr. Vancise gave notice that he claimed a thresher's lien in respect to his bill for threshing on the grain grown on said two parcels of land.

Under these facts the trustee applies to the Court for directions:—

(1) As to whether the claimant Vancise is entitled to a

Sask.
K.B.
RE SMITH; EX PARTE VANCISE.
MacDonald, J.

lien on the proceeds of the sale of the grain of the debtor in the hands of Mr. Nicks, or in the hands of the assignee in priority to the claim of the unsecured creditors of the said debtor.

(2) Whether, in the event of the said Vancise being entitled to and exercising his right to take the grain remaining on the said lands and having the portion set aside for the lessors herein and disposing of the same in accordance with the provisions of the Threshers' Lien Act, the landlords Wilkinson and Kirkpatrick would have a claim over against the proceeds of the sale of the debtor's grain in the hands of the assignee in priority to the unsecured creditors of the debtor.

It is first suggested that notwithstanding the Threshers' Lien Act, ch. 208 R.S.S. 1920, the landlords have, under the Crop Payments Act ch. 126 R.S.S. 1920, an absolute claim to one-half share of the crop, and that the threshers' lien does not affect the said half share. In my opinion, the threshers' lien affects all the grain threshed, the half to which the lessor has a right as well as the half to which the lessee has a right. Section 2 of The Threshers' Lien Act provides:—

"Every person who threshes or causes to be threshed grain of any kind for another person at or for a fixed price or rate of remuneration and who has complied with the provisions of the Noxious Weeds Act regarding threshing machines shall from the date of the commencement of such threshing until sixty days after the completion of the same have a lien upon such grain for the purpose of securing payment of the said price or remuneration."

Taken by itself it is, therefore, clear that under the said Act the lien given covers all the grain threshed.

Section 2 of The Crop Payments Act provides:—

"In all cases in which a *bona fide* lease has been made and a *bona fide* tenancy created between a landlord and tenant, providing for payment of the rent reserved or any part thereof, or for payment in lieu of rent, by the tenant delivering to the landlord a share of the crop grown or to be grown on the demised premises, or the proceeds of such share, then, notwithstanding anything contained in the Chattel Mortgage Act, or in any other statute, or in the common law, the lessor, his personal representatives and assigns shall, without registration, have a right to the said crops or the proceeds thereof to the extent of the share or interest reserved or agreed to be paid or delivered to him under the terms of such lease, in priority to the interest of the lessee in said crops or the proceeds thereof, and to the interest of any person claiming through or under the

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lessee, whether as execution creditor, purchaser, mortgagee or otherwise."

In *Annable Co.* v. *Younglove,* [1917] 3 W.W.R. 453, Lamont, J., held that the Crop Payments Act does not take away a thresher's lien even in respect to the share of the crop, which, in an agreement between the grower thereof and the vendor to him of the land, belongs to the vendor. With this, I, if I may be permitted to say so, respectfully agree, for it appears to me that the thresher claiming a lien under the Thresher's Lien Act cannot properly be said to be "a person claiming through or under the lessee." It is true that, in order to have the lien, he must have a contract with the person for whom he threshes the grain but his lien arises under the statute in that behalf.

I am, therefore, of opinion that the creditor Vancise holds a lien on the grain remaining on the said land even though same has been set apart for the lessors, and, it seems to me clear that, if a portion of the grain set apart for the lessors is taken to satisfy the threshers' lien, the portion so taken must be made good out of the half of the crop set aside for the lessee.

I am further of opinion that the lien of the thresher follows and binds the proceeds in the hands of the elevator man Mr. Nicks or in the hands of the assignee so long as such proceeds can be properly identified. See *Goebel* v. *Canadian Bank of Commerce* (1921), 61 D.L.R. 402, 14 S.L.R. 451. Re *Goodfallow, Traders' Bank* v. *Goodfallow,* (1890) 19 O.R. 299. *Taylor* v. *Plumer* (1815), 3 M. & S. 562, 105 E.R. 721. *In Re Hallett's Estate* (1880), 13 Ch. D. 696 per Jessel, M.R. at p. 717.

I am further of opinion that the authorized assignee should pay the thresher Mr. Vancise in priority to all other creditors, and that the lessors Wilkinson and Kirkpatrick are also entitled to receive one-half of the crop of grain grown on said respective lands, or the value thereof out of the proceeds in priority to the other creditors of the debtor.

The creditor Vancise's costs must be paid out of the estate, but I fix the same at the sum of $60. *Judgment accordingly.*

MACKENZIE v. PALMER.

Supreme Court of Canada, Idington, Duff, Anglin, Mignault, JJ., and Cassels, J. (ad hoc.). November 21, 1921.

Seduction (§I—1)—Statutory offence—Plaintiff swearing as to violence—Trial judge discrediting this part of her evidence—Crediting evidence as to seduction—Right of judge to give judgment for seduction.

Where in an action for damages for that the defendant did seduce and carnally know the plaintiff against her will and by

force, the plaintiff either in examination-in-chief or in cross-examination gives evidence of circumstances which negative the existence of violence sufficient to establish a case of ravishment, her right to recover is not necessarily destroyed because she has alleged and sworn to such violence. The trial Judge can credit one part of her testimony and disbelieve the other part as being grossly improbable, and if in his opinion a case of seduction has been made out he is entitled to give the plaintiff judgment for seduction.

[*Mackenzie* v. *Palmer* (1921), 56 D.L.R. 345, 14 S.L.R. 117, reversed; *E.* v. *F.* (1906), 11 O.L.R. 582, applied.]

APPEAL by plaintiff from the judgment of the Court of Appeal for Saskatchewan (1921), 56 D.L.R. 345, reversing the trial judgment awarding plaintiff damages for seduction in an action brought for assault amounting to rape. Reversed and the trial judgment restored.

W. S. Gray, for appellant.

H. Fisher, for respondent.

IDINGTON, J.:—I am of the opinion that this appeal should be allowed with costs and the judgment of the trial Judge be restored.

I agree so fully with the reasons assigned by Lamont, J.A., in his dissenting judgment in the Court of Appeal (1921), 56 D.L.R. 345, that I need not repeat same here.

DUFF, J., concurs in allowing the appeal.

ANGLIN, J.:—I had occasion very fully to consider the chief question which arises on this appeal in the case of *E.* v. *F.* (1905), 10 O.L.R. 489; (1906), 11 O.L.R. 582. I have had no reason to change the views there expressed. The only difference between that case and the case at Bar is that there the plaintiff was the father whereas in the present case the girl herself brings the action by virtue of a statutory provision enabling her to do so. That difference in my opinion does not suffice to render inapplicable here the ground of decision in *E.* v. *F.* I agree with the view of Lamont, J.A., 56 D.L.R. 345, that where, in an action constituted as is that at Bar, the plaintiff either in examination-in-chief or in cross-examination gives evidence of circumstances which negative the existence of violence sufficient to establish a case of ravishment, her right to recover is not necessarily destroyed because she has alleged and sworn to such violence. The reasons assigned by that Judge in his dissenting opinion are so satisfactory that I feel I cannot usefully add to them.

I would therefore with respect allow this appeal with costs here and in the Court of Appeal, and would restore the judgment of the trial Judge.

Can.
S.C.
MACKENZIE v. PALMER.
Mignault, J.

MIGNAULT, J.:—The appellant testified that the respondent had connection with her, and that it was without her consent and by force. The trial Judge discredited this latter statement, and indeed under the circumstances described by the appellant it seems impossible that the respondent could have succeeded in having connection with her unless she had allowed him to do so. But the trial Judge none the less believed that connection had taken place and that the respondent was the father of the child to whom the appellant had given birth.

The respondent argues that the appellant's action was an action for an assault amounting to rape; that in such an action the trial Judge could not give her judgment for seduction and that the appellant's testimony should either be rejected entirely as unworthy of credit, or, if believed, it should be held that that appellant was not seduced, seduction implying consent induced by wiles or persuasion, without force, but was overcome by force, so the case would really be one of rape and not within the statute giving an action to the victim of a seduction.

In my opinion the trial Judge could credit one part of the appellant's testimony and disbelieve the other part as being grossly improbable, not to say impossible. If notwithstanding her statement that she was not a consenting party but was overcome by force the trial Judge really believed, under all the circumstances, that a case of seduction had been made out, he was certainly entitled to give the appellant judgment for seduction. Of course, the position of the appellant on this appeal is somewhat extraordinary, for she, or her counsel for her, is forced to contend that a part of her testimony was rightly discredited by the trial Judge. But there is no doubt in my mind that the Judge at the trial could partly accept and partly reject the appellant's story, as unquestionably a jury could do. That is all I need say, for I feel that I can add nothing to the dissenting opinion of Lamont, J.A., 56 D.L.R. 345, in which I fully concur.

The judgment of the Court of Appeal should be reversed and the judgment of the trial Judge restored.

CASSELS, J. (*ad hoc*) (dissenting):—I would dismiss this appeal. I agree with the reasons of Haultain, C.J.S. (56 D.L.R. 345). The plaintiff, Amelia MacKenzie, was at the date of the alleged assault or rape July 1, 1917, of the age of 20 years. On June 30, 1920, she was 23 years of age. Her story as well as her conduct is full of inconsistencies and in my opinion it would be

a danagerous precedent to allow a judgment to stand based on evidence such as that given on behalf of the appellant.

Appeal allowed.

Re JAMIESON (GREGORY).

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 23, 1922.

ILLEGITIMACY (§I—1)—CHILD BORN IN ENGLAND—PARENTS SUBSEQUENTLY MARRIED IN AND DOMICILED IN ALBERTA—RIGHT OF PARENTS TO HAVE CHILD REGISTERED UNDER VITAL STATISTICS ACT, 1916 (ALTA.), CH. 22, SEC. 18.

Taking into account the purpose of the Vital Statistics Act, 1916 Alta. Stats., ch. 22, and reading sec. 18 with the other sections of the Act, it is clear that the Act was not intended to apply to any births, deaths or marriages outside of the province. The Court has jurisdiction upon a direct application for the purpose, to make a declaration of legitimacy.

[*Re Jamieson* (1921), 61 D.L.R. 312, reversed.]

APPEAL from the judgment of Walsh, J., granting a mandatory order to compel the Registrar-General of Alberta to register an illegitimate child under the provisions of the Vital Statistics Act, 1916, Alta. Stats., ch. 22, sec. 18. Reversed.

G. H. Steer, for applicant.

R. E. McLaughlin, for respondent.

SCOTT, C.J., concurs with STUART, J.A.

STUART, J.A.:—I agree that under the Vital Statistics Act, 1916, ch. 22, the births of only those persons who have been born in the Province can be registered. It seems to be very clear from the whole scope of the Act that only facts occurring in the Province, whether births, marriages or deaths, were intended to be registered and put on record. Section 5 provides that the Minister nay appoint District Registrars, and sub-sec. 2 provides that every notice, request, report, transmission or return required by the Act to be made to a District Registrar shall be made to the District Registrar whose residence or place of business is nearest to the place where the birth, marriage or death took place. Then when the special clauses enacting the obligation to report are reached we find that only in the clause relating to births (sec. 16) is the expression "in the Province" to be found. It is omitted in sec. 22 relating to marriages, and in 23 and 25 relating to deaths. From all this and from the obvious purpose of the Act, it seems clear that with respect to births, generally only those occurring in the Province can be registered. This applies, in my opinion, also to illegitimate births registered as such under sec. 17. (See schedule A and the last question, "Are the parents married?").

Alta.
App. Div.
RE JAMIESON (GREGORY).
Stuart, J.A.

Then, coming to sec. 18, it is to be observed that under it the application is to be made, not to a District Registrar, but to the Deputy Registrar-General. The reason for this no doubt is that a certain judicial function is imposed upon that officer, *viz.*, that of deciding as to whether the required proof of the fact of the subsequent marriage, is in proper form. He is then practically to declare that the child is the lawful issue of the parents and to make a note in the remarks column that the registration has been made under the section in question. Then the section goes on to say, "if the child has been previously registered," that is, under section 16, a note is to be made in the remarks column of the previous registration. I think the obvious assumption here is that the child might legally have been previously registered under sec. 16. But for the reasons already given, I do not think that could have been done unless the child had been born in the Province.

I can see no reason whatever to infer that the legislature in passing sec. 18 intended it to cover any wider class of births than that already covered by the Act, *viz.*, those occurring in the Province, whether legitimate or illegitimate. The previous Act of 1907, ch. 13, had also provided in sec. 15 for the registration of illegitimate births. It, therefore, seems clear to me that sec. 18 of the Act of 1916 was intended merely to furnish a means either of amending the previous registration, or of making a first registration in a special form, so as to show a record of statutory legitimacy.

I prefer not to express any opinion on the question suggested by my brother Beck as to the possibility of a declaratory order of judgment being obtained from the Court by a recourse to the English statute of 1858, 21-22 Vict., ch. 93. It seems to me to be possible that the situation might be found to be different from that existing in *Board* v. *Board* (1918), 41 D.L.R. 286, 13 Alta. L.R. 362; 48 D.L.R. 13, [1919] A.C. 956. There it was held that the Matrimonial Causes Act of 1857, ch. 85, had created a substantive right to a particular remedy for a certain wrong and that, although the statute creating this Court had not specifically and in terms given this Court all the jurisdiction of the Court for Divorce and Matrimonial Causes, nevertheless this Court, being the only superior Court of the King in this Province, had necessarily jurisdiction to enforce that right in an absence of any Court here to which such specific jurisdiction had been given. But the Act of 1858, as I read it, appears not to give a substantive right or to enact any substantive law as to legitimacy, but merely to give jurisdiction to a specific Court to declare legitimacy if certain prescribed proceedings are taken. This

Alta.

App. Div.

RE JAMIESON (GREGORY).

Beck, J.A.

Court has not been given specifically the jurisdiction of the English Court there referred to, a circumstance which caused all the trouble in *Board* v. *Board*. Therefore, I should prefer to reserve any opinion with regard to the applicability of the Act of 1858 until the matter is presented to us upon proper argument.

I think it not impertinent to express some curiosity as to why, after the marriage has taken place in this case, the name of the mother seems to be retained as the surname of the child.

Our Legislature only enacts laws for this Province, and even with respect to the statute creating legitimacy *per subsequens matrimonium* I should have some doubt as to how far it could apply, until at least a domicile is acquired here, to a foreign birth followed, for example, by a foreign marriage or how far other Courts might be induced by the comity principle to recognize the status ascribed to the child by our statute even after birth or domiciliation here. But this need be pursued no further.

The appeal should be allowed, and the application dismissed, but I agree that there should be no costs.

BECK, J.A.:—This is an appeal from an order of Walsh, J., made upon an application of the father of the infant for a mandamus to compel the Deputy Registrar-General, Vital Statistics Branch, of the Department of Public Health, Alberta, to register the infant pursuant to sec. 18 of ch. 22 of 1916: The Vital Statistics Act, as the lawful issue of the applicant and his wife.

The facts are that the father lived for nine years in Alberta, except during 60 months, during which he served overseas; that he is the father of the infant, who was born in England on May 10, 1920; that the birth was registered in the District of St. Pancras in England on May 27, 1920; that the mother of the infant is Sarah Gregory, to whom he was married in Edmonton on March 16, 1921. In other words, the child was born illegitimate outside of the Province, and was, it would seem, in this Province legitimated by the subsequent marriage in accordance with the provisions of sec. 9, sub-sec. 2, ch. 3 of 1916.

The Judge of first instance made the order asked. The Deputy Registrar-General appeals.

We are all agreed in opinion that taking into account the purpose of the Vital Statistics Act and reading sec. 18 with the other sections of the Act, the Act was not intended to apply to any births, deaths or marriages happening outside the Province.

The initiation of the proceedings seems to have been taken on the supposition that there was no other method of obtaining

a declaration of legitimacy and possibly this may have influenced the mind of the Judge.

It appears, however, that this Court has jurisdiction, upon a direct application for the purpose, to make a declaration of legitimacy.

There is an English statute—The Legitimacy Declaration Act, 1858 (21-22 Vict., ch. 93). Section 1 provides that any natural born subject of the Queen . . . being domiciled in England . . . . may apply by petition to the Court of Divorce and Matrimonial Causes praying the Court for a decree declaring that petitioner is the legitimate child of his parents, and the marriage of his father and mother . . . . was a valid marriage, &c."

This provision corresponds closely to the provisions of the Matrimonial Causes Act, 1857 (20-21 Vict., ch. 85), under which, as is well known, the Privy Council decided that this Court has jurisdiction to decree divorce, on the principle that the substance of the law was introduced into this Province by the introduction of the law of England as it stood on July 1, 1870. I am, for similar reasons, of opinion that this Court has jurisdiction in an appropriate proceeding to declare legitimacy.

The adjectival law or practice laid down by the statute is not effective in this jurisdiction where there is a complete system of practice with a provision that in default of express explicit rule analogy to our own rules shall be the guide.

I think a convenient practice to adopt would be to initiate the proceedings by petition of the parents. The English statute provides for service of the Attorney-General. I think that a similar practice should be followed here—the official guardian of infants being served instead of the Attorney-General, and that usually the Judge hearing the petition should take the oral evidence of the parents.

In the result, then, I would allow the appeal, and discharge the order of the Judge of first instance. I think that there should be no costs, as the purpose of the proceedings and appeal was mainly to have a judicial declaration of the meaning and effect of a public statute of the Province.

HYNDMAN and CLARKE, JJ.A., concurred with STUART, J.A.

Appeal allowed.

SEGUIN v. BOYLE.

Imp.

P.C.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Shaw and Lord Phillimore. March 3, 1922.

MINES AND MINERALS (§IA—7A)—PLACER MINING CLAIM—HYDRAULIC LEASE—CONSTRUCTION—EXCLUSION OF PLACER CLAIMS—ABANDONMENT OF CLAIM—RELOCATION—RIGHTS OF PARTIES.

The proper construction of Hydraulic Lease No. 18 whereby the Government leased a certain tract of land in the valley of the Klondyke river, to be worked by hydraulic or other mining process, is that placer mining claims within the ambit of the lease which were in good standing at the time it was executed, were reserved from the lease, and the holders of such claims were guaranteed non-disturbance so long as they conformed with the terms of their holdings, by accepting the yearly renewals demanded by law and by working their claims. If however the persons then working such placer claims ceased to work them, and if the renewals were neither granted nor asked for the rights and claims lapsed entirely and the land which if there had been no lease would have reverted to the Crown became included in the hydraulic lease.

[*Osborne* v. *Morgan* (1888), 13 App. Cas. 227, applied; *Boyle* v. *Seguin* (1921), 57 D.L.R. 402, reversed.]

APPEAL from a judgment of the Court of Appeal of British Columbia (1921), 57 D.L.R. 402. It was dated March 1, 1921, and it affirmed a judgment of the Territorial Court of the Yukon Territory (Macaulay, J.) dated May 11, 1920, 52 D.L.R. 651, whereby it was ordered that a writ of mandamus should issue commanding the appellant, as mining recorder for the Dawson Mining District, to accept the application of the respondent in his appeal for "a grant of Creek Placer Mining Claim No. 3 on Crofton Gulch, in the said Dawson Mining District, Yukon Territory, and on payment of the proper fees in that behalf to issue to the said Anna Theresa Boyle a grant of said Creek Placer Mining Claim No. 3 on Crofton Gulch in accordance with the provisions of the Yukon Placer Mining Act."

The recorder had refused the application. The question of substance in this appeal is whether that refusal was right. Reversed.

A further question—one of procedure—has also been argued, namely, whether a writ of mandamus as sought was a competent and correct mode of seeking relief.

The judgment of their Lordships was delivered by

LORD SHAW:—The respondent purported to act under the Yukon Placer Mining Act, R.S.C. 1906, ch. 64. In the year 1920 she staked out a claim 500 ft. long on a certain piece of ground which in fact comprised the area covered by two grants —No. 3 Crofton Gulch, 250 ft. long, which had been issued to

Imp.
P.C.
SEGUIN
v.
BOYLE.
Lord Shaw.

one Patten on February 17, 1899, and another grant of No. 4 Crofton Gulch, 250 ft. long, which had been issued 3 days thereafter to one Putzy.

The history of the ground is important. The grant of the first portion issued to Patten in 1899 was duly renewed and was "kept in good standing" until February 17, 1902. The grant of the second portion to Putzy in 1899 was duly renewed and "kept in good standing" until February 20, 1901. On those respective dates, accordingly, namely, February 20, 1901, and February 17, 1902, the Putzy and Patten claims completely lapsed.

On November 5, 1900, that is to say, during the standing of the two placer claims, which shortly after that date lapsed, a hydraulic lease, after discussed, was granted, after due procedure of the Government, to J. W. Boyle. The hydraulic lease included within its geographical bounds these claims, but was made subject to the rights of the holders of placer claimants. The effect of this lease with this reservation will be hereafter discussed.

Until March 9, 1920, when the respondent's claim was put forward, the ground was possessed under the lease for a period of over 18 years, that is to say, from the lapsing of the Patten and Putzy leases in 1902.

It should further be explained that on March 10, 1902, application had been made by W. Shaw for a grant of Claim No. 3, and on May 3, 1913, a similar application by C. W. McPherson had been made. But both these applications were refused on the same ground, namely, that the right to the block of ground had reverted to the holder of the hydraulic lease.

When in March, 1920, the claim by the respondent was put forward, the appellant's action as mining recorder for the Dawson Mining District is stated in his own words in his affidavit thus:—

"I refused to issue the said grant for the reason that the said Crofton Gulch is within the limits of hydraulic lease No. 18, and was for that reason on land lawfully occupied for placer mining purposes, as described in sec. 17 of the Yukon Placer Mining Act."

Were this action and reason correct? After very full consideration of the arguments and the judgment of the Judges in the Court below, the Board is of opinion that they were.

It is expedient now to consider the nature and provisions of the hydraulic lease. As mentioned, it was granted on November

5, 1900, in favour of one Joseph Whiteside Boyle. (On June 26, 1913, is was assigned to the Canadian Klondyke Company, Ltd.) The preamble to the lease narrates the application to the Minister "for the exclusive right and privilege of taking and extracting by hydraulic or other mining process, all royal or precious metals or minerals from, in, under or upon that certain tract of lands . . . particularly mentioned and described." The preamble further narrates that it is desirable to introduce hydraulic mining into the Yukon Territory. It recognises that large expenditure might be necessary, and in view thereof that the lessee is "entitled to have secured to him, his executors, administrators and assigns, the exclusive right of extracting and taking for his own use and benefit, all royal or precious metals from, in, under or upon the said tract of lands." It is important to add with regard to the preamble that the lease of these particular lands was expressly authorised by an Order of the Governor-General in Council of December 3, 1898. The operative grant and demise is in these terms:—

"Now This Indenture Witnesseth that in pursuance of the premises and in consideration of and subject to the rent, covenants, provisions, exceptions, restrictions and conditions hereinafter reserved and contained, and by the lessee to be paid, observed and performed, Her Majesty doth grant, demise and lease unto the lessee the said tract of lands and the exclusive right and privilege of extracting and taking therefrom, by hydraulic or other mining process, all royal or precious metals, or minerals, from, in, under or upon the tract of lands hereby demised and leased with regard to which the said rights and privileges are hereby granted."

There follows a description of the tract in some detail and a reference to a plan or survey thereof. The rental payable was $1,008 per annum, and in addition to the rent a certain royalty upon the output. Furthermore, the lessee becomes obliged, under pain of complete forfeiture of the lease, to have sufficient hydraulic or other machinery in operation on the demised premises within one year, and to expend during every year of the term the sum of $6,000 "in mining operations or in, about or upon the mining rights and privileges."

There are two broad, admitted, facts in the case: In the first place, that the rent has been regularly paid, and, in the second place, that the obligation as to the annual expenditure in operations has been amply fulfilled. It is not, in short, denied that the lessee and his assigns fully entered into and have continued

Imp.
P.C.
SEGUIN v. BOYLE.
Lord Shaw.

in possession of the lands demised, a possession which by the terms of the contract was to be exclusive. A third admission, however, is of equally great importance, and it is that geographically these lands do embrace the tract of 500 yards claimed by the respondent; and the case, therefore, is one in which the respondent, in face of an exclusive title in favour of the Klondyke Company, sets up, not a mere competing, but an over-riding right as a placer miner.

She bases the application upon the important foundation of placer claimants' rights, namely, sec. 17 of the Yukon Placer Mining Act. That section is in the following terms:—

"Any person over, but not under, eighteen years of age may enter for mining purposes, locate, prospect and mine for gold and other precious minerals or stones upon any lands in the Territory, whether vested in the Crown or otherwise, except lands within the boundaries of a city, town or village, as defined by any ordinance of the Commissioner in Council, or lands occupied by a building or within the curtilage of a dwelling-house, or lawfully occupied for placer mining purposes, or which form part of an Indian Reserve."

In addition to the admission of the geographical inclusion of the tract claimed by the respondent within the land granted to Boyle, it is not denied that that lease, although named an hydraulic lease, is also a lease for other mining purposes, and that in fact the Klondyke Company, Boyle's successor have placer mining rights upon all the land which their lease contains.

The consequences in ejectment or otherwise so as to enable the affirmation of the respondent's right to become effective are sufficiently obvious, and, other things being equal, it lies upon the respondent, who presents a competitive title later in date by twenty years than the lease, to establish her right.

In discharging this burden it is, of course, clear, however, that it is within the rights of the respondent to challenge the title of the Klondyke Company and to examine the Boyle lease so as to verify that challenge. But in connection with this topic it has to be kept prominently in view that the respondent has shrunk from attacking and expressly declined to attack the lease as such. The argument, however, is that although the lease may be valid, yet it proves by its terms that the block which the respondent now claims was excluded from its ambit. Reason "c" in the case for the respondent before the Board is explicit. It is in the following terms:—

"The respondent is not attacking the Hydraulic Mining Lease No. 18 as such, but she disputes the appellant's ruling to the

effect that the Patten and Putzy placer mining areas fell into that lease upon the lapsing of those placer mining claims."

The case is accordingly in a somewhat singular position. It is not asked that the lease as a whole be declared void, nor does the respondent maintain its voidability as such.

It may be well that the respondent is content simply to demand that this lease does not include and cannot by law include the Patten and Putzy tract. Upon examination, however, of the argument upon which this demand is based, it becomes plain that this argument involves putting upon the lease and regulations, taken together, a construction under which the reference by the former to the latter would destroy the lease altogether, the lease would by its own terms have written away its own validity. This point is of importance to the Province, and has received the careful examination of the Board.

The respondent particularly refers to the third clause of the lease and also to the provisoes contained in clause 18 thereof. The third clause is as follows:—

"3. That the said lease or demise shall be subject to the rights or claims, but to such rights of claims only, of all persons who may have acquired the same under the regulations of any Order of the Governor-General in Council up to the date of these presents."

It is to be noted that this is not a reservation from the lease of any particular land as such, and it would be inapt for such a purpose. On the contrary, it is an implied affirmance that the land itself is in fact within the ambit of the lease, but that that land, so included, is nevertheless subject to certain rights or claims. In the second place, the nature of these rights and claims was, as was most natural, determined as at the date of the lease, as then belonging to the persons who had already acquired the same under the regulations, and prior to the lease. Those persons—and the clause says those persons only—are referred to in the exception. In short, the lease is in accordance with the policy of the statutes, that is to say, it is a lease guaranteeing non-disturbance of existing claimants who are in point of fact conforming with the terms of their holding by accepting the yearly renewals thereof demanded by law, and by working on their claims. If, however, the persons then working placer claims cease to work them, and if renewals are neither granted nor asked for, then those rights and claims lapse and lapse entirely. Those persons no longer have any right as against the lessee; and the exception to which the lease was made subject has disappeared.

Imp.
P.C.
Seguin v. Boyle.
Lord Shaw.

Had there been no lease the land as lapsed land would have reverted to the Crown. But there being a lease, the land as lapsed land as to which the exception of rights has passed off, falls under the lease. It does not appear to their Lordships to be reasonable to construe the exception in any broader sense. It certainly did not, as will be noted afterwards by a reference to a correspondence which took place at the time, appear to the Government or officials of the day that there was any exception of the lands themselves from the scope of the lease granted in 1900, and it does not so appear to the Board. The other view would imply that there was,, so to speak, by the mere incident of certain lands being, at the date of the lease, worked as placer claims, an enfranchisement in perpetuity of such lands and a permanent exclusion thereof from the lease which geographically covered them.

The policy of the statutes and regulations was manifestly, on the one hand, to promote the development of the mineral resources of the Province, and, on the other, to prevent overlapping the rights and the confusion that would thereby ensue. While it is plain that the view last mentioned would be out of accord with this policy, it is sufficient to say that, in their Lordships' opinion, the view is unsound as a construction of sec. 3.

A more difficult question, however, arises in the construction of the regulations themselves. The important clause is the last one of sec. 18 of the lease, which is in these terms:—

"Provided also, that this demise is subject to all other regulations contained and set forth in the said Order in Council of the third day of December, A.D. 1898, 'as amended by subsequent Orders in Council' as fully and effectually to all intents and purposes as if they were set forth in these presents."

Section 3 of the regulations of December 3, 1898, is very important. It is in these terms:—

"3. To any person who files an application in the Department of the Interior at Ottawa for a location previously prospected by him, or his authorised agent at the time the location was prospected, a lease will be issued provided he is the first qualified applicant therefor. Before the issue of any such lease there shall be filed in the Department of the Interior at Ottawa a report from the gold commissioner to the effect that it has been proved to his satisfaction that the applicant himself, or a person acting for him, was upon and actually prospected prior to the date of the application the ground included in the location, and

Imp.

P.C.

SEGUIN
v.
BOYLE.

Lord Shaw.

that the ground included in the location is not being worked and is not suitable to be worked under the regulations governing placer mining.

"No application for a lease for hydraulic mining purposes, however, shall be entertained *for any tract which includes within its boundaries any placer, quartz or other mining claim* acquired under the regulations in that behalf, *or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated*, and also that the gold commissioner shall, in addition to furnishing the reports above referred to, be required to furnish a certificate that the location applied for does not contain any such placer, quartz or other mining claim, nor have any such claims been granted in the immediate vicinity of such location." . . . (The words are italicized in order to be noted.)

In an able argument for the respondent Mr. Barton maintained that this clause was a definite pronouncement incorporated in the lease to the effect that no application for a lease in the year 1900 by Boyle should or could be entertained in respect of any tract which included within its boundaries the land at its date occupied by Patten and Putzy. The argument, logically considered, would destroy the lease altogether. For the contention cannot be confined to these two plots, seeing that the scope of the proviso is that the whole tract of land under lease must be included: and the argument would mean that no lease of such a tract of land could be entertained or could be granted if *de facto* any portion of the land embraced in it was, at the particular moment or time when the lease was granted, occupied by a placer miner with a claim in good standing. The result as mentioned would amount to a declaration of the incompetency of the Crown ever to bind itself by granting any lease which included any plot however small, and however transitorily occupied for placer mining at its date. In the view of the Board the regulations cannot be so construed.

Their Lordships have no hesitation in treating these regulations as primarily directory to all parties, and particularly to the officials of the Government in carrying out the mining policy of the Province. Several of the regulations—they need not be entered upon in detail—are plainly of that character, and among them is No. 18.

Furthermore, attention should be paid to sec. 13, which makes careful provision for the action of the gold commissioner and the giving of notice to all persons concerned by any right or semblance of right. It is in these terms:—

Imp.
P.C.
SEGUIN v. BOYLE.
Lord Shaw.

"When it is decided to hold any ground for the purpose of the same being included in locations under these regulations the gold commissioner shall cause a notice to that effect to be posted in a prominent and conspicuous place in the office of the mining recorder of the district in which the ground is situate: and after the posting of such notice no occupation or right under the regulations governing placer mining shall be recognised on any ground so held; but any *bona fide* occupation or right acquired under such regulations prior to the posting of such notice shall be recognised and the gold commissioner shall make provision for the miner who has acquired such occupation or right being protected in the same."

This is a very plain declaration that the same policy, upon the one hand of encouraging development and upon the other of preventing overlapping, is to be administratively carried out with consideration for the interests of the possessors for the time being. These, if any, are concerned at the time, and, their rights being adjusted, the lease goes forward.

Upon the whole, their Lordships have come to the conclusion that sec. 3 of the lease itself is the governing and over-riding provision, and that sec. 18 does not have the effect of turning a directory section of the regulations into a section restricting the ambit of the lease. The exception governed by sec. 3 is of "such rights of claims only of all persons who may have acquired the same under the regulations"—pointing, as has been said, to the protection of individual persons and of existing rights and claims only, and to those sets of persons who had actually anterior to the date of the lease acquired particular blocks. Interpreted in the concrete, that meant Patten and Putzy; it did not mean that the lands themselves (their right in and occupancy of which had lapsed) were excluded from the lease. If it were so, the result would be peculiar. The lands would presumably revert to the Crown in such a manner as to lay it open for placer claimants who might in future years repeat the former experiment and also disappear. Fluctuating series of invaders would arrive asserting placer claims upon blocks of land geographically under the lease. This would be a mere confusion.

Reference has been made to the disclaimer of attack upon the lease as a whole, but in their Lordships' opinion the argument logically stated can result in nothing less than such an attack. And it is now necessary to examine whether any such right of challenge lay in the respondent. This lease according to the argument, was void, or was voidable, and voidable at the in-

Imp.
P.C.
SEGUIN v. BOYLE.
Lord Shaw.

stance of the newly arrived claimant, the respondent, in the year 1920. In the opinion of the Board the respondent has no such right. But their Lordships need not discuss the principle in any detail, because in truth the point has been settled with complete clearness in the case of *Osborne* v. *Morgan* (1888), 13 App. Cas. 227, 57 L.J. (P.C.) 52.

That was a case occurring under the Queensland Goldfields Act, 1874, and regulations made thereunder, and the action was at the instance of holders of "miners' right," its object being to set aside mining leases granted to the defendants. There were two grounds of action: first, that the leases had been granted contrary to a provision of the Act of Parliament, namely, within two years from the proclamation of the Goldfield; and secondly, that the applicants for the leases had not complied with the regulations in force.

As will be seen, the circumstances were not unlike those of the present case, and they raise precisely the same questions. In the first place, is the lease void or is it merely voidable? And did a title to challenge rest in the holder, in the Australian case, of a miner's license; and in the present case does it rest in a placer claimant? Upon the first question, the opinion of the Board, as expressed by Lord Watson, was clear. Said he, at p. 235:—

"The right to interfere with the possession of a tenant under a formal lease, independently of the lessor, and in derogation of his rights, is not one of the natural incidents of a mere license, which carries no legal or equitable interest in the soil. An *ex facie* regular lease, followed by possession, and impeachable only upon such extrinsic grounds as are alleged in the appellant's declaration, is, as between the parties to it, not void but voidable; and, the lessees being willing to continue in possession and to comply with its stipulations, it is the privilege of the lessor to determine whether they shall be permitted to do so or not."

As in the Australian case, so here, the lessor is the Crown acting through the government of the day and its officers. This pronouncement seems to conclude both questions. It is in the first place clear that the Klondyke Company's lease was not void.

When, however, a lease is merely voidable, then the principle of law to be applied is that the title of the person seeking to avoid it is not a general one in the public, and such a title is not in fact extended to anyone except to (1) those who are in

Imp.

P.C.

SEGUIN v. BOYLE.

Lord Shaw.

contract relations; or (2) those who have, by convention between those who are so, a title of challenge; or (3) those upon whom by statute a right to challenge is conferred. The two first examples do not occur in the present case; but it may be added upon the question of voidability that the present would be a singularly clear case in which such voidability would not even be open to the Crown itself. *Res non sunt integrae.* It seems perfectly plain that, the lease not being itself void, but voidable on just cause shewn by the lessor, any attempt by the Crown brought to declare it void, and brought 20 years after possession had been taken, after payment of rent and royalties had been made, and after great expenditure upon the subject of the lease by the lessee, such an attempt could not be successfully maintained.

It further turns out that at the time of the lease a fair and frank correspondence took place between the Government itself and the lessee, Mr. Boyle. They negotiated upon this very subject of difficulty, namely, the occupancy at that time of certain plots of the leased ground by working placer miners. The letters are as follows:—

"Ottawa, Canada, 22nd November, 1900.

To the Honourable
the Minister of the Interior,
Ottawa, Ont.

Sir,

Regarding any placer mining claims existing within the limits of the area leased for hydraulic mining purposes, on record in the Timber and Mines Branch of the Interior Department as Lease No. 18 File No. 55,466, I beg to state that while the intention is clearly apparent that when abandoned these claims are to revert to and become a part of the leasehold, it appears to be necessary that the lessee should have a letter from your Department to this effect. Will you kindly look into this matter at your earliest convenience and have a letter issued to me covering this point.—I have the honour to be, Sir, your obedient servant,

H. B. McGiverin."

"File 55,466, T. & M.
Department of the Interior,
Ottawa, 12th December, 1900.

Sir,

I beg to acknowledge the receipt of your letter of the 22nd ultimo addressed to the Minister of the Interior, with respect

to Hydraulic Mining Lease No. 18, issued in favour of Mr. Joseph Boyle, of Dawson, of a tract of land situated on the Klondyke River, in the Yukon Territory, and in reply to inform you that all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease, but which may be abandoned or forfeited for any cause, will at any time during the currency of the lease revert to the lessee.—Your obedient servant,

P. G. Keyes, Sec.

H. B. McGiverin, Esq.,
Ottawa, Ont."

It is manifest that in face of such correspondence a challenge by the Crown would be in bad faith and could not succeed, and their Lordships are not surprised to find that the Government of the Province takes up no such attitude and is in no way concerned with the challenge made by the respondent.

It would be a curious circumstance if, the lessee having thus against the Crown an indefeasible right, his right could nevertheless be challenged by another party who was no party to the contract but a late arrival on the ground, and the only result of whose challenge would be, when given ultimate effect, to accomplish that dispossession of the appellant which even the Crown itself could not legally achieve.

It is, moreover, very clear that no such result and no material step leading to it should be taken by a Court unless the contracting parties are convened before it; and in the present case a mandamus is asked and the case has proceeded to judgment granting it without either the lessee, the Canadian Klondkye Co., or the lessor, the Crown, having been made parties to these proceedings. It is in any view plain to the Board that no final judgment should have been reached without all the parties having been called.

This appears to follow, and very properly so, from the decision in *Osborne* v. *Morgan* already referred to; and another passage clearly elucidating the point, from the judgment read by Lord Watson, may be here given. It is as follows, at p. 235:—

"But the appellants assert their right to terminate the leases, and to dispossess the lessees, not only without the aid, but against the wish of the Crown. They concede that no decree which they can obtain in this action could operate as *res judicata* between the lessees and the Crown; and it is obvious that their contention, if well founded, will be productive of very singular

Imp.

P.C.

SEGUIN v. BOYLE.

Lord Shaw.

results. On that supposition, the lessees may have so conducted themselves that they cannot withdraw from their contract obligations: and the Crown may have so ratified the contract that it cannot disturb the possession of its lessees; yet any one or more persons holding a miner's right may avail themselves of an original flaw in the lease at any time during its currency. They may delay their challenge until the lessees have, on the faith of their lease, spent large sums of money in preparing the land for mining operations, and may then intervene and appropriate the whole benefit of such expenditure, without the lessees being entitled either to repetition of the rents which they have paid, or to compensation for their beneficial outlay. That may be a necessary, but it can hardly be described as a just, consequence of the statutory privileges implied in a miner's right."

In conclusion, and upon the merits of the contention as to the application of the regulations to the lease, the opinion of the Board is definite that the proviso to sec. 18 of the lease—that the demise is subject to the regulations—*ex necessitate* incorporates only such regulations as are consistent with the existence of the lease itself and applicable thereto. It is impossible to conclude that when the regulations are imported by reference into the lease itself they should be imported for the purpose and with the result—the parties knowing what they did as is proved by the correspondence cited—of destroying altogether the demise and of rendering it void. Upon the construction contended for, this lease thus contained on its face a declaration of its own non-validity. This is necessarily the result of the argument submitted, and it need hardly be observed that a suicidal interpretation of this sort must be the last resort of construction. *A fortiori*—if in the circumstances an *a fortiori* is possible—such a construction should not be adopted at the instance of an applicant who was no party to the contract in issue.

Their Lordships have felt constrained to enter fully into a discussion of this fundamental question on account of the difficulty in which it is manifest the Judges of the Court of British Columbia felt themselves to be placed by reason of the judgment in *Smith* v. *The Canadian Klondike Mining Co.*, reported first in (1910), 16 W.L.R. 196, and on appeal in (1911), 19 W.L.R. 1. The judgments of the Court of Appeal do not appear to have been reported officially, but the parties have been good enough to incorporate in the record in the present case a full report thereof.

Imp.
P.C.
SEGUIN v. BOYLE.
Lord Shaw.

On a perusal of the case of *Smith* v. *The Canadian Klondike Mining Co.*, it appears *prima facie* peculiar that it should have been reckoned as a precedent of authoritative bearing upon the subject of the present appeal. Th difference on the facts between the two cases is outstanding. The present is a case where it is claimed that the respondent has the right to set up a mining claim on ground which is unoccupied land, and to set it up by a proceeding 20 years in date subsequent to the lease which geographically embraces it and upon which the appellant takes his stand as a title. In *Smith's* case the respondent's claim was located on November 2, 1899, and was recorded on November 3, and a record was issued therefor as provided by the regulations for the disposal of quartz mining claims. It was an admission in the stated case that the respondent's claim "is still, by virtue of such compliance with the requirements of the Act and regulations, on foot." It was not until more than a year thereafter, namely, November 5, 1900, that a hydraulic lease (the same lease as is in issue in the present case) was made by the Crown to Boyle. The analogy between that case and the present accordingly fails at the outset. Boyle as lessee was preferring against the quartz miner a right under a lease subsequent to the miner's record. This was clearly an illegal attempt to dispossess one in actual occupancy. As Idington, J., says:—

"The actual operations conceivable under each of these alleged rights would seem to me so clearly conflicting that they could not advantageously be operated together on the same land, and I do not think ever were intended to be so. The two claims are mutually destructive of each other. . . . The respondent's rights were acquired earlier, and therefore in such view must stand and appellant's contention fail."

The other Judges accept the same position, and the answer to the case as a precedent ruling the present is simply that the lessee's right was put forward for the purpose of dispossession of a quartz miner who was, to use the familiar language, actually "in full standing" at the time when the action was brought, and had been so at the date of the lease.

But in the course of these judgments certain expressions were used which have undoubtedly embarrassed the Judges in the present case, because they lend colour to the idea that in addition to protecting the right of a prior placer holder in full standing the actual land of the claim itself becomes forever excluded from the possible ambit of the lease. It may quite possibly be supposed that it did not cross the minds of the

Imp.
P.C.
SEGUIN
v.
BOYLE.
Lord Shaw.

Judges in the *Smith* case that it would ever be maintained as here, that in the case of land the claims upon which had lapsed, although they were in standing at the date of a lease, such land became itself enfranchised, excluded from the lease, and open to be left waste or to be claimed for by others as placer claimants in the course of future years. Accordingly, the Judges, dealing with a case in full standing and with nothing else, have used language of a breadth which is now cited as a precedent in the present case. Their Lordships note with satisfaction and with agreement that Anglin, J., inclines to hold "that the lease was issued subject to these regulations rather than that the Minister acted in contravention of them," and the same holds of that part of the judgment of Duff, J., which says:—"The last provision of Clause 18 of the lease in question introduces the regulation of the 25th August, 1900, in so far at least as the application of the regulation is not inconsistent with the validity of the lease itself."

Nor do they differ from the concluding passage in Idington, J.'s judgment dealing with the regulations, to the effect that they form a code—"which may and must get a rational interpretation and one that will, however the words looking to futurity may be capable of being read, be so read that everybody's rights will if possible be preserved, even including those of the appellant" (that is, a claimant in full standing and occupancy) "if and so far as founded on these regulations."

When, however, the Judges express their view, as does Anglin, J., "that by the very terms of their contract they should therefore be deemed to have excluded from the demised premises the territory covered by the quartz mining claim of the plaintiff," and when Duff, J., construes the effect of the regulation to be—"to prohibit the leasing for hydraulic mining of any area embraced within the boundaries of a quartz claim; and the incorporation of the regulation in the lease in question consequently excluded all such areas from the limits of the land demised," their Lordships are of opinion that these views were not necessary for the decision of the case and were as stated unsound. As mentioned, the expressions were used in a case affecting and affecting only land under quartz miners "in full standing." They, however, are apparently capable of construction as applicable to land itself and even to land which was worked on by a claimant under a claim which has entirely lapsed. But the policy of these regulations would be impeded, in so far as development of the colonial mining industry is concerned, by

such a construction, and their Lordships do not see their way to adopt it. In these circumstances their Lordships agree with the conclusion come to by McPhillips, J.A., rather than with that arrived at by the other Judges who deferred to the dicta in the case of *Smith* already dealt with.

The merits of the application having been fully investigated and determined, no occasion accordingly arises for dealing with the argument upon procedure, including the question of the competency of a writ of mandamus.

Their Lordships will humbly advise His Majesty that the appeal should be sustained, that the judgments of the Court below should be recalled, and that the application of the respondent should be refused and the appellant found entitled to costs here and in the Courts below.

Appeal allowed.

HOLM v. MORGAN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. November 28, 1921.

SALE (§ IC—19)—OF MOTOR CAR—LIEN NOTE AND CHEQUE GIVEN IN PAYMENT—GOODS AT PURCHASER'S RISK UNTIL NOTE PAID—FAILURE TO PAY NOTE OR CHEQUE—SEIZURE BY VENDOR—GOODS DESTROYED BY FIRE WHILE UNDER SEIZURE—RIGHTS AND LIABILITIES OF PARTIES.

The purchaser of a motor car gave a lien note which contained a provision that "The ownership of the goods for which this note is given shall remain at my risk in the owner and shall not pass from the owner to me until this note and any renewal or renewals thereof and all judgments recovered in respect of this note or any such renewals are paid with interest." . . . . . The seller seized the car for non-payment and during the time it was under seizure it was destroyed by fire. The Court held that the car was at the risk of the buyer until the note was paid, and so was at his risk notwithstanding the seizure, and when it was destroyed by fire, and that the trial Judge was right in giving judgment to the seller for the amount of his claim and costs.

APPEAL by defendant from the judgment of the trial Judge in an action on a lien note and a cheque given in payment of a motor car. Affirmed.

R. L. Klaholz, for appellant.

D. C. Kyle, for respondent.

The judgment of the Court was delivered by

MCKAY, J.A.:—On May 1, 1919, the respondent agreed to sell to the appellant a Ford touring car for $575. Possession of the car was given to the appellant, and the appellant gave

Sask.
C.A.
HOLM v. MORGAN.
McKay, J.A.

to respondent a cheque for $150, and a lien note on the car for $425, payable November 1, 1919.

The cheque and the lien note were not paid, and on or about April 24, 1920, the respondent seized the car and gave notice he would sell it on May 14, 1920, at the premises of the Hanley Garage, Hanley.

It appears that the appellant kept the car in the Hanley Garage, and after respondent seized it he left it in the same place. Before the date advertised for the sale, the car was destroyed by fire. The respondent, thereafter, sued the appellant on his promise to pay contained in the lien note for $425, and also on the cheque for $150.

The trial Judge gave judgment in favour of the respondent for the full amount of his claim. From this judgment, the appellant appeals.

It is admitted that the car was not destroyed through any fault of the respondent, and that the sole question to determine is, the respondent having seized the car and it being destroyed while in his possession under seizure, can he recover?

By sec. 22 of ch. 147 (R.S.S. 1909):—

"Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer . . ." But in the case at bar the lien note signed by the appellant, among other things, provides as follows:—

"It is agreed between me and the payee of this note and the assigns of such payee (hereinafter called the owner) as follows:

The ownership of the goods for which this note is given shall be and remain at my risk in the owner and shall not pass from the owner to me until this note and any renewal or renewals thereof, and all judgments recovered in respect of this note or any such renewals are paid with interest at the said rate. . . . . ."

I think the first question to consider in connection with this clause is, what is it that is to be at the risk of the buyer? The clause is not clearly worded, but, from the language used, it apparently was the intention that the risk usually attendant to ownership of goods was by this clause to be transferred to the buyer, the appellant; that is, the car was to be at the risk of the buyer, and I think that is the meaning to be given to it. And in any event it was so understood by the appellant. During the argument, counsel for the appellant admitted that the car was at the appellant's risk from the time he bought it until respondent seized it.

The risk as to the car, then, which by above in part quoted

Sask.
C.A.
HOLM v. MORGAN.
McKay, J.A.

sec. 22 would be in the seller, was by this agreement transferred to the buyer, the appellant.

The next question is, how long was this risk to remain in the buyer?

Appellant's counsel contends that the risk ceased as soon as respondent retook possession. But I cannot agree with this. In my opinion, the risk which the buyer assumes under this agreement continues as long as the ownership in the car cantinues in the respondent. Extending the agreement, it says the ownership of the car shall be and remain in the respondent at the risk of the appellant, and such ownership shall not pass from the respondent to the appellant until the note is paid, etc.

If the ownership of the car is to remain in the respondent until the note is paid, and the car is to be at the risk of the appellant while the respondent has the ownership, surely the risk is to continue in the appellant until the note is paid. There is not limitation to the risk of the appellant, under this agreement except payment of the note.

After the clause as to ownership and risk, the lien note goes on to provide that, in default of payment, the respondent shall be at liberty to take possession of the car and sell it, and apply the proceeds of sale, less the costs, on the amount then unpaid on the note. The appellant, then, must, have had in mind at the time he made and signed the lien note that the respondent might retake possession of the car, otherwise provision would not have been made for it. Yet he does not limit his risk to the time of retaking possession.

Furthermore, the appellant agreed to insure the said car for an amount sufficient at all times to secure the interest of the respondent therein. In Hals. vol. 25, para. 331, it is stated:

"The fact that one party or the other is, by the terms of the contract, to insure the goods is relevant to show that it was intended that he should take the risk."

The cheque and note have not been paid, and in my opinion, the car was still at the risk of the appellant after respondent seized it, and when it was destroyed by fire, and the trial Judge was right in giving judgment to the respondent for the amount of his claim with costs.

The following cases were cited for the appellant:—*A. Harris, Son & Co.* v. *Dustin* (1892), 1 Terr. L.R. 404; *Sawyer* v. *Pringle* (1891), 18 A.R. (Ont.) 218; *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208, 43 L.J. (C.P.) 91, 22 W.R. 370; *Mersey*

Alta.

App. Div.

Steel & Iron Co. v. *Naylor* (1884), 9 App. Cas. 434, 53 L.J. (Q.B.) 497, 32 W.R. 989.

These cases do not apply to the case at bar. They were all cases with regard to rescission of contracts. There is no such question involved here, as it is admitted respondent seized the car and was proceeding to sell under the contract as provided by the Conditional Sales Act, R.S.S. 1920, ch. 201, when it was destroyed by fire before the day of sale, through no fault of the respondent.

The appeal is dismissed with costs.

Appeal dismissed.

ST. PAUL LUMBER Co. v. BRITISH CROWN ASS'CE CORP'N.

Alberta Supreme Court, Appellate Division, Scott, C.J., Beck and Hyndman, JJ.A. March 16, 1922.

INSURANCE (§IIIF—140)—BREACH OF WARRANTIES AND CONDITIONS IN APPLICATION FOR—DECEPTION OF COMPANY—LOSS—LIABILITY.

Representations and statements made in an application for fire insurance on lumber, which lead the insurance company to believe that such lumber is ploughed round or piled on the river bank "and not exposed to bush hazard," when in fact there is no ploughing and is a large quantity of brush between the lumber and the river bank are material misrepresentations, and where the insurance company has acted on such misrepresentations in insuring the lumber it will not be held liable under the policy.

[*London Ass'ce* v. *Great Northern Transfer Co.* (1899), 29 Can. S.C.R. 577, referred to.]

APPEAL from the judgment of Walsh, J. (1921) 62 D.L.R. 587. Reversed.

H. P. O. Savary, K.C., for appellant.

S. W. Field, K.C., for respondent.

SCOTT, C.J., concurs with HYNDMAN, J.A.

BECK, J.A.:—This is an appeal from the judgment of Walsh, J. The action is on a policy of fire insurance. What was insured was:— 150,000 feet of sawn lumber piled on bank of river in section 3, township 63, range 10, west of the 4th meridian, Province of Alberta. On a sheet of paper typewritten in black attached to the face of the policy was the following provision:—

"It is understood and agreed that this insurance also covers loss or damage arising from or traceable to prairie fires. (sic) It (sic) being warranted by the assured that the several locations named herein (there were three lots) on which lumber are piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard."

It is admitted that the evidence discloses no ground for sup-

posing that the loss arose from or was traceable to prairie fire, although in the view I take of the case this is immaterial.

The policy is endorsed with the statutory conditions in compliance with the provisions of ch. 8, of 1915, the Alberta Insurance Act.

Statutory condition 14 begins with the words:—"The company is not liable for the losses following, that is to say:—." Then follows seven clauses of exclusion from liability. Loss arising from or traceable to prairie fires is not one of the losses excluded. So far as the terms and conditions of the policy go without the special clause in relation to prairie fires attached to the policy a loss arising from or traceable to a prairie fire would be covered by the policy.

It seems to me it is impossible to treat the special clause in question otherwise than as a variation, i.e., a variation of omission from or addition to the statutory conditions (sec. 70). It seems to me that the plain sense of the clause which is in no wise affected by the transposition of the two parts of it or by the question of punctuation is this,—that the statutory conditions are varied so as to prevent the policy covering the case of loss arising from or traceable to prairie fire if the lumber is not entirely surrounded by ploughed ground and in any way exposed to bush hazard. I am not sure that counsel for the company ventured to argue otherwise. His argument was rather, or mainly, that as the clause was a warranty, it was something outside of the conditions.

The reasoning in the decision in *Curtis's & Harvey* v. *North British & Mercantile Ins. Co.*, 55 D.L.R. 95, [1921] 1 A.C. 303, 90 L.J. (P.C.) 9, a Quebec case, seems to furnish an answer to this contention. In that case the policy contained a warranty in the following words: "Warranted free of claim for loss or damage caused by explosion of any of the materials used on the premises." These words appeared upon the slip by which the appellants themselves proposed the insurance, but were not printed on the policy in the manner prescribed for a variation. By statutory condition 11 of the Quebec Act R.S.Q. 1909, art. 7055 the company were liable for all "loss caused by any explosion." Statutory condition 11 was as follows:—

"The company shall make good loss caused by the explosion of gas in a building not forming part of gas works, and all other loss caused by any explosion causing a fire and all loss caused by lightning, even if it does not set fire."

In the course of the judgment it is said, 55 D.L.R. 95, at p. 98, that in *Hobbs* v. *The Northern Ass'ce Co* (1886), 12 Can.

Alta.

App. Div.

ST. PAUL LUMBER CO. v. BRITISH CROWN ASS'CE CORP'N.

Beck, J.A.

S.C.R. 631, it was decided that "a policy which insured against fire covered *all loss caused by explosion which was an incident of the fire, i.e.,* when a fire began without an explosion and an explosion took place during its course and was caused by it." Then it was said that statutory condition 11 was to be taken "to fill up the lacuna left by *Hobbs* case; that is, to make it clear that when the *original cause of the fire is explosion* the damage must be made good by the insurer."

Then it is said, at p. 100: "The insurers are warranted free from explosions of every sort except such explosion as is provided for by statutory condition 11. Now statutory condition 11, as already stated, only deals with *an explosion originating a fire* and does not deal with the case of *an explosion incidental to a fire.* It follows that the present case is not touched by statutory condition 11, and the warranty free from explosion can have effect." In other words, inasmuch as the warranty dealt with something *not dealt with by the statutory conditions* the Board held that the warranty was valid to that extent. The clear inference is that if the warranty had dealt with something dealt with by the statutory conditions and so far as it did so, it would have been held to be ineffective because not treated as a variation.

On the ground, therefore, that the so called warranty in the present case is of such a character as to be a variation within the meaning of the Insurance Act, I think it was ineffective because not printed as a variation to the statutory conditions.

It has been suggested that the words "shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard," ought to be taken as part of the description of the property insured.

It may be that had the words "being now entirely surrounded by ploughed ground and in no way exposed to bush hazard" been inserted as a part of the description and have purported to be part of the description, such words would properly be held to be a part of the description and not a variance of a condition, but the policy is not in that form; the words in question seem to have been purposely disjoined from the description and to have been put in the future tense for the only purpose of giving them the character of a condition, to be maintained continuously as a condition of the validity of the policy.

For the foregoing reasons I would dismiss the appeal with costs.

HYNDMAN, J.A.:—It seems to me that under the circumstances of this case it must be held that the basis upon which the

Alta.

App. Div.

ST. PAUL LUMBER CO. v. BRITISH CROWN ASS'CE CORP'N.

Hyndman, J.A.

policy of insurance was issued, was the correpondence by letter and telegrams between Lebel and Hann and Lowes Dunham Co.; without which no contract would ever have been made between the parties. Whilst in the strictest sense perhaps Lebel might not have been the agent of the assured, neither can it be said that he was the agent of the company. He might, reasonably, be said to be acting in a dual capacity. He was, I think, more a broker than an agent in the true sense.

"A broker is one who exercises the trade and calling of negotiating between parties the business of buying and selling or any other lawful transactions. He may be the mandatary of both parties and bind both by his acts in the business for which he is engaged by them." (See Cameron on Fire Insurance in Canada p. 217.)

Clearly in the first place respondent applied to Lebel for insurance, and Lebel immediately wrote to the London & Lancashire Co., using the following language in his letter of May 4, 1920:—

"Now one of my clients wishes to have some lumber insured right away, and I understand that such securities are required of him by the bank he is dealing with. He is anxious to have a policy for that purpose, and I wish you would take the matter up at once on my behalf, *as it is a special risk,* which I am not familiar with."

As a result of this, a series of telegrams and letters followed, and the gist of them would apear to be that Lebel and Hann, acting for him, represented (quite *bona fide*) or led the defendant company to assume that all the lumber insured was either ploughed round or piled on the river bank and not exposed to any bush hazard. The impression, I would say, which the company would naturally receive from a perusal of the correspondence, was, that the lumber in question was piled on the bank of the river in such a way and manner and amidst such surroundings that there was no risk or hazard from fire being communicated as a result of a fire in such brush or bush. In fact, that it was more or less on open ground on three sides with the river on the fourth, from which there could be no reasonable probability of fire being communicated. The fact of there being a considerable quantity of brush between the lumber and the river quite capable of being burnt, to my mind was a very material circumstance, being a much different thing from being "bounded by a river."

In Hann's letter to Dunham, ex. 11, he says:—

"The considerations that I arranged with Mr. Lebel, were

Alta.
App. Div.
ST. PAUL LUMBER CO. v. BRITISH CROWN ASS'CE CORP'N.
Hyndman, J.A.

that all this lumber was to be under some kind of supervision, ploughed round and in no way exposed to bush hazard; a cover against prairie fire is also desired."

Now it seems to me that these representations or statements ought to be construed as going to the description and location of the goods insured which the insurer is entitled to insist on being true and accurate. But for such representations it is fair to assume no contract would have been made. The right of the insurer to know exactly what risk he is undertaking cannot be denied. (Cameron on Insurance p. 76. See also Porter on Insurance 4th ed. p. 166 as to promissory warranties or conditions).

It is admitted that no ploughing at all was ever done at the location in question, which consequently means that the description of the situation and surroundings of the goods insured was not correct. And so far as the warranty can be considered promissory only, has not been complied with.

Statutory condition No. 1 of the policy reads:—

"1. If any person insures property and causes the same to be described otherwise than as it really is to the prejudice of the company, or misrepresents or omits to communicate any circumstances which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made."

In *Thomson* v. *Weems,* (1884), 9 App. Cas. 671, at pp. 683, 684, Lord Blackburn said:—

"This, in my opinion, depends on the construction of the whole instrument. It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material.

In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, *prima facie*, at least that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the

Que.

S.C.

balance of authority the general principles of insurance law apply to all insurances, whether marine, life or fire."

If then there was any material misdescription of the goods or their location as a result of the said statutory condition and the authorities, the policy never took effect and the defendant company should not be held liable.

It is agreed, however, that the so-called warranty in the policy as to the ploughing and freedom from bush hazard should be held to be a variation of the policy and not as a description of the goods.

I cannot see it in that light. The policy includes loss due to prairie fire and a variation is only required to be indorsed when loss by prairie fire is intended to be excepted. The "warranty" refers not only to ploughing which would affect prairie fires but also to bush hazard, for which there is no necessity to insert a "variation" as required by the Alberta Insurance Act, ch. 8 of 1915.

I cannot see any difference between this case and one where say the property might have been described as distant, say 100 feet, from any wooden building, when, as a matter of fact, there happened to be a wooden building within 10 feet. In other words the disputed clause of the policy is one bearing on the description as opposed to one varying the statutory conditions and that its incorrectness is so material as to vitiate the policy. See *London Ass'ce Co.* v. *Great N. T. Co.*, 29 Can. S.C.R. 577.

I must, therefore, allow the appeal with costs and dismiss the action with costs. *Appeal allowed.*

CHAREST v. MONTREAL TRAMWAYS Co.

Quebec Superior Court in Review, Archibald, Acting C.J., Demers and Hackett, JJ. May 14, 1921.

CARRIERS (§IIK—236)—BLOW-OUT ON STREET CAR—FRIGHT OF PASSENGERS—RUSH TO LEAVE CAR—INJURY—NEGLIGENCE OF COMPANY—ART. 1053 (QUE.) C.C.

A street railway company is not liable in damages for injuries to a passenger, caused by his becoming frightened at a blow-out occurring on a street car, without negligence on the part of the employees of the company, and attempting with other passengers to rush from the car. The presumption of fault in such a case is governed by art. 1053 of the (Que.) C.C.

APPEAL from the judgment of Howard, J. Affirmed.

The judgment appealed from is as follows:—

HOWARD, J.A.:—A "blow-out" is due to creation of ionised gas in the controller by the flashes that occur when circuits are made and broken, and this ionised gas, when heated, be-

Que.
S.C.
CHAREST v. MONTREAL TRAMWAYS Co.
Archibald, Acting C.J.

comes a good conductor, causing short circuits with consequent ignition of the insulations. It is provided most conclusively by experts heard on behalf of both parties that, though the problem has been under consideration by electricians and scientists for many years, there is no known method of preventing the formation of ionised gas in a controller, or of eliminating it from a controller so as to prevent blow-outs. It is also proved that the controller was of just as good a type as any known to science, and, though one of the older models and no longer manufactured, the reason for discontinuing manufacturing the type is on account of the greater cost and not on account of improvements in regard to burn-outs or otherwise.

Considering that the plaintiff bases his action upon the fault and negligence of the defendant by alleging that the accident and consequent injuries to his wife were due to the fault and negligence of the employees of the defendants who were in charge of the said tramcar, and the fact that its motor was out of order, thereby assuming the burden of proving such fault and negligence on the part of the defendants and that the accident was caused thereby, which he has wholly failed to do;

Considering that even if, as plaintiff contends, the fact of the explosion was *prima facie* evidence of negligence on the part of the defendants under the doctrine of *res ipsa loquitur*, the defendants have rebutted that presumption of fault by proving that, though they took all possible precautions and their employees did everything they could in the circumstances, they were unable to prevent it; doth dismiss the plaintiff's action with costs.

L. Camirand, for the appellant.

Perron, Taschereau, & Co., for the defendant.

ARCHIBALD, Acting C.J.:—There remains then only a question of fault arising from the fact that the controller burnt out when it was not designed to burn out. The plaintiffs cite art. 1054 relating to damage caused by a thing in the charge of a person against whom an action for damage is pending and they pretend that the proof was upon the defendant to shew what was the cause of the accident and that whatever it was, it did not engage their responsibility or, in other words, to show that they could not prevent the accident and they cite the Privy Council judgment of *Vandry* v. *Quebec Railway Light & Power Co.*, 52 D.L.R. 136, [1920] A.C. 662, 26 Rev. Leg. 244.

In my opinion, this case has no application to the present case; where damage is caused by a thing which is in motion and

Que.
S.C.
CHAREST v. MONTREAL TRAMWAYS Co.
Archibald, Acting C.J.

furnished with power under the control of a man, art. 1054 does not apply. The general rule contained in 1053 that every person is responsible for damage caused by his fault applies in such a case, and that rule is connected with the other rule that the man who claims the damage has been caused by fault must prove his case. Sometimes, however, the very fact of an accident happening is a sufficient proof of fault under the maxim *res ipsa loquitur*. This maxim is not a maxim of responsibility but a maxim governing proof. It is applied in cases where it is at least more probable that the damage happened by the fault than that it happened without fault. See Broom's Legal Maxims, 6 ed. p. 247, where he says: "As a rule the mere fact that an accident has happened is not evidence of negligence."

Then he speaks of the circumstances in which the maxim *res ipsa loquitur* may be applied. He instances two trains colliding with each other, a ship in motion colliding with another ship at anchor and he says at p. 248: "The maxim: *res ipsa loquitur* ought not to be applied unless the facts proved are more consistent with negligence in the defendant than with a mere accident."

He instances a horse bolting in the street, is no evidence of negligence. See also *Crisp* v. *Thomas* (1890), 63 L.T. 756, which lays down the same doctrine, also *Smith* v. *Midland Ry. Co.* (1887), 57 L.T. 813. This was an action against the railway company for injury to cattle in transport and the Court held that the injury might have been caused by the fighting of the cattle amongst themselves instead of by the shunting operations. See also *Ferland* v. *Laval Electric Co.* (1916), 32 D.L.R. 291, 25 Que. K.B. 347. This case was a case of fire and it was attempted to prove that it was caused by the electric installation. This installation was proved to have been defective but no proof could be made that the fire resulted from that cause. The Court of Appeals rejected the action and their judgment was confirmed in the Supreme Court, Idington, J., remarking:—

"The case made falls far short of any case I know where the maxim *res ipsa loquitur* has been successfully applied to maintain the action."

In this case, as appears by the judgment which is, as a matter of fact, supported by the evidence, the controller in question and entire motive machinery of the tram car were in perfect order and condition at the time of the accident; it was a custom for the defendant company to make a thorough inspection of all its cars at short intervals and, as a matter of fact, this particular car had undergone a thorough inspection and had been

Que.
S.C.
CHAREST v. MONTREAL TRAMWAYS CO.
Archibald, Acting C.J.

found or made perfect in every respect, just a few hours before the accident. A blow-out is due to the creation of ionised gas in the controller generated by the flashes that occur when circuits are made and broken, and this ionised gas, when heated becomes a good conductor, causing short circuits with consequent ignition of the insulations.

It is proved most conclusively by experts heard on behalf of both parties that, though the problem has been under consideration by electricians and scientists for many years, there is no known method of preventing the formation of ionised gas in a controller or of eliminating it from a controller so as to prevent blow-outs to occur. Of course, if these blow-outs had serious results, it might be necessary to provide by legislation that that system should not be used for locomotion. But the contrary of that has happened. The system is expressly authorised. There is no one who is in the habit of riding in the cars who does not know that these blow-outs occasionally occur. They are very expensive for the tramways and doubtless the company would be glad if any engineer would succeed in the discovery of a means by which the difficulty would be overcome. That is what is known as an accident in law, something which happens which cannot be foreseen or provided against, and our Code says that that does not give rise to responsibility.

In this case also, while I am not disposed to go the length of saying that the plaintiff was in fault in consequence of being frightened and had done an injudicious thing in that condition, still, the Court finds that there was absolutely no danger, and that was truly justified by the proof. The flame only lasted a couple of seconds, the conductor did all he could to re-assure the passengers, stating that there was no danger, he shut the ordinary exit door, but the passengers forced their way through the entrance door and were hurt, not in consequence of anything that happened in the car, but in consequence of the unjustified panic of their fellow passengers. I am of opinion to confirm the judgment.

Appeal dismissed.

Sask.

C.A.

MASON v. ELLIS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

AUTOMOBILES (§IIIB—180)—MOTOR CARS APPROACHING ONE ANOTHER IN SAME DEEP RUT IN HIGHWAY—DUTY OF DRIVERS—NEGLIGENCE—LIABILITY.

When two motor cars are approaching one another in the same deep rut in a highway there is a duty on the driver of each car to stop his car rather than take the chance of getting out of the rut before the cars meet, and where one of the drivers properly stops but the other does not, and in getting out of the rut collides with the other car he is guilty of negligence and liable for the resulting damage to the other car.

[See Annotation on Automobiles and Motor Vehicles, 39 D.L.R. 4.]

APPEAL by defendant from the judgment at the trial of an action for damages caused to a motor car through the negligence of the defendant. Damages reduced.

H. G. W. Wilson, K.C., for appellant.

W. J. Mars, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—On June 29, 1920, the plaintiff was proceeding eastward on the road from Lipton to Cupar in his automobile. The defendant was proceeding in the opposite direction, likewise in an automobile. The road wound around some bluffs which prevented the parties from seeing one another until they were within a distance of 140 ft. The travelled portion of the road consisted of two ruts, one on each side, 9 inches deep; both cars were travelling in these ruts. As soon as they espied one another each driver attempted to turn his car out of the rut to the right. The plaintiff, finding himself unable to get out of the rut, stopped his car. When he brought his car to a stop, he says the defendant was still 40 ft. away. The defendant says that he was going 20 miles an hour (other witnesses say 35), and that as soon as he saw the plaintiff he tried to turn to the right; that his wheels would not leave the rut, and that "he stepped on the accellerator to get more gas to get more speed to get out of the rut." Realising that he was unable to get his car out of the ruts to the right, the defendant, instead of stopping, turned to the left in the hope of getting out on that side. He succeeded in getting out of the ruts, but, when he did, he was so close to the plaintiff's car that in passing he collided with it, causing damage. To recover for this damage the plaintiff has brought this action. The trial Judge held that the accident was caused by the defendant's negligence, and he

Sask.

C.A.

MASON v. ELLIS.

Lamont, J.A.

awarded the plaintiff damages in the amount of $160, although in his judgment he says the evidence as to the actual damage was very unsatisfactory.

I agree with the conclusion reached by the trial Judge that the collision was due to the negligence of the defendant. Assuming that he was not travelling at a reckless rate of speed—although I am inclined to think he was—it was his duty to have stopped when he found that the wheels of his car would not leave the ruts. Instead of which he accelerated his speed, in the hope that with greater speed he might get out of the ruts to the right. When he found he was still unable to get out, he was faced with a head-on collision; to avoid this he turned his car to the left. He got out on that side, but not in time to avoid a collision. I do not doubt that had the defendant not turned to the left when he did, a head-on collision would have taken place. That, however, is no answer to the plaintiff's claim. The negligence of the defendant which caused the damage was not in turning to the left to avoid a head-on collision, but in not stopping his car before a head-on collision became inevitable. This he could easily have done if he were going at a reasonable rate of speed. Where two cars are approaching one another in the same deep rut, there is in my opinion a duty on the driver of each to stop his car rather than take the chance of getting out of the rut and getting clear before the cars meet. This duty the plaintiff performed, but the defendant did not. The defendant is, therefore, liable for the damage caused by the collision.

As to the damage done, I agree with the trial Judge that the evidence is not satisfactory. But, with deference, I think, he erred in fixing an arbitrary sum of $160 without its being proved that the collision caused a loss to the plaintiff of that amount. The plaintiff filed the bills from the garage, showing that he had been charged $226.85, but it was not shown that the work which this sum represented had been rendered necessary by the collision. In fact, some of it was shown not to have been. The damage specifically testified to by the plaintiff was: "Bumper bent; rim of right front wheel broken; tire blown out, and front axle bent." In addition to this damage the plaintiff had to pay $10 for another car to take him home.

The garage to which the plaintiff's car was taken for repairs after the collision did not have the necessary machinery to straighten the bent axle, so a new axle was put in. It was admitted in evidence that the cost of straightening the bent axle would have been less than the price of a new one, if the garage had had the necessary machinery. The failure of the gar-

age to have the necessary machinery to straighten the bent axle does not justify charging the defendant with the price of a new one. The only items of damage of which sufficient proof was given to justify charging the same to the defendant are the following: Front wheel and rim and assembling same, $30.55; hire of car to go home, $10; one tube, $6.90; one bumper, $18; total, $65.45.

In the bill filed there is a charge of $85 for labour, and I have no doubt some of it was properly chargeable to the defendant, but what part is not shown and therefore no allowance for labour can be made. Neither is it shown what would have been a fair charge for straightening the bent axle. As no evidence was given that any of the items charged in the bill other than those above referred to were rendered necessary by the collision, they must be disallowed.

In his notice of appeal, the defendant raised no question as to the failure of the plaintiff to prove his damages. He however did on the argument. His chief ground of appeal was that it was not the defendant's negligence which caused the collision. On this ground he fails. Under these circumstances, I would allow the appeal and reduce the plaintiff's judgment to $68.40, but I would allow no costs of appeal.

Appeal allowed.

Re SUCCESSION DUTY ACT and WALKER.

British Columbia Supreme Court, Hunter, C.J.B.C. February 9, 1922.

TAXES (§VC—190)—SUCCESSION DUTIES—PROMISSORY NOTES AND AGREEMENT FOR SALE OF LAND—MAXIM MOBILIA SECUUNTUR PERSONAM—APPLICATION TO B.N.A. ACT.

By reason of the maxim *mobilia secuuntur personam* where a person dies domiciled in British Columbia, succession duties may be claimed by the Province in respect of promissory notes and agreements for sale of land, although they were made without the jurisdiction, and create obligations payable without the jurisdiction and have never been brought within the jurisdiction.

[*Smith* v. *Provincial Treasurer of Nova Scotia* (1919), 47 D.L.R. 108, 58 Can. S.C.R. 570; *Barthe* v. *Alleyn-Sharples* (1920), 54 D.L.R. 89, 60 Can. S.C.R. 1 (affirmed by the Privy Council, 62 D.L.R. 515, [1922] 1 A.C. 215), followed.]

ACTION by the Crown to recover succession duties on certain promissory notes and agreements for the sale of land. Judgment for the Crown.

C. H. Tupper, K.C., for applicant.
W. D. Carter, K.C., for the Crown.

HUNTER, C.J.B.C.:—In this case succession duties are claimed in respect of promissory notes and agreements for sale of

B.C.
S.C.
RE SUCCESSION DUTY ACT AND WALKER.
Hunter, C.J.B.C.

land, all of which were made without the jurisdiction and create obligations payable without the jurisdiction, and none of which documents have ever been brought within the jurisdiction.

By the B.N.A. Act the Legislature is empowered to impose direct taxation within the Province in order to raise revenue for provincial purposes. There are therefore two limitations, namely that the taxation must be direct, and that it must be within the Province.

Had the matter been *res integra,* giving the language the meaning which would be in accordance with the ordinary understanding of men, one might have said that this was not "direct taxation within the Province."

But the Supreme Court of Canada in *Smith* v. *Provincial Treasurer of Nova Scotia,* (1919), 47 D.L.R. 108, 58 Can. S.C.R. 570, in construing a similar statute only not so explicit in its terms as our own have held that it is so by reason of the maxim *mobilia secuuntur personam.* The propriety of the application of this rule was re-affirmed by the Court in *Barthe* v. *Alleyn-Sharples,* (1920), 54 D.L.R. 89, 60 Can. S.C.R. 1, although that case dealt with a Quebec statute which is not *in pari* as it imposes a duty on the transmission or succession and not on the property itself. This latter case came before the Judicial Committee, 62 D.L.R. 515, [1922] 1 A.C. 215, but the Board rested its decision on the ground that the transmission took place within the Province to a person domiciled or resident within the Province, the duty was lawfully imposed and did not consider the applicability of the maxim to the construction of the B.N.A. Act.

It follows from the Supreme Court decision that if a man maintains a residence in Toronto where his children are being educated, and dies domiciled in British Columbia, that the contents of his Toronto residence are liable to British Columbia taxation, although he may never have had any intention of moving the assets to British Columbia. I find it difficult to persuade myself that such a result was ever contemplated by those who framed the enactment, in fact I would have thought that by the use of the words "within the Province" they expressly intended that it should not be in the power of the Province to tax property actually situate in another Province or elsewhere, but that each Province was to be confined to such as was within its own borders. Nor am I able to see any valid reason for resorting to a rule which may be useful in deciding questions of administration in the construction of the Act. However the result is that by means of a maxim which says

Sask.

C.A.

that things are in law what they may not be in fact, taxes may be exacted in respect of property outside the Province and one can imagine the rapture of the first Provincial Minister of Finance who made the discovery that he might get an extra territorial property under the shield of this legal fiction as well as the shock experienced by the recipient of the first attack. It may well be that the rule is relevant in questions of taxation in those jurisdictions where the range of the taxation authority is limited only by international law, but I am unable to see its relevance to the construction of a statute which expressly limits the power to a given area.

If Latin maxims are to be called to control the plain meaning of English statutes then there seems to be some danger that the Court will become the temple of a mysterious cult intelligible only to the initiated instead of being preserved as the shrine of that common sense which all can understand. However the question is settled so far as I am concerned and there must be judgment for the Crown.

Judgment accordingly.

ZIMMERMAN v. ARCHER.

Saskatchewan Court of Appeal, Haultain C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

CONTRACTS (§IID—145) — CONSTRUCTION — AGREEMENT TO "TAKE GOOD CARE IN EVERY WAY" OF HORSE FOR WINTER—HORSE UNBROKEN—HORSE PUT WITH OTHERS IN FIELD ENCLOSED BY TWO WIRE FENCES—ESCAPE AND LOSS OF HORSE—LIABILITY—CUSTOM OF FARMERS IN DISTRICT TO LET HORSES RUN AT LARGE FOR WINTER.

A party who agrees to winter an unbroken horse, and to take good care of it in every way during the time, and puts it with other horses in a pasture surrounded by a fence composed of two strands of wire, and goes to see it every other day, it being customary for farmers in the locality to allow their horses not being used to run at large during the winter, is not guilty of negligence nor liable for the loss of the horse, if it breaks out of the pasture and is lost.

APPEAL by defendant from the judgment at the trial of an action for the value of a horse which plaintiff let out to the defendant and which defendant failed to return. Reversed.

S. F. Arthur, for appellant; No one *contra.*

HAULTAIN, C.J.S.:—I would dismiss this appeal, as the evidence in my opinion does not show that the defendant lived up to his agreement to "take good care in every way" of the plaintiff's horse. The fact that the horse escaped from the field where it was being kept on two occasions before it finally got out and was lost, is to my mind sufficient evidence of want

Sask.
C.A.
ZIMMERMAN v. ARCHER.
McKay, J.A.

of reasonable care on the part of the defendant. The fact that farmers in the neighborhood usually allowed their horses to run at large during the winter does not seem to me to have any significance. Neither the defendant nor Sorenson, in whose field the horse was kept, wintered their horses in that way. If the plaintiff had been satisfied to allow his horse to run at large, an agreement with the defendant to "take good care of it in every way" would have been meaningless and unnecessary. The defendant evidently, and quite properly, considered that something more was required of him, and put the horse in Sorenson's field. The fence surrounding the field was to the defendant's knowledge broken down on several occasions during the winter, and, as already mentioned, the horse escaped twice, but was recovered. It broke out a third time and was lost. The loss in my opinion was due to lack of good care amounting to wilful negligence on the part of the defendant.

I would dismiss the appeal with costs.

LAMONT and TURGEON, JJ.A., concur with MCKAY, J.A.

MCKAY, J.A.:—The plaintiff brings this action for the value of a gelding which he let out to the defendant, and which defendant failed to return. The agreement is as follows:—

"Kealy Springs, Sask.

This agreement made in this 28th day of November, A.D., 1919. Between Anton Zimmerman, owner and Frank P. Archer, lessee.

Witnesseth, first party letting out to the second party one gray gelding branded Z-Z on left shoulder, three years old. The second party have right to work the horse until July 1st, 1920, by taking during the time, good care in every way, of the same.

Signed,

Anton Zimmerman, F. P. Archer."

The trial Judge gave judgment in favour of the plaintiff for $150 and costs. From this judgment, the defendant appeals.

According to the above agreement the defendant was to take good care in every way of the horse while he had it. The question to determine is, what is taking good care in every way of the horse under the circumstances of the case.

The evidence shows that the horse was unbroken, and when defendant received the horse from plaintiff in November, 1919, his neighbor Sorenson also took over two horses from plaintiff. The 3 horses were put in a pasture belonging to Sorenson.

Sask.
C.A.
ZIMMERMAN v. ARCHER.
McKay, J.A.

with Sorenson's and defendant's horses. This pasture was surrounded by a fence of 2 strands of wire. These horses were kept there all winter with Sorenson's and defendant's, and defendant went to see them every other day. The horse in question got out of the pasture twice during the winter, but was put back. He disappeared about the end of April or beginning of May, 1920, and cannot be found.

The plaintiff says defendant agreed to keep the said horse in a stable. This the defendant flatly denies. There is no finding by the trial Judge on this point.

The evidence shows that the fence surrounding the pasture within which the defendant kept the horse was down in some places, and that it is the custom in that neighbourhood for the farmers to allow their horses not being used to run at large during the winter. They stable only those they are using.

The defendant was to work the horse in question; however he would have to break him in to do so. The evidence, however, shows that it is not customary to break horses in that locality till the spring, after the snow is off the ground. I would have thought sometime during the winter—when the farmers have less to do than in the spring or summer—would be the time for breaking in horses. However, the evidence is otherwise.

Under the circumstances of this case, I think the defendant took sufficiently good care of the horse, when he put him in the pasture with the other horses and went to see them every other day. He did not allow him to run at large on the prairie, as apparently was the usual practice. The horse was with two of plaintiff's horses he had been accustomed to before, and was not likely to wander away from these. The plaintiff had lived in that neighbourhood for several years, and must have known of the custom to let horses not being used run at large on the prairie during the winter, and I think if he intended that this horse was to be kept in a stable he would have so stipulated in the agreement which he prepared.

In my opinion the appeal should be allowed with costs.

Appeal allowed.

Can.

Ex. C.

THE KING v. KELLY.

Exchequer Court of Canada, Audette, J. December 3, 1921.

EXPROPRIATION (§IIIC—137)—HARBOUR IMPROVEMENTS—PREVIOUS EXPROPRIATION—UNDERTAKING TO GRANT EASEMENT IN MITIGATION OF DAMAGES—UNDERTAKING UNFULFILLED—SUBSEQUENT EXPROPRIATION BY THE CROWN—ASSESSMENT OF DAMAGES IN VIEW OF UNDERTAKING GIVING AN ENHANCED VALUE TO THE LANDS.

A portion of the defendants' lands had been previously expropriated for the improvement of navigation in the harbour of Fort William, Ont. On the trial of the issue of compensation an undertaking was filed by the Crown that the defendants were at liberty whenever they so desired to construct upon such portion of the land expropriated "wharves, docks or piers extending out to and abutting upon the harbour line . . . subject to compliance with the provisions of the Navigable Waters Protection Act, R.S.C. 1906, c. 115." The Crown further agreed to execute any conveyance or assurance of the right or easement forming the subject of the undertaking as might become necessary to give effect to the purpose of the undertaking. Instead of fulfilling the undertaking the Crown subsequently expropriated the lands of the defendants beneficially affected by such right or easement.

Held: That in assessing the compensation for the subsequent expropriation the Court must have regard not only to all the elements of value inherent in the lands themselves at the time of such expropriation, but also to the value to the owner of the easement in question.

INFORMATION exhibited by the Attorney-General of Canada to have the compensation for property expropriated fixed by the Court.

W. A. Dowler, K.C., for plaintiff.

F. R. Morris, for defendants.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to some of the defendants herein were, under the provisions of the Expropriation Act, R.S.C. 1906, ch. 143, taken and expropriated for the purposes of a public work of Canada, namely, the improvement and enlargement of the harbour of Fort William, in the Province of Ontario, by depositing, on December 13, 1919, a plan and description of the said lands with the Local Master of Titles, at the said city of Fort William, in which district the same are situate.

The area of the piece or parcel of land expropriated by the present proceedings is (4.964) four acres and nine hundred and sixty-four thousandths of an acre, being the balance of, in round figures, a piece of land of ten acres,—out of which (2.83) two acres and eighty-three hundredths of an acre were expropriated in 1906, and (2.79) two acres and seventy-nine hundredths of an acre were taken under a second expropriation in May, 1909.

[63 D.L.R.

Can.
Ex. C.
THE KING v. KELLY.
Audette, J.

(See the *King* v. *Bradburn* (1913), 14 Can. Ex. 419, at pp. 426, 427, 428, 438, 440.

By this present third expropriation, the balance of the property is taken by the Crown for, among other purposes, enlarging the turning basin at the junction of the Mission and Kaministiquia rivers and materially improving navigation at this dangerous place, thereby answering the requirements imposed upon it in the public interest. I have had the advantage, accompanied by counsel for both parties, of viewing the *locus in quo* and realised the advisability and necessity of the present expropriation in the interest of navigation in these waters.

For the lands taken by the present proceedings (3rd expropriation), the Crown offers, by this information, the sum of $4,248.29—an amount somewhat lower than $1,000 an acre.

The owners of the lands, the defendants, Thomas P. Kelly, John J. Flanagan, Young & Lillie, Limited, Arzelie Rochon, and Esther A. Flanagan, by their statement in defence, claim the sum of $35,000.

The Toronto General Trusts Co. were not represented at trial, but by their statement in defence, state they are judgment creditors, and submit their rights to the Court asking that the compensation monies be applied to satisfy their claim. The other defendants, be they mortgagees, or judgment creditors as stated at Bar, although duly served with the information, did neither file any statement in defence nor appear at trial. However, the compensation monies will be made payable to the proprietors, free from all incumbrances.

The whole property, composed of about 10 acres, was purchased in 1906, by some of the present defendants, for the sum of $14,250, including the right to the compensation for the piece of land taken by the first expropriation. The property was bought for speculative purpose, and it had from the outset the inherent defect that its very site would work against it, because it would be required as part of the general scheme for the improvement of navigation and in fostering the development of industrial sites. However, the owners are entitled to the market value of this property, at the date of the expropriation, in respect of the best uses to which it can be put, taking into consideration any prospective capabilities or value it may obtain within a reasonably near future.

In the case of *The King* v. *Kelly* (1913), 14 Can. Ex. 448, (see also the case of *The King* v. *Bradburn,* 14 Can. Ex. 419, at pp. 426, 427, 428, 438, 440), wherein the question of compensation in the two previous expropriations in respect of the two parcels of land taken from these 10 acres above referred to,

Can.
Ex. C.
THE KING v. KELLY.
Audette, J.

the Crown filed the following undertakings which were embodied in the judgment of the Court, bearing date August 29, 1913, affirmed on appeal to the Supreme Court of Canada on May 2, 1916, *viz.*:—

"The Attorney-General, on behalf of His Majesty, being thereunto duly authorised by Order in Council of the first day of July, 1913, undertakes and consents that the defendant and his successors in title may, without further assurance or consent on behalf of His Majesty, construct, maintain and use upon such portions of the lands expropriated and described in the information herein as lie between the expropriation line and the harbour line.......................................such wharves, docks, or piers extending out to and abutting upon the harbour line, as they may desire to construct subject, however, to compliance with the provisions of the Navigable Waters Protection Act, R.S.C. 1906, ch. 115, and any Acts passed or to be passed in amendment to or in substitution thereof, or in addition thereto, and that His Majesty will, as may be reasonably required execute such further conveyance or assurance, if any, as may be necessary in order to give full effect to this consent or undertaking, and in the event of the above permission as to said use of such portions of the lands expropriated as lie between the expropriation line and the harbour line so fixed as aforesaid, being revoked by Parliament or otherwise, or rendered nugatory by future expropriations, the owner of any structures erected upon the same shall be entitled to compensation for such structures, to be determined as usual in expropriation cases.

The Attorney-General on behalf of His Majesty being thereunto duly authorised by Order in Council of the first day of July, 1913, hereby undertakes that the lands expropriated and described in the information herein if not already dredged as hereinafter mentioned will be dredged to the harbour line as soon as the work can reasonably be done in connection with the scheme of harbour improvement proposed to be carried out by the Government save and except the natural slope required to protect and safeguard the bank of the channel and unexpropriated property from erosion; and that in the event of docks or other structures being built out to the harbour line, the channel will be forthwith dredged clear to such docks or other structures so as to enable vessels to approach to and lie along the same, the whole subject to the Navigable Waters Protection Act."

Great stress has been laid upon these undertakings in the reasons for judgment in the above mentioned case, *The King* v. *Kelly*, 14 Can. Ex. 419, wherein the Judge says, at pp. 427, 428:—"In my opinion, the effect of the work in question, coupled

Can.

Ex. C.

THE KING v. KELLY.

Audette, J.

with the undertaking of the Crown, is to enhance *enormously* the remainder of the lands, . . ." and the judgment gave effect to the same in the adjustment of the amount of the compensation therein allowed, a set-off was allowed in view of the same both under sec. 30 of the Expropriation Act, R.S.C. 1906, ch. 143, and sec. 50 of the Exchequer Court Act, R.S.C. 1906, ch. 140.

Dealing first with the compensation which should be allowed for the (4.964) four acres and nine hundred and sixty-four thousandths of an acre upon which issue the proprietors have adduced evidence placing upon this piece of land a very high valuation, bearing in mind that they were getting the right to build docks and trackage. Witness Lillie puts it in this language:

"Figuring getting the right to build docks and tracks," and witness Paterson "cannot see any reason for refusing right to build dock, on account of maritime interests, my valuation is with clear right to build dock."

Witness Duncan says: "My value is based on my right to have the docks and in anticipating no difficulty in getting tracking right."

Witness Lillie testified that they had had an opening enquiry for the purchase of their land, but that it fell through because they had not succeeded in getting from the Crown the leave to build docks under the provisions of the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, and the several Acts amending the same in 1909, ch. 28; 1910, ch. 44, and 1918, ch. 33. (See also examination on discovery upon this question.)

The proprietors of this land—as appears by ex. C—applied to the Crown, under statute, for leave to build docks on the said property, and the Crown never acquiesced in such petition or demand.

The defendants had no legal right or franchise to build such wharves or docks, and nothing but a legal right can form or be the subject of an element of compensation. See upon this question *Raymond* v. *The King* (1916), 29 D.L.R. 574, 16 Can. Ex. 1; *The King* v. *Bradburn*, 14 Can. Ex. 437; *Gillespie* v. *The King* (1909), 12 Can. Ex. 406—all three cases confirmed on appeal to the Supreme Court of Canada; *Central Pacific Railway Co.* v. *Pearson*, 35 Cal. 247; *Corrie* v. *MacDermott*, [1914] A.C. 1056, 83 L.J. (P.C.) 370; *Benton* v. *Brookline* (1890), 151 Mass. 250; *May* v. *Boston* (1893), 158 Mass. 21; *Lynch* v. *City of Glasgow* (1903), 5 F. (Ct. of Sess.) 1174; *Cunard* v. *The King* (1910), 43 Can. S.C.R. 88; *Wood* v. *Esson* (1883), 9 Can. S.C.R. 239.

Therefore, the valuation by the defendants' witnesses at

Can.
Ex. C.
THE KING v. KELLY.
Audette, J.

figures ranging from $50 to $70 a foot frontage for 807 ft. on the Kaministiquia bears on its face an apparent fallacy and being adduced upon a wrong basis, a wrong principle, leaves the Court without any help therefrom. The numerous sales referred to at trial always covered the right to erect docks and piers.

The Crown, on the other hand, rests upon the price paid for the Hamilton property, a sale much commented upon. But here again it is obvious that this sale was made under such special circumstances that it makes it impossible to use it as a criterion of the market value of property in that neighbourhood at the time. Dr. Hamilton, when disposing of his properties, was very ill, and was seeking to sell at his price with the view of liquidating and settling his estate before his death, which, according to the statement of counsel at Bar, happened shortly afterwards. Furthermore, that sale was made in 1917, before the termination of the war.

In the result, that would leave the Court with very little help or evidence upon the question of value, but for the statements of two of the proprietors when examined on discovery. Indeed, both defendants Lillie and Kelly testified on discovery, which was filed at trial, that this property, without the right to build docks, was worth in 1919 about $2,000 an acre. I will accept their figures for the value of the solum for the land actually taken—which had become improved industrial lands as a result of the government works on the river and the construction of the bridge between the main land and the island—namely (4.964) four acres and nine hundred and sixty-four thousandths of an acre at $2,000 an acre, $9,928.

However, there is more in the present case. To the land so taken was attached a most valuable easement resulting from the above undertakings, in favour of the owners of the land so taken. Indeed, the owners of the land expropriated herein, had the—

"Right to construct, maintain and use—upon the lands adjoining and taken by the two previous expropriations, as lie between the expropriation line and the harbour line . . . such wharves, docks, or piers extending out to and abutting upon the harbour line, as they may desire to construct, subject, however, to compliance with the provisions of the Navigable Waters Protection Act."

In other words, while they were not *eo nomine* proprietors of the lands expropriated in 1906 and 1909, they had—under the undertakings, the right to build piers upon the same, as if they had been owners thereof—subject, however—alike the balance of the land left to them and expropriated by the present

Can.
Ex. C.
The King
v.
Kelly.
Audette, J.

proceedings—to obtaining, as a condition precedent the right to do so under the Navigable Waters Protection Act. These undertakings, thus creating an easement, are a charge on the land formerly expropriated for the benefit of the lands taken by the present expropriation. The rights resulting from such undertakings, including the dredging mentioned in the second paragraph thereof, are most valuable rights, and were considered so in the case in which the undertakings were given and deduction and set-off were made and allowed in fixing the compensation to be paid therein.

As a result of these undertakings, the Crown has on the one hand granted valuable rights to the proprietors upon the lands so taken in the former cases, and on the other hand, by the present expropriation, the Crown has taken them away.

I have come to the conclusion to place upon this easement, resulting from the undertaking, the value of $1,000 an acre for the rights the defendants had and still retained upon the lands taken by the previous expropriations.

That is to say, for the (2.83) two acres and eighty-three hundredths of an acre and (2.79) two acres and seventy-nine hundredths of an acre above referred to, making a total of (5.62) five acres and sixty-two hundredths of an acre—I will allow $1,000 an acre, namely, $5,620.

The total compensation will then be: for the land or solum taken by the present proceedings, $9,928, and for the so-called easement, $5,620, making the total sum of $15,548.

Therefore, there will be judgment as follows, *viz.*:—1. The lands and the easement attached thereto expropriated herein are declared vested in the Crown from the date of the expropriation, namely, December 13, 1919. 2. The compensation for the said lands and easement expropriated herein is hereby fixed at the total sum of $15,548, with interest thereon at the rate of 5% from December 11, 1919, to the date hereof. The whole in full satisfaction for the land and easement so taken and for all damages whatsoever resulting from the said expropriation. 3. The defendants-proprietors of the said lands, upon giving and delivering to the Crown, a good and valid title free from all incumbrances and sufficient release or releases of all claims, liens, charges, mortgages, or incumbrances of any kind or nature whatsoever which existed upon the said lands at the date of the expropriation herein—are entitled to recover from the plaintiff the said sum of $15,548 with interest thereon, as above mentioned. Failing the said proprietors to discharge the said incumbrances, the compensation moneys will be used to satisfy the same, and the balance, if any, will be so paid to the said

Sask.

C.A.

defendants-proprietors. 4. The defendants are further entitled to the costs of the action.

Judgment accordingly.

KUSCH v. PEAT.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

PARTIES (§IB—55)—AGREEMENT FOR THE SALE OF LAND—ASSIGNMENT BY VENDOR OF MONEYS PAYABLE BY PURCHASER UNDER—ACTION ON AGREEMENT FOR BREACH OF COVENANTS—ASSIGNEE AS PARTY PLAINTIFF — FILING OF CONSENT REQUIRED BY RULE 41 — PROOF OF SIGNATURE OF PARTY CONSENTING—AUTHORITY OF MANAGER OF LOCAL BRANCH OF BANK TO SIGN CONSENT.

Where it is sought to have a bank added as a party plaintiff, a local manager has authority to give the consent required by Rule 41 which requires that the consent shall be in writing; proof of the signature of the party consenting is not required, and in the case of a corporation it is not necessary to establish the authority of the officer signing on behalf of the corporation, and where a consent regular on the face of it is put in by counsel on his responsibility as counsel it should be accepted.

APPEAL by plaintiff from the trial judgment dismissing an action on an agreement of sale of land, dismissed but for different reasons than those given by the trial Judge.

J. F. Frame, K.C., for appellant.

H. E. Sampson, K.C., for respondent.

HAULTAIN, C.J.S.:—This action is based on an agreement for the sale of a certain parcel of land by the appellant to the respondent. The statement of claim alleges several breaches of covenant, and asks for a declaration that the respondent has made default, and for cancellation of the agreement, possession of the land, etc.

During the course of the trial the evidence disclosed that the plaintiff, in the course of her dealings with the Canadian Bank of Commerce, had executed a document in favour of the bank in the following terms:—

"The undersigned hereby assigns and transfers to the Canadian Bank of Commerce as security for all existing or future indebtedness and liability of the undersigned to the bank, all the debts, accounts and moneys due or accruing due, or that may at any time hereafter be due, to the undersigned by Sydney Peat, of Saskatoon, under article of agreement dated 25th day of September, 1917, for the purchase of the east ½ of section 17, twnp. 37, rge. 4, west of 3rd m. on which there is owing the principal sum of fifty-five hundred dollars with interest accrued at 6% per annum payable in half crop payments, and also all contracts, securities, bills, notes, and other document now held,

Sask.

C.A.

KUSCH v. PEAT.

Haultain, C.J.S.

or which may hereafter be taken or held by the undersigned, or anyone one behalf of the undersigned, in respect of the said debts, accounts, moneys, or any part thereof."

An application was made by council for the plaintiff to add the bank as a party plaintiff, and in support of the application a written request to that effect, signed "The Canadian Bank of Commerce, W. J. Savage, manager," was put in. The trial Judge refused the application on the grounds that there was no proof that Mr. Savage, the manager, had authority to sign the document, and that his signature was not proved. He accordingly dismissed the action, holding that the plaintiff had no interest in the agreement in question.

In his reasons for decision, the trial Judge refers to the document mentioned as "having been offered in evidence." The document was not really "offered in evidence" at all, but was simply brought in in compliance with the rule governing applications to add parties as plaintiffs in an action. So far as I understand the rule, proof of the signature of the party consenting is not required. Nor do I think that, in the case of a corporation, the authority of the officer signing on behalf of the corporation need be established. The consent, regular on the face of it, was put in by counsel on his responsibility as counsel, and, in my opinion, it should have been filed and the application granted. In any event, there does not seem to have been any necessity for adding the bank as a party plaintiff, as, on the authority of *Covert* v. *Janzen* (1908), 1. S.L.R. 429, the action would seem to have been properly brought in the plaintiff's name.

The plaintiff's action, therefore, was properly brought and was founded on clearly established breaches of covenant by the defendant.

While I do not agree with the trial Judge that these breaches were merely trivial, I concur with his opinion that this was a proper case for relief from forfeiture. That relief would only have been given upon terms including payment by the defendant of the costs of the action. It has, however, been brought to our attention that, since the trial of the action, the Canadian Bank of Commerce has accepted a very substantial payment, $1,284.70, from the defendant on account of the purchase money. This sum represents the appellant's share of the crop grown on the land in question in 1921. Under these circumstances the action should stand dismissed, but the plaintiff should have her costs of action as well as the costs of this appeal.

LAMONT, J.A.:—By an agreement in writing bearing date September 25, 1917, the plaintiff sold to the defendant the east

Sask.
C.A.
KUSCH v. PEAT.
Lamont, J.A.

½ 17-37-4-w/3rd for $12,800, payable $3,500 cash and the balance by delivering to the plaintiff before December 1 in each year one-half of the crop grown upon the said land for that year. The agreement contained the following provisions:—

"Said purchaser further agrees that at the proper seasons of 1918 and each and every year during the continuance of this contract he will seed to wheat or such other grain as said vendor may consent to in writing all the land upon the said described premises that may be broken previously to that year unless some part of the said land be left to summer fallow as below provided; . . .

The purchaser agrees................at his own expense to kill and destroy before the same ripen and go to seed all noxious weeds which may grow on said premises during the term of this agreement. . . .

It is expressly understood and agreed that the performance of each and every of the covenants and agreements herein contained is as much the consideration of this contract and a condition precedent as the payment of the purchase money aforesaid."

The agreement also provided that in case the purchaser made default in the performance of any of the covenants contained therein, the vendor was to be at liberty to cancel the contract, and that any payments made on account thereof should be forfeited. The defendant paid the cash payment, and in 1918 the plaintiff received a further sum of $3,800. In 1919, she received nothing, there being very little crop that year. The defendant failed to keep the weeds under control, and in the Spring of 1920 they were so bad that he decided not to put in any crop that year, but to summer fallow the whole of the land under cultivation, 245 acres. The plaintiff appears to have either expressly or impliedly acquiesced in the defendant's decision, for in her evidence she testified that she was willing to lose the 1920 crop if the defendant summer-fallowed the land. What the defendant did in the way of summer fallowing, he tells us in his evidence. He says that in June and July the ground was too dry to summer fallow; so he did nothing until July 28, when he let a contract to plough and harrow the 245 acres. The contractor commenced ploughing in the first week in August and ploughed until the end of September. He ploughed three furrows at a time with the harrows dragging behind. 210 acres were in this way ploughed and harrowed. The remaining 35 acres were not ploughed at all. The plaintiff did not consider this summer fallowing, and on November 20 brought this action, asking to have the agreement cancelled and declared at an end.

Sask.

C.A.

KUSCH v. PEAT.

Lamont, J.A.

At the trial it appeared that on December 31, 1918, the plaintiff assigned to the Canadian Bank of Commerce all the monies payable under the agreement by the defendant, and also all contracts and other documents held by the plaintiff in respect of the said moneys or any part thereof. An application was made to have the bank added as a party plaintiff. A consent on the part of the bank purporting to be signed by the local manager of the bank at Saskatoon was tendered as a compliance with R. 41, which requires the consent of a person added as plaintiff to be in writing. The trial Judge refused the application, because it was not proved that the local manager had signed the consent, or, if he had, that he had authority to do so. On the merits, the Judge held that the breaches of his covenant by the defendant were trivial in character and should be relieved against, and he dismissed the plaintiff's action with costs.

The first question to be determined is: Was the action properly constituted, or was the bank a necessary party thereto?

If the bank was a necessary party, I have no hesitation in saying that the application should have been granted. That a local manager has authority to give consent on behalf of the bank in respect of transactions within his branch, is, I think, clear. If there was any reasonable doubt whether or not the signature purporting to be the manager's was in reality his, the order should have been that the bank would be added as a party plaintiff upon filing the necessary consent. The non-joinder of parties is not now a ground for defeating an action. *Leeson* v. *Moses* (1915), 24 D.L.R. 158, 8 S.L.R. 222.

In my opinion, however, the action was properly constituted as it stood. In *Covert* v. *Janzen*, 1 S.L.R. 429, it was argued before the Court *en banc* that as it had appeared during the course of the trial that the plaintiff had assigned the entire benefit of the contract sued on to a third party, the action should have been dismissed. Wetmore, C.J., however, in giving the judgment of the Court, pointed out, at p. 434, that, under the ordinance then in force, an assignee may bring an action in the name of the assignor, and the Court affirmed the judgment in favour of the plaintiff, although the assignee was not made a party to the action, nor was it shewn that he had anything to do with its being instituted.

Covert v. *Janzen* was followed in this Court in *Krienke* v. *Schafter* (1919), 45 D.L.R. 758, 12 S.L.R. 148, our present statute respecting the assignment of choses in action being in this respect identical with the Ordinance.

The assignment in this case transferred to the bank the

Sask.
C.A.
KUSCH
v.
PEAT.
Lamont, J.A.

benefit not only of the monies due or accruing due from the defendant under the agreement, but also all contracts or documents held by the plaintiff in respect of the said monies. This carries with it, in my opinion, the benefit of the covenants of the defendant for securing payment of the said monies, including his agreement that in default the plaintiff might cancel the agreement. The bank was, therefore, in a position to enforce the defendant's covenant against him, and the action must be presumed to have been brought for the bank's benefit.

On the merits, I am unable to concur in the view of the trial Judge that the breach by the defendant of his covenant was trivial. His agreement in the first of the above-quoted provisions placed him under an obligation to put in crop or to summer fallow each year the whole of the 245 acres of cultivated land. In 1920, he put in no crop. He was, therefore, under obligation to summer fallow the whole 245 acres. The agreement provided that he would "do all the summer fallowing in proper season and manner according to the best methods of cultivation." Some of the witnesses testified that they had done ploughing on their summer fallows in June and July and that these were the months in which summer fallowing should be done. Although the defendant says the ground was too dry during these months, I do not see how it would be any drier for him than for the others. I, therefore, doubt very much if ploughing the land in question once, with the harrows following, in the latter half of August and September, can be designated as "summer fallowing in proper season and manner." The trial Judge, however, has found that it was.

Even assuming his finding to be correct in this respect, there remain 35 acres which the defendant did not in any way attempt to summer fallow. His failure to either crop or summer fallow that 35 acres cannot, in my opinion, be said to be a trivial breach. It was a clear failure to perform his covenant in respect of a matter which was material. In the contract the defendant agreed that, if he made default in the performance of any of his covenants, the plaintiff was to be at liberty to cancel the contract. According to the defendant's express agreement, therefore, the plaintiff is entitled to have the contract cancelled upon such terms as the Court may think fit (*Prov. Sec. Co.* v. *Gratias* (1919), 46 D.L.R. 104, 12 S.L.R. 155), unless the Court relieves the defendant from the forfeiture resulting as a consequence from his agreement and his default.

The Court has jurisdiction to grant relief upon such terms as it may think fit. (King's Bench Act, ch. 10, 1915, sec. 25, sub-sec. 5).

The terms upon which a Court will relieve were laid down by the Court *en banc* in *Cowie* v. *McDonald* (1917), 34 D.L.R. 159, 10 S.L.R. 218. From that case it appears that, in order to be entitled to relief the defendant must be ready and willing to give the plaintiff all the advantages which would have been hers had he performed his contract. That is, he must place her in the same position as she would have been in had he properly summer fallowed the whole 245 acres.

To put her in this position, she should have not only her share of the crop grown upon the land which was actually summer fallowed in 1920, but she should have the equivalent of one-half the crop grown upon the 35 acres had it been summer fallowed. This she would have been entitled to on December 1, 1921.

As the trial took place before the crop was sown in 1921, it could not be then determined how much land the defendant would crop during that season.

The judgment, in my opinion, therefore, should have been, that the defendant be relieved from the forfeiture provided he delivered to the plaintiff on December 1, 1921, not only one-half of the crop grown upon the land actually sown, but, in addition, the equivalent of one-half of the crop which should have been sown upon the balance of the 245 acres had it all been summer fallowed and cropped, and a reference should have been directed to be held by the local registrar after harvest to determine what this amount would be. Taking the trial Judge's finding that the 210 acres ploughed were properly summer fallowed, if the whole 210 acres were seeded, the reference would cover simply the other 35 acres. If less than 210 acres were put in crop, the reference would cover the difference between that acreage and 245 acres. The defendant should also, as a condition of being relieved, pay the costs of the action. *Dobson* v. *Doumani* (1909), 2 S.L.R. 190.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff declaring that the defendant has made default in the performance of his covenants under the agreement, that the defendant will be relieved from the forfeiture consequent upon his default on the following terms: (1) He will pay into Court within six months from the registrar's report whatever sums it may be found that the plaintiff would have received from a share of the crop on that portion of the 245 acres not put in crop in 1921, the estimate of the portion uncropped to be based on the returns from the portion cropped; (2) he will pay the costs of the action. In default of defendant's complying with these

Alta.

App. Div.

terms, the agreement will be declared void, and the plaintiff entitled to retain the monies paid in respect thereof.

TURGEON, J.A., concurred with LAMONT, J.A.

McKAY, J.A., concurred in the result.

MAYCOCK v. J. J. MURRAY & Co.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. December 17, 1921.

CONTRACTS (§ID—55)—SALE OF GOODS—ESTABLISHMENT OF BY TELEGRAMS—DEFINITENESS—FAILURE TO DELIVER—DAMAGES.

The defendant in Edmonton, Alta., inserted an advertisement in a Toronto paper offering a quantity of potatoes for sale, to which the plaintiff replied, and certain telegrams passed between the parties in regard to the sale and delivery of a quantity to the plaintiff. The defendant delivered only five car loads and the plaintiff claimed that he was liable in damages for non-delivery of a further quantity. The Court held that on the proper construction of the telegrams the parties were never *ad idem* and that there never was any real contract arrived at between the parties.

APPEAL by the plaintiff from a judgment at the trial dismissing his action which was for damages for non-delivery of certain car-loads of potatoes. Affirmed.

Pelton, Archibald & Stanton, for the appellant.

McDonald & Wells, for the respondent.

The judgment of the Court was delivered by

STUART, J.A.:—The defendant, a one-man firm, was a seed merchant in Edmonton. The plaintiff was a dealer, or broker, in Vinemount, Ontario, and carried on business under the name of Vinemount Orchard Company. On March 27, 1917, the defendant inserted an advertisement in the *Toronto Globe* which, so far as material here, reads as follows:—

"Potatoes.

We offer fifteen to twenty-five cars of first-class white, well-graded potatoes, for domestic or seed, at $2.10 per bag, 90 lbs. bulk; also ten cars of well-selected mixed potatoes, white and pink, bulk at $1.85 per bag; five cars of small round white potatoes for seed, well screened, in bulk at $1.75, sound and free from frost.

The above offers are for prompt shipment and subject to be unsold. Prices quoted are in bulk; if sacked will be ten cents higher in ninety pounds; f.o.b. Edmonton points, freight rate on C.P.R., G.T.R., or C.N.R., cash for bill of lading.

The freight rate to Ontario points is sixty cents per 100 pounds. The varieties of white are mostly Carman No. 1, Table Talk and Wee McGregor and Irish Cobblers, and Green Mountains. Straight named varieties ten cents higher. Potatoes will be loaded in refrigerator cars. We give all our potatoes

rigid and close inspection. Purchasers may have J. D. Smith, the provincial seed inspector, or have their banker to arrange inspection. . . .

Wire if interested J. J. Murray & Co., seed merchants, Edmonton, Alta."

The parties never met personally, but as a consequence of this advertisement, the following telegrams passed between them:—

"Vinemount, Ont., Mch. 27, 17.

J. J. Murray Co.,
Edmonton.

Your Globe add, can you book twenty-five cars all first grade, put up two bushel bags for export all white and stand brokerage ten dollar per car on prices quoted, reply quickly, glad to see someone doing the thing right.

Vinemount Orchard Co."

"Strathcona, Alta., 3/28.

Vinemount Orchard Co.

Sorry delay. Returned to-night. Globe adds. selling potatoes fast but think could still book twenty cars. Do you want export abroad or United States if later foreign cars scarce. Ten dollars brokerage O.K. if guarantee freight deposit on purchase and cash for Bill Lading. Arranged. We trade Bank Commerce. Wire.

J. J. Murray & Co., Edmonton."

"Vinemount, Ont., Mch. 30, 17.

J. J. Murray and Co.,
Edmonton, Alta.

My principals offered to take five cars immediate shipment as sample lot put up in new two bushel sacks at ten cents extra per sack or two and half bushels per sack if you choose shipping Canadian Pacific and billing to Bridgeburg, Ont. Immediate reply necessary.

Vinemount Orchard Co."

"Strathcona, Mar. 30.

Vinemount Orchard Co.,
Vinemount, Ont.

Can ship five cars. Two immediately three inside of five days, could make shipment sooner if you can take them on any of the three railroads. This is for immediate wire acceptance. Also for your credit arrangements by wire to your bankers here for payment and inspection.

J. J. Murray & Co., Edmonton."

Alta.
App. Div.
MAYCOCK v. J. J. MURRAY & CO.
Stuart, J.A.

"Vinemount, Ont., Apl. 1, 17.

J. J. Murray and Co.,
Edmonton.

Accept five cars immediate or within five days arranging with Royal Bank Monday morning also take five cars more within week same quality number one white new sacks as per former telegram confirm how soon could shipment of another ten be made making twenty cars. Have inspection certificate attached to bills. Notify W. M. J. Thomas, Buffalo.

Vinemount Orchard Co."

"Monday, Edmonton, Apl. 2, 17.

Vinemount Orchard Co.,

Accept 5 cars, not too sure within 5 days about getting cars for American shipment, will give you five more cars as soon as can get cars. Our stock ready to ship, would not confirm ten more cars on your specified time on account shortage cars. Would you be satisfied with relined box cars.

J. J. Murray."

"Vinemount, Ont., April 3, 1917.

J. J. Murray and Co.,
Edmonton, Alta.

We understand your wire last night confirms second 5 cars. Will you confirm the additional ten making 20 as per offer if we take risk box cars relined this is how interpret your wire. Please confirm. Also offer your two fifty 5 cars screened mixed two bushels new sax.

Vinemount Orchard Co."

"Strathcona, Apl. 5.

Vinemount Orchard Co.,
Vinemount, Ont.

Answering yours third. Have booked you ten cars as per our wire second. Will also book you five cars mixed red and white screened at two fifty per bag. Two bushels each. Have received Royal Bank message from Stoney Creek. Are we to understand that this is for payment in full from Royal Bank here on presentation of bill lading and inspection certificate. You are also to give railway bank guarantee for freight. Answer quick.

J. J. Murray & Co., Edmonton."

On April 2, the Royal Bank at Stoney Creek, Ontario, had sent to defendant the following telegram:—

"Stoney Creek, Ont., Apl. 2, 17.

J. J. Murray and Co.,
Edmonton.

Will guarantee payment for five cars potatoes sold to Vinemount Orchard Co., sight draft bill of lading and Government inspectors' certificates attached.

Royal Bank."

Then the following telegrams were exchanged:—

"Vinemount, Ont., April 6, 1917.

J. J. Murray and Co.,
Edmonton.

Have arranged freight guarantee with Can. Pac. additional ten cars mentioned my wires first and third are all sold please give confirmation otherwise principal refuses five cars mixed. Re bank guarantee manager could not do otherwise without submitting to his supervisor which would take several days this guarantees payment and should be satisfactory bill to order Royal Bank notify Thomas destination Bridgeburg wire car numbers.

Vinemount Orchard Co."

"Edmonton via Toronto 4/8.

Vinemount Orchard Co.

After exchange wires on unnecessary delay all we can do at present is to confirm five cars whites and five cars mixed our prices with following conditions either instruct your bankers here to pay us here in full or cancel all communications and advise destination of five cars mixed.

J. J. Murray & Co."

"Vinemount, Ont., Apl. 10, 17.

J. J. Murray Co.,
Edmonton.

Wiring credit five cars further credit on advise cars ready for shipment taking your confirmation ten cars all white five cars mixed writing.

Vinemount Orchard Co."

"Vinemount, Ont., Apl. 11, 17.

J. J. Murray and Co.,
Edmonton.

Have now arranged credit at Royal for fifteen cars confirmed. Will arrange further quick as you are ready to ship want potatoes. Will you confirm the additional ten offered if price

Alta.
App. Div.
MAYCOCK v. J. J. MURRAY & Co.
Stuart, J.A.

advanced requote want your business will meet your wishes and send man if you give sufficient quantity cars reply.

Vinemount Orchard Co."

"Strathcona, Apl. 13/17.

Vinemount Orchard Co.,
Vinemount, Ont.

Returned to-night from country. Wire received. Refer you our wire eighth. Your delay exchanging wires leaves us only able confirm five cars white which will go forward fast as cars available. Will make further offer when we can make purchases. Roads very bad condition here now. Hard get delivery.

J. J. Murray & Co., Edmonton."

"Edmonton, Apl. 15/17, via Quebec Bd.

Vinemount Orchard Co.

The very bad condition of roads is delaying shipment. Impossible to get them away in time mentioned. Will you extend time, roads drying.

J. J. Murray & Co."

"Vinemount, Apl. 16, 17.

J. J. Murray & Co.,
Edmonton.

Wire received. We must have some, our credit for first five has been in Edmonton nearly ten days and our later credit a week, don't fail to ship the fifteen confirmed, surely our purchase and your confirmation said you had the goods ready mailed letter today, will extend reasonable time.

Vinemount Orchard Co."

"Edmonton, Alta., 50 N.L., via Toronto 17.

Vinemount Orchard Co.

After exchanging several unnecessary wires would state as absolutely final that agreement stands between us as follows. We agreed to furnish you five cars and no more. Will endeavour to get off two cars this week if this is not satisfactory wire us at once and we will cancel entire deal.

J. J. Murray."

"Vinemount, Ont., Apl. 23, 17.

J. J. Murray and Co.,
Edmonton.

Refer to your telegram second and fifth and my letter four-

teenth must have potatoes saw my principals and they insist on filling orders confirm sent man.

Vinemount Orchard Co."

"Vinemount, Ont., May 2nd, 17.

J. J. Murray and Co.,
Edmonton.

Answering your wire Thomas Buffalo will take five cars as offered at dollar eighty-five providing you will fill ten cars ordered all white and we will cancel five cars mixed this is offered without prejudice otherwise are buying in open market to fill orders confirmed and must hold you.

Vinemount Orchard Co."

"Edmonton, Alta, 3rd, via Toronto.

Vinemount Orchard Co.,
Vinemount.

Answering your wire second we have shown Walker we had cars ready to ship long before your credit was fixed right, stock being perishable had to dispose of quick and also to save further demurrage. All we intend to give you is the five cars, this without prejudice and final.

J. J. Murray & Co."

There were one or two letters also, but they seem to be immaterial.

It appears from the evidence of McMillan, the manager of the Royal Bank at Edmonton, that on April 10 he had received the following telegram from the manager of the bank at Stoney Creek, Ont.:—

"Notify and pay J. J. Murray Co. for account of Vinemount Orchard on delivery of bills of lading and certificate of inspection No. 1 all white screencd potatoes payment for five cars of potatoes at $2.90 per sack of 120 pounds."

And on April 11, McMillan received from the supervisor of the Royal Bank at Toronto the following telegram:—

"You are authorised to pay drafts for potatoes by J. J. Murray Co. on H. F. Maycock payable at Stoney Creek to the extent of $12,000 not exceeding $1,200 per car when accompanied by bills of lading and certificates of inspection."

It was stated in evidence by Murray, and was in no way contradicted, that he was never informed as to any credit other than that of April 10, for the price of five cars of white potatoes. McMillan said that there was nothing to indicate that the Toronto telegram of April 11 referred to the Vinemount Orchard Co., because Maycock's identity with that company

Alta.

App. Div.

MAYCOCK
v.
J. J.
MURRAY
& Co.

Stuart, J.A.

was not revealed. Murray said that he did later on enquire as to a credit for five cars of mixed red and white potatoes and was told that there was none. There is nothing to show that he was ever informed of the credit of April 11.

It appears that Murray had some cars of white potatoes ready loaded at certain points when the correspondence began, but he stated that he was forced to sell them elsewhere, to save demurrage, before the credit of April 10 was promised.

However, the defendant did, in fact, send forward five cars of white potatoes, although shipment did not begin till about April 23.

It was contended by the defendant that upon the above correspondence he never bound himself to sell more than those first five cars. The plaintiff contended that the defendant had bound himself to sell and deliver ten cars of white potatoes and five cars of mixed red and white potatoes.

The trial Judge, in his judgment, expressed grave doubt as to whether there had ever been a concluded agreement as to the additional ten cars, but he dismissed the plaintiff's action, not on that ground, but because, upon the only evidence adduced by the plaintiff the market price at the time of the breach, even if there was a breach, was not higher than the contract price and, therefore, there was no damage suffered.

It is open, therefore, to the defendant to hold his judgment, if he can, upon the ground that there was no concluded agreement.

In my opinion, the parties were never *ad idem* with respect to anything more than the first five cars. The original advertisement in the Globe, in stating the terms expected, used the expression "cash for bill of lading," and referred to the expectation of Murray that official government inspection or inspection by the purchaser's own agent chosen through a bank, should take place at Edmonton. The telegram of March 28 repeated the expression "cash for bill of lading arranged" in stating the conditions upon which Murray would sell. Then the telegram of March 30, which began with the words "can ship five cars," ended with the sentence "also for you credit arrangements by wire to your bankers here for payment and inspection." Then, I think, the obvious interpretation of the telegrams of April 1 and 2, is that the first words of that of April 2, *i.e.* "accept five cars," still refers to the first five cars about which there is no dispute, as they were shipped and delivered. Then we come to the telegram of the defendant of April 5, answering the plaintiff's of the 3rd. In that telegram the defendant admits receipt of the telegram from the Royal Bank at Stoney Creek,

Alta.
App. Div.
Maycock v. J. J. Murray & Co.
Stuart, J.A.

merely guaranteeing payment, but he at once, in the same telegram, asks what is meant. In effect he says "we have booked you ten cars, but we want to have it clearly understood that we want cash for the bill of lading here in Edmonton." Up to this point there might have been good reason to contend that the expression "cash for bill of lading" previously used should be interpreted as meaning that the cash should be paid at Stoney Creek on production of the bill of lading there, *i.e.* that a draft was to be paid before the bill of lading attached to it should there be surrendered; although the distinct references to inspection at Edmonton might cast serious doubt upon the propriety of this interperation in the circumstances. But, however that might have been, it is clear that in the message of the 5th, the defendant raised the point squarely and wanted a clear understanding upon it before he would consent to be bound. Instead of accepting the defendant's proffered condition, the plaintiff in his wire of the 6th merely gives a reason for having been able to arrange only a guarantee of cash at Stoney Creek and assumes that an additional ten cars over and above the first five were to be sent. Then on the 8th, the defendant again specifically stated that he would only sell five cars of white potatoes and five cars of mixed potatoes on condition that payment in Edmonton was arranged for. Then in the wire of April 10, the plaintiff, while accepting the condition as to payment in Edmonton, expressed the understanding that the contract was to be for "ten cars all white five cars mixed." And in the next telegram of the 11th, he again insists on fifteen cars. The difficulty is that Murray had never, up to that point, unequivocally and unconditionally offered fifteen cars. Aside from other reservations, Murray had insisted on an agreement to pay in Edmonton. And before he got that agreement out of Maycock he had definitely drawn back to ten cars, five of white and five mixed, as stated in the telegram of the 8th. Then, although Maycock finally agreed to make payment in Edmonton his assent to that condition was coupled with an insistence that the contract was to be for fifteen cars. Obviously, therefore, there never was any meeting of the minds of the parties upon any definite contract with terms understood and arranged between them. The question whether the necessary credit ever existed at Edmonton or not is, to my mind, immaterial. What is material is, whether Maycock ever assented in time that the credit should be there whenever the bills of lading and certificates of inspection were produced. As I say, he eventually did so assent but, at the same moment, insisted on fifteen cars while Murray had already quite explicitly refused to go further than promise ten cars.

Sask.

C.A.

I think, therefore, that there never was any real contract arrived at between the parties. I have some doubt whether Murray was ever obliged to deliver even the first five cars which were in fact delivered and paid for. But, however that may be, he was not, in my opinion, bound to deliver any more.

This result renders it unnecessary to deal with the question of damages. Upon the evidence as it stood, the judgment was admittedly correct but an application was made to the trial Judge at the close of the hearing to permit further evidence of damage to be given. This application was refused, and it was renewed before us. But there is no reason, in my view, of the case for considering the matter at all.

The appeal should be dismissed with costs.

Appeal dismissed.

LEVINE v. DOMINION EXPRESS Co.

Saskatchewan Court of Appeal. Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

NEGLIGENCE (§IC—50)—EXPRESS OFFICE—INVITEE—NEGLIGENCE OF EMPLOYEE—INJURY—LIABILITY—DAMAGES.

A person attending at the office of an express company for the purpose of sending away a parcel, is an invitee, and as long as he uses reasonable care for his safety is entitled to expect that the company shall use reasonable care to prevent damage from unusual danger of which it should know.

It is negligence on the part of an employee of an express company to throw a parcel to another when an invitee is present and without ascertaining that the person for whom it is intended is ready to catch it, and when as the result of such act the parcel strikes a mop stick which causes damage to such invitee, the company is liable for the resultant damage.

APPEAL by plaintiff from the judgment at the trial of an action for damages for injuries received and expenses incurred owing to the negligence of the defendant's employees. Reversed.

P. G. Hodges, for appellant; *P. H. Gordon*, for respondent.

The judgment of the Court was delivered by

MCKAY, J.A.:—The plaintiff brings this action to recover damages for injuries received and expenses incurred owing to the negligence of defendant's employees. The trial Judge dismissed the action with costs, and plaintiff appeals.

The evidence shews that the defendant is an express company, and has an office and warehouse in the city of Regina. The office is open from 8.30 a.m. to 5.30 p.m. on business days. The office is the usual place for transacting business with the defendant company. The customers bring their parcels to the office, and the defendant receives them there from the customers. The parcels are then put in the warehouse, and the servants

Sask.
C.A.
LEVINE v. DOMINION EXPRESS CO.
McKay, J.A.

of the defendant sort them there and ship them from there by the proper railway train to their destination. The warehouse is open after the office is closed in order to ship out-going parcels and receive incoming parcels. The plaintiff, shortly after 6 p.m. on February 14, 1921, went to the warehouse with a parcel, to send it by way of express. He had done so 5 or 6 times before. He handed his parcel to the weighing clerk, Waters, and while the latter was busy writing out a receipt for the parcel, Goodhue, another clerk of the defendant, who was sorting the parcels for the outgoing train, threw a parcel to Waters; the latter did not catch it, not being ready for it, and it fell behind him on the handle of a mop-stick lying on another parcel, which mop-stick flew up and hit plaintiff (who was standing behind Waters) on the mouth, and bruised his lip and broke his front tooth. It was customary for the sorting clerks to throw parcels to the weighing clerk, otherwise they would not be able to get through their work in time to ship the express matter by the several outgoing trains. The parcel in question weighed from 5 to 8 lbs., and was of some soft material, such as dry-goods, from Simpson's Ltd.

There are two questions to consider in this case:—

1. Was the plaintiff in the warehouse as a licensee or invitee?
2. Was there negligence on the part of the defendant's servant in throwing the parcel as he did on this occasion?

As to the first question, in my opinion the plaintiff was there as an invitee.

In Smith's Leading Cases, 12th ed., at p. 865, in the notes to *Indermaur* v. *Dames*, the author says:—

"The invitees whose rights are in question include customers of a tradesman and persons who resort to his premises............... with a view to business engagements, or relations;............These invitees also include persons................on the business premises of the occupier with his assent engaged in a transaction of common interest to both parties; *Holmes* v. *N.E.R. Co.*, L.R. 4 Ex. 254, 6 Id. 123."

The plaintiff came into defendant's warehouse to transact business with the defendant, and he was there on business with its assent engaged in a transaction of common interest to plaintiff and defendant.

As to the second question: The duty that an occupier of premises owes to an invitee is thus stated by Willes, J., in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, at p. 288, 35 L.J. (C.P.) 184:—

"And, with respect to such a visitor at least we consider it settled law, that he, using reasonable care on his part for his

Sask.
C.A.
LEVINE
v.
DOMINION
EXPRESS CO.
McKay, J.A.

own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

The warehouse was a place where defendant received many different kinds of parcels, some soft, some hard, some being sticks (such as brooms or mop-handles, etc.), and these were placed about the locality where the invitee would be standing when transacting his business with the employee of the defendant. The defendant's employees must be taken to have known, or ought to have known, of such articles being there, as they are continually handling such articles in the warehouse. They must also have known, or ought to have known, that if one of these sticks, such as a mop-handle, is lying across another parcel, and a parcel of from 5 to 8 lbs. weight—whether hard or soft—hits one end of it, it is liable to fly up and strike a person near by. Under these circumstances, one of the employees throwing a soft parcel to another employee at a distance of 5 or 6 feet, with an invitee standing near by the other—before ascertaining that the other is ready to catch it—when as a fact that other employee is busy and not ready to catch the parcel, is, in my opinion, an act of negligence.

I am also of the opinion that the injuries sustained by the plaintiff were the direct result of the negligent act, and the defendant is liable therefor.

The plaintiff claims:—

Loss of earnings for 1 week following injury	$47 00
Loss of 8 hours, being time necessarily spent absent from place of employment in attendance on dentist other than during the week above mentioned at 98 cents per hour	7 84
Charges to dentist and medical attendant	60 00
General damages	200 00
	$314 84

The injury was received and the work of the dentist was done, according to plaintiff's evidence, during his holidays. I cannot, therefore, see how I can allow him for loss of earnings when he was not working at the time. The items, therefore, of $47 and $7.84 are not allowed.

The plaintiff says that the amount of Dr. Robb's bill was $60. Dr. Robb, who was his own witness, says it is $40. I do not think the plaintiff should be allowed more than the amount sworn to by Dr. Robb. This amount, $40, is allowed. The evidence of Dr. Robb is, that the tooth that was broken is the best front tooth of the mouth, and, notwithstanding that it has

B.C.

C.A.

been repaired, it is not likely that it would be as good as the natural tooth. There is also the pain and inconvenience the plaintiff would suffer to be considered. I therefore think that $150 for general damages is a proper amount, and which amount, in my opinion, should be allowed.

The result is that the appeal is allowed with costs, the judgment below set aside, and the plaintiff will be entitled to judgment against the defendant for $190, with costs.

Appeal allowed.

KITCHEN v. THE KING.

British Columbia Court of Appeal, Martin, Galliher and Eberts, JJ.A. January 10, 1922.

Mines and minerals (§IB—10)—Mineral Act, R.S.B.C. 1911, ch. 157, secs. 48, 50 and 51—Certificate as to assessment work—Extension of time—Payment of money instead of work—Extension of time in case of—Lapse of claim—Protection under sec. 27.

The thirty days' extension granted by sec. 50 of the Mineral Act, R.S.B.C. 1911, ch. 157, where the necessary assessment work required by the Act has been done during the year, for recording and obtaining the necessary certificate from the mining recorder, does not apply where money is paid in lieu of work under the provisions of sec. 51 of the Act. The fact that the gold commissioner has advised such holder that he is entitled to the extension, does not bring him within the protection of sec. 27 of the Act, or prevent the claim from lapsing under the Act.

Appeal by the Crown from a judgment of Hunter, C.J.B.C., in an action under the Mineral Act. Reversed.

W. D. Carter, K.C., for appellant; *Victor Harrison*, for respondent.

Martin, J.A., would allow the appeal.

Galliher, J.A.:—I would allow the appeal.

The petitioners, who were free miners, located two mineral claims in April, 1907, known as "The Copper King" and "Cameron," near Cameron Lake, in the Province of British Columbia, and in the years 1908, 1909 and 1910 respectively, in lieu of work on said mineral claims, paid within the year, as they were entitled to do under the Mineral Act, the sum of $200 in each year, together with the sum of $5 for recording certificate of work and recorded such certificate of work in the office of the gold commissioner.

In the year 1911, the petitioner, Thomas Kitchen, according to his evidence, interviewed the gold commissioner in his office some 6 weeks before the money was due in lieu of work and asked if he could have an extension of time for 30 days in which to pay the money by paying $20 extra. The gold commissioner

B.C.
C.A.
KITCHEN v. THE KING.
Galliher, J.A.

informed him that he could, and within the 30 days, but not within the year, accepted the sum of $200 together with the sum of $5 for recording certificates of work, the sum of $20 extra for extension being paid before the year expired. These certificates of work were recorded.

In 1912, the petitioner, Kitchen, again applied to the gold commissioner for an extension of time for paying the money and was at first informed that it would be all right, but in the meantime and before the year had expired, the gold commissioner informed Kitchen that he could not accept the money, that the inspector had been up and informed him that he was wrong in granting an extension of time where money was paid in lieu of work, that he should not have accepted it in 1911, and that the claims had lapsed.

Subsequently these claims were re-located by other parties, but it does not appear whether these locations were before or after Kitchen was informed his claims had lapsed.

The first question we are asked to decide is whether the 30 days' extension applies where money is paid in lieu of work. The sections dealing with the doing and recording of work and the payment in lieu of work are 48, 50 and 51 of the Mineral Act, ch. 157, R.S.B.C. 1911. From a perusal of these sections there is no doubt in my mind that the extension of 30 days in no way applied to the payment of money in lieu of work.

The next question is: Is the petitioner within the protection of sec. 27 of the Act? Sec. 27 reads:—

"27. No free miner shall suffer from any acts of omission or commission or delays on the part of any Government official, if such can be proven."

Hunter, C.J.B.C., below, has held that the petitioner is within the protection of that section. With every respect, I take a different view.

What the gold commissioner did, no doubt under a misapprehension of the effect of the Act, was to inform the petitioner wrongly of such effect. I do not think that it is any part of the duties of a commissioner to give advice as to the meaning of the Act, and if the party chooses to rely on that advice, and it is wrong, he must suffer the consequences.

It is not, I think, the class of acts of omission or commission referred to in 27. Supposing the commissioner had said: "you have 60 days within which to pay your money after the year expires"—evidently that would be wrong, as the statute contains no such provision—neither does it contain any provision that any extension can be granted where money is paid in lieu of

work. Both would be acts done by the commissioner, and if it were to be held these were within the protection of 27, any commissioner desiring to assist a friend might protect that friend by doing acts he had no power or authority to do. But if this view is wrong, I still think the petitioners cannot recover.

The action is for a return of the monies paid during the years 1908, 1909, 1910, and 1911. The Government has paid into Court the amount paid in in 1911, $225, and the further sum of $25, which they say is sufficient to cover petitioners' costs up to the date of payment in. This is the amount which they say the commissioner should not have accepted and for which the petitioner received no benefit or protection.

That narrows it down to the three payments made in 1908, 1909 and 1910, all within the statutory year and amounting to $615.

Under the Act the interest of a free miner in his mineral claim is declared to be equivalent to a lease from year to year. Now the rental, if I may so put it, is either the doing of $100 work on the claim, or the payment of $100 in lieu of work, and when either is done and the certificates of work recorded the lease, so to speak, is extended another year, and so on. The free miner either by his work or payment of money has secured to himself, the right of possession, right to mine and extract minerals and to hold title for another year. Now, during the 3 years he paid these monies he received this protection, he received what he paid for and he cannot complain, and it seems to me the only complaint he can make is that he lost his claim by reason of the acceptance of the money by the commissioner in 1911, or in other words, by the act of commission on the part of the Government official.

What would then be the damages he would be entitled to? Not, I think, the return of the monies he paid and for which he received value during those years—but the loss he suffered by reason of the commissioner's act in 1911, which occasioned the loss of the claims. That might be nothing if the claims were of no value, or it might be considerably greater than the monies now claimed, but that would depend upon the proof of which we have not a title.

If the petitioners have any claim against the Crown, which, as I view the statute, they have not, it cannot be recovered under the petition as framed, and in the absence of proof of actual loss.

EBERTS, J.A., would allow the appeal.

Appeal allowed.

Sask.

C.A.

Re LAND TITLES ACT; Re MASSEY-HARRIS Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

LAND TITLES (§IV—40)—CAVEATS—WHO MAY FILE—ASSIGNEE OF LAND PURCHASE CONTRACT—SPECIAL CLAUSE AS TO VENDOR'S APPROVAL OF ASSIGNMENT—ASSIGNMENT WITHOUT APPROVAL—EFFECT.

An agreement for the sale of land contained the following clause "No assignment of this agreement shall be valid unless it shall be for the entire interest of the purchasers and be approved and countersigned by the vendor or his agent, and no agreement or conditions or relations between the purchasers and their assignees or any other person acquiring title or interest or through the purchasers shall preclude the vendor from the right to convey the premises to the purchasers on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder unless the assignment hereof be approved and countersigned as aforesaid. The terms vendor and purchasers in this agreement shall include the executors, administrators and assigns of each of them." The Court held, following *Atlantic Realty Co. v. Jackson* (1913), 14 D.L.R. 552, that a company which obtained an assignment of the purchaser's interest, but did not obtain the approval of the vendor or his agent to the assignment did not obtain an interest in the land upon which a caveat could be founded.

[*Atlantic Realty Co. v. Jackson* (1913), 14 D.L.R. 552, followed. See Annotation on Caveats, 7 D.L.R. 675.]

APPEAL by the company from the refusal of a local Master to register a caveat. Affirmed.

E. S. Williams, for appellant.

H. E. Ross, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—By an agreement in writing made November 15, 1917, Frank M. Jurema, the registered owner, sold the fractional south-east quarter 16-24-11-w2nd to Peter Makoryk and Metro Makoryk, and all his interest in the said land. The agreement contained the following provisions:—

"9. No assignment of this agreement shall be valid unless it shall be for the entire interest of the purchasers and be approved and countersigned by the vendor or his agent, and no agreement or conditions or relations between the purchasers and their assignees or any other person acquiring title or interest or through the purchasers shall preclude the vendor from the right to convey the premises to the purchasers on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder unless the assignment hereof be approved and countersigned as aforesaid.

10. The terms vendor and purchasers in this agreement shall include the executors, administrators and assigns of each of them."

Sask.
C.A.
RE LAND TITLES ACT; RE MASSEY-HARRIS CO.
Lamont, J.A.

On February 10, 1920, Peter Makoryk assigned and quitted claim to Metro Makoryk all his interest in the said lands. Metro Makoryk did not make the payments due under the agreement and the same became in arrear. To enable Jurema to obtain these arrears and a further amount of the purchase money, it was arranged between him and Metro Makoryk that Makoryk would apply for a loan on the land, that Jurema should give him a transfer thereof to enable the mortgage to be registered, that Jurema should receive the monies advanced by the mortgagees and should take a second mortgage for the balance of the purchase price. Makoryk applied for the loan, which was granted, and the mortgage was prepared and executed. But before it could be registered the Massey-Harris Co. had obtained from Metro Makoryk an assignment of all his interest in the said land, as security for an indebtedness of $324, due from him to the company, and had registered a caveat against the property to protect said security. Jurema then caused the registrar of Land Titles to notify the company that their caveat would lapse unless within 30 days it obtained an order of the Court continuing the same. The company applied to the Local Master at Melville for an order continuing the caveat, but the application was refused on the ground that the company had no interest in the land upon which a caveat could be founded. The company now appeals to this Court.

In my opinion, the decision of the Local Master was right. The agreement by clause 10 was made binding not only on the purchaser, but on his "assigns." The company became the assignee of Makoryk and was, therefore, bound by the terms of the agreement. One of those terms was, that no assignment should be valid unless such assignment was approved of by the vendor or his agent, and that no agreement between the purchaser and his assignee should preclude the vendor from conveying the land to the purchaser unless the assignment was approved of as above mentioned. The company did not obtain the approval of Jurema or his agent to the assignment, it is, therefore, as against Jurema, invalid, and as the caveat purports to preclude the vendor from making any conveyance of the land, except subject to the company's right, it is contrary to the terms of the agreement and cannot be upheld.

The point raised in this appeal came squarely before the British Columbia Court of Appeal in *Atlantic Realty Co.* v. *Jackson* (1913), 14 D.L.R. 552, 18 B.C.R. 657, where it was held that the assignee of a purchaser of land under a contract containing a clause similar to the one set out in clause 9 of the

Alta.
App. Div.

agreement in question in this application, had no status to file a caveat.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

Re PIPKE.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 2, 1922.

INFANTS (§IC—11)—ILLEGITIMATE CHILD—MOTHER PAYING FOR ITS SUPPORT—APPLICATION BY MOTHER FOR CUSTODY—PERSON HAVING CHARGE OF CHILD WILLING TO KEEP IT — MOTHER HAVING NO PERMANENT HOME—BEST INTERESTS OF CHILD.

The mere fact that a child is illegimate is no bar to its mother obtaining its custody provided the mother can properly care for it and it is in the best interests of the child that she should have its custody, but where the child is being cared for properly by persons who are able to provide for it, and care for it in a permanent home, while the mother is working as a domestic servant, and has no settled plans for the future in the direction of acquiring a permanent home, the Court will not order the possession to be given to the mother.

APPEAL from the order of Harvey, C.J., dismissing an application by mother of an illegitimate infant, for an order directing that she should be given its custody. Affirmed.

S. R. Wallace, for appellant.

A. L. Marks, for respondent.

SCOTT, C.J. (dissenting):—The infant is the illegitimate child of the applicant, and was born in September, 1918. During the following month she placed it in the custody of Mrs. Phoebe Archambault under an agreement by which she was to pay the latter $15 per month for its maintenance. It remained in her custody under that agreement until March, 1921, at which time a new agreement was entered into between them under which the applicant was to pay $5 per month for the infant's future maintenance. It remained in the custody of Mrs. Archambault under that agreement up to the time of the hearing of the application. She alone is contesting the applicant's right to its custody.

Mrs. Archambault, who I will hereafter refer to as the respondent, states that in March, 1921, the applicant demanded that the infant should be delivered to her, stating that she wanted her father to take care of it, as he would do it for nothing; that she replied that she would do it for nothing if the applicant would leave it with her until it was old enough to release and fight for itself; that the applicant refused to consent to this as she would thus lose all right to it, and that she would pay anything at all to hold her right, and that she

finally agreed to pay $5 per month, which the respondent accepted.

The applicant appears to have paid the full amount due by her to the respondent under the agreements referred to. She has been earning from $30 to $35 per month and her board as a domestic servant, and, although she is not in a position to take personal charge of the infant, she is well able to pay for its proper maintenance and support.

It is shewn that about the time of the birth of the infant she was guilty of adultery upon one occasion. It does not clearly appear whether this was before or after its birth, and for anything that appears to the contrary, it may have been with the father of the infant. There is no evidence of any misconduct on her part since that time, and it is shewn that at least from Christmas, 1920, she has led an exemplary life, and that her conduct has been beyond reproach.

The applicant supplied the infant with wearing apparel from time to time, but the respondent states that it was insufficient, and that she occasionally had to supply clothing for it.

The respondent states that the applicant displayed a want of affection for the infant, and that she occasionally slapped it and treated it harshly, but this is denied by the latter.

It is apparent that the respondent has developed a deep affection for the infant, and is loth to part with it. She states that she is fond of her children, *especially the infant;* that she is desirous of adopting it as her own and that on two occasions she applied to Mrs. Murphy, the Police Magistrate, to coax the applicant to give it to her.

In view of the fact that the respondent obtained the custody of the infant and held it under the agreements referred to, the effect of which was that she was bound to restore it to the applicant upon demand, I cannot understand upon what ground she is entitled, as against the applicant, to resist such a demand.

It appears to me that she is in no better position than she would be if, not having its custody, she had applied to the Court to compel the applicant to place it in her custody.

Section 4 of ch. 13 of 1913 (Alta.) 2nd sess., provides that where, upon an application by the parent for the protection or custody of an infant, the Supreme Court is of opinion that the parent has abandoned or deserted it or that he has otherwise so conducted himself that the Court should refuse his right to its custody, it may, in its discretion, refuse to make the order. Section 6 provides that, where a parent has abandoned or deserted the infant, or allowed it to be brought up by another at that person's expense, for such a length of time and under such

Alta.

App. Div.

RE PIPKE.

Scott, C.J.

circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order.

The reasonable deduction from these provisions is that the Court should not deprive the parent of the custody of the infant unless it is shewn that the parent has abandoned or deserted it or that his conduct has been such as to disentitle him to its custody or that he has allowed it to be brought up by another person at that person's expense.

The applicant is a Protestant, and the respondent is a Roman Catholic. The latter states that if she kept the infant she intended to bring it up as a Roman Catholic.

The defendant, like many other Roman Catholics and Protestants, is unable to explain the difference between the two religions or to give reasons for the faith that is in her, but nevertheless she may be a devout Protestant, and as such would naturally desire that her child should be brought up in that faith.

In *Andrews* v. *Salt* (1873), L.R. 8 Ch. 622, 21 W.R. 431, Sir R. Malins, V.C., in his judgment in the Court below, says at p. 627 (n):—

"Now with regard to the doctrine of the Court that a child, a ward of Court, must be brought up in the religion of its father in the absence of any special circumstances to the contrary, noboby will attempt to deny that."

In the case in appeal, Mellish, L.J., who delivered the judgment of the Court, says at pp. 636, 637:—

"We entirely agree with the decision of the Lord Chancellor of Ireland (*In re Meades,* Ir. L. Rep. 5 Eq. 98), in which he held that the Court could not, during the lifetime of a father, compel him out of his own funds to educate a child in a different religion from his own."

I see no reason why the mother of an illegitimate child should not have the same right with respect to it as a father would have with respect to his legitimate children.

The Chief Justice has not found that the applicant has forfeited her right to the custody of the infant by reason of any misconduct on her part, nor has he found that she is not in a position to properly provide for its maintenance and support. He appears to base his judgment upon his finding that she is not in a position to personally take proper care of it, and that it would be better cared for by the respondent than by her.

As the applicant is shewn to have been leading a reputable life, and that she is in a position to provide for maintenance and support of the infant, I am of opinion that she is entitled

to its custody. Should it be hereafter shewn that she is neglecting her duty in that respect, it would then be the duty of the persons upon whom authority is conferred for that purpose by the Children's Protection Act, 1909 (Alta.), ch. 12, to take the proper steps to remove it from her custody.

In view of the fact that the respondent is devoted to the infant, and is desirous of adopting it, I think that, if she is not entitled to its custody permanently, it would be better for her that it should now be removed from her custody, as the longer she retains it the harder it will be for her to part with it.

I would allow the appeal with costs, and direct that the infant be returned to the applicant.

STUART, J.A. (dissenting):—I agree with the Chief Justice. The Judge below did not find that the mother is an unfit person to have charge of her child. Apparently he merely held that, having no home of her own, she was not in a position to look after it as well as Mrs. Archambault. But it was she herself who left it with Mrs. Archambault and paid for its sustenance and care. She made a moral slip, of which the child is the result, but the evidence shews that practically ever since the birth, her conduct has been exemplary. To say that such a mother shall not have control of her own child is, in my opinion, not only an injustice, if not a moral wrong, but an invasion of the natural primal rights of humanity. If the mother could choose so good a person as Mrs. Archambault to look after her child, she can probably choose another one just as good. She works hard and faithfully and it is, in my opinion, for her to say where and how the child should be placed and educated. We have no right to assume that she will not make as good a choice as she did before, and there is nothing to shew that Mrs. Archambault is the only person who can fully and carefully take charge of the child. Other things being equal, and they obviously may well be so, I think this mother has the right to make the choice. It is not so much a question of actual possession in my view as of the right to control the possession, and of this latter, I see nothing yet disclosed which justifies the Court in depriving her.

I would like also to make another observation which is, I think, not irrelevant. This child, if with the mother or under her control, would be a source of moral strength to the mother, and I think the mother has a right to that influence. If the state wrests an illegitimate child from its mother when she wants it and is behaving herself properly, it might lead, under temptation, to a resolve on her part to disregard morality again and turn to the wrong path.

Alta.

App. Div.

RE PIPKE.

Beck, J.A.

BECK, J.A.:—This is an appeal from the order of Harvey, C.J., refusing an application made by the mother of her illegitimate child to have the custody of the child given to her, which means that it be taken out of the custody of a Mrs. Archambault.

The child was born on September 27, 1918. The applicant at the time was living with a Mrs. Smith who arranged, with the willing consent of the applicant, that the child should be placed in the care of Mrs. Archambault, a married woman, then living in Edmonton with her husband, who is a man apparently well-to-do. It was arranged that the applicant should pay Mrs. Archamboult $15 a month and supply clothing. The payment seems to have been kept up somewhat irregularly, being often much in arrear, till March 21, 1921, when Mrs. Archambault agreed to accept $5 a month, which seems to have been paid up to August. Mrs. Archambault is now willing to keep, maintain and educate the child for nothing. Some clothing was furnished by the applicant, but apparently more by Mrs. Archambault. About a month after the arrangement with Mrs. Archambault, she and her husband moved to Gun Siding, a hamlet about 45 miles from Edmonton. The applicant has visited the child several times at Mrs. Archambault's and on one occasion the child was brought into Edmonton for the purpose.

The application was based upon the affidavits of the applicant, Mrs. Dunlop and Mrs. Chatham. The last two were for the purpose of giving good character to the applicant. Mrs. Archambault filed in answer an affidavit of herself and one by Mrs. Smith. The applicant, Mrs. Smith and Mrs. Archambault were orally examined at length before the Chief Justice.

He came to the conclusion that it was in the best interests of the child that it should remain with Mrs. Archambault. I think in view of the fact that he saw the two women, and heard them give their evidence, he was in a much better position to form an opinion than we are; and I think his finding should not be disturbed. There was undisputed evidence that while the applicant was pregnant with her child she had illicit connection with a man other than its father, and that against the advice of Mrs. Smith, with whom she was living at the time, she received him as a visitor frequently. There is some evidence that the applicant had little affection for the child, and on some occasions acted with an apparent lack of kindness towards it, and it is said she expressed herself as looking forward to the time when he would at the age of six or seven be able to make money by selling newspapers. There seems no doubt that Mrs. Archambault will take excellent care of the child.

It was stated by counsel for the applicant, in the argument

that the father of the child had asked the applicant to marry him, but that she was withholding her consent until she obtained the custody of the child, fearing that the father would not permit her to have the child afterwards. This suggests to me that if she gets the child and marries the father, the child may be a source of trouble between them, resulting in the child not being properly cared for.

Orders for the custody of children are always subject to further applications and are to be treated as if expressed to be made—"until further order." *In re W. W.* v. *M.*, [1907] 2 Ch. 557, 77 L.J. (Ch.) 147; *Witt* v. *Witt*, [1891] P. 163, 60 L.J. (P.) 63, 39 W.R. 432; *In re Holt* (1880), 16 Ch.D. 115; Infants Act, ch. 13 of 1913 (2nd sess.), sec. 2.

I think the order of Harvey, C.J., should stand as it is for the present. It will be quite open to the applicant to move again at any time when she thinks she can satisfy a Judge that she is so situated that she can properly care for the child, and that consequently it will be in the best interests of the child that its custody should be given to her.

The question of religion is raised. The applicant is a Protestant; Mrs. Archambault a Catholic. I infer from the evidence of Mrs. Archambault that the child has not been baptized and will not be unless and until it is finally settled that the child is to be brought up and educated as a Catholic. In these circumstances the applicant need not be disturbed as to the religious training of the child, if within any reasonable time she is in a position to satisfy the Court that she ought to have the custody of the child.

The mere fact that the child is illegitimate is no bar—and should be no bar—to its mother obtaining its custody, provided the mother can properly care for it and it is in the best interests of the child that she should have its custody, and the Court should, in my opinion, always favour the parent's right, whether of a legitimate or illegitimate child; and this I should be prepared to do in the present case if and when convinced it would be to the advantage of the child. For the present, however, I think the order should stand.

I would therefore dismiss the appeal, and would make no order as to the costs.

Hyndman, J.A.:—At the conclusion of the argument, I felt strongly inclined to the view that the applicant should have the custody of her child, being its mother, and having paid for its maintenance since it was given to Mrs. Archambault.

But a further reflection and consideration of the authorities on the subject, I have modified my first opinion, and have come

to the conclusion that for the time being the order of the Chief Justice should not be disturbed.

The facts clearly shew that the applicant has no fixed or settled plans for the future in the direction of acquiring a permanent home. She apparently is a woman who must depend for a living, whilst unmarried, upon her work as a domestic servant of the average class, which means an earning capacity of from $25 to $40 per month. If she keeps the child with her, it necessarily follows that she will have to find employment in a home where her employers will be agreeable to having the child in their home. Whilst it is possible to secure such a situation, the probabilities are that the chances are rare to find a home where the child will be advantageously cared for. Such an arrangement generally brings about friction and dissatisfaction, due to no fault perhaps of either side, but simply because such things in practical life don't work out well. The child is but 3 years old, which means that it requires very constant attention, subject as it must be to the usual ills common to children.

For these reasons there must be occasions when the mother, if a domestic servant, would find it difficult to attend to her duties, and almost assuredly she would be driven to the necessity of frequently changing homes and mistresses. Such a life cannot be said to be good for the child.

The alternative scheme would be to place the child with other people, and we have before us no evidence which satisfactorily established that where she proposed placing the child is at all equal to the favourable situation at the present time.

In *The Queen* v. *Gyngall*, [1893] 2 Q.B. 232, 62 L.J. (Q.B.) 559, arising out of facts in many respects similar to this, the question is dealt with very exhaustively by Lord Esher, M.R., and Kay, L.J., which can be readily referred to. That case is, I admit, much stronger as against the mother's claim than the present, but the principle is the same, which is the welfare of the child.

"The dominant matter for consideration of the Court is the welfare of the child" (per Lord Esher at pp. 242, 243).

There is no doubt but that Mrs. Archambault has a great affection for the child, but that cannot be taken into consideration except to shew that it is likely to be well cared for. It is not Mrs. Archambault's rights which are in issue. That is not the point at all. The question is, if this infant be handed over to its mother under her present circumstances will it be for its advantage or disadvantage?

Whilst I would not for a moment be party to an order giving the permanent custody to the respondent, I think the facts and

N.S.

S.C.

circumstances, *at the present time,* are such that it would be the opposite of its best interests to make a change.

I would dismiss the application, however, with leave to the mother to apply at any time in the future if she feels that she can satisfy the Court, under new circumstances, that she is able to take proper care of her infant child.

There should be no costs of the appeal.

Clarke, J.A., concurs with Beck, J.A.

Appeal dismissed.

HILTZ v. CREASER.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., Chisholm, Mellish and Rogers JJ. March 21, 1922.

Contracts (§IC—10)—To pay for part of fisherman's outfit if he will sign on for fishing trip—Fisherman signing on and making trip—Contract collateral to hiring agreement—Enforcement of—Consideration—Evidence.

A contract to pay a part of a fisherman's outfit, if he will sign articles and go on a fishing trip, is collateral to and does not form part of or vary the hiring agreement, and the fisherman having signed the agreement and gone on the fishing trip is entitled to have such collateral agreement enforced.

Appeal from the judgment of a County Court Judge in favour of plaintiff for $24.50 and costs in an action to recover the sum of $25 alleged to have been promised by defendant to plaintiff towards his outfit for the fishing trip of 1921, provided plaintiff would sign articles and go on said trip. Affirmed.

V. J. Paton, K.C., for appellant.

J. A. McLean, K.C., for respondent.

The judgment of the Court was delivered by

Ritchie, E.J.:—The statement of claim is as follows:—

"The plaintiff's claim is against the defendant as captain of the schooner 'Donald A. Creaser' for the sum of $25, which sum the defendant promised to pay the plaintiff towards his outfit for the summer fishing trip of 1921 if the plaintiff would sign articles and go on said trip. The plaintiff signed said articles as sharesman on said trip in said vessel and went on said trip as said sharesman, but the defendant neglected and refused and still neglects and refuses to pay the plaintiff said sum of $25. Plaintiff claims $25."

The defence puts the contract sued on in issue, and when the plaintiff came to the proof of his case it was objected that oral evidence could not properly be received because the contract for the plaintiff's remuneration was in writing and could not legally be varied by parol.

The question which the Court has to decide is as to whether

Sask.

C.A.

or not the promise to pay the $25 is collateral to the written agreement or whether it forms part of it. If the latter, then the parol evidence was improperly received. The evidence fully supports the allegations in the statement of claim and the County Court Judge has so found.

In my opinion the promise was collateral to and altogether independent of the question of remuneration which is settled by the written document headed "Agreement with Fishermen." The promise is to pay the plaintiff $25, not by way of increased remuneration, but $25 "towards his outfit for the summer fishing of 1921 if the plaintiff would sign articles and go on said trip." This is the promise alleged and proved to the satisfaction of the trial Judge; and it does not form part of or vary the written agreement.

No attack was made on the Judge's finding; if such an attack had been made it would have been quite hopeless as the evidence is clear and positive.

The remarks of Lord Moulton in *Heilbut* v. *Buckleton*, [1913] A.C. 30, at p. 47, 82 L.J. (K.B.) 245, are applicable to this case. I quote:—

"It is evident, both on principle and on authority, that there may be a contract, the consideration for which is the making of some other contract. 'If you will make such and such a contract, I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract."

No question was raised at the argument as to the disposition which the Judge made of the set-off.

I would dismiss the appeal with costs. *Appeal dismissed.*

CANADIAN GRAIN Co. v. MITTEN BROS.

Saskatchewan Court of Appeal. Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

BROKERS (§I—2)—SALE OF GRAIN—FUTURE DELIVERY—FAILURE TO DELIVER—PURCHASE BY BROKER TO COVER SHORTAGE—LIABILITY OF SELLER—DAMAGES.

Where a party enters into a contract with a broker for the sale of wheat for future delivery and the broker carries out his instructions according to the agreement, and the rules of the grain exchange, the seller is liable in damages to the broker for the amount such broker has to pay for other grain which he is compelled by the rules of the grain exchange to buy, to cover the shortage caused by the seller's failure to deliver.

[*Canadian Grain Co.* v. *Mitten Bros.* (1921), 57 D.L.R. 464, affirmed.]

APPEAL by defendants from the trial judgment (1921), 57 D.L.R. 464, in an action to recover damages caused by the defendants' failure to deliver certain wheat sold to the plaintiffs for future delivery, which delivery was guaranteed by the plaintiffs, and through which default the plaintiff was compelled to purchase other wheat under the rules of the Winnipeg exchange in order to cover the shortage. Affirmed.

R. Hartney, for appellants.

B. H. Squires, for respondents.

HAULTAIN, C.J.S., concurred with TURGEON, J.A.

LAMONT, J.A.:—In my opinion this appeal must be dismissed. On January 29, 1916, the defendants instructed the plaintiffs at Saskatoon to sell 3,000 bushels of wheat on their account on the Winnipeg Grain Exchange. These instructions were in writing in the form of a contract, the material items of which were:—

"(1) The seller does hereby constitute and appoint the company, and the company agrees to act, as the seller's agent to sell on the Winnipeg Grain Exchange and according to the rules and regulations thereof 3,000 bushels of wheat for delivery in the month of October at and for the price of $1.23 per bushel.

(3) The seller covenants and agrees with the company to deliver all grains sold by the company on his behalf,...............

(4) The seller covenants and agrees to indemnify and save harmless the company from all loss or damage arising directly or indirectly from failure of the seller to deliver."

The plaintiffs immediately notified the Norris Commission Co., their agents on the Grain Exchange, to sell 3,000 bushels, which that company did. The sale was made to Hagar & Co. at $1.23 per bushel. On October 28, the defendants notified the plaintiffs that they could not make delivery, whereupon the plaintiffs instructed the Norris Commission Co. to buy in the market 3,000 bushels to deliver in lieu of the grain which the defendants had agreed to deliver. The market price of grain of the same grade at that time was $1.89¼, which amount the Norris company paid. The difference between what they paid for the 3,000 bushels purchased and what they received they charged to the plaintiff, who paid the same, and this amount the plaintiffs now seek to recover from the defendants.

The question to be determined is: Was the transaction, as carried out by the plaintiffs, the one the defendants instructed them to undertake? The plaintiffs' instructions were, to sell on the Winnipeg Grain Exchange, and in accordance with the rules and regulations thereof, 3,000 bushels of wheat for October

Sask.
C.A.
CANADIAN GRAIN CO. v. MITTEN BROS.
Turgeon, J.A.

delivery. The rules of the Grain Exchange, according to the evidence of Mr. Robb, require the members of the Exchange to buy and sell as principals. Specific instructions to sell according to the rules of the Exchange would, therefore, it seems to me, authorise an agent to sell as a principal. That such was in the contemplation of the parties is, I think, established by clause 4 of the agreement. By that clause the defendants agreed to indemnify and save harmless the plaintiffs from all loss or damage arising from the defendants' failure to deliver. No such loss would arise unless the plaintiffs obligated themselves to deliver as principals, as the rules of the Exchange required. No other way has been suggested by which the plaintiffs might be held liable in case the defendants failed to deliver. In view of this clause, I cannot reach any other conclusion than that the defendants contemplated at the time the agreement was entered into that the plaintiffs should sell as principals. This distinguishes the present case from the case of *Beamish* v. *Richardson & Sons* (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595.

As what the plaintiffs did in the fulfilment of the agreement was exactly that which the defendants requested them to undertake, I would dismiss the appeal with costs.

TURGEON, J.A.:—The appellants are farmers. In July, 1916, the prospects of a favourable wheat crop seemed good, and, being acquainted with the condition of the market, they made up their minds that it would be profitable for them to sell 3,000 bushels of wheat forthwith for delivery in October. They accordingly entered into the following written contract with the respondents, a grain commission company then carrying on business at Saskatoon:—

"This agreement made in duplicate the 29th day of July, A.D. 1916, between The Canadian Grain Company, Limited, hereinafter called the 'company,' of the first part, and Mitten Bros., of the Village of Coleville, in the Province of Saskatchewan, hereinafter called the 'seller,' of the second part.

Witnesseth that the parties hereto mutually agree as follows:

(1) The seller does hereby constitute and appoint the company, and the company agrees to act, as the seller's agent to sell on the Winnipeg Grain Exchange and according to the rules and regulations thereof, 3,000 bushels of wheat for delivery in the month of October at and for the price of $1.23 per bushel..................bushels of..................for delivery in the month of............at and for the price of............cents per bushel; ....bushels of................for delivery in the month of.......... at and for the price of.............cents per bushel.

Sask.

C.A.

CANADIAN GRAIN CO. v. MITTEN BROS.

Turgeon, J.A.

(2) The seller hereby warrants that he has now under crop: in wheat 480 acres of the sec. 34-31-24-w3rd, and in oats............ acres of the............and in flax............acres of the............

(3) The seller covenants and agrees with the company to deliver all grains sold by the company on his behalf, and further covenants and agrees that all grain so delivered shall grade not lower than number three northern.

(4) The seller covenants and agrees to indemnify and save harmless the company from all loss or damage arising directly or indirectly from failure of the seller to so deliver.

(5) It is understood and agreed that delivery herein means that all grain sold by the company on behalf of the seller shall be received in the terminal elevators at Fort William on or before the last day of the month named for delivery.

(6) The seller does further constitute and appoint the company and the company agrees to act as the seller's agent to market all shipments of grain made by the seller of the grain grown by the seller in the year 1916, and the seller agrees to consign all such shipments to the company and to pay to the company one cent for each bushel of grain so marketed.

In witness whereof the party of the first part has hereunto affixed its corporate seal duly attested by the hands of its proper officers, and the party of the second part has hereunto affixed his name and seal, the days and year first above written.

Witness to signature of
Mitten Bros.
'S. Edwards.'

For
The Canadian Grain Company,
Limited (Seal.)
per 'C. R. Vannatter.'
For the Seller,
'Mitten Bros.' (Seal)."

The respondents, pursuant to these instructions of the appellants, forthwith sold 3,000 bushels of wheat upon the Winnipeg Grain Exchange through their brokers and agents, the Norris Commission company. The sale was made to Hagar & Co., at the price of $1.23 per bushel. The effect of this contract was that the appellants were bound to deliver the 3,000 bushels of wheat at the terminals not later than October 31, 1916.

On October 28, the appellants informed the respondents that they would be unable to deliver any of this wheat on account of the failure of their crop. Thereupon the respondents wired their Winnipeg agents to buy 3,000 bushels in order to honour the contract. This was done, the price paid being $1.89¼ per

Sask.
C.A.
CANADIAN GRAIN CO. v. MITTEN BROS.
McKay, J.A.

bushel (the current market price). The respondents later brought this action against the appellants to recover the sum of $1,987.50, the loss they sustained through having to buy the 3,000 bushels at $1.84¼, whereas the selling price in July was $1.23, and for $7.50 for the commission they would have earned under the contract had the appellants carried it out.

In my opinion, the respondents are entitled to succeed in their action, and the judgment of the trial Judge, 57 D.L.R. 464, should be confirmed. The evidence shews clearly that the respondents did exactly what the appellants requested them to do: they sold the 3,000 bushels of wheat "on the Winnipeg Grain Exchange and according to the rules and regulations thereof." This included, of course, their assuming the risk of liability in case the appellants failed to deliver the grain. This liability fell upon them in October, and they met it, as they were legally bound to meet it, by an expenditure of $1,987.50. This contingency was considered and provided for in the contract between the parties, where it is plainly covered by the provisions of paragraph 4. I can find no defence to be established by the appellants, and, in my opinion, their appeal should be dismissed with costs. I may add that, in my opinion, this case is distinguishable from the case of *Richardson* v. *Beamish*, 16 D.L.R. 855, for the reasons given by my brother McKay in his judgment.

McKAY, J.A.:—The appellants, William and Henry Mitten, are farmers, and in the year 1916 were operating and living on a farm at Coleville, Saskatchewan. In July of that year they had prospects of a good crop of wheat, and whilst William Mitten was in Saskatoon he was advised by his brother, R. C. Mitten, who is not a member of the firm, that as wheat was then selling at a good price, it would be well to sell part of his crop. William Mitten decided to sell 3 car-loads. He did not discuss the matter with his co-partner, but went into the office of the respondent and told one of the officers what he wanted, and asked him to sell 3,000 bushels of wheat for him. The respondent had a private telegraph wire between its office and that of its correspondents, The Norris Commission Co., in Winnipeg. Instructions were sent on this wire to the said Norris Commission Co. to sell 3,000 bushels of wheat at the market price, and the advice was received in a few minutes that 3,000 bushels had been sold at $1.23 for October delivery.

A written contract was then drawn and signed in the respondent's office, as the agreement between appellants and respondent, the material paragraph of which is as follows:—

"The seller does hereby constitute and appoint the company

and the company agrees to act, as the seller's agent to sell on the Winnipeg Grain Exchange and according to the rules and regulations thereof 3,000 bushels of wheat for delivery in the month of October, and for the price of $1.23 per bushel."

On the same date, July 29, 1916, the Norris Commission Co. sent a letter to the respondent confirming the sale, and the respondent on the same date mailed to the appellants a statement confirming said sale.

On October 20, 1916, the respondent wrote to appellants inquiring if their wheat was on the way to the terminals to fill the contract, to which appellants replied by letter dated October 28, 1916, saying that they would have only about 2,000 bushels of wheat, and none of it would grade better than 5 or 6, and they would require it for seed for the next year, and were unable to fill the contract. This letter was signed by William Mitten. The respondent, having received this letter, on the October 30, 1916, instructed the Norris Commission Co. to purchase 3,000 bushels October wheat, which the said company did on October 30, 1916, at $1.89¼ per bushel. The respondent paid the Norris Commission Co. the difference in price between $1.23 and $1.89¼ per bushel for 3,000 bushels of wheat, amounting to $1,987.50, and $1,87 for commission, amounting to $1,989.37. The respondent's commission on the sale of the 3,000 bushels was ¼ of a cent. per bushel, amounting to $7.50, and respondent claims damages from appellants owing to their failure to deliver the said wheat, in the sum of $1,995.

The respondent contends that as it was liable to its agents, the Norris Commission Co., for the delivery of the wheat, according to the rules of the Winnipeg Grain Exchange and the Winnipeg Grain and Produce Exchange Clearing Association, where the wheat was sold, and had to buy the said wheat as above indicated, it had to pay the Norris Commission Co. the said difference, and the appellants in turn are liable to it.

There is no evidence that the respondent was on July 29, 1916, or at any time thereafter a member of the Winnipeg Grain Exchange. The only evidence on this point is that "they" (meaning the respondent) "were members for awhile."

In my opinion, the respondent is entitled to recover. First, with regard to the making of the contract, William Mitten alone signed it, but the trial Judge has found that Henry Mitten, the other member of the firm, ratified it, and there is ample evidence to support this finding, and, in my opinion, it is correct.

Secondly, with regard to privity of contract: This case is distinguishable from *Richardson* v. *Beamish*, 16 D.L.R. 855, 49 Can. S.C.R. 595, not only on the question of illegality, which

Sask.
C.A.
CANADIAN GRAIN CO.
v.
MITTEN BROS.
McKay, J.A.

does not arise here, but also on the question of privity of contract. In that case the defendants therein employed the plaintiffs therein, who were brokers on the Winnipeg Grain Exchange, to buy and sell grain for them on the said Exchange, and the majority of the Court held that, while the plaintiffs therein did, according to the rules of the said Exchange, make contracts for buying and selling, creating privity of contract between the defendants therein and third parties, yet these third parties were discharged when the contracts were cleared in the Clearing Association according to the rules thereof, so that the only persons defendants therein could then look to for the fulfilment of their contracts were their brokers or agents, the plaintiffs therein. And that, as defendants therein had no knowledge of the rules which allowed this, they were not bound by them.

In the case at Bar the appellants employed the respondent (not the Norris Commission Co.) as its agent to sell 3,000 bushels of wheat on the Winnipeg Grain Exchange. The respondent in turn employed the Norris Commission Co. to sell the said wheat; the latter sold to Hagar & Co. This contract was subsequently passed through the Clearing Association. If, on the facts of this case, what took place in the said Clearing Association discharged Hagar & Co., which I very much doubt, leaving only Norris Commission Co. and the respondent for the appellants to look to for the fulfilment of its contract, there is still privity of contract created with a third party, namely, the Norris Commission Co. The respondent has, therefore, performed what it agreed to do: sold the wheat on the Winnipeg Grain Exchange, and established privity of contract with a third party.

With regard to the damages claimed. The respondent was at one time a member of the Winnipeg Grain Exchange, and shews by the evidence of its president, Mr. McCallum, that it knew the rules and customs of said Exchange and Clearing House, and it would be held to be bound by them. And furthermore, Norris Commission Co., in its confirmation of the sale sent to respondent, notified respondent that the said sale was subject to the rules, by-laws, regulations and customs of the said Exchange and of the said Clearing Association, and that this trade had been or could be cleared through the said Clearing Association, and on being so cleared it would be the only party to whom respondent could look for the carrying out of the trade. Norris Commission Co. could, therefore, recover from respondent; and respondent was directly liable to Norris Commission Co. for the delivery of the wheat, as it dealt with it as a principal, which it had to do as appellants were not known to Norris Commission Co. Hence,

respondent was right in instructing Norris Commission Co. to purchase the 3,000 bushels of wheat in October to fulfil the contract on which the appellants defaulted.

The agreement between appellants and respondent has this clause:—

"4. The seller covenants and agrees to indemnify and save harmless the company from all loss or damage arising directly or indirectly from failure of the seller to deliver."............

The loss or damage arising from the failure of the appellants (the seller) to deliver the wheat, is the difference between the price at which the 3,000 bushels of wheat were sold in July and bought in October, namely, $1,987.50, which amount the respondent paid to Norris Commission Co., and this amount the respondent is entitled to recover from appellants, under above clause.

The difference between $1,987.50 and $1,995—the latter being the amount of damages claimed by respondent,—is evidently made up by the commission of ¼ of a cent per bushel on 3,000 bushels, which respondent would be entitled to on the sale. But respondent does not claim commission, and, therefore, I do not think this should be allowed.

The result is, that, in my opinion, the appeal should be dismissed with costs to the respondent, but the judgment below varied by reducing the amount of the judgment to $1,987.50.

Appeal dismissed.

ROWAN v. WHITE.

Alberta Supreme Court, Appellate Division, Beck, Hyndman and Clarke, JJ.A. March 16, 1922.

STATUTES (§IIA—96)—CHAPTER 27, 1906 ALTA.—AN ACT TO PREVENT FRAUDS AND PERJURIES IN RELATION TO SALES OF REAL PROPERTY—CONSTRUCTION — LEGISLATIVE INTENT — NECESSITY OF HAVING COMPENSATION MENTIONED IN THE WRITING.

Chapter 27 of 1906 Alta. Stats. entitled an Act to prevent Frauds and Perjuries in relation to Sales of Real Property was passed to prevent frauds and perjury as to whether the party claiming to be agent was so in truth and not as to the compensation to be paid, as this in the absence of any agreement was well settled by general custom, and the word "contract" in the Act means the contract so far as it creates the relation of principal and agent, the compensation need not therefore be fixed by the writing; if the writing fixes it the writing stands, if in default of that there is an oral agreement fixing the compensation, that stands; if there is neither, the law will imply an obligation to pay a reasonable compensation in accordance with common custom.

APPLICATION for leave to appeal from the judgment of the District Court dismissing the plaintiff's action for the recovery of commission for the sale of real estate. Leave granted.

Alta.
App. Div.
ROWAN v. WHITE.
Beck, J.A.

Duncan Stuart, for plaintiff, applicant.

J. J. Petrie, for defendant, respondent.

BECK, J.A.:—The decision in this case depends upon the proper interpretation of ch. 27 of 1906 entitled An Act to prevent Frauds and Perjuries in relation to Sales of Real Property. This Act was amended by ch. 4, sec. 38, 1920, but in my view the amendment does not call for consideration in the present case.

The words calling for interpretation are:

"No action shall be brought whereby to charge any person *either by commission or otherwise, for services rendered in connection with the sale of any land*, tenements or hereditaments or any interest therein, unless the contract upon which recovery is sought in such action, or some note or memorandum thereof, is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorised in writing."

The words of sec. 4 of the Statute of Frauds are:

"Unless the agreement on which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

The words of sec. 17 (Sales of Goods Ord. C.O.N.W.T. 1898 ch. 39, sec. 6) are: (after using the word "contract") "Unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

It seems that the meaning of secs. 4 and 17 is substantially the same, but this distinction has been drawn; that if the memorandum states all that is to be done by the party to be charged, that is sufficient within sec. 17, though not enough within sec. 4. (See cases cited in Agnew on Statute of Frauds p. 227).

In *Sarl* v. *Bourdillon* (1856), 1 C.B. (N.S.) 188, 26 L.J. (C.P.) 78, 140 E.R. 79, 2 Jur. 1208, 5 W.R. 196, it was agreed at the time of the making of the contract that payment should be made by the cheque of the purchaser's brother. This part of the agreement was not stated in the writing, which, nevertheless, was held sufficient.

Although these three statutory provisions are much in the same words the subject with which they respectively deal is different and it is this which, at least in large measure, accounts for the difference in interpretation of secs. 4 and 17 of the Statute of Frauds.

Section 4 covers the five cases of (1) a special promise by an executor or administrator to answer damages out of his own es-

tate; (2) a special promise to answer for the debt, default or miscarriage of another; (3) an agreement made upon consideration of marriage; (4) a contract or sale of land; (5) an agreement not to be performed within a year.

In all these cases it was held that the consideration must appear in the "contract." But under sec. 17 it was held that if no price for the goods was agreed upon the price need not be stated because the law would imply an agreement to pay a reasonable price.

In *Valpy* v. *Gibson* (1847), 4 C.B. 837, at p. 864, 136 E.R. 737, the Court said:—

"With regard to the terms of the contract not having been completely agreed upon—it appears that the price was agreed on, but that the mode and time of payment were not at first specified. But the omission of the particular mode or time of payment or even the price itself does not necessarily invalidate a contract of sale. Goods may be sold and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement or to be determined by what is reasonable under the circumstances."

In *Hoadly* v. *M'Laine* (1834), 10 Bing. 482 at pp. 487, 488, 131 E.R. 982, 3 L.J. (C.P.) 162, it is said:—

"What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth.

It has been contended that this would open a door for perjury and let in the mischief which the statute of Frauds proposes to exclude. But I cannot agree in that proposition; for it does not appear that any specific price was agreed on; and if it had appeared that such was the case, this note would not have been evidence of such a bargain, as the case of *Elmore* v. *Kingscote*, [(1826), 5 B. & C. 583, 108 E.R. 217] expressly decides."

The cases dealing with the question of the interpretation of secs. 4 and 17 of the Statute of Frauds for the most part refer to the purpose and policy of the Act and the mischief to be met.

As a matter of history, well known to the legal profession and evidenced by many decisions of this Court and of the Courts of the other Western Provinces in which the same conditions and customs obtain, the mischief to be met by the Pro-

Alta.
App. Div.
ROWAN v. WHITE.
Beck, J.A.

vincial Act under consideration was never a difficulty over the compensation to be paid to a real estate agent by way of commission for the sale of land, for that was well settled by general custom in the absence of agreement and where there was agreement it was with scarcely an exception in accordance with general custom but the matter of dispute was practically always whether the party claiming to be agent was so in truth. It was undoubtedly to prevent frauds and perjury upon that question only that the Act was passed. Had the Act contained a preamble it is altogether likely it would have been to that effect. Considering then the clear purpose of the Act, the mischief to be met, the fact too that many contracts of agency, whether for the sale of real estate or otherwise, do not fix the remuneration, it seems to me that the word "contract" in the Act may well and properly be taken to mean the contract insofar as it creates the relationship of principal and agent.

The insertion of the words which I have italicised:—"either by commission or otherwise for services rendered in connection with the sale of lands" [p. 446] seem to me to accord with this view—that, in the mind of the draftsman, the mode of payment, whether by commission or otherwise, was of little consequence so long as the proof of a contract of agency was put beyond dispute by a writing.

While then in the case of the several classes of contract enumerated in sec. 4 of the Statute of Frauds the consideration, it is properly held, ought to be expressed, because, by reason of the subject of the contract, there can be no commonly understood basis of consideration; and while, in the case of the sale of goods within sec. 17 the consideration, if not agreed upon, need not be expressed, because by reason of the subject of the contract, payment of a reasonable compensation will be implied, though, if a price has been in fact agreed upon, that fact will exclude the implication and invalidate the writing as sufficient evidence of the contract, yet in a case under the provincial statute there seems no reason for interpreting "contract" as meaning more than the contractual relationship of principal and agent.

If this is so, the compensation need not be fixed by the writing. If the writing fixes it, the writing stands. If, in default of that, there is an oral agreement fixing the compensation, that stands. If there is neither the law will imply an obligation to pay a reasonable compensation—a compensation which will accord with common custom.

For these reasons I hold that there was in this case a suf-

Alta.
App. Div.
ROWAN v. WHITE.
Clarke, J.A.

ficient writing to bind the plaintiff to pay the commission sued for.

There is another ground on which I think the plaintiff can sustain his action. If the compensation is not stated in the writing the law will imply an agreement to pay a reasonable compensation. It is common knowledge that $1 an acre is a very commonly recognised compensation in such cases. If there was an agreement that that should be the compensation, the implied agreement and the express oral agreement would accord with each other—there would be no inconsistency between the two—and consequently it would not be the ordinary case of an express term negativing an implied term. For these reasons I think the trial Judge was wrong in his conclusion that the contract of agency was insufficient in view of the terms of the provincial Act and I would, therefore, give leave to appeal.

HYNDMAN, J.A., concurs with BECK, J.A.

CLARKE, J.A.:—The plaintiff applies for leave to appeal from a judgment of the District Court of the District of Calgary delivered by Mahaffy, Co. Ct. J. which dismissed the plaintiff's action—for the recovery of $160 claimed as commission for the sale of real estate.

The question at issue depends upon the construction of the Act to prevent Frauds and Perjuries in relation to Sales of Real Property, ch. 27, 1906, amended by ch. 4, sec. 38, 1920, pleaded as a bar to the action and its application to the facts of the case.

The statement of claim alleges that on September 1, 1920, the defendant requested the plaintiff to find a purchaser for certain described lands and agreed to pay the plaintiff for the said services the sum of $160, on the sale being made.

It was stated upon the application by the plaintiff's counsel that the arrangement was verbal and that there was no writing signed by the defendant in relation to the matter prior to the finding of a purchaser by the plaintiff but the plaintiff submits that the requirements of the statute have been satisfied by subsequent writings, including correspondence between the parties which I shall refer to.

On January 28, 1921, the plaintiff having procured a purchaser, Mrs. Cruse, the two went to the office of Mr. Petrie, the defendant's solicitor, and she paid him $500 and received a receipt from him in these words:—

"Calgary, 29th January, 1921.

Received from Mrs. Cruse the sum of Five hundred dollars ($500.00) as a deposit on the N. W. 1/4 30-24-2, W.5th. Terms

Alta.
App. Div.
ROWAN v. WHITE.
Clarke, J.A.

of sale: $16.00 an acre, balance in five equal annual payments. Interest at 6%. Subject to owner's approval.

John J. Petrie, Per. "J.A." "

For the purposes of this application I assume that the owner's approval was obtained.

There followed some correspondence between the plaintiff and defendant from which it is clear that the defendant recognised the plaintiff as his agent in making a sale of the property and for the purpose of this application I assume that the correspondence recognises that the plaintiff was to be paid a commission, though it contains no express promise to that effect by the defendant, but before resting upon this assumption the case of *Nunnelley* v. *Blatt* (1919), 47 D.L.R. 254, 14 Alta. L.R. 534, would require careful consideration.

In the plaintiff's letter to the defendant of February 15, 1921, after reference to the sale being made this occurs:—

"I also need some spending money, this little commission will work in fine. You will remember yourself how nice it was to get it. You had better come up for a day and square it away and we will have that bottle of Scotch."

The defendant replied by a letter of March 1, in which these expressions appear:—

"I note what you say about the deal and I trust that ere now it has gone through. I put a d........ lot of money into that quarter and I am not going to get a cent out of it but a wee drop of Scotch."

There was a later letter of April 23 from defendant to plaintiff which referred to the deal but made no reference to a commission.

I think there are no other references to a commission being payable.

What the statute requires to be in writing is "the contract upon which recovery is sought . . . or some note or memorandum thereof." I think this means that when there is an express verbal agreement the written memorandum must, in order to comply with the statute, contain all the material terms of it, such as the amount of the commission, the conditions of earning it, the time when payable. These terms or some of them may be implied if they have not been expressly agreed to; for instance, where the amount of the commission has not been stated in the verbal agreement it cannot, of course, be stated in the written memorandum of that agreement but the statute is complied with and recovery can be had upon a *quantum meruit*. See *McIntyre* v. *Law* (1918), 40 D.L.R. 231, 13 Alta.

L.R. 282; *King* v. *Schon* (1918) 44 D.L.R. 111, 14 Alta. L.R. 79; *Peterson* v. *Bitzer* (1920), 57 D.L.R. 325, 48 O.L.R. 386; 62 Can. S.C.R. 384, [reversed on appeal to the Supreme Court of Canada, 63 D.L.R. 182.]

The authorities upon the sufficiency of the written note of memorandum required by the Statute of Frauds are, I think, applicable to the statute under consideration, the material words being identical in the two statutes.

In *Green* v. *Stevenson*, (1905), 9 O.L.R. 671, where the question upon sec. 4 of the Statute of Frauds is fully discussed at p. 679, Anglin, J., says:—

"By evidence admissible in any Court he shows a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus complete. By no known process can those terms not so evidenced be put in a writing signed by the defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails."

For cases upon the sufficiency of the memorandum under sec. 17 of the Statute of Frauds see Benjamin on Sales, 6th ed. at p. 296.

It seems to me impossible for the plaintiff to overcome the defence of the statute unless he can bring himself within the amendment of 1920 and that is also in my opinion an impossible task.

No transfer having been executed or delivered the plaintiff, in order to succeed, must prove that the defendant "has executed an agreement of sale of lands . . . or any interest therein signed by all necessary parties entitling the purchaser to possession of the said lands . . . or any interest therein as specified in the said agreement and has delivered the said agreement to the purchaser."

The formal agreement signed by the defendant and offered to the purchaser contained a reservation of the mines and minerals, and she refused to accept it as her agreement, evidenced by the receipt from Mr. Petrie, was for the land without such reservations. I do not think it can be said this formal agreement has been delivered to the purchaser or that she is entitled to possession under it. The only agreement delivered to the purchaser is the receipt of January 29. Assuring that under its terms the purchaser became entitled to possession, the difficulty at once arises that it is not signed by all necessary parties as the defendant is not the owner of the mines and minerals and, therefore, the purchaser does not in fact become

Sask.

C.A.

LEVEY v. RURAL MUN. OF RODGERS No. 133.

Turgeon, J.A.

entitled to possession of the lands specified in the agreement, viz., the lands including the mines and minerals.

In my opinion, upon the facts admitted and assumed in the plaintiff's favor, he cannot succeed in the face of the plea raising the statute.

If, however, the plaintiff desires to persevere in his desire to appeal so as to have the benefit of a decision of the Full Court I think the question involved of sufficient importance to warrant leave being granted, to which I agree.

If the appeal proceeds I think the costs of this application should be costs in the appeal, otherwise should be paid by the plaintiff.

Leave to appeal granted.

LEVEY v. RURAL MUN. OF RODGERS No. 133.

Saskatchewan Court of Appeal, Haultain, C.J.S., Turgeon and McKay, JJ.A. November 28, 1921.

HIGHWAYS (§IVA—127)—DITCH AT SIDE OF HIGHWAY — ACCIDENT TO MOTORIST—DEGREE OF REPAIR NECESSARY—RURAL MUNICIPALITY ACT, R.S.S. 1920, CH. 89, SEC. 196—CONSTRUCTION.

The mere fact that a ditch or cut exists along the side of a highway does not raise any presumption of negligence on the part of a rural municipality under the Rural Municipality Act, R.S.S. 1920, ch. 89, sec. 196, if the road is reasonably safe and sufficient for the requirements of the locality and may be used without danger by those who use ordinary care. Such municipality is not liable for accidents arising from the use of the road in a most unusual manner.

[*Williams* v. *North Battleford* (1911), 4 S.L.R. 75, applied and followed.]

APPEAL by plaintiff from a District Court judgment dismissing an action for damages caused by the alleged negligence of the defendants in not keeping a highway in proper repair. Affirmed but for different reasons.

W. A. Beynon, for appellant.

C. E. Gregory, K.C., for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—The accident which gave rise to the action herein occurred about 3 o'clock in the afternoon of October 14, 1919. The plaintiff and three others were proceeding in an automobile eastwardly along a road between sects. 7 and 18 in tp. 14 and range 2, west of the 3rd meridian. This road runs into another road running north and south along the eastern side of the aforesaid sects. 7 and 18. The driver of the automobile was endeavouring to reach Lake Johnston, but was unacquainted with the roads. At a point upon the east and west

road about 270 feet from the intersection of the two roads a trail branches off in a south-easterly direction, crossing the north and south road about 90 ft. south of the said intersection. At another point upon the east and west road, about 150 ft. further on, and consequently about 120 ft. from the intersection, another trail runs off in a north-easterly direction, reaching the north and south road about 90 ft. north of the intersection. The driver passed the first trail, but turned off upon the second. When he reached the field on sect. 18 he found he could not proceed further on account of ploughing. He then made up his mind that he ought to have taken the first trail running to the south-east, and he decided to join it, not by turning back and retracing his way, but by cutting straight across and off the east and west road and proceeding thus south-easterly to this lower trail. This mode of travel led him to a point near the south-west corner of the intersection of the roads where his car was upon the east and west road and at right angles, or nearly at right angles, with it and about 6 ft. from the south side of it. He then noticed that he was in danger, his car being upon the edge of a cut in the ground about 3 ft. deep, which the defendant municipality had dug in order to build up and level the north and south road and the intersection of both roads. To prevent his car slipping sideways over this cut, he turned sharply to the east so as to face it. The car went down the cut, across the north and south road and down the grade on the other side of the road. The plunge of the car threw the plaintiff out upon the ground and broke his leg. His action is brought for the damages so sustained.

The District Court Judge before whom this case was tried found that the defendants were guilty of negligence in leaving the cut bank, over which the automobile fell, unprotected. But he also found that the driver of the automobile was guilty of contributory negligence in travelling across the road in the manner he did, and that this negligence of the driver was the negligence of the plaintiff and sufficient to defeat his claim. He dismissed the action with costs.

The plaintiff appeals against the Judge's finding of contributory negligence. He contends that even if the driver was negligent, this negligence cannot affect the plaintiff's case, under the authority of ***Smith*** v. ***C.P.R.*** (1921), 59 D.L.R. 373, 62 Can. S.C.R. 134; ***Hunter*** v. ***City of Saskatoon*** (1919), 48 D.L.R. 68, 12 S.L.R. 354, etc. The defendants cross-appeal from the finding of negligence against them.

This question of negligence on the part of the defendants is

Sask.
C.A.
LEVEY v. RURAL MUN. OF RODGERS No. 133.
Turgeon, J.A.

the first to be determined. With all respect to the opinion expressed by the trial Judge, I must say that I do not agree with him upon this point, and that, in my opinion, the plaintiff's case must fail. I cannot find from the evidence that the defendants, in discharging the duty cast upon them by the Rural Municipality Act, ch. 89, sec. 196, R.S.S. 1920, were guilty of any negligence. This section is as follows:—

"196. Every council shall keep in repair all public roads, highways, streets and lanes, and also all public bridges, culverts, dams and reservoirs and the approaches thereto which have been constructed or provided by the municipality or by any person with the permission of the council, or which have been constructed or provided by the province; and in default of the council so doing the municipality shall be civilly liable for all damages sustained by any person by reason of such default."

The mere fact that a ditch or a cut exists and that an accident happens, does not raise any presumption of negligence. I take it that in proceeding to examine the question of negligence by the defendants in this case, the first thing to consider is the condition in which the road was at the time of the accident. Had the defendants put the road in such a condition that it was reasonably safe and sufficient for the requirements of the locality and might be used without danger by those who exercised ordinary care? If so, I think they had done all that the law required of them and could not be held guilty of negligence, either on the ground of misfeasance or of non-feasance. In framing this question, which, in view of all the circumstances of this case, must, I think, be answered in the affirmative, I have merely paraphrased the language of the authorities which seem to me to be applicable. The nature of the obligation which is cast upon municipalities in respect to highways has been considered on several occasions in the Courts of this Province. The decision of the Supreme Court of Saskatchewan *en banc*, delivered by Wetmore, C.J., in *Williams* v. *Town of North Battleford* (1911), 4 S.L.R. 75, is, I think, of particular interest. The Chief Justice in his judgment reviews and comments with approval upon a number of decisions rendered by the Courts of Ontario, which, I think, are very much in point here, and which clearly lay down the rule, that, in considering the duty of a rural municipality in the repair of highways, regard must be had to the nature of the country, the amount of the local traffic, the means at the disposal of the council, the manner in which the country roads are usually built, and, in

short, all the elements which a person of practical knowledge would naturally take into account. The evidence in this case satisfies me that the defendants had used the material at their disposal, that is, the soil on either side of the centre of the road, to build up their grades and lay down their levels in order to furnish a proper and sufficient passage-way for those travelling along either road, or turning from one road on to the other. On this point I find myself in agreement with the trial Judge, who says: "However, if one kept to the centre of the trail from the west he would come on the grade going north and south without difficulty."

And I find that they had left the road in such a condition that it presented no danger to persons travelling with ordinary care. But necessary work of this kind cannot be done without creating cuts and hollows at the sides of the road off the travelled portion, and vehicles travelling in the most unusual manner in which this automobile was travelling are very liable to meet with mishaps which cannot reasonably be attributed to the municipality, because, in point of fact, the condition of the road is not the result of any negligence on their part, but is rather the result of work which, from a practical point of view, was properly done by them in the performance of their statutory duty.

I do not think, in view of previous decisions, and particularly of the decision in *Williams* v. *Town of North Battleford*, *supra*, that it is necessary for me to go further into the law upon this subject; nor do I find it necessary to enter upon a fuller recital of the facts in this case, or to endeavour to give an exact description of the highway in question. Each case will have to depend upon its own circumstances. In the case at Bar I consider that no negligence has been proved against the defendants, and that the plaintiff's action should have been dismissed upon that ground.

Having arrived at this conclusion, it is unnecessary for me to consider the question of contributory negligence on the part of the driver or of the plaintiff.

In the result, I think the appeal should be dismissed and the cross-appeal allowed and that the judgment in the Court below dismissing the action with costs should be affirmed. The respondents should have their costs of the appeal and cross-appeal.

Appeal dismissed.

N.S.

S.C.

KOURZSWKI v. METROPOLITAN FIRE ASS'N OF CANADA.

Nova Scotia Supreme Court, Harris, C.J., Russell, J., Ritchie, E.J., and Mellish J. January 12, 1922.

INSURANCE (§IIIE—87)—FIRE INSURANCE ON HOUSE AND FURNITURE—CHANGE IN USE OF BUILDING—VITIATION OF POLICY—INSURANCE ON STOCK WHILE IN PARTICULAR BUILDING—REMOVAL TO ANOTHER BUILDING.

Where in policies of fire insurance on the building and furniture the building is described as a "dwelling (small boarding house)" the occupation of such building as a store constitutes a material change to the risk, which vitiates the policies on the building and furniture where no notice of the change has been given in writing as required by the policies.

Insurance on a stock of groceries which by the express terms of the policy applies "only while contained in the two storey frame felt paper roofed building situate and being No. 48 on the south side of Tupper street," cannot be recovered when the loss occurs after the removal of the goods from these premises and while they are contained in another building not named in the policy.

APPEAL by defendant from the trial judgment in an action to recover on a fire insurance policy. Reversed.

S. Jenks, K.C., for appellant.

T. R. Robertson, K.C., for respondent.

HARRIS, C.J.:—The plaintiff is a married woman and the wife of S. Kourzswki, and the plaintiff and her husband owned a dwelling house No. 44 Tupper St., Sydney, and the furniture therein in common. The wife also had a stock of groceries and conducted a store in an adjoining building, No. 48 Tupper St.

On May 30, 1918, the plaintiff insured the household furniture in the building, No. 44 Tupper St., for $700 and in the application described the building as occupied as a "dwelling and some boarders."

On May 30, 1919, she insured the stock of groceries, fruits and meats contained in No. 48, Tupper St., for the sum of $500.

On July 15, 1919, she insured the building, No. 44, Tupper St., for $900, and in the application it was described as a "dwelling (small boarding house)" and as occupied as a small boarding house.

In May, 1920, the building No. 44, Tupper St., was damaged by fire and the household furniture was also damaged.

A short time—at least 10 days—before the fire took place, the stock of groceries, etc., contained in the building No. 48, Tupper St., had been removed to the building No. 44, Tupper St.; and a part of the latter building was thereafter, until the fire took place, used as the store. These goods were damaged by the fire.

An action was brought on the three policies referred to and a number of defences have been set up. The trial Judge gave judgment for the plaintiff for the amount claimed on all three policies and there is an appeal.

I think the appeal must be allowed.

It is, I think, clear on the evidence that the occupation of the premises No. 44 Tupper St., as a store constituted a change material to the risk which vitiated the policies on the building and furniture under the conditions of the policies unless notice in writing of the change was promptly given to the insurers and no such notice was given.

So far as the insurance on the stock of groceries, fruits and meats is concerned, the policy by its express terms applied "only while contained in the two story frame felt paper roofed building situate and being No. 48 on the south side of Tupper Street." The loss occurred after the goods had been removed from 48 Tupper St., and while they were in 44 Tupper St., and the loss was therefore not covered by the policy.

There was a number of other questions argued but the plaintiff's case fails for the reasons I have mentioned and it is not necessary to express any opinion regarding the other points raised.

The appeal will be allowed with costs and the action dismissed with costs.

RUSSELL, J., RITCHIE, E.J., and MELLISH, J., concurred.

Appeal allowed and action dismissed.

Re DAUNTLESS MANUFACTURING Co. Ltd.

Alberta Supreme Court, Walsh, J. January 13, 1922.

COMPANIES (§VF—255)—SALE OF SHARES BEFORE CERTIFICATE PERMITTING IT TO DO BUSINESS—ILLEGALITY—SALE OF SHARES ACT (SASK. STATS. 1916, CH. 15) — CONSTRUCTION — LIABILITY OF SHAREHOLDERS.

The sale of shares in the capital stock of a company before the company has obtained from the Local Government Board of Saskatchewan a certificate permitting it to do business in that Province being illegal and void under sec. 4 of the Saskatchewan Sale of Shares Act, 1916 Sask. Stats., ch. 15, purchasers of such shares are entitled to have their names removed from the list of contributories.

[*Veilleux* v. *Boulevard Heights Ltd.* (1915), 26 D.L.R. 333, 52 Can. S.C.R. 185, applied. See Annotation, Company Law of Canada, 63 D.L.R. 1.]

MOTION to remove certain persons from the list of contributories, they having subscribed for shares in the capital stock of the company before the company had obtained from the

Alta.
S.C.
Re DAUNTLESS MANUFACTURING CO. LTD.
Walsh, J.

local Government Board of Saskatchewan a certificate permitting it to do business in that Province. Motion granted.

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

N. A. McLarty, contra.

WALSH, J.:—Motion to remove the above-named from the list of contributories. They subscribed for shares in the capital stock of the company in Saskatchewan before the company had obtained from the local Government Board a certificate permitting it to do business in that Province. Section 4 of the Saskatchewan Sale of Shares Act, 1916, enacts that "No person shall sell or offer or attempt to sell in Saskatchewan any shares, stocks, bonds or other securities of a company . . . without first obtaining from the board a certificate and in the case of an agent a license as hereinafter provided." Upon the argument I held that upon the principle on which *Veilleux* v. *The Boulevard Heights, Ltd.* (1914), 20 D.L.R. 858, 8 Alta. L.R. 16, affirmed on appeal, 24 D.L.R. 881, and by the Supreme Court of Canada, 26 D.L.R. 333, 52 Can. S.C.R. 185, was decided the sale of these shares was illegal, being in direct contravention of a statute which prohibited it.

It was suggested, however, that it is now too late for these men to escape their liability as they should have repudiated their contracts before the winding-up order was made. The affidavits before me disclose the bare fact of their subscriptions having been made more than 4 years ago and some 2 years before the company was in a position to do business in Saskatchewan. I do not know anything of what was done, either by any of these men or the company in respect of these shares subsequent to their subscription for them.

There is, however, a clear distinction in this respect between a contract which is void and one which is voidable. This distinction is pointed out by Beck, J., in delivering the judgment of the Court in *Re Western Canada Fire Ins. Co.* (1915), 22 D.L.R. 19, at p. 23, 8 Alta. L.R. 348. The contracts with which I am dealing being illegal are void and so the applicants' objection to being placed on the list of contributories must be given effect to. The order will go as asked with costs, which I fix at $50, to be paid by the liquidator out of the assets of the company in liquidation.

Motion granted.

BANK OF TORONTO v. ROEDER and KNOX.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and McKay, JJ.A. November 14, 1921.

PRINCIPAL AND SURETY (§IB—13)—PROMISSORY NOTE GIVEN TO BANK TO SECURE INDEBTEDNESS—SURETY SIGNING ON EXPRESS UNDERSTANDING THAT CHATTEL MORTGAGE GIVEN TO SECURE INDEBTEDNESS—REMOVAL OF CHATTELS FROM DISTRICT—NEGLIGENCE OF CREDITOR IN NOT SEIZING—LOSS OF SECURITY—DISCHARGE OF SURETY.

The respondent Knox signed a joint note with her co-defendant as surety for him on the understanding to the knowledge of the appellant that the defendant Roeder would give a chattel mortgage to the appellant on 10 horses as security for the payment of the said note and another small note which he owed to the appellant. This chattel mortgage was given and duly registered in the proper registration district. The respondent upon hearing that the defendant Roeder was taking the horses out of the district, notified the appellant, and requested it to stop the removal of the horses. The appellant did nothing to stop the removal and the horses were removed out of the district. After the maturity of the note some efforts were made to seize the horses but was given up as being too expensive. The Court held that the appellant did not use due care and diligence in preserving the security in the state in which it received it, and that its negligence relieved the respondent from her liability on the note.

APPEAL by plaintiff from the trial judgment in an action to recover the amount of a promissory note. Affirmed.

E. Gravel, for appellant.

E. F. Collins, for respondents.

HAULTAIN, C.J.S.:—The defendant Roeder being indebted to both the plaintiff bank and the defendant Knox, was desirous of obtaining a further amount of money from the bank for the purpose of both paying off Knox and securing money for other purposes. The bank agreed to advance the required amount if Roeder could procure a satisfactory endorser. Mrs. Knox agreed to endorse for him on condition that he should give the bank a chattel mortgage as collateral security to the note. Upon this understanding between themselves and with the bank, the bank advanced $425 to Roeder on the joint note of Roeder and Knox for that amount, dated December 14, 1918, and payable on May 1, 1919. In further pursuance of the arrangement made, Roeder on the same day executed a chattel mortgage upon 10 horses to secure the amount represented by the above-mentioned note and an additional amount of $159, being the amount of another note made by Roeder of the same date, representing an earlier liability of Roeder to the bank. Those transactions were all carried out at Mazenod, in the Gravelbourg Registration District, and the mortgage was duly filed in the proper office for that district.

In April, 1919, Knox, acting for his wife, went to McQueen,

Sask.
C.A.
BANK OF TORONTO v. ROEDER AND KNOX.
Haultain, C.J.S.

the plaintiff's manager at Mazenod, and informed him that Roeder was leaving the country and taking the horses covered by the mortgage with him. McQueen and Knox immediately made enquiries and discovered that the animals were on that day at a place called Ettington, a station in the Weyburn Registration District about 8 miles distant from Mazenod. They also learned that Roeder had shipped the horses with other property of his on that day at Ettington to Moreland, another place in the Weyburn Judicial District. At that time Knox requested McQueen to act under the mortgage, but nothing was done. McQueen's reason for taking no steps to protect the mortgage was, that he could do nothing until the mortgage became due. In his evidence at the trial he says, after discovering in April that the horses had been taken out of the Gravelbourg District and removed to the Weyburn District, "I let the matter go until the note fell due, and then took proceedings sometime in June and seized two horses that had been left behind by Roeder." After the note became due, the plaintiff, according to evidence, made some slight efforts to find and seize the horses by sending the mortgage to the sheriff of the Weyburn District, although a certified copy of the mortgage was not filed in the office of the registration clerk of the Weyburn Registration District within 3 weeks of the removal of the animals, or indeed at all. All that was done, apparently, was that the sheriff reported that he could not locate the animals and that a more thorough search, which would be very expensive, was necessary. The plaintiff then, according to McQueen's evidence, decided not to take any further steps in the matter for the stated reason that it would be too expensive.

This action was brought against the defendants on the note in question, and Mrs. Knox defended on the ground that the facts as above stated entitled her to be relieved, as a surety, from all liability on the note. On the trial of the action, the trial Judge found in favour of the defendant Knox and dismissed the action, on the ground that the bank had failed to keep the security intact for the benefit of the defendant Knox as surety, and that she was therefore discharged.

The evidence, in my opinion, clearly shews that the bank did not use due care and diligence in preserving the security in the state in which it received it. On being informed in April that the horses were being removed from the district, the bank should have seized and could have seized the horses at once, under the express terms of the mortgage. Instead of doing that, no action of any kind was taken; the mortgage was not filed in

the district into which the horses were removed, and, according to the evidence of the officials of the bank, the security became so impaired as to be worthless to the bank. That seems to be the result of Mr. McQueen's evidence when he said that further efforts to find and seize the horses were abandoned on the ground that it would be too expensive. As a general rule a surety is only discharged *pro tanto* if the securities are impaired or deteriorated. *Pearl* v. *Deacon* (1857), 24 Beav. 186, 53 E.R. 328; *Wulff* v. *Jay* (1872), L.R. 7 Q.B. 756, 41 L.J. (Q.B.) 322, 20 W.R. 1030; *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596 at p. 603, 55 L.J. (P.C.) 47.

In this case we have it on the uncontradicted evidence of Mrs. Knox that if the horses had been seized and sold at the time they were removed they would have realised about $800, nearly double the amount of the defendant's liability on the note.

I would, therefore, agree with the conclusion arrived at by the trial Judge, and would dismiss the appeal with costs.

LAMONT, J.A. (dissenting):—The main facts in this appeal are outlined in the judgment of Haultain, C.J.S., and the question to be determined is, was the bank guilty of any negligence which entitles the surety to be relieved from her liability.

The trial Judge gave judgment in her favour as follows:—

"Wherefore the plaintiff not having seized the chattels before removal or taken steps to prevent their removal, I find that it failed to perform an active duty which the law and the terms of the contract imposed on it and has thereby inflicted loss on the defendant Knox and she is relieved from payment of the note sued on herein."

In addition to this ground, two others are submitted to us in support of the judgment: (1) That the surety was discharged by reason of the failure of the bank to register the chattel mortgage in the Judicial District of Weyburn, and (2) that, in any event, the bank should have seized the horses when they were at Ettington after their removal from the farm, as Ettington was only 8 miles from Mazenod where the securities were held and where Mrs. Knox resided.

The judgment, in my opinion, cannot be supported for the reasons given by the trial Judge, because the note was not due for another 6 weeks and the mortgage gave no right of seizure prior to maturity, simply because it was rumoured that the mortgagor was considering the removal of the chattels from the district.

Sask.

C.A.

BANK OF TORONTO v. ROEDER AND KNOX.

Lamont, J.A.

The failure of the bank to register the chattel mortgage in the Judicial District of Weyburn within 3 weeks after the removal of the horses from the District of Gravelbourg is likewise insufficient to discharge the surety for, as the trial Judge pointed out, "the evidence does not disclose where the chattels were actually shipped to from Ettington." The report received by the bank manager from the station agent at Mazenod that the agent at Ettington stated they were billed to Mooretown in the Judicial District of Weyburn, being merely hearsay, was not evidence. The bank therefore could not be under any obligation to register the mortgage in the Weyburn District unless it had been established that the horses on leaving Ettington had been shipped to some other point in that district.

The last contention presents greater difficulty. The mortgage expressly gave the bank a right to take possession of the mortgaged chattels at any time in the event of the mortgagor attempting to remove them from the place where they were without the consent of the mortgagee in writing to such removal. Having this right, the liability of the bank, in my opinion, depends upon two considerations: (1) Was the bank under any obligation before the maturity of the note to take active steps to prevent Roeder from taking his horses out of the district, and (2) if so, was the bank's failure to prevent their removal under the circumstances such negligence that the surety should be credited on the note with the loss arising therefrom?

In *Carter* v. *White* (1883), 25 Ch. D. 666, 54 L.J. (Ch.) 138, 32 W.R. 692, objection was taken by a surety that the acceptances taken from the principal debtor had in certain respects been left blank and that they had never been presented for payment. It was held that the laches of the creditor in these respects had not released the surety. Cotten, C.J., in his judgment, said at p. 670:

"The principle is this, that if there is a contract, express or implied, that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has, that discharges the surety; but when there is no such contract, and he only has a right to perfect what he has in his hand, which he does not do, that does not release the surety, unless he can show that he has received some injury in consequence of the creditor's conduct....... A surety is not discharged merely by the negligence of the creditor. If he had required them to be enforced, and the creditor had refused, the surety might have been discharged;

but he is not discharged merely by the laches of the creditor for this reason, that the surety may at any time pay off the debt, and sue the debtor in the name of the creditor, or call on him to sue."

In *Wulff* v. *Jay* (1872), L.R. 7 Q.B. 756, the creditor, as surety for the debt of the principle debtor, was to take a mortgage on the plant, fixtures and movable property upon the debtor's premises. The mortgage was taken, and it provided that upon default the creditor could take possession and sell the mortgaged goods and chattels. The creditor did not register the mortgage. Default was made in February and continued until August without the creditor taking possession of the mortgaged goods. In August the debtor became bankrupt, and the trustee in bankruptcy seized and sold the mortgaged property. The creditor was well aware that the principle debtor was in insolvent circumstances and that his bankruptcy was imminent. By exercising his right to take possession at any time prior to the bankruptcy, he could have obtained priority over the bankrupt's trustee. In an action against the surety it was held, that the creditor by his omission both to register the mortgage and to seize the mortgaged property upon default, had deprived himself of the power to assign the security to the surety, and that, owing to such laches, the surety was discharged to the extent of the value of the mortgaged property. This case was held to be rightly decided by Blackburn, J., in *Polak* v. *Everett* (1876), 1 Q.B.D. 669 at p. 675, 46 L.J. (Q.B.) 218, 24 W.R. 689.

In 15 Hals. p. 506, para. 955, the author says:—

"955. The surety may, after the guaranteed debt has become due, and before he has been asked to pay it, require the creditor to call upon the principal debtor to pay off the debt. The creditor is, however, not bound to sue the principal debtor before suing the surety who, moreover, even where he deposits the amount of the guaranteed debt, cannot compel the creditor to proceed against the principal debtor unless he undertakes to indemnify the creditor for the risk, delay, and expense he thereby incurs, and, apparently, satisfies him that the principal debtor is solvent."

From these authorities it would seem to me that had Mrs. Knox informed the bank officials that Roeder was moving the chattels secured by the mortgage out of the district, and had she paid to them the costs of following the horses and seizing them, or had indemnified the bank against such costs and at the same time shewed that it was fairly certain that the horses

Sask.
C.A.
BANK OF TORONTO v. ROEDER AND KNOX.
McKay, J.A.

could be obtained by sending a bailiff to seize them at Ettington, the bank might not unreasonably, even before the maturity of the note, have been called upon to take the necessary steps to prevent the security being rendered unavailable for her.

It is, however, not necessary in this case to determine that question, for it is neither alleged nor suggested that she made any offer to pay the costs of seizure or to indemnify the bank against the same. Neither does the evidence establish that had the bank acted with reasonable promptitude the horses could have been secured at Ettington. Upon this latter point the evidence is conflicting. The manager of the bank testified that the first notification he had of the removal of the horses was on the morning they were shipped from Ettington, whereas Knox testified that he had informed the manager the preceding day. The trial Judge made no finding as to which of those statements was correct. The onus was upon Mrs. Knox to establish negligence on the part of the bank releasing her from liability, and, in my opinion, she has not established it.

The appeal should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff with costs.

McKAY, J.A.:—This is an action on a promissory note signed by the defendants as makers in favour of the appellant for $425. The respondent Knox signed the said note as surety for her co-defendant to the knowledge of the appellant, on the understanding that the defendant Roeder would give a chattel mortgage to the appellant on 10 horses as security for the payment of the said note and another for $159.

The defendant Roeder gave the said chattel mortgage. The above transactions took place at Mazenod in the Registration District of Gravelbourg. The defendant Roeder resided, and the said horses were within the said registration district of Gravelbourg and the said chattel mortgage was duly registered within the said registration district.

The defendant Roeder, left said registration district and moved into the adjoining registration district of Weyburn, and took with him 8 of the said horses.

Knox, the husband and agent of the respondent, at the time defendant Roeder was moving said horses out of the Registration District of Gravelbourg, informed the appellant's manager at Mazenod that the horses were being so moved. This is admitted by appellants' manager, McQueen. But Knox also says he requested McQueen to stop the removal of the said horses, and he said he would do so. McQueen denies this. The

Sask.
C.A.
Bank of Toronto v. Roeder and Knox.
McKay, J.A.

horses were moved out of said Registration District of Gravelbourg before the maturity of the note without the appellants' manager stopping or attempting to stop them. After maturity of the note, the appellants had two of the ten horses seized and sold under the said chattel mortgage. These two horses were found in the Registration District of Gravelbourg, but the costs of realizing on these two horses were more than the proceeds received from the sale thereof, and after making inquiries the appellants' manager came to the conclusion it would be too expensive to hunt up and seize the other horses, and no further action was taken on the said chattel mortgage, and appellant brought this action.

The trial Judge held that:—

"If it were too expensive for the bank to follow the chattels, it can be assumed that it would be too expensive for Knox to follow them. Therefore the plaintiff not having seized the chattels before removal or taken steps to prevent their removal, I find that it failed to perform an active duty which the law and the terms of the contract imposed on it and has thereby inflicted loss on the defendant Knox and she is relieved from payment of the note sued on herein. The action will be dismissed with costs."

The law upon which the trial Judge apparently bases his judgment and which he quotes in the earlier part of his judgment, is as follows:—

"If there is a contract, express or implied, that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has that discharges the surety; but when there is no such contract, and he only has a right to perfect what he has in his hands, which he does not do, that does not release the surety unless he can show that he has received some injury in consequence of the creditor's conduct." *Carter* v. *White*, 25 Ch. D. 666 at p. 670.

There is no evidence to shew whether or not the chattel mortgage was registered in the Weyburn Registration District, although the trial Judge appears to find that it was not; but even if it was so registered, the reasons given for the Judge's judgment would still apply, namely, that appellant should have seized before removal of the horses or taken steps to prevent removal, as it was too expensive to seize after removal.

The appellant did not do anything to deprive itself of the right it acquired nor did it do anything to release the right it had, namely, to seize the horses mortgaged. According to the

Sask.
C.A.
BANK OF TORONTO v. ROEDER AND KNOX.
McKay, J.A.

evidence there is nothing to shew that the appellant could not seize after the horses were removed except that it was considered too expensive. The most therefore that the appellant can be charged with in this case is laches, in that it did not seize before the removal of the horses, and prevent their removal. But laches does not necessarily discharge the surety. If a creditor through his laches impairs or diminishes the security, the surety is entitled to be allowed the amount by which the security is impaired or diminished. This is clearly established by the following cases: *Wulff* v. *Jay*, L.R. 7 Q.B. 756; *Polak* v. *Everett*, 1 Q.B.D. 669;

In *Wulff* v. *Jay*, the security held by the creditor was lost absolutely through the laches of the creditor, the trustee in bankruptcy having seized and sold the property which had been given by the bankrupts as security, and thus cut out the surety entirely. And it was held in this case that the surety was released only to the extent of the injury he suffered by the loss of the security, namely, the value of the property lost, £300, and judgment was given to plaintiff against the surety for the balance of the debt of £7. 10s. the whole debt being £307. 10s. 3.

Polak v. *Everett* was not a question of laches. It was an active interference with the rights of the surety by the creditor, the creditor having released to the debtor some book-debts given as security. Although these book-debts were not to the amount of the debt, it was held the release of the same discharged the surety, not only to the amount of the book-debts, but for the whole debt. But the question of laches of the creditor is discussed, and it is there again laid down that where the surety is entitled to relief on account of laches, he is not totally discharged, but only *pro tanto*.

The question then to consider is, was the non-seizure of the horses before removal such laches on the part of the appellant as to entitle respondent to relief?

To come to a correct conclusion as to this one must carefully consider the evidence bearing on this point.

McQueen admits that in April, 1919, and at other times, Knox, acting for his wife, came to him and said that he wanted him to realise on that security of Roeder's (meaning the chattel mortgage in question). Then there is the evidence of what took place when the horses were being actually removed, where Knox says he told McQueen the day before the horses were shipped from Ettington that Roeder was moving the horses out of the district, and he wanted the mortgage so as to stop the removal of the horses, and McQueen told him, "He (Mc-

Sask.

C.A.

BANK OF TORONTO v. ROEDER AND KNOX.

McKay, J.A.

Queen) would move on the mortgage and have the horses stopped." McQueen denies this, but the trial Judge makes this finding:—

"The defendant Knox learning of this contemplated move on the part of Roeder, requested the bank to take action. The witness Knox (husband of the defendant) said that he had gone to the bank many times when he learned that Roeder was making plans to leave and urged it to take action, and the reply of the manager, James F. McQueen, was that they would attend to it."

I gather from this finding that the trial Judge believed Knox with regard to what he said about asking for the mortgage to stop the removal of the horses, and McQueen said he would move on the mortgage and have the horses stopped.

In 15 Hals. para. 955, p. 506, the author states as follows:—

"955. The surety may, after the guaranteed debt has become due, and before he has been asked to pay it, require the creditor to call upon the principal debtor to pay off the debt. The creditor is, however, not bound to sue the principal debtor before suing the surety who, moreover, even where he deposits the amount of the guaranteed debt, cannot compel the creditor to proceed against the principal debtor unless he undertakes to indemnify the creditor for the risk, delay, and expense he thereby incurs, and, apparently, satisfies him that the principal debtor is solvent."

In view of this statement of the law, while the bare request of the respondent that the appellant should seize the horses, without her indemnifying the appellant, might not create any obligation upon the appellant to seize, yet in the case at Bar, where the appellant promised to do so under the circumstances as found by the trial Judge, in my opinion this was a waiver by the appellant of the right to indemnity etc. from the respondent. It must be remembered that the appellant knew that respondent was anxious to have the chattel mortgage realised, and that Roeder contemplated moving the horses out of the district, and when respondent asked for the mortgage to seize the horses, there might not have been any obligation for appellant to promise to act, yet it did do so. Had it told the respondent it would not act unless indemnified, or even if it simply refused to give up the mortgage, it might not have been guilty of laches. But having promised to move on the mortgage and have the horses stopped, and not attempting to do so, I think it is guilty of such laches as to entitle respondent to relief, as it is now owing to the removal—on appellant's own ac-

mission—too expensive to seize, and the whole security is lost to the surety.

In *Carter* v. *White*, 25 Ch. D. 666, the head note is as follows:—

"A debtor gave his creditor a bill of exchange accepted by himself, but with the drawer's name left blank. The Plaintiff at the same time, as a surety, deposited with the creditor certificates of stock in a joint stock company as collateral security for the debt.

The debtor died without the creditor having filled in the name of the drawer, and his estate was insolvent.

The bill was never presented for payment, nor was notice given to the Plaintiff of its non-payment.

Held, that the creditor had not discharged the Plaintiff from his suretyship by his omission to fill up the drawer's name and to give notice of the non-payment of the bill to the Plaintiff."

Cotton, L.J., in the course of his judgment, at p. 670, says:—

"It is said that if filled up in proper time they might have been presented and payment enforced. That question does not arise here. Noble never required that they should be filled up . . . Here although these acceptances were not perfected, there is no evidence that anything could have been recovered from the debtor if they had been; therefore the surety is not entitled to anything in the nature of damages for being deprived of an advantage which he otherwise would have had. . . . A surety is not discharged merely by the negligence of the creditor. If he had required them to be enforced, and the creditor had refused, the surety *might* have been discharged . . . by the laches of the creditor, for this reason, that the surety may at any time pay off the debt, and sue the debtor in the name of the creditor, or call on him to sue."

This case is distinguishable from the case at Bar in that the respondent here requested that action should be taken on the chattel mortgage and the appellant promised, but did not. The horses were at Ettington, only about 8 miles away, when it was informed before noon of their removal, and they were not moved from there until the next day. But the appellant did not act, until sometime after they were moved from Ettington, and it did not know where they were. The chattel mortgage had a proviso in it that the appellant could seize the horses at any time on removal without the written consent of the appellant.

Further, the evidence of Knox, uncontradicted, shews that the horses could have realised $800 if then seized at time of removal.

And the evidence of appellant's own witness McQueen is to the effect that it would be too expensive to seize after they were moved away, that is, as I understand it, from Ettington.

In my opinion then, owing to the laches of the appellant in failing to seize as it promised to do when the horses were being moved to or were at Ettington, the whole value of the security, which exceeded the debt for which she is surety, has been lost to the surety, and she is discharged to the full amount of the note sued on, and the appeal should be dismissed, with costs to the respondent.

Appeal dismissed.

REX v. U.S. FIDELITY.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and Eberts, JJ.A. January 10, 1922.

TAXES (§VA—180)—SUCCESSION DUTIES — APPOINTMENT OF COMMISSIONER TO ENQUIRE INTO AMOUNT — VALUATION OF EXECUTOR TAKEN — POWER OF COURT TO INTERFERE WITH — SUCCESSION DUTIES ACT, R.S.B.C. 1911, CH. 217, SECS. 23-33.

The Finance Minister being dissatisfied with valuation of property given by the executor for succession duty purposes appointed a Commissioner to enquire into the value. The Commissioner made a valuation somewhat lower than that of the executor. The Auditor-General then fixed the amount of succession duty on the valuation given by the executor without any protest on his part, and the defendant became a surety for the payment of the amount so fixed, under sec. 23 of the Succession Duty Act, R.S.B.C. 1911, ch. 217. In an action upon the bond the Court held that the property had been very greatly over-valued and at the time of the action was practically valueless, but that the only jurisdiction of the Court to interfere with the values as fixed was by the Court of Appeal under sec. 33 of the statute, when there was an appeal from the report of the Commissioner, and in this case there had been none. Held, that the succession duty was payable notwithstanding that neither the deceased nor her executor were the registered owners of the legal estate. The executor being the owner of all the equity and the only person entitled to be registered as owner of the legal estate, and having full control of the property it being unnecessary to decide whether his dealing with the property was in his capacity of executor or devisee. The property had "come into his hands" within the meaning of the bond.

The Court of Appeal adopted the interpretation of the words "coming into his hands" given by Boyd, C., in *Ianson* v. *Clyde* (1900), 3 O.R. 579 at 585, and dismissed the appeal.

APPEAL from the trial judgment (1921), 60 D.L.R. 372, in an action on a bond given to secure the payment to the Crown of succession duty, the defendants being surety for the executor. Affirmed.

H. B. Robertson, for appellant.
S. S. Taylor, K.C., for respondent.

B.C.
C.A.
REX
v.
U. S.
FIDELITY.
Galliher, J.A.

MACDONALD, C.J.A.:—I am in entire agreement with the judgment of Galliher, J.A.

GALLIHER, J.A.:—The second objection taken by Mr. Robertson to the judgment below is that the Judge should have re-valued the assets and cited *Rex* v. *Roach*, [1919] 3 W.W.R. 56.

In the case at Bar the Auditor-General after receiving the affidavits of valuation filed by the executor, Quagliotti, had a Commissioner appointed under the Act, who made his report, and after the receipt of such report which was somewhat lower than the valuation put upon the property by the executor, accepted the executor's valuation and the bond now sued upon was entered into by the defendants with full knowledge of such valuation and acceptance.

Simmons, J., points out, what is, I think, a clear distinction between the *Roach* case and the one at Bar, where he says, at p. 59:—

"The provincial treasurer did not appoint an appraiser under these sections (referring to sections under the Succession Duty Ordinance of N.W.T. 1903, cap. 50) and the parties interested had no recourse where the treasurer did not accept the value of the executor and did not appoint an appraiser other than to defend an action and raise by way of defence, any objection."

This contention fails.

On the third ground raised by Mr. Robertson—Mr. Taylor for the Crown at once assented to the judgment below being amended so as to subrogate the defendants to the rights of the Crown without the limitation put upon it in said judgment.

Mr. Robertson's substantial point is:—

"Duty is payable only by an executor on property which comes into his hands as executor, and as no property came into his hands as such executor, no duty became payable from him and hence none under the bond sued on."

Quagliotti was both devisee under the will and executor named therein and probated the will.

Under our law in British Columbia, real estate did not at the time of Mrs. Quagliotti's death, devolve upon the executor but he was made liable for the payment of debts and the Succession Duty Act gives the executor power to sell the lands of his testator to pay duties. We have to look at the bond sued on and interpret the conditions of that bond—keeping in mind our statute, R.S.B.C. 1911, ch. 217. The conditions are as follows:—

"The condition of this obligation is such that if Lorenza Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti, late of the City of Victoria, in the Province of British Columbia, deceased, who died on or about the 20th day of May, 1913, do well and truly pay or cause to be paid to the Minister of Finance of the Province of British Columbia for the time being, representing His Majesty the King in that behalf, any and all duty to which the property, estate and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenza Joseph Quagliotti may be found liable under the provisions of the "Succession Duty Act" within two years from the date of the death of the said Petronilla Quagliotti, or such further time as may be given for payment thereof under the provisions of said Act, or such further time as he may be entitled to otherwise by law for the payment thereof, then this obligation should be void and of no effect, otherwise the same to remain in full force and virtue."

In the beginning of the condition, Lorenzo Joseph Quagliotti is described as executor but later on the condition is that the payment is to be of all duty to which the property estate and effects of Petronilla Quagliotti, (of which Joseph Quagliotti was devisee under the will) coming into the hands of the said Lorenzo Joseph Quagliotti may be found liable under the Succession Duty Act, etc.

Mr. Robertson wishes us to read that as if the words "as such executor" had been inserted between the words "Quagliotti" and "may be found."

I think both under our statute and the condition in the bond, that is the true interpretation, and it remains only to determine what meaning shall be given to the words "coming into the hands."

We received no assistance from counsel on either side in the way of authorities on this point, but I have after considerable research, found an interpretation of these words in the case of *Ianson* v. *Clyde et al.* (1900), 3 O.R. 579, heard on appeal in the Divisional Court composed of Boyd, C. and Robertson, J. The features of that case which are necessary to notice on the point in question here are as follows:—

By R.S.O. 1887, ch. 108, sec. 4, (the Devolution of Estates Act) real estate devolves upon the legal, personal representatives. By 1891, ch. 18, sec. 1, (1) real estate not disposed of by the executors within 12 months after the death shall then be deemed to be vested in the devisee or heirs beneficially entitled

Alta.
App. Div.
REX v. MOORE.

thereto without any conveyance by the executors unless a caution is registered during the year.

No caution was registered during the year, consequently the real property became vested in the beneficiaries under the will, but by the Act of 1893, ch. 20, sec. 1 provision is made for registering a caution after the expiry of the 12 months and such caution was registered and in dealing with the effect of such registration, Boyd, C., at pp. 585, 586, says:—

"The effect of this legislation acted upon by registering a caution under the sanction of the county Judge appears to place the lands again under the power of the executors, so that they can sell them to satisfy debts. The county court judgment is against the property of the deceased in the hands of the executors, and though this property was not in their hands at the date of the judgment, it became so practically when the caution was subsequently registered. 'In the hands' is of course a metaphorical expression, and it is satisfied if the land is under their control or saleable at their instance: (*In re Martin* (1895),26 O.R. 465)."

Giving then full effect to Mr. Robertson's contention as to the interpretation to be placed upon the condition in the bond, I hold that the lands were under the control or saleable at the instance of the executor for the purposes of paying succession duty and adopt the interpretation placed upon the words "coming into his hands" given by Boyd, C.

In this view the appeal must be dismissed, with the variation aforesaid, which will not affect the costs, which should follow the event.

EBERTS, J.A., would dismiss the appeal. *Appeal dismissed.*

REX v. MOORE.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 18, 1922.

INTOXICATING LIQUORS (§ IIIH—90)—SEARCH WARRANT UNDER SEC. 79 OF THE ALBERTA LIQUOR ACT — SUFFICIENCY OF INFORMATION ON WHICH MAGISTRATE MAY ISSUE—JUDICIAL DISCRETION—BELIEF OF OFFICER TAKING OATH INSUFFICIENT.

A magistrate before issuing a search warrant under sec. 79 of the Alberta Liquor Act, added to the 1916 Act by sec. 15 of ch. 22 of 1917, is bound to exercise a judicial discretion, and to enable him to do so he must be informed by an officer under oath of such facts and circumstances as will enable him to form his own opinion that there is reasonable ground for belief that liquor is being kept for sale and the mere statement under oath of the officer's belief is insufficient.

[*Reg.* v. *Walker* (1887), 13 O.R. 83; *R.* v. *Kehr* (1906), 11 Can. Cr. Cas. 52; *R.* v. *Bender* (1916), 30 D.L.R. 520, 36 O.L.R. 378, 26 Can. Cr. Cas. 393; *R.* v. *Frain* (1915), 24 Can. Cr. Cas. 389, referred to.]

MOTION by defendant by way of certiorari to quash a conviction for unlawfully keeping liquor for sale, and the concurrent order for forfeiture of 76 barrels of bottles of beer. Order for forfeiture quashed.

A. McL. Sinclair, K.C., for appellant.

J. W. McDonald, K.C., for the Crown.

SCOTT, C.J., and STUART, J.A., concur with BECK, J.A.

BECK, J.A.:—It is impossible on the evidence to quash the conviction; but the question of the validity of the order of forfeiture calls for consideration.

An "information to obtain a search warrant" was laid by A. S. Hale, a constable of the Alberta Provincial Police, reading:—

"Who says that liquor is being kept for sale in contravention of the Liquor Act, 1916, and that the said liquor is, and that he has just and reasonable cause to believe and suspect and suspects that the said liquor or some part of it is concealed in the warehouse of Sam Moore of Coleman, Alberta, from reliable information received."

The search warrant signed by the Magistrate, based wholly, as far as it appears or can be inferred, upon this information, reads as follows:—

"Whereas it appears upon the oath of A. S. Hale, constable, &c., that there is reason to believe and suspect that liquor is being kept &c."

The statutory provision authorising the issue of a search warrant is sec. 79 added to the Liquor Act 1916, (Alta.) ch. 4, by sec. 15 of ch. 22 of 1917, which reads:—

"A Magistrate, if satisfied *by information on the oath* of an officer that there is reasonable ground for belief that liquor is being kept for sale &c. may, *in his discretion* grant a warrant &c."

Clearly what the statute requires is not merely that the constable is to have information which justifies *him* in making oath that *he* has information by reason of which *he* has reasonable ground for belief, but that the magistrate himself should be satisfied by information on the oath of an officer that there is (in fact and in truth) reasonable ground for belief upon which the Magistrate, *in his discretion* may grant a warrant, &c.

The general provision of the Criminal Code R.S.C. 1906, ch. 146 regarding search warrants is sec. 629. That section says that "any justice who is satisfied by information upon oath in form 1 that there is reasonable ground for believing etc."

Alta.
App. Div.
REX v. MOORE.
Hyndman, J.A.

Form 1 requires "the grounds of belief, whatever they may be" to be set out.

That is the general rule.

There are exceptions under the Code because of the wording of the particular section, for instance:—

Section 610, search for weapons:—upon oath before him of belief of the deponent. Sec. 637, search for precious metals:—On complaint in writing. Sec. 640, search for woman in house of ill fame:—Upon complaint thereof under oath by the parent &c. Sec. 641, search in disorderly house:—Constable's report in writing.

Even to justify a magistrate in issuing a warrant of arrest instead of summons for the purpose of a preliminary hearing or a summary hearing an information under oath on mere information and belief without disclosing the grounds for the belief is insufficient. See cases cited Tremeear's Crim. Code. sec. 711.

A search warrant under sec. 79 of the Liquor Act, is the foundation for an adjudication of forfeiture and the conditions precedent to its issue must, therefore, be strictly fulfilled. It is by that process that the goods, which thus become the subject of a proceeding *in rem,* come under the jurisdiction of the Court. See *R.* v. *Walker* (1887), 13 O.R. 83; *R.* v. *Kehr* (1906), 11 Can. Cr. Cas. 52; *R.* v. *Bender* (1916), 30 D.L.R. 520, 36 O.L.R. 378, 26 Can. Cr. Cas. 393; *R.* v. *Frain* (1915), 24 Can. Cr. Cas. 389; in all of which cases a search warrant was quashed.

I hold then that a magistrate before issuing a search warrant under sec. 79 of the Liquor Act is bound to exercise a judicial discretion and that, to enable him to do so, he must be informed by an officer under oath of such facts and circumstances as will enable the magistrate to form his own opinion that there is reasonable ground for belief that liquor is being kept for sale and that the mere statement under oath of the officer's belief is insufficient.

I would, therefore, while affirming the conviction, quash the search warrant and, because it is the foundation for the order of forfeiture, I would quash the order of forfeiture also.

I would give no costs.

HYNDMAN, J.A.:—I concur with what my brother Beck has said with regard to the necessity for something further from the constable in the information for the search warrant than a bare unqualified statement that he has just and reasonable cause

to believe and suspect and believes and suspects that liquor is being concealed in the accused's premises.

Whilst no doubt in most cases the constable may honestly believe what he says, nevertheless the door remains open for an unscrupulous or revengeful person to unjustly embarrass the object of his revenge or dislike. That aspect of the matter induces me to think that what the Legislature had in mind was to provide a safeguard against such injustice by requiring that definite facts or circumstances exist to induce the suspicion or belief in the mind of the constable, which facts must be communicated to the magistrate on oath (either in writing or by way of deposition). Upon which the Magistrate may exercise a judicial and not a capricious discretion. Discretion in the Act must mean judicial discretion and I am at a loss to see upon what ground he can exercise proper discretion without some specific facts to guide him. Otherwise it seems to me he is nothing more than an automaton in the hands of the constable, which was surely not intended he should be.

I would, therefore, whilst upholding the conviction, quash the order of forfeiture.

CLARKE, J.A., concurs with BECK, J.A.

Order for forfeiture quashed.

SCHON v. NEW YORK LIFE INSURANCE Co.

Nova Scotia Supreme Court, Russell, J., Ritchie, E.J., Chisholm and Mellish JJ. February 18, 1922.

CURRENCY (§ I—1)—POLICY OF INSURANCE MADE IN NEW YORK AND PAYABLE IN NEW YORK—ASSURED DOMICILED IN NOVA SCOTIA—PAYMENT OF EXCHANGE BY COMPANY.

A policy of insurance made in New York and payable in New York must be paid in legal tender of Canada to an amount equivalent to the amount of the policy calculated in New York legal tender at the date of its maturity although the assured is domiciled in Nova Scotia. Chapter 15, 1903 Nova Scotia Stats. does not affect this construction.

[See *Barthelmes v. Bickell*, 63 D.L.R. 203.]

APPEAL from the judgment of Harris, C.J., in favour of plaintiff in an action on two policies of life insurance held by the late William Schon in defendant company under both of which policies the defendant agreed to pay the amount insured to the executors, administrators or assigns of the insured at its office in the city of New York. The question was whether the policies were to be paid in United States or in Canadian funds, and as to the effect of the Life Insurance Act 1903, ch. 15, sec. 4, of the Province of Nova Scotia providing that such contracts were to be construed according to the laws of Nova

N.S.
S.C.
SCHON
v.
NEW YORK
LIFE INS. CO.
Russell, J.

Scotia and that all moneys payable under the contract were to be paid in Nova Scotia at the office of the company or its chief officer or agent in lawful money of Canada. The Chief Justice held in the judgment appealed from that plaintiffs were entitled to be paid in the currency of the United States and that the fact that the premiums were paid in Canadian currency at the office of the company in Halifax did not affect the question. Affirmed.

S. Jenks, K.C., for appellant.

J. McG. Stewart, for respondents.

RUSSELL, J.:—This is an appeal from the decision of Harris, C.J., to the effect that a policy of insurance made in New York and payable in New York must be paid in legal tender of Canada to an amount equivalent to the amount of the policy calculated in New York legal tender at the date of its maturity; in other words, that the exchange must be paid by the defendant company. This would be the obviously proper construction of the policy under settled principles governing the conflict of laws if we had no statute of the Province making a different provision, Mr. Jenks, K.C., has presented a very able and ingenious factum arguing that the Nova Scotia statute 1903, ch. 15, has displaced the rule otherwise applicable to such a contract by enacting that where the assured is a person domiciled in the Province and the policy has been delivered over to the assured in the Province it shall be deemed to evidence a contract made in Nova Scotia and the contract shall be construed according to the law of Nova Scotia and all moneys payable under the contract shall be paid in Nova Scotia at the office of the insurer or its chief officer or agent in lawful money of Canada.

Reading this statute literally and applying its terms to the case before us it certainly does seem to say that the word "dollar" as used in the policy means a Canadian dollar and not a New York dollar. If the policy is to evidence a contract made in Nova Scotia, and to be construed according to the law of Nova Scotia, then, in their literal application, these words can have no other meaning than the one contended for. But this consequence follows simply because of the accident that the same terms are used in describing the currency of Nova Scotia and that of New York. It does happen also that the New York dollar contains the same amount of gold as the Canadian dollar, or at least is of the same intrinsic value.

Do these accidental circumstances oblige us to give the statute the literal construction contended for in the defendant's brief? The question is not to my mind a simple one and I ex-

perience some difficulty in formulating a satisfactory answer to the arguments presented in the brief. Nevertheless I am not convinced of their soundness. If the dollars of the United States legal tender currency had been called by some other name than dollars no such question as the present could have arisen under the statute. Had the American dollar consisted of two hundred American cents or of only fifty American cents it would not, I think, have been contended that because of this statute the beneficiary should receive in the one case only half as much as he would have received in the absence of the statute or in the other case twice as much. Furthermore, I think that there cannot have been an intention on the part of the Legislature to make a different principle apply to the case of a policy expressed in dollars from that which would apply to one expressed in pounds, shillings and pence, or in guilders or marks or kronen. In any of the cases last suggested the amount of the policy would have been paid in Canadian legal tender of value equivalent to the amount named in the policy in legal tender of the country in which the policy had been issued.

To repeat perhaps *ad nauseam* what has been already said, if the American dollar had been called an eagle no such question as the one we are now considering could have arisen. Is it not the same thing to say that when we read in this policy the word "dollar" we must, placing ourselves in the position of the parties, be understood to be saying American dollar? But the statute says we must construe this policy according to the law of Nova Scotia. Very well, there is nothing in the law of Nova Scotia to prevent the parties from contracting to pay the amount in American dollars. But what must we say of the further provision that the policy is to be deemed to evidence a contract made in Nova Scotia with the consequence that seems as already said to logically follow. I can only say as to this, as already conceded, that the consequence does seem to follow from a literal reading of the terms of the statute. But this is one of the cases in which "the letter killeth." The literal construction must be rejected because of the inconsistencies and absurdities in which it must result.

One of these absurdities I have not yet alluded to. It will be observed that the statute applies not only where the assured is domiciled here at the time the policy is issued, but also where he is domiciled here at the maturity of the policy. It follows, if the contention of the defendant is sound, that a policy issued in New York is payable in New York dollars if the assured is

Alta.
App. Div.

domiciled there at its maturity but in Canadian dollars if the domicile is changed to this Province.

Because of the foregoing reasons I am of opinion that the appeal should be dismissed with costs.

RITCHIE, E.J.:—I construe the policy, having regard to the statute and am of opinion that the contract was to pay one thousand dollars in the currency of the United States of America and that these dollars are payable in Canadian currency.

I would therefore dismiss the appeal with costs.

CHISHOLM, J.:—I am of opinion that this appeal should be dismissed with costs, and that the plaintiffs are entitled to recover for the reasons stated in the decision of the trial Judge. Mellish, J., I agree.

Appeal dismissed.

ZORNES v. THE KING.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 16, 1922.

CROWN (§II—20)—LIABILITY FOR TORTS—COMMON LAW RULE—PUBLIC UTILITIES ACT, ALBERTA STATS. 1915, CH. 6, SEC. 31 (2)—LIABILITY UNDER—LOOSE WIRE ON GOVERNMENT TELEPHONE SYSTEM—INJURY TO TRAVELLER—LIABILITY.

Section 31 of the Public Utilities Act of Alberta (Alta. Stats. 1915, ch. 6) expressly changes the common law rule that the Crown is not liable for a tort and makes it liable for damages to a traveller on the highway, caused by coming in contact with a loose wire on a Government telephone system.

APPEAL from the judgment of Ives, J.A., who dismissed the applicant's claim on the ground that the Crown is not liable for an action on tort. Reversed and new trial ordered.

J. A. Clarke, and *R. S. Wallace,* for appellant.

R. A. Smith, for respondent.

SCOTT, C.J., concurs with STUART, J.A.

STUART, J.A.:—This is an appeal by the plaintiff from a judgment at the trial dismissing his action upon the "sole ground that the King cannot be sued for a tort."

There was no evidence taken at the trial. A fiat had been granted by the Attorney-General under the Petition of Right Act 1906, (Alta.) ch. 20, but when the case came on for trial the objection raised by counsel for the Crown that no action could lie for a tort was sustained and the action was dismissed with costs.

The suppliant in his petition alleged that on the night of June 20, 1921, he was driving along a public highway along which His Majesty through the Minister of the Department of

Alta.
App. Div.
ZORNES
v.
THE KING
Stuart, J.A.

Railways and Telephones of the Province owned and operated a telephone line subject to the provisions of the Public Utilities Act 1915, (Alta.) ch. 6, and that he was injured by reason of his automobile becoming entangled in a loose wire which the said department, its officers, servants, &c., had negligently, carelessly and illegally allowed to lie upon the said highway.

In my opinion the general proposition laid down by the trial Judge cannot now be successfully controverted. It may be that the Courts originally narrowed unjustly the grounds upon which relief could be obtained against the Crown by petition of right. But even so it is certainly quite too late for us to attempt by mere judicial decision and aside from statute, and perhaps aside from very different conditions existing in the Province, to widen them. The whole history of the subject is fully detailed in the article on Petition of Rights in the Encylopaedia of the Laws of England, vol. 11 p. 96 and in *Tobin* v. *The Queen* (1864), 16 C.B. (N.S.) 310, 33 L.J. (C.P.) 199, 12 W.R. 838. In this latter case it is said at pp. 359 and 360:

"Throughout these enactments no mention is made of a remedy against the King for compensation in damages. Against him the redress to be obtained is restitution only. If damages are sought they are to be obtained if at all from the officer who did the wrong. Where the question raised by a demurrer to a petition of right was whether the Crown was responsible for negligence in servants, employed under the Crown, whereby damage was caused, Lord Lyndhurst decided in the negative: *Viscount Canterbury* v. *The Attorney General*, 1 Phillips 321. His words are: 'For the personal negligence of the Sovereign neither this or any other proceedings can be maintained. Upon what ground then can it be supported for the acts of the agent or servants? If the master or employer is answerable upon the principle *qui facit per alium facit per se*, this would not apply to the Sovereign who cannot be required to answer for his own personal acts.' If the master is responsible by reason of his negligence in retaining a careless servant this principle does not apply to the Sovereign to whom negligence cannot be imputed."

And there are of course numerous other and more recent cases both in England and in Canada to which particular reference need not be made, where this rule has been recognised and it is undoubtedly now absolutely settled as law.

But this is all quite aside from the effect of our local legislation and with this it is necessary to deal.

We have here a statute passed in 1906 ch. 20 entitled the Al-

Alta.
App. Div.
ZORNES v. THE KING
Stuart, J.A.

berta Petition of Right Act. In this Act there is no section explicitly enumerating the cases in which the subject can sue the Crown. We were referred to three cases in The Judicial Committee, viz., *The Queen* v. *Williams* (1884), 9 App. Cas. 418, 53 L.J. (P.C.) 64; *Farnell* v. *Bowman* (1887), 12 App. Cas. 643, 56 L.J. (P.C.) 72, and *Att'y-Gen'l of the Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192, 57 L.J. (P.C.) 62, in which statutes in New South Wales, New Zealand and the Straits Settlements had to be interpreted. But in each of these statutes there was a clause affirmatively and specifically enacting that in certain cases the subject could bring an action by petition of right against the Crown. For this reason they are not of very great assistance because our statute of 1906 contains no parallel clause.

What we have is first, a clause in the interpretation section, (sec. 2, sub-sec. (c)) which reads as follows:—

"(c) The expression 'Relief' shall comprehend every species of relief claimed or prayed for in any petition of right whether a restitution of any incorporeal right or a return of lands or chattels or a payment of money or damages or otherwise."

Then the rest of the statute ostensibly relates solely to procedure, that is, there is no clause giving in so many words a right to the subject to sue the Crown as in the cases in the Judicial Committee. But it is necessary to ascertain in what sections of the Act the word "relief" as above interpreted is used.

Section 3 enacts that the petition of right shall be in a certain form and "shall set forth with convenient certainty the facts entitling the suppliant to relief." Then after a number of sections relating solely to procedure sec. 15 says, "Upon every such petition of right the judgment of the Court x x x shall be that the suppliant is or is not entitled either to the whole or to some portion of the relief sought by his petition or such other relief as the Court thinks right and such Court may give a judgment that the suppliant is entitled to such relief and upon such terms and conditions (if any) as such Court thinks just."

This section, which also is mere procedure, is a re-enactment almost *ipsissimis verbis* of sec. 9 ch. 34 of the English Petition of Right Act of 1860. The word "relief" only occurs once more in the Act, viz., in sec. 19, which provides that where the judgment declares that the suppliant is entitled to relief a certificate may be given by the Judge to the Provincial Treasurer setting forth the judgment.

Reference should also be made to sec. 14 of the Act which says "Any issue of fact or assessment of damages to be tried or had under this Act shall be tried or had by a Judge without a jury."

Now it is so contended on the one hand by the Crown that this statute has not the effect of extending the cases in which relief may be obtained by petition of right against the Crown so as to include a case of tort and on the other hand by the plaintiff that the statute has such effect.

In considering this question it is first to be observed that the definition of the word "relief" given in the statute is taken practically word for word from the section 16 of the English Act. The reason however why no similar problem has arisen in England is this, that sec. 7 of the English Act which makes the general rules of procedure apply to proceedings by petition of right so far as the same are really applicable and which in this respect corresponds to sec. 11 of our Act concludes with these words "Provided always that nothing in this Statute shall be construed to give to the Subject any Remedy against the Crown in any Case in which he would not have been entitled to such remedy before the passing of this Act."

These words were referred to in *Tobin* v. *The Queen*, *supra*, as having the effect of confining the remedy to those cases where it had already existed at common law. But the words were omitted from the corresponding section of our Act a circumstance to which some importance perhaps should be attached especially when it seems clear that much of the phraseology of the English Act is adopted. At any rate it is clear that we are called upon to decide upon the effect of the interpretation clause in a way in which the English Courts never needed to do.

Now it is true that damages may be obtained upon a breach of contract as well as upon a tort, and it can therefore easily be contended that the use of that word does not necessarily extend the right to relief to a claim of the latter nature. But on the other hand it is to be observed that the section says that the word "relief" "shall comprehend *every species of relief* claimed or prayed for in any petition of right." Does this mean merely every species of relief which, as the law stood before the Act, could properly be claimed against the Crown by a petition of right, or does it not rather mean every species of relief that the suppliant may hereafter see fit to claim in his petition leaving the actual liability to be determined as in a case between subject and subject?

After some hesitation I am rather inclined to the former

Alta.
App. Div.
ZORNES v. THE KING
Stuart, J.A.

opinion I cannot find any reason which will overcome the force of the circumstance that the Act is on its face an Act dealing with procedure only. As I have stated there is no clause, as there was in the cases in the Judicial Committee, positively giving a right to sue the Crown. We have no such clause to interpret; We have merely an interpretation clause to interpret. And I do not think that the liability of the Crown at common law ought to be extended by such a slender implication. We were referred to a passage in the judgment in *Attorney-General of the Straits Settlements* v. *Weymss*, 13 App. Cas. 192, at p. 197, which reads as follows:—

"In the case of *Farnell* v. *Bowman* attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which in England are usually performed by private persons and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a Colony in such circumstances allows claims against the Crown in words applicable to claims upon torts it should mean exactly what it expresses."

This passage would be of much weight, no doubt if we had a positive clause in our Act directly giving a right to relief in some such words as are contained in the interpretation clause. But as the matter stands I do not think it is of any assistance to the plaintiff.

Indeed the passage may properly I think be used as the basis for an opposite conclusion because in the case of the very public work now in question the matter of injuries caused in the course of its operation is dealt with by a special statute, viz. the Public Utilities Act to which it will be necessary to refer.

I think therefore that aside from this special statute, and aside from the circumstance that the Crown has in this Province gone into a business heretofore the subject of merely private enterprise, there is no right in the subject in this Province to sue the Crown on the right of the Province for damages arising out of a tort committed by a servant of the Crown at least so far as anything contained in the Alberta Petition of Right Act is concerned. And there apparently is no other statute dealing with the matter.

But it was further contended by the plaintiff that he has a right to sue the Crown in the circumstances alleged in this case by virtue of the provisions of the Public Utilities Act.

Section 2 (the interpretation clause) of that Act enacts that

"in this Act unless the context otherwise requires . . . (b) the expression 'public utility' means and includes every corporation . . . and every firm, that now or hereafter own, operate, manage or control any system, works, plant or equipment for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway . . . *also the Alberta Government Telephones now managed and operated by the Department of Railways and Telephones.*"

Now, first, it is to be observed that by sec. 7 sub-sec. 7 of the Interpretation Act (ch. 3 of 1906) it is enacted that "in every Act unless the context otherwise requires .. .. .. the expression "Alberta Government" means His Majesty the King acting for the Province." So that obviously the above clause in the Public Utilities Act must be read as if it said, "Also His Majesty's telephones in Alberta now managed and operated by the Department of Railways and Telephones."

Section 31 of the Public Utilities Act sub-sec. 1, reads in part as follows:—

"In the case of a public utility which has for its object the construction working or maintaining of telegraph, telephone or transmission lines or the delivery or sale of water, gas, heat, light, or power the following conditions shall be fulfilled over and above those which may be prescribed by the board, that is to say:—

(a) The public utility shall not interfere with the public right of travel or in any way obstruct the entrance to any door or gateway or free access to any building."

And subsection 2 enacts:—

"The public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works."

Now the effect of all these enactments obviously is simply reduced, for the purpose of this case, to this, that the Legislature has enacted that His Majesty the King's telephones now managed and operated by the Department of Railways and Telephones shall not interfere with the public right of travel and shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works.

The simple question therefore is plainly this whether owing to the peculiar wording of these clauses whereby legal responsibility is apparently placed not in exact words upon the King but upon the King's telephones managed by a department of the King's executive Government we must hold that there was

Alta.
App. Div.
ZORNES v. THE KING
Stuart, J.A.

no intention to create any liability in the Crown for tort. I think such a contention needs merely to be stated to shew its absurdity. The Legislature must be held to have known well enough that, aside perhaps from actions *in rem* in Admiralty, a physical thing such as the material of a telephone system could not be made "responsible" for damages. I think we ought to assume that the Legislature meant to say something sensible with respect to the responsibility of that particular "public utility" which consists of His Majesty the King's system of public telephones. Undoubtedly it was creating or intending to create a real legal liability. It was not intending to say for example that the wind should be "responsible." We are bound, if at all possible, to give an interpretation to the Act which will make it intelligible and sensible. And the only possible interpretation for that purpose is to infer an intention that His Majesty in the right of the Province should as the operator of the Government telephone system be liable for any unnecessary damage done by his servants and agents operating that system for him, that is, acting within the scope of their employment.

Moreover, there is another somewhat different point of view which I think ought to lead us to the same conclusion. In a strict sense there never was and is not now of course, a liability in the Crown, in the sense that a writ of execution could issue against the Crown. The origin of the procedure by petition of right was this, that all kinds of petitions were presented to the King. Some were referred to Parliament and dealt with by legislation and this was the way many old statutes originated. We still see a relic of this in the procedure by petition in the case of private bills. Other petitions complaining of some injustice to the suppliant were referred through the Chancellor to the justices by means of the fiat "let right be done." But substantially all that the justices ever could do was to declare that the Crown ought in good conscience and on account of the infallible justice of the Crown to remedy the wrong complained of. And the Crown acted on that opinion not owing to the exigency of any writ but because the petition was a petition of *right,* and the prayer of it was granted upon the decision of the justices *ex debito justitiae* in accordance with the promise of Magna Charta "*nulli vendemus, nulli negabimus aut differemus justitiam vel rectum.*" In submission to the opinion of his justices the King paid the money claimed out of his treasury or restored the property wrongfully taken. But through the course of decision finally laid down in *Tobin*

v. *The Queen*, 16 C.B. (N.S.) 310 and thereafter accepted by the Courts as the rule of law to be applied it was held that the King should not be considered as in justice liable for the torts of his servants. But in my opinion that rule ought not to be applied and the case is quite distinguishable where we have such a statute as the Public Utilities Act. Quite aside from the mere interpretation of the Act it seems to me that it presents a case in which the Court, consisting of His Majesty's justices to whom the petition has been referred with the fiat "let right be done," ought to depart from the old rule and declare that the Crown should, *ex debito justitiae*, pay the damages suffered by the subject by any violation by the Crown's servants of the duties laid down for them by sec. 31 of the Act; in other words it is a case in which under sec. 15 of the Petition of Right Act the judgment should if on a trial the facts are brought within sec. 31, be that the suppliant is entitled to the relief asked for. It is still then for the Crown through the procedure set forth in secs. 19 and 20 to provide for the payment of the damages assessed, if any.

This of course leaves it still open to the Crown after the facts have been ascertained by a trial to argue that they do not fall within the terms of sec. 31. But even then, even if it be held that they do not so fall, I think it ought still to be left open to the suppliant to contend for a still wider departure from the common law rule and to argue, owing to the mere fact that the Crown has gone into the business of operating a public telephone system, a thing never dreamt of when the old rule was established, as to the Crown not being liable for a tort, that even aside from sec. 31 the strict rule is not now applicable. But it is not necessary to definitely decide that point now and it would be preferable to leave it open until the facts are ascertained. *The Queen* v. *McLeod* (1882), 8 Can. S.C.R. 1, seems however to be an authority against such a view.

I would therefore allow the appeal with costs and order a new trial but I think the costs of the first trial should go to the plaintiff in any event on final taxation.

BECK, J.A.:—This is a case of a petition of right. The Alberta Petition of Right Act, 1906, ch. 20, says (sec. 2 c.) that:

"The expression 'relief' shall comprehend every species of relief claimed or prayed for in any petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a *payment of money or damages, or otherwise.*"

This is in effect the same definition of "relief" as is contained in the Dominion Petition of Right Act, R.S.C. 1906, ch.

Alta.

App. Div.

ZORNES v. THE KING

Beck, J.A.

142, and is identical with that in the English Petition of Right Act, 1860.

The ground of complaint is that the suppliant sustained injuries to his person and to his automobile, caused by the servants of the Department of Railways & Telephones *negligently, carelessly* and *unlawfully* allowing the Government telephone line to be in a state of disrepair and by allowing or permitting a loose wire or wires, along or across the traffic portion of a public highway (by which I understand to be meant a wire remaining attached to and forming a part of the telephone system to become partially detached and to hang from some part of the system and to extend on to and over the highway) whereby the suppliant's automobile became entangled in the wire, resulting in the damage aforesaid.

The broad question we have to decide is whether the Crown, representing the Government of Alberta, is in respect of its Government telephone system liable for such negligence as is here charged. In my opinion the Crown is liable.

The case of *The Queen* v. *McFarlane* (1882), 7 Can. S.C.R. 216, and the case of *The Queen* v. *McLeod,* 8 Can. S.C.R. 1, determined that under the Dominion Petition of Right Act a petition of right did not lie against the Crown in respect of negligence of the officers or servants. See the subsequent cases of *City of Quebec* v. *The Queen* (1894), 24 Can. S.C.R. 420; *The Queen v. Filion* (1895), 24 Can. S.C.R. 482; *Letourneux* v. *The King* (1903), 33 Can. S.C.R. 335; *Windsor & Annapolis R. Co.* v. *The Queen* (1886), 11 App. Cas. 607, 55 L.J. (P.C.) 41.

In the *McLeod* case the Court in holding that a petition of right did not lie for negligence of servants of the Crown in connection with the P.E.I. Railway expressed a distinction between a great public undertaking virtually imposed as a duty upon Government and a work undertaken by Government in the nature of a mercantile speculation.

"The establishment of the government railways in the Dominion is, as has been said of the Post Office establishments, and as we thought of the slides in the case of *McFarlane* v. *The Queen,* a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as private mercantile speculations.

As to the Intercolonial Railway, it was in no sense in the nature of a private undertaking, constructed for reasons influencing private promoters of similar works, or in the nature of a mercantile speculation —it was constructed as a great

public undertaking essential to the consolidation of the union of British North America, and in the fulfilment of a duty imposed on the government and parliament of *Canada* by the *British North America Act.*

And so with respect to the P. E. I. Railway now in question. We find from the Journals of the House of Assembly of P. E. I., 1871, the following history of the legislation and reasons for its construction, &c. . . . . .

On Prince Edward Island becoming a part of the Dominion this public undertaking became the property of the Dominion, the management, direction and control of which the legislature has entrusted to the Board of Works, under statutory provisions, for the benefit and advantage of the public; and being thus established for public purposes, it is subordinate to those principles of public policy which prevents the Crown being responsible for the misfeasances, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on these public works, and therefore the maxim *respondeat superior* does not apply in the case of the Crown itself, and the Sovereign is not liable for personal negligence and therefore, the principle *qui facit per alium facit per se,* which is applied to render the master liable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or retaining a careless servant, is not applicable to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if it occurs, in fact the law affords no remedy. . . . . . .

None of the great public works have been undertaken with a view to mercantile gain but for the general public good," per Ritchie, C.J., 8 Can. S.C.R. 1, at pp. 23-26:

The Act respecting Government Telephone and Telegraph Systems, 1908 (Alta.), ch. 14, contains some provisions which, it seems to me, have some bearing upon the question under consideration. Section 1 enacts that the Government of Alberta shall have power to *purchase, lease,* construct, extend, maintain and operate in the province a telephone or telegraph system or systems, and for such purpose the Government shall have power *to enter into any agreement with any person, company or municipality,* providing for connection, intercommunication, *joint-operation, reciprocal use* or transmission of *business* as between any telephone or telegraph system owned or operated by the respective parties,and for such consequent division of receipts, expenditures or *profits* or such payment of compensation, or such other financial or other adjustments

Alta.
App. Div.
ZORNES v. THE KING
Beck, J.A.

between the respective parties as may be necessary or advisable for the purposes of the said agreement. Section 2 gives power to the Government to take lands and property for the purposes of the system, paying compensation to be fixed under the Arbitration Act.

Section 6 validated all agreements theretofore made by the Minister of Public Works for such connection, inter-communication, joint operation, reciprocal use or transmission of business between the telephone system owned or operated by the Government of Alberta and the telephone system owned or operated by any other party or parties, company or companies, municipality or municipalities.

The Railways & Telephone Department Act (ch. 10 of 1911-12 Alta.), established a new department and transferred the powers and duties of the Minister of Public Works to the new department, under a newly constituted minister, the Minister of Railways and Telephones.

The Public Utilities Act, 1915 (Alta.), ch. 6, sec. 2, interprets "public utility" as meaning and including:—

"Every corporation, other than municipal corporations (unless such municipal corporation voluntarily comes under this Act in the manner hereinafter provided), and every firm, persons or association of persons, the *business and operations* whereof are subject to the legislative authority of this province, their lessees, trustees, liquidators, or receivers appointed by any Court that now or hereafter own, operate, manage or control any system, works, plant or equipment for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway or tramway, or for the production, transmission, delivery or furnishing of a water, gas, heat, light or power, either directly or indirectly to or for the public; also, *the Alberta government telephones, now managed and operated by the Department of Railways and Telephones.*"

Section 3 declares that the Act shall apply:—

"To all public utilities as hereinbefore defined, which are now or may hereafter be owned or operated by or under the control of the government of the province."

Then by a variety of provisions the Board of Public Utility Commissioners is empowered to investigate the finances of the public utility for the purpose of fixing or altering tolls and charges on the basis of what is just and reasonable, doubtless the question of a *fair business profit* being largely a governing element.

It seems to me that the Government telephone system is, by the statutory provisions with respect to it, very distinctly and clearly assimilated to an ordinary business corporation established and operated for the purpose of furnishing public service for a profit.

Farnell v. *Bowman* (1887), 12 App. Cas. 643, was a New South Wales case. The Colonial Act provided for the nomination by the Government of a nominal defendant to be sued instead of the Crown. The Act contained this provision:

"In any action or suit under this Act all necessary judgments, decrees and orders may be given and made and shall include every species of relief, whether by way of specific performance or restitution of rights for recovery of lands or chattels, *or payment of money or damages.*"

The correspondence of these italicised words with the concluding words of the clause quoted from our Petition of Right Act is to be noted.

The Board said at pp. 648, 649:—

"Unless the plain words are to be restricted for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatever against the Government." These are the words of one of the sections of the Act. "These words are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants. . . . .

It must be borne in mind that the local Government in the colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'The king can do no wrong' were applied to Colonial Government in the way now contended for by the appellants, it would work much greater hardship than it does in England. . . . . .

Justice requires that the subject should have relief against the Colonial Governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them."

In that case there were two counts in the declaration, one founded on trespass, the other on *negligence*. There was a demurrer to both. The demurrer was overruled.

Alta.
App. Div.
ZORNES v. THE KING
Beck, J.A.

The Att'y-Gen'l of the Straits Settlement v. *Wemyss*, 13 App. Cas. 192, was on a petition of right by the respondent for damages for a trespass brought under an Ordinance—the Crown Suits Ordinance of 1876. The Ordinance contained the following provision (sec. 18, sub-sec. 2):

"Any claim against the Crown founded on the use or occupation, or right to use or occupation, of Crown lands in the Colony, and any claim arising out of the revenue laws, or out of any contract entered into, or which should have or might have been entered into, on behalf of the Crown, by or with the authority of the Government of the Colony, which would, if such claim had arisen between subject and subject, be the ground of an action at law or suit in equity, *and any claim against the Crown for damages or compensation* arising in the Colony, shall be a claim cognisable under this Ordinance."

The Board said at p. 197:—

"Their Lordships are of opinion that the expression 'claim against the Crown for damages or compensation' is an apt expression to include claims arising out of torts, and that as claims arising out of contracts and other classes of claims are expressly mentioned the words ought to receive their full meaning.

In the case of *Farnell* v. *Bowman* attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses."

Having indicated some principles to be applied to the interpretation of what I think to be the statutory provision upon which, it seems, the decision of the point of law involved in the case finally depends, I now quote it.

The Public Utilities Act, sec. 31, enacts:—

"31. In the case of a public utility which has for its object the construction, working or maintaining of telegraph, telephone or transmission lines or the delivery or sale of water, gas, heat, light or power, the following conditions shall be fulfilled over and above those which may be prescribed by the board, that is to say: . . . . . .

(2) *The public utility shall be responsible for all unneces-*

sary damage which it causes in carrying out, maintaining or operating any of its said works."

The facts—that this Government telephone system is that of a Provincial Government for local purposes as contrasted with some great national undertaking of the Dominion Government as a great public work for the consolidation of various parts of the Dominion; that it is so clearly assimilated to a business corporation established, maintained and operated for profit; that the system may be constituted in whole or in part of a system previously the system of a private person or corporation or a municipality, and it is unlikely, therefore, that the legislature intended, in the event of the Government taking over such an existing system, to diminish the liability of that system to the public, or that there should be a different rule of liability applicable to different parts of the system—these facts and circumstances seem to me to have the effect of reversing the presumption with which one should approach the consideration of the question of the proper interpretation of the clause I have just quoted. The whole presumption ought to be against the applicability of the principles arising out of the maxim, "The King can do no wrong," and in favour of the applicability of the principles applicable to profit earning corporations with which the Government system is assimilated.

The Queen v. *Williams* (1884), 9 App. Cas. 418, was a New Zealand case brought against the Crown under the Crown Suits Act, 1881. That Act differs considerably from our Petition of Right Act. The Judicial Committee interpreted the clause relating to relief. The clause read as follows (sec. 37):

"A wrong or damage independent of contract, done or suffered by or under any such authority as aforesaid in, upon or in connection with a public work as hereinafter defined."

The Board, at p. 433, held that *negligence in failing to take reasonable care* was a "wrong done" within the meaning of the foregoing clause.

Section 31 declares that the "public utility," that is, the Crown, shall be responsible for all unnecessary damage, which it causes not only in "carrying out" but also in "maintaining or operating" any of its said works. There is not much room for spending many words over the opinion which I hold that what is charged in the petition is "*unnecessary damage,*" caused in "maintaining or operating" the telephone system. It seems to me that although in the course of the maintaining and operating of the system it can be imagined that the department might require to acquire lands and in doing so cause

Alta.
App. Div.
ZORNES v. THE KING
Hyndman, J.A.

damage, and that such damage would be covered by the words of the subsection, yet the improper, unskilful, negligent or careless method of doing the work of maintaining and operation is what would first present itself to one's mind, and in view of the presumptions which, as I contend, ought to be applied in the interpretation of the section, and to apply the views expressed in the Privy Council, this latter case ought to be taken to have been intended to be included in the subsection.

I have a clear opinion that a case of negligence is covered by the words of sub-sec. 2. This being my opinion, I would allow the appeal with costs and direct a new trial, the costs of the former trial to be costs to the suppliant in any event of the cause.

HYNDMAN, J.A. (dissenting):—This is an appeal from the judgment of Ives, J., who dismissed the applicant's claim on the ground that it arose out of tort and the Crown is not liable in such an action.

Assuming the facts alleged in the petition of right to be true, then it seems to me there can be no other conclusion but that, it is a claim arising out of tort pure and simple, being, as alleged, the result of negligence and carelessness on the part of certain officers, servants, agents or workmen in the employ of the Department of Railways and Telephones, one of the principal departments of the public service.

The facts alleged are that the applicant on the night of Monday the 20th, or early morning of June 21, 1921, was returning to Edmonton from Tofield, Alberta, along the public highway on the south-east side of South Cooking Lake. That the Crown in its right as exercised by the Minister of the said department, owns and operates a telephone line along the said highway at the said place, subject to the provisions of the Public Utilities Act.

At the same time and place the suppliant suffered damage from personal injuries to himself and injury to his automobile caused by said department, its officers, servants, agents or workmen, by reason of its officers, &c., *negligently*, *carelessly* and *illegally* allowing the said telephone line to be in a state of disrepair and by allowing or permitting a loose line or wires, along or across the traffic portion of the said highway, whereby the suppliant's automobile became entangled in the said wire resulting in damage aforesaid. The particulars of the damage are hospital and doctor's fees $500, damage to motor car $300, loss of employment during illness $750 and general damages $10,000—total $11,550.

Alta.
App. Div.
ZORNES v. THE KING.
Hyndman, J.A.

It is clear beyond dispute that the claim arises not out of contract, or out of anything done in any way necessarily dependent on the carrying out of the undertaking or its maintenance or operation, but springs from an accident to a person entirely unconnected with the work of construction, maintenance or operation of the system, as a result of negligence only on the part of some employee.

Leaving out of consideration for the moment the provisions of the Public Utilities Act, it seems to me that under all the authorities both in England and Canada the plaintiff must fail.

In the case of *The Queen* v. *Macfarlane,* 7 Can. S.C.R. 216, Ritchie, C.J., at pp. 238-240, said:—

"As to the first, in contemplation of law the sovereign can do no wrong and is not liable for the consequences of her own personal negligence, so she cannot be made answerable for the tortious acts of her servants. The doctrine of *respondeat superior* has no application to the Crown, it being a rule of the common law that the Crown cannot be prejudiced by the wrongful acts of any of its officers, for as has been said long ago, no laches can be imputed to the sovereign "nor is there any reason that the king should suffer by the negligence of his officers or by their compacts or combinations with the adverse party. . . .

And while it has been determined in the United States that the maxim that the King can do no wrong has no place in the system of constitutional law as applicable either to the government or to any of its officers, it has been held that the restriction of the jurisdiction of the Court of Claims to cases of contract express or implied has reference to the well understood distinction between cases arising *ex contractu* and *ex delicto,* and is founded on the sound principle that while Congress was willing to subject the government to suits on valid contracts which would only be valid when made by some one vested with the authority which raised an implied contract, it did not intend to make the government liable for the wrongful and unauthorised acts of its officers, however high their place, and though done under a mistaken zeal for the public good. It is unnecessary to cite authorities to show a petition of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty, inasmuch as a petition will not lie for a claim founded upon a tort on the ground that the Crown can do no wrong. The cases of *Tobin* v. *Reg.,* 16 C.B. (N.S.) 310, and *Feather* v. *Reg.,* 6 B. & S. 257, *Viscount Canterbury* v. *Attorney General,* 1 Phill. 306 sufficiently establish this if authority was needed."

Strong, J., at p. 240 said:—

Alta.
App. Div.
ZORNES v. THE KING.
Hyndman, J.A.

"The well known case of *Lord Canterbury* v. *The Queen* (1 Phill. 306) establishes that the Crown is not liable for injuries occasioned by the negligence of its servants or officers and that the rule *respondeat superior* does not apply in respect of wrongful or negligent acts of those engaged in the public service."

And at p. 241 he said:—

"The law is well stated by Mr. Justice Story in the following extract from his Commentaries on the Law of Agency: 'It is plain that the government itself is not responsible for the misfeasances, wrongs, negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties and losses which would be subversive of the public interests, and indeed laches are never imputable to the government.'"

In *Gibbons* v. *U. S.*, 8 Wallace 269, Mr. Justice Miller, in delivering the judgment of the Supreme Court of the U. S. says:—

"But it is not to be disguised that this case is an attempt under the assumption of an implied contract to make the government responsible for the unauthorised acts of its officers, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorised exercise of power by its officers and agents."

In *The Queen* v. *McLeod*, 8 Can. S.C.R. 1 the decision in *The Queen* v. *Macfarlane* was affirmed.

The Alberta Petition of Right Act, 1906 Alta. ch. 20 is practically identical with the Dominion Act 1876 ch. 27, sec. 21 and the English Statute 1860, in the definition of the word "relief" and reads:—

"In the construction of this Act .. .. .. the word 'relief' shall comprehend every species of relief claimed or prayed for in any such petition of right whether a restitution of any incorporeal right, or a return of lands or chattels or a payment of money or damages or otherwise."

With this statute before them the Courts in England and the Supreme Court of Canada have decided that no action will lie against the Crown in respect of damages resulting from a tort, which is the nature of the claim at Bar.

If suppliant can recover at all therefore, it must be by virtue of the Public Utilities Act. Section 2 (b) of that Act

brings the Alberta Government Telephones within the expression "Public Utilities" used in the Act. Section 2 (b) provides that the Act shall apply to such a public utility as the Government Telephones. Section 31 (a) provides that the public utility shall not interfere with the public right of travel or in any way obstruct the entrance of any door or gateway or force access to any building. 31 (b) provides that the public utility shall not permit any wire to be less than 16 feet above such highway or public place or erect more than one line of poles along any highway, and sec. 31 sub-sec. 2 provides *the public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its works.*

It is argued that this latter provision curtails the prerogative of the Crown to the extent of making it responsible for damages of every kind arising, by reason of the undertaking, not only *ex contractu*, express or implied, but also *ex delicto*, i.e. tort.

Apart from the question of the necessity of express words to limit the prerogative my opinion is that the proper interpretation of sec. 3 (b) is that it refers, and is intended to comprise only such damage as may naturally or may reasonably be expected to flow from the exercise of the authority conferred on the utility to construct, maintain and operate its undertaking.

It means, for instance, that in case it is necessary to enter upon or expropriate the land of any person it shall do so with the minimum of damage to that person and should they exceed the reasonable limits the utility shall be responsible for the damages so created, that is, the damage contemplated must be in some way related to the exercise of the statutory powers in the work of construction, maintenance or operation and not the claim for damage suffered by a person in no way connected with it but merely injured as the result of some unauthorised act or negligence of a workman or employee. Without the aid of the statute a private corporation is liable, at common law, for damages caused by negligence (see *Manley* v. *St. Helens Canal* (1858), 2 H. & N. 840, 157 E.R. 346, 27 L.J. (Ex.) 159, 6 W.R. 297) and there would not appear to be any necessity for an enactment to that effect. If it was intended to curtail the prerogative to the extent contended for making the Crown liable for negligence I feel satisfied the legislation would have dealt with it in most express and clear terms.

In Craies' Statute Law at p. 365 it is stated: —

"If a duty is thrown directly upon the Crown by statute

Alta.
App. Div.
ZORNES v. THE KING.
Hyndman, J.A.

there is no way of enforcing the performance of that duty if left unperformed by the Crown. If a subject neglects to perform a statutory duty, there are several ways in which he may be proceeded against, but no proceedings of any kind can be taken against the Crown itself or against any servant of the Crown to compel the performance of the statutory duty devolving on the Crown. For no action of tort can be brought against the Crown upon any statute, in the absence of *express provisions* in consequence of the maxim that the King can do no wrong. This rule had in Canada the curious result that persons injured on State Railways had no remedy until the passing of 44 Vic. c. 25 (Canada)," and cites *The Queen* v. *McLeod*, 8 Can. S.C.R. 1 and *The Queen* v. *McFarlane*, 7 Can. S.C.R. 216.

The Statute 1881 ch. 25 sec. 27 subsec. 3 (Government Railway Act) makes express provision for liability of the Crown in the case of personal injury on the railway and subsec. (c) of sec. 16 ch. 16 (Supreme and Exchequer Courts) (1887) enacts:—

"16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

It is by virtue of these express enactments that the Dominion of Canada is now liable for damages in certain negligence actions. The words are clear and free from ambiguity.

The whole case to my mind must depend on the meaning of the words "unnecessary damage" used in sec. 31 of the Utilities Act.

There is of course no question as to the right to construct, maintain or operate the telephone system and all necessary enabling statutory provisions exist for those purposes.

In *London and Brigton R. Co.* v. *Truman* (1885), 11 App. Cas. 45, at pp. 60, 61, 55 L.J. (Ch.) 354, 34 W.R. 657, Lord Blackburn said:—

"I do not think there can be any doubt that if on the true construction of a statute it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the

intention of the legislature. No doubt when compensation is not given to those interested in the neighboring land, that is, as against them, harsh legislation. But I think the construction of ordinary Railway Acts is now fixed. And whether they should have originally been construed so, or not, I agree with what is said by North, J., (25 Ch. D. 431) 'Now it is clearly settled that the power to take defined lands compulsorily, and to make a line of railway thereon, and to use locomotives upon that line, entitles a company to run locomotives thereon, notwithstanding that in so doing they cause what in the absence of such power would be an actionable nuisance, provided always that they are not guilty of negligence.' "

In my opinion on a proper interpretation of the section unnecessary damage means not damages resulting from negligence for which there is an implied obligation, but damages resulting from the performance of authorised acts, but going beyond what is absolutely necessary for the carrying out of the undertaking.

In the absence of statutory provisions limiting their operations a company might in the exercise of its powers, commit nuisance and damage of various kinds without any redress on the part of the injured public apart altogether from negligence for which latter, as I have said, there is the common law remedy. In *Raffan* v. *Can. West. Natural Gas Co.* (Can.) (1915), 8 W.W.R. 676, Fitzpatrick, C.J., referred to sec. 11 of the Ordinance authorising the company to lay its gas mains, etc., which reads:—

"The company shall locate and construct its gas or water works or electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith communicating and wheresoever situated *so as not to endanger the public health or safety.*"

He said (pp. 677, 678):—

"The intention of the legislature could not have been, in enacting s. 11, to give a remedy which already existed at common law if the company was guilty of negligence. The object of the qualifying section must have been to prevent the company from endangering the public health or safety in carrying out their undertaking."

The clause above referred to is to my mind analogous to sec. 31 in question here and is intended to prevent a company or even the Crown from exercising its powers beyond the point where it is reasonably necessary they should do so. Where an unnecessary act has the effect of creating a nuisance or inflict-

Sask.
C.A.

ing damage on any one then compensation shall be made and this altogether aside from negligence. See also *Midwood* v. *Manchester Corp'n,* [1905] 2 K.B. 597, 74 L.J. (K.B. 884; *Charing Cross* v. *London Hydraulic,* [1913] 3 K.B. 442, 83 L.J. (K.B.) 116.

If I am correct in this interpretation of sec. 31 of the Utilities Act negligence is excluded from its contemplation. Consequently in the absence of legislation curtailing the prerogative of the Crown in this respect there can be no liability herein and the action will not lie.

Reference might also be made to statutes (Eng.) 1845 ch. 20, secs. 6 and 16, 1847, ch. 65, secs. 6 and 17. 6 Hals. p. 21, 31, 32 and generally under the heading Compulsory purchase of land and Compensation.

I would, therefore, dismiss the appeal but without costs.

CLARKE, J.A., concurs with STUART, J.A.

Appeal allowed. New trial ordered.

GNAEDINGER & SONS v. TURTLEFORD GRAIN GROWERS CO-OPERATIVE ASS'N., Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

CONTRACTS (§IIIB—200)—AGRICULTURAL CO-OPERATIVE ASSOCIATIONS—PURCHASE OF GOODS ON CREDIT—ILLEGAL BY STATUTE—AGRICULTURAL CO-OPERATIVE ASSOCIATIONS ACT, R.S.S. 1920, CH. 119—CONSTRUCTION—RETURN OF GOODS PURCHASED—LIABILITY OF PURCHASER.

Persons selling goods to an agricultural co-operative association are presumed to know the law that such an association is expressly forbidden by the Agricultural Co-operative Association Act, R.S.S. 1920, ch. 119, sec. 5, to purchase goods on credit, and that a sale on credit to such an association is invalid and cannot be enforced. Where an order is sent in to a company for goods and nothing is said about credit the presumption is that the goods are to be paid for on delivery, but where the invoice sent to the purchasers expressly agrees to give time for the payment of the goods shipped and the purchasers take possession of the goods and do not pay for them it must be presumed that they took possession on the terms contained in the invoice. The contract for the sale of the goods being invalid, the property in the goods remains in the vendor and the purchaser must return the goods. The purchaser is also liable to the vendor for the purchase price of any part of the goods which have been sold.

[See Annotation, Sale of Goods, 58 D.L.R. 188.]

APPEAL by defendants from the judgment at the trial of an action on a sight draft and in the alternative for goods sold and delivered. Varied.

G. H. Barr, K.C., for appellants.

P. H. Gordon, for respondents.

Sask.

C.A.

GNAEDINGER & SONS v. TURTLEFORD GRAIN GROWERS CO-OPERATIVE ASS'N, LTD.

Haultain, C.J.S.

HAULTAIN, C.J.S.:—There is no doubt, in my opinion, that the contract in question was *ultra vires* of the association, and consequently null and void so far as the association is concerned. I agree with my brother Lamont that the plaintiff is entitled to a return of the goods which are still in the possession of the defendant, but I do not agree that the plaintiffs can recover the price of the goods sold by the association indirectly by way of accounting unless the actual money received for them can be followed.

To hold otherwise would seem to me to nullify the absolute prohibition of the statute.

LAMONT, J.A.:—The facts of this case are not in dispute. The plaintiffs are merchants with their head office at Montreal, while the head office of the defendants is at Turtleford in this Province.

In the fall of 1920, the defendants' general manager ordered a bill of goods, amounting to $295.75, from the plaintiffs. Nothing was said about the goods being supplied on credit. The plaintiffs accepted the order and shipped the goods. The goods arrived, the defendants took them into their possession, but omitted to remit price thereof. Part of the goods they sold, and part they have still in their possession. Not having received the purchase price of above goods, the plaintiffs on April 5, 1920, drew a sight draft on the defendants for the amount. This draft the defendants accepted, but did not pay. The plaintiffs then brought this action, claiming for the amount of the draft, and, in the alternative, for goods sold and delivered; and in the further alternative for goods delivered at the defendants' request which had not been returned or paid for.

The sole defence of the defendants was, that the plaintiffs had no right of action against them because, by sec. 5 of the Agricultural Co-Operative Associations Act, R.S.S. 1920, ch. 119, the defendants were prohibited from purchasing on credit, and that the sale of the goods in question was a sale on credit. The trial Judge gave judgment in favour of the plaintiffs for a return of the goods or payment of their value, and the defendants now appeal.

Two questions are raised in the appeal. The first involves the interpretation to be placed upon sec. 5 above referred to. The second it: Was the sale in question a sale on credit, and, if so, have the plaintiffs any remedy?

Section 5, in part, is as follows:—

"(4) The association shall, except as hereinafter provided, pay for all goods purchased upon delivery:

Provided that any association may purchase upon credit from

Sask.
C.A.
GNAEDINGER & SONS v. TURTLEFORD GRAIN GROWERS CO-OPERATIVE ASS'N, LTD.
Lamont, J.A.

any other agricultural co-operative association or any company, association or society incorporated by any special Act of the Legislature of Saskatchewan having objects wholly or in part similar to the agricultural co-operative associations.

(6) The directors shall not have power to pledge the credit of the association except as aforesaid or for the purchase price or rental of business premises, salaries and incidental expenses, or for moneys borrowed to pay for goods purchased or expenses incurred in connection therewith or the shipment thereof."

The intention of the Legislature as set out in these provisions is, I think, clear. That intention was to prevent the association from buying on credit. Sub-section (4) directs that all goods purchased must be paid for on delivery. That sub-section, in my opinion, is a statutory direction to any association formed under the Act, but the Act does not say that if the association fails to pay on delivery the contract of sale shall be null and void. Failure to comply with sub-sec. (4) does not necessarily, in my opinion, make a contract of sale invalid. Sub-section (6) is the provision relied upon to ensure that purchases will not be made on credit. By that sub-section power to pledge the credit of the association is withheld from the directors, except as therein set out. A purchase such as the one made from the plaintiffs is not included within the exceptions. If, therefore, the directors enter into a contract for the purchase of goods which, by its terms, shew that the goods were to be paid for at some future time and not on delivery, such contract, not being within the powers of the association, is invalid and cannot be enforced as a contract. The firms supplying the association with goods are presumed to know the law, and to know that the directors have no power to pledge the credit of the association, and that if they agree to sell on credit the Courts will not enforce the agreement or entertain an action for the purchase-price. They are bound to satisfy themselves that the proposed dealing is not inconsistent with the Act. Lord Halsbury, in *County of Gloucester Bank* v. *Rudry Merthyr Steam Co.*, [1895] 1 Ch. 633, 64 L.J. (Ch.) 451; *Struthers* v. *McKenzie* (1897), 28 O.R. 381.

The want of authority on part of the directors to enter into a contract for the purchase of goods on behalf of the association is confined, under sub-sec. (6), to contracts which call for the pledging of the credit of the association. Where the contract is, that the goods purchased are to be paid for on delivery, and the association receives the goods but neglects or refuses to remit the price, such neglect or refusal on the part of the association

cannot, in my opinion, convert what was to be a sale for cash into a sale on credit.

We have, therefore, to ascertain whether or not the contract of sale in question in this action was a sale with payment to be made on delivery, or whether the directors, acting through their general manager, undertook to pledge the credit of the association for payment at a future date. So far as the evidence discloses, this was the first purchase made by the defendant association from the plaintiffs. An order was sent in for the goods, nothing being said about credit. The plaintiffs accept the order and ship the goods, and defendants receive them. If nothing more than this had appeared, the sale, in my opinion, would have been a sale on which the purchase-price was payable on delivery. Where goods are ordered and supplied, and nothing has been said as to payment, the law presumes that the parties intended to make payment of the price and the delivery of possession concurrent conditions.

Section 27 of the Sale of Goods Act, R.S.S. 1920, ch. 197, reads as follows:—

"27. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

An "exchange" of the possession of the goods and the price means an exchange in a business sense, having regard to the nature of the contract. (Benjamin on Sales, 6th ed., at p. 683.) It does not, in my opinion, mean that the vendor must have some one on hand who will refuse to permit the purchaser to take possession of the goods unless the cash is then and there paid. That a vendor must do this would appear to have been the opinion of the Court in *Fitzgerald* v. *London Co-operative Ass'n* (1869), 27 U.C.Q.B. 605, where, under a statute similar to ours, it was held that the vendors could not recover the price of goods sold on credit. In giving the judgment of the Court, Morrison, J., at p. 607, said:—

"And the 14th section is a *caveat venditor,* that in dealings like the one in question, before delivery of the goods there must be either prepayment or delivery and payment must be simultaneous: that if the vendor parts with his goods, no matter what the terms upon which they were sold, whether relying on the word of honour of the officers of the association or its trustees, or otherwise, the party has no remedy as for a debt or breach of contract against the association."

Sask.
C.A.
GNAEDINGER & SONS v. TURTLEFORD GRAIN GROWERS CO-OPERATIVE ASS'N, LTD.
Lamont, J.A.

If the Judge there meant that a vendor who supplies goods which the purchasers have agreed to pay for on delivery cannot recover the price if the goods get into the hands of the purchasers without the cash being first paid, then I must say that with great deference, I do not agree, and that for two reasons: (1) because, as pointed out above, the exchange of the goods for the price is an exchange in accordance with the way business is usually carried on, and it is not in the usual course of business for a firm in Montreal supplying goods to a purchaser in this Province to have an agent accompany the goods who will keep one hand on the goods until he receives the price in the other. The usual business procedure is, for the vendor to send the goods and for the purchaser to remit the price upon their receipt: and (2) because a vendor is not bound to contemplate that his purchaser will not fulfil his agreement and remit the price upon delivery of the goods.

To establish that the sale in question was a sale on credit, the defendants rely upon the invoice forwarded by the plaintiffs. That invoice is dated September 10, 1920. It contains a description of the articles shipped, with the price of each. Below the invoice is written the following: "Terms 6% 10 days 1st Nov." Then, just below that is stamped, evidently with a rubber stamp, the following: "3 mos. net or 6% 10 days, 5% 30 days, 2½% 60 days." Although no evidence was given as to the meaning of any of these terms, their meaning is a matter of common knowledge. The written words, "Terms 6% 10 days 1st Nov," mean that the plaintiffs will allow a discount of 6% off the price if paid within 10 days from November 1. The goods evidently had been shipped, and the plaintiffs knew that it would take some time for them to reach Turtleford; that in the ordinary course they should arrive before November 1, and they inserted that date as a date in reference to which the discount would be allowed according to the time of payment. The terms stamped on the invoice mean that the defendants will have three months to pay the invoice price. If they pay in 10 days, a discount of 6% will be allowed them; if in 30 days, 5%, and if in 60 days, 2½%. As the plaintiffs evidently forwarded the invoice when they shipped the goods, and as in the ordinary course of business the defendants would receive the invoice long before the arrival of the goods, I think it is to be presumed that, when the defendants took possession of the goods and did not pay for them, they took possession upon the terms contained in the invoice, which were for payment at a future time. The directors, by accepting an offer to pay at a future time, were

Sask.

C.A.

GNAEDINGER & SONS v. TURTLEFORD GRAIN GROWERS CO-OPERATIVE ASS'N LTD.

Lamont, J.

pledging the credit of the association, which was beyond their power. The transaction was therefore invalid.

From this it follows that this action, in so far as it is based upon the bill of exchange or for goods sold and delivered, cannot be maintained.

It does not follow, however, that, because an action cannot be maintained on the contract for the purchase-price, the defendants are at liberty to keep the goods now in their possession, and the proceeds of the goods of plaintiffs' which they have sold, and at the same time refuse to account therefor.

In Brice on Ultra Vires, 3rd ed., at pp. 640, 641, the author says:—

"Though a corporation cannot be sued, any more than an ordinary citizen, directly upon a transaction which does not bind it, yet if it sets up this defence it must restore to the other party what it has obtained from him................The principle is that a person not directly liable must account for benefits which he has received from an invalid transaction, and pay to the other party the amount or value of the benefits received by him."

And in *Sinclair* v. *Brougham*, [1914] A.C. 398, 83 L.J. (Ch.) 465, Lord Dunedin, at p. 431, says:—

"Now, I think it is clear that all ideas of natural justice are against allowing A to keep the property of B, which has somehow got into A's possession without any intention on the part of B to make a gift to A."

And at p. 436, in referring to an action founded on a *jus in re*, he said:—

"It shews that both an action founded on a *jus in re*, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him."

The case of *Sinclair* v. *Brougham* shews that, though an action for money had and received will not lie to recover money obtained as the consideration of an *ultra vires* borrowing, yet if the money can be identified an action will lie for its return. The goods of the plaintiffs which the defendants have on hand being readily identified, must be returned to the plaintiffs as they are their property.

In the *Brougham* case above referred to, at p. 441, Lord Parker of Waddington said:—

"A company or other statutory association cannot by itself or through an agent be party to an *ultra vires* act. If its directors or agents affecting to act on its behalf borrow money

Can.

Ex. C.

City Safe Deposit & Agency Co. Ltd. v. Central Railway Co. of Canada; Re Armstrong's Claim.

which it has no power to borrow, the money borrowed is in their hands the property of the lender."

The contract for the sale of the goods to the defendants being invalid, the property in the goods is still in the plaintiffs. The judgment below, in so far as it directed these goods to be returned to the plaintiffs, should be affirmed.

A small quantity of the goods, however, was sold, and the purchase-price therefor received by the defendants. Are the plaintiffs entitled to recover the money thus received? In my opinion they are. This money was not received as the consideration of the *ultra vires* contract; the contracts under which it was received were contracts by which various purchasers agreed to buy from the defendants the various articles and pay the price therefor. The defendants had authority to make sales of goods to these purchasers, and, although the goods sold did not belong to them, the defendants cannot set up that such contracts were *ultra vires*. The plaintiffs having placed the goods in the hands of the defendants would probably, as against the purchasers, be estopped from claiming title to them, but the defendants, having received the purchase-price, must account for it to the plaintiffs.

In my opinion, there should be a reference to the Clerk of the Court on this branch of the case, to ascertain what amounts the defendants received from the sale of the plaintiffs' goods. The plaintiffs are entitled to judgment for the amount so found.

I would, therefore, dismiss the appeal in so far as the return of the goods is concerned, and vary the judgment below by directing a reference to ascertain the amounts received, with leave to enter judgment for such amounts.

The defendants should pay the costs of the appeal.

TURGEON and MCKAY, JJ.A., concur with LAMONT, J.A.

CITY SAFE DEPOSIT & AGENCY Co. Ltd. v. CENTRAL RAILWAY Co. OF CANADA; RE ARMSTRONG'S CLAIM.

Exchequer Court of Canada, Audette, J. February 7, 1922.

RAILWAYS (§ VI—120)—RECEIVERSHIP—FUND IN THE EXCHEQUER COURT—PROCEEDINGS IN THE PROVINCIAL COURT AGAINST FUND—CONCURRENT JURISDICTION—COMITY.

After proceedings had been instituted in the Exchequer Court of Canada by the trustee for the bondholders of the company defendant for the recovery of the amount due on the unpaid bonds of the company a receiver was appointed and an order made for the sale of the assets. Thereafter moneys representing purchase-price of certain property or assets of the company were paid into the Court. In order to distribute the fund, creditors of the company were duly notified to file their claims before the Registrar, acting as Referee. Armstrong thereupon filed his claim, which was contested by plaintiff, and after full inquiry was dismissed by the Referee in his report. The report was subsequently con-

firmed by this Court, (1921) 57 D.L.R. 145, 20 Can. Ex. 346. From this judgment Armstrong appealed to the Supreme Court of Canada, such appeal being afterwards dismissed for want of prosecution. In the meanwhile Armstrong had sued the defendant company in the Superior Court of the Province of Quebec on substantially the same claim, and obtained judgment by default for a large sum and a declaration that the same was privileged as "working expenditure" under the Railway Act, R.S.C. 1906, ch. 37. The plaintiffs having applied for the payment out to them of the balance of the fund in the Exchequer Court after satisfying the claims of the privileged creditors, Armstrong opposed the application, filed the judgment in his favour of the Provincial Court, and asked that such balance in the Exchequer Court of Canada be not paid over to the plaintiff as trustee for the bondholders until the said judgment in his favour in the Provincial Court had been satisfied out of the said fund. Held: on the facts, that the fund in Court, representing the proceeds of certain assets of the company, was exclusively under the judicial control of this Court; and no other Court could interfere with it.

2. That even if the Superior Court of Quebec had concurrent jurisdiction with the Exchequer Court in the matter, the latter being first seized thereof, the former should, by comity of Courts, hold its hand.

Semble: The Central Railway Co. of Canada not being a railway or section of a railway wholly within one Province, the Exchequer Court of Canada alone has jurisdiction to appoint a receiver thereto, to settle and determine the claims and priority of creditors, in respect of the proceeds of the assets of defendant company so sold and constituting the said fund in Court.

PETITION by claimant C. N. Armstrong for an order that the fund in Court be not paid to the plaintiffs, as agents for the bondholders, until the judgment obtained by him against the said company before the Superior Court, Province of Quebec, had been satisfied.

At the instance of the plaintiff herein, trustee for the bondholders, a receiver was appointed to the defendant company and an order made for the sale of the assets of the said company, and a certain sum deposited in Court, proceeds of a sale of certain rails. The creditors of the company were then called by advertisement and the claimant Armstrang duly filed his claim along with others. A Referee was appointed to enquire into the claims and report to the Court. The claim of the said Armstrong was contested by plaintiff, and after hearing all parties was dismissed by the Referee. Armstrong then appealed from the said report to the Court (1921), 57 D.L.R. 145, 20 Can. Ex. 346, and his appeal was dismissed. From this decision he appealed to the Supreme Court of Canada and, after several months had elapsed without proceedings being taken therein, said appeal was dismissed for want of prosecution.

Subsequent to the appeal taken from the report of the Referee and to the judgment therein, Armstrong took an action in the Superior Court for the District of Montreal, Province of Quebec

Can.

Ex. C.

City Safe Deposit & Agency Co. Ltd. v. Central Railway Co. of Canada; Re Armstrong Claim.

Audette, J.

against the company for substantially the same claim as had been filed before this Court, and been fully gone into as aforesaid. Judgment was obtained in the said Court, by default, for the full amount of his claim, declaring the same to be privileged as "working expenses."

Plaintiffs herein then moved before this Court for an order that the balance of the fund in Court be paid to them as trustees for the bondholders, after the payment of the privileged claims and said Armstrong filed the present petition before this Court asking that the fund in Court be not paid to the said plaintiffs unless and until the judgment obtained against the company by default in the Province of Quebec as aforesaid, was first satisfied. Armstrong also took out a seizure by garnishment after judgment in the Superior Court, aforesaid which was served upon the Registrar of this Court ordering him to declare what moneys were in his hands or under his control belonging to the defendant, etc. To the said judgment and seizure the plaintiffs filed an opposition, and obtained an order thereon from a Judge of the said Superior Court staying execution which opposition became a plea to the action.

J. W. Cook, K.C., for plaintiff.

E. W. Westover, for claimant.

AUDETTE, J.:—I do not think this is a matter in which I should reserve judgment for further consideration. I feel that I have all the facts before me, and I can dispose of it this morning.

Dealing first with the petition of Armstrong claiming to be collocated, under the judgment of the Superior Court of Quebec, District of Montreal, I may say that the present fund—realised from the proceeds of the sale of the rails—is entirely under the judicial control of the Exchequer Court of Canada, and no other Court has any right or will be permitted to interfere with it. A receiver having been appointed by this Court to the defendant company, all of the assets of the said defendant company—the Central Railway Co. of Canada—and more especially the proceeds of the rails became vested in the receiver and out of the control of the said company, pursuant to the judgment appointing the receiver. Moreover, the defendant company being a railway not only within one Province and not having a special section thereof alone in any one Province, it would seem the Exchequer Court of Canada alone has jurisdiction in the matter. Armstrong has not suffered and is not aggrieved. When these proceeds were realised, all the creditors of the defendant company were called, and claimant Armstrong, as well as the other creditors, filed his claim which was duly enquired into upon evidence adduced and finally it was disposed of under judgment of this Court. There was then an appeal taken from the same to

the Supreme Court of Canada, which appeal was afterwards abandoned after a certain time and dismissed by the latter Court; so that he is not in the position of a creditor appealing to the indulgence of the Court to be heard after delays. He has been heard. He chose to go to another Court that had concurrent jurisdiction and present to it the same claim and obtained judgment by default upon it and he now claims priority thereunder,—a real travesty of justice. It is a well established jurisprudence that whenever any fund of an insolvent defendant is under the control of a competent Court, no other Court should interfere with it.

This is the principle that has found its way into the Winding-up Act, under sec. 22 R.S.C. 1906, ch. 144,—and we have had in this Court, in the past, in respect of railway matters a number of those applications made, and that jurisprudence has always been observed by all the Courts of the Dominion. I have no hesitation in coming to the conclusion to dismiss, with costs, the application of claimant Armstrong, his rights having been already considered and disposed of by the Court. The application savours of the nature that can be qualified as vexatious, impertinent and irrelevant.

Judgment accordingly.

McLEAN v. DINNING AND SASKATCHEWAN CO-OPERATIVE ELEVATOR Co., Ltd.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 30, 1922.

CONTRACTS (§IIA—127)—TO FARM LAND—CROP PAYMENT—CONSTRUED AS LEASE—RIGHT OF TENANT TO DELIVER GRAIN TO THRESHER IN PAYMENT FOR CHARGES OF THRESHING ON OTHER LAND—DELIVERY OF EXTRA AMOUNT OF GRAIN TO ELEVATOR—RIGHTS OF OWNER AGAINST THRESHER AND ELEVATOR COMPANY.

The plaintiff respondent, by agreement in writing engaged a party to do during the season of 1916 all of the necessary work involved in farming a certain quarter section of land owned by the plaintiff respondent. The party working the farm was to furnish sufficient horses and equipment to do all necessary work including hauling the grain to town, all crop was to belong to the plaintiff respondent, but the party working the farm was to receive from plaintiff respondent as compensation for his work and expenses a certain share of the crop arrived at as follows:—From two-thirds of the crop there was to be deducted a sufficient number of bushels to cover, at the market price, the threshing and twine bill, and any money advanced by the plaintiff respondent, and the party working the farm was to be entitled to the remainder of the two-thirds share when he completed his work for the season. The Court held that the agreement should be construed as a lease whereby the plaintiff respondent was to get a one-third share of the crop, and the other two-thirds was to pay first the twine, and threshers' bills and advances, and the balance to go to the tenant who had therefore authority to authorise the defendant appellant,

Sask.

C.A.

McLEAN v. DINNING & SASKATCHEWAN CO-OPERATIVE ELEVATOR CO. LTD.

McKay, J.A.

to take the two-thirds of the crop to which he was entitled to pay for threshing done for him on other land for which the grain threshed was insufficient to pay, but in view of the amount of grain grown on the quarter the plaintiff respondent who sued for $210.80 proceeds delivered to the respondent company was only entitled to $130 of such proceeds. The respondent company claimed to be entitled to indemnity by virtue of the Sale of Goods Act, sec. 14, sub-sec. 1 of ch. 147, R.S.S. 1909, because the wheat the appellant sold to it or a portion thereof was the property of the plaintiff respondent, and appellant had no right to sell it. Held, that this section did not entitle the company to indemnity against appellant, and it was not entitled to judgment against him in this action. In the result, the judgment of the plaintiff respondent against the appellant was reduced to $130, and the judgment of the defendant respondent against the appellant was set aside.

APPEAL by one of the defendants from the trial judgment in an action for alleged conversion of grain. Varied.

W. G. Ross, for appellant.

N. Gentles, for respondent McLean.

E. B. Jonah, for respondent company.

The judgment of the Court was delivered by

McKAY, J.A.:—The respondent McLean brought this action against the appellant and respondent company for the sum of $210.80, the value of 124 bushels of wheat alleged to be wrongfully taken from him by the appellant and sold to the respondent company.

The trial Judge gave judgment for respondent McLean against appellant and the respondent company for the said sum with costs, and judgment in favour of the respondent company against the appellant for whatever amount the respondent company was called upon to pay respondent McLean.

The appellant appeals from this judgment.

The facts are shortly as follows:—The respondent McLean by agreement in writing, dated August 5, 1916, engaged one Gregory Keppelor to do, during the season 1916, all of the necessary work involved in farming a certain quarter section of land owned by respondent McLean. Keppelor was to furnish sufficient horses and equipment to do all necessary work, including hauling the grain to town. All the crop was to belong to respondent McLean, but Keppelor was to receive from respondent McLean, as compensation for his work and expense, a certain share of said crop arrived at as follows: From 2/3 of the crop there was to be deducted a sufficient number of bushels to cover, at the market price when sold, the following:—a. The threshing bill. b. The twine bill. c. Any money advanced to or guaranteed for Keppelor by the respondent McLean, or paid out by respondent McLean for necessary work on said quarter not done by Keppelor. The grain remaining from said 2/3 of the total crop, after deducting the number of bushels as afore-

said, was to become the property of Keppelor, when he completed his work for the season.

The appellant threshed in 1917 the crop raised on said quarter section in 1916, and took grain from said quarter of the value of $324.35. Of this grain he sold 124 bushels for $210.80 to the respondent company. Appellant's threshing bill for said quarter, according to his figures, amounts to $260, made up as follows:— Threshing and moving, 10½ hours at $20 per hour, $210; paid for hauling grain, $50; total, $260.

Appellant had threshed two other quarters for Keppelor, and the grain received therefrom was not sufficient to cover the cost of threshing, and he says Keppelor authorised him to take the grain threshed from McLean's quarter.

The first objection raised by appellant is that respondent McLean has wrongly sued the defendants on two distinct causes of action which cannot be joined in one action.

I do not think they are distinct causes of action. If the grain in question belongs to respondent McLean, then the two defendants are liable for depriving him of the grain and converting it to their own use. In my opinion there is only one cause of action. See *Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264, 76 L.J. (K.B.) 127; and *Compania S. de C.C.* v. *Houlder Bros. & Co., Ltd.*, [1910] 2 K.B. 354, 79 L.J. (K.B.) 1094.

The next question is: Had Keppelor the right to authorise the appellant to take all the grain from this quarter and sell it to the elevator in his own name, to pay for the threshing bill due to Dinning by Keppelor for the three quarter sections?

Respondent McLean contends that the whole crop belonged to him, and that Keppelor had no right to authorise appellant Dinning to take any of it.

In his statement of claim the respondent McLean refers to the agreement with Keppelor as a lease, and in his evidence, when asked if he was farming this land in 1916, he said: "No, Mr. Keppelor was on that land," evidently regarding him as his tenant. And I think, taken as a whole, the agreement should be construed as a lease, whereby respondent McLean was to get one-third share of the crops and the other two-thirds share was to pay first the twine bill, threshers' bill and advances, and the balance was to go to Keppelor. The evidence shews that there were no advances made. There is no evidence as to any unpaid twine bill, so I presume it was paid.

In *Campbell* v. *McKinnon*, 1903, 14 Man. L.R. 421, the lease reserved as rent "the shares or portion of the whole crop which shall be grown upon the demised premises as hereinafter set

Sask.

C.A.

McLEAN v. DINNING & SASKATCHEWAN CO-OPERATIVE ELEVATOR CO. LTD.

McKay, J.A.

forth," and then provided that the leesor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes and to repay advances and other indebtedness; that the lessee, immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, etc., should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sums retained for taxes, advances, indebtedness or guarantees previously mentioned. Before the grain was delivered at the elevator it was seized under an execution against the lessee. The lessor claimed the grain under the provisions of his lease. Killam, C.J., in delivering the judgment of the Court, said at p. 425:

"Taking the case as a whole, it is very clear that the share intended to be reserved as rental was one-third of the crop of grain; the remaining two-thirds were to be security for the advances, etc. I cannot interpret the clause as giving the lessor the property in the crops as operating to prevent the lessee from ever having any property therein. The land was demised to the execution debtor and out of the crop a certain portion was to be paid over as rent. *Prima facie* the property in the whole until so paid over would be in the lessee. There is nothing to indicate that he was to cultivate the soil as the servant, agent, bailee or other instrument of the lessor."

Although the document in the case at bar recites that respondent McLean "engages" Keppelor to farm the land, as above stated respondent McLean treated it as a lease. He expressly states in the evidence that he was not farming it in 1916 but that Keppelor was on the land. If he regarded Keppelor as his servant or hired man, and not his tenant, I think he would have used different language.

Nothing is said in the agreement as to who is to have the grain threshed, but as Keppelor was to do all necessary work, including hauling the grain to town, he would have authority to have the grain threshed; and I think could authorise appellant Dinning to take two-thirds of the crop in his own name. All that respondent McLean would be entitled to, therefore, under the lease and ch. 34 of 1915 (Sask.), sec. 2, is one-third of the grain of each kind.

The effect of respondent McLean's evidence is, that he watched where the wheat went when they were threshing on his quarter,

Sask.

C.A.

McLean v. Dinning & Saskatchewan Co-operative Elevator Co. Ltd.

McKay, J.A.

and he saw that all the wheat was hauled away. Mr. Hutch, who was in charge of the threshing, says it all went to town.

I find from the evidence that there were only 5 loads of wheat grown on the quarter, of which two went to the respondent company, amounting to $210.80; 2 loads to J. D. Turner Elevator, $113.55; 1 load to Chadwick, $66.25; Total $390.60.

One-third of this amount is $130.20, which respondent McLean is entitled to, and the remaining two-third, namely $260.20, Keppelor is entitled to.

Appellant admits he received the amount that went to the respondent company and to Turner elevator, amounting to $324.35. Appellant's bill, according to his own figures, is $260. He therefore received $64.35 too much on these items. But he knew before he began to thresh that all Keppelor was entitled to, at móst, was a 2/3 share of the crop, and as Keppelor had given one load to Chadwick for coal, amounting to $66.25, and for which amount appellant says he recovered judgment against Chadwick, this amount should be allowed to respondent McLean out of the $324.35.

The result is that, in my opinion, respondent McLean, who sues for the $210.80, proceeds of the wheat delivered to the respondent company, is entitled to $130.20 out of this amount.

The appellant also contends that the District Court Judge should not have given judgment against him in favour of the respondent company on the third party notice, for two reasons:—
1. That no application was ever made to the Court or a Judge for directions, and none were made, as required by Old Rule 78;
2. The respondent company is not entitled to contribution or indemnity over against the appellant.

The respondent company takes the position that by the conduct of the appellant at the trial he waived the necessity of making an application for or an order for directions under said R. 78.

Owing to the view I take of reason No. 2, it is not necessary for me to decide reason No. 1.

The rules under which the respondent company claims indemnity are Rr. 74 and following.

Rule 74 reads, "Where a defendant claims to be entitled to contribution or indemnity over against any person, etc., he may serve a third party notice," etc.

The respondent company claims it is entitled to indemnity by virtue of sec. 14, sub-sec. 1 of chap. 147, R.S.S. 1909, the Sale of Goods Act, because the wheat appellant sold to it, or a portion thereof, was the property of respondent McLean, and appellant had no right to sell it.

Section 14, sub-sec. 1 is as follows:—"In a contract of sale

Sask.
C.A.
McLean v. Dinning & Saskatchewan Co-operative Elevator Co. Ltd.
McKay, J.A.

unless the circumstances of the contract are such as to show a different intention there is: 1. An implied condition on the part of the seller that in the case of a sale he has the right to sell the goods," etc., and cites as authority for this contention *The Birmingham & District Land Co.* v. *The London & N.W.R. Co.* (1886), 34 Ch. D. 261, 56 L.J. (Ch.) 956, 35 W.R., 173, and *Carshore* v. *The N.E.R. Co.* (1885), 29 Ch.D. 344, 33 W.R. 420, 54 L.J. (Ch.) 760.

The latter case does not help the respondent company, as in that case the Court, without giving an opinion whether the claim of the defendant as against the third party was well or ill founded, considered that there were circumstances in the case which, having regard to the cases cited, made it not unreasonable that the defendant should raise the contention that he was entitled to indemnity.

The *Birmingham* case is, in my opinion, against the respondent company. In that case the defendant company contracted to purchase from Boulton certain poperty, subject, as it alleged, to three building agreements only and to the plaintiffs' rights thereunder. In an action brought by the plaintiffs against the Company, alleging a further agreement whereby Boulton's rights were modified, and that the defendant company had bought with notice of such agreement, and claiming a declaration that the agreements were still subsisting and consequential relief, the defendant company applied for leave to issue a third party notice on Boulton and his trustees, claiming indemnity against them. The application was refused, and in appeal the Court held that the claim of the defendant company against Boulton, if substantiated, was one for damages only, and the application was refused. Cotton, L.J., at pp. 271, 272, in his reasons for judgment, says:—

"There is clearly no express contract. Is there an implied contract? It may be that the railway company, if they fail in this action, can establish a claim for damages for breach of contract or for misrepresentation as against the *Boulton* trustees, but that is not indemnity.

Then is there any other ground of indemnity? Of course, if A. requests B. to do a thing for him, and B., in consequence of his doing that act, is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A. to indemnify B. from the consequence of his doing it. In that case there is not an express, but an implied, contract to indemnify the party for doing what he does at the request of the other. But here I cannot see what request can be said to have been made by the *Boulton* trustees to the *London and North*

Sask.

C.A.

McLean v. Dinning & Saskatchewan Co-operative Elevator Co. Ltd.

McKay, J.A.

Western Railway Company, nor how any contract to indemnify can be implied, unless in every case of a contract for sale a contract to indemnify is to be implied. That, in my opinion, is not the law."

And Bowen, L.J., at p. 274, says:—

"But it is quite clear to my mind that a right to damages, which is all that the Defendants have here, if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself."

And Fry, L.J., at p. 276, says:—

"Now in my view the word 'indemnity' in the rule which we have now to construe means to express a direct right either at law or in equity to indemnity as such; and I think that this right has to be contrasted and not to be for a moment confounded with the right to damages which arises either from a breach of contract or from tort. Let me take, in the first instance, the case of a breach of contract. A breach of contract gives rise, or may give rise, to a right to damages, but those damages are not the subject of the contract. They arise from the breach of the contract, and therefore they are in no sense the subject of the contract itself. When a man contracts that he will do a thing, it can hardly be taken as implying a contract as to what will arise if he does not do the thing. In the same manner with regard to tort, the right to damages for tort does not arise from any implied contract that if I do a wrong I will indemnify the person wronged for the wrong I have done. It is the common law right which everybody has to damages for a wrong which has been done to him. Therefore the right to such damages is not a right to indemnity, although when you come to ascertain what the measure of damages is, it may be that indemnity will properly express that measure of damages. That being so, it appears to me sufficient to enquire what is the right of the present applicants. It is merely the right which arises out of the contract of sale entered into between the *Boulton* trustees and the railway company. If the railway company have any right against those trustees or the tenant for life, whichever it may be, it is simply for breach of contract. That is not a covenant for indemnity in any proper sense of the term."

See also *Marton* v. *Whale, Thacker, Third Party,* [1917] 1 K. B. 544, where the head note reads as follows:—

C.A.
App. Div.

"Where, a purchaser having bought a specific chattel from a seller who had no title to it, an action is brought by the true owner against the purchaser for its recovery, the right of the purchaser to get back the price that he has paid is not a right of indemnity, and the seller cannot be brought in as a third party to the action."

In view of the foregoing authorities, the respondent company has no right of indemnity against the appellant and is not entitled to judgment against him in this action, but may be entitled to judgment against him for damages in an independent action, for breach of the implied condition.

In my opinion, then, the judgment of the District Court Judge in favour of the respondent McLean against the appellant and the respondent company should be varied by reducing the sum of $210.80 to $131.20, and the judgment against the appellant in favour of the respondent company should be set aside, with costs.

The appellant will be entitled to his costs of appeal.

Judgment varied.

BANQUE D' HOCHELAGA v. HAYDEN and GILLESPIE ELEVATOR Co.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 17, 1922.

TROVER (§IB—10)—CONVERSION—WHAT CONSTITUTES—LEASE OF FARM ON CROP PAYMENTS — CHATTEL MORTGAGE OF TENANT'S SHARE OF GRAIN—CONSTRUCTION—SPECIFIC SHARE OF GRAIN MORTGAGED TO BE FOUND IN LEASE—ARBITRATION CLAUSE—ARBITRATORS EXCEEDING POWERS—LIABILITY.

It is not necessary in order to comply with sec. 12 of the Bills of Sale Ordinance, C.O.N.W.T. 1898, ch. 43, that the description in a chattel mortgage should be such that with the mortgage in hand, without any other inquiry the property can be identified, but there must be such material on the face of the mortgage as will indicate how the property may be identified if proper inquiries are instituted, and a chattel mortgage of grain which is in existence at the time, from a mortgagor who is at least co-owner of it, of "All the grain that belongs to me under lease from . . . in my favour dated . . . harvested on the lands hereinafter described being about 4,000 to 5,000 bushels composed of 4,000 bushels oats, more or less, 700 bushels barley more or less, 200 bushels wheat more or less, all of which said goods, chattels, etc., are now in the possession of the mortgagor and are situate lying and being upon or about the following lands and premises . . ." sufficiently describes the grain, although the mortgagor's share of the grain could not at the time the mortgage was given be identified as it had not been ascertained by a division of the bulk. The specific share of the grain mortgaged must be found in the lease, and collateral agreements, and when there is nothing in these which authorises the owner to take the tenant's share of the grain or any part of it to satisfy any claim of the owner against the tenant, an

Alta.
App. Div.
BANQUE D'HOCHELAGA v. HAYDEN & GILLESPIE ELEVATOR CO.
Clarke, J.A.

arbitration clause in the collateral agreement cannot be construed to enlarge the owner's rights and the arbitrators appointed under it can only give effect to the rights of the parties as they are fixed by the agreement, and where they do in fact sell such tenant's share to satisfy a claim of the owner, not authorised by the agreement, they and the purchasers are liable to the mortgagee for conversion of such grain.

APPEAL by plaintiff from the trial judgment dismissing an action for damages for the conversion of certain grain claimed by the plaintiff under chattel mortgages. Reversed.

G. V. Pelton, for appellant.

S. W. Field, K.C., for Elevator Co., respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—This is an action for damages for the conversion by the defendants of certain grain claimed by the plaintiff under chattel mortgages from one Robert L. Stanley. The defendant Hayden did not defend.

Upon the trial the action was dismissed against both defendants on the ground that no share of the grain was ever definitely assigned to Stanley, which could at any time answer the description in the mortgages.

The following facts are disclosed by the evidence:—By lease bearing date July 27, 1918, the defendant Hayden leased to Robert L. Stanley the west half of sect. 10 and the west half of sect. 15, in tp. 74, r. 16 w. of 5th m.; also w½ of sect. 27, tp. 75, r. 16, w. 5th m., for 2 years from October 1, 1918, "the lessee yielding and paying therefor yearly, the clear yearly rent hereinafter mentioned, namely, the one-half share or portion of the whole crop of the different kinds and qualities which shall be grown upon the demised premises in each and every year during the said term, according to collateral agreement of even date."

By a collateral agreement of even date between the same parties it was provided that the lease should be read into and form part of the agreement and each should be held to supplement the other in more fully setting forth and defining the terms and conditions of the entire transaction.

Under the agreement Stanley was to have possession of Hayden's stock, comprising horses, cattle and pigs, also of his farm machinery, all set forth and enumerated therein and he agreed to furnish all the labour necessary to properly work the said lands and care for the said stock and increase, the latter to be divided at the end of each year equally between the parties after allowing for all losses, costs and expenses connected therewith—and Stanley was also to share in certain events and to a certain extent in the original stock.

Paragraph 13 relates to the crop and reads as follows:—

Alta.
App. Div.
BANQUE D'HOCHELAGA v. HAYDEN & GILLESPIE ELEVATOR CO.
Clarke, J.A.

"All the crop of every kind grown upon the said lands shall, after deducting what is necessary to provide for the feeding of all stock, the upkeep of the said farm and all operating expenses including the hire of horses, cost of twine, hail insurance, threshing, etc., be divided equally between the said parties, share and share alike."

Paragraph 14 provides that Stanley shall deliver to the elevator "Hayden's said half of the grain crop."

Paragraph 17 is an arbitration clause:—

"At any time in any way connected with the said entire transaction under the said lease or this agreement or otherwise if the said parties cannot agree upon the matter at issue, the same shall be fixed or settled by arbitration under the Arbitration Act."

Stanley gave a chattel mortgage to the Bank, dated November 4, 1919, for $1,500 on his share of the grain and hay the description of the grain being as follows:—

"All the grain that belongs to me under lease by Daniel S. Hayden in my favor dated July 27, 1918, harvested on the lands hereinafter described, being about 4,000 to 5,000 bushels, composed of: 4,000 bushels oats, more or less, 700 bushels barley, more or less, 200 bushels wheat, more or less, all of which said goods, chattels, &c., are now in the possession of the said mortgagor and are situate, lying and being upon or about the following lands and premises, that is to say, the west half of section 10 and the west half of section 15, township 74, range 16, west of the 5th meridian."

The indebtedness of Stanley to the bank having increased, a further mortgage was given for $2,500 on January 26, 1920, which contains the same description of goods as in the earlier mortgage.

Some disputes having arisen between Hayden and Stanley, A. Y. Blain, Master in Chambers at Edmonton, was appointed sole arbitrator by Hyndman, J., presumably in accordance with the provisions of the Arbitration Act, ch. 6, 1909.

The matters submitted to arbitration do not appear in evidence otherwise than as indicated by the settlement in the arbitration proceedings signed by the parties (Hayden and Stanley) and approved by Mr. Blain, dated February 13, 1920.

The written memorandum of settlement provides for the division of the live stock, hay and straw, and that the grain is to be divided share and share alike, the division to be carried out by the parties in the presence of their representatives named, and an umpire to be selected by the arbitrator, Stanley to vacate the premises on or before March 1, 1920.

The only other material provisions in the settlement are the following:—

"The remaining three claims—that of Stanley for the work, management and care of this farming proposition from October 1, 1919, to the time of vacating or at the latest March 1, 1920, and secondly, the claim of Stanley for the surrender for the second year, and thirdly, the claim of Hayden for loss and damage to the herd of cattle shall be determined by the said two representatives and said umpire who shall make a majority finding upon each of the said claims in writing and return the same to the arbitrator herein and the finding of the majority shall be final and binding and not subject to appeal or review.

The payment of any sum found due by the majority of the said two representatives and umpire under the second last preceding clause as to the said three claims shall be payable forthwith in cash or in kind at the option of the payor and if in kind the payor may select the same but if not approved of by the payee the same shall be selected and fixed by a majority of the said Board, who shall also determine any other matters in the working out of this settlement."

The bank's claim against Stanley having been increased to $3,500, a third chattel mortgage was given for that amount, dated February 19, 1920, on chattels described as follows:—

"All of my interest in the animals, chattels and farm produce, coming to me the said Stanley upon the division and settlement provided for in the settlement agreement upon the arbitration between myself and Daniel S. Hayden before the Master in Chambers, at Edmonton, which settlement is dated February 13, 1920, and which division and settlement is about to be completed, all of which said goods, chattels, live stock, &c., are now in the possession of the said mortgagor and are situate lying and being upon or about the following land and premises, that is to say: west half of section 10 and west half of section 15, both in tp. 74, r. 16 and the east half of section 27, tp. 75, r. 16, west of the 5th meridian, commonly known as the Hayden Ranch."

The two representatives and the umpire, sometimes styled the Arbitration Board, met on February 24, 1920, and after making some progress Stanley's representative withdrew, owing to some disagreement and a new representative chosen by Stanley acted for him until the end. The proceedings lasted some days and all three, namely the representative of Hayden, the substituted representative of Stanley, and the umpire, joined in a written report of their findings, dated March 1, 1920. This report was not put in evidence upon the trial but both parties agree that it should be treated as part of the appeal case.

Alta.

App. Div.

BANQUE D'HOCHELAGA v. HAYDEN & GILLESPIE ELEVATOR Co.

Clarke, J.A.

The material parts of the report as to division of the grain are as follows:—

"1. The undivided oats is to be separated by using a tub, giving one to each party until the bin is emptied. 2. The wheat stored upstairs in the old granary, to be dealt with in the same manner. 3. The oats now lying in the field to be divided by wagon boxes, each box to be measured and placed alike. 4. The barley in the new granary to be divided tub by tub until finished. 5. Mr. Stanley takes the granary on the s.w. ¼ of 15—74—16—w. 5th, with all it contains (oats) and Hayden, the new granary on section 10. 6. The stock has to be fed by taking grain from each bin until the premises are vacated by Stanley. 19. The method of the division of the grain is as follows: Mr. Stanley gets the oats in the granary on the s.w. of 15. and the seed oats in west bin of the new granary on section 10; also the oats in the centre bin on the north end, and ground floor of the old granary. He also gets the barley in the s.e. bin upstairs, and 150 bushels of the wheat upstairs, in the old granary. 20. Hayden takes the oats in the east end of the new granary and the seed oats in the south-east corner down-stairs; the north-east bin of oats down-stairs; the barley in the south-west corner of the bin upstairs, and the remaining part of the wheat upstairs."

The claims left to be determined by the Board were disposed of as follows:—

Stanley was allowed $1,000 for work, etc., on farm; $100 for surrender of lease, making with $200 payable to Stanley under Mr. Blain's settlement $1,300.

Hayden was allowed for loss of cattle, $2,445, miscellaneous items, $310.15, total $2,755.40, leaving a balance in favour of Hayden of $1,445.40.

Regarding the payment of this balance the report says:—

"25. On page 3, last clause, the arbitrators are to ask for cash and if no cash can be paid, the payor may select any kind he may wish to dispose of, if accepted by payee. The question was put to Mr. Stanley, who absolutely refused to act and used very unnecessary language to the arbitrators. He stated that the whole of his belongings was the property of the bank at Grouard; the arbitrators were then compelled to hold the following grain to have it converted into cash at once, to meet the amount due Hayden and others, in connection with the farm lease. So the following grain was put under the care of Mr. Stewart, who is acting as caretaker until disposed of, all Stanley's share of the wheat, all his shares of the barley, and sufficient oats to finish the account.

The above mentioned grain is to be delivered at the Elevator at

High Prairie, and the storage receipts to be deposited at the Canadian Bank of Commerce at High Prairie, until sufficient grain is delivered to pay for all the amounts due; then Mr. McLeod, Hayden's representative, and Mr. Hill, Mr. Stanley's representative, will cash the orders and pay to the parties to whom the amounts are due, taking the receipts for same, and sending same to the Master in Chambers, Edmonton."

It appears that the umpire arranged with the elevator company, one of the defendants, to take Stanley's share of the grain, appropriated as above, and issue cash tickets to the two representatives, McLeod and Hill, which was done. They hauled in the grain on the 1st, 2nd and 3rd of March, the cash tickets were made out to them, endorsed and deposited to the credit of Hayden in the Bank of Commerce at High Prairie, on or about March 4.

Hayden received $1,209.60 which he says included—91 bushels of his own wheat which, taking an average price, I estimate to be worth $102.74; the cost of hauling was $132.86, which I think should be allowed against Stanley and the bank; deducting these two sums I would place the value of the grain in question at $974.

Hayden and the Board of Arbitrators were aware of the plaintiff's mortgage. On March 1, Stanley's solicitor wired the umpire, then at High Prairie as follows: "Anyone removing Stanley's share does so at his peril. You are exceeding your authority."

The evidence of notice to the elevator company is conflicting. Stanley says that on March 1, he telephoned the manager of the company, at High Prairie, but the bank had a mortgage on the grain being hauled in, but the manager denies this. The bank manager also stated that he had a written notice of his mortgage given to the elevator company by the bailiff at Grouard, on March 1 or 2, but the bailiff was not called to prove the service and the elevator manager denied receipt of the notice.

The bank manager was aware of the settlement agreement of February 13, 1920, and was present at High Prairie, the last day of the arbitration and on that occasion told the arbitrators of the bank's mortgages on the grain.

To add to the complications the plaintiff in an action against Stanley for the amount of its advances to him on March 4, issued garnishee proceedings against the two representatives of Hayden and Stanley and the elevator company claiming payment of their indebtedness to Stanley. The elevator company was served at Edmonton on March 4, and on the same or the following day wired its manager at High Prairie. Apparently nothing was

Alta.
App. Div.
BANQUE D'HOCHELAGA v. HAYDEN & GILLESPIE ELEVATOR CO.
Clarke, J.A.

gained by this proceeding. It remains to consider what are the rights and liabilities of the parties.

The elevator company attacks the validity of the chattel mortgages as against creditors and *bona fide* purchasers for non-compliance with the provisions of the Bills of Sale Ordinance, ch. 43, 1898, C.O.N.W.T. sec. 12 of which provides that all instruments mentioned therein, other than assignments for the general benefit of creditors, shall contain such sufficient and full description of the goods and chattels that the same may be readily and easily known and distinguished. It is objected that the descriptions in all three mortgages are insufficient.

In *McCall* v. *Wolff* (1885), 13 Can. S.C.R. 130, on a corresponding statute the Court held the description there in question was insufficient, but Ritchie, C.J. stated the meaning of the statute to be that the description was to enable the property to be identified as against third parties, creditors or others claiming an interest in the property. This need not be such a description as that with the deed in hand, without other enquiry the property could identified, but there must, in my opinion, be such material on the face of the mortgage as would indicate how the property may be identified if proper enquiries are instituted, as for instance "all the property now in a certain shop, &c."

This case was approved and distinguished in *Hovey* v. *Whiting* (1887), 14 Can. S.C.R. 515, in which the description was held sufficient, and the latter case was followed in *Thomson* v. *Quirk* (1889), 18 Can. S.C.R. 695.

Adopting the rule laid down, I have no difficulty in the present case in holding that the descriptions are such as to indicate how the property may be identified if proper inquiries are instituted. It is difficult to see how, under the circumstances, the descriptions could be much improved upon. It is true the mortgagor's share of the grain could not, at the time of the mortgages, be identified as it was not ascertained by a division of the bulk, but that is a difficulty arising from the condition of the property rather than from insufficient description. Certainly the mortgagor's interest in the grain, though undivided, was capable of being mortgaged. It may not have been and probably was not capable of immediate delivery and actual and continued change of possession, and, if not, in view of the decisions of this Court in *International Harvester Co.* v. *Jacobson* (1916), 28 D.L.R. 582, 11 Alta. L.R. 122, and *McMillan* v. *Pierce* (1917), 37 D.L.R. 242, 13 Alta. L.R. 151, considerable force is given to the contention of the appellant that the mortgages in question do not come within and are not subject to the requirements of the Bills of Sale Ordinance.

I express no opinion as to the soundness of this contention, preferring to rest my judgment on the sufficiency of the descriptions to satisfy the statute. I think the bank acquired more than an equitable interest under its mortgages, which would be defeated by a sale to a *bona fide* purchaser. The grain was in existence and the mortgagor was at least a co-owner of it. The authorities as to future acquired goods are not, I think, applicable.

The objection that the affidavit of *bona fides* in one or more of the mortgages was not sworn to was practically overruled during the argument; the evidence does not support it. Nor can the objection that the jurat in the affidavit of *bona fides* attached to the third mortgage does not contain the day of the month nor the month prevail. Evidence was given upon the trial of the date when the affidavit was sworn. The Bills of Sale Ordinance does not prescribe any form of affidavit to be followed. So that such cases as *Archibald* v. *Hubley* (1890), 18 Can. S.C.R. 116; *Smith* v. *McLean* (1892), 21 Can. S.C.R. 355; *Morse* v. *Phinney* (1894), 22 Can. S.C.R. 563; *Parsons* v. *Brand* (1890), 25 Q.B.D. 110, 59 L.J. (Q.B.) 189, 38 W.R. 388, are inapplicable. It is well settled that the formalities required by Rules of Court in judicial proceedings are not applicable to affidavits required under statutes. See *Ex parte Johnson* (1884), 50 L.T. 214; *Moyer* v. *Davidson* (1858), 7 U.C.C.P. 521; *De Forrest* v. *Bunnell* (1858), 15 U.C.Q.B. 370; *Brodie* v. *Ruttan* (1858), 16 U.C.Q.B. 207.

It is very desirable that the jurat should contain the date on which the affidavit is sworn but I cannot find that its absence is fatal.

The next question is, what was mortgaged? Was it a specific share of ascertained goods? or as the trial Judge held, only what, if anything, should remain of the tenant's share after payment of all the owner's claims against him? The answer to this question is to be found in the lease and its collateral agreement. I can find nothing in either document which authorizes the owner to take the tenant's half share of the grain or any part of it to satisfy any claim of the owner against the tenant.

Paragraph 13 of the collateral agreement provides for certain deductions to be made, not from the tenant's share, but from the whole crop, before division so that each party contributes equally to the subjects of such deductions. The claim for damages, to satisfy which the grain in question was taken, was not such a claim as is provided for in this paragraph. It is for damages for negligence against the tenant alone and is not a subject for contribution.

The arbitration clause cannot, I think, be construed to enlarge

Alta.

App. Div.

BANQUE D'HOCHELAGA v. HAYDEN & GILLESPIE ELEVATOR Co.

Clarke, J.A.

the owner's rights. The arbitrators appointed under it can only give effect to the rights of the parties as they are fixed by the agreement, nor does the arbitrator, Mr. Blain, in the settlement of February 13, 1920, approved by him, profess to give the owner any right to take the tenant's share to satisfy his claims.

The memo of settlement expressly provides that the grain is to be divided share and share alike and this was done by the appointed Board or under their supervision.

The only pretence of justification for taking the tenant's share of grain towards satisfaction of the owner's claim for damages is in the clause which provides for payment in cash or in kind, but this is at the option of the payor. He did not elect to pay in kind and if he had done so he could only have delivered kind which belonged to him, certainly not the property of the bank, and the Board had not, in my opinion, any greater authority.

The authority to them to "determine any other matters in the working out of this settlement" was not sufficient to justify them in taking the bank's property to satisfy a debt of Stanley. If such was the intention it should have been expressed in much plainer language.

In my opinion, Stanley's share was and remained subject to the bank's mortgages and the elevator company, by taking it into stock, become liable to the bank for damages for its conversion. It is no answer that it purchased for value without notice, even if such be the fact. It acquired no better title than the sellers had and I see nothing in the conduct of the bank to preclude it from denying the seller's authority to sell. A purchaser must rely upon the person from whom he buys and must reckon with him if it turns out the latter had no right to sell.

See sec. 23, Sale of Goods Ordinance; Benjamin on Sales, 6th ed. p. 16; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, 47 L.J. (Q.B.) 481, 26 W.R. 406; *McLean* v. *Dinning* (1922), 63 D.L.R. 507.

I cannot see that the plaintiff is prejudiced by the garnishee proceedings. It was entitled to pursue its remedy for the debt without affecting the mortgage security. There was no waiver of the remedy claimed in this action nor anything to support an estoppel, as the conversion was complete and payment made before service.

The defendant Hayden was a party to the unauthorized proceedings and received the proceeds of the grain and has not defended the action nor appeared upon the appeal. He should be held liable as well as the elevator company.

I would allow the appeal with costs against the elevator company, set aside the judgment below and direct judgment to be entered in favor of the plaintiff against both defendants for

$974 and the further sum of $100 in the nature of interest on the value of the goods from March 4, 1920, to the date of the judgment of this Court, making a total of $1,074 with costs, the costs to be taxed against Hayden to be limited to the costs of an undefended action, but to include costs of a motion for judgment and assessment of damages.

Appeal allowed.

PHINN v. GLOVER.

Ontario Supreme Court, Mulock, C.J. Ex. February 14, 1922.

GIFT (§ III—16)—INTER VIVOS—DONATIO MORTIS CAUSA—SUFFICIENCY OF—NECESSITY OF DELIVERY.

The deceased shortly before her death made a will whereby she intended certain victory bonds to pass to her husband. Some days after signing the will she signed the following document "Norwood, Ont., Feb. 20, 1920, Merchants Bank, Chatham, Ont. Please turn my victory bonds over to . . . (the husband)." The will being invalid because of the absence of attesting witnesses. The husband claimed the bonds as his either as a gift *inter vivos* or a *donatio mortis causa.*

The Court held, that when the deceased signed the order she was under the impression that on her death the bonds in question would pass to her husband by her will and that she had never said anything to indicate any change of intention, and it being clear that deceased did not intend her husband to acquire the bonds either as a gift *inter vivos* or as a *donatio mortis causa.* There could be no gift of either kind, and in any case the gift was invalid because of non-delivery, of the bonds which was essential to a valid gift of either kind.

[See Annotation on Gift, 1 D.L.R. 306.]

ACTION for a declaration that certain Dominion Government Victory Bonds of 1919, form part of estate of late Luella E. Glover.

J. M. Pike, K.C., for plaintiff.

Alexander Clark, and H. E. Grosch, for defendant.

MULOCK, C.J. Ex.:—The plaintiff brings this action, on behalf of himself and all others the next of kin of Luella E. Glover, for a declaration that certain Dominion Government Victory Bonds of the issue of 1919, amounting in all to $4,000 form part of the estate of the said Luella E. Glover.

In 1907 the defendant was married to the said Luella E. Glover, and at the time of her death she was fifty-nine and the defendant was fifty-eight years of age. There were no issue of the marriage. Prior to her marriage she taught public school but after marriage she assisted her husband, the defendant, in a store which he conducted in his own name in the village of Northwood, and she seems to have put some of her own money into the business. About four years before her death, because of

Ont.

S.C.

PHINN v. GLOVER.

Mulock, C.J. Ex.

indifferent health, she withdrew her interest in the business, defendant continuing to carry it on on his own account.

The branch of the Merchants Bank, at Chatham, was agent for the Dominion Government for the sale of bonds of said issue and in November, 1919, the defendant, acting on his wife's verbal instructions, applied to the branch bank for $4,000 of said bonds, the same to be made payable to and registered in the name of his said wife, and I infer from the evidence that at the time of the application she paid the bank for the bonds, and in due course they, registered and payable to her order as directed, reached the bank for her. The bank's agent, who was a witness in the case, stated in the earlier part of his examination that the bonds had reached the bank before the death of the deceased, but later he expressed a doubt on that point.

The deceased continued in failing health from the month of November, 1919, until her death, which happened on the morning of February 23, 1920.

The defendant claims these bonds either as a gift *inter vivos* or as a *donatio mortis causa*, and his evidence in support of his claim is to the following effect. In the early part of February, 1920, his wife told him that she thought she ought to make a will, but he told her that he did not think it necessary and that she would get well. Later again she spoke to him about it, when he suggested a lawyer being called in, but that she said Dr. Caldwell, her physician, could draw a will. Dr. Caldwell informed the defendant that the deceased had spoken to him about drawing her will and that he had told her to go ahead and make her will; that the night succeeding this conversation she told the defendant to bring over paper from the store, and she would have [him] write out the will. He states that this request was made a day or two before the date of the will (February 13). The same night he brought over paper and on her dictation wrote, in pencil, the following portion of the will:

"Feb. 13th, 1920. This is the last will and testament of Luella Glover. I hereby bequeath to Edna Lewis, my niece, one china set of dishes and the silverware when Mr. Glover is through with them, gold watch and chain and pianee if she wants it, if not Mary Betters gets it after she is 12 years old."

At this stage he says she referred to $5,000 of Government bonds of the issue of 1918, which she thought of giving to Edna Lewis, but stated that she did not like to give them to her all at once, and told the defendant to leave the "will" in the bureau drawer in order that she might have further time to consider the matter, and, accordingly, the will was not completed that night.

The defendant states that, a night or two after, she had

Ont.
S.C.
PHINN v. GLOVER.
Mulock, C.J. Ex.

decided to give the $5,000 1918 bonds to Edna Lewis, and that he then added to the portion of the will above set forth, the following words, which the defendant says were her "very words": "My 1918 bonds goes to Edna Lewis all my bonds and other property goes to my husband, J. T. Glover," and she then signed it, there being no attesting witnesses. Thereupon, he said "What am I to do with this," and she said: "All you have to do is to take it to a probate," "and so I folded it up and put it away."

The preparation of this document took place in the middle of the night, no one except the deceased and the defendant being present, and she signed it lying upon her back. The defendant says that when she signed this document the pain which she was suffering prevented her lying upon her side. The explanation given by the defendant for the document being prepared in the night was that that was the only time which he had available for the purpose. He also stated that no one else was present because the deceased did not wish anyone else to know about her affairs.

From the evidence of the defendant, it is clear that both he and his wife supposed the will to be valid, and that under it he would take the bonds in question, but it being invalid because of the absence of attesting witnesses, the defendant now claims that the bonds are his, either as a gift *inter vivos* or a *donatio mortis causa* and bases his claim upon a document in the following words and figures, and bearing the signature of the deceased: "Norwood, Ont., Feb. 20, 1920. Merchants Bank, Chatham, Ont. Please turn my Victory Bonds over to J. T. Glover. (Signed) Luella Glover."

The defendant's explanation as to the circumstances under which this order was given, is as follows: "We were talking the matter over about disposing of her property. She was sick in bed and it had been talked about before, and when she was dividing the thing up she gave these bonds to me $4,000 and I had made arrangements to come to town (meaning Chatham) to attend to some business on Monday morning she died, and she said that she would have to give me an order to get these bonds out of the bank.

His Lordship. You were talking with her about disposing of her property? A. Yes. She gave me these bonds in disposing of the property.

Q. What do you mean by 'She gave them.' A. She told me these bonds was—she wanted me to have.

Q. Wanted you to have the $4,000? A. Yes, 1919 bonds."

Ont.
S.C.
PHINN v. GLOVER.
Mulock, C.J. Ex.

The following is a further extract from the defendant's examination regarding the bonds in question.

"Q. Did you have any further conversation about the $4,000 worth of 1919 Victory Bonds? A. After the will was written? Q. Yes? A. Yes. She spoke about that. I could not get it out of the bank without her giving me an order for it. Q. Was anything done then? A. Well, wrote that order. She had me write the order out so I could take it in and get the bonds. Q. Did you ask her to give you an order? A. No, I did not think about it till she spoke about it. Q. She wrote the order because you could not get these out of the bank without an order? A. I wrote the order and she signed it so as I could get them out of the bank. Q. Did you say she wrote the order? A. I wrote the order for her. Q. You wrote the order? A. Yes. Q. Is this order in your own words—the language of it? A. Well, I asked her, I says, 'How will I write it,' and she said 'Just write an order for it,' so I wrote that. I read it to her and she told me that was all right, and signed it. Q. Did you read it just as it is here now? A. Yes. Q. Did she at any other time tell you anything about whether or not you were to have the $4,000 worth of bonds? A. She spoke about it a couple of times before. She did not want to give Edna only the $5,000 bonds and she said: 'I want you to have the $4,000 because we have made it between us here.' "

Asked as to her condition during the week preceding her death, he said: "Well, she was not so bad at times. She would have spells, you know, that would last for probably five or ten minutes, pains, and then maybe she would have an hour or two it would be quiet. She would sleep a little, doze a little, and the pains would come again. Off and on that way. The doctor was giving her medicine to ease these pains."

The following is an extract from the defendant's evidence on his cross-examination:—

"Q. February 13 was not the day she signed it (referring to the will)? A. No. Q. How many days after the 13th? A. It wasn't for two days after. Q. That would be about the 15th she signed it? A. Yes, sir. Q. That would be five days before she signed the other document? A. Yes. Q. Exhibit 2? A. Yes. Q. Now you see from the written ex. 3 (the alleged will) that in that she was going to let you have these bonds after her death under that will. If that was a good will you would be getting $4,000 bonds after she died? A. Yes. Q. And apparently that was what she intended you were to have? A. Yes. Q. Apparently that was what she intended, you were to have the $4,000 1919 bonds after she died. Is that what she intended? A.

She intended that I should have them. Q. Under that will you did not expect to get them in her lifetime. Did you or did you not? A. No. Q. Did she ever say anything to you that changed her expression of her intention as in that will there? A. No."

As to the meaning to be attached to the order, I think it is clear from the defendant's evidence that the deceased intended the order to be merely authority to the bank to deliver the bonds to her agent, the defendant, but did not intend it as evidencing a gift. She told him she would give him an order to get the bonds, and he worded the order "turn my bonds over," etc. He says he read it to her before she signed it. Even so, I doubt if, in her dying condition she would have been likely to discover in these words any meaning other than her desire to have the bonds handed to her husband, and I interpret them as having no other significance. If there is any ambiguity as to their meaning the defendant is not entitled to profit by it. The onus is on him to satisfy the Court that they are equivalent to clear definite language, expressive of a present giving. This onus he has not discharged. I am of opinion that this order does not go to shew either a gift *inter vivos* or a *donatio mortis causa*. When the deceased signed it, she was under the impression that on her death the bonds in question would pass to her husband by her will, and for her own reason she desired them to be brought to her house, where she then and always had had the other $5,000 bonds. The evidence of the defendant also shews that he expected to acquire the bonds in question by virtue of the will, and not otherwise, and that the deceased had never said anything to indicate any change of her intention that he was to take them under the will. This, however, would be impossible if he took them either as a gift *inter vivos* or as a *donatio mortis causa*. I think it clear that the deceased did not intend her husband to acquire them either as a gift *inter vivos* or as a *donatio mortis causa*, and there cannot be a gift of either kind unless the donor so intended. But, even if the deceased did intend either a gift *inter vivos* or a *donatio mortis causa*, in either case the gift is invalid because of non-delivery of the bonds. Delivery is essential in each case. The defendant obtained from the deceased merely an order on the bank for the bonds, but the deceased died before the presentation of the order. The bank was her agent, and her death revoked the agency, whereupon the bank ceased to have any authority from her to act upon the order. Further, the order being without consideration, the deceased had the right at any time before actual delivery of the bonds to countermand it. Thus she retained

Ont.
S.C.
PHINN v. GLOVER.
Mulock, C.J. Ex.

dominion over them until her death and in consequence there was no completed gift of them.

For the defence it was contended that the bonds were not ready for delivery prior to the death of the deceased; that, therefore, delivery was impossible, and might be excused. The evidence is not clear as to whether the bonds were or were not in the custody of the branch bank prior to the death of the deceased, but there is this undisputed fact, that the bonds did not reach the defendant's hands and that the order was not presented to the bank prior to the death of the deceased. If it had been, and the bank, for any reason, had refused to comply with the order, the gift would have remained uncompleted, and therefore would have failed for want of delivery, *Douglas* v. *Douglas* (1869), 22 L.T. 127.

Further, if the transaction in question was a gift *inter vivos*, it would, I think, fail on another ground. The deceased, when she gave the order to her husband, was bed-ridden, suffering great pain, and her death was imminent. These circumstances made it possible for her husband to have acquired the alleged gift from her by undue influence. There is no evidence that he exercised undue influence over her, but he having had the opportunity of doing so, the onus was on him to prove the absence of undue influence. As a matter of public policy the law seeks to protect persons who are in positions where they may be over-reached for the benefit of those who have the opportunity of over-reaching them.

Under such circumstances, a person having such an opportunity, cannot acquire a substantial voluntary benefit *inter vivos* without proving the absence of undue influence unless he shews that the donor had the protection of independent advice. This the defendant has not here shewn, and therefore, if this were a gift *inter vivos* it would fail because of the deceased not having had the protection of independent advice.

For these various reasons, I am of opinion that the defendant has failed to establish either a gift *inter vivos* or a *donatio mortis causa*, and that the plaintiff is entitled to the relief asked for, with costs. Thirty days' stay.

Judgment accordingly.

ACME STEEL GOODS Co. OF CANADA v. WALSH CONSTRUCTION Co.

British Columbia Supreme Court, Macdonald, J. February 1, 1922.

TROVER (§ I B—10)—CONVERSION—WHAT CONSTITUTES—CONSIGNMENT OF GOODS TO COMPANY FOR SALE ON COMMISSION—FRAUDULENT SALE AS OWNER—KNOWLEDGE OF PURCHASER OF FRAUD—"ACTING IN THE ORDINARY COURSE OF BUSINESS OF A MERCANTILE AGENT" IN SALES OF GOODS ACT R.S.B.C. 1911, CH. 203, SEC. 69—MEANING OF —LIABILITY OF PURCHASER—ESTOPPEL BY MAKING REQUEST FOR PROCEEDS OF GOODS.

The words "acting in the ordinary course of a mercantile agent," in sec. 69 of the Sales of Goods Act R.S.B.C. 1911 ch. 203, means a mercantile agent acting within business hours, at a proper place of business and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done or to give him notice that the disposition is one which the mercantile agent had no authority to make. Applying this test the Court held that certain sales by a company of shingle bands which the company held as agent for the plaintiff and for sales of which it was bound to account to the plaintiff and which were evidently purchased under a special arrangement by a brother of the manager of the company making the sale for the purpose of accommodating his brother, could not be said to be within the meaning of the words of the section, and the evidence shewed that the goods were not acquired through a *bona fide* purchase for value in the ordinary course of business, it could not be said that a sale had taken place and the purchaser was liable for conversion of the goods. An application for the proceeds of the goods and shewing the amount claimed to be due, is not an election to affirm the transaction and does not estop the plaintiff from seeking redress from the fraudulent purchaser.

[*Oppenheimer* v. *Attenborough*, [1908] 1 K.B. 221; *Waddington* v. *Neale* (1907), 23 T.L.R. 464; *Rice* v. *Reed*, [1900] 1 K.B.D. 54, applied.]

ACTION to recover as damages the value of a quantity of steel shingle bands which the plaintiff alleged were wrongfully converted by the defendant.

R. Symes, for plaintiff.
Robert Smith, for defendant.

MACDONALD, J.:—Plaintiff seeks to recover, as damages, the value of a quantity of steel bands, of which it was the owner, and which it alleges the defendant wrongfully converted. This property had been consigned by plaintiff from Chicago, Ill., to T. A. Walsh & Company, Limited, at Vancouver, for sale on commission. Sales were to be made in the name of plaintiff as owner, and it was bound to account to the plaintiff for the proceeds of such sales. A separate account was kept of such business and of the amount of the plaintiff's goods on hand from time to time in the warehouse of T. A. Walsh Co. It disposed, however, of 25,356½ pounds of these shingle bands, by delivery

B.C.
S.C.
ACME STEEL GOODS CO. OF CANADA v. WALSH CONSTRUCTION CO.
Macdonald, J.

to the defendant, without making any proper entries in its books or depositing any amount in the bank to the credit of the plaintiff. Defendant contended that the goods were acquired, through a *bona fide* purchase for value in the ordinary course of business, and then, by amendment, set up as a further defence, the provisions of sec. 69 of the Sales of Goods Act (R.S.B.C. 1911, ch. 203). Sub-sec 1 of said sec. 69 is as follows:—

"(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same: Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

The corresponding Act in England is termed the Factor's Act, 1889 (52 and 53 Vict., ch. 45) and said sub-sec. 1 is a counterpart of sub-sec. 1 of sec. 2 of that Act. The trend of the trial was as to the applicability of this sub-section, and whether the defendant, while admitting that the goods were at the time the property of the plaintiff was thereby protected in their acquisition. Defendant repudiated any suggestion that it became possessed of the goods by way of a "pledge," and the sole ground taken was one of sale and purchase.

In attacking the transaction, plaintiff contended that the facts, attendant upon the transfer to the defendant of 17,006½ pounds of shingle bands in December, 1920, and the balance, namely, 8,350 pounds in April, 1921, shewed that the T. A. Walsh Co., was not acting "in the ordinary course of business of a mercantile agent," and thus that the protection that might otherwise be afforded to the defendant under the Act did not exist.

The object of the legislation, both with respect to "sales" and "pledges" was that a person, who, was with the consent of the owner, in possession of goods, as a mercantile agent, should have the same rights of dealing with them as if he were himself the actual real owner. The question, whether or no, the defendant believed, that the T. A. Walsh Co. was in possession of such goods as the owner, or simply as a mercantile agent, may remain in abeyance and is not for the moment material. It will become important in considering the "good faith" transaction.

In *Oppenheimer* v. *Attenborough & Son*, [1908] 1 K.B. 221,

B.C.
S.C.
ACME STEEL GOODS CO. OF CANADA v. WALSH CONSTRUCTION CO.
Macdonald, J.

the meaning of the expression "when acting in the ordinary course of business of a mercantile agent" was considered. Buckley, L.J., at pp. 230, 231, thought it meant a mercantile agent acting "within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make." Accepting this definition of the expression then, did the two deliveries of the steel shingle bands take place in a manner, that would be considered "in the ordinary course of business."

T. A. Walsh Co. was a small organization with apparently very little capital, and in December, 1920, was financially embarrassed. It was practically a one-man company, managed and controlled by T. A. Walsh, a brother of J. P. Walsh, who held a similar position with the defendant company. Under these circumstances, T. A. Walsh sought assistance from his brother, J. P. Walsh. Dorothy Stafford gave evidence as to what took place in December, at the first delivery of the shingle bands. She was, at that time, in the employ of the T. A. Walsh Co. as stenographer and bookkeeper, and did all the clerical work, though subsequently employed by the plaintiff. She stated that she was well aware that the shingle bands then in the warehouse belonged to the plaintiff, and had been received on consignment for sale. Under instructions she prepared an invoice, purporting to shew a sale by the T. A. Walsh Co. to the defendant of 17,000 pounds of shingle bands at 12c. per pound. She explained how this particular transaction in December differed from other transactions in Acme shingle bands as follows: "Acme goods were supposed to be invoiced on Acme invoices. They had a special invoice. In that way the money would be paid to the Acme Steel Goods that was received on it, and copies of the invoices were sent to Chicago." It appeared that her employers had only been dealing in the plaintiff's goods since July previous, when the agency was obtained. In carrying out the terms of the agency, the proceeds of the goods received were after sale as the goods of the plaintiff, to be deposited to the credit of plaintiff in a separate bank account. This course of proceeding was in all respects ignored.

Defendant was not engaged in the buying and selling of this commodity, and it is quite evident that the transaction simply arose through the request made by T. A. Walsh to his brother for assistance. Defendant company, if it became the purchaser of the goods, would, as to their further disposition, not be in

B.C.
S.C.
ACME STEEL GOODS CO. OF CANADA v. WALSH CONSTRUCTION CO.
Macdonald, J.

any better position than the T. A. Walsh Co. The shingle mills were the most likely purchasers of the shingle bands for actual use, and they were not more accessible for business to the defendant than to T. A. Walsh Co. The defendant would generally require to sell to such mills in order to realise their value. It is thus apparent that the transfer by the T. A. Walsh Co. to the defendant was not an "ordinary sale" in the sense that it was not a sale by a vendor to a purchaser desirous of obtaining goods with a view either of using them or disposing of them to an advantage.

It is common ground that the transaction was intended to benefit the T. A. Walsh Co. and not the plaintiff. Miss Stafford was quite clear and emphatic in her evidence, as to the form of the transaction, not being in accordance with her understanding, as to the true intention of the parties. She considered the invoice in December was, to use her own term, "irregular," and so stated to T. A. Walsh, but he explained the irregularity by stating that it was simply a matter of accommodation for a few days, and that he had to give his brother security for the advance of $2,000. If I accept Miss Stafford's recollection of the transaction, then in the words of Darling, J., in *Waddington* v. *Neale* (1907), 23 T.L.R. 464, "there really was no sale at all."

It was contended that the defendant believed, on reasonable grounds, that the T. A. Walsh Co. were the actual owners of the goods in question, further, that if this contention were not accepted, then that under the sub-section referred to, the whole question turns upon whether the defendant acted *bona fide* and comes within the meaning attached to the expression as previously outlined by Buckley, J. Was there to the knowledge of the defendant anything wrong or any circumstance "to lead the (defendant) to suppose anything wrong?" In considering this matter, I might properly put to myself the question that Lord Tenderden submitted to the jury in *Evans* v. *Trueman* (1831), 1 Moo. and R. 10, and approved of by Lord St. Leonards in *Navulshaw* v. *Brownrigg* (1852), 2 DeG.M. & G. 441 at p. 452, 42 E.R. 943, 21 L.J., (Ch.) 908:—"The question I shall leave to the jury in this case, where there is no evidence of direct communication, is whether the circumstances were such that a reasonable man and a man of business applying his understanding to them would know that the goods were not Nevitt's."

The actual payment of the money by the defendant to T. A. Walsh Co. will not destroy the fact of *mala fides*, if I find it existed. It might be an incident, worthy of consideration, but is not in any sense conclusive.

In *Gobind Chunder Sein* v. *Ryan* (1861), 9 Moo. Ind. Ap. 141

B.C.

S.C.

ACME STEEL GOODS CO. OF CANADA v. WALSH CONSTRUCTION CO.

Macdonald, J.

at p. 165, 19 E.R. 695, 15 Moo. P.C.C. 230, 15 E.R. 482, 10 W.R. 155, the manner in which a Court should deal with "good faith" between a mercantile agent and a lender (purchaser) is outlined as follows:—

"The Tribunal deciding the issue whether the jury, or as there, the Judges acting as a jury, must............categorically find the facts of want of good faith, and of notice to the leader of want of authority in the agent or that he is acting *mala fide* in the transaction against his principal. The statute is silent as to the grounds on which a conclusion is to be arrived at; that is left to the ordinary principles of evidence. But where the fact is so found it would be as much against mere honesty, as against the interests of commerce, properly considered, to afford any protection to the transaction."

I have already found that the transaction was not an ordinary sale, but this would of itself only have a bearing upon the question of good faith. It, as it were, creates an atmosphere, in which a person would be critical, as to the true nature of the transaction. Then further, in considering it, I think one should bear in mind the relationship existing between the parties who are interested in opposing the alleged conversion.

T. A. Walsh Co., by disposing of these goods to the defendant, acted in fraud of its principal and failed to comply with the contract of agency in many respects. It was required not only to sell the goods as the property of the plaintiff, but to send copies of all invoices shewing such sales to Chicago. This would afford a check on the business. In this instance neither the sale of December nor that in the following April was so reported. It was also agreed that the plaintiff would do all the accounting necessary at its head office, and directly make collections for sales. It was also stipulated that the duty paid should be indicated in a separate item, so that the plaintiff might know, at all times, the net amount that its agent was securing on its behalf from customers for goods sold.

The dishonesty of T. A. Walsh, on behalf of his company, is not, however, sufficient. The plaintiff must assume the burden of satisfying me that the defendant acted in bad faith, and in so doing relies upon various circumstances as proving either directly or by fair inference that a "sale" of the goods did not take place.

Miss Stafford expressed her belief that J. P. Walsh was present at the time of the transaction in December, when the "irregularity" was discussed, and she was instructed to make out an invoice which, to her mind, was false, and was not a correct record of the transaction. As against her belief on this point,

B.C.

S.C.

ACME STEEL GOODS CO. OF CANADA v. WALSH CONSTRUCTION CO.

Macdonald, J.

J. P. Walsh is very positive that the transaction was what he termed a "straight" sale. There is no direct evidence to shew that he knew that the goods were not the property of the T. A. Walsh Co. at this time. He states that he saw the invoices and that they apparently shewed an ordinary transaction of sale between the plaintiff and T. A. Walsh Co. He says he first became aware of the true position of matters in June or July, 1921, but if he bases the time, on information received from Harry McColl, then he must be mistaken as McColl, a witness on behalf of the defendant, states that he advised J. P. Walsh, before May 20, that the goods were only on consignment to the T. A. Walsh Co. I accept McColl's statement as to the time. Then J. P. Walsh was well aware in December that the $2,000 his company was then paying the T. A. Walsh Co. would be applied in payment of his help, warehouse expenses, freight, etc. It was not intended to be applied in payment of the large quantity of plaintiff's goods then in the warehouse. These he states, he thought had been bought on credit, but was not asked whether he thought it probable that a business corporation would sell outright and without security to a company so involved as T. A. Walsh Co. He also knew at the time that his father, employed by the T. A. Walsh Co., was in arrears for his wages, and had already lost money invested in the company. J. P. Walsh had assisted at the organisation of the company by endorsing a note for $10,000.

With the company controlled by his brother thus in financial difficulties, he was again approached in April for further assistance. The peculiarity of the whole transaction then becomes more noticeable. On April 15, J. P. Walsh wrote to his brother, drawing his attention to the purchase of the steel bands in December, and stating that as he would like to use the money, "I think I will have to go into the market and sell them." He also refers to there being a likely drop in the price of iron, and that his company would take a big loss on the bands. He explains the tone of this letter by stating that there was an understanding that he should not offer these bands in the market, in competition with similar stock held by the T. A. Walsh Co. Still, in the face of the prospective financial loss and probable drop in the price referred to in his letter of April 20, 1921, he acquired a further large quantity of steel bands from T. A. Walsh Co., amounting to $1,012.02,—J. P. Walsh, having intimated that the main object "in taking the bands was to help out the T. A. Walsh & Co. and keep it from going into liquidation," admitted that they were not for re-sale,—at any rate at a profit, by stating as the first quantity that it would certainly have been

B.C.

S.C.

ACME STEEL GOODS CO. OF CANADA v. WALSH CONSTRUCTION CO.

Macdonald, J.

given back if the $2,000 had been paid to his company. He still, however, adhered, in his evidence, to the position, that both transactions consisted of sale and purchase. This position was in addition to those already outlined attacked on other grounds. Particular stress was laid upon the fact that an account had been rendered by his company to T. A. Walsh Co. on July 2, 1921, shewing the disposition of the steel bands, which was inconsistent with such a position. This statement of account, ex. 11, as well as the letter of April 15, ex. 9, came into possession of the plaintiff before action. It, coupled with the information afforded by Miss Stafford, doubtless formed the material upon which the plaintiff felt warranted in attacking the transactions. In cross-examination, J. P. Walsh, after reference had been made as to the $2,000 being paid back, and the steel bands covering that amount returned, was asked these questions:—

"Q. That is all you wanted, was security and not a sale? A. Because I felt sure that he would never be able to *get* $2,000 *to get them back* and he would know we would have to sell them. Q. If the price of shingle bands had increased to 24 cents you would still have given your brother them back? A. Less my costs, I suppose."

These replies, in addition to the statement, are worthy of special consideration. If Miss Stafford had been positive, as to J. P. Walsh being aware that the transaction in December was "irregular," and that she demurred on that account to an improper conversion of the goods, then I would accept her evidence in preference to that of J. P. Walsh, especially in view of the relationship between himself and T. A. Walsh.

The attack upon the defendant is such, that while the term "fraud" is not used, still it amounts to the same. Bearing this in mind, I think that the evidence should be such as to prove the *mala fides* of the alleged sale to the hilt. I have commented upon the nature of the transaction, and that defendant conceded that it was not an "ordinary" sale. This fact, coupled with such replies, statement and correspondence, corroborate Miss Stafford and are consistent with her "belief" that J. P. Walsh was present and heard the discussion as to irregularity of the disposition of plaintiff's goods.

It is beyond doubt that he did not on behalf of his company acquire the steel bands with a view of selling them when and as he saw fit. I am satisfied that he had an understanding with T. A. Walsh Co. as to their disposition, and that any profit over and above the amount paid at the time should be accounted for and paid to such company. It was also in the mind of J. P.

B.C.

S.C.

ACME STEEL GOODS CO. OF CANADA v. WALSH CONSTRUCTION CO.

Macdonald, J.

Walsh, as a first alternative, that T. A. Walsh Co. might by repayment obtain a return of the steel bands within a reasonable time. In this view of the matter, on defendant's own admissions, the T. A. Walsh Co. still retained a substantial interest in the steel bands. It was in the nature of a resulting trust. This interest was equitably possessed by the plaintiff, as owner of the goods, so wrongly disposed of by its agent. Defendant should, in any event, as it was aware, prior to May 20, 1921, that the steel bands which it had acquired, had wrongfully come into its possession, have accounted therefor to the plaintiff. Defendant, notwithstanding such knowledge, paid to T. A. Walsh personally $2,000, received from the proceeds of the sale of such goods. Then when the statement of July 2nd was rendered, it shewed a balance due of $118.88. This sum was also paid to T. A. Walsh Co., but by arrangement diverted for the use of Mrs. Nellie Walsh, mother of J. P. Walsh and T. A. Walsh.

In my opinion, however, I should, under the circumstances, and for the reasons thus outlined, go further, and find that a "sale" of the steel shingle bands did not take place between T. A. Walsh & Co. and the defendant. The result is that the defendant fails in its contention and cannot obtain the aid of the Act in acquiring the plaintiff's goods and are liable for conversion.

The question then remains, what amount of damages should be allowed the plaintiff?

Accounts were rendered to T. A. Walsh Co. by the plaintiff, subsequent to the plaintiff being aware of the defalcation and impairment of its stock of goods. A statement was rendered by plaintiff, shewing the amount claimed to be due by T. A. Walsh Co. It is now contended that the plaintiff is, by its actions, estopped from seeking redress from the defendant. I do not think this position tenable. The plaintiff did not, by anything done or course pursued, waive any rights it possessed, as against the defendant, for conversion of its goods. See on this point, *Rice* v. *Reed*, [1900] 1 K.B.D. 54, 69 L.J. (Q.B.) 33, where a somewhat similar action was brought, and it was decided that the plaintiff had not, through his dealings with his agent, elected to affirm a wrongful sale of plaintiff's goods, nor waive the right of action for tort against the purchaser of such goods. Lord Russell, C. J., at p. 64, states that the cases there referred to establish two propositions: first,

"that an application for the proceeds of goods, said to have been tortiously dealt with, is not conclusive proof of election to affirm the transaction; and, secondly, that the receipt of part of the proceeds is not conclusive proof of election."

Defendant is, however, entitled to the benefit of actual state of account between the plaintiff and T. A. Walsh Co. It was stated during the course of the trial that a further credit than that appearing in the account rendered should be allowed, and it was agreed by plaintiff that any proper credit would be given.

If the amount which should be deducted from the value of the steel bands cannot be settled between counsel, then it may be determined, when settling the formal order for judgment. Judgment will be for the plaintiff for such amount, with costs.

Judgment for plaintiff.

THE KING v. THE NEW ENGLAND Co.

Exchequer Court of Canada, Audette, J. January 14, 1922.

CROWN LANDS (§IB—8)—LICENSE OF OCCUPATION—1849 (CAN.) CH. 9, SEC. 1—1853 (CAN.) CH. 159, SEC. 6—INTERPRETATION POWERS OF COMMISSIONER OF CROWN LANDS EXERCISED BY GOVERNOR IN COUNCIL—VALIDITY.

By sec. 1, 1849 (Can.), ch. 9, sec. 1 and 1853 (Can.), ch. 159, sec. 6, the Commissioner of Crown Lands was empowered to issue, under his hand and seal, a license of occupation to any person wishing to purchase and become a settler on any public land, such settler upon the fulfilment of the terms and conditions of the license to be entitled to a deed in fee of the land. By sec. 15 of the last mentioned Act the Governor in Council was authorized to extend the provisions of this Act to the Indian lands under the management of the Chief Superintendent of Indian Affairs and when such lands were so declared to be under the operation of the Act the Chief Superintendent was entitled to exercise the same powers as the Commissioner of Crown Lands had in respect of the Crown Lands. The Governor General, on April 7, 1859, purported to grant a license of occupation in respect of certain Crown lands to N. "for and on behalf of" the defendant company, under his hand and seal at arms.

Held, that inasmuch as the license in question was granted by the Governor General under his hand and seal at arms instead of by the Commissioner of Crown lands, such license did not comply with the provisions of the statutes in that behalf and was therefore invalid and conveyed no legal right or interest in the lands to the defendant company.

INFORMATION of Intrusion exhibited by the Attorney-General of Canada seeking to recover possession of lands granted to the defendants under license of occupation.

R. V. Sinclair, K.C., and *A. G. Chisholm*, K.C., for plaintiff.

W. S. Brewster, K.C., for The New England Company.

AUDETTE, J.:—This is an Information of Intrusion exhibited by the Attorney-General of Canada, whereby the Crown, *inter alia*, seeks to recover possession of the lands mentioned in the said Information, and which have been in the possession of the defendants for upwards of 60 years, under the license of occupation hereinafter referred to.

Counsel at Bar waived and abandoned the claim of $10,000

for issues and profits from April 7, 1859, and further declared and expressed their willingness that the defendants be at liberty to remove, at their expense, all buildings erected upon the said premises.

In consideration of the yeoman services rendered to Great Britain by the Six Nations Indians during the war of the Revolution, the British Crown felt, when the war was over and when these Indians had thereby been thus deprived of the lands of their habitat—in what is now the United States—that these loyalists (so to speak) Indians should be given some lands within the Canadian Territory and 6 miles on each side of the Grand River was granted them, after having obtained a surrender of the same by the Mississagua Indians.

On the question of title, it suffices to say that the origin of the same goes as far back as 1784 and 1792 and that the title,—the license of occupation of part of the lands above mentioned upon which the whole case turns, bears date April 7, 1859,—long before Confederation.

The whole case rests upon the validity of the license of occupation, and it is found unnecessary to go beyond the date of the same for the disposal of the present issues under controversy and as set out in the pleadings,—and if I were,—a consideration which would carry us far afield—I would again be led to find in favour of the plaintiff under the titles produced and filed.

The license reads as follows, namely:—

"Province of Canada.

By His Excellency the Right Honourable Sir Edmund Walker Head, Baronet, one of Her Majesty's Most Honourable Privy Council, Governor of British North America and Captain General and Governor in Chief in and over the Provinces of Canada, Nova Scotia, New Brunswick, and the Island of Prince Edward and Vice Admiral of the same etc., etc., etc.

To All to whom the presents shall come.

Greeting.

Know ye that *I* have granted and do hereby grant unto the Reverend Abraham Nelles, of the Town of Brantford in the County of Brant, for and on behalf of the New England Company for all that parcel of land . . ."

Here comes the description of the premises and then the habendum clause, which reads as follows:—

"The said License of Occupation being granted on the express condition that the New England Company shall hold possession of the same so long as they keep up Manual Labour School for the use of the Six Nations Indians, and no longer.

Given under my hand and seal at arms at Toronto, this

seventh day of April, in the year of Our Lord one thousand eight hundred and fifty-nine and in the twenty-second year of Her Majesty's Reign.

By Command, (Sgd.) Edmund Head; (Sgd.) C. Alleyn, Secretary."

The defendant Sweet, trustee under the last will of the Rev. Abraham Nelles, in the said license mentioned, having filed no defence to the Information, judgment by default was entered against him on March 15, 1921.

Under the provisions 12 Vict., ch. 9, sec. 1 (1849), and 16 Vict., ch. 159, ss. 6, 15 (1853)* it is, among other things, enacted that a license of occupation shall be issued by the Commissioner of Crown lands. Therefore, the issue of a license by the Governor General "under his hand and seal at arms" is in direct contravention to the statute and it must, therefore, be found that the license was *ab initio* invalid and that nothing passed thereunder. This license of occupation, which the Governor General assumed to issue under his seal at arms, could not, in violation of the statute, constitute a legal and binding document. *Doe ex. Dem. Jackson* v. *Wilkes* (1835), 4 U.C.R. (O.S.) 142; *Doe Dem. Sheldon* v. *Ramsay* (1852), 9 U.C. Q.B. 105; *The Queen* v. *Clarke* (1851), 7 Moo. P.C. 77, 13 E.R. 808.

By this license of occupation the lands in question, as was contended at Bar, became practically tied up in perpetuity and it being found to be detrimental to the Indians, the present Information of Intrusion has been resorted to with the object of using these lands to a better advantage for the Indians. *The Queen* v. *Hughes* (1865), L.R. 1 P.C. 81.

On the other hand, during the whole period that the defendants have been in occupation, that is for over 60 years, there is not a tittle of evidence establishing they ever failed to discharge their part of the obligation arising out of the license.

Have not, however, the Indians the right to represent to their trustees that their land could be used to better advantage to them? Should a trustee be allowed to tie up lands for an indefinite period to the detriment of the *cestui que trust* when the law would afford a remedy to cure such detriment?

It would seem that land vested in the Crown can only be dealt with by a patent under great seal or under statutory authority.

*REPORTER'S NOTE:—By sec. 15 of the last mentioned Act the Governor in Council was authorized to extend the provisions of the Act to the Indian lands under the management of the Chief Superintendent of Indian Affairs; and when such lands were so declared to be under the operation of the Act the Chief Superintendent was entitled to exercise the same powers as the Commissioner of Crown Lands had in respect of the Crown lands.

Man.

C.A.

There will be judgment ordering and adjudging that nothing passed under the said license of occupation and that the plaintiff recover possession of the lands in question.

No costs are asked by the prayer of this information, and this is, however, a case where there should be no costs to either party.

It having appeared at trial that some of the lands covered by the license of occupation had been since its issue, about 63 years ago, disposed of and sold under expropriation for railway purposes and otherwise, the judgment will apply only to such part now in the hands of the defendants. If the parties fail to agree as to the metes and bounds of the said lands, leave is hereby reserved to either party to apply, upon notice, for further direction in respect of the same.

The judgment by default obtained against the trustee, Sweet, will go no further than the condemnation against the defendant company.

The defendants are furthermore at liberty, at their expense, to remove from the premises in question all buildings thereon erected.

Judgment accordingly.

STANBRIDGE v. TENNING.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. December 28, 1921.

COURTS (§ II A—151)—COUNTY JUDGE—APPLICATION FOR POSSESSION OF LANDS UNDER LANDLORDS AND TENANTS ACT (MAN.)—TAXATION OF COSTS—JURISDICTION OF JUDGE—DELEGATION OF POWER TO FIX REASONABLE COSTS.

A County Court Judge in Manitoba has no jurisdiction on an application under the summary proceedings clauses in the Landlords and Tenants Act R.S.M. 1913, ch. 109, secs. 11-22, to recover possession of the lands described in a lease, to award costs on the King's Bench scale, nor can the Judge on such an application delegate to the registrar of the Court of King's Bench his discretion as to allowing reasonable costs.

APPEAL by a landlord from the dismissal by Metcalfe, J., of an appeal from an order made by a County Court Judge, in an action to recover possession of lands described in a certain lease. Reversed.

C. W. Jackson, for appellant.

J. A. McAulay, for respondent.

The judgment of the Court was delivered by

PERDUE, C.J.M.:—Stanbridge, the appellant in this matter, in April, 1921, made an application to the Judge of the County Court of Stonewall to recover possession of the lands described in a lease made between Stanbridge, as landlord, and Tenning, as tenant. The application was made under the "summary proceedings" clauses in the Landlords and Tenants Act, R.S.M.,

Man.

C.A.

STANBRIDGE
v.
TENNING.

Perdue, C.J.M.

1913, ch. 109, being secs. 11-22. The lands being outside the judicial division of Winnipeg, the application was made to the County Court Judge of the judicial district in which they were situate (sec. 12). Owing to a defect in the material used upon the application, a second application was made. The first application appears to have been argued, but was abandoned after the second was commenced, and, after one or two adjournments of the latter, it, too, was abandoned. Tenning then applied to the County Court Judge for an order allowing him the costs of the landlord's two applications. The Judge ordered the landlord to pay the tenant his costs of and incidental to the applications forthwith after taxation, such costs to be taxed by the Registrar of the Court of King's Bench at the City of Winnipeg on the same scale as costs are taxable in an action in the King's Bench for the recovery of land.

The landlord then applied, on notice of motion, to Metcalfe, J., in the Court of King's Bench, to stay the taxation of the costs under the above order, or, in the alternative, for an order to prohibit the County Court Judge from further proceeding upon the above order on the ground that it was made without jurisdiction. The motion was dismissed and the landlord now appeals from the order of dismissal.

The power of a Judge to award costs of applications made under the summary proceedings sections of the Act is contained in sec. 19, which is as follows:—

"19. The judges of the Court of King's Bench, or a majority of them, of whom the chief justice shall be one, may, from time to time, make such general rules or orders respecting costs in cases under the eight last preceding sections as to them may seem just; and any judge before whom any such case is brought may in his discretion award costs therein, according to any such rules or orders then in force, or, in case no such rules or orders be made, according to the scale of costs in like proceedings in the court in which the proceedings are being taken; or he may award reasonable costs in his discretion to the party entitled thereto; and, in case the party complaining be ordered to pay costs, execution may issue out of the said court for such costs as in other cases in the court."

No rules appear to have been made under this section.

The words "in the court in which the proceedings are being taken" appear in sec. 19 for the first time in the Revised Statutes of 1913, and they are not found in any of the earlier statutes.

In *Winnipeg* v. *Guiler* (1885), 3 Man. L.R. 23, it was held by Taylor, J., that the costs of proceedings under the statute (as

Man.
C.A.
STANBRIDGE v. TENNING.
Perdue, C.J.M.

it then stood) should be taxed according to the scale of proceedings upon the trial of an action in ejectment. This decision was followed by Mathers, C.J.K.B., in *West Winnipeg Development Co.* v. *Smith* (1910), 20 Man. L.R. 274, and again in *Suckling* v. *Lyons Paint and Glass Co.* (1920), 51 D.L.R. 700. But in all these cases the proceedings were taken in the Court of King's Bench. Actions of ejectment or for the recovery of land are expressly excluded from the jurisdiction of the County Courts: R.S.M. 1913, ch. 44, sec. 56 (d). The close analogy between a proceeding under the statute and an action for the recovery of land which exists when the proceeding is taken in the King's Bench, does not apply when it is taken in the County Court. There is no like proceeding in the County Court. But an analogy sufficient for the guidance of the Judge in awarding costs might be found by adopting the scale of costs allowed in County Court suits involving legal or equitable claims of like importance, as nearly as may be, and requiring as much time and care in the disposition of them.

An alternative is provided by sec. 19. The Judge "may award reasonable costs in his discretion to the party entitled thereto." This discretion must be exercised by the Judge himself, and he has no power to delegate it. Where a Court is expressly given a discretion as to costs, the exercise of such discretion cannot be delegated; and, if such power has been delegated to someone else, then the question has not been decided and the Court has not exercised jurisdiction at all, *Lambton* v. *Parkinson* (1887), 35 W.R. 545.

The County Court Judge, in my opinion, exceeded his jurisdiction in making the order, in the following respect:—(1) He had no power to award costs on the King's Bench scale as taxable in an action for the recovery of land, because that was not "according to the scale of costs in like proceedings in the Court in which the proceedings were being taken"; (2) The Judge could not delegate to the registrar of the Court of King's Bench his discretion under the statute as to awarding reasonable costs; (3) the order does not fix the amount of the costs, but leaves the same subject to the award or decision of an officer of another Court.

For these reasons, I think the appeal should be allowed and an order made prohibiting the County Court of Stonewall and Jusan Tenning, the tenant above referred to, from further proceeding under the order made by His Honour, Paterson, J., in this matter, dated June 14, 1921. The landlord is entitled to the costs of the application to Metcalfe, J., and also the costs of this appeal.

Can.

Ex. C.

As the Judge has not yet exercised his discretion as to awarding costs in the manner prescribed by the statute, there is nothing to prevent him from doing so.

Appeal allowed.

FRASER v. AZTEC.

Exchequer Court of Canada, Audette, J. March 19, 1921.

ADMIRALTY (§II—18)—EXCHEQUER COURT IN ADMIRALTY—APPEAL FROM LOCAL JUDGE IN ADMIRALTY—QUESTIONS OF FACT—INTERFERENCE WITH JUDGMENT.

The Exchequer Court of Canada sitting as a Court of Appeal from the judgment of a Local Judge in Admiralty assisted by two assessors will not interfere with his judgment as regards pure questions of fact, unless firmly convinced that such judgment is clearly erroneous, the Judge of first instance having had an opportunity of hearing and seeing the witnesses and testing their credit by their demeanour under examination.

APPEAL by plaintiff from the judgment of the Deputy Local Judge, Quebec Admiralty District (1920), 52 D.L.R. 175, 19 Can. Ex. 454; 56 D.L.R. 440, 20 Can. Ex. 39, in an action *in rem* for damages. Affirmed.

R. A. Pringle, K.C., for appellant.

A. R. Holden, K.C., for respondent.

AUDETTE, J.:—This is an appeal from the Deputy Local Judge of the Quebec Admiralty District (1920), 52 D.L.R. 175, 19 Can. Ex. 454; 56 D.L.R. 440, 20 Can. Ex. 39, sitting at Montreal, with assessors, in an action *in rem* for damages arising out of an accident which occurred, in day time, on August 15, 1919, in lock No. 17 of the Cornwall canal.

The details of the accident are clearly set out in the reasons for judgment of the trial Judge and I am therefore relieved from the necessity of repeating them here on appeal. The case, in the result, resolves itself into a very small compass.

After reading the evidence, it is impossible to find that the respondent ship had anything to do with the cause of the accident, which was absolutely beyond its control. The surging astern, the sudden disturbance of the water and the unexpected current occurring in the lock, which caused the accident, were all foreign to the doings of the respondent. Had there been an additional line at the stern and a "breast-line," it would not be unreasonable to entertain the view that they, like the bowline, would have snapped or been pulled out like the steel cable, as found by the trial Judge under the special advice of his assessors, acting in the same capacity as the Elder Brethren do in England. Had there been two lines at the stern, it is self-evident that they would have been of no use, since the sudden

Can.
Ex. C.
FRASER v. AZTEC.
Audette, J.

current originating in the lock, took the vessel immediately to the west or astern, the water surging in that direction. Had there been a breast-line, it is manifest that having to withstand the tremendous strain of the loaded craft, it would also have broken like the manilla hauser or been pulled out like the steel cable. There was no false or wrong manoeuvre on behalf of the Aztec, while moored at the pier or bank of the canal. There was no want of care or skill exhibited on her part.

Sitting as a single Judge, in an Admiralty Appeal from the judgment of a Judge of first instance assisted by two assessors, while I might, with diffidence, feel obliged to differ in matter of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere with the Judge below, unless I came to the conclusion that it was clearly erroneous.

Indeed, as said by Lord Langdale, in *Ward* v. *Painter* (1839), 2 Beav. 85, at p. 93, 48 E.R. 1111:"A solemn decision of a competent Judge is by no means to be disregarded, and I ought not to overrule it without being clearly satisfied in my own mind that the decision is erroneous." See also *Reg.* v. *Armour* (1899), 31 Can. S.C.R. 499; *Montreal Gas Co.* v. *St. Laurent* (1896), 26 Can. S.C.R. 176; *Weller* v. *McDonald-McMillan Co.* (1910), 43 Can. S.C.R. 85; *McGreevy* v. *The Queen* (1886), 14 Can. S.C.R. 735; *Arpin* v. *The Queen* (1886), 14 Can. S.C.R. 736; Coutlee's Digest S.C.R., pp. 93 et seq.

The Supreme Court of Canada held that when a disputed fact involving nautical questions (as the one raised in this case) with respect to what action should have been taken immediately before the accident, is raised on appeal, the decree of the Court below should not be reversed merely upon a balance of testimony. *The Picton* (1879), 4 Can. S.C.R. 648.

Moreover, it cannot be overlooked that the trial Judge has had an opportunity of hearing and seeing the witnesses and testing their credit by their demeanour under examination. *Rickmann* v. *Thierry* (1896), 14 R.P.C. 105. And in the present case, there is more—there is a finding by the trial Judge disregarding the testimony of some of the witnesses whom he disbelieved. *Dominion Trust Co.* v. *New York Life Ins. Co.*, 44 D.L.R. 12, [1919] A.C. 254.

Apart from the controversy raised on appeal there is ample evidence for the Court below to arrive on this question of fact at the conclusion above referred to and to justify the decree, and in such a case the appellate tribunal ought not to interfere.

The appeal will be dismissed with costs.

Appeal dismissed.

Can.

S.C.

THE M. F. WHALEN v. POINT ANNE QUARRIES, Ltd.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. November 8, 1921.

REFORMATION OF INSTRUMENTS (§I—1) CONTRACT FOR TOWAGE OF BARGES—CONSTRUCTION—REFORMATION TO INCLUDE SCOWS—JUSTIFICATION—MISTAKE—EVIDENCE.

Where two men thoroughly accustomed to transacting business, meet after a negotiation with the object of making an agreement upon business which has been the subject of full consideration by each, and after discussion of the matter, deliberately set down in writing in perfectly unambiguous language, what purports to be the agreement between them, the Court will not reform such agreement unless it is shewn that the agreement is not the whole of the agreement between the parties, and further that the parties did agree upon something which did not appear in the writing, where one of the parties denies the alleged variation, the parol evidence of the other is not sufficient to enable the Court to act.

Held, that the trial Judge was in error in reforming an agreement to "tow barges," by adding the word "and scows" after the word "barges."

APPEAL from the judgment of the Exchequer Court of Canada, affirming the judgment of Hodgins, L.J.A. in an action claiming damages to a scow while being towed by defendant ship and loss of its cargo. Judgment appealed from varied.

The facts and circumstances are fully set out in the judgments of Audette, J., and Hodgins, L.J.A., which are reported in full.

The judgment of Hodgins, L.J.A., is as follows:—

Action claiming damages for injury to a scow while being towed by the defendant ship, a tug of 112 gross tons, from Presqu'ile to Toronto, and for the loss of its cargo. The scow originally cost $36,000 and was laden with 1,000 tons of stone. It was cut adrift on the night of November 11, 1920, by order of the Master of the Whalen, when beyond Port Hope, in Lake Ontario. The scow then drifted down the lake and stranded near Consecon in Prince Edward County. It was agreed that if the plaintiffs succeeded, the damages including the value of the repairs to the scow, after they were completed, were to be fixed by the Registrar in Toronto.

The cargo was valued at $1,875 and was a total loss.

The tug Whalen and scow left Presqu'ile on November 11, 1920, at 8 a. m., and the log of the tug, as deciphered at the trial, is as follows:—

November 11, 8 a. m. Presqu'ile. Log out. Zero. Wind south-west, light barometer 29.60. Course south-west by south.

November 11, 9.50. Hauled course west. Log 3¾. Wind south. Barometer 29.50. Proctor Point.

Can.
S.C.
M. F. WHALEN v. POINT ANNE QUARRIES LTD.

November 11, 11 a. m. Wind changed south-west. Strong. Barometer 29.50.

6.30 p. m. Cobourg. Course south-west by west-half-west. Wind south-west. Gale. Barometer 29.10.

10.20 p. m. Let go Scow No. 2 and drifting wind west-south-west. Gale. Barometer 29.10.

11.00 p. m. Get Cobourg. Wind-bound. Wind too strong for steering. We couldn't fetch her back to the wind: Log 32¼.

November 12. Gale south-west; too big for going outside.

November 13, 2.30 a. m. Left Cobourg for go after the scow. Wind west.

6.10. In Presqu'isle.

6.20. Brochton's Dock. Wind south-west. Gale. Barometer 29.65.

The log is not accurate in all its details and as to part of it there was, in my judgment, a deliberate attempt to manufacture evidence. To this I will recur.

The plaintiffs and the Kirkwood Steamship Line made a contract dated October 27, 1920, which dealt with the towage of what were denominated as the plaintiff's "barges." It appears that the owners who intervene, and whose exact status becomes material later on, were anxious to sell the Whalen to the plaintiffs, and this trip was to some extent a test which would in all probability determine whether or not a sale would be effected. The tug was sent to Presqu'ile and the instructions to its Master from the Kirkwood Steamship Line were that he was to get his orders from the plaintiffs "taking whatever is light (as stated in the contract) at this (Toronto) end, and bringing up what is loaded at the quarry end." In consequence of these instructions the tug undertook the towage of the scow and cargo in question. It is asserted that this towage was outside the scope of the contract, a point important as to the liability of the owners, but not entirely controlling responsibility for what happened in the course of the voyage.

The arguments urged on behalf of the plaintiffs were concentrated on four periods of time—on November 11—off Cobourg, between Cobourg and Port Hope—off Port Hope and beyond, and the whole of the day following. The charges were that negligent navigation was shewn by not putting into Cobourg when off that port, in not seeking refuge in Port Hope, and in the alternative, in not turning back towards Presqu'ile during one or other of these periods. It was also asserted that the crew were both negligent, incompetent and disobedient and

that the tug was not properly equipped and efficient for the work undertaken.

The tow rope was a long one, about 600 ft., and there was about 9-10 of its length out board, and the remaining tenth in board. This length of rope was given as the reason why refuge was not sought in Cobourg or Port Hope when passing there. It is a fact which is practically conceded that the horse-power of the Whalen was not sufficient for the task in hand, in view of the weather conditions which supervened. It fell from 140 H.P. to 100 H.P. before Cobourg was reached. This caused a consultation between the Master and the mate of the tug, one Mailhot, as to whether it would not be safer to get into that habour. It was decided that with the length of tow rope which was out, the Whalen could not make that port in safety, the trouble alleged being that the approach was difficult to negotiate with a heavy scow in a south west wind, and that if the harbour was reached there was no space in it of sufficient depth to allow manoeuvering so as to bring both tug and tow to anchor in safety and afloat. Having arrived at that decision the Master kept past Port Hope, the steam pressure steadily diminishing, the wind and sea increasing meanwhile. About 10 p. m., when 2½ to 3 miles beyond Port Hope, the *Whalen* began to drift back though being driven with all the steam she had. An attempt was made to turn to starboard for Port Hope. She was so light, her towing posts were so far back and her power so small that she could not be got to swing round and was unmanageable. In an endeavour then to turn to port so as to be able to return to Presqu'ile, the tow rope caught in a chock on the quarter. This accident, according to the Master's evidence, caused the tug to lose its power to turn, every effort being defeated by the awkward strain of the scow, while the diminishing power, and the violence of the wind aided to prevent the tug from overcoming the drag and to bring herself into the wind and turn. In consequence of this unfortunate situation and being of the opinion that the rope could not be got out of the chock owing to the space available in which to work being so limited that a sufficient force of men could not tackle it together, and because the vessels were on a leeshore, the Master decided to cut the scow adrift, and he did so. He then turned and reached Cobourg harbour before midnight. I accept the evidence given as to the restricted space at the stern rendering it very difficult, if not impossible, owing to the wind and sea to get any slack on the rope at 10 p.m., so as to enable the crew to extricate it from the chock.

Can.

S.C.

M. F. WHALEN v. POINT ANNE QUARRIES LTD.

But I have come to the conclusion, after much consideration, that the Master of the *Whalen* cannot be absolved from negligence in navigation nor can it be said that the tug was, in the circumstances which occurred, and which might have been foreseen, adequate for the duty undertaken. While not convinced that his judgment was entirely wrong, as to the possibility of taking an unwieldly scow safely into Cobourg Harbour, I have no doubt that the situation at that time—6.30 p.m.—was such as to demand some definite decision by the Master as to what his ultimate course should be. He noticed at 6.30 p.m. that the power was diminishing. The fact that he discussed his position when off Cobourg with the mate and had before his eye the low barometer and the increasing wind and sea, rendered it in my judgment reasonable that he should have made up his mind as to what safety and good seamanship demanded. He ought to have realised that if Cobourg was impossible, Port Hope would be so also, and that his only hope then would be to press on for Toronto or turn back. But the failure of power of which he was fully conscious, when opposite Cobourg, was as he knew, bound to increase, and the likelihood of heavier weather should have aroused in him the certainty that he could not persevere very long on his course and might be driven ashore if the steam pressure dropped much lower. In the circumstances in which he found himself at 10 p.m. with his tow rope fast in a chock and his power low and the tug failing to make progress or respond to her helm, I cannot say that his act in cutting the rope was not justified. But I have heard nothing on his behalf to warrant me in holding that either off Cobourg or later until the last moment when the rope got fast, he could not have turned both tug and scow and made down the lake, favoured by the wind and the drift. This, in my view of the conditions I have described, was not only possible but advisable, and the length of tow rope was not any hindrance but rather a help in executing that manoeuvre. Added to the consideration of immediate safety was the fact that by retracing his course he would have had a chance of standing by the scow and keeping it off shore. To sum up my view, the weather, the barometer, and the increasing loss of power required action, either in seeking shelter or if he could not make a port by reason of his length of tow line, then by turning back when conditions were still favourable, thus taking advantage of the set of the wind and waves, and keeping the scow under his control. If, indeed, this alternative had been taken, it is entirely probable that when turned he would have been able to haul in some portion of the rope when the

Can.

S.C.

M. F. Whalen v. Point Anne Quarries Ltd.

strain on it would be less, and if so to have resumed his course and gone into either Cobourg or Port Hope if he found that expedient more desirable.

I cannot see why this change was not decided upon. The tug is shewn to be an ocean vessel staunch and good. The difference between an attempt to turn at 10 o'clock at night and at 6.30 p.m. is easily calculable, as the conditions were radically changed for the worse as the evening wore on, apart from the jamming of the tow rope. In what he did the Master displayed, as I see it, neither proper seamanship nor resource and he seemed to lack realisation of what would be likely to happen if he kept on his course during the night, while the power continued to decline and the sea and wind got higher. The inability of the tug to maintain its horse power at an efficient figure is a very important factor. It was due either to want of capacity to develop or to maintain sufficient power in bad weather or to do so with the crew then on board. From the evidence I am forced to conclude that both factors were present on this occasion and that to continue safely on its course was more than the tug was capable of. There is an implied obligation in a contract for towage that the tug shall be efficient and properly equipped for the service. The *Undaunted* (1886), 11 P.D. 46, 55 L.J. (P.) 24, 34 W.R. 686; the *West Cock,* [1911] P. 208, 80 L.J. (P.) 97.

A further failure on the following day, must be laid at the Master's door. Being safely moored in Cobourg Harbour, his engineer and crew refused next morning to go out to seek for the drifting scow. The duty of a tug, when it has had to cut its tow adrift or has lost it through stress of weather, is to stand by so far as that can be done without actual peril to life or property. The *White Star* (1866), 1 A. & E. 68; see also *Minnehaha* (1861), 15 Moo. P.C. 133, 15 E.R. 444, 30 L.J. (P.) 211, 9 W.R. 925. It is no excuse that it would have been difficult or even dangerous to try and secure the tow again, unless that result is clearly proved to be the reasonable consequence of such an attempt. It was said that if the tug had gone out and found the scow, it would hardly have been possible to secure it, as the tow rope was floating with the scow and no other cable was available. Besides this it was urged that no man could have been landed upon the scow to make it fast, if a rope had been procured in Cobourg.

I do not deny the probable difficulty or the danger, but I do not think the excuse can be accepted at its face value, unless it is shewn that all reasonable efforts were made to do what was possible under the circumstances in the endeavour to render

Can.

S.C.

M. F. WHALEN v. POINT ANNE QUARRIES LTD.

assistance. The reasons given for the absolute failure to make any attempt were, first, the refusal of the engineer and crew to go out, and the absence of a tow rope. No evidence was given of any effort at all to supply the engineer's place. This, in case of emergency, should have been done by shipping a temporary substitute if available. There is nothing in R.S.C. 1906, ch. 113, Part VII., to prevent this in a tug of the size of the *Whalen*. The crew, if they disobeyed the Master's orders, could not be compelled to do their duty. But others might be found in Cobourg. If any, even slight, evidence had been given that search was made for an engineer, sailors or rope, in the Port of Cobourg, I would be bound to find that blame could not attach to the Master. But in the absence of such suggestion it is not reasonable to say that the duty which rested on the tug had become entirely impossible of performance. Equally so, I cannot accept the argument that had everything been done and the scow overhauled no man could have been found sufficiently agile to be capable of landing on board the scow and hauling a line aboard. Impossibility of performance must rest upon actual conditions and not upon the mere apprehension accompanied by the absence of even the smallest attempt to bring about a state of affairs favourable to whatever action necessity demanded. There is no doubt in my mind, upon the evidence, that the weather conditions on November 12, before the scow grounded, were such that if the tug had gone out with a tow rope, a rescue would have been in all probability successfully accomplished. Incompetence and slackness vitiate what might be a good defence, and nothing has been proved from which it could properly be inferred that what could be done was done, nor has it been shewn that those in charge of the tug were exonerated by conditions which they could not control, so as to avoid responsibility for contributing by inaction to the subsequent loss of cargo and injury to the scow.

In this connection I must refer to the entry in the log under date November 12, made by the mate, which is as follows:—

"Nov. 12. (Gale south-west too big for going outside"). In the witness box the mate stated that he made this after midnight of the 11th-12th November, when the tug arrived in Cobourg. If so, what he did was contrary to sec. 243, sub-sec. 1, of the Canada Shipping Act, R.S.C. 1906, ch. 113. I am unable to accept his testimony as truthful, or if truthful, that the entry was not intended to mislead. It is so extremely unlikely that the writing up of the log of November 12 would be done before the day had well begun, or if made at night, that it would have

Can.

S.C.

M. F. WHALEN v. POINT ANNE QUARRIES LTD.

referred to the impossibility of going out during the whole of the succeeding 24 hours. It was doubtless intended to make evidence for the crew and for the owners and to be read as if made at a later hour, after the refusal of the crew had to be concealed. I shall direct the Registrar to report to the Department having to do with the licensing of ship's officers the circumstances surrounding this entry and my finding thereon.

The result of the foregoing is that I find that the *Whalen* was negligently navigated by her Master and that he failed to take any reasonable steps towards endeavouring to secure the scow and its cargo on the day after its abandonment. I also find that the tug lacked capacity to accomplish the task undertaken by it in the weather conditions which ought to have been expected in November in that it could not sustain sufficient steam pressure, a condition aggravated by the inefficiency of the crew.

There remains a somewhat more difficult question to be determined, namely, whether the owners are entitled to limit their liability under R.S.C. 1906, ch. 113, sec. 921 (d.). That section applies to a towage contract. *Wahlberg* v. *Young* (1876), 45 L.J. (C.P.) 783, 24 W.R. 847; *Fullum* v. *Waldie* (1909), 12 Can. Ex. 325.

The condition is that the damage which happens by reason of the improper navigation of the ship shall be without the owners' actual fault or privity. The cause of the loss in question here was not only the negligent navigation, in the popular sense of the term, of the Master, but was also due to what I have called the want of capacity to maintain sufficient steam pressure and also to the incompetency of the crew to bring out the best results of which the boilers were capable. The accident of the jamming of tow ropes by reason of the action of both tug and tow in a heavy sea, which finally led to the abandonment, brought about a crisis due to the gradual failure of power. It was argued that these matters in the peculiar circumstances of this case, occurred without the owners' actual fault or privity, both in law and in fact. Among these circumstances are the provisions of the contract. This names only "barges" and it is urged that to tow a scow was outside the scope of the owners' engagement, nor could it have been foreseen by them and so could not have been provided for. There is force in this contention if the facts support it. At the trial leave was asked by the plaintiffs to amend by claiming reformation of the contract so as to make it express the true bargain. I then intimated that reformation did not seem to be necessary but on reflection I have come to the conclusion that the plaintiffs may, if they desire it, so amend that upon their doing so, the contract should

Can.
S.C.
M. F. WHALEN v. POINT ANNE QUARRIES LTD.

be reformed *quantum valeat* by adding the words "and scows" after the word "barges." The evidence makes it clear that these words were omitted by inadvertence, to use the language of Mr. T. R. Kirkwood, and also that he knew the equipment of the plaintiffs included "scows" and that the Whalen was intended to do for the plaintiffs the work done by Russell's tug Lakeside, whose place this tug was to take, and I so find. I am not convinced that reformation is strictly necessary as this action does not depend wholly upon a breach of the agreement to tow but may succeed irrespective of the contractual relationship. But as the defence was permitted to set up a claim to limit liability on any application made 2 days before the trial, it seems only fair that the plaintiffs should be allowed to assert that the true bargain should be the condition under which that limitation should be determined. Had the facts appearing at the trial been before me when granting leave to set up sec. 921 I should have made this a term of granting that leave. Irrespective of this relief I am of the opinion that the owners cannot successfully assert want of actual fault or privity. Improper navigation is not restricted to what happens while afloat; it may include antecedent matters which reaching in effect into the voyage, so control the navigation attempted as to permit it to be rightly described as improper. In the *Warkworth* (1884), P.D. 145, at p. 147, 53 L.J. (P.) 65, 33 W.R. 112, Lord Esher, M.R., said that "all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action of the ship by which damage is done is due to the negligence of any person for whom the owner is responsible is comprised within the statute." In that case the collision was caused by the ship's steering gear failing to act at a critical moment, due to the negligence of a person on shore employed by the owners in overlooking the machinery. See also ***Diamond,*** [1906] P. 282, 75 L.J. (P.) 90, and Mayers' Admiralty Law, p. 163.

The owners themselves selected this tug to do the plaintiffs' work. The correspondence makes this plain; their descriptions and their proffers before the contract was made indicate very clearly that this vessel was virtually warranted to be fit to tow whatever the plaintiffs had been in the habit of entrusting to tug boats. The Master was given definite instructions that he should take his orders from the plaintiffs and the owners did not suggest any limitation on these orders. It was of course open to the Master to decline a job for which his tug was not fitted, but that would not be because the owners had so directed him,

but would have rested upon a personal election not to undertake too hazardous an enterprise. His not refusing, but accepting the tow was, so far as the owners are concerned, in line with their instructions to him. Where a principal gives open instructions he cannot restrict them after the event and if they are ambiguous he is bound by the construction placed upon them by his agent. In this case if the tug was insufficiently equipped and manned for the duty undertaken by their agent, or was structurally unsuited to its probable requirements, the owners cannot set up that what he did was so far outside what he was entitled to do that they would not in law be privy to it. And upon the contract, as reformed, there can be no doubt, that they must stand to the plaintiffs in the position of supplying a vessel unable to perform its task through want of sufficient power and suitability in structure, as well as through lack of a capable and efficient crew. The restricted space in which the work of firing and clearing away the ashes had its effect in reducing the power. Whether the remark made by Kirkwood as to which I accept the evidence given on behalf of the plaintiffs in reply, referred to the better staying qualities and boiler efficiency or to the structure and layout of the sister tug Metax or to its crew, makes little difference. It discloses knowledge that there were defects in the Whalen or want of proper seamanlike qualities in the crew, and brings it directly home to the owners who must accept such responsibility as that knowledge casts upon them. *The Republic* (1894), 61 Fed. Rep. 109, affirming (1893) 57 Fed. Rep. 240. If nothing appeared in the case but the negligent navigation of the Master due to his want of decision and failure to use proper judgment as to what should have been done or the inefficiency of the crew and their refusal to do their duty, the owners would have a valid excuse under sec. 921. But the other matters raise quite a different question.

The statutory provision enabling liability to be limited in case of loss by improper navigation casts the onus on the owners of shewing that what occurred was without their actual fault or privity. *Grain Growers Export Co.* v. *Canada Steamship Lines* (1917), 43 O.L.R. 330. But if the damage arose because they had furnished a vessel which was not fitted for the task it undertook, and so caused the navigation to be improper navigation, then the section does not protect them. Incapacity to tow efficiently or to manoeuvre properly due to want of sufficient motive power, or want of suitable space to work in affects the navigation of the tug in such a manner that it can-

Can.

S.C.

M. F. WHALEN v. POINT ANNE QUARRIES LTD.

not be said that what occurred was without the actual fault or privity of the owners.

It appears that the Kirkwood Steamship Lines were managing the Whalen and other vessels, and in this case, as appears by the two telegrams produced, stood in relation to the registered owner, T. M. Kirkwood, in this particular enterprise, as partners and equal sharers of the profits either of operation or sale. Neither, therefore, can be permitted to take advantage of the limitation clause in the statute. *Hughes* v. *Sutherland* (1881), 7 Q.B.D. 160, 50 L.J. (Q.B.) 567, 29 W.R. 867. I hold that this defence fails and that limitation of liability cannot be allowed.

There will be judgment reforming the contract as indicated and condemning the Whalen in damages, to be ascertained by the Registrar in Toronto, for the loss of the cargo of the scow and for the costs of the repairs to the scow and such other damages if any as follow upon the liability declared. The counterclaim will be dismissed with costs. The defendants will pay the costs of the action and counterclaim up to and including the trial forthwith and the costs of the reference after the report is made.

I am indebted to each of the counsel for the speed and skill with which they conducted their side of the case.

The judgment of Audette, J., on appeal from Hodgins, L.J.A., is as follows:—

This is an appeal from the Local Judge of the Toronto Admiralty District, in an action *in rem*, for injury to the plaintiff's scow No. 2, and for the loss of her cargo, when the scow was cut adrift on the night of November 11, 1920, when beyond Port Hope, on Lake Ontario.

The details of the case are clearly and abundantly set out in the reasons for judgment of the trial Judge and I am therefore relieved from the necessity of repeating them here on appeal. In the view I take of the case, the controversy resolves itself into a very small compass.

As I have already had occasion to say, sitting as a single Judge, in an Admiralty appeal from the judgment of a trial Judge, that while I might, with diffidence, feel obliged to differ in matters of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere with the Judge below, unless I came to the conclusion that it was clearly erroneous. *Fraser* v. *S.S. Aztec* (1921), 63 D.L.R. 543, 20 Can. Ex. 450.

The Supreme Court of Canada further held that when a dis-

puted fact involving a nautical question (such as the one raised in this case) with respect to what action should have been taken immediately before the accident, is raised on appeal, the decree of the Court below should not be reversed merely upon a balance of testimony. *The Picton* (1879), 4 Can. S.C.R. 648.

The trial Judge in the present case has had to pass upon testimony of a very important nature and in respect of which there is much conflict; but on the other hand he has had the opportunity of hearing and seeing the witnesses and testing their credit by their demeanor, under examination before him. In these circumstances he disregarded the testimony of some of them whom he disbelieved. *Riekmann* v. *Thierry* (1896), 14 R.P.C. 105; *Dominion Trust Co.* v. *New York Life Ins. Co.* 44 D.L.R. 12, [1919] A.C. 254, 88 L.J. (P.C.) 30. Therefore with his findings upon the facts, I will not interfere.

The only question which calls for special consideration is that of the statutory limitation of liability to $38.92 for each ton of the vessel's tonnage, in the case provided for by sec. 921 of the Canada Shipping Act, R.S.C. 1906, ch. 113.

The solving of the question is not without difficulty. Numerous cases were cited at Bar by counsel respectively upon the point of law. The cases most stressed were that of *Wahlberg* v. *Young* (1876), 45 L.J. (C.P.) 783, 24 W.R. 846; *Fullum* v. *Waldie* (1909), 12 Can. Ex. 325; and *McCormick* v. *Sincennes-NcNaughton* (1918), 47 D.L.R. 483, 19 Can. Ex. 35. This last case was carried on appeal to the Supreme Court of Canada and the reasons for judgment of the Judge of that tribunal were much discussed and relied upon. This judgment on appeal, important as it is, for some reason unknown, has not been reported.

All of the cases cited, and especially those specifically mentioned are distinguishable on the facts from the present case in that the owners of the defendant ship here expressly made themselves privy to all that occurred after the tug had cut the scow adrift and had sought shelter in the haven for the night. I refer to the fact creating this privity below.

Accepting, as I do, all findings upon what occurred before the scow was cut adrift and when the tug put in Cobourg for the night, we face the other phase of the case, wherein arose the question as to whether or not on the following day the tug did her duty and acted with proper seamanship when she did not go out to rescue the scow. It appears from the evidence that while it was blowing on the 12th, that it was far from blowing a gale, or that there was a wind blowing that would

justify a vessel of 84 ft. not going out. It would seem to be a case of funk. No one at trial seems to have assumed the impossible task of justifying this conduct.

Now, on the day following the cutting adrift of the scow, the emergency arose, constituting a concrete duty upon the crew, to avoid the consequences of the negligent events of the first day; to avoid the result, as found by the trial Judge, of an antecedent negligence. And, between the first day and the end of the second day, a time came when the happening of the casualty could have been avoided and in what happened on the second day the owners of the vessel clearly became privy as appears by their telegram to the captain, which reads as follows, viz.:

"Montreal, Nov. 12, 1920.

Captain Henry Malette,
Tug *Mary Francis Whalen,*
Cobourg, Ont.

Point Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so.

Kirkwood Steamship Line."

Another telegram to the same effect, is sent, on the same day, by the defendants to the plaintiff.

The owners had control over their tug and crew and exercised it by that telegram. They thereby became privy to and partakers in responsibility with all its legal consequences in respect to all actions taken by the tug on November 12—actions which resulted in the scow being allowed to run aground and become a wreck. This happened for want of the tug running out from Cobourg in weather which, under the evidence, should not justify keeping in harbour or haven a vessel like the *Whalen.* The telegram contains the words "without risk to your tug." But the evidence establishes that there was no storm prevailing on the 12th—far from it. There is always some risk inherent to navigation, and this seems to have given rise to the doctrine popularly called "perils of the sea," understood in its more extended sense as covering all accidents on the watery plane. Todd & Whall's Practical Seamanship, (p. 249), impliedly recognising that risk, say that a mariner must always be ready for a "sea-fight."

It appears from the evidence that from the morning of the 12th to the morning of the 13th, the scow could and should have been easily saved. Captain Malette himself repeatedly stated that there was no danger for his tug to navigate in that weather and that "she could winter out there."

Now, after the tug cast the scow adrift and sought comfort rather than necessary shelter in the harbour of Cobourg, there is no doubt that there came a time when the impending catastrophe could have been averted—but for self-created incapacity on behalf of the defendants—and the negligence which produced a state of disability, in which the crew and the owners contributed, is in very truth the efficient, the proximate, the decisive cause of the mischief. *Brenner* v. *Toronto R. Co.* (1907), 13 O.L.R. 423; *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, at p. 10, 20 C.R.C. 309, [1916] 1 A.C. 719.

In the circumstances of the case the statutory limitation of liability cannot be applied or allowed.

Under the evidence considered in its *ensemble*, weighing its conflict to the best of my ability, I am of opinion that the Judge, who had the additional advantage of seeing and hearing the witnesses and so testing their credibility, has come to the proper conclusion, and I hereby affirm the judgment pronounced on April 7, 1921, on all issues and dismiss the appeal with costs. However, seeing that no additional costs were incurred in the consideration of this appeal, upon the counterclaim, there will be no costs to either party upon the issue of the counter claim.

A. R. Holden, K.C., for appellants.

S. C. Woods, K.C., and *G. M. Jarvis*, for respondent.

DAVIES, C.J.:—After having given the facts of this case and the evidence a great deal of consideration, I have reached the conclusion that the reformation made by the trial Judge ante. p. 545, 21 Can. Ex. 99, of the written contract contained in the letter of the respondent plaintiffs to the appellant dated October 27, 1920, by the addition thereto of the words "and scows" after the word "barges" cannot be upheld, and that the towing contract must be read and be held to have been as stated in the plaintiffs' letter covering barges only. The letter reads as follows:—

"Pointe Anne Quarries Limited.

Toronto, Ont., Oct. 27th, 1920.

The Kirkwood Steamship Line,
14 Place Royale, Montreal, Que.

Dear Sirs:—

This will confirm arrangement made with your Mr. T. R. Kirkwood this morning, whereby you agree to send the "M. F. Whalen" to tow our barges between Pointe Anne, Presqu'isle and Toronto at the following rates:—

Can.
S.C.
M. F. WHALEN v POINT ANNE QUARRIES LTD.
Davies, C.J.

From Pointe Anne to Toronto—

General Business 75c. per yard, Crib filling stone 90c. per yard.

From Presqu' Isle to Toronto—

General Business 60c. per yard, Crib filling stone 75c. per yard.

It is understood that the tug will take her towing orders from the Superintendent Mr. Thompson, taking down whatever is light at this end and bringing up what is loaded at the quarry end; we to look after fuelling arrangements and purchase of supplies.

(Sgd.) J. F. M. Stewart, Manager."

J.F.M.S./ET.

In the absence in the above letter of the words added by the trial Judge I do not think this action against the defendants would lie at all as the tow scow damaged was not under any construction a barge. There is a broad and well understood distinction between the two; the "scow" not having any rudder or steering gear or crew. So the contract as altered or amended or reformed by the trial Judge was a much more onerous one on the tug and its owners than that entered into by the appellants.

The difference between a barge and a scow is fully explained by Kirkwood, the appellants' manager, in his evidence. "One (the barge) has a rudder which steers it, making it sure of navigation, towing behind, and the other (the scow) has no rudder, is square built and as Mr. Lambert, the naval architect and marine surveyor, testified is 'a very lumbering awkward heavy built boat' and a very tough proposition for towing in any case and 'in rough weather tougher still.' "

The defendants sent their tug the M. F. Whalen specifically named in the contract to Presqu'isle to carry it out giving the captain instructions as provided in the contract to take his orders from the plaintiffs' superintendent Thompson. The captain obeyed his instructions and Thompson attached a laden scow to the tug instead of a barge. The captain knew nothing of the terms of the contract. The fact that Thompson attached a loaded scow which was not within the contract cannot make or create a new and more onerous contract as against the defendants.

I have reached the further conclusion that even if the reformation of the contract by the trial Judge is justified on the evidence, sec. 921 of the Canada Shipping Act R.S.C. 1906, ch. 113 applies to and limits the owners' liability in this action.

That section limits to an aggregate amount not exceeding $38.92 per ton for each ton of the ship's tonnage the liability whenever *inter alia* "without their actual fault or privity" any loss or damage is, by reason of the improper navigation of such ship caused to any other ship or boat or its cargo. I am clearly of the opinion that in this case there was no such actual fault or privity on the part of the owners of the tug which caused the damage complained of and in my opinion their liability, even under the reformed contract, must be limited to $4,389.01, and the judgment appealed from amended accordingly.

The tug was as I have before mentioned, specifically named as the one defendants were to send to carry out the contract. If the loss or damage sued for occurred by reason of the improper or wrongful navigation of the tug that is just such a case as the statute expressly mentions and was intended to cover and even assuming the contract to have been rightly amended or reformed, I cannot see how the specific thing, the tug M. F. Whalen, having been selected and agreed to by the parties and named in their contract as the tug to be sent, her alleged unsuitability for the work the contract provided for her to do can be successfully argued as a reason for refusing the statutory limitation of liability.

In an ordinary contract of towage when the tug is not specifically named there is an implied obligation that the tug shall be efficient and properly equipped for the service required. See *The Undaunted* (1886), 11 P.D. 46, 55 L.J. (P.) 24, 34 W.R. 686; *The West Cock*, [1911] P. 208, 80 L.J. (P.) 97, cited and relied upon by the trial Judge. But these two cases relate to general contracts to supply tugs for towage purposes and do not apply to contracts where a tug is specially named and agreed upon as was the case in this action.

The trial Judge based his judgment for an unlimited liability on the part of the defendants, the Kirkwood Steamship Lines and T. R. Kirkwood, for any deficiency that might be found in the amount owing to the plaintiffs after crediting them with the net amount realised by the sale of the tug M. F. Whalen upon first, the want of proper seamanship and resource on the captain's part, and, secondly, "the inability of the tug to maintain its horse power at an efficient figure" which inability he thought was due "either to want of capacity to develop or to maintain sufficient power in bad weather or to do so with the crew on board" and he concluded that both factors were present on the occasion in question.

Can.
S.C.
M. F. WHALEN v. POINT ANNE QUARRIES LTD.
Davies, C.J.

As I have already stated, the defendant owners' liability for damages arising from the improper or wrongful navigation of the tug by the captain and crew which are without the owners' fault or privity clearly come within the statute. With regard to the second ground of the judgment, the want of capacity of the tug to maintain sufficient horse power in the bad weather experienced, I am of the opinion that the implied rule or obligation which applies in an ordinary contract of towage, that the tug supplied should be sufficient as regards seaworthiness, equipment and power to perform the service she undertakes in weather and circumstances reasonably to be expected, does not apply to this case of the contract for the specially mentioned tug, the M. F. Whalen. (Bucknill, The Law Relating to Tug and Tow, 1913, p. 18 "where a contract is made with reference to a specific thing, qualities in that specific thing which are in fact absent will not be implied by law. A tug cannot increase her size or power, and if a 'named' tug is engaged to tow, there is no implied warranty by the tug-owner that the tug is different from her real nature, and the other contracting party must be taken to know the size and power of the tug which he has selected as the instrument of the towage.")

See also *Robertson* v. *Amazon Tug Co.* (1881), 7 Q.B.D. 598, 51 L.J. (Q.B.) 68, 30 W.R. 308, Court of Appeal.

Brett, L.J., at p. 606, * * * * "When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made."

Bramwell, L.J., dissented upon another point, but he also dealt with this question as follows at p. 602:—

"Now the plaintiffs' complaint was not that the vessel was unfit for the voyage and work; that it was not properly built or strong enough. Nor did he complain that the machinery or boiler was inadequate, not of the best make, or a good make, or strong or large enough. Had such been his complaint, then I think it ought to have failed because his engagement was with respect to specific things, and he took them for better or worse." * * * *

See also Marsden, Collision at Sea, pp. 181, 186 and 187, *The*

Warkworth (1884), 9 P.D. 145, 53 L.J. (P.) 65, 33 W.R. 112; *The Diamond*, [1906] P. 282, 75 L.J. (P.) 90.

IDINGTON, J.:—This appeal arises under the following circumstances:—The owners of the appellant were desirous of selling her to respondent and negotiations opened by the son of the owner of the appellant with that in view had, after conversations with some one on behalf of respondent and correspondence with respondent in course of which he wrote, on September 11, 1920, a long letter describing her and a sister ship in laudatory terms and at the conclusion thereof, says:—

"They will stand very heavy weather, and therefore will not lose any money on that score. They are certainly an exceptional bargain at the price which of course, is subject to being unsold."

That was followed by a submission to him of an account of what another vessel owned or managed by one Russell had done in the month of August from which it appears that said vessel had been engaged by respondent in the service it required and that set forth 14 trips of towing service of which 10 were towing scows and only 4 for towing barges.

Then ensued the bargain now in question which evidently was intended as a test of the suitability of the appellant for such a service as now in question.

Using that as a basis or rather guide of what might be reasonable in regard to charges for such an experiment, the said representative of the appellant's owner and the agent or respondent orally agreed upon the terms upon which she should do towing service for respondent.

Thereupon the respondent's agent dictated to a stenographer the following:—[See judgment of Davies, C.J., *ante* pp. 557-8]

It is to be observed this is not signed by anyone on behalf of the appellant but seems to have been given as evidence of the oral contract that preceded it.

It was argued before the trial Judge that the word "barges" did not include "scows". At first he seemed of the opinion that it would cover the towing of scows. But later allowed an amendment by way of reforming the contract, as he expressed it, and evidence was directed to that which taken with what appears above clearly demonstrated that towing of scows as well as barges was understood to have been the bargain in fact.

There was a conflict of evidence between the agent of appellant's owner and the signer of the above memo, as to whether scows as well as barges had been mentioned.

Can.
S.C.
M. F. WHALEN v POINT ANNE QUARRIES LTD.
Idington, J

The trial Judge accepted the latter's version of the facts, disregarded that of appellant's agent, and allowed the reformation of the contract, if such necessary to maintain respondent's action, for evidently in his own opinion it was not.

It seems to me not only from the foregoing but from that to which I am about to refer, that the evidence is overwhelmingly against appellant on this point.

Not only did the appellant entering upon the service accept the duty of towing two barges, but towed also the scow, without any remonstrance as to the latter before towing the scow now in question but also when the Master of the appellant cut loose her tow in a storm and went into port and refused to go next day after it when the storm had abated, there ensued the following correspondence by telegraph.

The Master of the appellant early on the day following his cutting the scow adrift sent the following:—

"Cobourg, Ont., Nft. 12.

Kirkwood Steamship Lines, 14 Place Royale, Montreal, Que.

Lost scow last night about two miles west Port Hope south west gale. H. Mallette.

Filed June 4th, 1921.

C.M., R.E.C."

That was apparently followed by a message from respondent as follows:—

"Toronto, Nov. 12-20.

Kirkwood Steamship Co., Montreal, Que.

Whalen threw big scow adrift off Port Hope twelve last night. Absolutely no reason except Capt. not control his crew. Scow still floating and have sent steamer from here but cannot reach scow till dark. Whalen in Cobourg wind off shore and crew refuses to go for scow.

Pointe Anne Quarries Ltd."

And that in turn by the following:—

"Montreal, Nov. 12, 1920.

Captain Harry Mallette,
Tug Mary Francis Whalen,
Cobourg, Ont.

Point Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so.

Kirkwood Steamship Line."

Which was followed by the following:—

"Toronto, Ont., Nov. 12-20.

Kirkwood Steamship Line, 14 Place Royale, Montreal, Que.

The scow the Whalen lost was built last year and cost over thirty thousand dollars. She carried a cargo worth twenty-five hundred dollars. No reason why tug should not get it and you should give Captain orders to this effect.

Point Anne Quarries Ltd."

And again replied to by the following:—

"Montreal, Nov. 12, 1920.

Point Anne Quarries Ltd., McKinnon Bldg., Melinda St., Toronto, Ont.

Wire received T. R. Kirkwood leaving for Cobourg first train to investigate have wired Captain to save scow if at no risk to tug.

Kirkwood Steamship Line."

And the man who pretends he never would have undertaken to tug a scow with the appellant followed all the foregoing by an expensive trip to find out what became of this scow.

And in all this not a word of remonstrance or objection to the towing of a scow, though he pretends he contracted only to tow barges, whatever that may mean in English.

It requires more than usual boldness in face of such recognition of duty to try to support the contention that someone later on no doubt suggested as to "scows" not being covered by the generic word "barges."

Such a surprising suggestion has induced me to look up the meaning of the words "barge" and "scow."

I find in the Century Dictionary the following, of many meanings:—

"*Barge.* 1. A sailing vessel of any sort. 2. A flat-bottomed vessel of burden used in loading and unloading ships, and, on rivers and canals, for conveying goods from one place to another."

Scow. 1. A kind of large flat-bottomed boat used chiefly as a lighter; a pram.— 2. A small boat made of willows, etc., and covered with skins; a ferry-boat."

Murray has the following:—

"*Barge.* 1. A small sea-going vessel with sails; used *specifically* for one next in size above the Balinger, and *generally* as —Ship, vessel (in which use it is now superseded by *Bark*) *Obs.* (except when historians reproduce it in a specific sense).

2. A flat-bottomed freight boat, chiefly for canal and river-navigation, either with or without sails; in the latter case also called a *lighter;* in the former, as in the Thames barges, generally dandy-rigged, having one important mast."

There are besides these two leading meanings in Murray five

Can.
S.C.
M. F. WHALEN v POINT ANNE QUARRIES LTD.
Idington, J

others which shew how comprehensive the word "barge" is, and how it has been applied to a great variety of vessels by no means consistent with the local application of the term as suggested herein. Then follow illustrations from many authors.

Illustrative of what I have just said the following appears in the Encyclopedia Britannica, descriptive of a "barge."

"*Barge.* Formerly a small sailing vessel, but now generally a flat-bottomed boat used for carrying goods on inland navigations. On canals barges are usually towed, but are sometimes fitted with some kind of engine; the men in charge of them are known as bargees. On tidal rivers barges are often provided with masts and sails ('sailing barges') or in default of being towed, they drift with the current, guided by a long oar or oars ('dumb barges'). Barges used for unloading, or loading, the cargo of ships in harbours are sometimes called 'lighters' (from the verb 'to light'—to relieve of a load). A state barge was a heavy, often highly ornamented vessel used for carrying passengers on occasions of state ceremonials. The college barges at Oxford are houseboats moored in the river for the use of members of the college rowing clubs. In New England the word barge frequently means a vehicle, usually covered, with seats down the side, used for picnic parties or the conveyance of passengers to or from piers or railway stations."

And no meaning is found in that work for the word "scow."

The word "scow" appears in Murray as a "large flat-bottomed lighter or punt," and a number of meanings cited from different authorities but nothing to justify the local description presented in argument herein.

It would seem from the evidence that there must be a local form of English and if that is resorted to and to be relied upon I prefer the conduct of the parties as above set forth as explanatory of what was intended by the use of the word "barges."

I agree, in regard to other points made, fully with the reasoning of the trial Judge ante p. 545, 21 Can. Ex. 99, and Audette, J., in appeal, ante p. 554, 21 Can. Ex. 114, but have thought it well to develop the foregoing as my own way of looking at what in the argument I found seemed to me rather a remarkable contention.

The appeal should be dismissed with costs.

DUFF, J.:—I am unable to say that the conclusion I have reached in this case is entirely satisfactory to my own mind. I can only say that of the three possible results, each one of

Can.

S.C.

M. F. WHALEN v. POINT ANNE QUARRIES LTD.

Duff, J.

which has met with acceptance by one or more members of this Court, that conclusion appears to me to be supported by the weight of argument. The first point for examination is whether the express contract between the parties is to be considered as embodied in the letter of October 27 signed by Stewart,, the manager of the respondent company and addressed to the owners of the appellant ship whom I shall refer to as the appellants. That letter was dictated on the day of its date by Stewart in the presence of Kirkwood, the appellants' manager. Beyond question it was, as Stewart explicitly says, intended to record the arrangement between the two parties and it was dictated by him, as already mentioned, in the presence of Kirkwood as embodying that arrangement and it was afterwards received and accepted by Kirkwood as the authentic record of it.

This document therefore *prima facie* constitutes the exclusive evidence of the contract between the parties. On behalf of the respondent it has however, been contended that in truth the contract was something different; that the parties had agreed upon a contract in different terms and that it was through the common mistake of both of them that the letter does not express the terms of the bargain they had concluded. This contention raises perhaps the most important issue on the appeal. Before proceeding to discuss it, I quote the letter, which is as follows:—

[See judgment of Davies, C.J., ante pp. 557-8]

The respondent company says that the agreement was one to tow scows and barges and that it was by mistake that Stewart used the words "to tow our barges" when to express the meaning of the parties the words should have been "to tow our barges and scows."

I refer for a moment to the suggestion that the word "barge" is in itself sufficient, that it denotes "scow" as well as "barge." The distinction is drawn very clearly in the evidence.

What is more important to note is this: The evidence of Stewart, that of Lambert as well as that of Kirkwood establish (and indeed I should be surprised to hear it disputed) that the distinction is one regularly observed in common speech and Stewart gives point to this by insisting that during the interview at the conclusion of which the letter was written scows were specifically mentioned and that the distinction between barges and scows was present to the mind of Kirkwood as well as his own and implies that the word "barge" would not have been used by either of them as a common term designating

Can.
S.C.
M. F. WHALEN
v
POINT ANNE QUARRIES LTD.
Duff, J.

scows as well as barges. In answer to a request for an explanation of the terms of the letter he says:—"I dictated it and there is no explanation except that that is the way the letter was written. It don't convey the intention."

The evidence negatives decisively this suggestion as to the scope of the word "barge."

My conclusion is that on this issue (as to the terms of the contract) the respondent company fails. I shall first give my reasons based upon the record as presented to us before discussing the judgments in the Exchequer Court. This I think is the more convenient course because I think effect ought not to be given to the findings of the two Courts below. This is not a case falling within the general rule which gives an almost conclusive effect to such concurrent findings for reasons which will be discussed later. Before proceeding to discuss the facts it should be observed that the proposition of the respondents in the form it ultimately assumes is this: That the appellants warranted the sufficiency of the tug "Whalen" for all the purposes of their business in the transport of stone from their quarries at Point Anne to Toronto and that this included a warranty of sufficiency to tow a scow of the type of that lost carrying a burden of 1875 yards of stone in the heavy weather of November.

By their statement of claim the respondents rested their cause of action upon the contract of October 27, paras. 2 and 3 being in the following terms:—

"2. On October 27th, 1920, a contract was entered into between the plaintiff and the owners of the ship M. F. Whalen, an ocean going steam tug of 200 I.H.P. registered at Halifax, for towage by the M. F. Whalen, of the plaintiff's barges, light and loaded, between Point Anne, Presqu'ile and Toronto.

3. On the 11th day of November, 1920, in pursuance of the said contract, the M. F. Whalen left Presqu'ile for Toronto at about 7 a.m. having in tow a barge of the plaintiffs laden with a cargo of stones. The tow was under control of the M. F. Whalen and the latter was manned and controlled by the servants of the owners of the M. F. Whalen and no officer, agent or servant of the plaintiff was on board either the M. F. Whalen or the tow."

The appellants by their statement of defence set up the writing of October 27, and denied that under the contract thereby disclosed they were under any obligation to assume the towage of scows. At the trial the letter of October 27 was first put in by the defence and it was only in rebuttal that respondents

Can.
S.C.
M. F. WHALEN v. POINT ANNE QUARRIES LTD.
Duff, J.

produced the evidence of Stewart who signed the letter, to the effect that the agreement between himself and Kirkwood in the interview on October 27, was an agreement to tow scows as well as barges. During the cross-examination of Kirkwood counsel for the defence objected to cross-examination on the ground that the contract spoke for itself and that matter dehors the contract was inadmissible. The trial Judge overruled the objection apparently taking the view that as some evidence of this character had been received without objection it was too late for the appellants to insist upon the contract as it stood and thereafter the trial proceeded upon that footing. At the conclusion of the evidence counsel for the respondents asked for leave to amend by adding a plea for rectification. This application was reserved by the trial Judge and granted by him in giving judgment in the action.

In discussing the point now under consideration it ought to be unnecessary to observe that where the parties have finally reduced their agreement to writing, a writing, that is to say which is intended to be the record of the agreement between them, it was not at common law competent to either of them to resort to previous negotiations or contemporary conversations or other matters for the purpose of varying or adding to its terms as expressed in the writing; and where the language is unambiguous, that is to say, capable of only one necessarily exclusive signification that it was not competent to refer to such extraneous matter for the purpose of giving colour to the plain meaning of the document. As Lord Bramwell, then Bramwell B. said in *Wake* v. *Harrop* (1861), 6 H. & N. 768 at p. 775, 158 E.R. 317, "They put on paper what is to bind them, and so make the written document conclusive evidence between them." The rule is obviously not a technical rule. It is founded upon the highest considerations of convenience and the value of it could hardly be better illustrated than by a case such as this where two men of affairs thoroughly accustomed to transacting business, meeting after a negotiation with the object of making an agreement upon business which had been the subject of full consideration by each and after discussion of the matter deliberately set down in writing in perfectly unambiguous language that upon which they have agreed. In commercial affairs it is of great importance that such documents should be regarded as final and on this principle the Courts have uniformly acted recognising that the very purpose of expressing agreements in writing is to reduce the terms of them to permanent form and to preclude subsequent disputes as to such terms.

Can.
S.C.
M. F. WHALEN v POINT ANNE QUARRIES LTD.
Duff, J.

Courts of Equity on the other hand have from early times possessed and exercised authority to rectify documents in which parties have professed to express their contracts, a jurisdiction now exercisable by Courts having equitable powers. The point was not argued and I express no opinion upon it but I am not prepared without further consideration to say whether the Exchequer Court of Canada in its Admiralty jurisdiction under the Admiralty Act of 1861 is endowed with the power to rectify instruments. Assuming that to be so it is important to note that an attempt to reform an instrument by invoking this equitable jurisdiction can only succeed where two conditions are fulfilled.

First it must be shewn not only that the agreement as stated in the writing, the agreement in this case to tow barges, was not the whole of the agreement between the parties and it must further be shewn that the parties did agree upon something which did not appear in the writing, in this case to tow barges plus scows and that the agreement, that is to say the intention to contract in this sense continued concurrently in the minds of both parties down to the time the document went into operation. The other condition relates to the character and probative force of the evidence required. Where one of the parties denies the alleged variation the parol evidence of the other party is not sufficient to entitle the Court to act. Such parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties satisfying the Court beyond reasonable doubt that the party resisting rectification did in truth enter into the agreement alleged. It is not sufficient that there should be a mere preponderance of probability, the case must be proved to a demonstration in the only sense in which in a Court of law an issue of fact can be established to a demonstration, that is to say, the evidence must be so satisfactory as to leave no room for such doubt. *Hart* v. *Boutilier* (1916), 56 D.L.R. 620, at p. 630; *Fowler* v. *Fowler* (1859), 4 De G. and J. 250 at p. 264, 45 E.R. 97; *Clarke* v. *Joselin* (1888), 16 O.R. 68 at p. 78.

Here as in all such cases the fundamental fact is the existence of the document prepared and executed with the intention of stating the terms agreed upon by the parties so executing it, and the importance of that fact in the present case is increased by the circumstance that it was prepared on the very occasion on which the parties concluded their agreement and prepared in such circumstances as virtually to make it their joint production. I do not attach as much weight to the fact

Can.

S.C.

M. F. Whalen v. Point Anne Quarries Ltd.

Duff, J.

although that is by no means without importance, that the letter was dictated by Stewart, as to the fact that it was dictated in the presence of Kirkwood when the very words of their conversation must have been fresh in the minds of both of them and in circumstances calculated to bring the attention of both to bear upon the phraseology used. I find it very difficult indeed to reconcile with these facts the statement of Stewart that he was mainly concerned as to the capacity of the tug in respect of the towage of scows and that this point had been the subject of specific discussion during the moments which preceded the dictation of the letter.

The circumstances mainly relied upon by the respondents in corroboration of Stewart's evidence may conveniently be commented upon in discussing the judgments in the Exchequer Court. As regards these judgments it should first be observed that there are cogent reasons why in this Court the findings of fact cannot be regarded as decisive. The trial Judge appears to have proceeded upon the view that even assuming the letter of October 27 embodied the concluded contract between the parties he was still bound to give effect to a warranty which he conceived to be disclosed by the correspondence preceding the contract; and in deciding that the document of October 27 was to be rectified it seems reasonably clear that his attention was not drawn either to the rules by which Courts of Equity have governed themselves in granting this relief or to the force of the considerations derived from the circumstances in which the letter was written. The letter, indeed, is treated by the Judge as only one of a series of facts of coordinate evidentiary value.

The question of rectification is thus disposed of at p. 552. "The evidence makes it clear that these words were omitted by inadverteance, to use the language of Mr. T. R. Kirkwood, and also that he knew the equipment of the plaintiffs included 'scows' and that the Whalen was intended to do for the plaintiffs the work done by Russell's tug Lakeside whose place this tug was to take, and I so find."

There is no explicit finding that there was a concluded agreement made orally on October 27 binding the respondents to employ the Whalen and the appellants to tow the respondents' scows with her. Rather excessive importance seems to be attached to a statement of Kirkwood at the trial that he had become convinced that Stewart had not intended "to deceive" him but had intended to provide for the towage of scows as well as barges. Kirkwood did, with a candour that does him

Can.

S.C.

M. F. WHALEN v. POINT ANNE QUARRIES LTD.

Duff, J.

no discredit, say that, but, at the same time, he insisted explicitly that while he knew the barges of the respondents and was willing to undertake their towage and to warrant the capacity of the Whalen to tow them, he would not have agreed to undertake the towage of scows of undefined weight and dimensions in the rough weather of November and he adds that he never would have agreed to tow a scow of the type of that which was lost since the Whalen, and this is common ground, was insufficiently powered for that purpose. He denies, moreover, that he knew that scows formed part of the "equipment" of the respondents although he admits that he was aware that scows had been used for the purpose of carrying the respondents' stone in August by one Russell whose account had been brought to his attention, adding however, that he was unaware whether or not these scows belonged to the respondents or to Russell himself; and stating moreover, that it was one thing to undertake the towage of such craft in August when steady weather would be assured and a totally different thing to consider the towage of them in November. He denies also in the most explicit manner that the scows were mentioned during the interview.

The trial Judge in finding that Kirkwood knew the intention of the respondents to be that the Whalen was intended to tow in November the same class of craft as Russell towed in August is drawing a conclusion from the evidence of Stewart alone; so likewise when he finds that Kirkwood knew scows were part of the "equipment" of the plaintiffs. It is not denied that Kirkwood had not seen the respondents' scows and it is not suggested that he had any information as to their weight or size. The view taken by the trial Judge is in effect that the appellants being in ignorance upon these points undertook to tow whatever might be assigned for towage.

Stewart says that on the voyage in which the mishap occurred he was engaged in testing the capacity of the tug and the question at this point for consideration is, is it conclusively (in the sense above mentioned) established that Kirkwood intended to enter into a contract and did enter into a contract warranting the capacity of his tug to tow in November successfully any scow which the respondents might see fit to provide for the purpose of giving her what they might consider to be a satisfactory test for the purposes of their business.

It is common ground and indeed it is the basis of one branch of respondents' case that the Whalen was insufficiently powered for the towage of the lost scow in November and there seems

Can.

S.C.

M. F. WHALEN v POINT ANNE QUARRIES LTD.

Duff, J.

little reason to doubt Kirkwood's statement that he would never have entered into a contract for the towage of such a craft at that season, that is to say a contract warranting the tug's capacity to deliver her tow safely; nor does there seem any reason to doubt his statement that he would not have entered into a contract for the towage of craft of that character of which he did not know the weight or dimensions. One must assume that he is a normally prudent man; and in examining Kirkwood's evidence it should be remembered that it was on his cross-examination that for the first time he received notice that he was expected to discuss the allegation by the respondents that he had entered into a contract of the kind now set up and notwithstanding this his evidence on the various points made against him is clear and consistent throughout. Weighing against Stewart's oral evidence the fact of the document itself and the facts connected with the litigation—the allegation that the contract of the 27th was a contract to tow barges and only barges and the basing of the plaintiff's claim upon that contract, the failure to bring forward the suggestion of mistake in the writing of the letter until the latest possible moment—I am unable to discover anything to justify the conclusion that the prayer for rectification is supported by that kind of weighty proof which the law demands in such cases. One must bear in mind, in the language of James, V.C., in *Mackenzie* v. *Coulson* (1869), L.R. 8 Eq. 368 at p. 375, that "it is always necessary for a Plaintiff to shew that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; * * * * It is impossible for this Court to rescind or alter a contract with reference to the terms of the negotiations which preceded it."

I cannot pass by the suggestion made during the argument founded upon a statement of Stewart's that the defence resting upon the terms of the contract was an after thought of Kirkwood's and that Stewart became aware that these terms were limited only when the statement of defence was filed. That is an extraordinary and incomprehensible suggestion having regard to the terms of the second paragraph of the statement of claim.

Independently of the letter of October 27 the trial Judge finds in the correspondence a warranty of capacity "to tow whatever the plaintiffs had been in the habit of trusting to tugboats." I have already pointed out that the letter is the governing document. I am unable, moreover, to agree with the trial Judge in his construction of this correspondence considered independently. Let us see what it discloses. The appel-

Can.
S.C.
M. F. WHALEN v POINT ANNE QUARRIES LTD.
Duff, J.

lants had two tugs which they wished to dispose of, and, with a view to a sale, they had been pressing the respondents to inspect them and to make trials of them. After some delay the appellants were informed by the respondents that they were not likely to make a purchase before the following spring. At the same time the respondents suggest that they employ one of these tugs in their service between Point Anne Quarries and Toronto and they add that this will give them an opportunity of making a test. The fact that in August scows were employed seems to have been magnified beyond its real significance; it did not follow that the respondents would entrust their cargoes to scows in November.

The trial Judge also proceeds upon the instructions given to the Master. The Master, he says, was given definite instructions to take orders from the plaintiffs and there was no limitation upon these instructions. This he seems to think is sufficient to fasten upon the respondents responsibility for everything undertaken by the Master on the instructions of Thompson.

It is important in considering the effect of this circumstance to bear in mind the terms of the contract. The contract provided that the captain of the "Whalen" was to take his towing orders from the respondents, but this provision, it is quite plain, is a provision touching the execution of the contract, that is to say, it is a provision relating to the employment of the Whalen in the towing of barges. To enlarge the obligations of the contract by reason of a general provision of this nature is quite inadmissible. The instructions to the Master were given pursuant to this term of the contract and in performance of it and can have no significance or effect as touching legal responsibilities of the parties.

The reciprocal rights and liabilities therefore of the parties to the appeal are to be determined by the application of the law to this state of facts. The appellants had undertaken to tow the respondent company's barges and for that purpose had placed their tug with its Master and crew under the control of one of the respondent company's officers, which officer used the tug for a service the appellants had not agreed to perform—a service admittedly more difficult and admittedly one of which the tug was incapable efficiently to perform in the event which supervened, an event which might have been anticipated—heavy weather on Lake Ontario in November.

In these circumstances it seems clear, too clear for discussion, that the appellants are not responsible as for a warranty of sufficiency of power of equipment or of crew. But the question arises, and it is this question which occasioned me the greatest

Can.

S.C.

M. F. WHALEN v. POINT ANNE QUARRIES LTD.

Duff, J.

concern in determining the appeal, the question whether, namely, having regard to all the circumstances of the case, the appellants are not in some degree responsible. Thompson, in so far as he professed to act under the contract, was doing an unauthorised thing when he directed the Master of the tug to take the scow in tow, but I think, not without much hesitation, that, having regard to the facts as a whole, he was not, strictly speaking, a wrongdoer. I think there are facts in evidence pointing to the conclusion that the appellants, while they would not contract to tow scows, and did not contract to tow scows, were not unwilling that Thompson should in any reasonable way test the capacity of the tug with reference to the possibility of purchasing her.

Looking at the relations between the parties and considering the object they both had in view I have come to the conclusion that Thompson was not a wrong-doer in using the Whalen for the purpose of testing her with regard to the towing of scows. Admittedly that is what he was doing. Stewart, the manager of the respondents, says so explicitly. I think that having regard to all the circumstances, Thompson might, not unreasonably, have assumed that he was at liberty to employ the tug in this way, but what is the legal relation arising from such employment? There was no contract by the owners of the Whalen respecting the capacity of their tug in relation to the towage of scows; the respondents employed the tug at their own risk, they took her as she was with her imperfections whatever they might be. At the same time while the captain was to take his towing orders from Thompson, he still was, in the navigation of the tug, I think, the servant of the appellants and therefore the appellants would be answerable for his negligent misfeasance in the course of such navigation. In the result the risk of deficiency of power must be borne by the appellants, and while adequate power would have saved the situation it is equally true that proper semanship, as the trial Judge has found, would also have saved the situation. It follows, I think, that the appellants are responsible for the consequences of the negligent navigation. With respect to the events of the 12th, I am unable to ascribe to the appellants responsibility for any wrong arising out of these events; the refusal of the crew to go out was due, no doubt, to the experience of the day before, which was the consequence largely of the fact that Thompson had exercised his discretion by assigning to the tug a task which she was incapable of performing. That must have been obvious to the crew and it is not surprising that they declined to go; and and it was not an unreasonable thing, I think, for the appel-

Can.

S.C.

M. F. WHALEN v POINT ANNE QUARRIES LTD.

Anglin, J.

lants, having been informed of the fact that the crew had refused to go out, to attach the condition that the tug should not be put in danger. They had not contracted that the safety of the tug should be risked in the towage of scows.

In the result the appellants are responsible but are entitled to a declaration limiting their liablity under the statute.

Having regard to the differences of opinion, I agree to the disposition of the costs proposed.

ANGLIN, J.—For the reasons given by Hodgins, L.J.A., sitting as local Judge in Admiralty, ante p. 545 I would affirm the judgment in favour of the respondents on the two matters to which the defendant restricted this appeal, viz., the deformation of the contract, or, more accurately, the determination of its scope, and the refusal of limitation of liability under sec. 921 of the Canada Shiping Act, R.S.C. 1906, ch. 113.

The question as to the terms of the contract depends chiefly on the respective credibility of the witnesses Kirkwood and Stewart. Giving to the letter of October 27 the weight to which it is undoubtedly entitled as evidence, nothing brought to my attention would lead me to doubt the soundness of the view on this aspect of the case, taken by the trial Judge, ante p. 545 and affirmed on appeal, ante p. 554. It would, I think, be a rash proceeding on our part to reverse the finding of the Judge who tried the case and saw the witnesses on a pure question of credibility. *Nocton* v. *Ashburton,* [1914] A.C. 932, 945, 83 L.J. (Ch.) 784; *Wood* v. *Haines* (1917), 33 D.L.R. 166, 38 O.L.R. 583.

Assuming therefore that the contract included the towing of the plaintiff's scows, the evidence is abundantly clear that the owners of the defendant tug were fully cognisant of the inadequacy of her power and equipment to handle those scows in such weather as was to be expected on Lake Ontario during November. Indeed the witness Kirkwood himself says that he would not have undertaken that responsibility because "she (the M. F. Whalen) was not capable for it at that time of the year. It was dangerous. She might land them in, but it was risky business."

The evidence supports the finding that the inadequacy of the Whalen's power was a contributing cause—probably the chief cause—of her captain finding himself obliged to cut the plaintiffs' scow adrift.

The "Whalen" was not chosen by the plaintiffs for the purpose of towing their vessels. She was selected by her owners and accepted for their towing by the plaintiffs who had never seen her, on the assurance of the owners that she was equal to

the Metax for which they had asked. Admittedly the Whalen did not develop as much power as the Metax did and her crew was inferior to that carried by the sister tug. The owners when sending the Whalen knew the capacity of the plaintiffs' scows and, if they did not impliedly warrant that that tug was capable of handling them in such weather as might be expected at the season when it was employed, they at least undertook that she was as fit for that purpose as care and skill could render her. *The West Cock*, [1911] P. 25, 208. Their knowledge of her deficiency in power and probably likewise of the inefficiency of her crew, which seems also to have been a contributing cause in bringing about the situation that led to the sending of the scow adrift, constituted fault on their part and deprives them of the benefit of sec. 921 of the Merchant Shipping Act.

I also rather incline to accept the view put forward on behalf of the respondents that the refusal of the Master of the Whalen to go out from Cobourg on November 12 to pick up the plaintiffs' scow, held to have been wrongful, was not "improper navigation" within sec. 921 (d) and that so far as it rendered the defendant liable the case is therefore not one for the application of that section.

The appeal should be dismissed with costs.

MIGNAULT, J.—The appellant's counsel submitted his case on two points only:—

1. The trial Judge should not have reformed the written contract by adding the words "and scows" after the word "barges," thus making the agreement one for the towage of the respondent's scows as well as barges.

2. The appellant is entitled to claim limitation of liability under sec. 921 of the Canada Shipping Act.

On the first point we have the fact that the letter prepared by the respondent's manager, Stewart, on October 27, 1920, after an interview of an hour's duration with Kirkwood, manager of the Kirkwood Steamship Line, owner of the appellant ship, mentions the towage of barges only. I must assume that this letter was deliberately prepared and that Stewart, who had dictated it, read it before he signed it. We have the further fact that when this action was started, the respondent, in its statement of claim, dated January 8, 1921, alleged a contract made by the owners of the appellant ship for the towage "of the plaintiff's barges, light and loaded." And when the statement of defence, dated January 15, 1921, set out that the contract did not cover the towage of the plaintiff's scows, but only of its barges, the plaintiff, on January 21, joined issue on the statement of defence without otherwise referring to the contract.

Can.

S.C.

M. F. WHALEN v. POINT ANNE QUARRIES LTD.

Mignault, J.

Up to the time of the trial, it was therefore common ground between the parties that the contract was for the towage of the respondent's barges. During the trial, the respondent asked leave to amend its reply so as to claim that the towage included its scows as well as its barges. And by his judgment the trial Judge rectified the contract accordingly.

On the issue of rectification of the contract, the evidence is restricted to the testimony of Kirkwood and of Stewart, the former of whom denied that the towage of the plaintiff's scows had been discussed. Stewart began by stating that the agreement with Kirkwood was that the tug furnished by him would tow all "our equipment." When the trial Judge asked Stewart why he called it "equipment" all the time, he answered "it was a floating plant," and to a further question whether that was the word used by him throughout, he replied, "no, we would speak of barges by name and the scows by scows." Stewart cannot say whether Kirkwood ever saw the scows, but he says he certainly heard of the scows at that interview. He is unable to explain the letter of October 27, except "that is the way the letter was written, it don't convey the intention."

I would naturally give every weight to the finding of a trial Judge on a question of fact. But here I cannot agree that a proper case was made out at the trial for adding to the contract, after the word "barges," the further words "and scows." With deference, this is permitting a plaintiff, who finds that the letter evidencing the contract which he himself prepared and which he alleges and produces does not support his action, to have it rectified at the trial on his own testimony so as to bring in something which the writing does not mention. I do not think that Stewart's evidence really goes further—and in this he is contradicted by Kirkwood—than to state that scows were discussed at the interview with Kirkwood, and to say that Kirkwood was mistaken when he stated that he did not know that the boat was to tow scows. Stewart entirely fails to explain why, if scows were discussed, they were not mentioned in the letter, and it is his own letter which he now attempts to contradict. In my opinion he has failed in his attempt to contradict it and I find no evidence explicit enough to shew that the towage of scows was a part of the contract agreed to by the owners of the tug. And if such towage was not a part of the contract the action cannot be maintained.

On this point, therefore, without it being necessary to discuss the second question, I would allow the appeal.

Judgment below varied.

MacDONALD v. PIER.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. April 13, 1922.

PLEADING (§IIID—325) — ACTION TO SET ASIDE FORMER JUDGMENT— ALLEGATION THAT DEFENDANT SWORE FALSELY ON FORMER TRIAL— NO SUGGESTION OF NEW EVIDENCE OR OF EXTRANEOUS FRAUD— SUFFICIENCY OF PLEADING.

In an action to set aside a former judgment, an allegation that the defendant knowingly swore falsely on the former trial does not disclose a good cause of action, when there is no suggestion made or allegation that the plaintiff can place before the second Court any new material evidence or proof of some extraneous fraud practised on the first Court which if proven would entitle him to judgment.

[Review of cases and authorities.]

APPEAL by plaintiff from a judgment dismissing an action on the ground that the pleadings disclosed no cause of action. Affirmed.

A. M. Sinclair, K.C. and *C. A. MacWilliams*, for appellant.

G. H. Ross, K.C. and *J. T. Shaw*, for respondent.

SCOTT, C.J., concurs with STUART, J.A.

STUART, J.A.:—In this action the plaintiff's statement of claim, omitting the introductory paragraph as to the occupation of the parties, reads in part as follows:—

"2. By a Judgment of the Honourable Court dated the 24th day of December, 1919, and duly entered in this Honourable Court on the 22nd day of December, 1920, it was ordered and adjusted that the Defendant recover against the Plaintiff the sum of \$4400.58 and the costs of action which were taxed at the sum of \$1273.24, making in all the sum of \$5673.82. 3. The said Judgment was obtained by the false and untrue statements made by the Defendant in giving his evidence before this Honourable Court. 4. The Defendant made such statements knowing them to be false and untrue, and with the intent that they should be acted upon by this Honourable Court, and this Honourable Court being misled and deceived by acting on such false and untrue statements caused Judgment to be given in favour of the Defendant in the said action to the loss and detriment of the Plaintiff in this action."

The claim then sets forth several pages of oral testimony alleged to have been given on the former trial and upon a reference by the present defendant, which it was alleged was false and perjured.

The statement of defence, after denying all the allegations of the statement of claim, has the following paragraphs:—

"The Plaintiff cannot now be heard to adduce evidence to shew that any of the statements complained of are false or

Alta.

App. Div.

MACDONALD v. PIER.

Stuart, J.A.

untrue for the following reasons: (a) All of the statements complained of were litigated on the trial of the action which resulted in the judgment referred to in paragraph 2 of the Statement of Claim. . . . (d) There is no evidence available to the Plaintiff which was not available to him at the time of the said trial, and at the time of the appeal taken therefrom. (e) If the Plaintiff now knows of any evidence which he did not produce at the trial his failure to produce it at the trial or on the appeal was due wholly to his failure to exercise reasonable diligence in his preparation for and conduct of the first trial, and the appeal taken therefrom."

And the defendant also pleaded that "the statement of Claim does not disclose a cause of action and is bad in law."

At the trial, after hearing a little evidence, the Judge disposed of the action in the following words:—

"The action as at present constituted will be dismissed on the ground that the pleadings disclose no cause of action. I think that to hear evidence would only leave me in the position that the judge was in when he tried the action of *Pier* v. *McDonald* and upon which he has decided."

From this decision the plaintiff has brought this appeal.

Now I apprehend that no one disputes the general proposition that a judgment which has been obtained by fraud can be set aside by an action properly brought in the same Court and alleging the facts necessary to sustain such an action. Therefore, the many expressions merely stating that general proposition, which are to be found in the precedents, do not at all advance the solution of the problem which is presented to us on this appeal. That problem is this:—what facts, if proven, are sufficient to sustain the action; in what form and how specifically must those facts be alleged and are the necessary facts properly alleged in the statement of claim before us?

Every one will admit that if it alleged and proved that a party, by some extraneous fraud, such as the clandestine substitution of a false exhibit for the real exhibit actually filed, or by the deliberate subornation of witnesses to testify to the genuineness of false documents, or even to give false oral testimony being material and relevant to the issues at the trial, has obtained a judgment in his favor, such judgment can be set aside in a new action.

But there are no allegations whatever of that kind contained in the present statement of claim.

On the other hand I think it will also be admitted that if the trial of this action had been proceeded with and it had at

Alta.
App. Div.
MACDONALD v. PIER.
Stuart, J.A.

the conclusion of the evidence been revealed that the plaintiff and the defendant had simply repeated the testimony which, as defendant and plaintiff they had given in the previous action, and the plaintiff had then asked the trial Judge to make a finding of fact, the reverse of the finding made on the previous trial, and to say that the present defendant had on that previous trial perjured himself although, on the same evidence he had been believed by the previous trial Judge, then, in such a case, the present plaintiff could not ask, would have no legal right to ask, that the former judgment be set aside. That would amount to nothing more than making the second Judge sit in an appeal on facts from the former.

Upon principle I think this is sound and unless there is some authority which must be held to have declared it unsound. I think the principle should be adopted and adhered to. I propose, therefore, to examine the reported cases to see if anything to the contrary has ever been done.

The Duchess of Kingston's case (1776), 20 How. St. Tr. 551, 1 Leach C.C. 146, 1 East P.C. 468, 2 Sm. L.C. 9th ed. p. 812, so often referred to, does not help in the slightest in the determination of the question. The Duchess of Kingston was being tried for bigamy as a peeress before the Court of the Lord High Steward with the peers as jurors. She pleaded that she had obtained a decree in a suit in the Spiritual Court for jactitation of marriage, declaring that there had been no marriage with the man Hervey, such as the Crown alleged as the basis of the charge of bigamy. And the whole report in 20 Howell's State Trials, particularly at pp. 555 et seq., shews that the Crown, in answer to this defence, proposed to shew that the woman and Hervey had colluded in order to get the decree in the Spiritual Court and, therefore, that it was no defence in a criminal charge. The decision merely declared that the Crown could do so.

In *Meddowcroft* v. *Huguenin* (1844), 4 Moo. P.C. 386, 13 E.R. 352, collusion between the parties to a divorce suit was admitted to be a sufficient ground for setting aside certain letters of administration, but it is noteworthy that the Privy Council there upheld a demurrer because the charge of collusion was made in too general terms.

Perry v. *Meddowcroft* (1846), 10 Beav. 122, 50 E.R. 529, is to the same general effect, relating indeed to the same matter.

In *Richmond et ux* v. *Tayleur* (1721), 1 P. Wms. 734, 24 E.R. 591, a bill was brought to set aside a decree because it was fraudulently obtained. The Lord Chancellor said at pp. 736, 737:—

Alta.

App. Div.

MACDONALD
v.
PIER.

Stuart, J.A.

"The plaintiff's bill is grounded upon the fraud and collusion made use of in obtaining the former decree against his wife then a tender infant; and if any fraud or surprise upon the court had been proved I would have set aside the decree; but on the contrary it appears that the court was fairly and fully apprised of the case of the articles and of the point in question, *vis.* the lapse of time and hath thought fit to make a decree which, as it may be a just one, therefore I will not set it aside."

In *Loyd* v. *Mansell* (1722), 2 P. Wms. 73, at p. 74, 24 E.R. 645, an original bill, to set aside a decree absolute for foreclosure, was filed, in which it was alleged that the present defendant "got a common bailiff, one of a scandalous character, to make an affidavit that the plaintiff's father had left his habitation and (as he believed and was credibly informed) was gone beyond sea, upon which affidavit the now defendant got an order that service of the then defendant's clerk in court might be good service, whereas the plaintiff's father was then living and publicly appeared in the next county &c; but upon this false affidavit and order made thereon the cause was heard *ex parte* &c."

The defendant to the bill did not deny this fraud but tried to rely merely on the decree and the Lord Chancellor said he could not do so.

In *Wichalse* v. *Short* (1713), 3 Bro. Parl. Cas. 558, 1 E.R. 1497, the plaintiff brought a bill to open a foreclosure decree "upon a suggestion that the former decree and proceedings had been obtained by collusion" apparently with no particulars. And the plea simply denied the collusion and rested on the decree. And this plea was held good and the bill dismissed.

In *Kennedy* v. *Daly* (1804), 1 Sch. and Lef. 355, the facts are sufficiently shewn by this passage from the judgment of the Lord Chancellor at p. 375:—"The cause proceeded without bringing *Thomas Daly* the trustee and the only person likely to take care of the interest of the minors really and truly before the Court; but deceiving the Court by having him nominally before the Court as a puppet in the hands of the person concerned for the *Kennedys*, he himself knowing nothing of it. Now these proceedings carried on under these circumstances were a fraud on the Court and in my opinion were a disgrace to all the parties concerned in them."

The previous decree was therefore set aside.

In *Manalon* v. *Molesworth* (1757), 1 Eden 18, 28 E.R. 590, the question was whether on an original bill certain allowances

made in a Master's report under a decree for sale in a previous proceeding by creditors, might be set aside, the facts being that an executor in breach of trust had suppressed the truth, which was that certain bonds had in fact been paid, and had yet made a claim on them and had falsely sworn that they were unpaid. The bonds had been actually delivered up by the testator and cancelled but had come by some means into the executor's hands. On this ground the previous decree was set aside.

Brooke v. *Lord Mostyn* (1864), 33 Beav. 457, 55 E.R. 445, 12 W.R. 616 was a proceeding instituted by an infant asking that a compromise arrangement, which affected his interests and for which the sanction of the Court had been asked and which the Court, after a reference to the Master to report as to whether the arrangement was in the interests of the infant, had by order approved, to be set aside and declared not binding upon him. It is apparent from the report that the Master acted upon affidavit evidence. The Lord Chancellor refused to set aside the arrangement but on appeal Lords Justices Turner and Knight Bruce set the arrangement aside on the ground that in the proceedings before the Master there had been a suppression of material facts known only to Lord Mostyn and his adviser. (See E.R. p. 451, bottom). But on appeal to the House of Lords ((1866), L.R. 4 H.D. 304) the judgment of the Lord Chancellor was restored on the facts without any question of the principle of law upon which Turner and Knight Bruce, L.JJ., had acted.

In *Priestman* v. *Thomas* (1884), 9 P.D. 210, 53 L.J. (P.) 109, 32 W.R. 842, there had been an earlier and a later will produced and by a compromise between interested parties the earlier will had been admitted to probate. Then, by an action in the Chancery Division, the compromise agreement was set aside on the ground that the earlier will was a forgery. It seems that in that action the Chancery Division did not and could not set aside the probate. Then an action to establish the second will was begun in the Probate Division, and there the plaintiff asked that it be declared that the defendant was estopped from denying that the earlier will was a forgery. It was held that they were so estopped, all being between the same parties. It will be observed that what happened here was that the Probate Court set aside its previous judgment on the strength of a judgment of the Chancery Division, which had merely set aside the compromise agreement for fraud, which was the forgery, but had not touched the probate, but the

Alta.
App. Div.
MACDONALD v. PIER.
Stuart, J.A.

question of forgery or no forgery was held to be *res judicata*.

In *Wyatt* v. *Palmer*, [1899] 2 Q.B. 106, 68 L.J. (Q.B.) 709, 47 W.R. 549, the claim, so far as relevant here, was to set aside a *consent* judgment obtained by a solicitor against his client for a bill of costs without taxation on the ground that the solicitor had secured this judgment by fraud.

In *Baker* v *Wadsworth* (1898), 67 L.J. (Q.B.) 301, the plaintiff brought an action to set aside a judgment obtained by the defendant in a previous action where the defendant was also a defendant, upon the ground that the defendant had obtained the verdict in her favour in the former action fraudulently by falsely and fraudulently committing perjury. The defendant did not defend the action and the plaintiff moved for judgment before Wright and Darling, JJ. His motion was dismissed. Wright, J., said:—

"I wish, however, to decide the present case upon the ground that there is no authority that the mere proof that a verdict and judgment have been obtained by perjury is sufficient to induce the Court to set the judgment aside."

And I think Wright, J., was right in saying that up to that time, at least, there was no authority for such a proceeding. At least I have found none. All the previous cases cited for the general proposition that a judgment may be set aside for fraud will be found upon examination to present distinctly different features, such as collusion.

In *Cole* v. *Langford*, [1898] 2 Q.B. 36, 67 L.J. (Q.B.) 698, it was alleged:—

"That the said judgment was obtained by the defendant by fraud in exhibiting to the court and jury *certain false and counterfeit documents* purporting to be letters written by the defendant to Baker or by Baker to the defendant as and for genuine letters passing between the defendant and Baker and also in exhibiting to the Court and jury certain memorandum books containing false and fraudulent entries touching the matters in issue in the action, which letters and books he so exhibited with intent fraudulently to influence the judgment of the Court and to procure the jury to give a verdict for the defendant, as in fact they did, and that the said verdict and judgment were procured by means of the said fraud of the defendant and not otherwise."

The defendant here also did not defend. The plaintiff moved for judgment *ex parte*. There was no opposing argument. The allegations were treated as confessed, and Ridley and Phillimore, JJ., in four lines said the plaintiff might have a judgment setting

the former one aside. Of the last two cases I should think the former both more in point and stronger. It is quoted everywhere in the text books, and moreover, in the former the party represented in argument failed, while the party who failed in the latter was not represented at all.

In *Birch* v. *Birch*, [1902] P. 62 and 130, letters of administration of an estate had been granted on the assumption that no will existed. Then two actions were brought by different plaintiffs to set these letters of administration aside and to secure probate of an alleged will of Dec. 18, 1897, or alternatively of certain instructions for a will which were dated December 8, 1897. These actions were consolidated and were tried by the President of the Probate Division in June, 1900. The proper execution of these documents was denied by the administrator, a defendant. The will of December 18 purported to be witnessed by one Sanders and one Ford. Neither of these parties was produced at the trial to give evidence. The instructions also purported to be witnessed by the same persons and also by one Barnes. This latter person was produced and severely cross-examined. Expert evidence as to the handwriting was given for and against the will. The President pronounced in favour of the will of December 18 and granted probate of it, revoking the letters of administration. In 1901 an action was brought in the Probate Division by one of the defendant to set aside the former judgment on the ground of fraud. The statement of claim set forth that one of the plaintiffs in the former action had instigated a certain other person and had assisted him to draw up and forge the alleged will and also the document of December 8; that the same person and two others had fraudulently signed the documents as attesting witnesses, and false and fraudulent statements on oath at the trial were alleged as well.

A motion was made before Gorell Barnes, J., before trial, to dismiss the action as being *res judicata*, but he refused to do so. The defendant appealed. On this appeal the plaintiff was allowed to adduce further evidence upon affidavit. Then Vaughan Williams, Stirling and Cozens-Hardy, L.JJ., allowed the appeal and dismissed the action. The plaintiff had alleged on affidavit in opposition to the motion that he had a letter from a woman in San Francisco enclosing what purported to be a confession from the alleged forger, and these were produced as exhibits. The additional evidence was in the nature of expert evidence tending to verify the handwriting of the alleged forger in the confession. In allowing the appeal and dismissing the action the Court of Appeal seem to treat the matter largely

Alta.
App. Div.
MACDONALD v. PIER.
Stuart, J.A.

as a case of the discovery of fresh evidence. Vaughan Williams, L.J., said, at p. 137:—

"In the present case my brethren do not think that the evidence of the handwriting of Sanders and the contents of the letter forwarded to the police, are sufficient even in a case in which the evidence which led to the judgment raised in the mind of the judge who tried the case considerable doubt, if not suspicion, and I do not think I ought to differ from them on such a question."

Cozens-Hardy, L.J., said, at p. 138:—

"But assuming that document to be written by Sanders, there is no possible mode of making it evidence in the present action. It is not known whether Sanders is alive and there is no reasonable probability of the alleged forgery being established."

The case *Flower* v. *Lloyd* (No. 1) (1877), 6 Ch. D. 297, 46 L.J. (Ch.) 838, was an application to the Court of Appeal to re-open the hearing of the appeal and set aside its own judgment on the ground of discovery of fresh evidence which tended to shew that the judgment of the Court of Appeal was obtained by a fraud practised in the Court below. The application was dismissed, but it was pointed out that the true remedy was by a separate action. Then we have *Flower* v. *Lloyd* (No. 2) (1878), 10 Ch. D. 327, 27 W.R. 496, shewing that the plaintiff adopted the suggestion. The former action had been for an injunction and damages for infringement of a patent. The trial Judge had decided for the plaintiff. The defendant had appealed and had succeeded and the action was dismissed. There had been an inspection, under order of the Court before the trial, of the defendant's process. In the action to set aside the judgment for fraud it was alleged that the defendants had wilfully and with corrupt intention deceived and misled the inspector. At the trial the plaintiff succeeded, the Judge holding that fraud had been committed as alleged. On appeal the Court of Appeal held that no fraud had been in fact proven and reversed the judgment. Then two of the Judges in the Court of Appeal pronounced some purely *obiter dicta* condemning the bringing of such an action. These sayings had nothing to do with the judgment or the reasons for it, and, therefore, have been given perhaps more attention than they deserve. In any case there was no suggestion of perjury at the trial, and the case does not get to our present point at all. But the case was decided in 1878 and it is noteworthy that the only cases cited for the plaintiff respondent by such eminent counsel as Kay, Q.C. (afterwards a Judge), and Aston, Q.C., were those of *Richmond*

v. *Tayleur, Kennedy* v. *Daly*, and *Brooke* v. *Lord Mostyn*, to which I have above referred, and none of which are of any assistance except in support of the very general proposition as to fraud, vitiating a judgement, and, as I shall point out, as examples of the special practice of the Court of Chancery.

In our own Courts there is the case of *Moses* v. *Bible* (1907), 5 W.L.R. 520, in which Harvey J. says at p. 521:—

"There is no doubt that both in England and in Canada judgments obtained through perjury have been set aside . . . . but there is no settled law in this province to that effect nor so far as I am aware is there any decision by any Court which is absolutely binding on me and under such circumstances I am not prepared to say that I would follow the authorities mentioned."

So he tried the case, which was by counterclaim, and dismissed it on the merits, saying he could not tell whom to believe.

The cases he cites are *Cole* v. *Langford, ubi supra, Wyatt* v. *Palmer, supra*, and *Johnston* v. *Barkley* (1905), 10 O.L.R. 724. But of these I think the first is the only one that comes near our present point. As I have pointed out, *Wyatt* v. *Palmer* was an action to set aside a judgment for fraud, indeed, but not for perjury, for the judgment had been *by consent*.

Then as to *Johnston* v. *Barkley*, the action was not to set aside a judgment at all. There had been garnishee proceedings in a lower Court, an Ontario division Court, and an issue had there been tried between the judgment creditor and the claimant to the debt under an assignment from the judgment debtor. The county Judge had declared the assignment valid. Then afterwards an action was begun in the High Court, not, of course, to set aside the judgment of the County Judge, but to set aside the assignment as fraudulent, and to this action there was a plea of *res judicata*. All the High Court did was to allow an answer to the plea of *res judicata* to the effect that the judgment of the County Court Judge had been obtained by fraud on the Court by suppressing material facts and by giving evidence that was wilfully false. As I intend to point out when dealing with the question of foreign judgments, there is a very material difference between making an answer to a plea of *res judicata* rested on the judgment of another Court, domestic or foreign, and a direct attack on the same Court upon one of its own judgments and seeking to wipe its own record off the slate.

Returning to England we have *Boswell* v. *Coaks*, [1894] 6 R. 167. There the facts were that there had been a previous ac-

Alta.

App. Div.

MacDonald v. Pier.

Stuart, J.A.

tion which had gone to the House of Lords (1886), 11 App. Cas. 232, 55 L.J. (Ch.) 761 and then the defendant in that action brought another action to have it declared that the previous judgment had been obtained by fraud and a motion was made to dismiss the action as frivolous and vexatious, which North J. did, and in this he was affirmed by the Court of Appeal. Then the matter went to the House of Lords and again the appeal was dismissed. Lord Selborne in his judgment examines the statement of claim. He shews that it was alleged that it had been discovered since the judgment in the former action that Coaks had abstracted from his copy letter book and deliberately concealed a portion of an important letter, and he says at p. 171 (6 R.):—

"Coaks denies in his affidavit the improper purpose imputed to him, but even if it had existed if the document is not shewn to be material, then the conditions are not fulfilled upon which a *res judicata* of this kind can be undone."

He then goes on to examine other allegations in the statement of claim and finds them insufficient.

It is also to be observed that the previous judgment which it was sought to set aside had itself been given in an action to set aside a previous sale made under order of the Court in a previous administration action and fraud in connection with that sale had there also been alleged. Apparently in the action of *Boswell* v. *Coaks,* Boswell tried a second time to attack the proceedings for fraud, alleged that he had now secured something further as evidence of fraud and he attempted to hark back again to the proceedings with respect to the order for sale.

The latest case to be found is *Re The Alfred Nobel*, [1918] P. 293, 87 L.J. (P.) 183 which was in Admiralty. There Sir Samuel Evans set aside an order made by himself in a previous proceeding with respect to prize of war but wherein he had acted on the affidavit of a claimant. See [1915] P. at p. 255 and [1918] P. at bottom of p. 296. It is noteworthy that the then Attorney-General, Sir Gordon Hewart, K.C., now Lord Chief Justice, in arguing that every Court has inherent jurisdiction to set aside a judgment obtained by fraud, refers to 7 cases, 5 of which dealt with defences to foreign judgments and not to actions to set aside domestic judgments. Of the latter he referred only to *Birch* v. *Birch* and *Boswell* v. *Coaks.* How he imagined a domestic Court could "set aside" a foreign judgment I do not understand.

Reviewing, now, all these precedents, it will be seen that they

Alta.

App. Div.

MACDONALD v. PIER.

Stuart, J.A.

fall into the two classes described by Lord Selborne in *Boswell* v. *Coaks*, at pp. 168, 169, where he used these words:—

"There are two classes of cases perhaps which ought to be distinguished for this purpose. One is that of which the celebrated case of the *Duchess of Kingston* 1 Leach C.C. 146, 1 East P.C. 468, 2 Sm. L.C. 9th ed. p.812, is an example, in which by the collusion of the parties the process of the courts has been abused and the whole proceeding may be described as it was described in language used in that case as *fabula non judicium*. This at all events is not a case of that kind. The present case falls within the second class namely *where it is not sought to treat as a nullity what has passed but to undo it judicially upon judicial grounds treating it as in itself and until judicially rescinded, valid and final.*"

In using these words Lord Selborne was not, as I apprehend, making the distinction between the two classes of cases rest upon the existence of collusion in one of them, but upon the circumstance that in the one case the former judgment was a judgment of a different Court, though a domestic one, which the Court in which the second proceeding was taken could not set aside, at least in the second proceeding as taken, but could and should disregard and refuse to treat as *res judicata* because of its being shewn that it had been obtained by fraud or collusion; while in the other class the former judgment was a judgment of the very Court in which the second action was brought and which the plaintiff in the second action sought to get rid of absolutely by setting it aside because there had been fraud exercised in obtaining it.

In the former class fall the following cases:—(1) *The Duchess of Kingston's* case, where to a charge of bigamy in a criminal Court the accused pleaded the judgment of an ecclesiastical Court, declaring the alleged former marriage non-existent and the Crown was allowed to shew that it was a nullity, because it had been obtained by collusion; (2) *Barkley* v. *Johnston*, where to an action in the High Court to set aside the assignment of a debt it was pleaded that the assignment had been adjudged valid by a division Court and the plaintiff was allowed to treat that earlier judgment of a different Court as a nullity because it had been obtained by fraud; and possibly (3) *Priestman* v. *Thomas*, for there the second action, I mean that in the Chancery Division, not the one reported, attacked no judgment but merely a compromise agreement by which an alleged earlier will was allowed to be proved and in the Chancery action the will was proved to be a forgery and so the comprom-

Alta.
App. Div.
MACDONALD v. PIER.
Stuart, J.A.

ise agreement was set aside. Then the reported case was a second probate action to set aside the earlier probate and the judgment of the Chancery Division was treated as *res judicata* with respect to the question of forgery and the earlier probate was set aside.

In the second class fall all the other cases cited, for in all these the action was brought in the same Court to set aside one of its own earlier judgments.

Now it is to be observed that of those which succeeded the earlier ones before the Judicature Act were all in early times in the Court of Chancery. This is significant and important because of what I gather was the practice of that Court. Of course my personal memory and experience does not go back to that period and I have had little occasion ever to enquire into that old practice. But on looking at such a book as Ayckbourns' Chancery Practice (1866) I find this stated at p. 157: "Formerly the evidence of witnesses for the hearing of the cause was taken by examination upon written interrogatories."

And it is there stated that the statute 15 & 16 Vic. ch. 86, which was a Chancery Procedure Act, provided for the taking of evidence in causes at issue either orally or by affidavit, and a reference to sec. 30 of that Act shews that it enacted that:—

"When any of the parties to any suit commenced by bill desires that the evidence should be adduced orally and gives notice thereof to the opposite party as hereinbefore provided the same shall be taken orally in the manner herein-after provided."

And indeed we know that in many proceedings, such as orders for sale, mere affidavit evidence was used, as it still is with us.

It, therefore, appears from this, and also from an examination of the cases I have cited, that the evidence on the former proceeding was not taken orally in open Court before the Judge. In nearly every instance cited, very probably in all, there had been, indeed, merely affidavit evidence and this was the case in Re The Alfred Nobel, the last case to which I referred.

I, therefore, think the Court should be very cautious in accepting as precedents cases where former decrees have been set aside for fraud, when we know that such was then the method of taking evidence in Chancery, and in applying those precedents to actions to set aside judgments for fraud, where, as now, the old common law practice as to taking evidence orally, in open Court, prevails.

Alta.
App. Div.
MacDonald v. Pier.
Stuart, J.A.

It is, to my mind, extremely significant that no case seems to be referred to, and I have discovered none, in which, before the Judicature Act, a judgment obtained in a common law action where the testimony was *viva voce* before the Judge and jury in open Court, has been attacked even unsuccessfully by a subsequent action to set it aside for fraud or perjury at the former trial. Even in Bacon's Abridgment under the title *Audita querela*, where one would expect to find it, if anywhere, there is no reference to the subject, and under the title "Fraud" there is in the American edition a single statement (p. 400) that a judgment at law obtained by fraud may be set aside in Chancery, though the reference is solely to a Missouri case. Probably the remedy may have been by injunction against proceeding on the judgment. The Encyclopaedia of the Laws of England discusses the subject, and after referring only to some of the cases I have cited, it says this at p. 266:—"And so long ago as 1757 the Court set aside a judgment obtained by trick" (refusal to produce a document because no notice to produce had been served.) But the case, *Anderson* v. *George* (1757), 1 Burr. 353, 97 E.R. 349, shews that this was done *upon a rule to shew cause.* And when the authors of that work go as far back as that and can cite nothing else, the conclusion seems to be obvious.

Surely if there had been earlier precedents in the common law Courts the books I have referred to would have made some mention of it.

It, therefore, appears almost certain that there is no case in existence in which a plaintiff in such an action has succeeded upon a mere allegation of perjury in oral testimony before the Court itself on a former trial in open Court, except, perhaps, *Cole* v. *Langford, supra,* and even there forgery of documents was alleged and no defence was filed. I have not been able to refer to *White* v. *Ivory* cited in 1922 Ann. Pr. 1089 as the report was only in a newspaper.

[See note at end of case for report referred to.]

Now in this paucity of precedent I do not consider it at all surprising that resort seems continually to be had to the, as I think, only apparent but really false analogy of foreign judgments. Upon the argument in this case and in all the text books and some of the judgments, reference was and is made to the case of foreign judgments. But in reality these judgments fall more properly within the first class above referred to in the passage cited from Lord Selborne's judgment in *Boswell* v. *Coaks* although, being foreign and not domestic judgments, they are even within that class also distinguishable.

Alta.
App. Div.
MACDONALD v. PIER.
Stuart, J.A.

We are in several places confronted with the statement "A judgment may be impeached for fraud and in this respect there is no distinction between foreign and domestic judgments." But such statement, wherever made, has always been merely *obiter* and in any case can mean no more than it says. Of course both may be impeached for fraud but the impeachment in the one case is an essentially different thing from the impeachment in the other.

The exact nature of a suit brought on a foreign judgment has been the subject of extended discussion. An elaborate and apparently almost exhaustive enquiry into the matter is to be found in the judgment of Mr. Justice Gray, delivering the judgment of the Supreme Court of the United States in *Hilton* v. *Guyot* (1895), 159 U.S. 113. He shews that up to the date of the Declaration of Independence the English Courts treated a foreign judgment as merely *prima facie* evidence of a debt but that the later tendency has been to treat them as conclusive, subject to certain special defences. The matter is discussed in Piggott on Foreign Judgments at pp. 25 et seq. But whether such judgments are only *prima facie* evidence or are conclusive evidence the fact remains that they are only *evidence* of a debt. Piggott suggests, indeed, that even in a suit on a domestic judgment that judgment is only evidence of a debt, which is probably correct;

But the matter may, in my opinion, be best put to the test in this way. Supposing the defendant here, who had got his judgment in the former action had not realised for nearly 12 years and, desiring to avoid the effect of the Statute of Limitations, had brought a second action on his judgment. Even aside from the lapse of time could the defendant, the present plaintiff, have pleaded *merely as matter of defence* that the judgment had been obtained by fraud? Would the Court have entertained such a defence? Would he not have certainly been told that the judgment was good and valid until judicially set aside by an affirmative action for that purpose? Would he not be told that he must first bring such an action or at least bring a counterclaim, as indeed the defendant evidently thought he must do in *Moses* v. *Bible, supra?*

For this reason I think there is a clear distinction between a suit in this Court to set aside one of its own records and a defence in this Court to an action on a foreign judgment. In the latter case the defendant merely says that the evidence adduced, viz;—the foreign judgment, is vitiated by fraud in the procurement of it and asks it be not enforced against him. In

Alta.

App. Div.

MacDonald
v.
Pier.

Stuart, J.A.

the latter case he asks the Court to destroy its own record. In the former case there can be no case for the application of the maxim, *interest reipublicae ut sit finis litium*, because the foreign litigation has not hurt or bothered our *respublica* at all.

I think the analogy is not safe or conclusive and I find no authority binding on this Court which declares that it is. I, therefore, think we ought to decide this case upon a consideration of precedents, strictly applicable to it, where an action of this nature has been brought and upon sound principle in so far as those precedents are not helpful, without resort to principles laid down in cases which present actions of a different kind altogether.

Now the statement of claim as it stands violates the rule laid down in Mitford on Pleading in Chancery at p. 114, where it is said:—"A bill to set aside a decree for fraud must state the decree, *and the proceedings which led to it*, with the circumstances of fraud on which it is impeached."

There is nothing whatever in the statement of claim to shew what the previous suit was about. Upon demurrer I think this would be fatal but the record of the proceedings before Ives, J., with a copy of which we have been furnished, shews that it was agreed by the parties that the former record should be produced in evidence, and indeed it was produced, though we have not got it before us formally. So that this objection was obviously waived by the defendant.

But the circumstances of fraud alleged consist simply of a copy of portions of the oral testimony of the present defendant, given on the former trial, where he was plaintiff. How this testimony was material cannot appear to us because we have not got the former pleadings before us. It might appear, if we had them, that it was not material and if that were so then the words of Lord Selborne, above quoted, from *Boswell* v. *Coaks*, would apply, viz:—"The conditions are not fulfilled upon which a *res judicata* of this kind can be undone."

But I will assume that the evidence set forth was material. What is alleged is merely this, that the defendant testified falsely and fraudulently on the former trial and, I will add for the purpose of argument, upon material points of fact.

The question is, does this constitute a cause of action. There is no suggestion that there was any witness called for the plaintiff in the former action but himself or that any one but the then plaintiff swore falsely. There is no suggestion of forgery of documents as in *Cole* v. *Langford* or of bribery of witnesses.

There is no authority whatever for saying that such a state-

Alta.
App. Div.
MACDONALD v. PIER.
Stuart, J.A.

ment of claim shews a cause of action. And in the absence of authority what is the proper principle to apply? Surely it cannot be said that a mere allegation that the defendant knowingly swore falsely on the trial before the former Judge discloses a good cause of action when there is no suggestion made, or allegation, that the plaintiff can place before the second Judge anything more than what was before the first one. It is suggested that the issue before the first Judge was merely whether what the then plaintiff, the present defendant, said was true or untrue, not whether, if untrue, he knew it was untrue and so was perjuring himself. And reference is made to some cases on foreign judgments where this distinction is drawn. But for the reasons I have given I set to one side the decisions in foreign judgment cases. Moreover, the second Judge must first certainly decide whether the statements were untrue before he can enquire whether they were untrue to the knowledge of the witness. And that first issue was before the former Judge and was decided by him. So that aside from the perjury the same issue is raised a second time and it is asked to be decided on the same evidence. Surely it cannot be seriously contended that the first Judge never addressed his mind to the problem whether the plaintiff was then telling what he knew to be untrue but that the second Judge, owing to the express pleading, would be bound (and could better succeed) to enquire into the previous state of knowledge of the witness.

In my opinion this ought not to be permitted without an allegation that something entirely new in the way of evidence has been discovered and there is no such allegation.

To this it may be answered that the plaintiff is not bound to disclose his evidence. But why not? In my opinion this usual rule ought not to be applied in an action of this kind for several reasons. In the first place in most actions the matter is between the parties who have not come into Court before. One party is attacking merely the other. But here a solemn judgment of the Court itself is what is attacked. Should not the reasons for that attack be set forth in the record so that the Court will see what the reasons alleged are for which it is asked to expunge its own record? I think they should be so shewn. Moreover, the rule that a party must not be obliged to disclose his evidence is not applied in the case of a motion to the Court of Appeal for a new trial (i.e. to set aside the judgment below), upon the ground of discovery of fresh evidence. Certainly there the appellant is bound, at least, to say that he has some fresh evidence. And here he does not even say that.

Alta.
App. Div.
MACDONALD v. PIER.
Stuart, J.A.

And still more on such a motion he is forced to disclose the nature of the evidence which he has discovered, so that it may be seen whether it is likely to change the result. *Riverside Lumber Co.* v. *Calgary Water Power Co.* (1915), 25 D.L.R. 818, 10 Alta. L.R. 128. And he must do this even where there is no suggestion of fraud or perjury on the part of his opponent.

If that is so then, surely, *a fortiori* where the defeated party instead of merely appealing and asking for a new trial actually brings an action to set aside the record, he ought to allege such facts as will shew on their face that if they are true he has a right to bring his action, that is that he has a good cause of action. There would be no need perhaps of disclosing the names of the witnesses but certainly the nature of any fresh evidence ought to be disclosed. In such a proposed action as this the discovery of new evidence assuming that to be sufficient ought to be treated as the very gist of the action. I think there is no right to bring it otherwise unless the fraud alleged is extraneous to the Court proceedings, which was undoubtedly the case in *Cole* v. *Langford*. In all the modern contested cases (in none of which,by the way, did the plaintiff succeed, except *Cole* v. *Langford*) it will be observed that the Court had before it a statement of what new evidence the plaintiff proposed to adduce, although, of course, he was perhaps forced to divulge it by motions to dismiss before trial.

What I mean is this. Supposing the case had gone on and the second Judge, Ives, J., had concluded that what the present defendant had sworn on the former trial before Scott, J., and the Master (for there was a reference) was untrue and that he then knew it was untrue and so committed perjury in Ives, J.'s conclusion, and if he had reached that conclusion merely on a repetition of the former evidence and nothing more, then in such case, Ives, J. must still have dismissed the action because he would be merely reversing the finding of Scott, J. and the Master as to the truth of the allegations in question. Then although the present plaintiff would have proved to Ives' J.'s satisfaction everything alleged in the statement of claim he yet would have failed. It inevitably follows from this that what is alleged in the statement of claim does not constitute *in itself* a cause of action, for otherwise, it all being proven to the Judge, the plaintiff should be given judgment. Therefore, an allegation of new evidence recently discovered or of some extraneous fraud is necessary to give the plaintiff a right to succeed and must, therefore, form part of the very basis and sub-

Alta.
App. Div.
MACDONALD v. PIER.
Stuart, J.A.

stance of his right of action. Nor is this unreasonable considering the nature of the action as one not merely to decide the rights of the parties but to set aside a record of the Court entered on a previous trial where those rights had been decided.

But it is not for this Court to suggest what might conceivably constitute a good cause of action. It is enough to decide upon what is before us, not upon a hypothetical case. And I do not wish to be understood as saying that no explanation would be necessary of the reason why the evidence had not been adduced before.

It may be suggested that the trial Judge should have gone on and that perhaps the plaintiff would have brought forth the new evidence and that he should have waited to see. But I, for my part, cannot accede to this contention. Surely it is not to be declared that a plaintiff may file some document, called on its face a statement of claim, but shewing no cause of action, and that, merely because the defendant waits till the trial to object to it, the Judge should go on and hear a lot of evidence and take his chance on whether he is really trying an action or merely listening to twice told tales! If that is so then pleadings ought not to exist at all and the Courts have all along been making a mistake in insisting upon them:

Neither do I agree that the plaintiff ought now to be allowed to amend. He never asked for the privilege. He wants his pleading tested and I think he should merely be given the test. Furthermore, if an amendment were allowed, as the plaintiff might be advised, it could only be on the condition of paying all costs to date. He will suffer nothing more by a simple dismissal of the appeal. He will, by a dismissal of the so-called action, not even be confronted with the possibility of a plea of *res judicata,* if he should start over again, because the dismissal would be on the ground that there had been no thing, *no res,* to be adjudicated upon.

It may, of course, be that the defendant's better course would have been to take the offensive earlier and, as was done in several of the English cases, apply to dismiss the action as frivolous and vexatious and so force the plaintiff, perhaps, to shew his hand more completely. But the fact that he waited until the trial to make objection cannot, I think, make any difference. Both at the trial and before us, the plaintiff had every opportunity to suggest the existence of recently discovered evidence and the absence of such an allegation was expressly complained of on the appeal by counsel for the respondent and indeed is raised in the statement of defence. Yet there never was any

Alta.

App. Div.

MacDonald v. Pier.

Beck, J.A.

suggestion made that any such new evidence existed. For this reason also I think we should let the dismissal of the action stand as being frivolous and vexatious in the circumstances.

I would, therefore, dismiss the appeal with costs.

Beck, J.A.:—This is an appeal by the plaintiff from the judgment of Ives, J., at the trial, dismissing the action on the ground that the statement of claim discloses no cause of action.

The action is one to set aside a domestic judgment obtained by the defendant against the plaintiff on the ground that it was obtained by fraud. Such an action undoubtedly lies. Bills to set aside judgments were not uncommon under the old Chancery Practice, and a distinction was made between the case where the proper remedy was a *bill of review* and where it was an *original bill;* a bill of review was the proper remedy where the plaintiff had discovered since the judgment matter which the defendant was not in the former proceedings bound in conscience to disclose; an original bill was the proper remedy where the matter was such that the defendant was bound in conscience to disclose—in the latter case the judgment would have been obtained by fraud; an original bill was the remedy. Story's Equity Pleading 8th ed. pp. 400 *et seq; Manaton* v. *Molesworth* (1757), 1 Eden 18, 28 E.R. 590; *Patch* v. *Ward* (1867), L.R. 3 Ch. 203 at p. 206, 16 W.R. 441.

In *Wyatt* v. *Palmer,* [1899] 2 Q.B. 106 (C.A.) it was held that an action will lie to set aside a judgment for fraud under the system of jurisprudence established by the Judicature Act and that it is not necessary in the case of a judgment by default to have recourse to English O. 27, R. 15 (our R. 163), and it is clear that it is not necessary in the case of a judgment otherwise than by default to appeal and ask for the hearing of further evidence and that an appeal with an adverse decision is no bar to the action to set aside the judgment for fraud. *Shedden* v. *Patrick* (1854), 1 Macq. H.L. 535; 9 Sc. R.R. (H.L.) 396.

In *Wyatt* v. *Palmer,* Lindley M. R. said at p. 109:—

"It is said that no such action will lie. That proposition is so new to me that, as an equity lawyer, I was startled by it. That an action could not be brought to impeach a decree or judgment on the ground of fraud was a surprise to me. I was familiar with such actions when at the Bar; and I have refreshed my memory by referring to Mitford on Pleadings where I find this: 'If a decree has been obtained by fraud it may be

Alta.
App. Div.
MACDONALD v. PIER.
Beck, J.A.

impeached by original bill without the leave of the Court' (5th Ed. p. 112)."

The respondent's counsel, however, does not dispute these propositions, but he contends (first) that the statement of claim must allege the discovery of new evidence. He cites *Boswell* v. *Coaks*, [1894] 6 R. 167 as supporting this proposition; but he has misinterpreted the case. Lord Selborne in the course of his judgment explicitly makes the distinction, to which I have already adverted, between two classes of cases: "one is that of which the celebrated case of the *Duchess of Kingston* (1 Leach C.C. 146; 1 East P.C. 468; 2 Smith's L.C. 9th Ed. p. 812) is an example, in which, by the collusion of the parties, the process of the Court has been abused, and the whose proceeding may be described as it was described in language used in that case as *fabula non judicium*."

The Judge is referring to a judgment attacked on the ground of fraud, in order to do which, under the old Chancery practice, as distinguished from a *bill of review*, an *original bill* had to be filed. He proceeds:—

"This, at all events, is not a case of that kind. The present case falls within the second class, namely, where it is not sought to treat as a nullity what has passed, but to undo it judicially on judicial grounds, treating it as in itself, and until judicially rescinded, valid and final."

The Judge is referring to a judgment sought to be set aside on the ground of the discovery of new evidence bearing on the issues determined in the action, which newly-discovered evidence was, of course, not before the Court when the issues were determined, and the method, properly adopted under the old Chancery practice, being a bill of review as distinguished from an original bill.

An action in the nature of a bill of review, which under the old Chancery practice could be filed only by leave of the Court, probably cannot now be brought. Lord Selborne at p. 169 says:—

"The old practice of the Court of Chancery applicable to bills of review may not be, and I assume for the present purpose that it is not, now in use. A simpler and less formal and technical code of procedure generally has been adopted, which does not expressely require a preliminary application to the Court when a proceeding in the nature of a bill of review to set aside a formal judgment otherwise final, is taken."

The Judge is referring to English O. 42, R. 27.

We seem to have no corresponding rule but a like remedy

Alta.
App. Div.
MACDONALD v. PIER.
Beck, J.A.

undoubtedly exists by virtue of the Judicature Act (ch. 3 of 1919) sec. 35 (10) and R. 326, corresponding with English O. 58 R. 2 and O. 39, R. 2.

I pointed out the distinction I am now insisting upon in *Riverside Lumber Co.* v. *Calgary Water Power Co.* (1915), 25 D.L.R. 818, 10 Alta. L.R. 128, at pp. 133-4, and in that case the authorities were discussed which shew that, speaking generally, where it is sought to get the benefit of newly discovered evidence, it is necessary to shew that the evidence would in all probability have changed the result at the trial and could not, with due and reasonable diligence, have been discovered so as to have been produced at the trial.

In re Scott & Alvarez Contract, [1895] 1 Ch. 596 at p. 622, 64 L.J. (Ch.) 376, another case referred to by respondent's counsel, was a case of a bill of review based on the discovery of new evidence.

It is quite clear, that in an action to set aside a judgment for fraud, it is not necessary to shew the discovery of new evidence which, with reasonable diligence, could not have been discovered before the trial and which evidence would in all probability have changed the decision.

The respondent contends (secondly) that although it is true that a judgment can be set aside for fraud it cannot be set aside for *mere perjury.* To me it seems that perjury is the grossest kind of fraud upon the Court and the parties. The respondent's counsel refers to the case of *Baker* v. *Wadsworth,* [1898] 67 L.J. (Q.B.) 301, the head note of which is: "A judgment obtained in an action will not be set aside in a subsequent action brought for that purpose upon mere proof that the judgment was obtained by perjury."

I think that the head note is not supported by the opinions of the Judges who decided the case and the case is open to several observations.

First, the decision is nowhere reported but in the Law Journal Reports; it was not carried into the authorised reports. Secondly, the decision was given upon a motion for judgment upon a statement of claim in default of delivery of defence and apparently in the absence of any evidence.

Thirdly, it was the decision of but two judges (Wright and Darling JJ.) given without reserving their judgment for consideration.

Fourthly, in the case of *Cole* v. *Langford,* [1898] 67 L.J. (Q.B.) 698), that is reported in the same volume of the Law Journal Reports, but, unlike *Baker* v. *Wadsworth* carried into

Alta.
App. Div.
MACDONALD v. PIER.
Beck, J.A.

the authorised reports, [1898] 2 Q.B. 36, and both reports of which should be looked at, the Court (Ridley and Phillimore JJ.), although *Baker* v. *Wadsworth* was cited to them, gave judgment on a motion for judgment in default of defence, the action being based upon an allegation which seems to me equivalent to perjury, namely production of forged documents. Of *Baker* v. *Wadsworth*, counsel urged that the Judges there refused the motion for judgment "apparently in the exercise of their discretion and not because they had no jurisdiction to do so," and an examination of the reasons of the Judges seems to support this view.

Fifthly, the Judges were unduly impressed with the remarks of James, L.J., in *Flower* v. *Lloyd* (1878), 10 Ch. D. 327, in which he questioned in very strong terms the propriety of permitting at all actions to set aside judgments for fraud; but these strong views of his have in subsequent cases been quite disregarded.

The case of *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295, 52 L.J. (Q.B.) 1, 31 W.R. 57, was the foundation of the subsequent cases. Coleridge C. J. and Brett, L. J., both distinctly decline to agree with the views of James L. J., expressed in the previous case and Baggallay L.J., who was in both, had in the earlier case dissociated himself in that respect from James L.J.

In *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310, 38 W.R. 594 the decision in *Abouloff* v. *Oppenheimer* was discussed and followed. The head note is as follows:—

"Where an action is brought in England to enforce a foreign judgment, the defendant may raise the defence that the judgment was obtained by the fraud of the plaintiff, even though the fraud alleged is such that it cannot be proved without retrying the questions adjudicated upon by the foreign Court."

The Court said at p. 318:—

"Not only where there has been a fraud on the Court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but where the plaintiff has obtained judgment by the use of perjured evidence that is such a fraud as would enable the defendant to impeach the foreign judgment."

The cases of *Abouloff* v. *Oppenheimer* and *Vadala* v. *Lawes* were followed by the Court of Appeal of Ontario in *Jacobs* v. *Beaver* (1908), 17 O.L.R. 496.

The cases referred to with regard to the practice before the Judicature Act were cases of bills to set aside domestic judg-

Alta.

App. Div.

MacDonald
v.
Pier.

Beck, J.A.

ments. The cases of defences to actions on foreign judgments on the ground of fraud are clearly applicable.

Some question was raised upon the form of the statement of claim. It alleges that the judgment attacked was *obtained* by the *false and untrue statements made by the defendant in giving his evidence;* that the defendant made such statements *knowing them to be false and untrue* and *with intent that they should be acted upon* and that the Court, being *misled and deceived by acting on such false and untrue statements caused* judgment to be given in favor of the defendant. Then follows a long extract of the evidence in the former case indicating the statements said to be false. It is impossible to say that these statements could have had no effect upon the decision of the case.

For the reasons I have given I am of opinion that the plaintiff is entitled to have his case tried and I would, therefore, allow the appeal with costs and direct a new trial, the costs of the former trial to be costs to the plaintiff in any event.

Post Scriptum.

The foregoing opinion was the one first written and has formed the basis of much discussion among the members of the Court.

I quite agree that the statement of claim is defective in not setting out what the issues were in the previous action and in not expressly alleging that the plaintiff was in a position to produce at the trial evidence to prove the perjury of the defendant in addition to that produced at the former trial. I think it not necessary to allege that such additional evidence was not available to him on the former trial. With regard to the first point, that objection was practically cured by the production and filing as an exhibit of the entire file in the former action. With regard to the second point, it seems to me to be obvious that additional evidence is essential, for one Judge could not make a contrary finding on the same evidence. But the trial having commenced, the trial Judge might have settled that point by a question whether the plaintiff proposed to adduce additional evidence. If plaintiff's counsel had answered, no, I think the Judge would rightly have dismissed the action.

The statement of defence contains the allegation that "the statement of claim does not disclose a cause of action and is bad in law."

Such an allegation is quite insufficient. The precise point of law intended to be raised must be indicated. See Annual Practice, 1922 notes to O. 25, R. 2; Chitty's Forms, 14th ed. pp. 167 *et seq;* Appendix E to English Rules, Sec. iii.

Alta.
App. Div.
MACDONALD v. PIER.
Hyndman, J.A.

The allegation in its general form gave no notice to the plaintiff of the ground or grounds on which the defendant intended to rely and consequently failed to suggest to him the advisability of endeavoring to procure the determination of any important point of law as a preliminary question to be disposed of before incurring the expense of going to trial.

Had the precise points been indicated the plaintiff would undoubtedly have amended, for the Court will not determine a question of law without first seeing it is based on the real facts.

No doubt a party has a right to raise a point of law at the trial *ore tenus*, but the fact that it is raised for the first time *ore tenus* at the trial, must have an important bearing upon the course which should be taken by the trial Judge.

Some points which are raised in other paragraphs of the statement of claim as questions of fact and not as questions of law, it is suggested are in reality questions of law, but they do not suggest the points now in question.

My view then is that the trial Judge, in the circumstances, ought to have asked plaintiff's counsel whether he proposed to adduce new evidence to establish the perjury; if counsel replied no, the action should have been dismissed, if yes, the action should have proceeded; in other words, the two defects in the statement of claim ought to have been disregarded, the plaintiff having leave to amend and the statement of claim being taken to have been amended accordingly. So far then as my brother Stuart has expressed a positive opinion there seems to be no difference between us, except as to the duty, in the circumstances, of the trial Judge, a difference which goes only to the question of costs.

The case having reached its present stage, the plaintiff should now, of course, amend.

HYNDMAN, J.A.:—After a careful consideration of the authorities it seems to me there can be no question but that the Court should entertain an action to set aside a judgment, either domestic or foreign, on the ground that fraud was practised on the Court, thus misleading it, by evidence known to the party obtaining such judgment to be false.

I need only refer to the following authorities upon which to base what I have said, viz: *Abouloff* v. *Oppenheimer*, 10 Q.B.D. 295. *Vadala* v. *Lawes*, 25 Q.B.D. 310. *Jacobs* v. *Beaver*, 17 O.L.R. 496 and the citations there mentioned—Story's Equity—Pleading 8th ed. p. 400.

The only doubt which I have with regard to the right of the plaintiff in the present action is due to what I think an insufficiency in the statement of claim.

Alta.
App. Div.
MACDONALD v. PIER.
Clarke, J.A.

In my opinion as it is at present framed, assuming the allegations put forward as true, it does not and cannot be said to necessarily follow that the plaintiff, appellant, would be entitled to judgment in his favor. The record and judgment in the former action are made part of the Appeal Book. A perusal of the pleadings and judgment therein and the impeached evidence as set out in the case fails to reveal to me either (1) that such evidence was material to the issues involved or indeed has any important bearing thereon, or (2) that should it be established that the evidence in question was false and perjured that it must have the effect of defeating the then plaintiff's claim.

The claim should first set out the facts in the former action, then the alleged perjured evidence, and then the material bearing and relationship of the latter on the former, making it clear that if such false evidence had not been adduced, in all reasonable probability, the action would have resulted in the present plaintiff's favor. Reference to the pleadings in the authorities cited will, I think, shew that this was the nature of the pleadings therein.

The conclusion to which I have come is that the appeal ought to be dismissed with costs.

CLARKE, J.A.:—I think the appeal should be allowed, and agree in the disposition of costs made by my brother Beck.

In order to succeed in the action the plaintiff must prove, in addition to the falsity and materiality of the facts sworn to by the defendant on the trial of the former action, the further fact that the defendant was guilty of fraud in the giving of his evidence, for the facts stated by him may have been untrue without any fraud on his part. The statement of claim alleges that the statements in question were made by the defendant knowing them to be false and untrue, and with the intent that they should be acted upon by the Court and that the Court was deceived and misled by acting upon them. Surely this is an allegation of fraud, which is an extraneous fact not before the Court in the previous action and it is difficult to see how it could have been, as the issue there was the truth or falsity of the statement, not the guilty knowledge and intention or in other words the fraud of the defendant, which is the vital issue in an action of this kind.

(Note)—*London Times, April 27, 1910, p. 3. Mr. Justice Channell. White* v. *C. & A. Ivory.* (Referred to in Ann. Pr. 1922. p. 1089) *Action to set aside judgment.*

This was an action of a somewhat unusual character. Brought by H. White, a farmer and fruit grower, to set aside verdict. . . . .

Sask.

C.A.

The plaintiff's case now was that its judgment was obtained by fraud and perjury.

It was alleged that certain documents, including a "bought ledger," a railway slip, and copies of letters purporting to have ben sent to the plaintiff, were forged by Perks, and that he was acting throughout at the instigation of defendant.

Channell J. The Judge said that in trying this case the jury were performing a service to the public. As far as he knew this was the first case of the kind tried by a jury. Actions of review had not been frequent and such as then had been had been tried on the equity side. The onus of proof undoubtedly lay upon the plaintiff, and this was practically a criminal case. But he did not know that made much difference—in every case it was for the plaintiff to satisfy the jury. They were faced with the fact that the story began with a discredited witness and they had, therefore, to decide whether that witness was satisfactorily corroborated by other evidence or documents. There were difficulties in the story told by each side. The question the jury had to answer was whether the defendants had fabricated or caused to be fabricated documents for the purposes of the other action, and had so fraudulently obtained the verdict that was in fact given in their favor. It was for the plaintiff to satisfy them beyond all reasonable doubt, but if he did, they must find for him without any consideration of the seriousness of the result.

They found for plaintiff.

TOLLEY & Co. v. SKUCE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon, and McKay, JJ.A. March 27, 1922.

BROKERS (§IIA—5)—REAL ESTATE AGENT OBTAINING TERMS OF SALE OF PROPERTY—REFUSAL OF OWNER TO LIST PROPERTY WITH HIM—AGENT FINDING PURCHASER—LIABILITY OF OWNER FOR COMMISSION ON SALE.

The refusal of an owner to list property with a real estate agent when giving him the terms on which she is willing to sell, negatives any inference which otherwise might be drawn from the circumstances, that she had impliedly agreed to pay him a commission for his services if he found a purchaser.

[See Annotation on Brokers, 4 D.L.R. 531.]

APPEAL by plaintiff from the judgment at the trial of an action for commission on the sale of a house. Affirmed.

R. Robinson, for appellant; No one *contra*.

HAULTAIN, C.J.S. concurred with LAMONT, J.A.

LAMONT, J.A.:—This is an action for commission on the sale of a house. Mrs. Skuce, the defendant, was the owner of lot 4, Block 34, Saskatoon, and the house situate thereon. Being desirous of selling the same, she placed a sale card in the window. The plaintiff, a real estate agent, learned that the house was for sale and interviewed the defendant on or about November 2, 1920, in respect of the same, and she gave him her price both for cash and on terms. That price, he says, was $4,000, with $1,000 cash, or $3,800, all cash. His evidence contains the following:—

Sask.
C.A.
TOLLEY & Co. v. SKUCE.
Lamont, J.A.

"Q. Did she know you were in the real estate business? A. Yes, I told her that. Q. Did she authorize you to sell the house then on those terms? A. On those terms. Q. Was anything mentioned about commission at that time? A. Other than telling her who I was and that I wanted the listing, nothing was said about commission."

The plaintiff took certain prospective purchasers to the house, and in March, 1921, took a Mr. Barraskill there, who was willing to give $3,800 for the house if she would take as part of the purchase money certain bonds. No sale was made on that occasion. Barraskill returned a day or two later, and told Mrs. Skuce that Tolley had quoted him $3,800, with a cash payment of $1,000. She told Barraskill she had never given that price to anybody. The plaintiff then went to see her and she upbraided him for stating terms which she had not given him. Later on she sold the house to Mrs. Barraskill for $3,700 through an agent employed by the Barraskills. The defendant's version of her conversation with the plaintiff is, that when he wanted a listing of her house she would not give it and told him so. She says she had not given a listing of it to anybody. The trial Judge accepted her evidence and found that there had been no express promise to pay a commission, and that under the circumstances one could not be implied, and he dismissed the plaintiff's action. The plaintiff appeals to this Court.

There is no doubt that the plaintiff found Barraskill as a purchaser for the defendant's house and introduced him to the defendant. That alone, however, does not entitle the plaintiff to be remunerated for his services. An agent has no right to receive remuneration from his principal unless there has been a contract express or implied to that effect. (1 Hals. p. 193, para. 412.) Here it is admitted there was no express contract to pay commission. Should such a contract be implied? It should if the services rendered by the plaintiff were rendered under circumstances which would lead the defendant to know that if she accepted the benefit of those services it was on the terms that she must pay for the same. *Barnett* v. *Isaacson* (1888), 4 Times L.R. 645.

Circumstances existed in this case which, had they stood alone, might well have justified the inference that the defendant understood that she was to pay for the plaintiff's services if he found a purchaser. There is one circumstance, however, which, to my mind, conclusively points the other way. The plaintiff, when he obtained the defendant's terms, told her he

Sask.
C.A.
TOLLEY & Co. v. SKUCE.
McKay, J.A.

was a real estate agent and asked for a listing of her house. She refused to list the property with him. Her refusal to let the plaintiff have a listing of the property in my opinion clearly negatives any inference which otherwise might be drawn from the circumstances that she was impliedly agreeing to pay him for his services if he found a purchaser. The judgment of the trial Judge was, therefore, right, and this appeal should be dismissed with costs.

TURGEON, J.A.:— This is a case where a real estate agent sued the defendant as a vendor of a piece of property for a commission on the sale, alleging that he had been employed as agent by the defendant and that he was the means of the sale taking place. The trial Judge has found, and I agree with him in this finding, that the defendant did not employ the plaintiff to act for her, either expressly or by implication. Nor can she be said to have ratified anything done by the plaintiff. Such being the case, the action was dismissed by the trial Judge; I think quite properly.

I would dismiss the appeal with costs.

MCKAY, J.A.:—The plaintiff brings this action to recover commission on the sale of defendant's house and lot, alleging that defendant employed him to sell the same.

There is no evidence that defendant ever employed plaintiff to sell the property, or agreed to pay him any commission. The plaintiff can only succeed on an implied agreement.

In *Barnett* v. *Isaacson* (1888), 4 Times L.R. 645, at p. 646, Lord Esher, M.R., is reported as stating the law to be as follows:

"To entitle a plaintiff to sue upon a *quantum meruit* the rule was that if the plaintiff relied upon the acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if he, the defendant, accepted what had been done, it was on the terms that he must pay for it."

The question then to consider is; Did the plaintiff try to sell said property and bring prospective purchasers, including the ultimate purchasers, to the defendant, under circumstances which led the defendant to know that, if she accepted the benefit of what the plaintiff was doing, she would have to pay for it?

The evidence, in my opinion, rebuts this.

The plaintiff's evidence of his first interview with defendant, after receiving her terms which he says were $4,000 with $1,000 cash or $3,800 all cash, is as follows:—

"Q. Did she know you were in the real estate business? A. Yes, I told her that. Q. Did she authorise you to sell the house there on those terms? A. On those terms. Q. Was anything mentioned about commission at that time? A. Other than telling her who I was and that I wanted the listing, nothing was said about commission."

In my opinion, in above evidence the plaintiff implies that the property was listed with him; being authorized to sell the property, and listing it with him, mean the same. And on reading the whole evidence I gather it was understood in that sense during the trial.

The defendant, while not denying that "she authorized" plaintiff to sell the property by the use of that word, denies that she listed it with the plaintiff or anybody else, and I take her denial to mean that she did not authorize plaintiff to sell it. And the trial Judge accepted her evidence as true. Consequently she must have at the time plaintiff asked for the listing on his first visit, refused to list or authorize the plaintiff to sell the property for her, as that is the only occasion on which plaintiff asked for the listing.

She then having refused to list the property for sale with him to his knowledge, it cannot be said that she would know she would be expected to pay for what he was doing.

In my opinion what she did was only to give him her terms when he asked for them, but she refused to employ him to sell the property for her.

In my opinion, the trial Judge was right in dismissing the action, and the appeal should be dismissed with costs.

Appeal dismissed.

BENNETT v. TOWN OF EDMONTON.

Alberta Supreme Court, Walsh, J. March 13, 1922.

PARTIES (§IIB—118)—ACTION BY WIFE FOR DAMAGES FOR PERSONAL INJURIES—HUSBAND NOT JOINED AS PARTY—OBJECTION NOT RAISED UNTIL AFTER CLOSE OF PLAINTIFF'S CASE—FAILURE TO ASK TO HAVE PARTY ADDED—RIGHT TO HAVE ACTION DISMISSED ON ACCOUNT OF—ENGLISH RULE 134—ALTA. RULE 28 (4).

A defendant who objects to the non-joinder of the husband as a necessary party in an action brought by the wife for personal injury, may by a motion in Chambers or at the trial in a summary manner apply to have the husband added, or may raise the objection in his pleading under Rule 105, but such non-joinder is not a ground for dismissing the plaintiff's action where the objection is raised for the first time at the end of the plaintiff's case.

[*Rex* v. *Cyr* (1917), 38 D.L.R. 601, 12 Alta. L.R. 320; *Weldon* v. *Winslow* (1884), 13 Q.B.D. 784; *Soules v. Doan* (1876), 39 U.C.Q.B. 337; *Swan* v. *C.N.R.* (1908), 1 Alta. L.R. 427; *Touhey* v. *Medicine Hat* (1912), 7 D.L.R. 759, 5 Alta. L.R. 116, considered.]

Alta.
S.C.
BENNETT
v.
TOWN OF EDMONTON.
Walsh, J.

ACTION by plaintiff, a married woman, for injuries sustained by her through the negligence of the defendant.

David Campbell, K.C., and *H. A. Friedman*, for plaintiff.
G. B. O'Connor, K.C., and *McCullough*, for defendant.

WALSH, J.:—The plaintiff sues to recover damages from the defendant for injuries sustained by her through its negligence. Her evidence and that of her daughter proves conclusively that she stepped into a hole in a sidewalk within the limits of the corporation and as the result broke the bone of her left leg. No evidence was called for the defence and I find that she did suffer the injuries of which she complains and through the cause alleged therefor. If the defendant is responsible for this walk, I think it was guilty of negligence in not keeping it in proper repair. The defendant seeks to escape responsibility for this misfortune on two grounds.

It says in the first place that under sec. 350 of the Town Act, ch. 2, 1911-12, it is only bound to keep in repair sidewalks laid within the corporate limits by itself or by some person with the permission of its council and that, in this case, the evidence does not establish the fact that this walk was so constructed. I disposed of this objection at the close of the trial by holding that there was proof that this walk was built by or with the permission of the defendant or at least that there was quite sufficient to justify the inference that it was and I refused to dismiss the action on that ground.

The other contention is that the plaintiff was, when the accident occurred and when this action was started and still is, a married woman, and that because of that she is not entitled to maintain this action, her husband not being a party to it. It is quite true that no statute has been passed in this Province, which is a pioneer in legislating for the emancipation of women as the phrase goes, which confers upon a married woman the right to sue alone in respect of a tort committed against her. She may vote, she may be elected to Parliament or the Legislature or a municipal council. She may be a member of the Executive Council. She may be appointed a Police Magistrate or practise any of the learned professions if she has the necessary qualifications. She has all of the property rights of an unmarried woman. But one looks in vain for any statute which gives her the right to sue in tort separately from her husband. The law affecting her in this respect is therefore the law of England as it stood on July 15, 1870, and that is the common law, for at that date no statute had been passed by the Imperial Parliament

Alta.

S.C.

BENNETT v. TOWN OF EDMONTON.

Walsh, J.

conferring upon a married woman the right to sue at all in her own name.

Now it is undoubted under the English decisions that at common law the wife could not sue alone but that the husband must have joined if the action was brought for her personal suffering or injury. In delivering the judgment of the Appellate Division in *Rex* v. *Cyr* (1917), 38 D.L.R. 601, 12 Alta. L.R. 320, at p. 610, 29 Can. Cr. Cas. 77, Stuart, J., expressed the opinion that "the Courts of this Province are not in every case to be held strictly bound by the decisions of English Courts as to the state of the common law of England in 1870." After referring to the various legislative enactments under which the status of women in this jurisdiction has of recent years been materially altered, in many respects, he proceeded (p. 611) to apply "the general principle upon which the common law rests, namely, that of reason and good sense as applied to new conditions," by holding "That in this Province and at this time in our presently existing conditions there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex." This principle might perhaps be not improperly applied here. I merely suggest this without labouring the point, as I think that even if the husband should have been joined as a party plaintiff to this action it is now too late for the defendant to complain of his non-joinder.

Brett, M.R., in the Court of Appeal in *Weldon* v. *Winslow* (1884), 13 Q.B.D. 784, at p. 786, 53 L.J. (Q.B.) 528, 33 W.R. 219, states the law as follows:—"What is done to her is the cause of action and under the old practice she might have sued in her own name without joining her husband and could have recovered if the defendant did not plead her coverture in abatement, for he could not plead it in bar of the action."

This was an action brought after the passing of the Married Woman's Property Act, 1882 (45 & 46 Vict., ch. 75) for personal injury sustained by the wife before the passing of that Act. Bowen, L.J., in the same case, at p. 787, said "if the wife sued alone the only way in which the defendant could object was by plea in abatement, and if the defendant did not plead in abatement the coverture was not a substantial bar to the action." These statements are amply supported by the cases. Some of the English authorities are collected in the Ontario case of *Soules* v. *Doan* (1876), 39 U.C.Q.B. 337, in which it was held that the plaintiff, a married woman who sued alone, was entitled to retain a judgment for damages for assault committed upon

Alta.
S.C.
BENNETT v. TOWN OF EDMONTON.
Walsh, J.

her as there was no plea of coverture on the record. In another Ontario case, *Murphy* v. *Bunt* (1846), 2 U.C.Q.B. 284, Robinson, C.J., in delivering the judgment of the Court said: "If a married woman who may be joined with her husband in suing improperly sues alone, advantage can only be taken by plea in abatement." Stuart, J., in *Swan* v. *C.N.R.* (1908), 1 Alta. L.R. 427, at p. 431, took the same view. He thought that under the present practice the defendant could by motion in Chambers or summarily at the trial insist that the husband should be added as a party and that he must be joined if the defendant demands it. When there was such a thing a plea in abatement was the proper method by which to raise the non-joinder of the husband. That plea has, however, been abolished, and in England since its abolition the proper practice is under Rule 134. See notes in the Annual Practice to Rule 253. Our Rule 28 (4) is in the identical language of the English Rule 134 and it authorises the making of an application to add a party either by motion in Chambers or at the trial in a summary manner. It is doubtless on this rule and the practice in such matters now in vogue in England that Stuart, J., founded his opinion as to the course which a defendant who objects to the non-joinder of a necessary party should take.

If, however, it is still a matter of pleading, then Rule 105 applies, under which a defendant must raise by his defence all matters which shew the action not to be maintainable. There is not a word in the statement of defence suggestive of the contention that the plaintiff cannot maintain this action. The fact that she is a married woman is set out in the statement of claim and so the defendant with full knowledge of that fact went to trial without moving to dismiss, without applying to have the husband added and without raising the question by its pleading. Even now it does not ask to have him added. It wants the action dismissed because of his non-joinder, an objection raised for the first time at the close of the plaintiff's case. This I must refuse to do. If I had been asked to do so I would, with his consent, have certainly added him at the trial, as Stuart, J., did in *Touhey* v. *Medicine Hat* (1912), 7 D.L.R. 759, at p. 763, 5 Alta. L.R. 116, but no such request was made by either party.

The plaintiff's injuries fortunately were not serious. She made a good recovery and there is nothing to indicate any permanent injury from the fracture. She has suffered only the pain resulting from the fracture. On the same day that I tried this case I awarded the plaintiff in another action $1,500 by way of general damages for a broken leg. There was in that case,

however, every reason to think, from the medical evidence, that permanent injury to some extent had been suffered and he was entitled to have compensation for his loss of time and the interference with his regular work. I think that if I allow this plaintiff $600, she should not complain. She cannot recover the special damages claimed for. They belong to her husband.

Judgment accordingly.

REX v. DINER.

Alberta Supreme Court, Appellate Division, Stuart, J.A., Beck and Hyndman, JJ.A. March 2, 1922.

INTOXICATING LIQUORS (§IIIA—55)—SALE OF—ACQUITTAL—SUBSEQUENT PROSECUTION FOR HAVING IN POSSESSION — PLEA OF AUTREFOIS ACQUIT—CONSTRUCTION OF ACT.

Under the Alberta Liquor Act, 1916 (Alta.), ch. 4, selling intoxicating liquor and having it in possession are separate and distinct offences created by separate sections of the Act (secs. 23 and 24) and if upon a hearing of a charge under sec. 23 the evidence discloses that the accused was guilty of an offence under sec. 24, he may be subsequently charged with the latter offence even though both charges are based upon the same facts and circumstances and he has been acquitted of the charge under sec. 23.

[See amendments, 1917, ch. 22, secs. 5 and 6; 1918, ch. 4, sec. 55; 1921, ch. 6, sec. 6.]

APPEAL from the judgment of Scott, C.J. Affirmed.

R. A Smith, for the Crown.

H. A. Friedman, for accused.

The judgment of the Court was delivered by

STUART, J.A.:—This is an appeal by the accused from a judgment of Scott, C.J., dismissing his application to quash a conviction entered against him by a magistrate for that he "the said Charles Diner on the 19th day of May, A.D. 1921, at Edmonton, did unlawfully have in his possession intoxicating liquor in a place other than the private dwelling house in which he resides, to wit on 96th Street in the City of Edmonton, contrary to the provisions of the Liquor Act."

The information was laid on May 27, 1921. The case was heard by the magistrate on May 31. At the opening of the case the accused entered a plea of *autrefois acquit*. This plea was based on the facts that the accused had been charged under information on May 25 with having on the same May 19 unlawfully sold intoxicating liquor contrary to the provisions of the Liquor Act, 1916 Alta., ch. 4, and had been acquitted, and it was alleged and admitted that the second charge was based upon exactly the same facts as those upon which the previous charge was based.

Alta.
App. Div.
REX
v.
DINER.
Stuart, J.A.

The magistrate overruled the plea and convicted. The grounds of the application to quash were (1) that there was no evidence to sustain the conviction and (2) that the plea of *autrefois acquit* should have been sustained. The Judge below did not deal with the first ground in his reasons for judgment no doubt for the reason that, as was admitted on the argument of the appeal, that ground was but weakly urged. Upon appeal, however, it was pressed upon the Court very strongly and will have to be considered.

Dealing, however, in the first place with the second ground I have come to the conclusion that the Judge below was right. In his judgment he said this:

"Under the Liquor Act selling intoxicating liquor and having it in possesion are separate and distinct offences created by different sections of the Act. (See secs. 23 and 24). If upon the hearing of a charge under sec. 23 the evidence discloses that the accused was guilty of an offence under sec. 24 I see no reason why he should not be subsequently charged with the latter offence, even though both charges are based upon the same facts and circumstances. I can find no direct authority to the contrary. In fact *Rex* v. *Barron*, [1914] 2 K.B. 570, 83 L.J. (K.B.) 786, is a direct authority in support of the view I have expressed as it was there held that the test is not whether the facts relied upon are the same in both trials but the question is whether the accused could have been convicted upon the first trial of the offence charged in the second."

The main contention raised by counsel for the accused against the soundness of this reasoning is that the Judge overlooked entirely the effect of sec. 45 of the Liquor Act, which reads as follows:—

"In any prosecution for the violation of any of the provisions of this Act in the event of any variance between the information and the evidence adduced in support thereof the justice or justices hearing the case may amend such information and may substitute for the offence charged therein any other offence against the provisions of this Act, but if it appears that the person charged has been materially misled by such variance he shall be granted an adjournment of the hearing if he applies therefor."

This section was quoted in order to show that the magistrate could at the first trial have substituted the present charge for the former one and that the accused could then have been convicted at that first trial of the offence of which he was convicted

Alta.
App. Div.
REX
v.
DINER.
Stuart, J.A.

on the second and it was therefore argued that the plea of *autrefois acquit* should have been allowed.

But it must be remembered that the rule accepted by the Judge below, following *Rex* v. *Barron,* is not a statutory rule. It is simply an expression of what was conceived to be the common law rule. Section 907 of the Code is not applicable to summary convictions even under the Code but only to indictments. We have, therefore, merely the common law rules to guide us, and we are not bound by the exact phraseology in which in one or more particular cases those rules may have been expressed. And moreover the common law rule as to the right to plead *autrefois acquit* was laid down when there was no such statute as the Liquor Act and no such section as sec. 45 of that Act in existence. When we have such a serious change in the law as to procedure in summary conviction cases as that section presents, for there is no such a provision in Part XV. of the Criminal Code, it then becomes a question just how far the particular language used in particular cases with respect to the right to plead *autrefois acquit* should be rigidly applied.

The accused could not have been convicted of the present charge upon the former trial as it was conducted in fact. But it is said that the magistrate could have substituted the offence now charged for the one then charged and that the matter should be treated as if he had done so. In my opinion, that is not so. I think there is a very substantial difference in meaning between the two phrases of sec. 45, viz.:—"may amend such information" and "may substitute for the offence charged therein any other offence against the provisions of this Act." The latter phrase is far more than a mere amplification of the former. The former phrase covers the case of an amendment of a charge in some detail of circumstance without changing the substantial nature of the offence and without proceeding to deal with another offence of the same nature but at a quite different time and place. If such an amendment had been all that would have been required in order, on the first trial, to convict the accused of the offence now charged, no doubt the plea would have been available. But recourse would have had to be made to the permission given by the second phrase, and that provides for the substitution of a charge of another offence entirely. If full effect were given to the contention advanced it would follow that a prosecution, whether resulting in conviction or acquittal, for any offence whatever under the Act, would be a bar to any prosecution for any other offence of any kind under the Act. For instance, the acquittal on the first charge against the present

Alta.
App. Div.
REX
v.
DINER.
Stuart, J.A.

accused would be a bar to any prosecution under sec. 36 for permitting drunkenness on the accused's premises. Obviously this cannot be possible. There must, therefore, be some consideration of the facts and circumstances. The facts are that there was apparently a wholesale liquor export warehouse carried on on 96th St. by a certain company. One day the accused was seen by two policemen to bring two suitcases out of this warehouse, cross the sidewalk and put them in a taxi-cab that was standing there. He then returned to the warehouse and the policemen rushed over to the taxi-cab and took possession of the suit cases, which were found to contain twenty-two bottles of whiskey. The taxi-cab driver stated in his evidence that he had come there in response to a telephone message and that he had been instructed to drive to the C.P.R. depot but that the accused had, after putting the suit cases in the car, asked him to wait a minute and had returned and re-entered the warehouse. The policemen found all the doors of the warehouse locked although they had come on the scene practically immediately after the accused had gone in.

There was no evidence whatever that the accused was an employee of the export company. He gave no evidence himself and his counsel at the trial merely got the policemen to say that the accused had told them so and that they knew nothing to the contrary. This was merely an unsworn statement of the accused and could be used against him as an admission but cannot be used in his favour.

The accused was first charged with illegal selling contrary to sec. 23. The question is whether in such circumstances an acquittal on the charge of selling is a bar to a charge of illegally having the liquor in possession. If it is, it simply means this, that although under sec. 45 the magistrate could at the first trial have changed the nature of the charge and substituted a charge of illegally having in possession and could have granted an adjournment if he thought just, or proceeded with the trial of such substituted charge and convicted, yet, because he did not make the substitution but acquitted on the first charge and within a day or two took an information in respect of the second charge, the accused could meet the second charge by a plea of *autrefois acquit* a thing which he could not have done if the other course had been pursued.

I do not think the enactment of sec. 45 can lead to any such application of the rule as to *autrefois acquit*.

As was said by Beck, J., in *Rex* v. *Weiss and Williams* (1913), 13 D.L.R. 166, at p. 168, 6 Alta. L.R. 163, 21 Can. Cr. Cas. 438,

Alta.
App. Div.
REX
v.
DINER.
Stuart, J.A.

"It seems to me that when there has been an *acquittal* the defendant may be again prosecuted on a charge setting up another legal aspect of the same facts that the principle is that he must not be *punished* more than once for the same acts or omissions." At least I think this is true in a case where the actual facts are admitted and it has only become a question as to what offence those facts properly disclose. If there had been a contest as to the facts and an acquittal amounting to a finding that the facts alleged by the prosecution were not true the situation might possibly be different. The more general plea of *res judicata* might then be raised. This, as I understand it, is what the Court of Appeal of Ontario decided in *Rex* v. *Quinn* (1905), 10 Can. Cr. Cas. 412.

But here there never was a finding that the facts alleged by the prosecution on the first charge were not true. Clearly all the magistrate decided was that those facts furnished no evidence, presumptive or otherwise of a sale. And indeed most of the evidence given on the first trial was simply, by arrangement, re-read from the stenographic report at the second trial.

If the acquittal could be held to have been a finding of the untruth of the facts alleged by the prosecution then it might be that the rule against an accused person being twice put in jeopardy would have some application. If a man gets a verdict in his favour upon a trial of disputed facts it may possibly be that he ought not to be forced to fight the same battle twice, but that is not the case here.

I therefore think that the judgment below was right as to the plea of *autrefois acquit*.

Then on the first point about the absence of evidence I think the appellant must also fail. The argument addressed to us was based entirely on the theory that the accused was an employee of a company lawfully engaged as its general business in the export of liquor. But as I have shewn there was no evidence of that fact at all. It was the business of the accused to bring that fact out if it were true. And even if it were true, I for my part cannot quarrel with the magistrate for refusing upon the meagre evidence incidentally elicited by cross-examination of the witnesses for the prosecution, to make the inference that the export company was at the time in question legitimately shipping liquor out of the Province. In the absence of any evidence whatever for the defence I think he was quite justified in making the inference that the liquor was in the taxi-cab for another purpose altogether and for an illegal one.

I would dismiss the appeal with costs. *Appeal dismissed.*

B.C.

C.A.

FREY v. FLOYD.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. January 10, 1922.

REFORMATION OF INSTRUMENTS (§I—1)—AGREEMENT FOR SALE OF LAND—NOTICE OF RESERVATION OF COAL RIGHTS—RESERVATION NOT INCLUDED IN AGREEMENT—PURCHASER ENTERING INTO POSSESSION OF LAND AND MAKING IMPROVEMENTS — WAIVER OF OBJECTION TO TITLE—SPECIFIC PERFORMANCE OF REFORMED AGREEMENT.

Rectification of an agreement for the sale of land which contains no reference to reservations of coal, petroleum, base metals and timber, will be granted by embodying the reservations in it, and specific performance of the reformed agreement will be decreed, where it appears that the purchaser had notice of the reservations and has waived all objections to the title by taking possession of the property and exercising acts of ownership by making repairs and improvements thereon.

[*Wallace* v. *Hesslein* (1898), 29 Can. S.C.R. 171; *Mackenzie* v. *Bing Kee* (1919), 48 D.L.R. 287, referred to; *Hobbs* v. *E. & N.R. Co.* (1899), 29 Can. S.C.R. 450, distinguished.]

APPEAL by defendant from the judgment at the trial of an action for reformation of an agreement for the sale of land, and for specific performance of the reformed agreement. Affirmed.

E. C. Mayers and *F. S. Cunliffe,* for appellant.

D. S. Tait and *Arthur Leighton,* for respondent.

MACDONALD, C.J.A.:—The action is for rectification of an executory agreement for sale and for specific performance of the reformed agreement.

The agreement was made October 29, 1919, between the plaintiff as vendor and the defendant as purchaser, and the sum of $1,000 was paid down, the balance extended over a period of years. The plaintiff's title was derived from what is known as an "E. & N. grant," a grant from the Esquimalt and Nanaimo Railway Co., which contained reservations of coal, petroleum, base metals and timber, which I need not particularize. The said agreement for sale contained no reference to these reservations and the plaintiff claiming mutual mistake, seeks to have the agreement reformed by embodying the reservations in it.

The plaintiff's case is not that Bates the vendor's agent, told the defendant of the reservations, but that the reservations in E. & N. deeds were so notorious that defendant must have known of them and contracted with reference to them. Now there can be no rectification where there is no prior contract, either written or verbal, by which to make the rectification. This, in itself, is sufficient to dispose of the question of rectification.

B.C.
C.A.
FREY
v.
FLOYD.
Macdonald, C.J.A.

It is quite clear from the evidence that no reservations were mentioned either before or at the time the contract was entered into. If it be of any importance the defendant denies that he was aware that this land was subject to such reservations, and I do not see that his evidence has been successfully shaken. He says that at the time of purchase, Mr. Bates, plaintiff's agent, who made the sale, assured him that he had everything "above and below," that the only question with regard to the coal rights spoken of was a licence to take coal given by the Government to one, McLellan, which defendant alleges Mr. Bates told him had expired. Defendant immediately took possession of the land and this is relied upon as a waiver of title but in view of the fact that a conveyance was to be made at a future time, I cannot hold that taking possession at this time without knowledge of the reservations, was a waiver. If there was waiver then it must have been subsequent to the contract and possession, and in this regard it becomes important to arrive at the date of the defendant's knowledge of the reservations. Coming back to the question of knowledge, it is alleged that while the defendant was shewing the property to one Hayes, the question of coal rights came up and as it is upon this evidence that the judgment of the trial Judge proceeds, I shall quote it.

"Q. What was the conversation you had with Floyd about this?

A. I asked him who owned the coal rights—and however he did not own them, so he told me, but it was only to the timber—he said it would be easy to dispose of what timber was there and that is how we got started about the coal rights.

Q. Did he say who did own the coal?

A. McLellan I understood, that is my understanding of who owned the coal rights.

The Court:— Q. When was this conversation with Floyd?

A. This took place —Well in the beginning; it would be in October sometime but I cannot remember the date.

Mr. Leighton: In 1920."

This is denied by defendant.

This evidence falls far short of making out the plaintiff's case The rectification sought is to have the E. and N. reservations inserted in the agreement. These include a great many other reservations besides the coal. There are, *inter alia,* reservations of timber, petroleum and the base metals and many others, and it is apparent from Hayes' evidence that the defendant did not know this In any case this evidence is specifially denied by

B.C.
C.A.
FREY v. FLOYD.
McPhillips, J.A.

the defendant, but even if it were accepted the plaintiff still cannot succeed because of the other reservations, exceptions and conditions claimed, which are substantial and as to which there is no evidence at all that defendant was aware of them. To shew that the plaintiff's solicitor even had no clear conception of the matter, it is only necessary to peruse his letter to defendant's solicitor on February 8, 1921, in which he says that:—

"The government own the coal and petroleum under this particular piece of land, I believe this was reserved by the Crown when this land was made a school reservation and the Crown have subsequently granted a lease to one McLellan;" which is quite inconsistent with the claim now made. The reference to McLellan is of importance as corroborating the evidence of defendant as to what was said about McLellan's licence at the time of the purchase. Mr. Leighton's letter is sufficient indication of the fallacy of supposing that because the land was in the railway belt, therefore, the conveyence of it must necessarily have contained reservations.

It will be found on a careful perusal of the evidence that there is entirely wanting in this case that clear irrefragable evidence which is always required to make out a case for reformation of a written instrument on the ground of mutual mistake.

The action should therefore be allowed. I need not enter upon the counterclaim as the majority of the court would dismiss the appeal.

MARTIN, J. A. would allow the appeal.

GALLIHER, J.A.—I think the Chief Justice below came to the right conclusion and would dismiss the appeal.

MCPHILLIPS, J.A.:—I am of the opinion that the Chief Justice of British Columbia, (Hunter, C.J.B.C.) arrived at the right conclusion, and that a proper case was established for rectification and specific performance.

In *Carroll* v. *Erie County Natural Gas & Fuel Co.* (1899), 29 Can. S.C.R. 591 at p. 594—Sir Henry Strong, then Chief Justice of Canada—said:—

"It was formerly held that a party could not have a decree for specific performance in the suit for rectification, that is specific performance of the agreement as altered by the decree, but no sound reason was ever given for this doctrine and it is no longer law. (*Olley* v. *Fisher*, 34 Ch. D. 367)."

The trial Judge found that there was notice to the appellant of the reservations contained in the conveyance from the railway company, and, in my opinion, there was evidence upon

which that finding could reasonably be made. *Wallace* v. *Hesslein* (1898), 29 Can. S.C.R. 171. (Also see *Mackenzie* v. *Bing Kee* (1919), 48 D.L.R. 287.)

The present case is not analogous to *Hobbs* v. *E. & N. Railway Co.* (1899), 29 Can. S.C.R. 450—there the vendee had no notice of any reservations and it was there held that the vendee was entitled to a decree for specific performance without regard to the claimed reservations.

Further, if it was at any time open to the appellant to take exception to the title as shewn—the facts disclose—without here stating them all in detail, (notably amongst other facts, the giving of a lease of the land after knowledge of the reservations of the railway company) that the appellant is now precluded from setting up any such contention—in *Wallace* v. *Hesslein, supra*, Sir Henry Strong, C.J., at p. 176, said:—

"There was moreover a clear waiver of all objections to title by Mr. Wallace, who took possession of the property and exercised acts of ownership by making repairs and improvements to the amount of $285, according to his own evidence, thus exercising acts of ownership sufficient to show a waiver."

(Also see *Rogerson* v. *Cosh* (1917), 37 D.L.R. 694, 24 B.C.R. 367, (C.A.)).

I would dismiss the appeal. *Appeal dismissed*

SAMUEL v. BLACK LAKE ASBESTOS AND CHROME Co.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. October 11, 1921.

CONTRACTS (§ IID—145)—CONSTRUCTION—PURCHASE OF ORE—TIME FOR DELIVERY—EXTENSION—BREACH—DAMAGES—MEASURE OF COMPENSATION.

The respondent in May, 1917, entered into two written contractcs with the appellants to sell and deliver to them Canadian lump chrome ore, the shipments were to be "as fast as possible the entire quantity to be shipped not later than November 1, 1917."

The respondent not only failed to complete delivery by November 1, 1917, but continually held out to the appellant hopes of doing so and accepted their forbearance from time to time until June, 1918, when the respondent's many broken promises led appellants to write them a letter that they would hold them for non-delivery, and on June 21, 1918, the respondent wrote appellants definitely repudiating the contracts and refusing to make any further deliveries.

The Court held, reversing the judgment of the Ontario Appellate Division (1920), 58 D.L.R. 270, 48 O.L.R. 561, that there had been no substituted contract entered into but that the parties had acted continuously under the original agreement, and that there had been no actionable breach of this agreement before June, 1918, and the measure of damages for the breach was therefore the difference between the contract price and the value of the ore on June 21, 1918.

Can.

S.C.

SAMUEL v. BLACK LAKE ASBESTOS & CHROME Co.

Idington, J.

[*Samuel* v. *Black Lake Asbestos and Chrome Co. Ltd.* (1920), 58 D.L.R. 270, 48 O.L.R. 561, reversed; *Ogle* v. *Vane* (1868) L.R. 3 Q.B. 272, followed; *Tyres* v. *Rosedale Iron Co.* (1873), L.R. 10 Ex. 195, distinguished.]

APPEAL by plaintiffs from the judgment of the Supreme Court of Ontario, Appellate Division (1920), 58 D.L.R. 270, 48 O.L.R. 561 in an action for damages for breach of two contracts for the sale and delivery of chrome ore. Reversed.

Anglin, K.C., and *R. C. H. Cassels*, for appellant.

H. J. Scott, K.C., and *R. S. Cassels*, K.C., for respondent.

IDINGTON, J.:—The respondent in the end of April and beginning of May, 1917, entered into two written contracts with the appellants to sell and deliver to them Canadian lump chrome ore.

The following is a copy of the first of these contracts:

"Philadelphia, April 25th, 1917.

Messrs. Black Lake Asbestos & Chrome Co., Ltd.,
Black Lake, P. Q., Canada.

Dear Sirs:—We have to-day bought for our account from you a lot of Canadian lump chrome ore on the following conditions, viz.:

Quantity 1,500 gross tons of 2,240 lbs. each. Brand or make. Quality good, well prepared chrome ore. Price: Ore analyzing 32 to 35% chromic oxide, $23.50; for ore analyzing over 35% to 38%, $25.75; for ore analyzing over 38% up to 39%, $27.50, with a scale of $1.00 for each full unit over 39% and up to 42%. All per gross ton. Terms of payment to be made in U. S. gold coin or equivalent. Cash in full to be paid in Black Lake, less 25c. per ton as heretofore. Place of delivery f.o.b. cars, Quebec Central Railroad Company's tracks, between Robertsonville and D'Israeli, P.Q. Time of shipment: As fast as possible. The entire quantity to be shipped not later than first of November. This purchase is subject to the Canadian Government granting permission to ship to the United States. Shipping directions: Will be given as fast as the ore is loaded. Remarks: Sampling and analyzing to be done by us, at our expense. Where our determinations are not satisfactory to seller, he is to have the privilege of disposing of such carloads which are to be replaced.

Note: Each delivery to constitute a separate and independent contract unless otherwise stated.

All agreements contingent upon strikes, accidents, delays of carriers, or other unforeseen circumstances beyond the reasonable control of the sellers, wars of this or other nations, as well as interruptions of navigation through strikes or other causes,

in which case deliveries against this contract may be suspended. Sellers are not compelled to replace shipments lost at sea.

Accept. May 29, 1917.

Black Lake Asbestos & Chrome Co., Limited.

(Sgd.) J. E. Murphy, Jr.

Yours truly,

(Signed) Frank Samuel."

The second is identical in its terms save being for 2,000 gross tons instead of as in the first for 1,500 tons and the dates of the making being May 2, and acceptance May 29, and in the use of the word "analyzing" for "containing." A printed form was used in each case and I surmise one used by appellants.

The respondent not only failed to complete delivery by November 1, 1917, named in each of the respective contracts for limit of time therefor, but continually held out to appellants hopes of doing so and accepted their forbearance from time to time until June, 1918, when the respondent's many broken promises had apparently become unbearable to appellants and led them to write respondent the following letter:—

"Philadelphia, Pa., June 11th, 1918.

Messrs. Black Lake Asbestos & Chrome Co.:

Dear Sirs:—Referring to our two contracts with you for chrome ore on April 25th and May 3rd, 1917, we are advised by our representative at Black Lake that your Black Lake office is shipping chrome ore to other parties without giving us the opportunity to sample and analyze this ore and apply against our contracts with you. We consider this a repudiation on your part of our contracts, and therefore, will have to take legal action and hold you for non-delivery of this ore. We telegraphed you to this effect to-day and must have an immediate answer in reference to same. We are sending a copy of this letter to your Black Lake office.

Yours very truly,

(Sgd.) Frank Samuel."

The substance of this letter was also sent by telegraph on June 11, but no reply came to either until the following:—

"No. 20 Victoria Street,

Toronto, Ontario, June 21st, 1918.

Frank Samuel, Esq.,

Harrison Building, Philadelphia, Pa., U.S.A.

Dear Sir:—Delay in answering your telegram and communication of the 11th inst. has been due to the writer's absence from the city.

Can.
S.C.
SAMUEL v. BLACK LAKE ASBESTOS & CHROME CO.
Idington, J.

The contracts to which you refer bear on their face a ground for termination, viz., the pinching out of ore, which unfortunately took place on our properties. We regret to say, also that the sampling and analysis which has been done by your representative in the past has been most unsatisfactory. In addition, practically our entire output at the present time is being used for home consumption, and we regret that we cannot make any further shipments to you.

Yours very truly,
Black Lake Asbestos & Chrome Company, Limited,
(Sgd.) Robert F. Massie,
Managing Director."

Hence this action for damages in which respondent sets up many defences all of which were decided by the trial Judge to be unfounded.

He assessed (expressly relying upon *Ogle* v. *Earl Vane* (1868), L.R. 3 Q.B. 272, 16 W.R. 463, 9 B. & S. 182 hereinafter referred to) the damages on the basis of the difference in market price for such goods on the date of respondent's last letter, quoted above, and the price named in each of said contracts.

On appeal therefrom to the first Appellate Division of the Supreme Court for Ontario, (1920), 58 D.L.R. 270, 48 O.L.R. 561, that Court maintained said judgment in all respects save in the taking of said date as basis for the assessment of damages.

It instead thereof directed a reference to the Master in Ordinary to inquire and state the damages.

Instead of taking any fixed date as the basis for applying the relevant law to the existent facts it directs said Master "to ascertain and state what quantity of Canadian lump chrome ore within the grades contracted for was diverted from delivery to the plaintiffs by the defendants other than for unsatisfactory analysis of the ore, and sold to other persons between May 1st, 1917, and June 22nd, 1918, and whether any and if so what quantity of similar ore was purchased by the plaintiffs between the said dates to replace the ore so diverted and sold to other persons, and is to allow to the plaintiffs as damages, in respect to the ore, so diverted and replaced, the excess, if any, between the price paid by the plaintiffs in each case and the contract price for the same grade of ore. And as to the residue of the 2,660 tons undelivered by the defendant the said Master shall allow as damages the sum of $30.26 per ton, being the difference per ton between $23.50 the contract price and $53.76, the market price on June 21st, 1918, of ore of the lowest grade, con-

tracted for, but the defendant shall be entitled to shew before the said Master in mitigation of the said last mentioned damages: (1) that the plaintiffs bought at a lower price than $53.76 per ton by reason of the situation caused by the defendant's default in delivery, and (2) that the plaintiffs bought in the market at a lower price than $53.76 per ton in excess of the amount required to fill their forward contracts, and in either of the said events the damages on the ore so bought shall be calculated on the basis of the said lower price instead of at the sum of $30.26 per ton."

I, with respect, cannot find in my view of the contract above set forth and the relevant facts anything to warrant the Court below in finding as the reasons for its judgment shew, that "as each car was diverted from the respondent (now appellant) and shipped elsewhere that was a repudiation *pro tanto* and was known to be so by the respondent (now appellant) through his agent Wooler."

The contract was not for the entire output of the mines of respondent regardless of its obligations to others either express or implied. The only words in the contract giving any colour for such an interpretation are, I submit, the words "fast as possible" which, seeing it had till November 1—a period of 7 months—to get out and load about 3,000 tons of the desired ore, must be interpreted reasonably.

Let us imagine a buyer under such like contract, on discovery that other customers of the vendors were getting shipments from him of the like goods, immediately going into the open market and buying at a lower price than named in his contract and trying then to evade the acceptance of delivery tendered him within the ultimate time named for delivery and setting up such a defence.

I submit such a proceeding could not be countenanced and that such a defence would not be listened to for a moment. Nor can the counterpart thereof as presented herein be maintainable. Contracts for delivery by instalments at stated times have been presented in some cases to Courts and damages assessed on that basis as evidently what was within the contemplation of the parties concerned therein. But that is not the nature of this contract. Nor do the words therein "Note: each delivery to constitute a separate and independent contract unless otherwise stated," which seem to be relied on by the reasons assigned below, make it so. They are words which form part of a printed form used in making the contract and the only operative effect they can have herein would be in the event

Can.

S.C.

SAMUEL
v.
BLACK LAKE
ASBESTOS & CHROME CO.

Idington, J

of a contest as to the quality of goods that had been so delivered, or something akin thereto, arising out of such delivery or in relation to such goods as had been delivered.

There is no dispute herein arising out of past deliveries.

The only thing here in question is what arises out of non-delivery to which the said note is entirely inapplicable.

I submit, therefore, the first part of the above quoted direction to the Master is not maintainable.

Thus, I conceive, is also eliminated from our consideration, all that transpired up to the time limit of November 1 for the complete fulfilment of the contract, save in so far as the correspondence between the parties hereto prior to that date may, and I think, must, be looked at to help in the due appreciation of what followed up to June 21, 1918.

It is upon the correct appreciation of the said correspondence so had, that maintenance of the remaining parts of the order of reference should depend.

The difference between the market price of such goods as in question, on November 1, 1917, and the price agreed for under the contract, would be the true measure of damages for the breach then, of the contract, unless otherwise provided, or determined by the conduct of the parties.

On October 17, 1917, in reply to a complaint as to the tardy nature of deliveries under the contract, on the part of appellants, the respondent wrote Samuel (the writer of said complaint) as follows:—

"Dear Sir:—We have your favour of the 11th inst. and in reply beg to advise, that we do not expect to be in a position to make larger shipments of chrome ore on your contract before next summer, so if you wish to cancel your contract on the first of next month we will do so. We regret very much that we are unable to make larger shipments on your contract at present, but it is a cause beyond our control. Kindly let us have your reply to this offer at an early date. Yours truly,

Black Lake Asbestos & Chrome Co., Ltd.,

Per J. E. Murphy, Jr."

Reply thereto (dated October 23) was as follows:—

"Dear Sirs:—We are in receipt of your favour of October 17th, and in reply would state that we cannot cancel our contract with you for chrome ore, as our people are willing and anxious to receive this ore at the present time, and we must ask you to get shipments off as rapidly as possible. Very truly yours,

(Sgd.) Frank Samuel."

It seems quite clear that respondent by offering cancellation meant literally what it said and did not intend to be held for damages in case of assent on the part of appellants to the proposition presented.

On November 20 the correspondence is resumed and it continued until June following of such a character as clearly to demonstrate that the respondent was claiming it was doing the best it could to live up to the contract and was asking and accepting appellants' forbearance and promising future deliveries and that the appellants were exercising due forbearance and perhaps more than the respondent deserved.

Indeed it would have been improper under such relations as said correspondence discloses to have bought chrome ore of kind and quality named in the contract for the sole purpose of asserting an action for damages and thereby establishing the measure of such damages as appellant had suffered.

The respondent's factum points to a letter of appellant of March 18, 1918, pointing out to the former the measure in which it had failed to live up to its promises and to threats it had made of a discontinuance of the forbearance that had hitherto been shewn respondent unless it shewed a better appreciation thereof.

It is to be observed that said letter went no further than pointing out the course which the appellant might be driven to adopt and hence they remained liable to fulfil their part of the contract until they had gone further or the respondent had as it did later repudiate in clear and explicit terms.

The answer to the respondent's attempt to use this letter as evidence that the contract had ended is not confined to that alone for the effect of it was to produce a delivery of it and acceptance by appellants of two more car loads of chrome ore in the month of April.

Thus by the concurrence of both parties the contract had not ended and the final breach thereof taken place.

The decision in the case of *Ogle* v. *Earl Vane,* L.R. 3 Q.B. 272, 16 W.R. 463, 9 B. & S. 182, seems to me to exactly fit the facts in the case as I find them by a perusal of the entire correspondence. In that case Blackburn J. wrote the leading judgment. In the Exchequer Chamber, in appeal therefrom, the Court was unanimous and it may not be amiss to remark that Willes J. was one of those writing to express the opinion of the Court. Shortly thereafter in 1875, in the case of *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598, 44 L.J. (C.P.) 358, 23 W.R. 872, a strong Court in appeal, Lindley J. writing the judgment,

Can.
S.C.
SAMUEL
v.
BLACK LAKE
ASBESTOS &
CHROME CO.
Anglin, J.

accepted that decision as a guide and applied the principle involved.

In 1899 the late Chief Justice Lord Russell of Killowen in the Commercial Court applied the identical principle thus involved to the decision of the case of *Ashmore & Son* v. *C. S. Cox & Co.*, [1899] 1 Q.B. 436, 68 L.J. (Q.B.) 72, 4 Com. Cas. 48, and at the close of his judgment, p. 443, furnished an apt illustration of what should be borne in mind in dealing with the facts presented herein.

Unfortunately respondent seemed to have been inclined herein throughout to get away from the actual facts as I view them both in its dealing with the appellants and the case presented to the Court, or to read them backwards.

In my view of the facts the case is simple and the appeal should be allowed and the judgment of the trial Judge be restored with costs here and in the first Appellate Division of the Supreme Court of Ontario, 58 D.L.R. 270, 48 O.L.R. 561.

DUFF, J.:—The appellants, I think, are entitled to succeed on the principal ground on which they based their appeal, namely that there was no substituted contract but that the time for delivery was extended from time to time in forbearance and by way of indulgence at the request of the defendants. That is, I think, a substantially just interpretation of what occurred between the parties, and it is also, I think, what the trial Judge intended to find although his findings, perhaps, are not very precisely expressed.

No question arises here such as that which, but for the arrangement between the parties, might have arisen in *Tyers* v. *Rosedale etc. Iron Co.* (1875), L.R. 10 Ex. 195, 44 L.J. (Ex.) 130, 23 W.R. 871, where the plaintiffs insisted upon putting an end at once to the indulgence and required immediate delivery of all the overdue instalments. No such question arises here, because the immediate cause of the indulgence being terminated was the repudiation by the defendants of their obligations under their contract.

ANGLIN, J.:—At the conclusion of the argument I had a strong impression that the disposition made of this case by the trial Judge had been entirely satisfactory and should not have been interfered with. Further consideration has confirmed that view. The issues as to the breach of the contract by the defendants, the date when such breach occurred, alleged purchases by the plaintiffs to replace ore which the defendants had failed to supply and the quantum of the plaintiff's damages were presented for trial and were tried out. The evidence sup-

Can.

S.C.

SAMUEL
v.
BLACK LAKE
ASBESTOS &
CHROME CO.

Mignault, J.

ports the finding of a wilful breach of contract by the defendants deliberately made in order to take advantage of an increased market price. Forbearance by the plaintiffs at the instance of the defendants prevented an actionable breach before June 21, 1918, when such a breach undoubtedly occurred. The assessment of damages as of that date was therefore warranted. The measure of damages adopted by the trial Judge—the difference between the sale price and the value at the date of breach—was that prescribed by the law under such circumstances as the evidence disclosed, no market in which the goods were procurable at the date of the breach. The quantum allowed has not been successfully challenged. Prior to June 21, 1918, the plaintiffs were under no obligation to look elsewhere for ore in order to mitigate their damages. Indeed they could not safely purchase ore to replace what the defendants were bound to furnish as the contract being still open they might be compelled to take the latter. After June 21, so far as the evidence shews, no ore was available—certainly none at any price less than that which the trial Judge fixed as the value at that date of the ore in the delivery of which the defendants made default.

There is in my opinion nothing to justify further investigation. The appellants had their day in Court. They took their chances on the evidence submitted at the trial. If they failed to take every advantage of the opportunity they then had they must suffer the consequences. With respect, the judgment of the trial Judge was in my opinion entirely right; it should not have been disturbed and should now be restored.

BRODEUR, J.:—I concur in the result.

MIGNAULT, J.:—The only question here is as to the quantum of the damages to which the appellants are entitled for the admitted default of the respondent to make deliveries in accordance with the requirements of the two contracts which it had made with the appellants to sell them the total quantity of 3,500 gross tons of Canadian lump chrome ore. The quantity undelivered was 2,660 tons, and by the terms of the contracts the whole of the ore should have been delivered not later than November 1, 1917.

The finding of fact of the trial Judge with regard to the question whether the time for delivery had been extended beyond November 1, 1917, is as follows:—(See 58 D.L.R. at pp. 273, 274.)

"From the beginning defendants were dilatory in making delivery, so that long before the 1st November—the date fixed

Can.
S.C.
SAMUEL
v.
BLACK LAKE ASBESTOS & CHROME CO.
Mignault, J.

for the completion of the deliveries—it became apparent that full delivery would not be made within that time. Plaintiffs did not then stand on their strict right to enforce performance at that time, but while they were continually pressing for more prompt and larger deliveries than they were getting, the facts warrant the inference that the effect of what happened between them was an extension from time to time of the time for making deliveries until hope for further deliveries was ended by a notice of the 21st June, 1918, by the defendants declining to make further shipments to plaintiffs. Not only is this so but Mr. Tomlinson makes the statement that plaintiffs had extended the time for delivery down to the time defendants repudiated the contracts, which statement has not been contradicted."

It is true that the Judge arrives at this finding by means of an inference from the facts proved, but there was certainly no refusal of the respondent to make any deliveries after November 1, and subsequently to that date the appellants pressed for the carrying out of the contracts, and the respondent made certain deliveries thereunder, so that until the final refusal to make further deliveries in June, 1918, both parties were acting under the original contracts of sale. The inference of the trial Judge is therefore fully justified by the evidence.

I cannot accept the contention of the respondent that after November 1, 1917, a substituted contract was entered into to sell ore to the appellants as fast as it could be mined, which contract not being in writing could not be enforced, but, according to my reading of the correspondence, until the final repudiation in June, 1918, the original contracts were considered in force and acted upon by both of these parties.

If therefore there was not a substituted contract, but a mere forbearance as to deliveries under the original contracts, the time of repudiation or of refusal to make further deliveries is the time at which the damages for breach of contract should be assessed. Unfortunately for the respondent the price of chrome ore had very notably increased from November 1, 1917, to June 21, 1918, when the letter of repudiation was written, so that its position is worse than if it had declined to make further deliveries after November 1. But it is impossible to accept the latter date as the one at which the damages should be assessed, for both parties acted under the contract for several months afterwards, and really the respondent, by its letter of repudiation, has determined the time for ascertaining the damages to which its repudiation entitles the appellants.

The only point remaining is whether the variation made by

Can.

S.C.

Samuel v. Black Lake Asbestos & Chrome Co.

Mignault, J.

the Appellate Division in the judgment of the trial Judge should be sustained. This involves the question whether an opportunity should be given to the respondent to shew, if it can, whether or not the appellants, under their obligation to minimise the damages, bought chrome ore to replace that undelivered by the respondent, the damages then being the difference between the contract price and the price at which such ore was purchased. After due consideration, I have come to the conclusion that up to the time of repudiation the appellants were not entitled to purchase chrome ore to replace that yet undelivered by the respondent, and that if they had made such a purchase they could nevertheless have been forced by the respondent to take the full quantity mentioned in the contracts. The reference ordered by the Appellate Division 58 D.L.R. 270, 48 O.L.R. 561, would therefore be without any possible use, for, if the appellants could not buy as against their contract, it is immaterial to inquire at what price they did in fact purchase ore. The appellants were dealers in ore and as there was a great demand for the commodity they naturally bought all they could. It is true that the contract states that each delivery should constitute a separate and independent contract, but that certainly does not mean that as to the quantity undelivered there should be as many contracts of sale as there were tons or carloads to be delivered. And even were there such a multitude of contracts to be fulfilled not later than November 1, unquestionably the time for delivery could be extended by forbearance beyond that date, and then the damages for the final breach of contract would have to be determined as of the time of the breach.

In my opinion, therefore, the judgment of the trial Judge should not have been disturbed, and the appeal should be allowed and this judgment restored. The cross-appeal of the respondent should be dismissed with costs.

I may add that inasmuch as the contracts in question were made in the Province of Quebec where also the breach occurred, the liability of the respondent should have been determined according to the Quebec law. The parties however assumed otherwise and they appealed to the law of the forum which was applied by the Courts below. I am not to be taken as dealing with the matter under any other basis.

Appeal allowed.

Sask.
C.A.

BORTH v. HIGGINS & THOMPSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

LIENS (§I—3A)—WOODMEN'S LIEN ACT, R.S.S. 1920, CH. 207, SEC. 4—APPLICATION—PERSON EMPLOYED AS CLERK—RIGHT TO UNDER ACT.

Section 4 of the Woodmen's Lien Act, R.S.S. 1920, ch. 207, sec. 4, is intended to give a lien only to those persons who assist in the bush work, that is the converting of trees into logs or timber, and the work necessary to convey these to the point at which they are to be taken and placing them there. A person employed as shipping clerk, and cook and who loads and scales lumber but does no work in the bush, is not entitled to a lien under the section.

[*Davidson* v. *Frayne* (1902), 9 B.C.R. 369, followed.]

APPEAL by claimants from the judgment in favour of the plaintiff on an issue directed to determine whether the plaintiff had a lien upon a certain quantity of lumber seized by the sheriff under a chattel mortgage made by the defendants in favour of the claimants. Reversed.

A. F. Sample, for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A. The defendants are lumber men, and in the winter of 1919-20 they went onto their timber limits and cut a large number of logs, and had them brought from the bush to the railway siding near Otesquen, where they had a camp and where they expected to saw them. They entered into a contract with one McFarlane to saw these logs into lumber, dimensions, etc. McFarlane reached the siding with his mill early in June, and the logs were already there when he arrived. The plaintiff Borth was employed by the defendants about May 31, 1920. He arrived at the siding after McFarlane, according to McFarlane's evidence, and was employed until July 8, 1921. On July 12, 1921, his wages being some $831. in arrears, he filed a lien under the Woodmen's Lien Act, R.S.S. 1920, ch. 207, on the

"Logs now situate near Otesquen Post Office aforesaid in respect of the following labour that is to say: bookkeeping for the said Higgins & Thompson from May 31, 1920, to July 8, 1921, and also for labour performed as shipping clerk, cook, loading and scaling lumber during the period above mentioned, which labour was performed for the said Higgins & Thompson between the 31st day of May, 1920, and the 8th day of July, 1921, at $100 per month."

In his evidence Borth admitted that he had done no work in the bush. The question to be determined is: Has the plaintiff

a lien on the lumber seized by the sheriff, the said lumber having been cut out of the logs at the siding?

Section 4 of the Woodmen's Lien Act reads:—

"4. Any person performing any labour in connection with any logs or timber within this province shall have a lien thereon for the amount due for such labour; and the same shall be deemed a first lien or charge on such logs or timber and shall have priority over all other claims or liens thereon except any lien or claim which the Crown has upon such logs or timber for or in respect of any dues or charges."

By sec. 2. "Labour" is defined as follows:—

"2. 'Labour' includes cutting, skidding, felling, hauling, sealing, banking, driving, running, rafting or booming any logs or timber and any work done by cooks, blacksmiths, artisans and others usually employed in connection therewith;"

The language of this definition, in my opinion, points to the conclusion that the lien is intended only for those persons who assist in the bush work; that is, the converting of the trees into logs or timber, and the work necessary to convey these to the point at which they are to be taken and the placing of them there. The title of the Act itself, in my opinion, points to the same conclusion.

In *Davidson* v. *Frayne* (1902), 9 B.C.R. 369, Hunter, C.J., in interpreting the British Columbia Act, (ch. 243, R.S.B.C. 1911) which is similar to ours, held, that it gave no lien to sawmill men, but only to those engaged in getting the timber out of the forest. The plaintiff Borth was not engaged in getting the timber out of the forest. It had all been cut and conveyed to the siding before he arrived there. For the work which he did around the mill after his arrival there, the Act, in my opinion, does not give him a lien.

The appeal should, therefore, be allowed with costs, the judgment below in his favour set aside, and judgment with costs entered for the claimants declaring that the lumber seized was not subject to the plaintiff's lien. *Appeal allowed.*

REX v. GALLAGHER.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. April 7, 1922.

NEW TRIAL (§II—8)—CRIMINAL CASE—TRIAL JUDGE'S CHARGE TO JURY—INDIRECT COMMENT ON FAILURE OF ACCUSED TO GIVE EVIDENCE—BREACH OF CANADA EVIDENCE ACT, SEC. 4, SUB-SEC. 5.

Where the trial Judge in his charge to the jury, in a criminal trial suggests that evidence ought to have been given which only the accused could have given, he commits a breach of sub-sec. 5

Alta.

App. Div.

REX v. GALLAGHER.

Stuart, J.A.

of sec. 4 of the Canada Evidence Act which provides that "The failure of the person charged . . . to testify shall not be made the subject of comment by the Judge . . .," and the accused is entitled to a new trial.

CASE reserved by the trail judge, on a conviction for murder. New trial ordered.

A. McL. Sinclair, K.C., and *O. H. E. Might*, for the appellant.
A. A. McGillivray, K.C., for the Crown.

SCOTT, C.J., concurs with BECK, J.A.

STUART, J.A.:—I agree with what my brother Beck has said. But I would like to add that it is quite possible—or rather of course very probable—that the trial Judge did not intend to refer, even indirectly, to the failure of the accused to testify at the trial. The situation seems to me to be this that the trial Judge inadvertently used language which was, on the face of it, to say the least, clearly capable of being understood as a reference to the failure of the accused to testify although it seems tolerably clear that, in their proper meaning, the words used must be taken as a reference to such failure. But it is not what the Judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.

With respect to the case of *R.* v. *Aho* (1904), 8 Can. Cr. Cas. 453, I am bound to say that it comes very near the line, and, I say it with much respect, I am rather inclined to the opinion that the Court went too far. I think that in that case it would have been safer for the trial Judge to point out to the jury that there may have been a third person such as John Jones or Robert Smith present at the critical moment in question, who could have explained what had happened and that in the circumstances it was the duty or obligation of the accused to call such third person, if there was one, to give the explanation and to leave it at that. And in any case the circumstances did not, as here, logically exclude the possibility of explanation or denial by any person other than the accused.

BECK, J.A.:—In this case a number of points of law were reserved by the trial Judge and he was asked to reserve a number of others which he refused to serve. All these points were discussed before us. One of these points was that the trial

Alta.
App. Div.
REX
v.
GALLAGHER.
Beck, J.A.

Judge had committed a breach of the provision of sub-sec. 5 of sec. 4 of the Canada Evidence Act that:—"The failure of the person charged . . . . . . to testify shall not be made the subject of comment by the judge. . . . ."

We are all agreed that the trial Judge in his charge to the jury offended against this provision, unwittingly no doubt.

The passages in the charge to which exception is taken are as follows:—

"We have the positive statements of Inspector Brankley and Inspector Nicholson and Detective Leslie that he said he had no such firearms in his possession at this time and the statements of Inspector Brankley that he had not had since he was in the Provincial Police in 1917 and Inspector Nicholson that he had not had any such firearms in his possession since he came back from France in '16 and the statement to Leslie that he had not had any such firearms since he came to the Carbon Valley. It is suggested that a man might make an untrue statement of that kind through fear, but, be that as it may, we have that bald fact *undenied and uncontradicted* that he had these guns at different times in his possession and that he denied having them. . . . . . .

Now then, though we have the evidence which we have that the defendant was the last person seen in the company of the murdered man, the circumstantial evidence, that he was killed at a certain time afterwards and the circumstantial evidence as to the possession of these bullets and the possession of the firearm or firearms and *that is not denied by the defendant*, it would still seem to leave room for a reasonable doubt as to whether or not he was the person who committed this crime. . . .

There is no suggestion of anything else, he either went down that path towards his own home or he went on with the car and *there is no suggestion from the defence or any other person* that he could have gone any other way."

We adopt the view expressed in *Dawson* v. *State* (1893), 24 S.W. Rep. 414. (Texas Court of Appeal) cited in notes to *Reg.* v. *Corby* (1898), 1 Can. Cr. Cas. 457 at p. 466, where it is said that it is the duty of the Court carefully to protect the accused from damaging insinuations which may not in terms invite a consideration of the prisoner's failure to testify but make indirect and covert allusion to defendant's silence.

In the instances to which exception is taken it was, in the circumstances of the case, only the accused who could have given the evidence which it was suggested ought to have been given.

Sask.

C.A.

It is suggested by counsel for the Crown that the Judge was referring not to the opportunity of the accused to give evidence at the trial but to his opportunity to have made statements upon these points in the course of making statements, which he did, in fact, make to some police officers; but it seems not possible so to interpret the expressions used by the Judge.

We think it useless to express an opinion upon any of the other questions raised inasmuch as they seem to depend only upon the particular facts of this case and are not likely to come before us again upon precisely the same facts.

We also think it inexpedient to express an opinion upon the point reserved at the request of the Crown namely whether the Judge was in error in refusing to admit the statements of the accused made as a witness at the Coroner's inquest because the question of their admission may depend upon the previous question of the freedom of the accused at that time from an improper inducement. See also *R.* v. *Lynn* (1910), 19 Can. Cr. Cas. 129, at p. 140, 4 S.L.R. 324 at p. 334.

In the result we think the conviction must be set aside and a new trial ordered.

HYNDMAN and CLARKE, JJ.A. concur with BECK, J.A.

New trial ordered.

SHEBLEY v. RUR. MUN. of MERVIN No. 499.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 30, 1922.

LIENS (§I—2)—SEED GRAIN—DISTRIBUTION OF BY MUNICIPALITY—THE MUNICIPALITIES SEED GRAIN ACT, SASK STATS. 1917, 2ND SESS., CH. 47, SEC. 16 (2)—"OWNER"—MEANING OF—PURCHASER UNDER AGREEMENT FOR SALE—PURCHASE PRICE UNPAID—CONSTRUCTION OF ACT.

The purchaser of land under an agreement for sale, is not an owner within the meaning of the Municipalities Seed Grain Act Sask Stats. 1917, 2nd sess., ch. 47, sec. 16 (2), until he pays in full for the land, and the consent of the registered owner must be obtained before such occupant can contract with the municipality for the advance of seed grain or create a lien against the land for such advance.

APPEAL by defendant from a District Court judgment in a special case stated to him, as to whether the defendant was empowered under the Municipalities Seed Grain Act, Sask. Stats. 1917, 2nd sess. ch. 47, sec. 16 (2), to advance seed grain to one Joseph Barner, without the consent of the plaintiff. Affirmed.

G. H. Barr, K.C., for appellant.

P. H. Gordon, for respondent.

HAULTAIN, C.J.S., and LAMONT, J.A. concur with McKAY, J.A.

TURGEON, J.A.:—Chapter 47 of the Statutes of Saskatchewan, 1917 2nd. sess., enables rural municipalities to borrow money for the distribution of seed grain to farmers, and deals with the persons to whom such seed grain may be supplied by the municipality, the security for repayment to be taken, the lien created, etc.

Sub-section (2) of sec. 16 of the Act is as follows:—

"16.- (2) No application for seed grain by a tenant or occupant who is not the owner of the land shall be granted unless the application is approved in writing by the registered owner of the land."

The only question before us in this appeal is as to the meaning of the word "owner" as it first appears therein. Is the rural municipality empowered to advance seed grain to a person who is a purchaser under an agreement for sale with the registered owner without the registered owner's consent? Is such purchaser an occupant of the land who is excluded from borrowing the seed grain, or is he himself the owner and entitled to borrow the seed grain and create the lien against the land, notwithstanding the absence of the registered owner's consent?

In my opinion the purchaser in a case of this kind is not an owner within the meaning of the sub-section, but he is an occupant who must have the registered owner's consent in order to contract with the municipality.

Outside of the statute, it is, of course, admitted that a purchaser of land under an agreement for sale has not the right to encumber the land to the prejudice of the vendor's interest. It is contended on behalf of the appellant that the statute in question gives him that right which otherwise he would not possess. I cannot agree with this contention. Nothing but the clearest language in a statute can suffice to shew that the Legislature had any such intention.

In the 6th. ed. of Maxwell on the Interpretation of Statutes, pp. 501, 502, I find the following statement of the law on the subject, which reads as follows:—

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognised 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

Sask.
C.A.
SHEBLEY v. RURAL MUN. OF MERVIN No. 499.
McKay, J.A.

Legislature does not desire to confiscate the property, or to encroach upon the right 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. It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights, without compensation, unless one is obliged so to construe it."

I agree with the foregoing statement, which, in my opinion, is a proper deduction from the authorities upon which the author relies in framing it.

In my opinion the appeal should be dismissed with costs.

McKAY, J.A.:—This is an appeal from the answer of the District Court Judge made in a special case stated to him.

The following among other facts are admitted:—

"1. That the plaintiff is and was at all times material to this action the registered owner of the south east quarter of section thirty-six (36) in township fifty-two (52) in range twenty-one (21), west of third meridian in the Province of Saskatchewan.

2. That the defendant is a rural municipality organised under the laws of the Province of Saskatchewan.

3. That the plaintiff on the 20th. day of July A.D. 1914 entered into an agreement with one, Joseph Barner for the sale to the said Joseph Barner of the said land for the sum of $2,370 payable by one-half crop payments on the 15th day of December, 1915, with interest at the rate of six per cent. per annum payable yearly on the 15th day of December, all interest in default to become principal and to bear interest at the rate aforesaid.

4. That the said Joseph Barner further covenanted in the said agreement to pay all taxes imposed upon the said land from the date of the said agreement, and did pay as follows:— 1914, $15, 1915, $18, 1916, $14.25, 1917, $12.50.

5. That the following payments and no others were made by the said Joseph Barner pursuant to the said agreement:— January 24, 1916, $125, March 3rd, 1916, $77.66, March 28th, 1917, $147.85, January 4, 1918, $15, February 5, 1918, $153.05.

That the defendant purporting to act under the provisions of the Municipalities Seed Grain Act, ch. 47, Statutes of Saskatchewan, 1917, 2nd sess. on March 14, A.D. 1918 and on May 11, A.D. 1918 advanced to the said Joseph Barner for the purchase of seed grain the sum of $126.50.

Sask.
C.A.
SHEBLEY
v.
RURAL
MUN. OF
MERVIN
No. 499.
McKay, J.A.

9. That no consent or approval was given by the plaintiff in respect of the said advance.''

The question submitted to the District Court Judge was:—

''Whether the provisions of the Municipalities Seed Grain Act, ch. 47, Statutes of Saskatchewan, 1917, 2nd sess., empowered the defendant to make the said advance to the said Joseph Barner without the consent of the plaintiff.''

The District Court Judge answered the said question in the negative.

I deal with this question as if the words ''so as to create a charge upon the said land'' were added to the said question submitted, as I do not think we should deal with the liability or non-liability of Barner without his being made a party to the special case. And further as the argument before us appeared to be directed to the question of whether or not a charge was created against said land by said advance.

The said ch. 47 provides for the distribution of seed grain by municipalities to certain persons upon certain conditions, and sec. 16 sub-sec. (2) reads as follows:—

''(2) No application for seed grain by a tenant or occupant who is not the owner of the land shall be granted unless the application is approved in writing by the registered owner of the land.''

It is contended for the appellant that Barner having agreed to buy the said land under written agreement, as admitted, was the owner thereof, and that the registered owner, the respondent, held the title thereof as trustee for him, and in order to make this sub-section applicable to Barner the word ''registered'' should have immediately preceded the word ''owner'' where it first occurs in said sub-section.

I cannot agree with this contention. While Barner has certain rights and interests in said land and may be considered owner for certain purposes, he does not become owner until he pays in full for the land, and the respondent is not really trustee for him till then.

This principle is fully set forth in *Ridout* v. *Fowler,* [1904] 1 Ch. 658, 73 L.J. (Ch.) 325 which was affirmed by the Court of Appeal in, [1904] 2 Ch. 93, 73 L.J. (Ch.) 579, 53 W.R. 42, where Farwell, J., at pp. 661, 662, ([1904] 1 Ch.) says:—

''Now the rights of vendor and purchaser have been explained so often that it is sufficient to refer to what Lord Hatherley says in *Shaw* v. *Foster,* where, quoting from his own decision, he says: 'It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and

Sask.
C.A.
SHEBLEY v. RURAL MUN. OF MERVIN No. 499.
McKay, J.A.

cestui que trust does, in a certain sense, exist between vendor and purchaser: that is to say, when a man agrees to sell his estate he is trustee of the legal estate for the person who has purchased it, as soon as the contract is completed, but not before.' That was in reference to the actual conveyance. The expression used by Sir Thomas Plumer in *Wall* v. *Bright*, which has, I think, been just read by the noble and learned Lord who preceded me, is this: 'The vendor, therefore, is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey.' James L.J. puts it perhaps more clearly in *Rayner* v. *Preston*. He says: 'I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is in fieri the relation of trustee and cestui que trust. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is in fieri. But when the contract is performed by actual conveyance, or performed in everything but the more formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and cestui que trust. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, 'is the correct definition of a trust estate.' Now here it is quite clear that the relationship of trustee and cestui que trust never was created by the completion of the contract, and therefore there never was any estate in land in the events that have happened on which this order by way of equitable execution could have operated. That disposes of the question of any charge upon the real estate, because by reason of the events that have happened, and which the plaintiff in the present action could not interfere with or prevent, no actual estate in the land ever belonged to the debtor at all."

In this case, then, Barner is only a prospective owner, and is not the owner within the meaning of said sub-section, as the respondent is the real owner until paid in full.

There is no doubt that a registered owner of land who has agreed to sell such land and on which a large amount is still unpaid has a very substantial vested interest in such land, and there is nothing in the Act shewing that he should be deprived of such interest, or that such interest should be encumbered without his consent. And apart from statutory authority a

purchaser under agreement of sale has no right to encumber the land without the consent of the registered owner, his vendor. This Act then should not be construed so as to deprive the registered owner of that interest or as allowing that interest to be encumbered without his consent, unless the Act clearly so states.

In Maxwell on the Interpretation of Statutes, 6th ed. at pp. 501, 502, the author states:—

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognised 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 right 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. It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights, without compensation, unless one is obliged so to construe it."

In my opinion, then, the appellant was not empowered by said Act to make said seed grain advance to Barner without the respondent's consent so as to create a charge against the said land, and the appeal should be dismissed with costs.

Appeal dismissed.

ROYAL TRUST Co. v. FAIRBROTHER & VALENTINE.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Ives, Hyndman and Clarke, JJ.A. December 17, 1921.

REFORMATION OF INSTRUMENTS (§ 1—1)—CONTRACT FOR SALE AND PURCHASE OF LAND—AGREEMENT FOR IMMEDIATE POSSESSION—MUTUAL MISTAKE IN INSTRUMENT—LAND SUBJECT TO LEASE—IMPOSSIBILITY OF PERFORMANCE—LIABILITY.

One who is induced to enter into a contract for the purchase of land on the distinct understanding that he take possession of the land at once and cut and take the crop of hay then growing, and who on entering into possession finds that the land is under lease to another who is entitled to the hay, and who relying on the representations and warranties brings an action against the lessor to restrain him from trespassing on the land, and from cutting or dealing with the hay, but is unsuccessful in such action, a lease of the property having been given by the vendor's agent, without the knowledge of the vendor, and the contract, by mutual mistake having been made subject to existing leases, is entitled to have the contract reformed so as to express the true intention of the parties, the result of such reformation being

Alta.
App. Div.
ROYAL TRUST CO. v. FAIRBROTHERS & VALENTINE.
Stuart, J.A.

to entitle him to damage for breach of the covenant to give immediate possession. The amount of damage being such as flow directly and naturally from the breach.

APPEAL from the judgment of Scott, J. (1921), 60 D.L.R. 528, in an action upon an agreement for the sale of lands. Affirmed.

Frank Ford, K.C., and *A. Knox*, for appellant.

E. D. H. Wilkins, for respondent.

STUART, J.A. (dissenting):—In this case I have very grave doubt whether the defendants are entitled to rectification of the agreement. Rectification is granted, as I apprehend, only where there has been a mistake. Upon the evidence I cannot find any mistake such as intended in the law of rectification. Neither the two parties nor Kirkwood, who prepared the agreement, knew that there was any clause in the agreement referring to possession. This is admitted by everyone. Then the evidence is that the defendants asked Kirkwood to put a clause in giving them possession so as to get the hay, and Kirkwood said it was not necessary, and the parties accepted that position. In other words, it was deliberately intended that there should be no reference to possession at all in the written agreement. Therefore, if there was to be any rectification, it would lead to the exclusion of the whole clause referring to possession, and not merely the phrase "subject to any existing lease." But this is not the rectification asked for.

It is one thing to say what the parties intended to agree upon and another to say what they intended should be inserted in the document. No doubt, upon the findings of the trial Judge, the parties did agree that there should be possession, but it is also clear that it was not by mistake, but by intention, that this was omitted from the written document. A mistake upon which rectification can be based is not a mere mistake in the advice the conveyancer, or in his knowledge as to what needs or does not need to go in, at any rate where the omission has been, as here, deliberately made with the knowledge and assent of the parties. There are no doubt cases such as *Wake* v. *Harrop* (1862), 6 H. & N. 768, 158 E.R. 317, 31 L.J. (Ex.) 451, where by a mistake of the draftsman, an agreement has been so drawn as to have a legal effect contrary to that intended, and where the Court has relieved a defendant from an obligation appearing on the face of the instrument but not intended to be imposed. But I doubt if a case can be found where there has been a deliberate omission (even though based on a misapprehension of the law) of a covenant upon a point raised and spoken of at

Alta.

App. Div.

ROYAL TRUST CO. v. FAIRBROTHERS & VALENTINE.

Stuart, J.A.

the time in which the Court has rectified the agreement by inserting such a covenant, even though there may have been in fact an agreement to the effect of the proposed clause.

I am inclined, therefore, to the opinion that the defendants, as far as their rights under the written agreement are concerned, must take it either as it stands or without any covenant for immediate possession at all.

But upon the findings of fact, abundantly justified by the evidence, the deceased Eldridge did agree in fact to give immediate possession. If the defendants, instead of suing Gehan, the man who had the lease, had forthwith sued Eldridge for breach of this agreement, how would the matter have stood? They would have come into Court alleging that they had purchased the land from Eldridge, that a written agreement had been drawn up, and they would doubtless have had to allege a mistake and ask for rectification. Upon the evidence they would have had to say "Eldridge verbally agreed to give us immediate possession, but a reference to this right was deliberately left out of our written agreement, and now we find that there is a clause giving us a right of possession which we did not know was there at all, but it has a reservation attached saving any existing lease. Now we want damages for a breach of the oral agreement for possession."

Halsbury, vol. 10, p. 447, says:—"Under certain conditions evidence may be given of a parol agreement contemporaneous with and touching the subject matter of a written agreement. The necessary conditions are that the parol agreement shall be entirely collateral to the written agreement................ The parol agreement will be more readily enforced if it was an inducement to entering into the written agreement."

I think we ought to distinguish here between such a parol agreement and a warranty. The parol agreement was that the defendants should have immediate possession. A warranty is a contract guaranteeing the existence of certain facts, but with reference to the future the word "warranty" can only mean the same as "agreement." Here any warranty in the proper sense of that word, which was given was a warranty that no lease existed on the land. The breach of such a warranty would cause no damage unless there was a right of physical possession, at least in the circumstances of this case. So that we get back to the question, was there an agreement for possession which can be enforced by an action for damages?

I have very grave doubt whether an agreement for immediate possession is such a collateral agreement as can be proved by parol and enforced. Whether there was an implied right of

Alta.
App. Div.
ROYAL TRUST CO. v. FAIRBROTHERS & VALENTINE.
Stuart, J.A.

possession is a question which does not come up because the point was never raised by any one on the argument. I should think that such an agreement could not seriously be considered as collateral. It is not like the agreement in *Erskine* v. *Adeane* (1873), L.R. 8 Ch. 756, 42 L.J. (Ch.) 849, 21 W.R. 802, where a lessor verbally agreed that he would kill down the game and not let (*i.e.* hire out) the shooting rights; nor like that in *Morgan* v. *Griffith* (1871), 6 Exch. 70, 40 L.J. (Ex.) 46, 19 W.R. 957, where there was a promise to destroy rabbits. In *Angell* v. *Duke* (1875), 32 L.T. 320, 23 W.R. 548, where a lease of house and furniture was involved, it was held by Cockburn, C.J., and Mellor, Field and Blackburn, J.J., that a promise to put in additional furniture was not collateral. *De Lasalle* v. *Guildford*, [1901] 2 K.B. 215, 70 L.J. (K.B.) 533, 49 W.R. 467, was a case of a warranty of existing conditions.

Moreover, it seems to me the failure to give possession was due, not to a breach of an agreement, which Eldridge had the power to perform, but did not perform, but to a defect in his title. He would undoubtedly have given possession if he had had in himself at the time the right to possession. He honestly believed he had that title. He honestly believed that his brother-in-law, Peterson, had no authority from him to give Gehan any lease for 1919. And he was so far justified in this view that Simmons, J., who tried the action, between the present defendants and Gehan, held that he was right in his belief. True, upon appeal, Simmons, J., was reversed. But at any rate Eldridge simply took the view that a Judge of this Court took as to his own title to possession. He acted on the faith of that view, but upon appeal it turned out to be, we must assume, incorrect. I am bound to say that under the judgment appealed from the estate of Eldridge is suffering a severe punishment for this innocent mistake.

Supposing that immediately or shortly after the agreement of July 26, Eldridge and Fairbrother had discovered that it took a law suit and an appeal to find out about the title and still Eldridge had sued for specified performance, as his estate now does, and if Fairbrother had protested against the failure to give possession, what would have been the situation? Assuming an enforceable agreement for immediate possession, certainly Eldridge would have been obliged to allow compensation for the slight defect in title which prevented possession during the summer. But if he had been told *at the time* that the compensation was to be assessed at $1,380 when the whole purchase-price of the quarter section was only $1,920, I think he would have been entitled to withdraw from the contract and pay only

such damages as the principle of *Bain* v. *Fothergill* (1874), 43 L.J. (Ex.) 243, 23 W.R. 261, would allow. It is true he has after the failure of the attempt to prove title as against Gehan, still proceeded to sue on his contract, but it was certainly not till judgment was given on the counterclaim that he became aware that the loss of the possession during that summer was to be compensated by such a sum as $1,380. And in the case supposed, I do not think the defendants would have been entitled to sue in damages and get anything more than *Bain* v. *Fothergill* would allow.

Again, I much dislike the treatment of the case as if a sale of goods was involved. This is what it comes to when so much is made of the hay. But this was a sale of real estate, and the green growing grass was part of it. Yet we have the matter treated as if a vendor had agreed to sell a specified bulk of chattels in the shape of certain raw materials and there had been a rival claim to ownership, and as if the proper way to assess damages in such a case would be to go through a varied process of transportation and manufacture into some finished product, find what that finished product would sell for (wherein profits on the manufacturing process would be provided for), deduct the cost and assess the damage at the amount thus produced.

I am bound to say that this method of assessing damages for non-delivery of goods seems to me rather strange. I always thought that the damage for non-delivery, where there is no market, would be the value of the goods as they stood at the date of breach, *i.e.* the bulk of raw material, which I have suggested as an example.

My firm opinion is that the damages should in any case have been arrived at by an enquiry into the value of the possession of the hay rights on the land in August, 1919. It seems to me incredible that anyone would have been found to give $1,380 for that right.

Moreover, I am not convinced of the applicability of the decision in *Hammond* v. *Bussey* (1887), 20 Q.B.D. 79, 57 L.J. (Q.B.) 58, to the facts of this case. There the costs which the plaintiffs sought to recover were costs in an action in which they had been defendants. Lord Esher said "I cannot doubt that any business man would contemplate as being according to the ordinary course of things under the circumstances not only the probable, but the inevitable result of such a breach of contract, that there would be a law suit by *the sub vendees* (*i.e.* against the then present plaintiffs *as defendants*) and that the reasonable

course to be pursued by the vendees might be that he should not at once submit to the claim but that unless they could get information from the vendor that there was really no defence, they should defend the action."

But here can it be said that it was reasonably in the contemplation of the parties that Fairbrother and Valentine should, when there was a breach of covenant for possession, themselves start an action and that all the costs involved in the ultimate failure of that action should be treated as damages flowing from the breach? The present defendants commenced the action of their own accord. True, Eldridge did his best to assist them, believing he was right, as the trial Judge held that he was. But I do not think the principle of *Hadley* v. *Baxendale* (1854), 9 Exch. 341, 23 L.J. (Ex.) 179, 18 Jur. 358, 2 W.R. 302, ought to be treated as justifying in this case any damages beyond what would naturally flow from the failure to get possession, *viz.*, the value of that possession which was lost.

There is no claim made upon any special agreement by Eldridge to pay these costs and no amendment of that kind was asked for.

Then there was not the slightest evidence adduced as to the impossibility of getting the grass on another quarter section to cut or of any attempt to get another quarter or of what it would have cost.

These are the considerations which make me refrain from concurring in the judgment proposed by the other members of the Court. At the outset there is the difficulty of enforcing a mere parol agreement as to possession to which I have referred. There is a clause in the agreement, not asked to be expunged, by which the defendants were to get one-half the rental (if any) produced by the property. Is not an oral agreement for possession inconsistent with that? The written agreement seems in itself consistent throughout. The evidence shews that a great number of the special clauses were never discussed between or known of by the parties. Could the defendants succeed in getting them all, or any of them, which turned out to be distasteful to them, struck out by a suit for rectification?

Then I have spoken of the measure of damages. Certainly I could not agree to the sum of $1,380 for the manufactured hay; and in the circumstances, I have grave doubts about the costs of the other action.

But my brothers are of a different opinion, and I am, therefore, quite probably wrong. I confine myself accordingly to saying that I would allow the appeal as to the value of the hay, and

Alta.
App. Div.
ROYAL TRUST CO. v. FAIRBROTHERS AND VALENTINE.
Beck, J.A.

direct a reference to enquire into the value of the possession of the land of which the defendants were deprived.

BECK, J.A., concurs with HYNDMAN, J.A.

IVES, J.A.:—This is an appeal from Scott, C.J. (1921), 60 D.L.R. 528, at trial.

On July 26, 1919, the deceased, Samuel Eldridge entered into an agreement in writing with the defendants for the sale to them of a quarter section of land. Nothing was paid down. During the negotiations for the sale and purchase, Eldridge represented clearly that there was no encumbrance on, and that no person had any rights over the land whatever by way of lease or otherwise. The form of agreement used is a printed form, and among other usual clauses contains the following:—"The purchaser shall immediately after execution of this agreement, *but subject to the terms of any lease affecting the said lands*, have the right of possession of the said premises and shall have the right to occupy and enjoy the same until default be made in the payment of the said sums of money, etc., . . ."; and the following clause:—"Provided that all arrears of taxes, etc., . . . shall be paid by the vendor . . . . *The current rent (if any) earned by the property shall be apportioned as of the date hereof between the vendor and the purchaser.*"

The words I have underlined are those in which the issue in the action are involved. The action is brought to enforce the agreement, and the defendants counterclaim for rectification of the document by striking out the words I have emphasised and for damages.

Immediately upon concluding the agreement sued upon the defendants went into possession and prepared to harvest the hay crop then growing. At the same time—July 30, I think—one Gehan appeared and claimed the rights of lessee and owner of the hay crop. Defendants unsuccessfully litigated this claim and in that action Eldridge supported them and gave evidence by affidavit and at trial. His affidavit was sworn on August 16, 1919, and para. 4 reads: "I state positively and distinctly that there is no lease in existence affecting the said lands and that no one other than the plaintiffs"—*i.e.* the defendants— "has any right whatever to enter upon the said lands and take any hay grown on the same."

In view of this admission on oath, and of the evidence at trial, the claim for rectification must succeed and thus the agreement between the parties was according to the writing with the words I have above referred to eliminated. That being so, the agreement was undoubtedly broken by the plaintiff, as to the covenant for possession and enjoyment. The hay was found to be the

Alta.

App. Div.

ROYAL TRUST CO. v. FAIRBROTHERS AND VALENTINE.

Hyndman, J.A.

property of Gehan and he had a lease of the lands for that year. It is also clear that Eldridge's representation to the defendants that there was no lease affecting the lands was an innocent misrepresentation. Now, as to the measure of damages, may I repeat what is being said daily and hourly by Judges that "where 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 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." *Hadley* v. *Baxendale*, 9 Exch. 341.

It is clear from the evidence that the hay crop was an important consideration to the defendants, and that Eldridge, at the time the agreement was made, knew this. The immediate result of Eldridge's breach was loss to defendants of the hay and this certainly was something that might reasonably be supposed to have been in contemplation of the parties when they made the contract. The amount should be the value of the hay crop at the time of the breach, which in fact was about July 6, when Gehan commenced cutting. As I understand it, this value is $1,380.49. The next point is whether they should recover as damages their party and party and solicitor and client taxed costs in their unsuccessful action against Gehan. By reason of the strong and unequivocal nature of Eldridge's representations, it seems to me that the defendants cannot be criticised if they in turn relied as strongly upon them and brought an action to oust Gehan. And particularly so when they were aided and abetted by Eldridge. I cannot so distinguish the circumstances here from those in *Hammond* v. *Bussey* (1887), 20 Q.B.D. 79, as to say that these costs are not properly a proximate consequence of the breach of contract.

I would, therefore, dismiss the appeal with costs.

HYNDMAN, J.A.:—It is clearly established that the land in question was sold on the understanding and condition that the defendants would acquire an unencumbered title and immediate possession which would result in giving them exclusive right to all the crops of hay or otherwise upon the land at the date of the agreement. The evidence is overwhelmingly to the effect that the clause in the instrument, "but subject to the terms of any lease affecting the said lands, &c." was included by mistake common to all parties, and was even unknown to the agent who drafted it. The agreement should be rectified in that respect.

Reformation of the agreement then carries with it the consequence that the plaintiff should have immediate possession. The existence of the lease to Gehan deprived them of that right, and failure to obtain same gave rise to an action for damages.

It is true that there was no fraud on the part of the deceased, who really believed that no lease existed, and had he at the time decided to rescind the agreement because of inability to give title, on the principle of *Bain* v. *Fothergill*, *supra*, I think he might have been entitled to do so, subject to indemnifying the plaintiffs for any damages they might have suffered in respect of examination of the title, &c. But he did not so elect, but maintained throughout that he had a clear title and encouraged the plaintiffs to prosecute their action against Gehan, the lessee, and used expressions which in effect amounted to a guarantee to insure them rightful and immediate possession.

There is no doubt but that it was well understood by him that their chief object in purchasing was so that they might get the hay on the land, and there was a warranty that they should have it. The action against Gehan for possession was decided adversely to the plaintiffs and they were deprived of the hay.

This situation was the direct result of the breach by the deceased of his covenant to give immediate possession and the defendants herein must, therefore, be awarded such damages as directly and naturally flow from that breach.

It seems impossible to avoid the conclusion that the loss of the value of the hay was one immediate and direct consequence. That value has been ascertained and found by the trial Judge, and it seems no fault can be found with the principle upon which he assessed it.

The claim to be indemnified for the costs of the action against Gehan and on the appeal from the judgment therein under the circumstances, also seems to be clearly well founded.

Whatever the attitude of the deceased in the early stages of that action, there is no doubt but that he stood behind or at least encouraged the defendants herein. He not only made an affidavit in that action, but made verbal statements which I think amounted to an undertaking to see that they suffered no loss by reason of it.

In respect to the right of the plaintiffs to recover these costs, I cannot see any difference in principle between the case at Bar and that of *Hammond* v. *Bussey* (1887), 20 Q.B.D. 79. There the defendant contracted for the sale of coal of a particular description to the plaintiffs knowing that they were buying such coal for the purpose of reselling it as coal of the same description. The plaintiffs did so resell the coal. The coal

Alta.

App. Div.

ROYAL TRUST CO. v. FAIRBROTHERS AND VALENTINE.

Hyndman, J.A.

delivered by the defendants to the plaintiff under the contract and by them delivered to their sub-vendees, did not answer such description, but this could not be ascertained by inspection of the coal and only became apparent upon its use by the sub-vendees. The sub-vendees, therefore, brought an action for breach of the contract against the plaintiff. The plaintiff gave notice of the action to the defendants, who, however, repudiated all liability, insisting that the coal was according to contract. The plaintiffs defended the action against them, but at the trial the verdict was that the coal was not according to contract, and the sub-vendees accordingly recovered damages from the plaintiffs. The plaintiffs thereupon sued the defendants for breach of contract, claiming as damages the amount of the damages recovered from them in the action by the sub-vendees, and the costs which had been incurred in such action. The defendant paid the amount of the damages in the previous action into Court but denied his liability in respect of the costs. It was held that the defence of the previous action being, under the circumstances, reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable, under the rule in *Hadley* v. *Baxendale*, 9 Exch. 341, as being damages which might reasonably be supposed to have been within the contemplation of the parties, at the time when the contract was made as a probable result of the breach of it.

In the case at Bar it must be said that the loss sustained by reason of the breach was the value, plus the costs of the suit to recover such hay from Gehan.

The contract was undoubtedly made under special circumstances, one of which was that the defendants should have immediate possession in order that they should harvest and have the hay crop. That circumstance was clearly understood by both sides. Considering then the circumstances and the attitude of the deceased towards the defendants' prosecution of their action, can it properly be said that such an action was reasonably within the contemplation of the parties.

Had deceased assumed a different attitude, and expressed even a doubt as to the rights of Gehan, or whilst expressing confidence, exhibited any fear of the result of the trial amounting to a warning not to follow up their suit, it might possibly be said that the present defendants should have contented themselves with a claim to damage for the value of the hay. But in view of his firm stand that Gehan had no rights whatever, it seems to me clear that it was not only not unreasonable for them to proceed with their lawsuit, but that it was almost a necessary condition, in order to justify their calling upon the deceased for

damages. The test is, was what they did reasonable or not? They certainly were entitled to rely on his assurance that their right to possession was absolute, and their conduct in the matter in my opinion was entirely proper and reasonable, and having been undertaken in reliance upon the covenant of the deceased, damage resulting from a breach of that covenant must be borne by the deceased's estate.

The costs allowed were taxed in the usual manner, and therefore must be considered reasonable in amount.

I would, therefore, dismiss the appeal with costs, making allowance, however, for the admitted mistake of $350, which must be deducted from the $3,613.70 awarded to the defendants.

CLARKE, J.A:—I agree that the judgment below should be affirmed with a reduction of $350 from the amount awarded to the defendants about which there is no dispute.

I have some doubt about the defendants' right to rectification in view of the denial of mistake by the deceased Eldridge in his pleadings, but I think he and his estate should be bound by his statements as to the hay in question and the right to possession, which I think amount to a warranty for breach of which the defendants are entitled to the damages awarded by the trial Judge with the reduction mentioned.

I think the defendants are entitled to their costs of the appeal.

Appeal dismissed.

THE WOLFE Co. v. THE KING. POWERS v. THE KING.

Supreme Court of Canada, Davies, C.J. Idington, Duff, Anglin and Mignault, JJ. November 16, 1921.

PUBLIC WORK (§ IV—65)—NEGLIGENCE—LOSS BY FIRE COMMUNICATED TO ADJOINING BUILDING—EXCHEQUER COURT ACT, R.S.C., 1906, CH. 140—"PUBLIC WORK," DEFINITION—BURDEN OF PROOF—INTERPRETATION OF STATUTES.

The phrase "public work" as used in sec. 20 of the Exchequer Court Act, does not include a building occupied under the circumstances peculiar to this case, namely: A building, part of which was used and rented as a recruiting station by the Department of Militia and Defence, and solely under its control with the right to vacate at any time upon giving 14 days' notice, and over which the Public Works Department had no control.

APPEAL by suppliants from the judgment of the Exchequer Court of Canada, (1921), 57 D.L.R. 266, 20 Can. Ex. 306, on a petition of right for damages to stocks of merchandise arising from fire alleged to have been caused by the negligence of officers of the Crown, in connection with a "public work." Affirmed.

A. E. Fripp, K.C., for appellant.

W. D. Hogg, K.C., for respondent.

DAVIES, C.J.:—The suppliants in each of these cases in their respective petitions of right claimed damages against the Crown;

Can.
S.C.
THE WOLFE CO. v. THE KING; POWERS v. THE KING.
Davies, C.J.

the former to the extent of $23,245.85, and the latter to the extent of $18,800 on the grounds that they were carrying on business in Ottawa on December 13, 1917, and for some years previously, and that as stated in their petition: "On the said 13th day of December, 1917, the Department of Militia and Defence occupied the adjoining premises, a public work of Canada, and, owing to the negligence and want of proper care on the part of the said Department, its servants and agents, by using a defective stove and pipes, and by negligent over-heating of the same and by neglect of a watchman in charge of said stove in leaving the premises while the stoves and pipes were overheated, the said premises were carelessly and negligently set on fire, destroying the said building and premises so occupied by the Department, and also the stock-in-trade of the suppliants."

The two appeals were by order consolidated and heard together.

The two questions on which the appeals turned were whether the premises occupied by the Department of Militia and Defence at the time of the fire were a public work within the meaning of the Exchequer Court Act, R.S.C. 1906, ch. 140, or the Public Works Act of Canada, R.S.C. 1906, ch. 39; and, if so, whether the fire originated from the negligence of the officials of the Department acting within the scope of their duties of employment.

Audette, J., of the Exchequer Court, held adversely to the appellants on both grounds (1921), 57 D.L.R. 266, 20 Can. Ex. 306, and after giving the arguments at Bar and the evidence every consideration, I have reached the conclusion that he was right.

As a fact it appears that the Department of Militia occupied only the basement and ground floor of the Arcade building as a recruiting station for soldiers under an agreement to vacate at any time after giving 14 days' notice. The Arcade building itself was not leased or occupied by the Department, but only the ground floor and basement, and the occupation was merely temporary, determinable on giving 14 days' notice.

It may be, I admit, somewhat difficult to decide in some cases what is or is not a public work within the meaning of the Act, and I do not think it desirable to attempt any definite interpretation of the words "public work." Every case arising must be determined on its own special facts. But in the cases now before us, it is sufficient to say, and I have no hesitation in holding, that the temporary occupation of the basement and ground floor of the Arcade building, subject to its being determined on

Can.

S.C.

THE WOLFE CO. v. THE KING; POWERS v. THE KING.

Idington, J

a 14 days' notice, could not constitute the whole building a public work, or, apart from the whole building, make the basement which was occupied such a work. To my mind such a conclusion offends one's common sense, and I agree with the finding of Audette, J., when he says, at p. 273: "The words 'public work,' mentioned in sec. 20 of the Exchequer Court Act, R.S.C. 1906, ch. 140, must be taken to be used as verily contemplating a public work in truth and in reality, and not that which is mentioned in the Public Works Act, R.S.C. 1906, ch. 39, or in the Expropriation Act, R.S.C. 1906, ch. 143, for the purposes of each Act."

This conclusion makes it, perhaps, unnecessary to determine the other point of alleged negligence on the part of the Crown officials causing the fire. I feel bound to say, however, after a close examination of the evidence, I am unable, like the trial Judge, to discover any such negligence. The evidence given by the fire inspector, Latimer, as to conditions found by him after the fire was over, was that the stove standing in the south-east corner of the basement, and which it was suggested caused the fire, had not burnt the floor on which it stood, "that part of the floor," he said, "was all right and the woodwork around there was there still. The wood-work, except a piece of the iedge of the window, was intact." Altogether, I could not help being satisfied from this and other evidence that the surmise of some witnesses of the fire having originated from the stove in the south-east corner of the basement could not be upheld. On the contrary, it is my opinion that the fire originated from other causes unknown.

I would, therefore, dismiss the appeal with costs.

IDINGTON, J.:—I have read the evidence in this case to see if by any possibility there was any evidence upon which to rest the claims herein of negligence on the part of those in respondent's service being the cause of the fire in question.

I can find none. The mere surmise or suspicion of a fire inspector is far from proof of anything.

We cannot hold, even if a negligent state of things exist in a given place, that a fire which started in that place must of necessity be attributable to such negligence.

It needs something else to establish legal liability, and I cannot find such facts existent herein as to justify the inference we are asked to draw.

These appeals should, therefore, be dismissed with costs.

DUFF, J.:—The Department of Militia and Defence, leased and occupied the basement and first floor of the Arcade building at a rental of $200 a month, a term of the agreement being

Can.
S.C.
THE WOLFE Co. v. THE KING; POWERS v. THE KING.
Duff, J.

that the Department was to be at liberty to vacate the premises so leased at any time upon giving 14 days' notice to the owner of their intention to do so. The three flats above the first floor in the same building were vacant. The Militia Department used the building as a recruiting office and for that purpose occupied it during the years of 1916-7. On December 13, 1917, these premises were destroyed by fire and the appellants, Wolfe & Co. and Powers Bros., who occupied the premises immediately adjoining on either side had their several stocks in trade destroyed by a fire which indisputably originated in the recruiting office.

The question to be determined is whether a right of action against the Crown has been established within the scope of sec. 20 of the Exchequer Court Act, as amended in 1917 by ch. 23. As a result of that amendment, sub-sec. (c) of that section takes the following form:—

"The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work."

The first point for examination, and indeed it is the point upon which Mr. Hogg chiefly relied, is whether, assuming the allegation that the fire in question arose from the negligence of some officer or servant of the Crown while acting within the scope of his duties in the recruiting office, that office, that is to say, the basement and the first floor of the Arcade building occupied by the Militia Department for the purposes of that office, was a "public work" within the meaning of this subsection. Public money, it may be mentioned, had been expended upon improving and fitting the premises in order to adapt them to the purposes for which they were occupied.

I have little difficulty in reaching the conclusion that these premises were a "public work" within the meaning of the enactment under consideration. The term "public work" is defined in at least two statutes, the Public Works Act and the Expropriation Act. In the Public Works Act it includes "the public buildings," "property . . . repaired and improved at the expense of Canada." And by definition in the Expropriation Act it also includes in the same terms "the public buildings" and "property repaired or improved at the expense of Canada." The definitions of the term "public work," to be found in these two statutes (they are substantially, if not quite, the same) have immediate statutory effect only in the interpretation of the enactments in which they are found; but they may very

Can.
S.C.
The Wolfe Co. v. The King; Powers v. The King.
Duff, J.

properly be resorted to for the purpose of throwing light upon the meaning of the same phrase found in another enactment with no legislative interpretation expressly attached to it. *Prima facie* it appears to me that the meaning of the phrase in the Exchequer Court is no less comprehensive than that to be gathered from these two definitions. *Prima facie,* therefore, the premises in question were a "public work" within the meaning of the Exchequer Court Act. Two points, however, are raised for consideration by the argument. 1st, it is argued that a "public work" within the meaning of this provision means a work of which the Dominion Government is proprietor and by that is meant, I presume, a work vested in the Crown by virtue of an estate not less ample than an estate in fee simple.

That appears to me to be a contention which must be rejected. It would exclude from the operation of this clause a building erected by the Crown under the provisions of a building lease giving a right of occupation for a very extended term and it is difficult to understand how a restriction involving such a consequence can be discovered in or attached to the general language employed by the Act. Sub-section 2 of sec. 8 of the Expropriation Act makes provision for taking lands compulsorily, for the purpose of constructing a public work for a limited period only. It is a provision which appears to be sufficiently comprehensive to entitle the Crown to take such premises as those under consideration for a limited period. The word "land" in the Expropriation Act is comprehensively defined to include "all real estate" and consequently includes erections upon land as well as the soil itself. I can see no reason why the basement and first floor of the Arcade building might not have been expropriated by the Crown; and if so, there is no question that the Crown could have taken those premises compulsorily upon the very terms upon which they were occupied by the agreement with the owner. Why that property so taken should not be embraced within the meaning of the phrase "public work," as well as a building actually constructed by the Crown, I am unable to comprehend, and it can make no possible difference that the property was not compulsorily acquired, but procured through private treaty.

The other point raised for consideration rests upon the language of sub-sec. (b) of sec. 20 of the Exchequer Court Act. That Act gives jurisdiction to the Court to entertain claims for damage to property injuriously affected by the "construction of any public work." It is suggested that in some way which I do not fully comprehend that the juxtaposition of sub-sec. (c) with this sub-sec. (b) is a reason for limiting the scope of

Can.

S.C.

THE WOLFE Co. v. THE KING; POWERS v. THE KING.

Anglin, J.

the phrase "public work" in the first named sub-section. It is quite true that sub-sec. (b) applies only to cases where something falling within the category "public work" has been constructed or is being constructed, but it seems an extraordinary conclusion from this that the class of things denoted by "public work" is limited to those members of that class to which sub-sec. (b) applies. It seems an unwarranted conclusion. The meaning of "public work" is not limited by sub-sec. (b), it is only the application of this sub-section which is necessarily limited by the language defining the class of cases to which it applies. My conclusion is that these premises were a "public work" within the meaning of the Act.

The last question for consideration is, was there evidence of facts giving a cause of action? On this point I think the Judge of the Exchequer Court (57 D.L.R. 266), has failed to take account of this, namely, that the fact being established that a fire originated in these premises, and that is not disputed, the onus rested upon the occupier to exculpate himself by shewing that the fault neither of the occupier nor of the occupier's servants, nor of his contractor, was the cause of the fire. *Becquet* v.*MacCarthy* (1831), 2 B. & Ad. 951, at 958, 109 E.R. 1396. Therefore, if on the facts the matter is left in doubt, the occupier does not escape responsibility.

ANGLIN, J.:—I have had the advantage of reading the opinion to be delivered by my brother Mignault. I concur in his conclusions and, speaking generally, with the reasons on which they are based. If the building in which the fire that destroyed the appellants' property originated had been a "public work" within the meaning of that term as used in sub-sec. (c) of sec. 20 of the Exchequer Court Act, I should, with respect, have inclined to the view that the proper inference from the evidence, taken as a whole, is that it was ascribable to negligence of some "officer and servant of the Crown, while acting within the scope of his duties or employment."

If sub-sec. (c) of sec. 20, as enacted by 1917 (Can.), ch. 23, stood alone, I should be disposed to give to the words "upon any public work" a very wide meaning—to treat them as equivalent to "while engaged in any public undertaking." But in the construction of clause (c) we must not lose sight of the fact that Parliament has placed it in juxtaposition to clause (b), which confers jurisdiction on the Exchequer Court to entertain "every claim against the Crown for damage to property injuriously affected by the construction of any public work." The words "any public work" in this sub-section are undoubtedly limited to physical works which are the subject of "construc-

tion." I am, with respect, however, not inclined to accept the view that the jurisdiction conferred by clause (b) is restricted to claims for compensation against the Crown for injurious affection of property occasioned by the exercise of powers to take land, etc., under the Expropriation Act. I would prefer to leave that question open. I am, therefore, not prepared, for the present at least, to accept the definition of "public work" in clause (d) of sec. 2 of the Expropriation Act as applicable to sub-secs. (b) and (c) of sec. 20 of the Exchequer Court Act. While, because the phrase "any public work" is found in sub-sec. (b) of the Exchequer Court Act as well as in sub-sec. (c), its construction in the latter phrase should be governed largely by that given to it in the former, *Blackwood* v. *The Queen* (1882), 8 App. Cas. 81, 94, 52 L.J. (P.C.) 10, 31 W.R. 645. I find nothing in either clause at all inconsistent with the construction which, in *La Compagnie Gemerale d'Entreprises Publiques* v. *The King* (1917), 44 D.L.R. 459, 462, 57 Can. S.C.R. 527, 532, I placed on the words "any public work" as used in sub-sec. (c) as it stood before the amendment of 1917, *viz.*, "not merely some building or other erection or structure belonging to the public, but any operation undertaken by or on behalf of the Government in constructing, repairing or maintaining public property."

To that view I respectfully adhere. The Arcade building temporarily occupied as a recruiting station did not, in my opinion, fall within the purview of the phrase "any public work," as used in sub-sec. (c), even with the extended meaning which I would be disposed to place on it.

MIGNAULT, J.:—These two petitions of right were argued together. The same evidence applies to both, and both involve the question whether under the circumstances an action in tort lies against the Crown. The trial Judge dismissed both petitions of right, holding that the cases did not come within sub-sec. (c) of sec. 20 of the Exchequer Court Act. He also held that the fire which caused damage to the appellants was of an accidental character, and that negligence had not been proved. These two questions are the only ones which call for determination on this appeal.

First question. Does the cause of action come within the terms of sub-sec. (c) of sec. 20 of the Exchequer Court Act?

The object of sec. 20 is to determine in what matters the Exchequer Court has exclusive original jurisdiction, although of course it also creates liability. Sub-section (c), as amended in 1917, by ch. 23, sec. 2, reads as follows:—

"(c) Every claim against the Crown arising out of any death

Can.
S.C.
THE WOLFE Co. v. THE KING; POWERS v. THE KING.
Mignault, J.

or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work."

In the French version the words "any public work" are translated by "tout ouvrage public."

Before this amendment sub-sec. (c) was as follows (R.S.C. 1906, ch. 140):—

"(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any public officer or servant of the Crown, while acting within the scope of his duties or employment."

The change in sub-sec. (c) was effected by the transposition of the words "on (upon) any public work." Before the amendment an action lay against the Crown for any death or injury to the person or to property *on any public work,* resulting from the negligence, etc. Now, an action lies for any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting, etc., *upon any public work.*

Before the amendment, in *Piggott* v. *The King* (1916), 32 D.L.R. 461, 53 Can. S.C.R. 626, servants of the Crown engaged in building a cement dock on the Detroit River caused damage by their blasting operations to the suppliant's dock adjoining the work carried on by the Crown. The Exchequer Court and this Court held that to render the Crown liable under sub-sec. (c) for injury to property such property must be *on a public work* when injured. Some of the Judges criticised the law as it then stood, holding that the words "on any public work" were misplaced. The amendment having been made in the year following this decision, it is not unreasonable to suppose that the intention was to bring such a claim as the one dismissed in *Piggott* v. *The King* within the ambit of the amended clause.

The trial Judge, however, held himself bound by the construction of the words "any public work" in a series of decisions enumerated in his reasons for judgment.

Before referring to these decisions, it will be well to mention that the appellants' claims arise out of the following circumstances. In March, 1916, the Department of Militia and Defence rented, from A. E. Rea & Co., the ground floor and the basement of the Arcade building, 194 Sparks St., Ottawa, as a recruiting station for soldiers, the rent being $200 per month, and the tenancy being terminable at any time on 14 days' notice. While the building was thus occupied, it was destroyed by fire on the night of December 12-13, 1917, as well as the adjoining buildings

Can.

S.C.

THE WOLFE CO. v. THE KING; POWERS v. THE KING.

Mignault, J.

occupied by the appellants, and it was alleged that their stock in trade was destroyed. The petitions of right claimed damages.

I have very carefully examined the following decisions of this Court, referred to by the trial Judge, where the construction and effect of sub-sec. (c) before its amendment were considered.

City of Quebec v. *The Queen* (1894), 24 Can. S.C.R. 420; *The Queen* v. *Filion* (1895), 24 Can. S.C.R. 482; *Larose* v. *The King* (1901), 31 Can. S.C.R. 206; *Hamburg American Packet Co.* v. *The King* (1902), 33 Can. S.C.R. 252; *Letourneux* v. *The King* (1903), 33 Can. S.C.R. 335; *Paul* v. *The King* (1906), 38 Can. S.C.R. 126; *The King* v. *Lefrancois* (1908), 40 Can. S.C.R. 431; *Chamberlin* v. *The King* (1909), 42 Can. S.C.R. 350; *Compagnie Générale d'Enterprises Publiques* v. *The King* (1917), 44 D.L.R. 459, 57 Can. S.C.R. 527.

In all these cases the collocation of the words "any public work," in sub.sec. (c) before its amendment—which words were considered as descriptive of the locality in which the death or injury occurred—was held to govern their construction, and consequently recovery was restricted to cases where the death or damage took place "on a public work." The words themselves were not construed independently of their collocation, but in the last-mentioned case it was suggested by Anglin, J., that "public works" might be read as meaning not merely some building or other erection or structure belonging to the public, but any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property.

It is to be observed that sub-sec. (b) of sec. 20 of the Exchequer Court Act, which has not been amended, also contains the words "any public work." This sub-section gives the Exchequer Court exclusive original jurisdiction as to "every claim against the Crown for damage to property injuriously affected by the construction of any public work."

In view of the collocation of the words "any public work," in sub-sec. (c) with the same words in sub-sec. (b), it follows that, according to the familiar rule of legal construction, these words should, if possible, receive the same construction in both sub-sections. Maxwell, Interpretation of Statutes, 6th ed., pp. 56, 57.

I think that sub-secs. (a) and (b) deal with the claims for compensation against the Crown in the exercise by the latter of statutory powers, and not with claims for damages against the Crown in respect of a tort, the latter being the subject of sub-sec. (c) (see opinion of Fitzpatrick, C.J., in *Piggott* v. *The King*, 32 D.L.R. 461), but this does not present any obstacle to giving to the words "any public work" in sub-secs. (b) and (c)

Can.

S.C.

THE WOLFE Co. v. THE KING; POWERS v. THE KING.

Mignault, J.

the same construction which no doubt must have been in the mind of Parliament when it enacted sec. 20.

It appears obvious that the "public work" mentioned in sub-sec. (b)—the construction of which might injuriously affect property and thereby cause damage—is a public work coming within the definition of "public work" and "public works" in sec. 2 of the Expropriation Act, to which Act sub-secs. (a) and (b) of sec. 20 of the Exchequer Court Act are properly referable. It is noticeable that no definition of a public work is contained in the latter statute, and I cannot doubt that the public work referred to in sub-sec. (b) is the public work contemplated in the Expropriation Act, for we find, in secs. 22, 25, 26 and 30 of the Expropriation Act, the very words "property injuriously affected by the construction of any public work," which are in sub-sec. (b), which property, so affected, is a subject for compensation.

The definition of the words "public work" and "public works," in sec. 2 of the Expropriation Act, is very comprehensive, and I think, for the reason stated, that we can take it as indicating the meaning of the words "any public work" in sub-sec. (b) and also, because of their collocation, in sub-sec. (c) of sec. 20 of the Exchequer Court Act. It would at all events be impossible to give a wider meaning to these words in sub-section (c) than in sub-sec. (b).

The definition in question reads as follows:—

"(d) 'public work' or 'public works' means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only;"

Can it be said that the Arcade building was a building "repaired or improved at the expense of Canada"?

If these words stood alone, such a contention might be possible, but they must be taken with the words which precede and which, to quote the whole sentence, are:—

". . . and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada."

It seems impossible to contend that any repairing or improving of the Arcade building, under a lease terminable at any time on 14 days' notice, for the purposes of a recruiting office in connection with the late war, would come within the description of the property referred to in the words I have just quoted. And if I am right in this view, I think it cannot be said that the cause of action in these two cases comes within the meaning of sub-sec. (c). It must not be forgotten that without this subsection no action would lie against the Crown in respect of a tort, and the only recourse would be against the tort feasor if the latter could not answer that he had exercised a statutory power and was therefore not liable. As to such a defence, I may refer to what I said in *Salt* v. *Cardston* (1920), 54 D.L.R. 268, at p. 273, 60 Can. S.C.R. 612.

I have therefore come to the conclusion—and but for the collocation of the words "any public work" in sub-sec. (c) with the same words in sub-sec. (b) I would have been inclined to adopt the contrary view—that the first question must be answered adversely to the contentions of the appellants.

Under these circumstances, it becomes unnecessary to answer the second question, but, having carefully read the whole evidence, I may perhaps say that I would have had great difficulty in considering the fire as purely accidental and not as having been caused by the negligence of officers and servants of the Crown in placing the stoves in too close proximity to inflammable partitions in the part of the premises where the medical examinations were held.

The appeals must be dismissed with costs.

Appeals dismissed.

REX v. GOLD SEAL LIMITED.

British Columbia Supreme Court, Hunter, C.J. B.C. January 17, 1922.

Intoxicating Liquors (§ III G—86)—Place of sale—Order sent from B.C. to Alberta—Order accepted in Alberta—Liquor supplied by vendor from liquor in stock in B.C.—British Columbia Government Liquor Act 1921, ch. 30—Construction.

A contract entered into with a liquor company in Alberta for the sale of liquor to be delivered in British Columbia, may be

B.C.
S.C.
REX v. GOLD SEAL LIMITED.
Hunter, C.J.B.C.

supplied by the company from liquor already in storage in its warehouse in British Columbia without infringement of the British Columbia Government Liquor Act 1921, ch. 30.

INFORMATION under the British Columbia Liquor Act, for illegally selling liquor in the Province. Dismissed.

E. P. Davis, K.C., for accused.

H. S. Tobin, for the Crown.

HUNTER, C.J.B.C.:—In view of an intended appeal, Mr. Tobin has asked me for my reasons in writing, there being no stenographer present.

In this case the purchaser applied at the office of the Western Canada Liquor Co., which had in its warehouse at Vancouver liquor belonging to the defendant company, for an order on the defendant company at Calgary, Alberta, for certain liquor which order, together with the amount of the price named was forwarded to the defendant company at Calgary. The order was accepted by the Company at Calgary and a telegram subsequently confirmed by letter, was sent to the Western Canada Liquor Co. at Vancouver to forward the liquor to Britannia Beach, British Columbia, the place named by the consignee.

The contract for sale was thus entered into without the jurisdiction, and if the liquor had been sent to the consignee direct from Calgary, I do not see how there could be any doubt that the transaction did not constitute a sale in British Columbia. Nor am I able to see any difference in principle, because the liquor was directed by the company without the jurisdiction to be supplied out of liquor already in storage in British Columbia. It was argued that this was an evasion of the Act, 1921, ch. 30, but the Privy Council has more than once pointed out that Acts may be successfully evaded. Where, as here, the essential acts necessary to set up a contract for sale take place without the jurisdiction, it is impossible to say that delivery *per se* within the jurisdiction constitutes a sale. If a man in Vancouver gives an order for grain which is accepted in Calgary, the grain to be delivered in Liverpool, one would say that the sale was in Calgary, even if the grain was in storage in Winnipeg at the time of acceptance. Had the statute prohibited delivery in pursuance of a contract entered into without the jurisdiction, the question as to its being *ultra vires* might have arisen, with which I am not now concerned, nor am I called on to deal with the wide question raised in the stated case as to whether the whole act is *ultra vires* as it was not argued.

MARSH v. ROYAL BANK OF CANADA.

Sask.

C.A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 30, 1922.

Banks (§ IV C—114)—Note discounted—Customer's account credited —Proceeds of note used to pay off customer's debt to other customers also indebted to bank—No authority to make payments—Liability.

The defendant bank discounted the appellant's note and credited his account with the proceeds; and then used this money to pay his debts to third parties who were also debtors of the bank. This they did voluntarily and without the consent and against the wishes of the appellant. The Court held, that the fact that the bank made these payments for him was no answer to a claim for the proceeds of the note and that the appellant was entitled to the proceeds of the note, with interest to the time his liability to the bank was discharged in the books of the bank at the same rate as that which the bank charged him and since that date at the rate of five per cent. Held also that a counterclaim based upon assignments obtained by the respondents from such third parties was ineffective, as the parties had been paid, and there was therefore nothing to assign, and the counterclaim must be dismissed.

Appeal by the plaintiff from the trial judgment in an action for damages caused to the plaintiff by the failure of the defendant to lend him certain money to apply on a mortgage, with the result that the mortgage was foreclosed, and to recover the amount of a promissory note, the proceeds of which were disposed of by the defendant without his knowledge or consent. Judgment varied.

C. E. Gregory, K.C., for appellant.

F. L. Bastedo, for respondent.

Haultain, C.J.S., concurs with Turgeon, J.A.

Lamont, J.A.:—I concur in the conclusion reached by my brother Turgeon, and desire only to point out that it is not claimed on behalf of the bank, nor does the evidence disclose, that the bank held the plaintiff's notes in favour of Blair & Elliott or the account in favour of J. M. Elliott as security for that firm's indebtedness to the bank at the time the bank discounted the $500 note of the plaintiff and his wife, although the firm of Blair & Elliott was indebted to the bank and the bank was pressing for a reduction of its liability. The defence on part of the bank was, that the bank's manager agreed to make a loan to the plaintiff on condition that he would hand over sufficient of the proceeds thereof to settle the accounts of Blair & Elliott and J. M. Elliott, respectively. This defence the trial Judge rejected, and, on the evidence, rightly so. When the bank credited the proceeds of the loan ($487) to the plaintiff, the relation between them was that of debtor and creditor. The bank was the plaintiff's debtor in the sum of $487. Of that amount, the bank has only recognised its indebtedness to the

Sask.
C.A.
MARSH v. ROYAL BANK OF CANADA.
Turgeon, J.A.

extent of the difference between $487 and $478.61, which wrongfully and without authority its manager charged up to the plaintiff's account. In the sum of $478.61 the bank is still indebted to the plaintiff, and the plaintiff is entitled to judgment therefor with interest.

As the counterclaim is based upon an assignment after this action commenced by Blair & Elliott and J. M. Elliott of the notes and account which the manager of the bank paid and charged to the plaintiff, the bank can have against the plaintiff only the rights which Blair & Elliott and J. M. Elliott, respectively, could have enforced against him. At the time of the assignment there was no debt or liability due in respect of the assigned documents from the plaintiff for which either the firm of Blair & Elliott or J. M. Elliott could have brought an action. The debts evidenced by these documents had been paid long before. The notes having been returned to the plaintiff, and the account receipted, there was, therefore, nothing to assign.

The bank, through its manager, had voluntarily paid the plaintiff's debts, without any request from him and against his will. The payment was not made under any mistake of fact. The manager of the bank was well aware of all the facts in connection with the transactions. He made the payment, doubtless, under a mistake of law, believing that he might properly charge it up to the plaintiff's account. It is a well established rule that the voluntary payment by one of the debt of another without his request gives no claim for monies paid against the person whose debt is discharged. *Rogers* v. *Ingham* (1876), 3 Ch. D. 351, 25 W.R. 338; *Bethune* v. *The King* (1912), 4 D.L.R. 229, 26 O.L.R. 117; *Levison* v. *Gault & Mackey,* (No. 1) (1915), 9 O.W.N. 14.

TURGEON, J.A.:—The material facts of this case, giving due weight to the findings of the trial Judge where the evidence is contradictory, appear to be as follows:—

On June 1, 1916, the appellant applied to the Northern Crown Bank, the predecessor in interest of the respondents and of which bank he was a customer, for a loan of $500, making known to the manager of the bank that he intended to apply this sum upon a mortgage, then overdue, upon certain lands belonging to him. The bank agreed to lend him the $500 for the said purpose, with the proviso that the appellant would first have to pay off a certain indebtedness of his to the bank, then outstanding, and amounting to, approximately, $200. The appellant accepted these terms. He gave the bank manager his note for the $500, dated June 1, and payable 3 months after date, which his wife also signed, and he began paying off his

Sask.

C.A.

Marsh v Royal Bank of Canada.

Turgeon, J.A.

outstanding indebtedness by selling his wheat and giving the bank the proceeds thereof. On August 11, the appellant presented himself at the bank and made his last payment upon the old debt. Thereupon the bank manager altered the date of the appellant's note for $500 from June 1 to August 11, discounted it and credited the appellant with the proceeds, $487. But instead of paying this amount to the appellant, or allowing him to dispose of it, the manager immediately applied $478.61 out of it to pay off a debt of $414.46, which the appellant owed to the firm of Blair & Elliott, who were likewise customers of the bank, and another debt, $64.15, which he owed to J. M. Elliott, a member of the said firm. Blair & Elliott and J. M. Elliott were also indebted to the bank, and the manager then applied these amounts to their credit. He also obtained the firm's signature to the appellant's note. By this transaction the indebtedness of Blair & Elliott and of J. M. Elliott to the bank was reduced by the amount of $478.61, and the bank held the appellant's note endorsed by the firm for $500 to cover this sum and the small sum still remaining to the appellant's credit out of the proceeds of the note. The appellant protested against this action of the bank manager and refused to acquiesce in it, and he has never since done anything which can be interpreted as an acquiescence in or a ratification of this transaction. On the contrary, he complained immediately that this disposal of the proceeds of his note put it out of his power to meet his obligations with his mortgagee. The bank at the time of this transaction held as his collateral security for advances made by it to the appellant, a number of promissory notes made by other parties in favour of the appellant and aggregating $1,900. They paid themselves the amount of the $500 note out of the proceeds of these collateral securities.

On January 16, 1920, the appellant brought this action against the respondents. He asserted that the failure of the bank to lend him the $500 to apply upon his mortgage, as agreed, had prevented him from meeting his obligations under this mortgage and another mortgage, and had resulted in one of these mortgages being foreclosed and the land covered by the other mortgage being sold. I may say at once that I agree with the trial Judge that the appellant cannot attribute the loss he may have suffered by reason of these mortgage proceedings to the breach of the contract to lend him the $300 committed by the bank. In other words, I think that no actual damage was proven. It is therefore unnecessary for me to go further into the particulars of these mortgage transactions.

Sask.

C.A.

MARSH v. ROYAL BANK OF CANADA.

Turgeon, J.A.

Nevertheless, the bank did break the contract which it had made with the appellant to lend him the money, and he is therefore entitled, in any event, to nominal damages and the costs of his action. (*Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, 109 E.R. 842, 9 L.J. (K.B.) 42; *South African Territories* v. *Wallington*, [1897] 1 Q.B. 692, 66 L.J. (Q.B.) 551).

The appellant also claims to recover the amount of his $500 note, on the ground that the disposal made by the bank of its proceeds was made without his knowledge or consent. He claims that this payment of $478.61 to cover the Blair & Elliott debt and the debt to J. M. Elliott was a purely voluntary payment made by the bank without his authority or consent, and which he has never ratified, and that they must account to him for the full proceeds of the note regardless of this payment.

The respondents allege that this payment was made by the bank at the appellant's request and with his authority, but this defence is not substantiated by the facts. They also counterclaim against the appellant for this sum of $478.61 paid by them to Blair & Elliott and to Elliott, and they base this counterclaim upon assignments from these parties of their claims against the appellant for this amount. The assignments in question were obtained by the respondents after the action was brought, and are dated March 2, 1920. The judgment of the trial Judge upon this branch of the case is as follows:—

"The plaintiff was improperly deprived of a credit of $478.61 on the 11th August, 1916, and he is entitled to judgment therefor and interest thereon at 10% per annum (the rate of discount of said note) for a term equal to that of the $500.00 note, namely, three months, and thereafter with interest at the rate of 5% per annum, with costs.

The defendants are entitled to judgment for the amount of their counterclaim, and interest at 5% per annum, and their costs of counterclaim."

With deference, I must say that I have come to a different conclusion in this matter. The facts seem to resolve themselves shortly into this: On August 11, 1916, the bank discounted the appellant's note and credited his account with the proceeds, *viz.*, $487. They then used this money, which had become his, to pay his debts to Blair & Elliott and to J. M. Elliott. They did this voluntarily, without his request and against his wishes. Therefore the fact that they made these payments for him is no answer to him when he claims from them the proceeds of his note, of which he has only received a few dollars. Or it may be more strictly accurate to say that the entering of this $487 to the appellant's credit in the books of the bank after the discounting

of the note constituted the bank the appellant's debtor in that sum, and, again in that case, they cannot refuse him payment now on the ground that they paid some of his debts for him without his request, his knowledge or his consent, and without being under any legal obligation to do so. (*Sleigh* v. *Sleigh* (1850), 5 Exch. 514, 19 L.J. (Ex.) 345, per Kenyon, C.J., and Lawrence, J., in *Exall* v. *Partridge* (1799), 8 T.R. 308, 101 E.R. 1405, and per Brett, M.R., in *Leigh* v. *Dickeson* (1884), 15 Q.B.D. 64, 54 L.J. (Q.B.) 18, 33 W.R. 539.

It is to be noted that the respondents base their counterclaim against the appellant upon the assignments obtained by them from Blair & Elliott and J. M. Elliott, respectively, and dated March 2, 1920. In my opinion these assignments are ineffective. At the time they were given the assignors had no right of action against the appellant and, therefore, they had nothing to assign. They had been paid over three years previously, and had given up the appellant's notes which they held for the greater part of the indebtedness.

The position of the parties, therefore, is, that the respondents have still to pay to the appellant the sum of $478.61, which they have retained from him since August 11, 1916. This sum should bear interest from that date down to the date upon which his liability to the bank on his note was discharged in the books of the bank at the same rate as that which the bank charged him, and since that date at the rate of 5%.

The plaintiff's appeal should, therefore, be allowed with costs, and the judgment in the Court of King's Bench varied by entering judgment for the appellant as above indicated, with costs, and by dismissing the respondents' counterclaim with costs.

McKAY, J.A., concurs with TURGEON, J.A.

Judgment below varied.

REX v. RITTER.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. April 13, 1922.

APPEAL (§IIIF—98)—INTOXICATING LIQUORS—ALBERTA LIQUOR ACT—APPEAL FROM CONVICTION—TIME FOR GIVING NOTICE—EXTENSION OF TIME—THE LIQUOR ACT, 1916 (ALTA.), CH. 4, SEC. 41—CRIMINAL CODE SEC. 750.

Under sec. 41 (8) of the Liquor Act, 1916 (Alta.), ch. 4, it is only the practice and procedure prescribed by part 15 of the Criminal Code, subsequent to the giving of the notice and other than the security on the appeal that is made applicable to appeals under the Liquor Act. Section 750 of the Criminal Code as amended by 1919, ch. 46, sec. 12, is not applicable to an appeal

Alta.
App. Div.
REX
v.
RITTER.
Clarke, J.A.

under the Liquor Act, so as to enable the time for giving the notice of appeal required by sec. 41 (2) of the Liquor Act to be extended.

APPEAL from a District Court judgment dismissing the defendant's application to proceed before him with an appeal from a conviction under the Liquor Act, 1916 (Alta.), ch. 4. Affirmed.

W. Beattie, for appellant; *J. Short*, K.C., for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—The defendant, a druggist, was convicted of a violation of sec. 17 of the Act, and was entitled to appeal to the said Judge "provided a notice of such appeal shall be given to the prosecutor or complainant within 5 days after the date of the said conviction" (sec. 41 (2) of the Liquor Act.)

The Liquor Act also provides for the giving of a recognizance for the prosecution of the appeal and for payment of the costs of the appeal or a deposit with the convicting Justice of the amount of the penalty and costs and a further sum of $25 to answer the respondent's costs of appeal (sec. 41 (3)). And also provides as a condition of the appeal that the defendant shall, within the time limited for giving notice of appeal, make and deposit with the convicting Justice an affidavit negativing the commission of the offence (sec. 41 (10 & 11).

After the provisions for the notice of appeal and the recognizance or deposit and for an appeal from the dismissal of a complaint, sec. 41 (8) provides as follows:—

"The practice and procedure upon such appeals and all the proceedings thereon shall thenceforth be governed by the provisions of part 15 of *the Criminal Code* or any Act passed in amendment or substitution thereof, so far as the same is not inconsistent with this Act."

The conviction was made by F. B. Rolfson, J., and dated on December 23, 1921. The affidavit required by sec. 41 (10 & 11) appears to have been made and deposited within the prescribed time, and no objection has been raised respecting the recognisance or deposit. The district Judge decided that the notice of appeal to him was not given in time and that there was no power to extend the time and for that reason refused to hear the appeal and the correctness of that decision is the question to be considered on the present appeal.

The finding of the district Judge is that the defendant's solicitor on December 28, being the last day for giving notice of appeal under the Liquor Act, called up Inspector Brankley, before whom the information was laid, and asked him where Constable Lyman, the informant, could be reached. Inspector Brankley said Constable Lyman was out on duty, but that he

would accept service. The solicitor then told him he would have his agents at Calgary serve him with the proper notices, etc. On December 29, 1921, a document, purporting to be a notice of appeal, was served on Inspector Brankley, according to the agreement between the solicitor and him.

The district Judge held that the written notice of appeal was not served on the prosecutor or complainant within the 5 days required by sec. 41 (2), which cannot be questioned. He also held that the conversation over the telephone with Inspector Brankley was not intended to be a notice of appeal.

I am disposed, if possible, to find a way to allow the appeal to be heard on the merits, owing to the short time allowed for the giving of notice (5 days). I think that Inspector Brankley can well be treated as the prosecutor to whom the notice may be given, as the complainant Lyman appears to be one of his subordinates, acting under his directions. See also *R.* v. *Kamak* (1920), 52 D.L.R. 485, 34 Can. Cr. Cas. 126, 15 Alta. L.R. 373, and cases therein referred to.

The statute does not provide that the notice of appeal shall be in writing, but sub-sec. 7 of sec. 41, referring to the notice of appeal to be given on an appeal from an order of dismissal, under sub-sec. 6, which contains the same words as to giving the notice, as sub-sec. 2 refers to service of the notice of appeal which would seem to imply that the notice to be given under either sub-sec. 2 or sub-sec. 6 is a written notice.

The statute is imperative that the notice must be within 5 days, and I see no way of extending the time or dispensing with the positive requirement of the statute.

I agree with the district Judge that sec. 750 of the Criminal Code, as amended by ch. 46, sec. 12, 1919 (Can.), is not applicable to an appeal under the Liquor Act, so as to enable the time for the giving of notice to be extended, for the reason that other provision for notice is made by the Liquor Act. The provision for an extension applies to cases under the Code where the time for giving notice is limited to 10 days, and other notices are required to be given than the one prescribed by the Liquor Act. Section 8 of the Act respecting Police Magistrates and Justices of the Peace, ch. 13, 1906 (Alta.), as amended by 1918, ch. 4, sec. 25, makes the provisions of the Code respecting summary convictions applicable to all convictions by Justices of the Peace under any law in force in the Province, *except as otherwise specially provided*. I think it is otherwise specially provided in the Liquor Act, and that under sec. 41 (8) of the Liquor Act it is only the practice and procedure prescribed by part 15 of

Man.
C.A.
KING'S PARK CO. v. BUCHANAN.
Cameron, J.A.

the Code, subsequent to the giving of the notice and other than the security on the appeal that is made applicable to appeals under the Liquor Act.

I would dismiss the appeal with costs.

Appeal dismissed.

KING'S PARK Co. v. BUCHANAN.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Dennistoun, JJ.A. March 10, 1922.

VENDOR AND PURCHASER (§IE—25)—AGREEMENT FOR SALE OF LAND—REAL PROPERTY ACT, R.S.M. 1913, CH. 171, SECS. 62 AND 64—PLAN NOT FILED AT TIME AGREEMENT ENTERED INTO—RESCISSION OF AGREEMENT BY PURCHASER.

Where it is evident from the provisions of an agreement for the sale and purchase of land that the purchaser knew of the non-registration of the plan at the time of the execution of the agreement and knew also that it was necessary that the plan should be registered before he could deal with the property in anticipation of his transfer, such knowledge is sufficient to preclude such purchaser from setting up the want of knowledge required by sec. 64 of the Real Property Act, R.S.M. 1913, ch. 171, to entitle him to rescission of the agreement, especially when such defence is only raised several years after the plan has in fact been filed and after an action has been commenced to recover the money due under the agreement.

APPEAL by defendant from the trial judgment in an action to recover money due on an agreement of sale. Affirmed.

A. E. Johnston, for appellant; *A. M. S. Ross*, for respondent.

PERDUE, C.J.M., concurred in dismissing the appeal.

CAMERON, J.A.:—This action is brought to recover money due on an agreement dated April 26, 1913, between the plaintiffs as vendors and the defendant as purchaser, for the sale of lands being Lot 11 in Block 20, as shewn on a proposed plan of subdivision of part of Lots 116, 117, 118 and 119 of the Parish of St. Norbert, known as King's Park, in consideration of $440, payable $40 cash and the balance in monthly payments of $10 each. The receipt of the $40 cash payment is acknowledged in the agreement, and there was a further payment May 12, 1913. The defendant thinks he made no other payment than that of the $15, but the plaintiff makes no claim in respect of the $40. The plan of subdivision was not registered until March 14, 1914. The action was begun March 24, 1921, the statement of claim was served on the defendant March 26, and he thereupon gave notice of rescission and of demand or payment under sec. 64 of the Real Property Act, R.S.M. 1913, ch. 171.

The action came on for trial before Macdonald, J., who gave judgment for the plaintiff, holding that the defect in the non-registration of the plan was cured by the subsequent registration. Section 64 is as follows:—

"If any person or corporation shall sell or convey or agree to sell or convey any lots or parcels of land, by number or letter, according to any plan or subdivision of any property, whether the same has been brought under the operation of this Act or not, before such plan has been registered according to law, the purchaser of any such lot or parcel of land without knowledge of the non-registration of the plan, or of the necessity for the same, or any person claiming under him, may at his option, on acquiring such knowledge, rescind the contract of purchase and recover back any money paid thereunder with lawful interest and any taxes or other expenses incurred by him in consequence of such purchase, and he shall in such case have a lien on such lot or parcel for all such moneys as against the vendor's interest in the said lot or parcel, but the vendor shall nevertheless be bound by any such contract, deed or conveyance, if the purchaser does not rescind the same."

In this case there is no question that the defendant at the time of the execution of the agreement knew of the non-registration of the plan. It is spoken of in the agreement as "the proposed plan."

"7. In consideration of the vendor entering into this agreement, the purchaser covenants that he will not, until the plan of subdivision has been registered, file a caveat against any portion of said lands and for the consideration aforesaid, he, the purchaser, doth hereby appoint the secretary for the time being, of the vendor his attorney irrevocable to withdraw any caveat or caveats which may be filed by him prior to the registration of the plan of subdivision," and authorises the District Registrar to withdraw any such caveat without inquiry.

"8. It is further agreed that in the event of any modification in the said proposed plan of subdivision being necessary, the purchaser will accept the lot or lots on the amended plan corresponding as nearly as possible to the lot or lots hereby agreed to be sold."

But it is said that he did not, until he had consulted his solicitor after the service of the statement of claim on him, acquire knowledge of the legal necessity for the registration of the plan, and it is on this one ground that he has rescinded or attempted to rescind the agreement and asks for repayment of all moneys paid by him.

Undoubtedly the object of the section was to compel the registration of plans in the interest of purchasers. Having that in view it is necessary to consider the intent and meaning of the section in relation to the facts of this case.

Man.
C.A.
KING'S PARK CO. v. BUCHANAN.
Cameron, J.A.

What is the meaning of the words, "or without knowledge of the necessity for the same"? Bringing back the words, "for the same" to the words to which they most closely relate, they would apparently mean "or without knowledge of the necessity for the non-registration of the same," plainly not what is intended. They must refer to the necessity for the registration of the plan either under the Real Property Act or the Registry Act, R.S.M. 1913, ch. 172, as the section covers the latter. Under the latter Act, sec. 63, there is a penalty for non-registration which can be recovered by any person interested. Under the Real Property Act, sec. 62 provides that where any person subdivides land for the purpose of selling same, the plan shall be approved by the Registrar-General and by the municipality in which the land is situate. Upon such approval being obtained, such person shall present the plan for registration when it must comply with the statutory requirements, and no such plan shall be registered within 60 days from the giving of such approval. There are the conditions expressly prescribed by the Act. The necessity for the registration of the plan does not include any express provision that that plan shall be registered before the owner deals with the land or fix any penalty for non-registration. It is implied, however, in the Real Property Act, that no certificate shall be issued and that there shall not be any other dealing with the land until the plan has been approved and registered. If the purchaser has no knowledge of the effect of the statutory provisions that the owner of a subdivision, the plan of which is unregistered, may have it approved and registered, and that until the owner has it approved and registered he cannot deal with the land under the Real Property Act, then he is given certain rights by sec. 64, which he may or may not exercise.

In view of the terms of the agreement stating that the lot is shewn on a proposed plan, and under its further provisions that the purchaser accepts title, covenants that he will not, until a plan has been registered, file a caveat, and that in the event of any modifications in the proposed plan being necessary, accept a lot as nearly as possible equivalent to that agreed to be sold, can the purchaser now (some years after the registration of the plan) set up his want of knowledge of those requirements? These provisions of the agreement clearly impute to the purchaser some general knowledge of the law respecting registration of plans and of proceedings under the Real Property Act. It was never intended that his knowledge should be of all the detailed provisions relating to plans and their registration.

I think we must take these provisions of the agreement as implying a sufficient general knowledge of the necessity for the

registration, and that in this case they preclude the purchaser from setting up the want of knowledge of such necessity as a defence to this action.

The appeal must be dismissed with costs.

DENNISTOUN, J.A.:—This is an appeal from Macdonald, J., who gave judgment for the plaintiff company in an action brought to recover under an agreement for the sale of land. The agreement to sell is dated April 26, 1913. It contains an acknowledgment of the receipt of $40 cash, and refers to lots as shewn on "a proposed plan of subdivision."

The agreement contains the following clauses:—

"7. In consideration of the vendor entering into this agreement the purchaser covenants that he will not until the plan of subdivision has been registered, file a caveat against any portion of said lands and for the consideration aforesaid, he, the purchaser, doth hereby appoint the secretary for the time being, of the vendor his attorney irrevocable to withdraw any caveat or caveats which may be filed by him prior to the registration of the plan of subdivision and doth authorise and request the District Registrar to withdraw or lapse any caveat or caveats so filed on the production to him of a withdrawal thereof executed by such secretary, either in his own name or as attorney for the said purchaser, without the necessity of any inquiry on the part of the District Registrar as to the circumstances under which, the consideration for which the withdrawal has taken place.

And it is further agreed that all costs, charges and expenses to which the vendor may be put in connection with any caveat filed by the purchaser or any person claiming through or under him prior to the registration of the plan of subdivision shall become and form a part of the moneys secured hereby and the vendor shall not be required to give a transfer of the lands hereby agreed to be sold or of any part thereof until such costs, charges and expenses have been paid to him.

8. It is further agreed that in the event of any modification in the said proposed plan of subdivision being necessary, the purchaser will accept the lot or lots on the amended plan corresponding as nearly as possible to the lot or lots hereby agreed to be sold."

On May 12, 1913, the defendant paid $15, but has made no further payment. On March 14, 1914, the proposed plan was duly registered in the land titles office. On March 24, 1921, this action was commenced. On April 5, 1921, 8 years after the making of the agreement and 7 years after the filing of the plan,

Man.

C.A.

KING'S PARK CO. v. BUCHANAN.

Dennistoun, J.A.

the defendant raises a defence which, so far as I am aware, has never been raised previously.

His defence is that he "did not become aware of the necessity for the registration of the said plan until the 26th day of March, 1921, and until after service of the statement of claim herein," and that he forthwith, on acquiring such knowledge, rescinded the agreement to purchase.

This defence is based on the provisions of sec. 64 of the Real Property Act, R.S.M. 1913, ch. 171, which reads as follows:— [See judgment of Cameron, J.A., *ante* p. 667.]

The intention of the Legislature, in passing this section, was no doubt to protect persons who purchase subdivision lots from speculative vendors who rely on obtaining sufficient money from future purchasers to enable them to perfect their titles and register their plans before the time for giving title arrives. It sometimes happens that a purchaser who has paid all or a substantial portion of his purchase-money, finds himself unable to get what he has bought by reason of the inability of his vendor to register a plan and finds his money gone beyond the hope of recovery.

The protection given by this statute enables a purchaser, without knowledge of the non-registration of the plan, or of the necessity for same, or any person claiming under him at his option on acquiring such knowledge, to rescind the contract and recover back his money.

In this case there is no question as to knowledge of the non-registration of the plan, for it is expressly referred to in the written agreement signed by the defendant, who relies solely on a lack of knowledge that registration was necessary.

There is here no suggestion of bad faith or absence of title. The plan was in due time registered as "proposed," and the defence that the defendant had no knowledge of the necessity for the same is devoid of merits. It should only succeed if the Court is of opinion that by reason of the wording of the Act and the conduct of the parties, it cannot avoid giving effect to it.

The defendant has been a resident of Winnipeg for 10 years. He is an employee of a large commercial company. In 1918, when the solicitors for the vendors began to press for payment, he discussed the situation with other purchasers and with Shaw, credit man of the Swift Canadian Co., "who has had a lot of dealings in real estate matters." It may be assumed that the defendant had the common knowledge in respect to real estate transactions which is possessed by ordinary citizens of intelligence who have passed through a "boom" period in a Western Canadian town.

Man.

C.A.

KING'S PARK CO. v. BUCHANAN.

Dennistoun, J.A.

I refrain from an attempt to lay down general principles in respect to the proper construction and meaning of this very difficult section of the Real Property Act. Cases under it, and they may be numerous, will have to be studied as they arise, and determined when possible on the particular facts which they present.

What bearing does the subsequent registration of the plan have upon remedies given for non-registration? Does lack of knowledge of the necessity for registration avail after registration has become effective? What is the lack of knowledge which gives persons claiming under the purchaser a right to rescind? These and other questions which suggest themselves are passed over for the present, and I will base my judgment on the knowledge which this purchaser possessed as evidenced by the document which he signed.

He knew when he read paras. 7 and 8 of the agreement that he must not register a caveat until the plan was registered, and that if he did so it would be withdrawn at his expense. He knew, therefore, that it was necessary that the plan should be registered before he could deal with the property in anticipation of the receipt of his transfer some 3 years later. He knew also that this restriction applied to "any person claiming through or under him prior to the registration of the plan."

If he knew as a fact that by the self-imposed terms of his contract there was a necessity for registration, how can he be heard to say that he did not know it as a matter of law, and that he is entitled to cancel because he did not apprehend all the *minutiae* which the law insists upon as necessary antecedents to registration under the statute, or the legal effect on the rights of parties subsequent thereto.

He knew that the proposed plan might be amended before registration for he had consented to that being done and that his rights were suspended until it got upon the files of the land titles office.

In my view, further knowledge was not necessary, and the attempt to rescind in 1921, when he first got information as to what a lawyer considered the necessity for the registration of a plan of subdivision, was abortive.

I would affirm the judgment appealed from and dismiss this appeal with costs.

Appeal dismissed.

Sask.

C.A.

HARRIS v. FERGUSON.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 27, 1922.

PRINCIPAL AND SURETY (IA—2)—CREATION OF RELATION—JOINT MAKER OF LIEN NOTE—ACCEPTANCE AS SUCH BY PERSON IN WHOSE FAVOUR NOTE IS MADE.

A person signing a joint lien note with another person for goods purchased by such other person at an auction sale, the terms of which require that persons giving notes shall sign as joint makers is liable as a joint maker of the note so signed unless he can prove not only that he signed the note as surety only but that the party in whose favour the note was given, or his agent, knew that he was signing as surety and agreed to accept him as such.

[*Strong* v. *Foster* (1855), 17 C.B. 201, 139 E.R. 1047; *Rouse* v. *Bradford Banking Co.*, [1894] A.C. 586, applied.]

APPEAL by plaintiff from the trial judgment in an action on a lien note. Reversed.

A. E. Vrooman, for appellant; *D. A. McNiven*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an action on a lien note, or agreement, by which the defendant Ferguson and one Bustard promised to pay to the plaintiff, on or before November 1, 1915, the sum of $102, with interest at 8%. The said Bustard has since died, and the defendant Ferguson is the administrator of his estate, and is sued both in his personal capacity and as administrator of Bustard's estate.

The lien note was given for a bay mare and colt, purchased by Bustard at an auction sale held by the plaintiff. Ferguson's personal defence is, that he was simply a surety for Bustard; that he had been discharged of liability through the giving of time to Bustard by the plaintiff. The lien note in question became due November 1, 1915. Nothing was paid upon it, and no steps taken for its recovery. The defendant was not notified that it remained unpaid. On February 28, 1917, the plaintiff received from Bustard a chattel mortgage on two black colts for $123.02, due October 1, 1917. There is nothing in the mortgage to shew that it was taken to secure the indebtedness covered by the lien note, but counsel admitted that it was. The mortgage contained a clause expressly reserving to the mortgagee any security which he then had in respect of such indebtedness and all remedies thereon. The mortgage was not paid, nor was it renewed. The trial Judge gave judgment against the administrator of Bustard's estate, but dismissed the action as against Ferguson personally. The plaintiff now appeals.

Mr. Vrooman, on behalf of the plaintiff, in his able argument, based his appeal on two grounds: (1) that Ferguson was not a

Sask.
C.A.
HARRIS
v.
FERGUSON.
Lamont, J.A.

surety, but a joint maker, and (2) that even if it had been established that Ferguson signed the lien note as a surety only, and even if it had been established that the plaintiff did give time to Bustard, that would discharge Ferguson only to the extent that he had been prejudiced thereby, and that it was not shewn that he had been in any way prejudiced.

The defendant, on the face of the document sued on, is a joint promiser. In his evidence he says that Bustard asked him to "*back his note*," and that he did so. Adams, who acted as auctioneer at the sale, says that "Ferguson signed as joint maker in accordance with the terms of the sale." Ferguson does not deny that the terms of the sale required persons giving notes for articles purchased to sign as joint makers. He was at the sale, and he bought a number of articles, for which he paid cash, but nowhere does he say that he was not aware of the terms of the sale, neither has he alleged or proved that the plaintiff or his agent at the sale knew that he was signing as a surety or ever agreed to accept him as such.

In 15 Hals., p. 506, para. 954, the law is laid down as follows:

"Where, however, two persons give a joint promissory note for the debt of one, it is necessary, in order to give the other the rights of a surety against the creditor, to shew that he was only a surety and that the creditor knew him to be so and accepted him as such."

In *Strong* v. *Foster* (1855), 17 C.B. 201, 139 E.R. 1047, 25 L.J. (C.P.) 106, 4 W.R. 151, Willes, J., at p. 224, said:—

"The result seems to be, that, here, if evidence is admissible to shew that the defendant signed the note as surety, it must also be shewn that the bankers agreed to accept him as such: and consequently, that, in the present case, where there was no such evidence, the defendant is not entitled to be treated as a surety, and the defence does not arise."

In *Rouse* v. *Bradford Banking Co.*, [1894] A.C. 586, 63 L.J. (Ch.) 890, 43 W.R. 78, it was held that where two or more joint debtors arranged among themselves that one of their number should be regarded as a surety for the rest and notice of this arrangement was given to the creditor, the creditor must thereafter recognise that such former joint debtor was only a surety.

There is absolutely no evidence here that the plaintiff was aware that Ferguson signed the lien note as surety, nor was any notice ever given to him that as between Bustard and Ferguson the latter was only a surety. In the absence of such evidence the terms of sale must be held to govern. The defendant being a joint maker of the note, and not a surety, is, therefore, personally liable.

Alta.

App. Div.

The appeals should be allowed with costs, the judgment below dismissing the action as against Ferguson personally set aside, and judgment entered for the plaintiff for the amount of the claim and costs.

Appeal allowed.

FYFE v. MUNICIPALITY OF BERTAWAN.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. April 13, 1922.

HIGHWAYS (§IVA—127)—CONTROL ASSUMED BY MUNICIPALITY—ROAD GRADED AND CULVERT PUT IN—ROAD SELDOM USED—HOLES IN ROAD CONSTITUTING A TRAP—OBSERVATION OBSCURED BY WEEDS—LIABILITY FOR DAMAGES—TRAVELLER USING ROAD WITH REASONABLE CARE.

A municipal council having assumed control of a road and constructed an embankment and built a culvert to permit the passage of water from one side to the other, is guilty of negligence if it allows such road, although seldom used by the public, to fall into such a state of non-repair that it constitutes almost a trap which is obscured by weeds from observation.

Persons travelling with reasonable care upon such graded road which is open to the public have a right to assume that the municipality has performed its duty to keep the road in repair as required by 1911-12 (Alta.), sec. 219, ch. 3, having regard to the locality of such road.

APPEAL by defendant municipality from the judgment of a District Court Judge, in an action for damages for injuries to plaintiff's automobile while driving over a road in the municipality. Affirmed.

A. B. Mackay, for appellant; *C. J. Ford*, K.C., for respondent.

SCOTT, C.J. (dissenting):—I agree in the result reached by my brother Beck as to the disposition of this appeal.

Notwithstanding the condition of the road upon which the plaintiff was travelling at the time the accident occurred, he was, in my opinion, guilty of such contributory negligence as should disentitle him to recover for the damages sustained by him.

STUART, J.A.:—This is unfortunate litigation. The damage to the plaintiff's car amounted only to $39. There must have been pigheadedness on both sides before the expense of a lawsuit was incurred. The taxed costs of the trial amounted to $180.15. Then we have the costs of this appeal, with an appeal book of 76 pages, which alone will have cost twice the amount of the damage. No doubt the councillors felt that they were trustees of the public money and should not pay anything unless legally liable to do so. But surely reasonable men could have made a

compromise that would have hurt either party but slightly. I cannot help suspecting some bad blood behind the whole thing.

The appellants say that they brought the appeal chiefly to test the question of their duty to keep such a road as that in question in repair. I think there is no doubt that the municipality failed in its duty in this respect when once it had graded up the road. The road was open to the public. It was, I think, leaving almost a trap in the road to leave such a place unrepaired and to let weeds grow up to obscure it from observation. The cost of repair would be small, and the number of such places occurring in the 486 miles of road in the municipality is not shewn to have been very large. Of course the west is a free and easy country in some respects, but I think a stiffening up of the consciousness of obligation will do no harm to municipal officials.

The appellant cannot succeed unless we are prepared to reverse the trial Judge on the issue of contributory negligence. I think this is seldom done except in a perfectly clear case of undisputed fact, such as was presented in *Muir* v. *C.P.R.* (1921), 57 D.L.R. 699. With respect to this case, I think it is very hard for this Court to visualise with accuracy the true situation at that spot from a mere reading of an admittedly defective stenographic report of the evidence, that is, it is difficult for us to see the place as the plaintiff saw it. *We* know the holes were there. The plaintiff did not. And a finding of contributory negligence would in substance amount to saying that the plaintiff was negligent because he did not anticipate the existence of the defendant's negligence. The real question is, can we say that the defendant was negligent in going through the place in the manner he did, if the place had been all right and in reasonable repair? I think there is not sufficient to shew that. No doubt a traveller might be bound at such a place to expect some rough surface and if he got jolted badly in going over it, I rather think he could not get damages for an injury, but I do not think he was bound to anticipate the possible existence of the kind of a place that in fact did there exist.

The trial Judge found, so we must infer, that the plaintiff was travelling with reasonable care in view of appearance which the road presented to *him*. I am unable to say that he was so clearly wrong that we would be justified in interfering.

I would dismiss the appeal with costs.

BECK, J.A. (dissenting):—This is an appeal by the defendant municipality from the judgment at the trial of Stewart, Co.Ct.J. The action was for damages arising from the plaintiff meeting with an accident to his automobile while driving over a road in the municipality. The Judge gave no reasons for judgment and,

Alta.

App. Div.

FYFE
v.
BERTAWAN.

Beck, J.A.

therefore, it must be taken that he decided all questions of law and fact necessary for his decision in favour of the plaintiff.

There are no real contradictions in the evidence, though there is evidently some little colouring and exaggeration on one side or the other of no consequence, however, in coming to a conclusion upon the main question, and nothing can turn upon the demeanour of the witnesses.

We are, therefore, in an equally good position as the trial Judge to pass upon the facts. I think the decision of the trial Judge throws too great a burden upon rural municipalities, and not a sufficient burden upon those who make use of country roads.

The municipality is 18 miles square. Some 60 miles out of 488 miles of road have had money spent upon them for the purpose of improving them. The Provincial Government has found it expedient to make a main highway through the municipality. The road on which the accident occurred was ploughed, disced and graded in 1915 it seems; then, because of the proposal—which was carried out—of the Provincial Government, to make the main highway already spoken of, this road was abandoned, that is, the municipality spent no more money on it, and it was very seldom used by anybody.

The plaintiff says he was going along the road in his automobile shortly after 8 o'clock in the morning. All at once he found the car right in a hole in the road. He could not see the hole—could not see it until he was in it. The whole road was covered with a growth of spreading fox-tail, it was a formation of alkali, the whole road was white, the same colour as the weeds. The hole is practically across the road; the road is 12 ft. wide; the grade is in the centre. It is a bank graded right up, with a slough of alkali. It was a large meadow of alkali. There was water there—meaning water which would have prevented him from driving around the side of the road. The road was graded through a slough. There were weeds growing right across the road. There were two cuts through the road. He was not going more than 10 miles an hour at the time of the accident. The reason why he was going "slowly" was that he saw that there was a wash-out. He had his foot on the brake. He had not gone 3 yards when he struck the hole. He had put his foot on the gas to go up the little incline. There were weeds in the ditch—in front, and behind and between, the only place in the road where there were no weeds was in the wagon tracks, but there was no evidence of recent wagon tracks.

A. F. Denton, a witness for the plaintiff, says it is a slough on each side of the road at the place in question. He judges

Alta.
App. Div.
FYFE
v.
BERTAWAN.
Beck, J.A.

there was water in the slough; there was grass growing in it. The road at that place appears to be a sort of alkali bottom.

M. M. Denton, another witness for the plaintiff, says a culvert had been put in at the place in question. The culvert was not large enough to carry the water, the water overflowed and cut the grade. It did not cut the two holes all the way across, one to the left and one to the right, from the centre of the road to the east side; the water overflowed the road last spring. One could not see the hole in the road "twice the length of this hall (apparently about 100 ft.), you wouldn't think there was anything there." The holes were obscured from view by wild barley or fox-tail; most of the grade was covered. The plaintiff could not have left the road and gone around the side of the road.

Baker, another witness for the plaintiff, says there was water on both sides of the road at the place in question.

Turner, another witness for the plaintiff, says the weeds were sufficiently high to obscure the view.

The evidence for the defence, none of which I have set forth, does not improve the plaintiff's case.

In my opinion, the plaintiff's case shews that he was guilty of contributory negligence.

There is, of course, no absolute standard of construction or maintenance of a road; there is a difference between the obligations of the authorities of a city on the one hand and of a rural municipality on the other; there is a difference between the obligations with respect to a much frequented road and those with regard to one little frequented.

The road in question had not been touched by the municipality for probably 5 years. It was scarcely ever used by anyone. This was obvious from its appearance. The road, at the place at which the accident happened, ran through a slough. A culvert which eventually proved inadequate, had in fact been put in, either to carry the water from one side so that it would ultimately flow away, or more probably to equalise the level of the water on each side. The existence of the slough was quite evident. The road bed, as it passed through the slough, was overgrown with fox-tail so as to prevent anyone from seeing the condition of the roadway. In my opinion, an ordinarily prudent man driving along such a road in an automobile ought to have and would have feared that that portion of the road was boggy, and either had been left in that condition or had been repaired, as is not uncommon, by poles laid across the road, or by a culvert, creating, as so often happens, an obstruction likely to cause an accident, and such a man would, therefore,

Alta.
App. Div.
FYFE
v.
BERTAWAN.
Hyndman, J.A.

have got out of his automobile to investigate, or at least have proceeded at a less rate of speed than 10 miles an hour. I think what the plaintiff saw before him was equivalent to a notice: "Danger: go slow."

On the ground, then, that the plaintiff's evidence shews that he was guilty of contributory negligence, I would allow the appeal with costs, and dismiss the action with costs.

HYNDMAN, J.A.:—The defendant municipality having assumed control of the road in question, sec. 219 of ch. 3 of the 1911-12 (Alta.), as amended by 1913 (Alta.), 2nd sess., ch. 21, sec. 14, applies. That enactment reads:—

"Every council shall keep in repair all bridges, roads, culverts and ferries and the approaches thereto which have been constructed or provided by the municipality, or by any person with the permission of the council or which if constructed or provided by the province, have been transferred to the control of the council by written notice thereof; and in default of the council so to keep the same in repair, the municipality shall be liable for all damage sustained by any person by reason of such default."

The liability of the defendant in case of negligence for non-repair being established, there remains to consider, first, whether as a matter of fact there was negligence, and if so, secondly, whether the plaintiff himself was guilty of contributory negligence.

There seems to be no question but that there is evidence to the effect that the holes in the road were of such a nature that the municipality must be held guilty of negligence.

The question of contributory negligence was decided by the trial Judge, and whilst if I had tried the action, I might have come to the opposite conclusion, nevertheless, it not being at all clear that he was guilty and the onus being on the defendant to prove it, I do not think his finding in that respect should be disturbed.

I would, therefore, dismiss the appeal with costs.

CLARKE, J.A.:—This is an appeal by the defendant from a judgment of the District Court of Acadia, which awarded the plaintiff damages for injuries to his automobile, alleged to have been due to the defendant's neglect to keep in repair a road within the municipality upon which the plaintiff was travelling. It appears that the portion of the road in question where the accident happened was through an alkali slough and that a few years before the accident the defendant's council had constructed an embankment through it, with a culvert to permit the passage of the water from one side to the other. It is alleged

that this culvert was insufficient to accommodate all the water leading to it, and as a result the water overflowed the embankment and washed out a portion of it, leaving two pits across the embankment from 18 to 24 inches deep, each of the width of 3 or 4 ft., separated by a wall of 18 inches or 2 ft. in width, which condition existed for 3 or 4 months prior to the accident. One witness refers to the pits as being in the shape of a basin. Another speaks of them as being more or less straight up and down. There is evidence that one member of the council was notified of the condition of the road during the month preceding that in which the accident occurred, but it does not appear that the matter had been brought to the attention of the council. The reeve apparently had the opinion that it was not necessary to look after this road, as appears by the following extract from his evidence:—

"Q. What can you say about this road allowance? A. I would say it would be a long time before there is anything done on it. Q. Why do you say that? A. There does not appear to be any one living on it."

He apparently refers only to the section of the road of a mile in length in which the slough was located, as the lands adjoining the road to the north and south of it appear to be fairly well populated. There was more or less travel over the part of the road in question, but the travel was not frequent. There was no sign or other notice indicating any disuse of the road or any danger or want of repair, other than the condition of the road itself, and it was pretty well grown up with weeds.

I think the road was one which it was the duty of the municipality to keep in repair within the requirement of sec. 219, ch. 3, 1911-12, of the Municipal District Act, which also provides that in default of the council so to keep the same in repair, the municipality shall be liable for all damage sustained by reason of such default.

No reasons for the judgment below appear in the record and it must, I think, be assumed that the trial Judge gave due consideration to the law on the subject of "repair" and "non-repair" and to the defence of contributory negligence which was pleaded. These are questions of fact, and, having been found in the plaintiff's favour, I do not feel justified upon the evidence in reversing this finding. A much less degree of repair is required in case of such a road as the one in question than of one constantly travelled, it being a question of fact in view of all the circumstances in the particular case whether the state of non-repair existed. It seems to me these were dangerous pits

Sask.

C.A.

in the road, which should not have been permitted to remain so long, especially when they could have been repaired by a trifling expenditure of money.

Whether or not the plaintiff might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence is rather difficult to determine. He had a perfect right to travel upon the road. He was not aware of the defective condition of it. There is no evidence that he was travelling at an excessive or unreasonable rate of speed, and the view of the road was more or less obstructed by weeds. I think he was entitled to assume that the municipality had performed its duty to keep the road in repair, and under all circumstances I am not prepared to say the Judge below was wrong in finding in his favour.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

BARNES v. BARNES.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Taylor, J. (ad hoc). November 14, 1921.

DIVORCE AND SEPARATION (§IIIB—28)—GROUNDS—REFUSAL TO ALLOW MARITAL INTERCOURSE.

The wilful, persistent and wrongful refusal of the wife to allow marital intercourse is not in itself sufficient in law to justify a decree declaring the marriage a nullity.

[*Napier* v. *Napier*, [1915] P. 184, followed. See Annotations on Divorce, 48 D.L.R. 7; 62 D.L.R. 1.]

APPEAL by plaintiff from the trial judgment dismissing an action for a declaration that his marriage was null and void on account of the alleged incapacity of the defendant to consummate the marriage. Affirmed but for different reasons than those given by the trial Judge.

H. J. Schull, for appellant.

J. F. Hare, for Dept. of Attorney-General.

HAULTAIN, C.J.S., concurs with LAMONT, J.A.

LAMONT, J.A.:—In this case I have reluctantly come to the conclusion that the appeal must be dismissed. Not, however, for the reason upon which the action was dismissed by the trial Judge, namely, that the matter was *res judicata*, but solely on the ground that the wilful, persistent and wrongful refusal of the wife to allow marital intercourse (which, in my opinion, the evidence establishes) is not of itself sufficient in law to justify a decree declaring the marriage a nullity.

This very question was considered by the Court of Appeal in England in *Napier* v. *Napier,* [1915] P. 184. There it was

Sask.
C.A.
BARNES
v.
BARNES
Taylor, J.

pointed out that by sec. 22 of the Matrimonial Causes Act, 1857 (Imp.), ch. 85, the Court was bound to act and give relief on principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief; that these Courts had never granted a divorce *a vinculo matrimonii* for any cause arising after the marriage, but only a separation *a mensa a thoro;* that in cases where a decree of nullity had been granted it was in consequence of an impediment or incapacity existing at the time of the marriage which made it no marriage at all, and that wilful and wrongful refusal on the part of the wife not arising from antecedent incapacity was a matter arising after marriage. "It would not," said Pickford, L.J., at p. 190, "have been a ground of nullity in the Ecclesiastical Courts, and therefore cannot be so now." To justify a decree of nullity on this ground, something must be shewn which would justify the inference that the wrongful refusal to allow marital intercourse resulted from incapacity or impotence existing at the time of the marriage. The mere wrongful refusal, though wilful and persistent, is not of itself sufficient for that purpose. That the law upon this point is in an unsatisfactory state will, I think, not be disputed. It is, however, the Legislature and not the Courts that must remedy the state of the law.

I would dismiss the appeal, but without costs.

TAYLOR, J. (*ad hoc.*):—This was an action in which the plaintiff prayed for a decree declaring his marriage to the defendant, which was solemnised at Medicine Hat on December 13, 1913, null and void on account of alleged incapacity of the defendant to consummate the marriage. The trial was had before MacDonald, J., at Moose Jaw, on June 14, 1920, and order *nisi* then made. On the application for final order the Attorney-General intervened in consequence of a letter purporting to have been written to the local registrar from a person in England, which reads:—

"This action was a collusive one; the fact that annullment on the same grounds had been refused in December, 1917, by Mr. Justice Horridge in London, England, was withheld from the Court."

The application for final order was heard at a subsequent sittings at Moose Jaw, and evidence then taken orally. A record of proceedings taken on an absolutely similar application between the same parties to the Probate, Divorce & Admiralty Division (Divorce) of the High Court of Justice in England was put in.

In that petition, it was alleged that the petitioner was then residing in London, England; was a sergeant of the Fifth Western Cavalry of Canada, and he and his wife were both

Sask.
C.A.
BARNES
v.
BARNES.
Taylor, J.

domiciled in England. These facts were verified by affidavit. The action came on for trial before Horridge, J., on November 12, 1917. Horridge, J., held, on the authority of *Napier* v. *Napier*, [1915] P. 184, that the petitioner had not adduced evidence from which it could be inferred that there was any incapacity on the part of the respondent, and dismissed the petition.

Up till the time the letter to which I have referred was received by the Local Registrar at Moose Jaw, the plaintiff apparently carefully concealed from the Saskatchewan Court the fact that he had made a prior application in the English Court, and any knowledge in connection therewith. Embury, J., who heard the application for final order, held that as the plaintiff had voluntarily submitted himself to the foreign tribunal he could not now raise the question of the jurisdiction of the foreign Court, and the matter was *res judicata*. From this refusal the plaintiff appeals on the ground that it now clearly appears that the domicile of the plaintiff was, at the time of the plaintiff's petition to the English Court and at all times during the continuance of the proceedings, in Saskatchewan, and that the Court in England was utterly without jurisdiction; that the only order that the English Court could make was one dismissing the application on the ground that it had no jurisdiction, and the actual decision given is not, therefore, binding upon the plaintiff. It is unnecessary, in the view I take of the matter, for me to express an opinion on this question, as, in my view, the appeal should be dismissed on other grounds.

The evidence put in on the application for final order shews that both the plaintiff and his wife were born in England; that as a young man he came to Saskatchewan, took up a homestead here, and, as he states, intended to make Saskatchewan his permanent home. He enlisted when the war broke out, and his residence in London, England, was an enforced residence, being stationed there in connection with his duties as a soldier in the Canadian Expeditionary Forces on active service. On this statement of fact his domicile would clearly be in Saskatchewan.

It was necessary for the plaintiff, in presenting his petition to the Court in England, to establish to the satisfaction of that Court a domicile in England, otherwise it would not have been heard. As I have already pointed out, he swore to that domicile. Further, the transcript of the evidence shews that counsel on his behalf endeavoured to establish on the hearing of the petition the prisoner's domicile in England. I find this evidence:—

"Q. Is your name John Ernest Barnes? A. Yes. Q. You are the petitioner in this suit? A. Yes. Q. You are a sergeant of the

Sask.
C.A.
Barnes v. Barnes.
Taylor, J.

5th Western Cavalry of Canada? A. Yes. Q. In the spring of 1911, you left this country for Canada? A. That is right. Q. You had prior to that known the respondent? A. Yes. Q. You stayed in Canada till 1912, when you returned to this country? A. That is right. Q. You then again met the respondent? A. Yes. Q. You returned then again to Canada in the spring of 1913? A. That is right. Q. A short time after that you had a letter from her from Medicine Hat, telling you that she also had gone to Canada? A. Quite right. Q. You then came down from where you were—what was the name of your farm? A. Ernfold. Q. —to Medicine Hat, where she was? A. Yes. Q. I think you proposed marriage? A. That is right. Q. You were married, as I have said, on the 13th December, 1913? A. Quite right, at the Church of Medicine Hat. Q. Church of England? A. Yes."

This evidence, as will be seen, established that the domicil of origin of both the plaintiff and his wife was in England; that after leaving England for Canada in 1911 he returned to England in 1912, returning to Canada in the Spring of 1913, and at the time of hearing was again in England. Upon this evidence, the finding of fact which the Court would make would be that the domicil of origin, England, still existed; that if there ever had been an abandonment of domicil of origin and a change of domicil to Saskatchewan, which could hardly be inferred in view of the return to England shewn in the evidence quoted, the domicil of choice had been abandoned when the domicil of origin would be resumed. See Dicey's Conflict of Laws, 2nd ed., pp. 119, etc.

I think one must assume that counsel for the petitioner was instructed by the petitioner upon that, and that it follows that the plaintiff, then residing in England, in the place of his domicil of origin, applied to the Court of that country representing to the Court that that was still his domicil. Such an application must be treated either as conclusive evidence that he had abandoned the domicil of choice and resumed the domicil of origin, or that he undertook to deceive the English Court by withholding from it the true facts, and in either view, in my opinion, he is estopped in this Court, and the final order should be refused.

I would go further and add that in an action for dissolution of marriage or declaration of nullity the onus is upon the applicant to bring before the notice of the Court all facts and all proceedings which are material, and which might affect or assist the trial Judge in arriving at a conclusion, and where material is suppressed the final order should be refused. Even in Eng-

Sask.
C.A.
BARNES v. BARNES.
Taylor, J.

land, where the Court has the assistance of the King's Proctor, the Court has insisted on this being done. See *Butler* v. *Butler* (1890), 15 P.D. 66. On the appeal therein Cotton, L.J., says, at p. 71:—

"In my opinion it is very important that in every case brought before the Court the proceedings shall be fairly and properly taken, that all judgments shall be fairly obtained, and that the Court shall refuse to make a decree not only and merely where it finds that the facts suppressed might lead to the conclusion that a matrimonial offence has been committed, but also where it finds, as in this case, that the parties by an agreement between them have prevented material facts from being brought before the Court."

And Lopes, L.J., at p. 75:—

"Now what is the object of this special provision with regard to collusion? I think that its object is to compel the parties to come into the Court of Divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect; to oblige them so to act as to enable the Court to be in a position to do justice between the parties."

And in that case, where, by agreement between parties, evidence was not adduced on certain lines, the final decree was refused. If the Court in England, where in every case notice of all proceedings is given to the King's Proctor for his investigation, hold the onus of requiring full disclosure to be important, how much more so must it be in our Courts, when the trial Judge must rely solely on his own vigilance at the trial, and especially when the action is undefended.

The appeal book did not contain a copy of the evidence taken before MacDonald, J., but I have procured a copy of this evidence and it shews that the trial Judge in Saskatchewan, on facts in my view as favourable to the petitioner as those shewn in the English Court, made the *decree nisi*, which Horridge, J., refused.

The plaintiff's evidence in the English Court was that on the evening of the marriage on December 13, 1913, he accompanied his wife to the house in which she resided; he tried to persuade her, as he puts it, to do as man and wife should do, but of no avail at all; she would not consent to sleep with him at all, and he was obliged to leave her and go to his room. He did everything he possibly could to induce her to act as his wife; he remained in Medicine Hat three or four days after the marriage;

Sask.
C.A.
BARNES v. BARNES.
Taylor, J.

and that he spent most of his time trying to persuade her, without avail; she insisted on going to her own room and leaving him to his, without expressing any reason for her refusal, and he then left under an arrangement that she was to join him at his farm in the following Spring. She did not turn up; there was some correspondence; she kept promising to come; everything was prepared for her reception; a time was appointed when she was to come, and she did not do so. The plaintiff went to Medicine Hat. In the proceedings in England the plaintiff says that when he went to Medicine Hat she did not meet him as he had not advised her of his coming, but he went and saw her; that he tried to persuade her to live with him, but she would not allow him in the same room; that in August, 1914, he enlisted.

On the trial before MacDonald, J., he said that the marriage was partly arranged by correspondence before he went to see her at Medicine Hat; and after certain wedding festivities and about 10 o'clock at night he proposed to his wife that she go to the hotel with him; she wanted to go to her own lodgings, a private house where she was the only boarder and roomer; he escorted her to this home; the proprietor and his wife were away, and they were alone in the sitting room; she seemed passionate, but declined to accede to his persuasions; on his asking her for her reason for refusing she informed him that he ought to know. The plaintiff is very specific in his evidence. He remained in Medicine Hat for 3 days only after the marriage, and tried the second and third nights to persuade her, but got no further explanation than that he ought to know her reason for refusal. Reading the evidence carefully I would infer that she meant him to understand that she was then having her monthly menstruation and refused intercourse on that ground, not on the ground that she was incapable, and that the wife would infer that he wanted intercourse notwithstanding her condition. Then after his return visit to Medicine Hat,—I have already remarked that in England he said she did not meet him at the train,—before MacDonald, J., he stated that he sent a wire to her to advise her that he was coming; the train arrived late at night and she met him at the station, to which she was escorted by one of the staff of the Union Bank of Canada with whom she was employed; that the three went off and had supper together; the other man left, and after he had left she turned to the plaintiff and said, "What brings you here anyway?" He answered: "Well, it is only a natural thing for me to come and find out why it is you don't come down." And then he tried to persuade her that he should go into her room, stating that they were properly

Sask.
C.A.
BARNES v. BARNES.
Taylor, J.

married and it was quite all right, and her answer was,—and he purports to quote her exact words,—"Well, it doesn't matter; I don't wish to go and I don't want you to press me." He did not go into her house at that time, and her reason is given; other people were there and she did not want it to be known; of course if they went into the house he would naturally want to consummate the marriage there and she did not want it to be known that they were doing that there. He went home the next day under an arrangement that she was to come along as soon as she felt like it; when she felt able and wanted to, and he was not to worry or press her.

There is not a suggestion in his evidence before Horridge, J., or MacDonald, J., that at the time he thought she was incapable of consummating the marriage, or that he at any time from her words or actions so inferred or believed her to be incapable; and the only inference I could possibly draw from the evidence in either case would be, not that she was incapable, but that she was for some undisclosed reason (and I can conjecture many) unwilling to consummate the marriage, and the decision to which Horridge, J., referred clearly establishes that under such circumstances an order should not be made. In that case, *Napier* v. *Napier*, [1915] P. 65, the President of the Division, Sir Samuel Evans, at p. 69, had enunciated the rule of law to be that, "where as I find in this case the suit is brought in good faith, and the consummation of the marriage has been prevented, after repeated attempts reasonably made on the part of the husband, by the wilful, determined and steadfast refusal of the wife, and the refusal is threatened to be, or likely to be, persistent," that was "a valid ground for annulling the marriage." That rule would be quite consistent with good sense, decency and justice, but the Court of Appeal (184, at p. 185), expressly disapproved holding that the President had introduced a new ground altogether, which could be done only by legislation, and state the law to be that a wilful, wrongful refusal of marital intercourse is not of itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence. The Court in recent times has not always required proof of an actual structural defect as evidence of incapacity, but has considered itself at liberty to infer from the conduct of the parties, or one of them, an incapacity arising from some abnormal condition of mind or body.

Even if the uncorroborated testimony of the plaintiff should be accepted, I cannot draw any inference of incapacity from the conduct of the parties to this action.

I would dismiss the appeal with costs. *Appeal dismissed.*

MEMORANDUM DECISIONS

Can.

Ex. C.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

THE "FREIYA" v. THE "R. S."

Exchequer Court of Canada, B.C. Admiralty District, Martin, L.J.A. June 18, 1921.

ADMIRALTY (§II—8)—*Judgment in—Release of ship—Appeal —Re-arrest of ship—No evidence of removal from jurisdiction.*]—Motion by plaintiff in Chambers to re-arrest the ship after judgment had been delivered dismissing the claim of salvage against her and from which judgment an appeal had been taken the Exchequer Court of Canada. Motion refused.

J. E. Clearihue, for plaintiff.

E. C. Mayers, for defendant.

MARTIN, L.J.A.:—On the 16th inst. a motion was made before me to cancel the bail bond since judgment had been pronounced in favour of the ship and I acceded to the motion according to the principle embodied in my decision in *The Abbey Palmer* (1909), 10 B.C.R. 383, 8 Can. Ex. 462, as no special circumstances were shewn in the opposition to the motion and in the absence of these, the bail, which takes the place of res, shall not be held in Court pending the result of the appeal.

After the motion was granted the present motion was made upon the same material by special leave and consent and the cases of *The Miriam* (1874), 43 L.J. (P.) 35, 30 L.T. 537, 2Asp. M.L.C. 259, and *The Freir* (1875), 44 L.J. (P.). 49, 32 L.T. 572, 2 Asp. M.L.C. 589, were cited as authority in support of a general right to re-arrest in case of an appeal which, upon the face of it, is not consistent with reason, because if the bail which represents the res should not be held at the Court why should the res itself be held?—the same thing cannot be regarded in different ways for the purpose of the appeal—but when the cases which are relied upon are closely examined they do not support the application because in the former it was stated by counsel that the ship would 'go at once' (i.e. out of the jurisdiction), if notice of the application were given, and in the latter case the vessel was a foreign one (Dutch) and would leave the country and the plaintiffs would be left without security unless arrested without notice which was ordered.

Though the former case is not as fully reported as one would want and had to be explained by counsel, it was clear that the principal upon which the respective ships were re-arrested, even though the former was British, is that it appeared to the Court

Sask.

K.B.

that they would not be within the jurisdiction to answer the appeal if the appeal went against them.

This view was supported by the following statement of the Practice in Williams & Bruce Admiralty Practice, 1902, p. 521, based upon the above cases:—

"Where the effect of the decision appealed against is that property which had been proceeded against at the instance of the appellant is released from the arrest of the Court below, the appellant, if he apprehends that the property will be removed out of the jurisdiction may, after instituting an appeal obtain a warrant of arrest out of the principal registry under which the property may be kept under arrest until the appeal has been decided."

As there is no evidence of removal from the jurisdiction or other good reasons (see *The Abbey Palmer*), I see no grounds for ordering the re-arrest of the vessel in question. Though the owners may be foreigners yet they reside here and carry on business in these waters.

The motion will be dismissed with costs.

Judgment accordingly.

DEGROW v. UNION BANK OF CANADA.

Saskatchewan King's Bench, Taylor, J. January 20, 1922.

BANKS (§IVE—114)—*Judgment against customer—Note taken for amount due—Excessive rate of interest charged—Fraud in collection of collateral—Liability of bank.*]—Action for a return of plaintiff's notes to the defendant, and collateral securities and for an accounting. Judgment for plaintiff.

J. C. Secord, for plaintiff.

F. L. Bastedo and *J. L. McDougall*, for defendants.

TAYLOR, J.:—In September 1913 the plaintiff, a farmer, was indebted to the defendant bank, and gave his note for $2,924.62, payable on November 1, 1913, bearing interest at 8% per annum, before and after maturity. On November 1, 1913, nothing having been paid thereon, the note was renewed then to bear 9%, and the account was not fully retired until 1918, during all of which time the bank has charged 9% per annum, renewing the notes every month or so, which has had the effect of compounding the interest. Realization was largely made from collateral, the proceeds of which were, when received, carried into what is termed a collateral account, and when convenient to the defendant's officials were applied on the direct liability on the notes, no allowance ever being made for interest

on this collateral account. The bank has always made an additional charge for collecting the collateral, although I am unable to discover in this particular case any authority therefor. It appears that the moneys so realised were on lien notes representing a claim against stock and implements mortgaged to the bank as collateral security, and from an assignment of a balance due by a purchaser of land.

This action is for a return of the plaintiff's notes and collateral securities and an accounting, it being alleged that the defendants are entitled to charge interest only at the rate of 5% per annum, and that all payments made have not been credited. The defence is that the excessive rate of interest (I do not think the term is at all unwarranted) was paid voluntarily; that at the most the plaintiff is entitled to a return of interest so charged only on his last note amounting to $88.50, which sum and the notes sued on were paid into Court with the defence of denial of liability.

At the trial, much was made by the defendants of an alleged solicitors' account for $20.89, alleged to have been received by the defendants after the account was closed out, and which it is now sought to charge to the plaintiff. The payment of this account was not proved, nor was it shewn that the services set out therein were actually rendered; that they had to do with the defendants' business, nor how it stands as an unpaid balance of some account previously paid. Nor is there a pleading in reference thereto, unless this sum has been taken into account in figuring the $88.50 paid into Court. To dispose of this item now, I hold that the defendants have failed to establish that the plaintiff is chargeable therewith.

On April 6, 1915, according to the defendant's figuring, the plaintiff was indebted to the defendants for $2,071.45, and for that sum he gave his note payable May 1, 1915, with interest at 9%. He was sued on this note, defended, and on September 25, a judgment pursuant to a settlement between counsel was entered. The terms of the consent are not on file, but it is quite evident from the orders filed that the then amount of the indebtedness was settled at $2,094.24 debt, $41.81 for interest, and $62.19 for costs, and the total amount was certified by the local registrar at $2,198.24.

Shortly after the entry of this judgment the now plaintiff and the defendant's manager MacLean had an interview, the result of which was that the plaintiff paid to the defendants on October 14, 1915, $300, and on November 2, 1915, $200, and on November 12, 1915, gave to the defendants a new note for

Sask.

K.B.

$1,702.40, payable on December 25, 1915, with interest at 9% before and after maturity, as before. The plaintiff says that this note was given under an understanding that though it included interest at 9% per annum it was understood that he would never be required to pay more than the amount collectable under the judgment, and it was expressly understood that if he paid the $500 he was not to be pressed for a year; that he was also to pay the solicitors' costs, and that he paid these in cash to the bank's solicitors. The bank manager denies that there ever was such an understanding as to interest, or that the plaintiff ever at any time raised the question as to interest, but has not disputed the other contentions, and agreed that the plaintiff paid the costs to the bank's solicitors.

I find it unnecessary to determine which should be believed, or whether the effect of such an understanding would be to leave the judgment which was never discharged as the primary debt, with the note and its renewals to be treated as collateral security. I think, however, the plaintiff is entitled to have this said: That I am much impressed with the great probability of his story as against the probability of the manager's story. Surely the fact that the judgment would bear interest only at 5% per annum would then be raised in the discussion; and so far as treating the bank manager's evidence as disinterested and from a source which should be taken as credible, the tenour of his discourteous, even insulting, correspondence with the plaintiff's solicitors, his refusal to accede to their reasonable proposals, his advancement of the claim of $20.89, and the way in which he put it forward, his demand that written authority from the plaintiff be furnished to him before he could give any information, his retention of the plaintiff's notes in order to have them in the hands 'of our chief council' (sic) when the suit commenced bespeaks for anything but an attitude with nothing to conceal and prepared to tell the whole truth; and a bank manager who crowds 9% compounded at least quarterly on an old man unable in his adversity to resist the demand is not "playing the game." On the face of the note upon which judgment was obtained there is a computation of the amount due thereon up to November 2, 1915. After crediting the payments of $300 and $200 which the plaintiff, pursuant to his undertaking had made, the then amount due is calculated to be $1,602.30, including interest at 9% per annum and some other charges which were explained to be solicitors' costs other than the taxed costs paid directly to the solicitors.

The renewal note under date November 12, 1915, is for $1,702.40, practically $100 too much. Surely it is in error. The plaintiff, in cross-examination, said that he never made up the amount of any of the notes; never made up the interest or anything of that sort; he trusted to the bank for the figures altogether. This was not denied, and I have no difficulty at all in concluding that such was the fact. Then, too, except the payments of $300 and $200 made shortly after the judgment was obtained, and perhaps (it is not clear) some small sums, the moneys which retired the plaintiff's indebtedness were received from collateral and appropriated by the bank when and as it pleased, without a suggestion of concurrence by, and without even full disclosure to, the plaintiff. Under such circumstances, they were not payments made by the plaintiff on interest account, nor was there ever an assent by the plaintiff with full knowledge of the facts to the application thereof by the defendants. It will be noted that as soon as the plaintiff commenced to figure at all, as shown from the correspondence, that he objected that so large a balance remained outstanding when it should have been discharged from his collateral.

I have already noted that the bank charged a collection fee on all moneys received. Besides the ordinary collection fee they paid to their solicitors for drawing a warrant to distrain, and perhaps also instructing distress on lien note, $10, and to the bailiff who made the distraint, in addition to the fees which he collected from the debtor, about $26, again even on the trial the exact amount was unascertainable. The $10 fee looks to be double what should be charged, and the $26 is not, so far as any evidence was given before me, chargeable at all.

In the accounts submitted and explanations thereof only the net amount after making all charges is disclosed. In no single instance do I find that I can from the accounts furnished to the plaintiff or his solicitors actually determine what sum the defendants received and what charges they have made to him thereon. I need only refer to one instance as an example. On January 4, 1918 the defendants write the plaintiff:—

"About 10 days ago we received a cheque from . . . for approximately $620, which amount has been applied on your indebtedness to us. There is still a balance owing of $376.35, excluding interest and costs, and we have the assurance of . . . that they expect Merrill to wipe off the balance before January 15, as the bank is forcing their claim. As it is not likely that Merrill will pay any more at present than the

Sask.

K.B.

amount of the bank's claim I would advise you to put your case in the hands of . . . and let them act for you."

The statement given to the plaintiff's solicitors credits only $614.20 as of December 14, 1917, on this item, and in a solicitors' account filed there is reference to a remittance to the defendants of $641.70 on this date, which can only refer to the same matter. How much the solicitors received is not shewn. The plaintiff was entitled to know exactly, not approximately, what his debtor paid. It was most important, in view of the unusual stand taken by the bank in accepting payment only of so much of the assigned debt as was necessary to discharge the plaintiff's liability to it, disclosing that sum to the debtor and plainly telling the plaintiff he must look after the collection of the balance himself. If the relation of the parties was that of banker and customer for whom it is acting, there is an entire lack of appreciation of the duty of a banker under such circumstances, and if it be that of a secured creditor realising on a debtor's securities assigned to it there are many unauthorised charges and a total disregard of the rights of the debtor. The latter, in my opinion, is the relation here. The bank took that position itself. I refer to the letter of July 5, 1918, ex. "P7", which contains this statement:—

"I might state that we held a chattel mortgage on practically everything that was sold at the sale, and subsequently received lien notes, so why was any promise given to you that the amount of the collateral notes would not be applied on your indebtedness. What do you suppose we held them for?"

The plaintiff is entitled to have moneys received on his account credited when and as received, and can be charged only with such disbursements in connection with the collection of securities as may be shewn to be reasonably necessary for that purpose; and he was entitled to know exactly what sums the defendants from time to time received, and what costs the defendants incurred in connection with the collection thereof. For these reasons,- the error in computation of the note of November 12, 1915 the failure to truly account, the mis-statement of amounts actually received, the charging for services which the defendants were not entitled to charge to the plaintiff, and the reliance of the plaintiff on the defendants throughout,—the renewal of the notes from time to time cannot be taken as a statement of accounts. It is more, too, than an arithmetical error. The judgment, and the indebtedness therein fixed at $2,198.24, with interest thereon at 5% per annum from September 25, 1915, must be taken as the full measure of the plaintiff's liability to the defendant bank. It is plain that the defendants

liability to the defendant bank. It is plain that the defendants have realised from the plaintiff's securities a considerable sum above the amount of his true indebtedness to them, and the defendant is accountable as a constructive trustee for the surplus proceeds.

There will be an order that the defendant do, on or before March 31, 1922, file with the local registrar of this Court at Regina a full and correct account, verified under oath, of all moneys received from the collateral securities left with them as security for the plaintiff's indebtedness to it, and of their dealings with the said securities, and what sums have been reasonably expended by them in connection with the collection thereof. The plaintiff will have leave to cross-examine thereon, and to surcharge and falsify, and there will be a reference to the said local registrar to take the said account and make any enquiries necessary in connection therewith, and to find the balance now due by the defendants to the plaintiff, and what, if any, securities of the plaintiff now remain in the hands of the said defendants, and to make any enquiries and take any accounts necessary therefor, and it will be declared that the said account should not go behind the said judgment of September 25, 1915, and that the amount then due to the defendants by the plaintiff was the sum of $2,198.24, bearing interest at 5% per annum, and the defendants were not entitled to take any higher rate or charge the plaintiff therewith in the said account, and there will be judgment for the plaintiff for the amount so found to be due, and for a return of the notes in the pleadings mentioned, and any securities of the plaintiff so found to be still in the hands of the defendants.

At the trial, evidence was adduced on the part of the plaintiff to charge the defendants with $50 for failure to collect a note given for a cook car. In this issue the plaintiff failed, and I do not think it should be open to him to go into the matter again on the taking of the account. In the same way the defendants sought to charge the plaintiff with $20.90, solicitors account, ex. "D13," referred to in the correspondence. On this issue the defendants fail, and it should not be open to them to again raise the issue on the taking of the account. Except, however, as to these two matters, there should be no limitation. Other matters were referred to, but not so completely or fully as to stop further enquiry into them.

The plaintiff is entitled to costs of the action to this date, to be taxed on King's Bench low scale. Subsequent costs will be reserved to be disposed of on application to a Judge in Chambers on conclusion of the accounting and enquiry.

Judgment accordingly.

Sask.
K.B.

CODVILLE Co. Ltd. v. JORDAN, et al.

Saskatchewan King's Bench, Bigelow, J. March 17, 1922.

PRINCIPAL AND SURETY (§IB—10)—*Promissory note—Accommodation maker—Extension of time—Assignment under Bankruptcy Act—No notice of dishonour given to surety—Rights of parties.*]—Action on a promissary note made by the defendants on July 15, 1918, whereby the defendants promised to pay to the plaintiff $2,500. on December 1, 1918, with interest at 10% per annum before and after maturity. Judgment for plaintiff.

W. F. Dunn, for plaintiff.

J. C. Martin, for defendants other than Jordan.

BIGELOW, J.:—The note sued on was made by the defendants other than Jordan for the accommodation of Jordan; that is, between Jordan and the other defendants the relationship of principle and surety existed to the knowledge of the plaintiff. Payments were made on the note from time to time by Jordan and the matter was allowed to drift along without any action being taken by plaintiff until February 25, 1921 when Jordan made an assignment under the Bankruptcy Act, ch. 36, (Can.) 1919. Shortly before the said assignment negotiations were conducted by Jordan to sell his assets to one McIntosh. The plaintiff I believe was satisfied with such a sale, but these negotiations were never completed and the assignment was made under the Bankruptcy Act, and the Trustee in Bankruptcy afterwards dealt with Jordan's property.

It is first contended that these defendants are discharged because no notice of dishonour was given them. I know of no authority for such a proposition, and none has been cited to me. These defendants are all makers of the note, and although accommodation makers to the knowledge of the plaintiff, in my opinion, they are not entitled to notice of dishonour. See *Hough* v. *Kennedy,* (a decision of the Appeal Court of Alberta) (1910), 3 Alta. L.R. 114. Stuart, J. in giving the judgment of the Court said at p. 117:—

"It was also contended that Dorin, being an accommodation maker to the knowledge of Hough, was entitled to strict notice of dishonour in the same way as if he had been an endorser. For this no direct authority was cited, counsel presenting an argument from analogy only, upon the ground that Dorin's position was in effect the same as that of an endorser. But here also it seems to be clear that there is nothing in the law-merchant or in the Bills of Exchange Act, which embodies that law, which entitles a person who becomes a party to a note as maker, even though only for the accommodation of his

co-maker, to the technical notice of dishonour, even from the payee who knew, when taking the note, of the exact state of the facts.

There seems to be uo reason to distinguish such a case in principle from the case of a surety under any other document. It was quite open to Dorin, if he desired to get the benefit of the law in regard to negotiable instruments, to become a party as endorser only, in which case that law would have expressly protected him, but he chose, instead, to become a party to the note as maker, and unless some specific rule of the law-merchant can be found, as confessedly none can be found, which gives him the right to notice of dishonour as understood in that law, it seems to be unquestionable that he must rely solely upon the ordinary rules as to the rights of a surety."

Then these defendants contended that extending the time for the principal debtor Jordan would discharge them. That would be so if there was an agreement extending the time which there was not in this case.

Then these defendants set up the defence in paras. 7, 8 and 10 of the defence as follows:—

"7. In or about the month of December, 1920, the said Thomas J. Jordan sold his business aforesaid, to one McIntosh, and obtained the consent of the plaintiff to such sale under the provisions of the Bulk Sales Act, which said consent was given by the plaintiff without notice to or reference to these defendants.

8. Thereafter, and in or about the month of January, 1921, the said Thomas J. Jordan made an assignment for the benefit of his creditors to the Trader's Trust Co., and the plaintiff without notice to these defendants, proved its claim under the said assignment and gave its consent to the ratification by the Trader's Trust Co. aforesaid of the sale to the said McIntosh referred to in paragraph seven hereof.

10. There defendants further say that by reason of the acts and omissions of the plaintiff alleged in paragraphs seven and eight hereof, the plaintiff acted to the prejudice of these defendants and thereby released them."

As I have said, the sale from Jordan to McIntosh was not completed before the assignment to the Trustee in Bankruptcy. If there was any evidence that these defendants lost any advantage or security by the long delay and want of notice which they might have otherwise obtained, I could understand this claim.

Sask.

K.B.

In *Hough* v. *Kennedy* (*supra*), Stuart, J., says at p. 119:— "The inference seems also to be clear, that the mere fact of the guarantee having been given by the guarantor becoming a party as joint maker would not leave him any the less entitled to notice of default, where the payee knew of his position and where the facts shew that some damage has resulted from the absence of notice. In this view the necessity of notice of default is not similar to the necessity of technical notice of dishonour under the law-merchant. The mere absence of notice of default will not in itself afford a defence. The failure to give notice must be shewn to have, either by itself, or taken along with other circumstances of delay, caused the guarantor to lose some advantage or security which he might have otherwise obtained."

I cannot find here that any damage resulted from the absence of notice, or that these defendants lost any advantage or security which they might otherwise have obtained.

The plaintiff will have judgment for the amount claimed, $948.70 and interest at 10% per annum and costs, less any amounts the plaintiffs have received from the Trustee in Bankruptcy since this action began. Any monies received in the future from the Trustee in Bankruptcy will also be credited on the executions.

Judgment accordingly.

CANADIAN BANK OF COMMERCE v. BEZY.

Saskatchewan King's Bench, Bigelow, J. March 29, 1922.

EVIDENCE (§III.—347)—*Mortgage debt—Promissory notes given—Payment of notes—Notes given as collateral—Lapse of time—Affirmative and negative evidence—Preference.*]—Action on a covenant in a mortgage made by defendants.

J. M. Crerar and *H. J. Foik,* for plaintiffs.

A. R. Bence, for defendants.

BIGELOW, J.:—On May 10, 1913 the Gautrons assigned to the plaintiff "all debts and cases in action which are now due or owing by them." The mortgage in question had previously been delivered to the plaintiff. The mortgage was given as collateral security to a note due November 1, 1912. Notice was given by the plaintiff to the defendants before maturity that plaintiff held the note, but there is no evidence that plaintiff gave defendant any notice that the plaintiff held the mortgage except that one of the defendants admits that he had knowledge of the note about 4 years ago.

The defence set up is that the defendants made settlement with the Gautrons prior to receiving the notice. This settlement is alleged to be by work done in 1912 for the Gautrons and (2) by delivering certain collateral notes to be applied on this mortgage amounting to about $500. These notes were afterwards paid.

As to the work alleged: Both Gautrons deny this work although they say considerable work was done in 1911, which they settled for. The mortgage was dated December 30, 1911. The burden of proof as to this work is on the defendants and they have not satisfied that. I think they must have made a mistake as to the year.

As to the notes: One Hurion and the defendants were in partnership in the farming business and after the defendants left Manitoba, Hurion had a sale in 1913. Six of the notes given at the sale found their way into the possession of the plaintiff. What these notes were given for to the bank is the question? The bank had at that time a note made by Hurion in favour of one Fradin. The note was not produced nor the amount otherwise proved. The bank also had at the same time a note made by the said Hurion and Louis Bezy in favour of Francois Gautron for $509.65, payable November 1, 1912, and endorsed to the plaintiff.

The plaintiff contends that the six auction notes were given to the plaintiff as collateral to the last mentioned two notes. The evidence to substantiate this contention is not very satisfactory. Henry L. Wethy, who was manager of the plaintiff's branch at Treherne at the time, was called as a witness but gave no evidence about this at all. Clement J. Moreau, now the plaintiff's manager at St. Bruges, but at that time in the branch at Treherne, gave evidence, but he said he did not believe the notes were handed to him.

A document is produced by the bank, which reads as follows:—

"Treherne, Man., 8th November, 1913.

To the Canadian Bank of Commerce:

It is hereby declared that the following security is held by the undersigned as security for the Note of E. Hurion for $450.75, hereto annexed, namely:

Robert Scott & J. S. Harrison $70.

J. S. Harrison & R. Scott, $76.

Clovis Maxurat & Paul Fay, $50.

The note first above mentioned having been transferred to you, the said security will be held by the undersigned in trust

Sask.
K.B.

for the bank, as security for the payment of the said note, and on demand the undersigned will execute and deliver to the bank a proper legal transfer of the same."

There is no signature at the foot of that document, but on the back is the signature of Francois Gautron. The three notes referred to therein are three of the six notes in question.

A ledger sheet of Ed. Fradin's account is produced shewing a credit on October 5, 1914, of $68.70 from B. A. Scott and J. S. Harrison, and $76.26 from Peter Jordan and S. C. Swan. It is contended that these are two of the six notes in question.

I am asked to find from this evidence that these six notes were given to the bank as collateral to the two Hurion notes above referred to.

It is not surprising that after all these years the bank manager or his assistant have no recollection where the notes came from. The matter has been allowed to drag along from November, 1912, so that the mortgage sued on has increased from $725, when it was made to $1,848 the date of the writ.

Against this unsatisfactory evidence from the plaintiff there is the evidence of Aime Prevost who was acting for the defendants at this sale and who says that he was present when one Parker, the clerk at the sale, acting on Hurion's instructions, handed these notes to Moreau who admittedly was at the sale, and that Parker told Moreau that these notes were to be applied on the mortgage in question. Moreau does not deny this, but says that he does not recollect this conversation. Even if he denied it, the rule is that a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative. In *Lefeunteum* v. *Beaudoin* (1897), 28 Can. S.C.R. 89, Taschereau, J. says at p. 93:—"It is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative . . . because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed."

And in *Lane* v. *Jackson* (1855), 20 Beav. 535, at pp. 539, 540, 52 E.R. 710, the Master of the Rolls, Romilly, said:—"I have frequently stated that where the positive fact of a particular conversation is stated to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstance. By this means, I give full credit to both parties."

If this conversation took place, and I find that it did, then no document signed by Francois Gautron or entry made in the plaintiff's books could work to the prejudice of these defendants.

I, therefore, think that the six notes in question should be credited on the mortgage sued on. The exact amounts and dates were not given in evidence. The only evidence as given by Moreau was that the face value of the notes was about $500.

There will be a reference to the Local Registrar to ascertain the amount of these notes and the dates and amounts the plaintiff received for the same which will be credited on plaintiff's mortgage on such dates. The Local Registrar will then ascertain the balance due plaintiff on the mortgage, for which amount the plaintiff will have judgment.

As to the costs: The plaintiff succeeds on the issue as to the mortgage. The defendants fail on the issue as to the work done, but succeed as to the notes. This latter issue took up most of the time of the trial and I think justice will be done by not allowing costs to either party.

Judgment accordingly.

BARTLE v. GRAND TRUNK PACIFIC R. Co.

Saskatchewan King's Bench, Embury, J. February 27, 1922.

MASTER AND SERVANT (§IIB—132)—*Shunting cars—Brakeman riding on car—Dangerous position—Negligence—Accident —Death—Liability.*]—Action under the Fatal Accidents Act (Sask.) 1920, ch. 29 by the administratrix of the estate of a brakeman killed while employed in the defendant's yards.

P. M. Anderson, K.C., for plaintiff.

J. N. Fish, K.C., for defendant.

EMBURY, J.:—This action is brought by the plaintiff under the Fatal Accidents Act 1920, (Sask) ch. 29, as administratrix of the estate of Joseph A. Bartle, who was killed while employed as a brakeman in the defendant's yards at Regina. The plaintiff alleges negligence, and the defendant claims that the accident arose from the negligence of the deceased, himself. The accident occurred during shunting or switching operations while the deceased was riding on a certain flat car, which had been converted into a water or tank car. The plaintiff alleges that the negligence of the defendant company consisted in not having a left grab-iron on the end of the said car—which might have been there for him to grasp should it be necessary to do so. The evidence shews that this car was not a standard car.

Sask.

K.B.

It appears that there were and had been 4 cars of this type in common use in the Regina yards, with all of which 4 cars the deceased probably would be familiar. Of these 4 cars, three were fitted with the left grab-iron in question, while one (being the one in use at the time of the accident) was not. It is possible that the accident resulted because the deceased relied on the presence of this grab-iron, but such a conclusion, it seems to me, would be founded on mere conjecture and not on the preponderance of the testimony.

Immediately before the accident happened the deceased was standing with his feet in the stirrup on the side and toward the end of the car, his left hand resting on the flat floor of the car, and his right hand grasping a grab-iron on an upright to his right. The train of cars and engine were in motion. Deceased wished to give a signal to stop, and released his hold with his right hand to do so. On the signals being obeyed, the train slowed down, and he, not having a firm hold of anything, and being supported merely by his own weight resting by his feet in the stirrup and his left hand on the flat floor of the car, fell over the end,—as he began to fall, grasping at the upright stake on which the left grabiron above referred to would have been situated if it had been there. Whether he expected to find the grab-iron there, or whether, not expecting to find it, he nevertheless grasped merely at the stake to save himself, is a pure matter of conjecture, for the possibility that deceased would know that the grab-iron was not there is quite as great as the possibility to the contrary. But the evidence discloses that deceased was in a dangerous position when he gave the signal, and further discloses that the signal might have been given without releasing his hold with the right hand, in which case there would have been no danger. Undoubtedly the plaintiff is entitled to recover under the Workmen's Compensation Act, R.S.S. 1920, ch. 210, but I think on the evidence the accident must be taken to have resulted from the negligence of the deceased himself.

Judgment accordingly.

Re ESTATE OF LANGLEY, AN INFANT.

Saskatchewan King's Bench, Taylor, J. March 29, 1922.

EXECUTORS AND ADMINISTRATORS (§IVC—112)—*Remuneration—Double commissions—Rate of interest allowable on funds held by administrator and not invested.*]—Application to determine the compensation to be allowed the guardian of the property of an infant, and the interest which should be charged on on certain uninvested funds in its hands.

P. H. Gordon, for the Standard Trust Co.

Harold Fisher, for the Official Guardian.

TAYLOR, J.:—Samuel Newton Langley, late of Springside, Saskatchewan, died on December 19, 1913, leaving him surviving two sons, Everet N. Langley, then aged 14 years, and Cecil Edward Langley, and a widow, Cora E. Langley. He had separated from his wife in his lifetime, and she had taken the child Cecil Edward Langley away with her, and it is stated in an affidavit that their present address and occupaton are unknown, although it is not shewn that any inquiries whatever have been made to locate them. Everet N. Langley was killed in action in the Great War, and the Standard Trust Co. were appointed administrators of his estate. In his lifetime they had been appointed guardians of his property, and now apply to have their accounts as guardian passed. An order was made directing the Official Guardian to appear, and he has taken part in the passing of the accounts, and it is stated that counsel are agreed except as to the amount of the compensation to be allowed the guardian, and on the question whether or not interest should be charged at the rate of 3% or a greater rate on certain funds which have been in the hands of the guardian for a considerable time uninvested.

As to the question of compensation, a close examination of the file does not disclose to me the reason for the appointment of the Standard Trust Co. as guardians of the property of the infant. They were then administrators of the father's estate. The only other property to which the infant was entitled other than his interest in the estate consisted of certain insurance monies which could readily have been paid into Court, if not retained by the company until he reached the age of 21 years. They received these insurance monies, transferred a small sum on their books from the one estate to the guardianship account, paid out a small sum on the account of the infant; and the suggestion is that I should now allow them the usual trustee's commission on the infant's estate now passing through their hands. If this is continued, it would mean that they would receive this commission as administrators of the father's estate, again as guardian, and again as administrators of the deceased son's estate. I can see no duties which they would be required to perform as guardian that they could not have performed in their capacity as administrators of the estate of Samuel Newton Langley, and under the circumstances, I do not think it is a case where they should be allowed any special compensation for their work as guardians. On the passing of their accounts

Sask.

K.B.

as administrators of the estate of Samuel Newton Langley, deceased, it should be noted that no compensation has been allowed to them for their guardianship, and the work performed by them *qua* guardian or *qua* administrator, and funds handled in that way, should be taken into consideration in fixing their compensation as adminisrators of the Samuel Newton Langley estate.

On the other question, as to the rate of interest,—these funds appear to me to have been reasonably available for investment. They could have been invested in a readily convertible security realising at least 5% per annum, and I think the guardian should be charged interest at the rate of 5% per annum on the balances remaining in their hands uninvested.

It should be noted that counsel who appeared for the Standard Trust Co. purported to appear not only for them as guardians but as administrators of the father's and the deceased son's estates, otherwise there would be an absence of the parties which would prevent the issue of the order.

PERRY v. CANADIAN PACIFIC R. Co.

Saskatchewan King's Bench, Taylor, J. February 22, 1922.

MASTER AND SERVANT (§V—352) — *Assessment of damages under Workmen's Compensation Act, R.S.S.* 1920, *ch.* 210—*Notice—Time—Dismissal of previous action—Assessment after appeal—Application of Acts—Measure of compensation.*]—Application to assess damages under the Workmen's Compensation Act.

D. Buckles, K.C., for plaintiff.

J. O. Begg, for defendant.

TAYLOR, J.:—This action came on for trial before me, with a jury, at Swift Current, at the May sittings in 1921. Questions were submitted to the jury, and on their answers on June 20, 1921, I directed judgment to be entered for the plaintiff. From this judgment the defendant appealed, and the judgment was reversed and the action dismissed with costs.

The action was to recover damages for an injury sustained by the plaintiff on September 22, 1920 whilst he was employed by the defendant as an oiler in the Swift Current yards, and was commenced on December 30, 1920. Within 30 days after the decision of the Court of Appeal application was made to me, *ex parte*, to assess the damages to which the plaintiff would be entitled under the Workmen's Compensation Act, R.S.S. 1920, ch. 210, if any. I directed notice to be served, and intimated that I would hear the motion at the sittings at Swift

Current commencing on February 7, 1922, and the motion was then made. Notice was served within the 30 days, but the hearing of the application was later.

It is very clear from facts which have not been controverted in the action that the accident arose out of, and in the course of, the plaintiff's employment with the defendant company. I cannot find on the record, nor in my notes, any reference whatever to any other application having been made for compensation under the Workmen's Compensation Act, but I am quite satisfied that at the conclusion of the trial I had in mind the right of the plaintiff to compensation under the Workmen's Compensation Act, and although apparently, so far as the record goes, I expressed no finding of fact in reference thereto, I think the plaintiff is entitled to have it stated that I had in fact determined that in the event of the plaintiff not being entitled to succeed at common law he was entitled to have damages assessed under the Workmen's Compensation Act up to the limit that could be granted under that Act, as the damages which he sustained were clearly in excess thereof. It may have come up in argument, but of that I have no present recollection.

The motion to assess compensation was opposed by counsel for the defendant company on the ground, first, that the application was not made in time. I do not think there is anything whatever in the contention that the motion must be brought on for hearing within the 30 days; and the contention that under sec. 8 of the Act, that it is too late after judgment given to determine that the injury is one for which the employer would have been liable to pay compensation under the Workmen's Compensation Act, is met by the judgment in the Supreme Court of Canada in *Western Trust Co.* v. *City of Regina* (1917), 39 D.L.R. 759, 55 Can S.C.R. 628, [1917] 3 W.W.R. 1055. I refer particularly to the judgment of Duff, J., at p. 1059, (3 W.W.R. 1055):—"My conclusion is that so long as the application for the assessment of compensation is not made too late, having regard to the provisions of the Act, that application may be treated as a proceeding in the action for the purpose of enabling the trial Judge to determine, on the hearing of the application, the existence or non-existence of the elements of responsibility under the *Workmen's Compensation Act.* It is quite true that an action having been dismissed *simpliciter*, and nothing further remaining to be done in it, the action must, as a general rule, be treated as having come to an end and the Courts and Judges to be *functi officio* as regards the subjects of litigation save for the purpose of hearing and deter-

Sask.

K.B.

mining appeals. But the legislature having attached this proceeding provided for in sec. 8 as an ancillary proceeding to this particular kind of action and prescribed the time within which the proceeding is to be taken, I think it is a not unreasonable inference that the proceeding may be regarded as a proceeding 'in the action' within the meaning of sec. 8. This was the view of Mr. Justice Newlands and it is supported by the authority to which he referred: the judgment of Stirling, L.J. in *Cattermole* v. *Atlantic Transport Co.*, [1902] 1 K.B. 204, at p. 209; 71 L.J.K.B. 173; 85 L.T. 513."

It is admitted that having regard to the other provisions of the Act the application is not too late. The contention is therefore untenable.

The other ground raised by counsel for the railway company is that the provision for assessment after appeal has no application to the facts of this case. The wording of the Act is: (sec. 8)

"But the judge before whom such action is tried shall if the plaintiff so chooses, either immediately or *in case of an unsuccessful appeal* upon notice to the opposite party within thirty days after the disposition of such appeal, proceed to assess such compensation and to adjudge the same to the plaintiff."

The argument is that the plaintiff did not choose to apply immediately and that there has been no unsuccessful appeal; the only appeal in the action was that of the defendant, which was a successful appeal. This, in my opinion, is too narrow a construction to be put upon the Act. The intention of the Legislature is quite evident. It is to enable compensation to be assessed after an appeal in which it has been held that the plaintiff is not entitled to recover at common law, and to narrow the right to assess to the case where there has been an unsuccessful appeal by a plaintiff from a judgment dismissing the plaintiff's action at common law, would be to confine the right to the case where there would be less merit in the application. The wording "unsuccessful appeal" may well be extended to include an appeal in which the plaintiff has not succeeded in establishing his right to recover damages at common law and include any such appeal. That must have been the intention of the Legislature. Had the Legislature intended to limit the application of the section to a case where a plaintiff appealed from a judgment dismissing his claim, and his appeal was dismissed, it would have been very easy to so express it. As the section stands, the language used is far from satisfactory, but the intention is clear to permit an award to be made in favour

of a plaintiff who has been unsuccessful in a common law action even after appeal.

I award the plaintiff $2,000 as compensation under the Workmen's Compensation Act. It was urged that I should deduct therefrom the costs caused by the plaintiff bringing his action independently of this Act, including the costs of the appeal. The statutory provision is that the Judge "shall be at liberty to deduct from such compensation all or part of these costs." In this case, the plaintiff had one leg removed in the accident; he is without any means of support, and I cannot bring myself to the view that this is a case where these costs should be deducted from the sum awarded. He is a young man and the sum awarded will not do much more than keep up an artificial limb, with the aid of which he may be enabled to secure some employment to keep himself and his family. There will be no costs of the application.

Judgment for plaintiff.

McCABE v. LEISH.

Saskatchewan King's Bench, Bigelow, J. February 2, 1922.

LIENS (§VI—2a)—*Thresher's lien—Garnishment—Attachment of debts—R.S.S.* 1920, *ch.* 59, *sec.* 12—*Establishing right to lien—Indulgence of Court—Costs.*]—Appeal from an order of the Master in Chambers, ordering certain money paid into Court to be paid out to the plaintiff under his thresher's lien. Affirmed.

J. J. Stapleton, for Abromovitch, appellant.

G. W. Thorn, for McCabe, respondent.

BIGELOW, J.:—The plaintiff threshed defendant's grain in the fall of 1921. There is no evidence of the date of completion of the threshing, but it was within a few days of the date the defendant placed the grain in the elevator at Bethune. The first load was so placed on October 6, and the last load on October 12. The grain at that time was stored in defendant's name, and was not sold until October 29. On October 13 the plaintiff served a written notice on the defendant that he claimed a lien for his threshing and that he intended to take a sufficient quantity of the grain to secure payment of his account,—$520. Neither the document so served, nor a copy thereof, was put in evidence, and the only evidence we have of the contents of that document is the plaintiff's statement in his affidavit that he gave such written notice. It would be more satisfactory to have a copy of that notice in evidence where the validity of the lien is in question. On the evidence of the

Sask.

K.B.

plaintiff and James Rowand, the manager of the elevator, I find with some hesitation that the written notice was given, and that the contents of the notice complied with the Act. The Thresher's Lien Act, R.S.S. 1920, ch. 208.

On the same date, October 13, the plaintiff verbally notified the manager of the elevator that he had served the written notice on the defendant and that he claimed his lien for $520 on the grain in question. The defendant was present at the time, and admitted to Rowand that plaintiff was entitled to his lien on the grain, and arrangements were made between the three of them that the elevator company would pay the plaintiff out of the proceeds of the grain.

For some reason which I do not understand the plaintiff issued a writ against the defendant on October 14 for the said claim of $520 and issued a garnishee summons against the elevator company which was served on the elevator company on October 17, 1921. The grain at that time had not been sold but was later purchased by the elevator company from the defendant on October 29, 1921.

On November 16, the elevator company paid into Court in this action $24.50, and, on November 23 they paid in $534.13, in all $558.63.

On November 19, 1921, one Abramovitch began an action against the defendant in the District Court for $364.65, and recovered judgment therein on December 10, 1921 for $394.80.

On November 19, 1921, Abramovitch issued a garnishee summons in his action and served the elevator company with the same.

On November 21, 1921, plaintiff recovered judgment against the defendant for $520 debt and his costs.

I find on the file handed to me a notice as follows:—

"I, Matthew L. McCabe, of Bethune in the Province of Saskatchewan , do hereby make claim to the sum of $520 which amount has been paid into this Honourable Court under and by virtue of my claim for threshing the grain crop of the above named defendant Harold Leish in the season of 1921, my account being as follows:—52 hours threshing at $10 per hour. $520.

This claim is filed under an Act respecting Threshers' Liens, being ch. 208 of the Revised Statutes of the Province of Saskatchewan.

Dated at Bethune, Saskatchewan, this 3rd day of December, A.D. 1921.

(Sgd.) George W. Thorn. (Sgd.) M. L. McCabe."

The signature to this notice is not verified, nor is the filing stamp of the Court on it, and I do not know how it comes before me.

On December 20, 1921, the plaintiff launched this application before the Master in Chambers claiming the money in Court under the thresher's lien.

The plaintiff's right is contested by Abramovitch who claims that he is entitled to enough of the money in question to pay his judgment on account of his garnishee summons served November 19.

On December 29, 1921, the plaintiff's solicitor notified the solicitor for Abramovitch that plaintiff withdrew his claim under his garnishee. I suppose this was because the wheat not being sold at the time of the plaintiff's garnishee, there was no debt due by the garnishee, and nothing to attach, the garnishee summons was irregular. The Master ordered the money to be paid out to the plaintiff under his thresher's lien, and from that judgment Abramovitch appeals.

It is first contended that the plaintiff, having abandoned his claim under the garnishee summons, has no right under any other claim to the monies in Court.

Section 12 of the Attachment of Debts Act, R.S.S. 1920, ch. 59, is as follows:—

"Whenever it is suggested by the garnishee, or any person claiming to be interested, that the debt attached belongs to some third person or that any third person has a lien or charge upon it, the court or a judge may order such third person or any other person to appear and state the nature and particulars of his claim upon such debt."

Then para. 13 provides the procedure for determining the claim and gives authority to the judge to make such order as he thinks fit.

It will be observed that the Court or Judge may order such third person or *any other person* to appear and state the nature and particulars of his claim. I think the words "any other person" are wide enough to include the plaintiff. I can see no reason for excluding the plaintiff under such a general phrase as that.

Then it is contended that the plaintiff waived his right to a lien when he took the garnishee proceedings. A waiver must be clear and distinct. I cannot find any evidence of an intention to waive. I do not think that the garnishee proceedings which turned out to be irregular would be a waiver. Although the issue of the writ and garnishee summons was a useless expense, a creditor is entitled to pursue all his remedies at the

Sask.
K.B.

same time, and beginning one proceeding would not, in my opinion, be a waiver of the other.

Then it is contended that the plaintiff has not established his right to the lien.

Section 2 of the Threshers' Lien Act is in part as follows:—

"Every person who threshes or causes to be threshed grain of any kind for another person at or for a fixed price or rate of remuneration and who has complied with the provisions of *The Noxious Weeds Act* regarding threshing machines shall from the date of the commencement of such threshing until sixty days after the completion of the same have a lien upon such grain for the purpose of securing payment of the said price or remuneration and may after having given to the owner of the grain at least twenty-four hours' written notice of his intention so to do take a sufficient quantity of such grain to secure payment of the said price or remuneration" etc.

It is important to establish that the grain was threshed at or for a fixed price or rate of remuneration. *Bell* v. *Cross*, (1917), 36 D.L.R. 459, 10 S.L.R. 286. A claim on a *quantum meruit* would not be sufficient.

The affidavit of the plaintiff supporting his lien is as follows:—

"That I threshed the crop of the said defendant herein Harold Leish in the fall of 1921 and my account for the said threshing was $520, being made up of 52 hours at $10 per hour."

This is not evidence that the threshing was done at a fixed price or rate of remuneration, but only evidence as to how the account was made up. What is sworn to in the plaintiff's affidavit is quite consistent with a claim on a *quantum meruit*. For this reason, I do not think the plaintiff has proved his right to a lien, but as this point was not taken by counsel and as it would be making the client suffer for what is perhaps a mistake of the solicitor, I would allow the plaintiff to file a further affidavit if he can prove that he has threshed for the defendant at or for a fixed price or rate of remuneration. In granting this indulgence, I have considered the evidence of Rowand that the defendant acknowledged the lien.

Then it is contended that the lien is only good for sixty days and that the plaintiff has lost his lien because he did nothing from October 13 until December 20.

On October 13—which was within the 60 days of the completion of the threshing—the plaintiff served the written notice on defendant that he intended to take a sufficient quantity of the grain to secure payment of his account. The grain was then in the elevator, and the plaintiff and the defendant went to-

gether to the elevator manager and notified him of the lien and it was arranged between the three of them that the grain should be sold by the Elevator Company and the plaintiff's lien paid out of the proceeds.

In my opinion, what was done on that occasion was equivalent to taking a sufficient quantity of the grain to secure payment of the price. See judgment of MacDonald, J. in *Re Smith; ex parte Vancise* (1921), 63 D.L.R. 359 at p. 362. He says:—

"I am further of opinion that the lien of the thresher follows and binds the proceeds in the hands of the elevator man Mr. Nicks or in the hands of the assignee so long as such proceeds can be properly identified." (See cases there cited).

Having taken the grain within 60 days, does he lose his lien because he did not apply to get his money until after the 60 days? I think not.

Section 2 of the Act (*supra*) provides:—

"The person performing such work of threshing or procuring the same to be done shall be deemed a purchaser for value of the grain which he takes by virtue of this Act."

And sec. 4 of the Act provides that the thresher may store the grain in an elevator and after 5 days sell the same.

If Mr. Stapleton's contention is correct he would have to sell and realize his money within the 60 days. I do not think any such limitation was intended by the Act. If there was no taking of the grain within the 60 days the lien would be lost, but, having taken it within the 60 days, he is by the Act deemed a purchaser for value and may sell it after the expiration of the said time. It is perhaps not necessary for me to go as far as this, as, in this case, the elevator company sold the grain within the 60 days, and paid the money into Court, and the complaint made is that the plaintiff did not apply to get his money until after the expiration of the 60 days. At the time of the payment into Court the money to the extent of the plaintiff's claim belonged to him, and, in my opinion, it would not matter when he applied to get the same.

The appeal is dismissed and the order of the Master confirmed, directing payment out of Court to the plaintiff the sum of $520 the balance of the money to be paid to the credit of the action in the District Court,—*Abramovitch* v. *the Defendant*.

This order is only to go on the plaintiff filing within 10 days an affidavit that he threshed for the defendant at or for a fixed price or rate of remuneration. If such affidavit is not filed, Mr. Stapleton may apply to me for another order.

Sask.
K.B.

As the plaintiff only succeeds in this application because of the indulgence I am allowing him of filing a further affidavit, he will not have the costs of this appeal. If Mr. Stapleton had raised the point in question I would have allowed him the costs of the appeal, but, as he did not, there will be no costs of the appeal to either party.

Judgment accordingly.

EVANS v. HAMILTON.

Saskatchewan King's Bench, Bigelow, J. March, 15, 1922.

CONTRACTS (§IE—89)—*Sale and purchase of land—Contract to reconvey — Option agreement — Construction.*] — Action to recover under an agreement whereby defendant agreed under certain circumstances to pay back all moneys paid for property purchased and take the property off the purchaser's hands.

C. E. Gregory, K.C. and *F. C. Kent*, for plaintiffs.

W. F. Dunn, for defendant.

BIGELOW, J.:—On December 19, 1911, defendant sold to plaintiffs 3 lots in Moose Jaw for $325 each, and defendant entered into the following agreement:—

"St. John, N.B., Dec. 19, 1911.

Geo. H. Evans & W. Russell Evans,
St. John, N. B.

Gentlemen:

In consideration of your purchasing three (3) lots, each 25 ft. x 125 ft., on Lynbrook Heights, in the city of Moose Jaw, between Laurier and McDonald Sts. on Connaught Ave. Nos. 14, 15 and 16, block 23, at $325 each. I hereby agree that in the event of your desiring to sell one lot or more for any reason after six months from this date I will, upon one month's notice, pay you back all moneys paid by you for the said lots with interest at 10% per annum, and take the said lot or lots entirely off your hands.

The lots are all guaranteed high and dry and level, and good building lots in every way, and good value for the money at present ruling prices, the building is going up in their direction, and lots should raise rapidly in value.

(Sgd.) A. E. Hamilton."

In February 1921 the plaintiffs duly notified defendant that they desired to sell to the defendant all of the three lots and demanded their money, with interest, which defendant refused to pay. This action is to recover the said amount.

The defence is set up that this is only an offer which would have to be accepted within a reasonable time to be binding on

defendant. There can be no dispute about the law cited by defendant that when no time is specified in an offer, a reasonable time is implied, and where the article in question is of a fluctuating nature (such as the land was in this case) the time for acceptance must be short, and the offer remains open only for a short time, 9 Cyc. 266; *Manning* v. *Carrique* (1915), 25 D.L.R. 840, 34 O.L.R. 453.

But I cannot agree with the defendant's contention that this was an offer. If it was an offer only, it could be revoked at any time before acceptance. 7 Hals. para. 718. I do not think it can be said that this agreement could be revoked. It seems to me a definite agreement as distinguished from an offer, being part of the consideration for the purchase. It is true that the defendant was to be liable only in a certain event; viz. "in the event of the plaintiff desiring to sell for any reason after six months from this date." The agreement does seem a hard one, especially at this late date, but, where parties make foolish agreements, the Court cannot make a new contract for them.

The defendant also contends that plaintiff has lost his remedy through his long delay. No Statute of Limitations is pleaded, and it seems to me that plaintiff's rights should only be limited by a statute. *Re Baker; Collins* v. *Rhodes* (1881), 20 Ch. D. 230, 51 L.J. (Ch.) 315, 30 W.R. 858.

The plaintiff will have judgment for $975, and interest at 10% per annum from December 19, 1911, and costs.

Judgment for plaintiff.

REPETA v. SHUMSKI.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

WILLS (§IIIA—75)—*Special clause—Construction—Lands charged with maintenance of children.*]—Appeal from the decision of the trial Judge on an application for the interpretation of a will.

H. E. Sampson, K.C., for John Shumski.

T. D. Brown, K.C., for estate of Annie Repeta.

H. Fisher, for Official Guardian.

The judgment was delivered by

TURGEON, J.A.:—The question before the Court in this appeal is the interpretation of the following clause in the last will and testament of Michael Repeta, deceased:—

"I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say,

Sask.

C.A.

One half interest in the south east quarter of sec. 28 tp. 13, r. 5, west of second meridian known as the homestead to my beloved wife Annie; and the other half interest to my daughter Pazia, wife of John Shumski. My half interest in the n. e. Quarter of sec. 24, tp. 13, r. 5, west of 2nd meridian to my beloved wife Annie, and all stock and machinery of which I am possessed to be divided equally between my wife Annie and daughter Pazia. All of my other children, Mary, Annie and John must be kept and provided for and the expense—to be equally divided between their mother and sister Pazia."

Upon an application made to him in Chambers, MacDonald, J. held, (1) that the lands described in the foregoing clause of the will are charged with the maintenance of the children Mary, Annie and John, and (2), that each of the said children is entitled to such maintenance as long as the same may be necessary, both before and after attaining the age of 21 years. He made the following order respecting the land:—

"The executor and executrix should not transfer the land to the devisees without requiring from them concurrently a registrable instrument executed by the devisees charging the land with the maintenance of said children, or issuing a registrable declaratory order declaring such charge. I have declared the charge so such order may issue."

In my opinion the Judge was right in his ruling upon both questions.

In the Ontario case of *Robson* v. *Jardine* ((1875), 22 Gr. 420) Blake, V. C. at p. 424, laid down the following rule, which I think is properly deducible from the many authorities cited by him:—

"I think the cases warrant the conclusion that, where a testator gives real estate to one, whom he directs to pay a legatee named in the will a sum of money, and the devisee accepts the devise, he takes the premises on the condition that he pays the legatee; and the land is in his hands subject to this burden, and liable for the fulfilment of this obligation."

I may refer also to the decision of Wetmore, J. in *Re McVicar*, reported in 1906, 6 Terr. L.R. 363.

I think also, upon the authorities, that a charge in a will for the maintenance of children does not cease upon the children attaining the age of 21 years, unless the intention of the testator that such maintenance should so cease is made clear by the terms of the will. (*Scott* v. *Key* (1865), 35 Beav. 291, 55 E.R. 907, 13 W.R. 1030; *Booth* v. *Booth*, 63 L.J. (Ch.) 560, [1894] 2 Ch. 282, 42 W.R. 613).

In the circumstances of the case I think that the learned judge in chambers made the proper order against the land in question, and that such order should be allowed to stand. (*Re Cust Estate* (1914), 19 D.L.R. 190).

In my opinion the appeal should be dismissed and all the costs of the appeal should be paid by the appellant John Shumski.

Appeal dismissed.

THORESON v. ZUMWALT.

Saskatchewan King's Bench, Taylor, J. February 20, 1922.

MECHANICS' LIENS (§II—8)—*Agreement for sale of land on crop payments—Purchaser in possession—Material supplied and used in erection of buildings—Privity and consent of vendor—Abandonment of land by purchaser — Priority of lien for materials to claim of vendor for unpaid purchase money.*]—Action by vendor to foreclose an agreement for the sale of land.

C. E. Bothwell, for plaintiff.

A. McWilliams, for claimant.

TAYLOR, J.:—This is a vendor's action to foreclose an agreement for sale. Defence was entered by one defendant only, the Beaver Lumber Co. Ltd. and in its defence it is set up that they supplied material to Zumwalt, the purchaser under agreement for sale, used in the erection of buildings upon the land in question; that this was supplied with the privity or consent and for the direct benefit of the plaintiff, and that, therefore, they are entitled to a lien upon the lands in question in priority to the claim of the vendor for balance of unpaid purchase money. The apreement for sale was made in 1917, and the purchaser has since abandoned the land.

The purchaser was given immediate possession, although he paid only $40 down. The balance of the consideration, $7,000 was to be repaid in half crop payments. The agreement contained a further proviso in these words:—

"Agreed that the party of the second part shall in the year 1917 put up a set of fairly good farm buildings on said land, provided it be not a crop failure the said year."

It was contended that as the purchaser had some crop in 1917 there was not an absolute crop failure and from this proviso it should be found the buildings were erected with the privity and consent of the plaintiff vendor, in the meaning in which the words are used in the Mechanics' Lien Act, R.S.S. 1909, ch. 150, and the lumber company so supplying material used in the erection of the buildings was entitled to a lien under the Act on the vendor's interest in the land.

Sask.

K.B.

The purchaser had 90 acres in crop in 1917, part of which yielded only two bushels to the acre in flax, and the balance yielded a little better owing to there being a volunteer crop of wheat on it as well. In all, it yielded only about 550 bushels mixed wheat and flax. It seems to me that is a practical crop failure. It would not repay the cost of production.

The vendor was not in any way consulted in regard to the erection of the buildings. The material for which the Beaver Lumber Co. claim a lien was sold and delivered to the purchaser without reference to the plaintiff.

Two separate claims of lien were filed; one on January 18, 1918, in which the company claims a lien upon the estate of the Hudson Bay Co. in the land; the second claim on January 22, 1919, in which the lumber company claim a lien upon the estate of E. A. Zumwalt therein. Neither document suggests any claim of lien upon the interest of the plaintiff in this action; and, no proceedings having been taken thereon in all this time to realise the lien, in my opinion neither of these alleged claims sufficiently set up a claim upon the interest of the vendor Edward Thoreson. On these facts the decision of the Court *en banc* in *Northern Plumbing & Heating Co.* v. *Greene* (1916), 27 D.L.R. 410, is decisive against the lien claimants.

On the other ground, that the provision in the agreement was sufficient to enable the lien claimants to charge the interest of the vendor in the lands, *Orr* v. *Robertson* (1915), 23 D.L.R. 17, 34 O.L.R. 147, was cited. At first blush this case does give some support to the contention, but the judgment, which was given for the Appellate Division in Ontario by Riddell, J. is explained by him and the report corrected in *Marshall Brick Co.* v. *Irving* (1916), 28 D.L.R. 464, 35 O.L.R. 542. The facts in this latter case more strongly support the lien claimants than those in the case at Bar, and it was held that the vendor's interest could not be charged. The decision was affirmed under the name of *Marshall Brick Co.* v. *York Farmers' Colonization Co., in* (1917), 36 D.L.R. 420, 54 Can. S.C.R. 569, in which Anglin, J. states, at p. 427:—"after carefully reading all the authorities cited I accept as settled law the view enunciated in *Graham* v. *Williams,* 8 O.R. 478; 9 O.R. 458 and approved in *Gearing* v. *Robinson,* 27 A.R. (Ont.) 364 at 371, that privity and consent involves something in the nature of a direct dealing between the contractors and the persons whose interest is sought to be charged . . . . Mere knowledge of, or mere consent to, the work being done is not sufficient."

If further authority were required reference might be made to *Flack* v. *Jeffrey* (1895), 10 Man. L.R. 514; *Hoffstrom* v.

Stanley (1902), 14 Man. L.R. 227, and *Anderson* v. *Godsal* (1900), 7 B.C.R. 404.

An argument was advanced that the words "privity and consent" used in the judgment of Anglin, J. *supra*, should be construed differently from "privity or consent" used in the Saskatchewan Act. The wording under consideration in *Gearing* v. *Robinson* (1900), 27 A.R. (Ont.) 364 referred to by Anglin, J. was "privity or consent." To adopt the language of Boyd, C. in *Graham* v. *Williams* (1884), 8 O.R. 478, which has been accepted as the guiding principle, the Act intends a dealing of some kind between the contractor and the owner resulting in a contract, express or implied; and, in the absence of such a dealing between the vendor of the land and the vendor of the materials sold for use in the construction of the buildings on the land that therefrom a contract express or implied can be found as a fact, the lien given by supplying material is limited to the estate of the purchaser in the land and cannot be maintained as a charge upon the interest of the vendor of the land.

I did not understand from counsel for the lien claimants that in the event of it being held that any claim of lien they might establish is subsequent to the vendor's claim for unpaid purchase money, that they desire to redeem. Their defence sets up no such plea, and it would appear that the order for cancellation of the contract and barring the interest of any person claiming through or under Zumwalt is sufficient to bar the interest of these lien claimants. Leave will be given, however, to the parties to apply if deemed advisable to a Judge in chambers or the Local Master for further directions.

In the issue tried before me the Beaver Lumber Co. fails; their claim to priority is dismissed with costs on the King's Bench low scale.

Judgment accordingly.

McPHERSON v. BAILEY.

Saskatchewan King's Bench, Taylor, J. February 23, 1922.

Liens (§I—2)—*Seed Grain—Supply of to purchaser under crop payment sale—Consent of owner—Special conditions—Municipalities Seed Grain Act, Sask.* 1917 — *Cancellation of agreement—Rights of parties.*]—Action for cancellation of an agreement for the sale and purchase of land on a crop payment plan, claim of municipality that land charged with the price of seed grain.

Sask.

K.B.

D. Buckles, K.C., for plaintiff.

C. E. Bothwell, for defendant Bailey.

J. E. Friesen, for defendant R. M. of Clinworth.

TAYLOR, J.:—This action was brought for cancellation of an agreement made by the plaintiff with the defendant Bailey on July 12, 1917, for the sale and purchase on the half-crop payment plan of certain lands therein named. In April, 1919, the defendant, the Rur. Mun. of Clinworth No. 230, advanced to Bailey seed grain of the value of $289.22, and there is still a balance due them therefor of $136.93, with interest on $128.37 at 8% per annum from September 1, 1920. Caveat was filed under the Municipalities' Seed Grain Act, 1917, ch. 47, 2nd sess. and this municipality made a party defendant by reason thereof.

The municipality claims that by reason of the supply of the seed grain which was sown on the said land that it has a charge thereon in priority to any claim of the plaintiff, as it is alleged that the seed grain was supplied with the approval of the plaintiff. The facts and documents have all been admitted. All other questions in the action have been disposed of, leaving only this claim of this defendant to be dealt with.

On January 1, 1919, Bailey applied to the municipality for seed grain. On January 8, the plaintiff was advised in writing that this application had been made, and as follows:—

"Now under the Seed Grain Act we cannot advance him anything without your permission but if you will send us authority properly attested the council will help on the usual conditions. Seed grain liens and notes on demand and caveats will be filed, etc."

No answer to this was put in evidence. On February 6 a second letter was written the plaintiff by the municipality:—

"We are still without your consent for the supply of seed for this land. Now this man has shown the Board that it is morally impossible for him to finance this deal, and the Hudson Bay are giving their consent. It is not you that will have to repay it, it is your tenant, so not as to hold him up send along your letter to help things along."

On March 16, 1919, the plaintiff sent to the municipality a letter in the following words:—

"Please supply Edward Bailey with seed grain for north half 36-22-23, west 3rd, as follows, viz: wheat 65 bushels, oats 35 bushels, flax 30 bushels. Please secure payment against his half of grain yield only and oblige. (Signed) Alex. McPherson."

It will be noted that this letter does not purport to be written as an answer to the letter of February 6, 1919, nor does the admission of facts state that no other communication passed between the parties. That can only be inferred from the fact that no others have been put in evidence.

The claim of the defendant to priority is based upon the Municipalities Seed Grain Act of 1917, the Act in force at the time the grain was supplied. The amendment made in ch. 40 of 1920, assented to December 15, 1920, directed to operate retrospectively and apply to charges theretofore as well as to charges thereafter created, provided that nothing therein contained should affect the rights of any parties in an action or other proceeding then pending, and as this action was commenced in November, 1920, that amendment would not apply, as it was then a pending action.

Sub-section 2 of sec. 16 of the Municipalities Seed Grain Act 1917, provided,

"No application for seed grain by a tenant or occupant who is not the owner of the land shall be granted unless the application is approved in writing by the registered owner of the land."

It is admitted that the plaintiff was the registered owner of the land, and the Court of Appeal has recently decided in *Shebley* v. *Rur. Mun. of Mervin* (1922), 63 D.L.R. 632, that a purchaser of land in the position of the purchaser in this action is not an owner within the meaning of this subsection. It will be noted, however, that the provision of the statute does not require from the registered owner anything more than a written approval. It does not in terms require that he should undertake that his interest in the land should be bound, or do more than approve of the action of the municipality in furnishing the seed grain to the occupant. Section 15 of the 1917 enactment provided that any sum owing to the municipality for seed grain advanced should be a charge upon the land upon which such seed grain was intended to be sowed.

What will constitute an approval in writing by the vendor? The seed is not to be supplied by him, but to the occupant of the land to whom he is in no way bound to supply seed, who is undertaking to procure it on his own credit and responsibility. Now it is contended that if the municipality supplied the seed with the approval of the vendor the cost thereof becomes a charge upon the vendor's interest in the land from which it follows that it is supplied, not on the purchaser's credit only but on the security furnished by the vendor. It is analogous to the act of the agent binding his principal's interest in the

Sask.

K.B.

land, and the approval closely resembles ratification. It is used, it seems to me, in the same meaning as the word was used in *Davis* v. *Corporation of Leicester,* [1894] 2 Ch. 208, 63 L.J. (Ch.) 440, 42 W.R. 610. There, the right of the defendant corporation to sell certain lands was conditioned on the approval of the Treasury. Lots had been offered for sale under a scheme involving building restrictions. The restrictive conditions were not brought to the notice of the Treasury when its approval was sought and given to the sale, and it was held that the purchaser could not enforce these conditions. It was argued that the Treasury had constructive notice of the conditions, and I quote from Kay, L.J., at p. 234, language which seems appropriate to the statute under consideration:—

"But I never yet heard that the doctrine of constructive notice had been pushed so far as to say that when a body in the position of the Treasury in this case had such constructive notice, they must be taken to have approved of that of which they had constructive notice. I should have thought that the doctrine which has always been observed in cases of election, waiver, and the like, viz: that in order to fix a person with election or with waiver of a right it must be made out that he had full knowledge of all the facts and of his rights, would apply *a fortiori* to a case of this kind. Before you can possibly fix the Treasury with approval of this building scheme, you must shew that the Treasury had not merely constructive notice of it, but that they had full knowledge of it, and deliberately and intentionally signified their approval of it."

In my opinion, it cannot be said from the correspondence put in evidence in this action that the plaintiff had full knowledge of the proposed arrangement to furnish seed grain to his purchaser; of an arrangement that not only was the purchaser's interest in the land to be charged, but also that the plaintiff's interest should likewise be charged with the purchase price, and with full knowledge of this arrangement deliberately and intentionally signified his approval thereof in writing.

In the letter of February 6, 1919, sent by the municipality to the plaintiff, they do not ask for his approval of any such arrangement. They ask his consent to the supply of the seed for the land, but there was added: "It is not you that will have to repay it, it is your tenant." And whilst the first part of the plaintiff's letter to the representatives of the municipality, on March 16, 1919, is an absolute request to supply Bailey with this seed grain, it is coupled with the request to "secure payment against his half of grain yield only," and I cannot follow the argument that this letter can be construed into an

approval of an arrangement to supply the purchaser Bailey with grain, the price thereof to be charged against the vendor's interest in the land.

The claim of the rural municipality for personal judgment against the plaintiff McPherson, and to have it declared that for the balance due for seed grain they are entitled to a charge on the plaintiff's interest in the land, must be dismissed. Their charge is limited to the interest of Bailey therein. It was not suggested that the rural municipality desired in the event of their claim to priority being dismissed to redeem the land, and I take it from the way in which the facts are stated that no such claim is advanced.

The defence of the rural municipality setting up claim to priority, and its counterclaim, will, as against the plaintiff, be dismissed with costs. As against the defendant Bailey, the rural municipality will have judgment for $136.93, with interest on $128.37 at 8% per annum from September 1, 1920 until this date, with costs of entering default judgment for the said sum on the scale appropriate to the said amount in a District Court action therefor. He did not appear in the action or on the counterclaim, and counsel appearing for him did not ask for any costs.

Judgment accordingly.

O'DONNELL v. CANADIAN NATIONAL RAILWAYS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. December 14, 1921.

ESTOPPEL (§IIC—36)—*Master and servant — Action for damages for personal injuries — Action dismissed — Damages assessed under Workmen's Compensation Act, R.S.S.* 1920, *ch.* 210—*Effect of on right of appeal from dismissal of action.*]—Application to quash an appeal. Application granted.

T. A. Lynd, for appellant.

A. M. McIntyre, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The application to quash the appeal should be granted.

The notes of the proceedings at the trial shew quite clearly that, on the dismissal of the action, counsel for the plaintiff asked for assessment of compensation under the Workmen's Compensation Act, R.S.S. 1920, ch. 210. This application was granted, and compensation was assessed and awarded by the trial Judge at $2,000, with costs on the District Court scale, with the usual right to set off costs to the respondents.

Sask.

C.A.

If there were any doubt from the official reporter's notes as to what transpired at the trial, and I do not think that there is, the notes of the trial Judge are conclusive on the question, and they shew that assessment was asked for and compensation was awarded as above set out.

The case, therefore, comes clearly within the decision in *Dalrymple* v. *C.P.R.* (1920), 55 D.L.R. 166, 13 S.L.R. 482, which followed the decision in *Neale* v. *Electric & Ordnance Accessories Co.*, [1906] 2 K.B. 558, 75 L.J. (K.B.) 974.

The notice of appeal should, therefore, be set aside and the appeal quashed. The respondent will have the right to set off the costs of the motion and of the appeal against the amount of compensation awarded.

Application granted.

DEANS v. ORR.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 16, 1922.

EXECUTORS AND ADMINISTRATORS (§IIA—10)—*Instructions to solicitors to advertise for tenders for real estate property—Mistake on part of solicitors as to instructions—Tender made to solicitors—Tender also made to one of executors—Unauthorised acceptance by solicitors of tender made to them—Validity of contract.*]—Appeal from the decision of a Judge in Chambers upon an application for the opinion of the Court, made by one of the executors and trustees of an estate. Reversed.

J. F. Frame, K.C., for appellant.

F. F. MacDermid, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—This is an appeal from the decision of a Judge in Chambers upon an application for the opinion, of the Court made by one of the executors and trustees of the late James Orr.

Under the will of the late James Orr, James Deans and J. F. Orr were appointed executors. They found they could not agree as to the manner in which the estate should be wound up. So great was the divergence of view, that on the argument before us both parties, through their counsel, agreed that the proper thing to do under the circumstances was to have a trust company administer the estate instead of the executors, and they both agreed to renounce their rights as executors and trustees under the will in favour of the National Trust Co., which company had been appointed receivers by the order appealed from.

They also agreed that the order should contain a provision directing the executors to pass their accounts and hand over the estate to the said company and to have title to the properties vested in it.

At the close of the argument two questions only were left for our determination:—(1) Was the acceptance by the solicitors of the executors of the tender of John Wier for $5,100, for lot 22, concession 16, township of Egremont, in the Province of Ontario, binding upon the executors, and had a valid contract been thereby constituted, and (2), What order under the circumstances should be made as to costs?

On August 13, 1920, the plaintiff and defendant instructed Ferguson & MacDermid & Co. in writing to advertise in certain eastern papers for tenders for said lot 22. They supplied their solicitors with a form of tender to be used, which contained the following clause:—

"Tenders to be forwarded not later than Sep. 30, to Ferguson & MacDermid, solicitors for the executors, Saskatoon, Sask. or to executors James Deans, Greenan, Sask. J. F. Orr, McGee, Sask."

The solicitors pursuant to these instructions inserted a notice in the papers mentioned that tenders would be received by "the *undersigned* up to and including Sep. 30th" etc. The "undersigned" was the firm of solicitors. No mention was made in the advertisement that tenders might be forwarded to either of the executors. On September 13, John Weir wrote to the solicitors as follows:—

"In reply to your advertisement in the Mount Forest Confederate and Representative for the sale of lot number 22, concession 16, Egremont township, I beg (subject to terms as to possession on being satisfactory) to offer the sum of five thousand one hundred dollars for same.

Your advertisement does not state the date when possession is to be given but I make this offer on the condition that I would get possession not later than April 1, 1921. I would also like to know the terms of payment but presume you would require a small payment down and the balance when possession would be given. I would be obliged if you would advise me as to terms and date of possession by return mail. Also please advise me if the purchaser will be allowed to do full plowing this year."

This letter the solicitors received on September 17, and a copy thereof was immediately sent to each of the executors. On September 20, Deans replied as follows:—

Sask.
C.A.

"For the sale of lot 22 concession 16 Egremont Ont. Terms $500 cash with possession this fall when the crop is off; to go on and plough balance of payment cash, or soon after possession is given."

On September 23, the defendant Orr replied as follows:—

"Have consulted with Mr. Deans and we agree that possession would be given not later than Ap. 1 1921 or sooner if required. $500 cash payment balance when possession is given, purchaser would be allowed to do ploughing or any other improvements."

On September 20 one Wilson, the tenant of said lot 22, forwarded a tender for $5,100 to J. F. Orr, and at the same time authorised him to increase the tender to an amount which would be $100 above any other tender, but not to exceed $6,050. This tender was received by Orr on September 28, but being busy with his threshing operations, he did not notify either Deans or the solicitors that he had received it until October 26. In the meantime the solicitors, interpreting the acknowledgement from the executors as instructions to accept Wier's offer, notified him that his tender had been accepted. On this being made known to the defendant Orr he denied having agreed to such a course and forwarded to the solicitors Wilson's tender.

In view of the fact that according to the instructions given, tenders might be forwarded to the solicitors or to either of the executors, which instructions the defendant Orr was entitled to assume had been carried out, I cannot find in his letter of September 23 anything that could be construed into an acceptance of Wier's tender, or any instructions to the solicitors to accept it. As Orr had reason to believe that he, as one of the executors, was the proper person under the advertisement to receive Wilson's tender, there was no obligation upon him to immediately make it known to the solicitors. Under the circumstances, I do not think the solicitors had any authority to notify Weir that his tender had been accepted. There was therefore no binding acceptance of Wier's tender, and, consequently, no contract of sale.

As the whole trouble here seems to have arisen through a misinterpretation by the solicitors of their instructions, costs of both parties, both in the Court below and before us should be paid out of the estate.

The appeal should, therefore, be allowed, and the judgment below set aside and an order made in accordance with the agreement of the parties and this judgment.

Appeal allowed.

GOEBEL v. CANADIAN BANK OF COMMERCE.

Sask.

C.A.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ A. January 16, 1922.

COSTS (§I—19)—*Conversion—Dismissal of action—Sale of goods after seizure not conducted as prescribed by statute—Defendant deprived of costs — Appeal — Discretion of trial Judge.*]—Cross appeal by respondent on the question of costs in an action for the conversion of grain (1921), 61 D.L.R. 402. Cross appeal dismissed.

W. Blain, for appellant; *H. E. Ross*, for respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—This action was brought by the appellant for the conversion of a quantity of oats. The action was dismissed by Brown, C.J.K.B., 1921, 61 D.L.R. 402, on the ground that the respondent bank had a right to the oats by virtue of a lien for advances for purchasing seed grain under the Bank Act, (Can.) ch. 9 of 1913 While he dismissed the appellant's action, the Chief Justice did not allow the bank its costs of the action, on the ground that the sale of the oats after seizure under the lien was not conducted in the manner prescribed by the statute. The respondent has cross-appealed on the question of costs.

In my opinion, the discretion exercised in depriving the appellant of the costs of the action should not be interfered with. The provisions of the statute were not complied with in an important particular, and in depriving the appellant bank of its costs of action the Chief Justice has very properly emphasised the necessity for a strict compliance with the statutory provisions governing the exercise of an extraordinary right.

I would, therefore, dismiss the cross-appeal with costs to be set off against the respondent's costs of appeal.

Cross-appeal dismissed.

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INDEX

ABRIDGMENT OF COMPANY LAW OF CANADA—
(**Annotation**) 1

ADMIRALTY—
Exchequer Court in Admiralty—Appeal from Local Judge in Admiralty—Questions of fact—Interference with judgment 543
Judgment in—Release of ship—Appeal—Re-arrest of ship—No evidence of removal from jurisdiction 687

ANIMALS—
Stray Animals Act, R.S.S. 1920, ch. 124—Application of Act—By-law passed in compliance with—Horses on highway in charge of a herder—Sudden and unusual action on part of one of horses—Injury to motor car—Liability of owner of horses 323

APPEAL—
Intoxicating liquors—Alberta Liquor Act—Appeal from conviction—Time for giving notice—Extension of time—The Liquor Act, 1916 (Alta.), ch. 4, sec. 41—Criminal Code sec. 750 663

ASSIGNMENT—
Of insurance policy—Verbal—Consideration of marriage—Death of insured—Failure of consideration—Gift—Failure of insured to divest himself of legal title—Validity...... 282

AUTOMOBILES—
Motor cars approaching one another in same deep rut in highway—Duty of drivers—Negligence—Liability 395

BAILMENT—
Contract—Obligation of Crown as bailee—Reasonable care—Tort—Contractual relationship 134

BANKRUPTCY—
Assignment to bank of existing and future book debts—Registration of instrument not required in Ontario—Assignment under Bankruptcy Act — Right acquired by trustee—Bankruptcy Act 1919, ch. 36, sec. 30, as amended by 1921 (Can.), ch. 17, sec. 25 58
Bankruptcy Act Amendment Act, 1921 (Can.), ch. 17—Construction—Lien agreements for goods purchased—Right of authorised trustee to possession and control—Rights of lien creditors 346
Mortgage under Saskatchewan Land Titles Act—Preference under Bankruptcy Act—Validity—"Transfer"—Meaning of—R.S.S. 1920, ch. 67, sec. 2 (14)—1920 (Can.), ch. 34, sec. 31 (1), (2)—Construction 352

BANKS—

Judgment against customer—Note taken for amount due—Excessive rate of interest charged—Fraud in collection of collateral—Liability of bank 688

Note discounted—Customer's account credited—Proceeds of note used to pay off customer's debt to other customers also indebted to bank—No authority to make payments—Liability 659

BROKERS—

Purchase and sale of American stocks in New York—Balance due to customer on closing accounts—Right to be paid in United States currency 203

Real estate agent obtaining terms of sale of property—Refusal of owner to list property with him—Agent finding purchaser—Liability of owner for commission on sale...... 602

Sale of grain—Future delivery—Failure to deliver—Purchase by broker to cover shortage—Liability of seller—Damages. 438

CANADA EVIDENCE ACT—

Breach of—New trial 629

CARRIERS—

Blow-out on street car—Fright of passengers—Rush to leave car—Injury—Negligence of company—Art. 1053 (Que.) C.C. 391

Child on street car—Car stopping in usual place—Child injured while alighting—Negligence of carrier—Contributory negligence of passenger — Evidence — Finding of jury not justified by—Appeal 251

CASES—

American-Abell Engine & Threshing Co. v. McMillan, 42 Can. S.C.R. 377, applied 352

Atlantic Realty Co. v. Jackson, 14 D.L.R. 552, followed 428

Barthe v. Alleyn-Sharples, 54 D.L.R. 89, 60 Can. S.C.R. 1, followed 397

Barthelmes v. Bickell, 20 O.W.N. 254, reversed, 19 O.W.N. 97, restored 203

Board v. Board, 48 D.L.R. 13, [1919] A.C. 956, applied 121

Boyle v. Seguin, 57 D.L.R. 402, reversed 369

Brabant & Co. v. The King, [1895] A.C. 632, 64 L.J. (P.C.) 161, 44 W.R. 157, applied 135

British Columbia Electric R. Co. v. Loach, 23 D.L.R. 4, [1916] 1 A.C. 719, distinguished 251

Brown v. Brown, 14 B.C.R. 142, not followed 121

Canadian Grain Co. v. Mitten Bros., 57 D.L.R. 464, affirmed.... 438

Cox v. Burbidge, 13 C.B. (N.S.) 431, 143 E.R. 171, followed.... 323

Cramp v. Cramp, [1920] P. 158, followed 332

Croydon Commercial Gas Co. v. Dickinson, 1 C.P.D. 707, followed 187

Davidson v. Frayne, 9 B.C.R. 369, followed 628

E. v. F., 11 O.L.R. 582, applied 363

CASES—Continued.

Eyre v. Bartrop, 3 Madd. 221, 56 E.R. 491, distinguished...... 187
Fraser v. Aztec, 52 D.L.R. 175, 56 D.L.R. 440, affirmed 543
Freeburg v. Farmers Exchange Bankers, 61 D.L.R. 79, 14 S.L.R. 342, affirmed 143
George v. Skivington, L.R. 5 Ex. 1, 39 L.J. (Ex.) 8, followed.. 63
Goebel v. Canadian Bank of Commerce, 61 D.L.R. 402, 14 S.L.R. 451, applied 359
Hall v. Hall, 60 L.J. (P.) 73, followed 332
Hallett's Estate, Re., 13 Ch. D. 626, applied 359
Hobbs v. E. & N.R. Co., 29 Can. S.C.R. 450, distinguished 614
Holme v. Brunskill, 3 Q.B.D. 495, followed 187
Jamieson, Re., 61 D.L.R. 312, reversed 365
Keats v. Keats, 1 Sw. & Tr. 334, 164 E.R. 754, followed 332
Mackay and The Public Works Act, Re, 58 D.L.R. 332, affirmed 171
Mackenzie v. Palmer, 56 D.L.R. 345, 14 S.L.R. 117, reversed.... 362
McMillan v. C.N.R. Co., 56 D.L.R. 56, affirmed 257
Moran v. Moran, 52 D.L.R. 339, followed 332
Napier v. Napier, [1915] P. 184, followed 680
Ogle v. Vane, L.R. 3 Q.B. 272, followed 618
Oppenheimer v. Attenborough, [1908] 1 K.B. 221, applied 529
Osborne v. Morgan, 13 App. Cas. 227, applied 369
Paisley v. Loc. Imp. Dist. No. 399, 56 D.L.R. 221, affirmed 242
Pedric and Palen, The King v., 59 D.L.R. 315, 21 Can. Ex. 14, distinguished 237
Peterson v. Bitzer, 57 D.L.R. 325, reversed 182
R. v. Cyr, 38 D.L.R. 601, 12 Alta. L.R. 320, considered........ 605
R. v. U.S. Fidelity, 60 D.L.R. 372, affirmed 469
Rice v. Reed, [1900] 1 K.B.D. 54, applied 529
Ross v. Dunstall, Ross v. Emery, 29 Que. K.B. 476, affirmed.... 63
Rouse v. Bradford Banking Co., [1894] A.C. 586, applied 672
Royal Trust Co. v. Fairbrothers & Valentine, 60 D.L.R. 528, affirmed 637
St. Paul Lumber Co. v. British Crown Ass'ce Co., 62 D.L.R. 587, reversed 386
Samuel v. Black Lake Asbestos and Chrome Co., 58 D.L.R. 270, 48 O.L.R. 561, reversed 617
Scott v. Scott, 4 B.C.R. 316, not followed 121
Secrest v. Secrest, 5 D.L.R. 833, followed 337
Sharpe v. Sharpe, 1 B.C.R. 25, followed 341
Smith v. Provincial Treasurer of Nova Scotia, 47 D.L.R. 108, 58 Can. S.C.R. 570, followed 397
Soules v. Doan, 39 U.C.Q.B. 337, considered 605
Spriggs v. Spriggs, 60 D.L.R. 563, reversed 279
Strong v. Foster, 17 C.B. 201, 139 E.R. 1047, applied 672
Swan v. C.N.R. Co., 1 Alta. L.R. 427, considered 605
Taylor v. Plumer, 3 M. & S. 562, applied 359
Touhey v. Medicine Hat, 7 D.L.R. 759, 5 Alta. L.R. 116, considered 605
Traders Bank v. Goodfallow, 19 O.R. 299, applied 359

CASES—Continued.

Turner v. Coates, [1917] 1 K.B. 321, distinguished 323

Tyres v. Rosedale Iron Co., L.R. 10 Ex. 195, distinguished 618

Upper Canada College v. Smith, 57 D.L.R. 648, 61 Can. S.C.R. 413, distinguished 233

Veilleux v. Boulevard Heights Ltd., 26 D.L.R. 333, 52 Can. S.C.R. 185, applied 457

Waddington v. Neale, 23 T.L.R. 464, applied 529

Walker v. Walker, 48 D.L.R. 1, [1919] A.C. 947, applied 121

Weldon v. Winslow, 13 Q.B.D. 784, considered 605

Williams v. North Battleford, 4 S.L.R. 75, applied and followed 452

Wolfe Co., The, v. The King, 57 D.L.R. 266, affirmed 647

CAVEAT—

See Land Titles.

COMPANIES—

Company law in Canada (**Annotation**) 1

Sale of shares before certificate permitting it to do business—Illegality—Sale of Shares Act (Sask. Stats. 1916, ch. 15)—Construction—Liability of shareholders 457

CONFLICT OF LAWS—

Master and servant—Servant domiciled in Ontario—Accident in Ontario—Action in Saskatchewan—Jurisdiction of Court—Right of action in Ontario taken away by Workmen's Compensation Act 257

CONSTITUTIONAL LAW—

Construction of statutes—Importation of alcoholic liquors by a Province for sale—1921 (B.C.), ch. 30—B.N.A. Act 1867, sec. 125—"Taxation"—Customs duties—Exemption 82

Divorce—Right of Appeal from King's Bench decision—B.N.A. Act, sec. 92 (14)—Court of Appeal Act, R.S.M. 1913, ch. 43—King's Bench Act, R.S.M. 1913, ch. 46—Construction.... 120

Quebec Alcoholic Liquor Act—Que. Stats. 1921, ch. 22—Construction—Validity 177

CONTRACTS—

Agricultural co-operative associations—Purchase of goods on credit — Illegal by statute — Agricultural Co-operative Associations Act, R.S.S. 1920, ch. 119 — Construction—Return of goods purchased—Liability of purchaser 498

Construction—Agreement to "take good care in every way" of horse for winter—Horse unbroken—Horse put with others in field enclosed by two wire fences—Escape and loss of horse—Liability—Custom of farmers in district to let horses run at large for winter 399

Construction—Purchase of ore—Time for delivery—Extension—Breach—Damages—Measure of compensation 617

Reformation of—Justification—Mistake—Evidence 545

Reformation of—Sale of land—Mutual mistake—Impossibility of performance 637

CONTRACTS—Continued.

Remodelling of public building—Tenders—Specifications—Sub-contract by contractor obtaining contract—Specifications submitted to sub-contractor incomplete—Instructions by contractor to do the work and "I will see you paid"—Construction—Liability—Statute of Frauds—Evidence .. 115

Sale and purchase of land—Contract to reconvey—Option agreement—Construction 710

Sale of goods—Establishment of by telegrams—Definiteness—Failure to deliver—Damages 414

To farm land—Crop payment—Construed as lease—Right of tenant to deliver grain to thresher in payment for charges of threshing on other land—Delivery of extra amount of grain to elevator—Rights of owner against thresher and elevator company 507

To pay for part of fisherman's outfit if he will sign on for fishing trip—Fisherman signing on and making trip—Contract collateral to hiring agreement—Enforcement of—Consideration — Evidence 437

Vendor and purchaser—Oral agreement—Memorandum in writing—Sufficiency—Statute of Frauds 182

CONVERSION—

See Trover.

COSTS—

Conversion—Dismissal of action—Sale of goods after seizure not conducted as prescribed by statute—Defendant deprived of costs—Appeal—Discretion of trial Judge 723

Taxation of—No action brought—Application for to be made to Supreme Court Judge—Legal Profession Act, Alta. Stats. 1907, sec. 59, ch. 20 269

COURTS—

County Judge—Application for possession of lands under Landlords and Tenants Act (Man.)—Taxation of costs—Jurisdiction of Judge—Delegation of power to fix reasonable costs 540

Jurisdiction of divorce actions—Fiat for interim alimony—Formal order not in accordance with fiat—Application to amend—Appeal 337

CRIMINAL LAW—

Conviction by police magistrate—Sec. 285c of the Crim. Code—Appeal to District Court Judge—Dismissal of appeal by Judge—Suspension of sentence—Jurisdiction 163

CROWN—

Liability for torts—Common law rule—Public Utilities Act, Alberta Stats. 1915, ch. 6, sec. 31 (2)—Liability under—Loose wire on Government telephone system—Injury to traveller—Liability 478

CROWN LANDS—

License of occupation—1849 (Can.), ch. 9, sec. 1—1853 (Can.), ch. 159, sec. 6—Interpretation—Powers of Commissioner of Crown Lands exercised by Governor in Council—Validity 537

CURRENCY—

Policy of insurance made in New York and payable in New York—Assured domiciled in Nova Scotia—Payment of exchange by company 475

Purchase and sale of American stocks in New York—Employment of Toronto broker acting through New York agent—Balance due to customer on closing accounts—Right to be paid in United States funds 203

DAMAGES—

Purchase of tractor — Purpose for which purchased made known—Failure to do work required—Purchaser under agreement to do work—Necessity of hiring work done—Measure of compensation 161

DIVORCE AND SEPARATION—

Action by husband—Interim alimony—Poverty of parties—Order for payment by Judge of King's Bench—Appeal 337

Adultery—Condonation—Meaning of—Proof 332

Alimony—Action for judgment—Failure to make payments—Execution for arrears not barred by Statute of Limitations 158

Divorce action—Wife petitioner—Application to compel respondent to deposit a sum to secure costs of suit—Jurisdiction of Court to grant 341

Divorce rules of British Columbia—Rule 26—Application—Jurisdiction of Court to grant application for examination of witnesses in support of petition for permanent alimony before the trial of the cause 341

Grounds—Refusal to allow marital intercourse 680

Right of appeal from decision of King's Bench of Manitoba .. 120

Sask. Rules — No appearance entered or defence filed—Necessity of proving case at trial 279

ERRATA—

Substitute for the word "realised" in 63 D.L.R., page 109, in the fourth line from the bottom of page, the word "released."

ESTOPPEL—

Fixing boundaries of street — Purchaser applying to town council—Chairman of street committee pointing out street line—Erection of building—Line subsequently changed so as to encroach on owner's land—Right of council to deny line as first fixed—Towns' Incorporation Act, R.S.N.S. 1900, ch. 71—Construction—Damages 306

Master and servant—Action for damages for personal injuries —Action dismissed—Action assessed under Workmen's Compensation Act, R.S.S. 1920, ch. 210—Effect of on right of appeal from dismissal of action 719

EVIDENCE—

Confessions and admissions—Warning by arresting officer—Subsequent statements to magistrate and other persons in authority—Proof that statement made voluntarily 146

Exchange of lands—Contract as to—Action for breach—Contract relied upon to support claim—Document produced containing material alteration—Burden of proof on party producing to prove that alteration made with consent of defendants 154

Mortgage debt—Promissory notes given—Payment of notes—Notes given as collateral—Lapse of time—Affirmative and negative evidence—Preference 696

Statement by accused to person in authority—Prisoner's protestations of innocence with accompanying statement of facts—Necessity of warning if statement is to be used to shew guilt 146

Trial—Divorce action—Copy of evidence used at former trial—Order of Judge in Chambers authorising use—Right of trial Judge to reject 279

EXECUTORS AND ADMINISTRATORS—

Instructions to solicitors to advertise for tenders for real estate property—Mistake on part of solicitors as to instructions—Tender made to solicitors—Tender also made to one of executors—Unauthorised acceptance by solicitors of tender made to them—Validity of contract 720

Remuneration—Double commissions—Rate of interest allowable on funds held by administrator and not invested 700

EXEMPTIONS—

Homestead—Purchase of—Initial payment made by wife—Other payments made by husband—Title to property put in wife's name—Insolvency of husband—Execution against—Right of creditors against homestead—R.S.S. 1909, ch. 142, sec. 37—Land Titles Act, R.S.S. 1920, ch. 67, sec. 150 (2)—Construction 97

EXPROPRIATION—

Harbour improvements—Previous expropriation—Undertaking to grant easement in mitigation of damages—Undertaking unfulfilled — Subsequent expropriation by the Crown—Assessment of damages in view of undertaking giving an enhanced value to the lands 402

GIFT—

Inter vivos—*Donatio mortis causa*—Sufficiency of—Necessity of delivery 523

HIGHWAYS—

Control assumed by municipality—Road graded and culvert put in—Road seldom used—Holes in road constituting a trap—Observation obscured by weeds—Liability for damages—Traveller using road with reasonable care 674

Ditch at side of highway—Accident to motorist—Degree of repair necessary—Rural Municipality Act, R.S.S. 1920, ch. 89, sec. 196—Construction 452

ILLEGITIMACY—

Child born in England—Parents subsequently married in and domiciled in Alberta — Right of parents to have child registered under Vital Statistics Act, 1916 (Alta.), ch. 22, sec. 18 365

INDEMNITY—

Agreement to guarantee debt to bank—Bond to indemnify to extent of one-third of amount for which ultimately liable —Payment of indebtedness to bank — No settlement of accounts—Liability under indemnity bond 214

INFANTS—

Illegitimate child—Mother paying for its support—Application by mother for custody—Person having charge of child willing to keep it—Mother having no permanent home—Best interests of child 430

INJUNCTION—

Agreement between company and employees as to wages—Termination of agreement—Notice of reduction in wages —Refusal to accept—Application to Board of Conciliation under Industrial Disputes Investigation Act—Application for injunction restraining enforcement of new schedule—Sec. 57 of Act—Right of Dominion Parliament to pass—Applicability 274

INSURANCE—

Breach of warranties and conditions in application for—Deception of company—Loss—Liability 386

Fire insurance on house and furniture—Change in use of building—Vitiation of policy—Insurance on stock while in particular building—Removal to another building 456

Policy of insurance made in New York and payable in New York — Assured domiciled in Nova Scotia — Payment in United States currency 475

Promissory note given for premium due—Note paid after death of assured—Clause in policy as to reinstatement—Evidence of insurability necessary—Right of beneficiary.. 107

INTOXICATING LIQUORS—

Appeal from conviction—Time for giving notice—Extension.. 663

Importation of—Taxation—Constitutional law—B.C. Government Liquor Act, 1921, ch. 30—B.N.A. Act, sec. 125—Construction 82

Place of sale—Order sent from B.C. to Alberta—Order accepted in Alberta—Liquor supplied by vendor from liquor in stock in B.C.—British Columbia Government Liquor Act 1921, ch. 30—Construction 657

Quebec Alcoholic Liquor Act—Illegal sale by housekeeper—Liability of owner under art. 91 177

Sale of—Acquittal—Subsequent prosecution for having in possession—Plea of autrefois acquit—Construction of Act 609

Search warrant under sec. 79 of the Alberta Liquor Act—Sufficiency of information on which magistrate may issue —Judicial discretion—Belief of officer taking oath insufficient 472

INVITEE—
See Negligence.

JUDGMENT—
Action to set aside—Sufficiency of pleading 577
Of sister province—Foreign—Simple contract debt—Limitations of actions 241

LANDLORD AND TENANT—
Application for possession of lands—Taxation of costs—Jurisdiction of County Judge 540

LAND TITLES—
Adverse claims—Two different purchases of same property under different agreements for sale—Equities equal—Registration of caveat by one before other acquires better title to call for real estate—Rights and liabilities 247
Caveats—Who may file—Assignee of land purchase contract—Special clause as to vendor's approval of assignment—Assignment without approval—Effect 428

LEVY AND SEIZURE—
Lien note and cheque given for motor car—Goods at purchaser's risk—Seizure by vendor—Destruction of car while under seizure—Rights and liabilities 383

LIENS—
For the price of seed grain—Municipal Districts Seed Grain Act, 1918 Alta., ch. 10—Construction — Enforcement of lien—Municipal Districts Act, 1911-12 Alta., ch. 3 — Application 138
Landlord and tenant—Property leased on crop payment plan—Thresher's lien covering all grain threshed—Threshers' Lien Act, R.S.S. 1920, ch. 208—Crop Payments Act, R.S.S. 1920, ch. 126—Construction—Following proceeds in hands of assignee 359
Seed grain—Distribution of by municipality—Municipalities Seed Grain Act, Sask. Stats. 1917, 2nd sess., ch. 47, sec. 16 (2)—"Owner"—Meaning of—Purchaser under agreement for sale—Purchase price unpaid—Construction of Act 632
Seed grain—Supply of to purchaser under crop payment sale—Consent of owner—Special conditions—Municipalities Seed Grain Act, Sask. 1917—Cancellation of agreement—Rights of parties 715
Thresher's lien—Garnishment—Attachment of debts—R.S.S. 1920, ch. 59, sec. 12—Establishing right to lien—Indulgence of Court—Costs 705
Woodmen's Lien Act, R.S.S. 1920, ch. 207, sec. 4—Application—Person employed as clerk—Right to under Act.......... 628

LIMITATIONS OF ACTIONS—
Judgment of sister province—Simple contract debt 241

MASTER AND SERVANT—

Assessment of damages under Workmen's Compensation Act, R.S.S. 1920, ch. 210—Notice—Time—Dismissal of previous action—Assessment after appeal—Application of Acts—Measure of compensation 702

Servant domiciled in Ontario—Accident in Ontario—Action in Saskatchewan—Jurisdiction of Court 257

Shunting cars—Brakeman riding on car—Dangerous position—Negligence—Accident—Death—Liability 699

MECHANICS' LIENS—

Agreement for sale of land on crop payments—Purchaser in possession—Material supplied and used in erection of buildings—Privity and consent of vendor—Abandonment of land by purchaser—Priority of lien for materials to claim of vendor for unpaid purchase money 713

MINES AND MINERALS—

Mineral Act, R.S.B.C. 1911, ch. 157, secs. 48, 50 and 51—Certificate as to assessment work—Extension of time—Payment of money instead of work—Extension of time in case of—Lapse of claim—Protection under sec. 27 425

Placer mining claim—Hydraulic lease—Construction—Exclusion of placer claims—Abandonment of claim—Relocation—Rights of parties 369

MONEY IN COURT—

Meaning of—Order made for payment out—Order not acted upon — Person entitled to money becoming execution debtor in subsequent action—Application by sheriff for payment out to him—Creditors' Relief Act, R.S.S. 1920, ch. 54, sec. 8 232

MUNICIPAL CORPORATIONS—

By-law as to electricity—Authority of town electrician—Installation of X-ray machine — Work superintended by electrician — Subsequent bequest to change wiring—Refusal to comply—Discontinuance of current—Damages.. 355

Liability for damages for injuries received on highway 674

Local improvement district—Diversion of water by—Injury to adjoining land—Liability 242

NEGLIGENCE—

Automobiles—Approaching each other in same rut in highway—Duty of drivers 395

Express office—Invitee—Negligence of employee—Injury—Liability—Damages 422

Sale of fire-arm by manufacturer—Latent defect making it dangerous — Knowledge of manufacturer of defect—Failure to warn purchaser — Injury owing to defect—Liability of manufacturer—Arts. 1522, 1527, Que. C.C..... 63

NEW TRIAL—

Criminal case—Trial Judge's charge to jury—Indirect comment on failure of accused to give evidence—Breach of Canada Evidence Act, sec. 4, sub-sec. 5 629

Trespass to land—Injunction—Inconsistent answers by jury—Impossible to interpret meaning 108

OBSTRUCTING JUSTICE—

Municipal election—Agent of candidate detaining voter—Candidate opening door and telling voter to go—Criminal Code sec. 169—Construction—Peace officer—Meaning of 104

PARTIES—

Action by wife for damages for personal injuries—Husband not joined as party—Objection not raised until after close of plaintiff's case—Failure to ask to have party added—Right to have action dismissed on account of—English R. 134—Alta. R. 28 (4) 605

Action under Mechanics' Lien Act, Sask.—Registered owner joined as party—No relief claimed as against him—Order striking out 174

Agreement for the sale of land — Assignment by vendor of moneys payable by purchaser under—Action on agreement for breach of covenants—Assignee as party plaintiff—Filing of consent required by rule 41—Proof of signature of party consenting—Authority of manager of local branch of bank to sign consent 408

PATENTS—

For invention—The Patent Act, R.S.C. 1906, ch. 69, sec. 24—Surrender of patent — Re-issue — Effect of surrender on judgment based on original patent—Contempt of Court—Practice 179

PLEADING—

Action to set aside former judgment—Allegation that defendant swore falsely on former trial—No suggestion of new evidence or of extraneous fraud—Sufficiency of pleading 577

PRINCIPAL AND AGENT—

See also Brokers.

Authority of agent to purchase certain kinds of goods—Purchase by agent of goods not within the class—Principal repudiating greater part of goods but retaining a small part—Acceptance of goods—Liability of principal—Sale of Goods Act, R.S.S. 1920, ch. 197, sec. 34 200

PRINCIPAL AND SURETY—

Creation of relation—Joint maker of lien note—Acceptance as such by person in whose favour note is made 672

Mortgage on land purchased—Special clause—Signed by surety—Mortgage payable in instalments—Extension of time for payment of first instalment—Release of surety as to first instalment—Liability as to other instalments 187

Promissory note—Accommodation maker—Extension of time—Assignment under Bankruptcy Act—No notice of dishonour given to surety—Rights of parties 694

PRINCIPAL AND SURETY—Continued.

Promissory note given to bank to secure indebtedness—Surety signing on express understanding that chattel mortgage given to secure indebtedness—Removal of chattels from district—Negligence of creditor in not seizing—Loss of security—Discharge of surety 459

PUBLIC WORKS—

Acquisition of land by Crown—Public Works Act, R.S.B.C. 1911, ch. 189, sec. 3—Order in Council necessary before contract can be enforced 171

Negligence—Loss by fire communicated to adjoining building—Exchequer Court Act, R.S.C. 1906, ch. 140—"Public Work," definition—Burden of proof—Interpretation of statutes.. 647

RAILWAYS—

Receivership—Fund in the Exchequer Court—Proceedings in the Provincial Court against fund—Concurrent jurisdiction—Comity 504

REFORMATION OF INSTRUMENTS—

Agreement for sale of land—Notice of reservation of coal rights—Reservation not included in agreement—Purchaser entering into possession of land and making improvements—Waiver of objection to title—Specific performance of reformed agreement 614

Contract for sale and purchase of land—Agreement for immediate possession—Mutual mistake in instrument—Land subject to lease—Impossibility of performance—Liability.. 637

Contract for towage of barges—Construction—Reformation to include scows—Justification—Mistake—Evidence 545

SALE—

Of grain—Future delivery—Failure to deliver—Purchase by broker to cover shortage—Liability of seller 438

Of motor car—Lien note and cheque given in payment—Goods at purchaser's risk until note paid—Failure to pay note or cheque—Seizure by vendor—Goods destroyed by fire while under seizure—Rights and liabilities of parties 383

SEDUCTION—

Statutory offence—Plaintiff swearing as to violence—Trial Judge discrediting this part of her evidence—Crediting evidence as to seduction—Right of Judge to give judgment for seduction 362

SEED GRAIN—

Distribution of by Municipalities—See Liens.

SPECIFIC PERFORMANCE—

Sale—Corporate shares—Offer—Acceptance—Reasonable time—Laches on part of purchaser's nominee in completing—Repudiation by purchaser 93

STATUTES—
Chapter 27, 1906 Alta.—An Act to prevent Frauds and Perjuries in Relation to Sales of Real Property—Construction—Legislative intent — Necessity of having compensation mentioned in the writing 445
Soldier Settlement Act, 1919 (Can.), ch. 71—Construction—Agreement of owner to pay agent commission on sale of land—Passing of Act—Agent getting in touch with purchasers—Sale of land to Board—Subsequent sale to parties procured by agent—Right to commission 233

SUBROGATION—
Two parties owners of land—One party mortgaging their undivided interest—Sale of land for taxes—Redemption—Right of party redeeming to lien in priority to mortgage 142

SUCCESSION DUTIES—
See Taxes.

TAXES—
Special War Revenue Act, 1915, as amended by 1921 (Can.), ch. 50 — Excise tax on sales by manufacturers — Interpretation—"Manufacturer" 237
Succession duties—Appointment of commissioner to enquire into amount—Valuation of executor taken—Power of Court to interfere with—Succession Duties Act, R.S.B.C. 1911, ch. 217, secs. 23-33 469
Succession duties—Promissory notes and agreement for sale of land—*Maxim mobilia secuuntur personam*—Application to B.N.A. Act 397

TROVER—
Conversion—What constitutes—Consignment of goods t o company for sale on commission—Fraudulent sale as owner—Knowledge of purchaser of fraud—"Acting in the ordinary course of business of a mercantile agent" in Sales of Goods Act, R.S.B.C. 1911, ch. 203, sec. 69—Meaning of—Liability of purchaser—Estoppel by making request for proceeds of goods 529
Conversion—What constitutes—Lease of farm on crop payments—Chattel mortgage on tenant's share of grain—Construction—Specific share of grain mortgaged to be found in lease—Arbitration clause—Arbitrators exceeding powers —Liability 514

VENDOR AND PURCHASER—
Agreement for sale of land—Real Property Act, R.S.M. 1913, ch. 171, secs. 62 and 64—Plan not filed at time agreement entered into—Rescission of agreement by purchaser 666
Oral agreement — Memorandum in writing—Sufficiency — Statute of Frauds 182

VITAL STATISTICS—
See Illegitimacy.

WAR REVENUE ACT—
See Taxes.

WILLS—
Special clause—Construction—Land charged with maintenance of children 711

WORDS AND PHRASES—
"Acting in the ordinary course of business of a mercantile agent" 529
"All the grain that belongs to me, etc." 514
"As fast as possible, etc." 617
"Coming into his hands" 469
"Donatio mortis causa" 523
"Dwelling" 456
"Executors or administrators or assigns" 282
"Farmer therein resident" 138
"I will see you paid" 115
"Inter vivos" 523
"Manufacturers" 237
"Mobilia secuuntur personam" 397
"Owner" 632
"Public work" 647
"Take good care in every way" 399
"Taxation" 82
"Transfer" 352
"Working expenditure" 505

WRIT AND PROCESS—
Divorce action — Rules governing substitutional evidence—Jurisdiction of Local Master to order 279