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ANNOTATED

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VOL. 34

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CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

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CANADIAN PACIFIC R. CO. v. S.S. "STORSTAD" AND AETNA ASSURANCE CO. AND OTHER INTERVENANTS AND CLAIMANTS.

Exchequer Court of Canada, Quebec Admiralty District, Maclennan, Dep. Local Judge in Admiralty. March 17, 1917.

ADMIRALTY (§ I—1)—COLLISION—PRIORITY OF CLAIMS—LIMITATION OF LIABILITY—LAW GOVERNING.

In a collision between a Canadian coasting vessel and a British ship on the high seas, more than 3 miles outside the Canadian coast, the maritime law of England, and not the Canadian law, applies and governs the rights of the parties. Under the Imperial Merchant Shipping Act (1898, sec. 503), claims for loss of life are given a preference over others, notwithstanding that a judgment limiting the liability had not been obtained.

[See annotation following as to the jurisdiction in damage claims for torts committed on the high seas.

Statement.

MOTIONS were heard by the Hon. Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, in Court at Montreal, on February 5, 1917, in an action *in rem* in connection with the report of the deputy district registrar dealing with claims for damages and the distribution of $175,000 deposited with the registrar representing the proceeds of the sale of the S.S. "Storstad." The grounds upon which the motions were based appear in the reasons for judgment.

A. R. Holden, K.C., in support of plaintiff's motion to vary the report.

J. W. Cook, K.C., and *W. F. Chipman*, K.C., in support of motions by certain claimants to vary the report.

George F. Gibsone, K.C., *Errol Languedoc*, K.C., *A. H. Duff*, K.C., *Errol M. McDougall* and *J. W. Weldon*, for life claimants on motions to confirm the report.

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MACLENNAN, DEP. L.J. IN ADM.:—This case comes before me on motions by the plaintiff and by certain intervenants and claimants to vary the report of the deputy registrar filed on May 31, 1916, settling the amounts of the claims proved and the distribution to be made of the money in Court and asking to have the distribution made on the basis of a *pro rata* division to all claimants, and on motions by other claimants for the confirmation of the report and an order for payment of the sums collocated. The claims admitted by the deputy registrar amount to

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$3,069,483.94, of which $469,467.51 were for loss of life and the balance for loss of property, including over $2,000,000 claimed by the Can. Pac. R. Co. as the value of its ship "Empress of Ireland," which was sunk with all her cargo and over 1,000 passengers and crew as the result of a collision with the S.S. "Storstad." The money now in Court to be distributed on these claims is $175,000 (with accumulated bank interest) being the proceeds of the sale of the "Storstad" made under order of the Court while the action to determine the responsibility for the collision was pending before this Court. The "Storstad" was held responsible by a judgment rendered herein by Dunlop, J., on April 27, 1915, its counterclaim was dismissed and a reference was made to the deputy registrar to assess the damages. The deputy registrar's report was made and filed on May 31, 1916, and is the subject of the various motions now before me.

The fund being insufficient to satisfy all claims, the deputy registrar, after allowance for costs, collocated the balance *pro rata* in favour of the life claims so far as such funds were sufficient, and excluded all other claimants from participation in the collocation. This distribution is in accordance with the provisions of sec. 503 of the Merchant Shipping Act, 1894 (Imp.), under which, claimants for loss of life have an absolute privilege and priority over claimants for loss of property or goods to the extent of an amount equal to £7 per ton of the ship held to have been at fault, and a claim on a further amount of £8 per ton along with all other claimants. It is admitted that an amount equal to £7 per ton would exceed the amount now before this Court for distribution. Counsel for plaintiff and for other claimants for loss of property have submitted that the distribution should be made in accordance with the Canada Shipping Act, under which no preference or priority is given to claims for loss of life, and they further submit that even if the Imperial statute governs the preference or priority put forward for life, claims must fail, as no proceedings were taken by the owners of the "Storstad" to obtain a judgment limiting their liability on the ground that the loss occurred without their actual fault.

The first important question to be decided is: Is it the maritime law of England or the Canadian law which governs the rights of the parties in respect to the claims for damages and the distribution of the fund now in possession of the Court?

The Exchequer Court of Canada as a Court of Admiralty is a Court having and exercising all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890 (Imp.), over the like places, persons, matters and things as are within the jurisdiction of the Admiralty Division of the High Court in England, whether exercised by virtue of a statute or otherwise, and as a Colonial Court of Admiralty it may exercise such jurisdiction in like manner and to as full an extent as the High Court in England.

The law which is administered in the Admiralty Court of England is the English Maritime Law. It is not the ordinary Municipal Law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English Maritime Law: *The Gaetano and Maria*, 7 P.D. 137, per Brett, L.J., at 143.

Although the Exchequer Court in Admiralty sits in Canada it administers the maritime law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty. The collision in this case took place after the "Empress of Ireland" had discharged her pilot at Father Point, her last port of call in Canada, and had put to sea on a voyage to Liverpool. It is admitted that the wreck now lies in the River St. Lawrence, 3¾ miles from the nearest coast line, and the Judge who tried this case found that the collision took place 1,200 or 1,500 ft. east of where the wreck lies, which certainly was not any nearer the coast. This was in tidal waters to the seaward of where the inland waters of Canada end in the River St. Lawrence (R.S.C. ch. 113, sec. 72 (*g*)) at a point where the river is about 25 miles wide and on the direct route to the Atlantic. The collision having taken place more than 3 marine miles from the Canadian coast, it must be held to have occurred outside the territorial jurisdiction of the Parliament of Canada and on the high seas as that term is understood in a British Court of Admiralty.

The expression "high seas," when used with reference to the jurisdiction of the Court of Admiralty, included all oceans, seas, bays, channels, rivers, creeks and waters below low-water mark, and where great ships could go, with the exception only of such parts of such oceans, etc., as were within the body of some country.

A foreign or colonial port, if it was part of the high seas in the above sense, would be as much within the jurisdiction of the Admiralty as any other part of the high seas: *The Mecca*, [1895] P. 95 107, per Lindley, L.J.

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The Queen v. *Anderson*, L.R. 1 C.C. 161. *The Queen* v. *Carr*, 10 Q.B.D. 76. The law applicable in England to cases of collision on the high seas is the Maritime Law of England: *The Leon*, 6 P.D. 148, and *Chartered Mercantile Bank of India* v. *Netherland India Steam Navigation Co.*, 10 Q.B.D. 521, 537, 545. Neither the "Empress of Ireland" nor the "Storstad" were registered in Canada and this Court obtained jurisdiction by reason of the "Storstad," after the collision, having come into the Quebec Admiralty District, when an action *in rem* was instituted and the steamer arrested at the instance of the plaintiff.

It was contended on behalf of plaintiff that the "Storstad" was found in fault by the trial Judge for failure to observe the Canadian Rules of the Road as enacted by order-in-council of February 9, 1897, and that this circumstance shewed that the Canadian law should govern. The order-in-council referred to was passed to bring into force in Canadian waters and to the notice of the owners and masters of Canadian vessels, the rules and regulations for preventing collisions at sea passed by an Imperial order-in-council on November 27, 1896, in virtue of the Merchant Shipping Act (1894). These rules are now commonly known as the International Rules of the Road and cannot be changed or modified by the Canadian authorities, except for the purpose of making them conform and agree with a change or modification made by an Imperial order-in-council, while regulations for the navigation of the inland waters of Canada on the other hand may be made and modified by order-in-council without reference to Imperial action: Canada Shipping Act, sec. 913.

The trial Judge found the "'Storstad' at fault in violating arts. 16, 21 and 29 of the Rules of the Road," and he further stated that "there is nothing to shew that the disaster was in any way attributable to the St. Lawrence route, and being open water, all sea rules apply." In dealing with a collision in the River St. Lawrence in the case of *Montreal Transportation Co.* v. *The Ship Norwalk*, 12 Can. Ex. 434, Dunlop, J., at pp. 452-3, said:—

> It is well known that from the Victoria Bridge down we are practically under the International Rules of the Road, that is to say, the Canadian Government has made the Imperial rules applicable in their entirety from the Victoria Bridge down stream.

From this it is quite evident that the "Rules of the R ad," which the trial Judge found had been violated by the "Storstad,"

were the Imperial or International Rules. These rules are to be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels: *The Anselm*, 76 L.J.P. 54, [1907] P. 151.

Counsel for plaintiff submitted that the "Storstad" must be held to have been subject to Canadian law because she was engaged in the coasting trade between Nova Scotia and the ports of Quebec and Montreal: Canada Shipping Act, R.S.C., ch. 113, secs. 952-960. Assuming the ship to have been engaged in this trade, the provisions referred to affect only the license, entries, clearances and pilotage dues of the ship and in no way affect the rules of navigation on the high seas.

The "Empress of Ireland" was a British ship and the collision having taken place on the high seas outside the Canadian jurisdiction, the maritime law of England alone applies and governs the rights of the parties originally and now before the Court. The part of that law which governs the distribution of the funds now in the hands of the Court is the Merchant Shipping Act, 1894 (Imp.), sec. 503, which gives the claimants for loss of life an absolute preference over all other claimants on the first £7 on the tonnage of the "Storstad:" *The Victoria* (1888), 13 P.D. 125. Her tonnage, according to Lloyd's register, was 6,028 tons and her liability for loss of life would be slightly over $200,000, an amount considerably in excess of what was realised from the sale of the ship.

The counsel for plaintiff and for certain intervenants and claimants further submitted that even if the maritime law of England did apply, sec. 503 of the Merchant Shipping Act had no effect in the present case seeing that the owners of the "Storstad" had not, under sec. 504, obtained a judgment limiting their liability. Sec. 503 provides that in the absence of actual fault or privity on the part of the owner he shall not be liable to damages beyond the following amounts, namely: when there is loss of life and also loss of property a total amount not exceeding £15 for each ton of the ship's tonnage (of which the first £7 is reserved for loss of life, if any), and when there is no loss of life and only loss of property, only £8 per ton. Sec. 504 provides that where any liability is alleged to have been incurred by the owner of a British or foreign ship, as enumerated in sec. 503, and several

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claims are made or apprehended in respect of that liability, then the owner may apply to any competent Court and that Court may determine the amount of the owner's liability and may distribute that amount rateably amongst the several claimants and may stay any proceedings pending in any other Court in relation to the same matter and may proceed in such manner as the Court thinks just. It will be seen that sec. 504 is permissive and does not in any way change the positive terms of sec. 503, but it gives the action in limitation of liability to a defendant when his property in excess of the statutory limit is under arrest or liable to arrest within the jurisdiction where damages are sought to be recovered in respect of loss of life or property. In this case neither the plaintiff nor the claimants, for loss of life or loss of property, were in a position to compel the owners of the "Storstad" to institute an action in limitation of their liability. The latter preferred to allow their ship to be sold and the proceeds of sale—$175,000—are admitted to be less than the liability under the statute, and as the owners of the "Storstad" had no other property within the jurisdiction of this Court subject to seizure, it was unnecessary for them to institute proceedings under the permissive provisions for limitation of their liability. Sec. 503 in positive terms provides for a preference in favour of claimants for loss of life on the first £7 of the ship's tonnage, and failure on the part of the owners to institute and obtain a judgment in their favour in limitation of liability does not take away that preference. In *The Victoria*, 13 P.D. 125, Butt, J., at p. 127, said:—

> The Act interferes with the claimants' right only by putting a limitation on the amount which they can recover from the ship owner, and there is nothing in the Act to shew that persons who have suffered loss have their rights otherwise altered.

Marsden's Collisions at Sea, 6th ed., p. 165:—

> Where the amount of the fund in Court is insufficient to satisfy in full claimants in respect of loss of life and loss of cargo, the former are entitled to the whole of that part of the fund which represents the seven pounds per ton.

MacLachlan's Merchant Shipping, 5th ed. (1911), p. 791:—

> The Court, in the application of equitable principles, will marshal such assets as are within its control in that way which best meets the just claims of competing plaintiffs, and best protects the relative interests of separate defendants.

The competing plaintiffs in this case, because the claimants

for loss of property and loss of life are now practically plaintiffs in the same position as the original plaintiff in the action, are urging their claims against the money now under the control of the Court and, in the application of equitable principles, the claims for loss of life are entitled to a preference over claims for loss of property. In dealing with the fund in Court in this way the owners are not made liable for any sum beyond the amount set forth in sec. 503. Their interests are not prejudiced and they are not concerned in the priorities existing between the respective claimants: 26 Hals' Laws of England, sec. 966.

I am therefore of opinion that the absence of any action by the owners for limitation of their liability does not prevent the Court giving effect to the preference and priority in favour of claims for life contained in sec. 503 of the Merchant Shipping Act.

I am of opinion that the law which governs this matter is the maritime law of England and the Merchant Shipping Act of 1894, and that claims arising from loss of life are absolutely privileged upon the fund in Court, and that the deputy registrar, in distributing the fund *pro rata* among the claimants for loss of life after providing for costs incurred by the different parties, acted upon proper principles and that the motions on behalf of the plaintiff and the other claimants for loss of property, asking that the report of the deputy registrar should be varied and their claims collocated *pro rata* with all other claims, should be dismissed.

Since the deputy registrar made his report a number of further claims have been filed, and, on September 26, 1916, an order of the Court was made that all parties having claims against the fund, the proceeds of the sale of the "Storstad" now in the hands of the deputy district registrar, should file such claims on or before October 10, 1916, after which date no claim should be allowed to be filed.

Certain new claims have been filed with the deputy registrar under this order, and it will be necessary to remit the whole matter to the deputy registrar for further enquiry and report.

A number of motions have been made by claimants for loss of life, asking that the report of the deputy registrar be confirmed and the amounts therein collocated be paid under rules 179 and

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192. These motions were probably considered necessary to support the report of the deputy registrar and to secure payment of the amounts allowed, and, in view of the fact that the report has to go back to the registrar for further enquiry and report on all claims now before the Court, these motions cannot be granted, but as they were all filed before the order of the Court extending the delay for the filing of further claims, I think that the parties making these motions are entitled to costs.

The costs collocated by the deputy registrar and not yet paid, as well as the Court costs on all motions to vary and confirm the report, should be paid now out of the fund in Court, and all claims filed up to October 10, 1916, are remitted to the deputy registrar for further enquiry and report on the whole matter to be filed within 2 months from the date of the present judgment.

Orders accordingly.

Annotation. **Annotation—Collisions on high seas—Limitation of jurisdiction.**

BY CHARLES A. HALE.

The most important question to be determined in the foregoing judgment was whether the Canada Shipping Act applies to the wreck of the "Empress of Ireland," which occurred three and three-quarter miles from the nearest shore, below Father Point, or whether the Imperial Merchant Shipping Act must be followed. Inasmuch as this question has never before been determined by our Admiralty Courts, it merits a further survey of the authorities relied upon.

At the outset it should be stated that our Dominion Admiralty Courts are not merely Canadian Courts, but also Imperial Courts, directly constituted by an Act of the British Parliament in 1890, entitled Colonial Courts of Admiralty Act (53 & 54 Vict. ch. 27). This Act authorizes the legislature of a British possession to declare any Court of unlimited jurisdiction, original or appellate, in that colony, to be a Colonial Court of Admiralty (sec. 3) with jurisdiction over like places, persons, matters or things as the admiralty jurisdiction of the High Court of England (sec. 2) but not to confer upon any such Court any jurisdiction not conferred by this Act (sec. 3 (*b*)).

Moreover sec. 4 goes on to state that:—"Where a Court of a British possession exercises, in respect of matters arising out of the body of the County or other like part of a British possession, any jurisdiction exercisable under his Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise."

Under the authority of this Act the Parliament of Canada, by th Admiralty Act of 1891 (54 & 55 Vict. ch. 29), declared the Exchequer Court of Canada to be a Colonial Court of Admiralty with such powers and jurisdiction as were conferred by the above Imperial Act.

As an Imperial Court of Admiralty, our Exchequer Court is, therefore, bound to apply the maritime law of England, where such law is applicable. It is sometimes, however, a very nice question to determine which law applies, especially when there are two statutes, Imperial and Canadian, upon the

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same subject, as in the case of navigation and shipping, and when the Imperial statute applies, at least, in part, to this country (Clement, Canadian Constitution, 3rd ed., p. 211).

As to the application of British criminal law upon the high seas, the original theory was that the Realm of England extended only to the low-water mark, all beyond being the high seas; although international law recognized the right of maritime states to exercise jurisdiction, for the purpose of self protection, to a distance reasonably necessary for that purpose. (Clement, p. 242.) Thus, in the well known case arising from the sinking of the British ship, "Strathclyde," by the German ship "Franconia," off Dover pier in 1876, the Central Criminal Court, in which vested the criminal jurisdiction of the Admiralty, held that it could not try the captain of the German ship for manslaughter of a British subject drowned as a result of the collision, inasmuch as the disaster, although within the 3 mile limit off the British coast, could not be deemed to have occurred in British territory, and inasmuch as, in the absence of legislation, a crime committed abroad by a foreigner could not be enquired into by a British Court (*R.* v. *Keyn* (1876), L.R. 2 Ex. D. 152; 46 L.J.M.C. 17).

Legislation, however, was soon after introduced to cover this deficiency in the criminal law, and by the Territorial Waters Jurisdiction Act of 1878 (41 and 42 Vict. ch. 73 Imp.) the criminal jurisdiction, not only of the United Kingdom, but of all other parts of Her Majesty's Dominions, was extended to one marine league or 3 miles from the low-water mark of the coast line.

In applying the civil maritime law of England to acts committed upon the high seas, the British Courts were more liberal, however, particularly in reference to torts. In support of this statement, the following may be quoted from Foote's International Jurisprudence, 4th ed., p. 451:—

"With respect to the high seas, it would appear that originally and independently of statute, the English Court of Admiralty exercises jurisdiction over all torts on the high seas, (b) and for the purposes of jurisdiction it would seem that there is no distinction between the high seas and other waters or harbours 'where great ships lie and hover' (c) though the last class of cases seems confined to wrongs (whether viewed as crimes or torts) committed on board British ships, regarded as 'floating islands'. (b) *The Volant* (1842) 1 W. Rob. 383. *The Lagan or Mimax* (1838), 3 Hagg Adm. 418. *The Hercules* (1819), 2 Dod. 353. *The Ruckers* (1801), 4 C. Rob. 73. *De Lovio* v. *Boit* (1815), 2 Gallison 398 (Am.). In the last cited case it was said by Story, J., that the English Court of Admiralty had jurisdiction over all torts committed on the high seas, and in harbours within the ebb and flow of the tide, quoting the Black Book (Temp. circa Edw. 111): (c) *Reg.* v. *Carr* (1882), 10 Q.B.D. 76; *Reg.* v. *Anderson* (1868), L.R. 1 C.C.R. 161, 167; *Reg.* v. *Allen* (1872), 1 Moo. C.C. 494; *Reg.* v. *Jemot*, cited in *Reg.* v. *Anderson*, p. 168."

Again on p. 456:—

"Torts, in the nature of collisions between vessels on the high seas, are within the original jurisdiction of High Court of Admiralty, whatever the nationality of the parties, though it may be that the Court has a discretion whether or not it will interfere between litigants who are both the domiciled subjects of a foreign state (per Sir R. Phillimore in *The Mali Ivo* (1869), L.R. 2 A. & E. 356) and by modern statutes, the same Court has been given jurisdiction over any claim for damage done by any vessel whether to another

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vessel or to a person or property in some other form. (24 Vict. ch. 10, sec. 7: 3 & 4 Vict. ch. 65.)"

And again on p. 459:—

"In pronouncing upon torts committed upon the high seas, the Court of Admiralty must, of course, be guided by maritime law without reference to the municipal law of either of the litigant parties; except where English statutes have laid down different principles for its guidance. The maritime law as administered in English Courts is in fact, according to the latest expressions of judicial opinion, English law (see. per Willes, J., in *Loyd* v. *Guibert* (1865), L.R. 1 Q.B. 125; *The Hamburg* (1864), 2 Moo. P.C.N.S. 289) and in applying it to actions founded upon torts committed on the high seas, the law of the forum is, in a sense, adopted in the place of any with a better claim, to be regarded as the *lex loci*."

As to the quantum of damages that could be collected from the owners of ships responsible therefor, the English common law originally held ship owners liable to the full extent of such damages. This, however, was subsequently cut down by a succession of statutes, each more favourable to the ship owners than the last. Thus by 53 Geo. III., ch. 159, sec. 1, it was provided that ship owners should not be liable in damages beyond the value of the ship and freight; while the Merchant Shipping Act of 1862 (25 & 26 Vict. ch. 63, sec. 54) adopted the principle of limiting the liability of the owners to an aggregate amount calculated in proportion to the ship's tonnage, and extended the benefit of this Act to the owners of foreign ships. Finally, by the Merchant Shipping Act of 1894 (sec. 503), the liability of ship owners, not personally at fault for the damage, was limited to 15 pounds per ton of the ship's registered tonnage, of which 7 pounds were set apart for claims for loss of life and 8 pounds, for claims arising from the loss of property (506).

Under this section, it has been held, when the funds realized from the sale of the ship were insufficient to satisfy in full both classes of claims, that the former are entitled to the whole of that part of the fund, which represents 7 pounds per ton, and they are entitled to prove against the residue of the fund *pari passu* with the cargo claimants. The latter have no priority of proof against the part of the fund which represents the 8 pounds per ton. (Marsden's Collisions at Sea, 6th ed., p. 165). *The Victoria* No. 2, 13 P.D. 125; *Nixon* v. *Roberts*, 1 J. & H. 739; *Leycester* v. *Logan*, 26 L.J. Ch. 306 (decided upon 17 and 18 Vict. ch. 104 sec. 514); *Burrell* v. *Simpson*, 4 Ct. of Sess. Cas., 4th series, 177.

Our Canada Shipping Act (R.S.C. ch. 113 sec. 921) has followed the principle adopted in the Imperial Shipping Act, in limiting the liability of ship owners, not personally responsible for the damage caused by their vessels, to a fixed amount, based upon the ship's tonnage; but it has departed from the provisions of the Imperial Act by cutting down their liability from 15 pounds to $38.92 per ton (sec. 921), and by failing to provide any priority for the life claims over those for loss of property, so that all claims of whatever sort must rank *pro rata* from the fund.

The question now arises whether our Canada Shipping Act has any application to damages caused upon the high seas, and if not, what is the line of demarcation between the high seas and Canadian waters.

Now to say that the Canadian Parliament has jurisdiction to pass laws, applying to acts committed upon the high seas, would be to claim for that legislative body jurisdiction beyond the borders of the Dominion. In this connection Clement, at p. 95, says:—

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"To apply the doctrine of exterritoriality as a constitutional limitation upon the legislative power of a colonial assembly would seem *primâ facie* to enlarge constructively their prescribed limitations. In the absence of express condition or restriction, limitation, if it exist, must exist because 'the general scope of the affirmative words' is not sufficiently wide to cover legislation affecting acts done without the colony, although, just as in the case of Imperial legislation, no exterritorial enforcement of such legislation is provided for or contemplated. If such legislation, to be enforced within the colony, is beyond the general scope of such affirmative words as 'laws for the peace, order and good government' of the colony, it must be because it is contrary to some fundamental principle in the constitution of the Empire that a colonial legislature should have such a power.".

And again on p. 96:—

"The law officers of the Crown in England have, almost without exception, taken the view that colonial legislatures are under a constitutional limitation along this line. In 1855, this opinion was given in reference to the Assembly of British Guiana: 'We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits—3 miles from shore—or, at the utmost, can only do this over persons domiciled in the colony who may offend against its ordinances even beyond those limits but not over other persons.' In 1861 the Parliament of (Old) Canada passed an Act to give jurisdiction to Canadian magistrates in reference to certain offences committed in New Brunswick. This Act was disallowed by order of the Queen in Council upon the report of the law officers of the Crown, who advised that 'such a change cannot be legally effected by an Act of the Colonial legislature, the jurisdiction of which is confined within the limits of the colony.'"

Further, under sec. 91 of the B.N.A. Act, in virtue of which alone, all Canadian laws have force, the Dominion Parliament has power to legislate upon the subject of "navigation and shipping" (sec. 91 (10)).

This power, however, is limited by the words for the "peace, order and good government of Canada" contained in the introductory paragraph of this section, and these restricting words have the effect of limiting Canadian legislation upon navigation and shipping strictly to Canadian waters. Moreover, the title of the Canadian Shipping Act itself (R.S.C. 113) and particularly the title of part 14 thereof, which contains sec. 921 above referred to, clearly indicates that that Act was never intended to extend beyond Canadian waters, to the high seas.

The question now is: what are Canadian waters? International law has come to recognize the jurisdiction of any country as extending to a distance out to sea of 3 miles, or one league from the low-water mark, and this principle has been established by our own Courts in a case of *The Ship "North" v. The King* (37 Can. S.C.R. 385). In this case it was held by the Supreme Court that under the provisions of the B.N.A. Act of 1867, sec. 91, (12), the Parliament of Canada has exclusive jurisdiction to legislate in respect to fisheries within the 3 mile zone of the sea coast of Canada, and to enforce these laws against all and sundry who may break them within this area.

This decision may be taken as governing also the case of "navigation and shipping" inasmuch as it is based upon and is an interpretation of the same sec. (91) of the B.N.A. Act and in conjunction with the other authorities just cited would indicate that Canadian legislation has full application within but not beyond the 3 mile limit from the low-water mark of the coast line.

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FAWELL v. ANDREW.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Brown, Elwood and McKay, JJ. March 10, 1917.

1. LANDLORD AND TENANT (§ III D—110)—DISTRESS—SUSPENSION OF DEBT—MORTGAGE.
The right of distress is not an incident of a mortgage unless created by special covenant. When exercised as a remedy it has the effect of suspending the debt distrained for until the sale.

2. JUDGMENT (§ VII C—282)—BY DEFAULT—EXCESSIVENESS—SETTING ASIDE.
A judgment by default entered for a greater amount than is due will be set aside *ex debito justitiæ*, apart from any consideration as to whether there is a good defence on the merits.

Statement.

APPEAL by defendant mortgagor from a judgment refusing to set aside an order *nisi* and writs of execution in a foreclosure action. Reversed.

H. F. Thomson, for appellant; *Bigelow*, K.C., for respondent.

Brown, J.

BROWN, J.:—On March 1, 1913, the defendant executed a mortgage in favour of the plaintiff on certain farm land to secure the sum of $26,000 and interest as therein mentioned. The defendant having made default in payment of a portion of the principal moneys under said mortgage, the plaintiff launched an action on October 22, 1915, and, under the acceleration clause in the mortgage, asked for judgment for the full amount of principal and interest owing under the mortgage, for foreclosure, and for possession of the land. The defendant, through his solicitor A. W. Routledge, of Davidson, in due course entered an appearance in the action. After the issue of the writ the plaintiff distrained, under the landlord and tenant provisions of the mortgage, for $2,602.40, being the full amount then in arrear, and seized a large quantity of grain situate on the property and belonging to the defendant. Owing to what is known as a "grain blockade," it was impossible for the bailiff to sell the grain and the same was still in his possession, unsold, at the time of the making of the order *nisi* which is complained of.

It would appear that the defendant anticipated that the grain seized would satisfy the arrears under the mortgage and terminate the action, and in consequence he made default in entering a defence. On April 11, 1916, the plaintiff served a notice of motion for judgment in default of defence, the same being made returnable for April 14. This service was effected on Brown, Thomson & McLean, agents at Regina for the defendant's solicitor, and they immediately forwarded the notice to the defendant's solicitor at

Davidson aforesaid. The defendant's solicitor in turn endeavoured to get in touch with his client, in order to secure from him an affidavit with which to oppose the motion, but being unable to so get in touch with his client in so short a time, he requested his agents to apply to have the motion enlarged. On the return of the motion, Mr. McLean, appearing for the defendant, asked for an enlargement, but this was opposed by the plaintiff's solicitor, apparently on the ground that his client desired to have immediate possession of the land as the season was at that time well advanced. The Master in Chambers refused to grant an enlargement and made the order *nisi* complained of. By this order it is declared that the amount due under the mortgage is $28,969.60, and judgment is ordered in the plaintiff's favour for that amount. It is further ordered that the defendant pay all arrears, certified at that time to be $5,261.56, and certain interest, on or before October 17, 1916, and in default that the plaintiff have an order for absolute foreclosure. It is also ordered that plaintiff have immediate possession of the mortgaged property.

The plaintiff issued writs of execution against both goods and lands for the full amount of the judgment, and made a seizure under the writ of execution against goods, which seizure apparently is still maintained. The plaintiff also entered into possession of the land, entering into a lease of same for a term of three years.

On application to the Master in Chambers by the defendant to have the order *nisi* and the writs of execution issued thereon set aside, the motion was dismissed. On appeal to a Judge in Chambers the defendant was allowed in to defend on terms. The defendant further appeals, claiming that the order *nisi* should be set aside *ex debito justitiæ*. In the affidavit of the plaintiff, which was before the Master when he made the order *nisi*, is the following paragraph:—

> 4. That some time in the fall of 1915 under a distress warrant under the landlord and tenant clause in the said mortgage, I caused a distress to be made on certain grain, the property of the defendant, for the sum of $2,602.40 and my bailiff made a seizure of certain grain on the defendant's farm under said distress warrant and the bailiff has been unable to market the said grain and the said grain is still lying in the granaries on the said property, and I do not know how much will be realized from the marketing of the said grain and I am not in a position to give credit for the amount realized for said grain until I receive the same.

It appears to be settled law, as between landlord and tenant, that the existence of a distress is, until the sale, an answer to

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an action for rent, irrespective of whether the distress be sufficient or not to satisfy the amount for which the levy is made, for the reason that, while the distress is held and until the sale, the debt from the tenant is suspended: 11 Hals. par. 356; *Lehain* v. *Philpott* (1875), L.R. 10 Ex. 242; *Smith* v. *Haight*, 4 Terr. L.R. 387.

It is contended, however, on behalf of the plaintiff, that a mortgagee is entitled to pursue all his remedies contemporaneously, and that, in this case, the right of distress is simply one of his remedies.

The right of a mortgagee to pursue all his remedies contemporaneously, I take it, means all the remedies which the mortgagee ordinarily has as incident to a mortgage, including the right to an action on covenant, the right of possession and the right of sale or foreclosure. The right of distress is not ordinarily incident to a mortgage, but is a right which arises by virtue of the relationship of landlord and tenant having been created between the parties, and this relationship in the case at bar, if it exists at all, has been created by a special covenant contained in the mortgage to that effect. If the mortgagee, therefore, wishes in this way to get the advantages of a landlord, he must take the same subject to the limitations incident to the relationship of landlord and tenant.

I am, therefore, of the opinion that the mere fact that the plaintiff as landlord in this case happens also to be a mortgagee, does not strengthen his position. In that view, when the mortgagee distrained for $2,602.40 and while the distress existed, the debt, to that extent, was suspended. The plaintiff, therefore, recovered judgment for a much larger amount than he was entitled to as disclosed by the material before the Master.

Where a judgment in default of appearance or defence has been entered for a greater amount than is due, it will be set aside *ex debito justitiæ*, apart from any consideration as to whether there is a good defence on the merits, and the plaintiff is usually ordered to pay the costs occasioned by the judgment or order: 18 Hals. p. 215; *Anlaby* v. *Prætorius* (1888), 20 Q.B.D. 764; *Hughes* v. *Justin*, [1894] 1 Q.B. 667.

In my opinion, therefore, the appeal should be allowed with costs, the order *nisi* and writs of execution issued thereon set aside, and the defendant should have his costs of his application to the Master and of his appeal to the Judge in Chambers.

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HAULTAIN, C.J., and MCKAY, J., concurred with Brown, J.

ELWOOD, J.:—The plaintiff commenced an action against the defendant under a mortgage made by the defendant in favour of the plaintiff.

In his statement of claim the plaintiff claims judgment against the defendant for the amount due under the mortgage, foreclosure and possession.

Subsequently to the service of the writ of summons, the plaintiff, purporting to act under the provisions of the mortgage, caused a distress to be made of the goods of the defendant for the sum of $2,602.40, representing instalments of interest and principal alleged to be overdue under the mortgage. A large quantity of grain was seized under this distress warrant, and this grain was under distraint at the time of the making of the order *nisi* herein, and, apparently, up to the present time.

An order *nisi* for foreclosure was made, and therein it was ordered that the plaintiff recover judgment for the amount due under the mortgage.

As part of the material upon which the order *nisi* was granted, the affidavit of the plaintiff disclosed the fact of the seizure under the distress warrant and that the goods were still unsold under the seizure.

On the application for the order *nisi*, counsel for the defendant asked for an enlargement which was refused and the order *nisi* was made. In consequence of the order *nisi* executions were issued.

The Judge in Chambers made an order giving the defendant leave to defend, but ordering that the judgment and executions stand as security for judgment. From this order the defendant appeals.

In *Lehain* v. *Philpott*, L.R. 10 Ex. 242, it was held that a distress for rent suspends the right of the landlord to recover the rent by action, so long as the goods distrained continue in his hands as a pledge unsold; and, at 247 & 248 of the above report, I find the following:—

> After the plaintiff had distrained he held in his own hands his remedy for recovering the rent, and the tenant was at that time no longer indebted, for so long as the landlord held the goods under distress, the debt due from the tenant was suspended . . As long as the distress remains, the tenant cannot tell what amount to pay into Court to satisfy the uncertain balance. It certainly seems more reasonable to say, in accordance with the precedents

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and current of authorities, that the levying the distress for the whole rent suspends the remedy for the whole rent as long as the distress continues a pledge. If the goods were insufficient to meet the whole arrears the landlord might have distrained in respect of one month's rent and have proceeded by action for the residue.

The right to distrain is not an incident of a mortgage; it is not one of the remedies the mortgagee has a right to pursue as mortgagee. It only arose in this case by virtue of the express provision contained in the mortgage and of the relationship created by that provision. The proceeds of the distress would have to be credited on the mortgage.

It would appear that in the case at bar the amount for which distress was made did not cover all that was due under the mortgage at the time of the distress. I am of opinion, however, that, in so far as the amount for which the distress was made is concerned, right of action and to proceed for that amount was suspended so long as the distress was in the hands of the plaintiff or his bailiff.

At the time that the application for the order *nisi* was made the plaintiff produced to the Master in Chambers evidence of the distress, and, in my opinion, the Master in Chambers, in ordering judgment for the amount of the mortgage without taking into consideration the amount for which the distress was levied, erred, and the judgment was, as to that amount, too large. That being so, it seems to me, on the authority of *Hughes* v. *Justin*, [1894] 1 Q.B. 667, and numerous other cases in this Court on the same lines, that the defendant is entitled to have the judgment and order *nisi* set aside *ex debito justitiæ*.

In my opinion, therefore, the appeal should be allowed, the order *nisi*, judgment and executions issued thereon and any proceedings under the executions set aside. The plaintiff should pay to the defendant the costs of his application to the Master, the Judge in Chambers and of this appeal. The plaintiff should be entitled to no costs of the order *nisi*, judgment and executions.

Appeal allowed.

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OLIVE SCHOOL DISTRICT v. NORTHERN CROWN BANK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 30, 1917.

TAXES (§ III—100)—PRESUMPTION AS TO VALIDITY—NOTICE OF ASSESSMENT—SCHOOL ORDINANCE.

Although generally statutory provisions relating to the imposition of taxes are to be deemed imperative, proceedings for the imposition of

the tax are to be presumed regular and valid until the contrary is shewn. A failure to give the owner notice of assessment under the School Ordinance (Alta.) is a fatal irregularity.

APPEAL from the judgment of Mahaffy, Dist. Ct. J., dismissing the plaintiff's action for school taxes. Reversed.

G. G. Norris, for appellant; *P. E. Graham*, for respondent.

The judgment of the Court was delivered by

BECK, J.:—The plaintiff school district sues for school taxes for the years 1908 to 1916, both inclusive. The District Court Judge held that, by reason of there being, as he thought, numerous irregularities in the proceedings for the imposing and collecting of the taxes, the plaintiff could not recover.

The defendant bank became the registered owner some time in 1907. The bank was assessed as the owner of the property—two village lots—for each of the years 1910 to 1916, both inclusive. The lots were assessed for the years 1908 and 1909 to the "Valley Hotel."

During the years 1908-9-10-11 the district was a rural school district. During the years 1911-12-13-14-15-16 it was a village school district. By reference to the School Assessment Ordinance (ch. 30 of 1901) what seem to be prescribed as the steps to be taken to impose taxes for the purpose of a rural school district are as follows: (1) The Board itself or an assessor appointed by the Board (sec. 3 (3)) is to assess "every person the owner or occupant of land in the district," and is to prepare an assessment roll setting out each lot or parcel of land owned or occupied in the district and the number of acres it contains and the name either of the owner or occupant or both.

The interpretation clauses of the School Ordinance are to be applied to the School Assessment Ordinance (sec. 2 (1)) and the terms "owner" and "occupant" are there interpreted. If the assessor (or the Board) does not know and cannot, after reasonable enquiry, ascertain the name of the owner of any unoccupied lot or parcel of land, the same shall be deemed to be duly assessed if entered on the roll with a note stating that the owner is unknown (sec. 7).

(2) On the completion of the assessment roll, the assessor (or the Board) shall deliver the same to the secretary of the Board (sec. 10).

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(3) The secretary is to mail to each person assessed, whose address is known to him, a notice of his assessment (sec. 10 (2)).

(4) After all notices have been mailed, the secretary is to post a copy of the roll at the school house, etc. (sec. 10 (3)). The method of appeal is by a notice to a Justice of the Peace (sec. 11).

(5) Then, after 15 days, if there are no appeals or after all appeals have been decided, the Board shall strike such a rate not exceeding 12 cents per acre on the number of acres of land in the district shewn on the assessment roll as shall be sufficient to meet the probable expenditure.

(6) The secretary is then to prepare a *tax* roll by entering on the *assessment* roll the rate per acre struck and the amount of taxes payable by each person assessed, provided that, in the event of the total tax of any person being less than $2, the tax to be entered on the roll shall be $2 (sec. 13 (3)) as it stood from (1903, ch. 21, sec. 3, to 1910, 2nd sess., ch. 6, sec. 7).

(7) The tax roll is to be posted up (sec. 14).

(8) A tax notice shall be mailed to each person assessed whose address is known (sec. 14 (3)).

The only curative provision seems to be sec. 10*a*, introduced (1910 (2) ch. 6, sec. 57), which says that "No *assessment* shall be invalidated by reason of any error or description in any assessment notice or by reason of the non-receipt of such notice by the person to whom it is addressed."

Certain provisions of the School Ordinance (sec. 90) are brought into question. Those provisions are, in effect, as follows:

90. Every regular or special meeting of the Board shall be called by giving two clear days' notice in writing to each trustee.

Provided that the Board . . may at any meeting at which all the members of the Board are present decide by resolution to hold regular meetings of the Board, and such resolution shall state the day, hour and place of every such meeting, and no further notice . . of any such meeting shall be necessary.

(2) The Board may by unanimous consent waive notice of meeting and hold a meeting at any time which consent shall be subscribed to by each member of the Board and shall be recorded in the minutes of the meeting in the following form: "We the undersigned trustees of . . hereby waive notice of this meeting."

91. No act or proceeding of any Board shall be deemed valid or binding on any party which is not adopted at a regular or special meeting at which a quorum of the Board is present.

Speaking generally, the provisions of statutes relating to assess-

ment and taxation are to be treated rather as mandatory so far as they relate to the imposition of the tax and rather as directory so far as they relate to their realization: *Re Calgary & Edmonton Land Co.* v. *Atty.-Genl. of Alberta*, 2 A.L.R. 446 at 456, 45 Can. S.C.R. 170.

Nevertheless, it is not every irregularity in the proceedings for the imposition of the taxes that is fatal. It seems to be proper to say that those provisions of the statute relating to the imposition of taxes which are intended for the security of the citizen, or to ensure equality of taxation, or for certainty as to the nature and amount of each person's taxes, are mandatory; but those designed merely for the information or direction of officers or to secure methodical and systematic modes of proceeding are merely directory, or, in other words, where there is substantial compliance with the statute, irregularities in the assessment which are of such a nature that their effect cannot be injurious to taxpayers will not be regarded. (37 Cyc., pp. 988-9).

The foregoing are only other forms of words to express what Strong, J., said in *O'Brien* v. *Cogswell*, 17 Can. S.C.R. 420, 424:—

> The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to adopted which is most favourable to the subject. Further, all steps prescribed by the statute to be taken in the process either of imposing or levying (not in the sense of realizing) the tax, are to be considered essential and indispensable unless the statute expressly provides that their omission shall not be fatal to the legal validity of the proceedings. In other words, the provisions relating to the imposition of the tax requiring notices to be given and other formalities to be observed are to be construed as imperative and not as merely directory unless the contrary is explicitly declared.
>
> It is to be observed that there is a very great difference between the relative importance of the two sets of objections—those relating to the *sale* and those relating to the *assessment* . . The omission to observe the requirements as to preliminaries of sale either as to the notices or as to the advertisements does not go to the legality of the tax itself but merely relates to proceedings for its enforcement. It is obvious that between these two objects there is a very wide difference.

See also Am. & Eng. Ency. of Law, 2nd ed., vol. 26, tit. Statutes, pp. 689, 690, quoted in *Local Imp. Dist.* v. *Walters*, 1 A.L.R. 188.

But, while it is true that, generally speaking, provisions relating to the imposition of the tax are to be deemed imperative,

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this in no way interferes with the recognition of the application to such cases of the maxim: *Omnia præsumuntur rite esse acta donec probetur in contrarium.* (See *per* Patterson, J., p. 472.)

In other words, though there be certain requirements which are imperative, yet, they being requirements which it is the duty of public officials to fulfil, it will be presumed, until the contrary is proved, that these public officials have done their duty.

"Every reasonable presumption ought to be made in favour of the validity and regularity of the proceedings in accordance with the maxim: *Omnia præsumuntur rite esse acta.*" 36 Cyc. 976.

It is perhaps not necessary to invoke this principle, for by sec. 17 (Rural School District) and sec. 50 (Village School District) the tax rolls or collectors' rolls—and these seem to have been produced—are declared to be *primâ facie* evidence of debt for arrears shewn thereon.

This reverses the rule for the burden of proof as applied by the trial Judge. He held the proceedings for the imposition of the tax and for the sale of the land to be insufficient because they were not affirmatively proved sufficient. I would hold that they are to be presumed to be sufficient, until it is made to appear that they are insufficient.

Turning to the evidence, it appears:—As to 1908 there was a meeting on March 28, at which the rate for the year was struck; this is shewn by the minute book of the Board; these minutes do not shew whether the meeting was a regular or special meeting or whether notice was given; and there is no entry in the minutes of waiver of notice.

I think it is not an unreasonable application of the maxim to presume that the meeting was regularly held and conducted. It seems to me that the provisions for recording the waiver of notice in the minutes, if there was in fact no notice, is not intended, if it is not complied with, to render the proceedings at the meeting a nullity, and that, therefore, that provision ought to be treated not as mandatory, but as directory. As to the year 1909: A meeting was held on the 9th of April; a motion was moved by one member of the Board, seconded by another, fixing the rate; there is no more information in the minutes.

For the same reasons I think the proceedings at the meeting should be held to be *primâ facie* regular.

For the years 1908, 1909, 1910, and 1911, the provisions which I have quoted were applicable, afterwards other provisions differing in some respects were applicable, because, in 1912, the school district became a village district.

The defendants have been registered as owners of the lots in question since 1907. They were not assessed in respect of them till 1910. I think the Board could, by reasonable enquiry, have ascertained that the defendants were the owners, and accordingly have assessed them as such for the years 1908 and 1909; and, consequently, have given them notice of assessment for those years. This was not done. I think, therefore, the assessment for these 2 years was not effective. In 1910 the lots were assessed to the defendants. An assessment notice seems to have been sent and the roll posted. The rate appears to have been struck at a meeting held on April 15. I think no fatal irregularity appears, although it appears that there was no fixed time for meetings and the minutes of the meeting at which the rate was struck do not shew whether due notice was given, or whether a quorum was present, and they contain no waiver of notice.

As to 1911 the conditions are virtually the same.

From 1912 the defendants were assessed, notices of assessment appear to have been given, rates to have been struck and tax notices to have been sent. That these proceedings were irregular in each case is, I think as I have said, to be presumed in the absence of evidence to the contrary.

I would, therefore, allow the appeal, and, on the evidence, the plaintiff school district would be entitled to judgment for the amount claimed, less the proper deduction to be made in consequence of the disallowance of the taxes for the years 1908 and 1909. It was, however, agreed between the parties that, in the event of the plaintiff being held entitled, on the evidence as it now stands, to judgment for any sum, the defendant should be allowed an opportunity to give evidence, the fact being that he refrained from doing so at the trial.

The order will, therefore, be that the appeal be allowed, with costs to be paid by the respondent, and that the trial be proceeded with before the District Court Judge.

Appeal allowed.

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S. C.

MITCHELL v. FIDELITY AND CASUALTY Co. of NEW YORK.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Hodgins and Ferguson, JJ.A. February 7, 1917.

APPEAL (§ XI—720)—TO PRIVY COUNCIL—STAY OF EXECUTION.

Sec. 10, Privy Council Appeals Act (R.S.O. 1914, ch. 54), does not apply to appeals by special leave of the Judicial Committee, but the Supreme Court of Ontario has inherent power to stay proceedings in it, when such special leave has been given.

Statement.

ON the 18th December, 1916, an order was made by RIDDELL, J., in Chambers, allowing the security given by the defendant company for the effectual prosecution of an appeal to His Majesty in His Privy Council from the judgment of the Appellate Division dated the 9th June, 1916 (37 O.L.R. 335, 28 D.L.R. 361), and the judgment pronounced by MIDDLETON, J., on the 4th January, 1915 (26 D.L.R. 784, 35 O.L.R. 280), but refusing to stay execution upon the judgment, holding that there was no power under the Privy Council Appeals Act, R.S.O. 1914, ch. 54, to stay execution in a case (such as this) where leave to appeal has been given by the Judicial Committee, there being no right of appeal under the statute.*

The defendant company applied for leave to appeal to the Appellate Division from the order of RIDDELL, J., in so far as it refused the stay of execution.

The application was heard by HODGINS, J.A., in Chambers.

HODGINS, J.A.:—Motion by the defendant company for leave to appeal from the order of Riddell, J., in so far as it refused an application to grant a fiat staying execution. The order allows the security on an appeal to the Privy Council from a Divisional Court, leave having been obtained from the Judicial Committee.

The view of my brother Riddell was that the Privy Council Appeals Act, R.S.O. 1914, ch. 54, applies solely to appeals as of right, and that there is no provision under it to stay execution in cases where the Judicial Committee has given leave.

I find that the power to stay under somewhat similar circum-

*Section 10 of the Act provides: "When the security has been perfected and allowed, a Judge of the Supreme Court may issue his fiat to the sheriff to whom any execution upon the judgment has been issued, to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not; but if the grounds of appeal appear to be frivolous, the Supreme Court or a Judge thereof may order execution to issue or to be proceeded with."

stances has been considered and affirmed in *Sharpe* v. *White* (1910), 20 O.L.R. 575, and that I myself have made an order (*Hughes* v. *Cordova Mines Limited* (1915), 8 O.W.N. 372) which takes for granted that the power exists notwithstanding that leave is necessary. In *Sharpe* v. *White*, reference is made to *Cotton* v. *Corby* (1859), 5 U.C.L.J.O.S. 67, which upholds the inherent right of the Court to suspend the operation of its decrees. The Privy Council in *Quinlan* v. *Child*, [1900] A.C. 496, held that they had no jurisdiction to stay proceedings in the Court below in a mortgage action.

In a recent case from India, *Srimati Nityamoni Dasi* v. *Madhu Sudan Sen* (1911), L.R. 38 Ind. App. 74, the Judicial Committee considered that there was no jurisdiction in the Court below to stay proceedings after leave had been given, but it is not entirely clear whether or not that view was taken owing to a change in the Code. See *Mohesh Chandra Dhal* v. *Satrughan Dhal* (1899), L.R. 26 Ind. App. 281.

In view of these decisions, which appear to conflict with the effect of the order of the learned Judge, and as I think it very desirable that it should be definitely decided in which Court the power to stay resides after leave to appeal is granted in England, I allow the defendant company to appeal on the one point raised.

Costs in the appeal.

Gideon Grant, for the appellant company.

J. H. Fraser, for the respondent, the plaintiff.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the defendant from an order of Riddell, J., dated the 18th December, 1916, allowing the security given by the appellant for the effectual prosecution of its appeal to His Majesty in His Privy Council from a judgment of the Appellate Division, dated the 9th June, 1916, and a judgment pronounced by Middleton, J., on the 4th January, 1916, and refusing to stay execution upon the judgments; and the appeal is from the refusal of the stay of execution. Meredith, C.J.O.

The case is not one in which the appellant has the right to appeal under the Privy Council Appeals Act, R.S.O. 1914, ch. 54, but special leave to appeal has been granted by the Judicial Committee.

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I agree with the conclusion of my brother Riddell that sec. 10 of that Act has application only to the appeals for which it provides; and the power to stay execution must therefore depend upon the inherent jurisdiction which the Court possesses over proceedings in it.

That the Court has inherent jurisdiction to stay execution is, I think, beyond doubt.

In Halsbury's Laws of England, vol. 14, para. 60, after referring to the power of the Court under the Order XLII., Rule 17, of which there is no counterpart in our Rules, and which provides that "the Court or Judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit," it is said that the Court "has an inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases."

In support of this proposition *Polini* v. *Gray*, *Sturla* v. *Freccia* (1879), 12 Ch. D. 438, is referred to.

If such jurisdiction is not possessed by common law Courts, as was argued by Mr. Fraser, it is strange that such cases as *Warwick* v. *Bruce* (1815), 4 M. & S. 140, and *Yates* v. *Dublin Steam Packet Co.* (1840), 6 M. & W. 77, were not disposed of on that ground; but, so far from that being the case, the jurisdiction was not even questioned, and all that was treated as open to question was whether, in the circumstances, the jurisdiction ought to be exercised. *Barker* v. *Lavery* (1885), 14 Q.B.D. 769, may also be referred to.

In the Courts of this Province the jurisdiction has been exercised; and, so far as I am aware, the existence of it has never been questioned.

In *Cotton* v. *Corby*, 5 U.C.L.J.O.S. 67, the Court of Chancery stayed execution upon its decree until a writ of appeal could be obtained and the bonds filed, and, delivering the judgment of the Court, the Chancellor said: "There is no doubt but this Court has full power over its decrees as to the time of their operation." That case was referred to with approval in *Sharpe* v. *White*, 20 O.L.R. 575; and in *Hughes* v. *Cordova Mines Limited*, 8 O.W.N. 372, my brother Hodgins stayed execution in a case similar to this. See also *The Khedive* (1879), 5 P.D. 1.

The Indian cases referred to upon the argument, *Mohesh Chandra Dhal* v. *Satrughan Dhal* (1899), L.R. 26 Ind. App. 281,

and *Srimati Nityamoni Dasi* v. *Madhu Sudan Sen* (1911), L.R. 38 Ind. App. 74, do not help upon the question of inherent jurisdiction, but are important as shewing that the fact that special leave to appeal to His Majesty in His Privy Council has been granted, will not prevent the Court appealed from from exercising any power it may possess to stay execution on the judgment appealed from.

In the earlier case, the High Court refused to stay upon the ground that it had no jurisdiction to do so, and Lord Hobhouse said that the Judicial Committee was "not prepared to differ from the High Court on the question whether or no they have jurisdiction without hearing full argument on the point." The ground upon which the High Court proceeded was that: "In sec. 608 of C.C.P., 1882, the powers pending an appeal were vested in the 'Court admitting the appeal,' so that when the appeal had been admitted by special leave from the Judicial Committee this Court should not be regarded as coming within that description."*

Notwithstanding the observations of Lord Hobhouse and the decision to the contrary of the High Court, in the later of the two cases the Judicial Committee decided that the High Court had power to stay execution notwithstanding that the appeal had been admitted by special leave of His Majesty in Council, and expressed the opinion that the Judges of the High Court were in a much better position than the members of the Board to determine whether execution ought to be stayed, and if so upon what terms and conditions and to what extent stay of execution ought to be granted.

In a later case, *Quinlan* v. *Child*, [1900] A.C. 496, which was a case in which special leave to appeal had been granted by the Judicial Committee, the Board held that it had no jurisdiction to make an order staying a sale that had been ordered by the Court appealed from.

Upon the whole, I am of opinion that my brother Riddell should have made an order staying execution until after the disposition of the appeal to His Majesty in His Privy Council, and that so much of his order as denied to the appellant that relief should be set aside, and the order I have mentioned substituted for it, and under all the circumstances I would give no costs of the appeal to either party. *Appeal allowed.*

*This quotation is from report of the later Indian case, L.R. 38 Ind. App. 74.

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BANK OF MONTREAL v. WEISDEPP.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Gallihcr and McPhillips, JJ.A. April 3, 1917.

BILLS AND NOTES (§V B—145)—RIGHTS OF HOLDER—COLLATERAL SECURITY—BANK.

Promissory notes held by a bank as collateral security, though given by the maker as renewals, under pressure of legal proceedings by the bank, entitle the bank, where no fraud is shewn, to recover from the maker as a holder for value, to the extent of its lien. (Sec. 54(2) of the Bills of Exchange Act (R.S.C. 1906, ch. 119.)

Statement. APPEAL by plaintiff bank from a judgment of Grant, Co.J., in an action on promissory notes. Reversed.

C. Wilson, K.C., for appellant.

S. S. Taylor, K.C., for respondent.

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

Martin, J.A. MARTIN, J.A.:—If the case set up here had been that the plaintiff had "taken an unfair advantage or acted unconscientiously knowing that (it) had no right to the money" it received from the defendant or the note sued on herein, then it would have been within *Ward* v. *Wallis* (1900), 1 Q.B. 675, and "the settlement under legal process was not *bonâ fide* on (its) part," and the defendant would have been entitled to re-open it. But we stated during the argument that we were of opinion that the amendment making the necessary allegation of wilful misrepresentation had not been allowed, indeed the revised proposed amendment refrained from going that length, so the action cannot on the pleadings be maintained, and the appeal must be allowed.

Gallihcr, J.A. GALLIHER, J.A.:—At the conclusion of the argument I was prepared to allow this appeal, and further consideration has confirmed me in that view.

McPhillips, J.A. MCPHILLIPS, J.A.:—It would appear that the bank held two promissory notes, the respondent being the maker of one of the notes, the other note being the joint note of one Ed. Brooks and the respondent.

The bank, it would appear, had, as a customer, one J. H. Brooks, a dealer in horses, and the business of J. H. Brooks was a large one involving the making of very considerable advances by the bank. The notes were made to the order of J. H. Brooks, and were pledged to the bank by an agreement in writing covering many other notes as well, the pledge being in the following terms:—

The undersigned J. H. Brooks herewith delivers from time to time in pledge to the Bank of Montreal, all negotiable paper described below as

additional collateral security for the payment of all my present and future debts and liabilities of what ver nature, to said bank, and with the understanding that said bank may, if it see fit, collect all or any of said negotiable paper, and may impute the moneys received therefrom to such of the said debts and liabilities as to the said bank may appear expedient, and further that said bank shall not be held liable to use any greater diligence, touching the said negotiable paper, or in collecting the same, or in suing thereon, than to said bank in its discretion may seem advisable. (Sd.) J. H. BROOKS.

It would seem that the bank took no steps to advise the respondent that it was the holder of these notes, but upon the evidence it is perfectly clear that the bank is well entitled to invoke sec. 54 (2) of the Bills of Exchange Act (R.S.C. 1906, ch. 119) which reads as follows:—

(2) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

In Maclaren on Bills, Notes and Cheques 5th ed., at p. 180, we read:—

A lien is the right to retain possession of a thing belonging to another until a claim is satisfied. Where bills and notes are deposited as collateral security for a debt the creditor acquires a lien upon them by contract.

Ex parte Twogood (1812), 19 Ves. 229 (34 E.R. 503); *Ex parte Schofield* (1879), 12 C.D. 337; *Belanger* v. *Robert* (1902), 21 Que. S.C. 518; *Sterling* v. *Zuber* (1914), 32 O.L.R. 123. The evidence shews that when the respondent was called upon to pay the promissory notes by the bank his statement was that they had been paid to Brooks the customer of the bank who had pledged them to the bank, and he refused to pay; then suit was brought, and under the pressure of the legal proceedings, a new promissory note was given by the respondent to the bank, less in amount by 50%, which the bank agreed to take in full of all liability to it in respect of the two overdue notes, the evidence being that it was at time of the giving of this new note, the statement was made that the promissory notes held by the bank had been discounted to the bank. Later, and after a sum of $155 had been paid on the new promissory note, the respondent refused to make any further payments, alleging that he had discovered the fact to be that the promissory notes held by the bank were not discounted to the bank, and suit followed. At the trial, when evidence was sought to be adduced upon this point, objection was taken that the pleadings did not allege fraud; counsel for the respondent refused to amend by alleging that the promissory note was obtained by fraud and asked to amend in the following terms:—

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Mr. Grant: I will change the amendment, then, "That the said moneys and notes herein were given by the defendant in the mistaken belief that the notes for which the note in question herein was given, and that the plaintiffs at the time of giving said note were not entitled to the same, and obtained the same by stating that the said note had *been discounted by the said plaintiff.*"

Mr. Wilson: In other words, an action of deceit, that he told him a lie, and that certainly is a fraud.

Mr. Grant: I am not saying anything about whether it was a fact or not, that is for the Court to find out, but surely we can set up that. It is setting up an absolute fact, and we can set that up at any time.

At the close of the trial the amendment was again referred to as follows:—

Court: The amendment you ask to make now is really alleging fraud.

Mr. Grant: Oh, no, your honour. A person can make a misstatement of an existing fact, that is what I am asking to make.

Court: The Court will consider it. You would not expect anything else upon the abundant authorities I have had submitted. I will look this matter up just as early as possible.

Therefore it is clear that fraud was not pleaded, nor do we find that the trial Judge held that there had been fraud in the obtaining of the promissory note sued upon; nevertheless the judgment went dismissing the action and allowing the counterclaim for $155, being the amount paid on the promissory note before becoming acquainted with the fact that the two promissory notes held by the bank as collateral security had not been discounted. In law, two courses were open to the defendant, assuming for the moment (although I do not agree) that the contract was a voidable one: (*a*) elect to repudiate it, or (*b*) elect to be bound by it and bring an action for deceit. In strictness the defendant adopted neither of these courses.

It is quite clear that the bank were not called upon at the trial to meet a case of fraud, and there is no evidence upon which fraud could have been found; in fact the trial Judge makes no finding of fraud. In Kerr on Fraud and Mistake (4th ed., 1910), at p. 9, we find it said that:—

> If the subject matter of the transaction be a contract no man is bound by a bargain into which he has been induced by fraud to enter because assent is necessary to a valid contract and there is no real assent when fraud and deception have been used as instruments to control the will and influence the assent. But a contract or other transaction induced or tainted by fraud is not void but only voidable at the election of the party defrauded. (*Rawlins* v. *Wickham*, 3 DeG. & J. 322; *Western Bank of Scotland* v. *Addie*, L.R. 1 H.L. Sc., 156.)

Now unquestionably the respondent was bound to establish

fraud, had he even set up such a case, then only could he escape liability to the bank, and were we entitled upon this appeal to treat the case as one in which fraud was pleaded, can it be said that it was in any way established, and in considering this question it is to be remembered that Mr. Hogg the manager of the Bank of Montreal had only, as appears by the evidence of Mr. Alley, "recently come there," that is to the branch of the Bank of Montreal at Vancouver, and it would follow, would not be very familiar with the very extensive business that had been transacted previous to his taking over the management. The law as to what proof is necessary in the establishment of fraud is well set forth in Kerr on Fraud and Mistake, at p. 447.

In *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch. 326, 74 L.J.Ch. 189, at p. 202, Joyce, J., in his judgment makes use of language peculiarly applicable to this case:—

> As to the misrepresentation a claim is founded upon an alleged misrepresentation and it appears to me, as it has done all through that the plaintiff's way of succeeding in his claim is beset with difficulties. In the first place there is no allegation of fraud, and in point of fact the imputation of fraud upon the defendant has been expressly disclaimed and properly so.

And later on in the case at p. 203, said:—

> It appeared to me from the first in this case that the absence of fraud and of any allegation of fraud is a fatal objection to the action and I should be perfectly justified in disposing of it on this ground, and this ground alone, and saying no more about the facts of the case, but I will add just a few words about the facts as they have been gone into so fully.

In the present case the facts disclose nothing more than the statement that the two promissory notes held by the bank, which were sued upon and following which suit the respondent effected a settlement with the bank being relieved of one-half of his indebtedness, had been discounted. It is a fair inference to draw that Mr. Hogg was not fully acquainted with the facts. Further "discounted" has really no magical meaning; it could as well mean in general language exactly what was the fact, paper of the payee of the promissory notes, J. H. Brooks, was under discount to the bank, and the particular notes were held as collateral thereto, and under sec. 54, sub-sec. 2 of the Bills of Exchange Act the bank was entitled to recover from the respondent to the extent of its lien. It is utterly impossible upon the evidence before us on this appeal to hold that any fraud has been established, even were it open to the Court to consider the point, which it is clearly disentitled to do. In *Sterling Bank of Canada* v. *Zuber*

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(1914), 32 O.L.R. 123 (C.A.), the headnote in part reads as follows:—

The defendant made a promissory note for $250 in favour of a customer of the plaintiff bank; the note was transferred by the customer to the bank as collateral security to a draft for $150, which was discounted by the bank for the customer, the proceeds, $149.60, being placed to his credit. This draft was not accepted or paid. The customer had in fact no right to pledge the note, but should have given it up to the defendant:—

Held: upon the evidence, that the note was completed by the defendant and delivered as a promissory note, and was given to the bank, before maturity, for value, without notice of any defect; and so the bank became the holder in due course, and was entitled to recover from the defendant thereon to the extent of its lien, *i.e.*, $149.60 and interest: Bills of Exchange Act, sec. 54, sub-sec. 2.

It may be further stated that in banking phraseology the word "discounted" is used to indicate that that is the nature of the transaction as between the bank and its customer, the customer's paper is discounted, and the discounter (the bank) is entitled to the collateral. Here we have a case where the promissory notes held by the bank (upon two of which the respondent was liable) were held under a pledge in writing as additional collateral security for the payment of all debts present and future of J. H. Brooks to the bank with the right in the bank to collect the same or sue therefor.

In *Ex parte Schofield, Re Firth* (1879), 12 Ch.D. 337, at p. 342, Bacon, C.J., said:—

A man indorses bills of exchange to his banker and says "I owe you a good deal of money; you can collect these bills for me and carry them to my account." Those bills no longer remain part of the customer's estate, so as to deprive the banker of the full title in law and equity which arises out of such transactions between bankers and their customers.

And upon appeal, James, L.J., said at p. 346:—

Upon full consideration of this matter, we are of opinion that we cannot differ from the conclusion at which the Chief Judge has arrived.

There is the further point of law that the giving of the new note was consequent upon pressure of legal proceedings, and the respondent cannot now be heard to dispute his liability upon the new note or claim the return of moneys paid thereon. Lord Halsbury, in *Moore* v. *Fulham Vestry*, [1895] 1 Q.B. 399, 64 L.J. Q.B. 226 (C.A.), at pp. 227-8.

In the present case the promissory note is a subsisting contract. No case has been made out for its rescission, nor has a case been made out of deceit; in fact, neither case has been properly set up upon the pleadings. But even were the case as

presented viewed in either phase, and of course there must be an election, the respondent could not claim rescission as well as an action for deceit. The evidence adduced at the trial fails in supporting either case. It is regrettable that the respondent should be required to pay moneys twice over, but there is this to be considered, that owing to the settlement made with the bank, the liability of the respondent was reduced by one-half of what really was the legal liability which was upon him to the bank. The respondent could have prevented this happening by following prudent and necessary procedure when paying promissory notes, that is, make payment only to the holder thereof and obtain delivery of same.

In my opinion, the appeal should be allowed, the judgment of the Court below should be set aside, and judgment entered for the appellant for the amount of the promissory note, together with interest and costs, and the counterclaim dismissed.

Appeal allowed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, J., Ferguson, J.A., and Rose, J. January 19, 1917.

1. TAXES (§ III B—116)—ASSESSMENT—DESCRIPTION—REMEDY FOR INVALIDITY.

An assessment roll when finally passed by a Court of Revision binds all parties concerned, notwithstanding any defects or errors therein, and such defects or errors are therefore not proper subjects for an action at law.

2. TAXES (§ I F—75)—FOR LOCAL IMPROVEMENTS—EXEMPTION.

Lands benefited by local improvements are not exempt from taxation for the benefit conferred because the debentures issued under the by-law authorizing the work were purchased by the municipality instead of by a stranger.

Statement.

APPEAL by plaintiff from the judgment of Latchford, J., dismissing an action for a declaration and an injunction and other relief in respect of assessments of the plaintiffs' lands and taxes imposed pursuant thereto and a local improvement by-law of the defendants. Affirmed.

The judgment appealed from was as follows:—

LATCHFORD, J.:—This action is brought to have it declared that certain assessments of the plaintiffs' lands in the city of Stratford for the year 1916 are invalid and void, that no taxes can be claimed thereunder, and that the taxes demanded of the plaintiffs by the defendants form no charge or lien upon such lands.

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The Court is asked to set aside the tax-bills or notices served on the plaintiffs, and to restrain the officers of the defendants from collecting or attempting to collect any taxes under such assessments and notices, or from charging any taxes for 1916 upon the lands of the plaintiffs.

A declaration is also sought that a certain by-law, under which rates for local improvements are claimed from the plaintiffs, is invalid, and the Court is asked to restrain the defendants from collecting taxes under such by-law for the year 1916 or any future years.

In February, 1909, the plaintiffs purchased the residence of Mr. Justice Idington in Stratford, with the surrounding grounds, and have since used the premises as a private hospital.

About two years prior to the purchase made by the plaintiffs, a plan of subdivision of the Idington property was registered on behalf of the owner, who had desired the defendants to make, for the benefit exclusively of the lands subsequently sold to the plaintiffs, the local improvement—a sewer—which the plaintiffs now ask to be relieved from paying for.

The boundaries of the lands included in the Idington survey were not established at the trial. The only plan in evidence, a "blue-print" of the plan registered, obviously includes lots not owned by Mr. Justice Idington. It bears the legend, "Only the tinted portion to be registered." What such tinted portion included does not appear from the blue-print, and was not stated by any witness. I am therefore unable to find with certainty what part of the plan was registered. It seems probable, however, that the "tinted portion" covered only the subdivisions numbered 1 to 26 on James, William, and Walnut streets and Idington avenue, and that it did not affect the remainder of the Idington property, stated on the plan to be, with the portion subdivided, "parts of park lots Nos. 428 and 429 in the city of Stratford." Lots 18 to 26 on Front street, as shewn on the blue-print, if all owned by Mr. Justice Idington at the time the plaintiffs purchased, were subdivisions according to a different plan of survey. The whole area owned by the plaintiffs is fourteen and five-eighths acres.

The assessment roll for 1916, so far as appears material, viz.:

Roll No. 2282, Hyslop, Margaret A.
Roll No. 2283, Hyslop, Elizabeth. } Street No., 47 James St.

Part of park lots 428 and 429, 14⅝ acres.

Built upon. Value of each parcel ,$2,800. Value of buildings, $3,000. Total, $5,800.

G. G. McPherson survey of parts of lots 46 and 47, Con. 1, N.E. Hope.

Roll No. 2318, Hyslop, Margaret A. Roll No. 2319, Hyslop, Elizabeth	Front Street.

Lots 21, 22, 23, 24, 25, and 26, 1 acre, vacant, value, $300.

Idington survey of park lots 428, 429.

Roll No. 2323, Hyslop, Margaret A. Roll No. 2324, Hyslop, Elizabeth	Canada Company's survey. Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 5 acres. vacant, value $2,100.

The scheme which the assessor adopted was to assess with the plaintiffs' residence the undivided portion of the property, consisting of two irregular areas, one composed of part of park lot 428 and the other of part of park lot 429, and to assess the subdivided portions by the numbers and description of the several lots forming such portions.

The area of the undivided portion is not stated. It certainly is not "14⅝ acres." This statement of area has reference to "part of park lots 428 and 429," constituting the Idington property.

Notice of the assessment is stated to have been given on the 4th September, 1915, and receipt of the notice is not denied.

There was no appeal by the plaintiffs against the assessment, which was duly confirmed; and notices demanding payment of the taxes, based on the values stated, are produced by the plaintiffs, shewing the date of the demands to be the 30th June, 1916.

Similar tax notices for the years 1909 to 1915, inclusive, are also produced by the plaintiffs, and each bears the receipt of the defendants, stating that the taxes have been paid. During this period of seven years, no question was raised as to the inaccuracy or indefiniteness now set up, as disentitling the defendants to claim payment of the taxes for the year 1916.

The plaintiffs accepted for years the identical assessment they now attack, and recognised its descriptions as sufficient. It may be that the property could be more amply and accurately described,

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but an extended and precise description is not required by the Assessment Act (R.S.O. 1914, ch. 195), to be given; and, if given, would afford the plaintiffs no information regarding this property which they did not themselves possess. They do not pretend to have been misled to the slightest extent, and I find that they were not misled.

The particulars required by sec. 22 of the Act (R.S.O. 1914, ch. 195) to be stated in the assessment roll are such as the assessor "after diligent inquiry . . . shall set down according to the best information to be had." The provisions of the section were, I find, substantially complied with. The part subdivided was designated by the numbers of the subdivisions, and the part not subdivided by an "intelligible description."

Miss Margaret Hislop testified that she owned no part of park lots 428 and 429, Canada Company's survey, but in so stating she was mistaken—honestly mistaken, I have no doubt. The plan filed on her behalf, while much less definite than the assessment attacked, bears the legends on the part not subdivided: "Park Lot No. 428" and "Park Lot No. 429." With a knowledge of the history of "The Huron Tract," which Miss Hislop may not possess, the assessor, "acting according to the best information to be had" (Assessment Act, sec. 22), recorded these park lots as having been shewn on a survey made by the company to which the Huron tract, including what is now the city of Stratford, was granted. I do not think he was required to state "Canada Company's survey" upon his roll.

Sub-section (1) (*e*) directs that each subdivision shall be assessed separately, but is modified by (1) (*f*), which provides that where a block of vacant land subdivided into lots is owned by the same person it may be entered on the roll as so many acres of the original block or lot if the numbers and description of the lots into which it is subdivided are also entered on the roll. The provisions of sec. 133 are made applicable to such cases, and enable the treasurer of the municipality or any owner of one or more parcels assessed in one block to apply to the Court of Revision for an apportionment of the taxes and rates on any particular lot or lots, and an apportionment may be made accordingly. No apportionment of that part was sought by the owners or by the defendants.

Section 43 prescribes that where land is held (as in this case) not for the purposes of sale, but is enclosed and used, as here, in connection with a residence, "as a paddock, park, lawn, garden or pleasure-ground," it shall be assessed with the residence, "unless by by-law the council requires the same to be assessed like other ground." The council took no action in exercise of this power.

I find that there has been in the assessment of the plaintiffs' property a substantial compliance with the requirements of the Act. The acreage of the portions of park lots 428 and 429 included with the residence is not indeed stated, but there is no evidence that that area was known to the assessor. It cannot be accurately ascertained from even the blue-print which is in evidence. An approximation could, no doubt, be arrived at, but only after determining, by use of a scale-rule, the distances unstated on the plan, and then making laborious computations of the numerous irregular areas. No such duty is cast upon an assessor. The particulars he is required to set down are such as are obtainable "according to the best information to be had," after diligent inquiry. The assessor did all that the statute required him to do.

The allegation that the assessment under roll No. 2318 is only another or double assessment of the lands assessed under roll No. 2282 has no foundation. It is based on the erroneous assumption that the "14⅝ acres" is the area of the parts of the Idington property not subdivided into small lots—which is not the fact.

The attack upon the local improvement by-law is based upon the contention that the frontage and special rates are not set out in the by-law, but only in a schedule referred to in the by-law. But the schedule is as much part of the by-law as if it appeared on the face of the by-law. Under by-law 1648, by which the work was initiated pursuant to sec. 669 of the Municipal Act, 3 Edw. VII. ch. 19, the City Engineer of Stratford was appointed to ascertain what real property was to be immediately benefited by the sewer. Notice of the intention of the municipal council to proceed with the work appears to have been duly given, and the sewer was undertaken and completed.

Then in 1910 the by-law now attacked was passed under sub-sec. (1) of sec. 672 of the last-mentioned Act. It complies with all the

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material requirements of the Act. The value of the whole ratable property is declared to be "set out and described in the schedule hereto prefixed marked A," with the value of the improvements thereon. The schedule is thus incorporated in the by-law. The frontage of each one of the plaintiffs' lots is separately stated, the rate levied per foot, the annual rate for such frontage, the amount of cost chargeable to each lot, and the names of the respective owners. A reference to the plan filed, although it is not "the McDougall plan" mentioned in the by-laws, makes it clear that the frontage stated as that upon which the special rate per foot is assessed is correctly set forth in the schedule. The dividing line between park lots 428 and 429 is indicated on the plan which is in evidence. It may be that the McDougall plan shews all the boundaries of the Canada Company's survey and includes the park lots of the Idington subdivision, but the McDougall plan is not before me. It was incumbent upon the plaintiffs to establish that the schedule does not correctly set out and describe the lands upon which the by-law imposed a special tax. This they failed to do. They contend that the reference to "Canada survey" attributed to all the lots except No. 21, and the "part of park lot No. 428, 150 ft.," is inaccurate and misleading. I have no means of knowing that the lots are not referred to in the McDougall plan as of the Canada Company's survey. But, according to the plan filed by the plaintiffs, all the lots mentioned by number in the by-law have the exact frontages attributed to them. The Idington residence, now the plaintiffs' hospital, is plotted upon part of "park lot No. 428," and that part also has the exact frontage—150 ft.—for which the by-law impeached assesses it.

The numerous cases cited have no application to the facts. There must of course be a valid assessment as a foundation for taxation. But there was here a valid assessment for the general rate and for the local improvement.

The action fails. It is absolutely without merit and is dismissed with costs.

T. Hislop, for appellants; *R. S. Robertson*, for respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The appellants are owners of lands in Stratford, lands which are liable to taxation, and ought to be taxed, for the purposes of the municipality; and these lands have been assessed always for the purpose of such taxa-

tion, and have been taxed accordingly, in precisely the same manner as they were assessed last year, and as it was intended to tax them, in due course, upon that assessment. The taxes were paid from year to year by the appellants without any kind of objection or fault-finding. And there can be no serious contention that they have not had the notice which the law requires of all such assessments.

But, in this action, the assessment of last year is objected to and found fault with; and the action is brought to prevent the usual taxation of the lands, in common with all other taxable lands in the municipality.

What is objected to, and found fault with, is the action of the assessor in setting out in the assessment roll some of the details of the assessment: it is said that in some respects, in his description of the lands, he did not fully comply with that which the Act requires him to do; and that as to part of the intended taxation a by-law authorising and requiring it is not altogether in conformity with the provisions of the Municipal Act under which it was enacted; and also that, as the municipality has not sold to a stranger the debentures provided for by the by-law, there can be no taxation under it.

But these first-mentioned matters are things over which the Courts of Revision of assessments, provided for in the Assessment Act, now have complete control, with full power to make all such changes, and give all such relief, as the nature of the case may require, if any; and so they are not the proper subject of an action in this Court, as they might be if the case were one in which there was no power in the municipality to tax; or one with which the Courts of Revision have not power to deal properly. If the appellants be right in their contention in this respect, and I am far from thinking they are, then the proper remedy for all that they complain of is an alteration of the assessment roll so that it may be in the form they contend for, and that remedy the Courts of Revision can apply, this Court cannot: see the Assessment Act, secs. 53, 54, 69, 70, 79, 82, and 83. Section 70 provides that the assessment roll, as finally passed, as it must be, by the Courts of Revision, shall be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in the notice of assessment, or the omission to deliver or transmit such notice.

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And as to the by-law, it does not seem to me to be open to any substantial objection; it, in substance, complies with all the requirements of the Act upon which it is based: and the assessments under it too were subject to appeal to a Court of Revision, but no appeal against them was made, nor was any motion to quash the by-law made; instead, as I have said, the appellants have, ever since it was passed, been paying, without objection or fault-finding, all the taxation upon these lands under it.

Nor can I imagine any good reason for holding that the lands benefited by the work done under the by-law are freed from payment for that benefit merely because the municipality itself has in effect purchased the debentures made under it in connection with their sinking fund, instead of selling them to a stranger: see the Consolidated Municipal Act, 1903, sec. 420 (3), the Act applicable to the case.

I would dismiss the appeal.

Riddell, J. Ferguson, J.A. Rose, J.

RIDDELL, J., FERGUSON, J.A., and ROSE, J., agreed that the appeal should be dismissed. *Appeal dismissed.*

MAN.

K. B.

DURE v. ROED.

Manitoba King's Bench, Mathers, C.J.K.B. January 23, 1917.

MECHANICS' LIENS (§ III—10)—PRIORITIES—OTHER ENCUMBRANCES—INCREASE IN VALUE—ENFORCEMENT.

Under sec. 5(3) of the Mechanics' Lien Act (R.S.M. 1913) prior encumbrances have priority over the mechanics' liens *only* to the extent of the actual value of the premises at the time the improvements are made, and the lien-holders have priority as to the increase in value effected by the improvements; the rights of the latter cannot be worked out in an action for the foreclosure of a vendor's lien or mortgage, but can only be given effect to in an action brought to enforce their liens.

Statement.

MOTION under r. 121 to set aside an order of the Master adding Sam Hansen and Willie Larsen as party defendants in an action brought by the vendors under an agreement of sale to foreclose the purchasers by reason of default in payment.

S. E. Richards, for plaintiff; *H. F. Tench*, for defendant.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—The purchasers had made some improvements in the making of which certain mechanics acquired liens.

The applicants are such lien-holders, and their contention is that under sub-sec. 3 of sec. 5 and sub-sec. 2 of sec. 11 of the Mechanics' Lien Act the plaintiffs have priority only to the extent of the actual value of the land at the time the improvements

were commenced, and that they have a right to redeem by paying that amount only, which may or may not be less than the amount still due under the agreement.

The lien-holders are undoubtedly subsequent encumbrancers to the extent at least of the actual value when the improvements were begun, and were, therefore, properly made parties in the Master's office.

As the judgment was drawn and entered, the Master had no alternative but to find the total amount due to the plaintiffs under the agreement of sale, and to appoint a time for payment of the sums so found by all the defendants, whether added in the Master's office or made so by the statement of claim.

The applicants point out that under a judgment so framed they will be compelled to pay possibly a larger amount than the actual value of the land at the time the improvements were commenced or suffer the consequence of being debarred from all claim to the land.

By sec. 5 of the Act the lien shall attach upon the estate or interest of the owner. By sec. 2 (c) "Owner" includes a person having an estate or interest in the land (1) at whose request and upon whose credit, or (2) on whose behalf, or (3) with whose privity or consent, or (4) for whose direct benefit, the work is done or materials furnished. The mere fact that a person has an estate in the land upon which the improvements were made is not enough to make that estate subject to a mechanic's lien. It must also appear that the work was done at his request and upon his credit or on his behalf or with his privity or consent or for his direct benefit. If he is not connected with the improvements in one or more of the four ways above mentioned then he is not an owner within the meaning of the Act, and his interest cannot be encumbered with a lien acquired thereunder. A vendor by merely standing by and seeing improvements being made by the purchaser on the property agreed to be sold is not an owner within the meaning of the Act, and his interest cannot be made liable for liens acquired in the making of such improvements. *Flack* v. *Jeffrey*, 10 Man. L.R. 514. It was not claimed by counsel for the lien-holders that the plaintiffs in this case were "owners" whose interests were subject to their liens. As I understand the matter, they base their claim entirely upon sec. 5 (3) and sec. 11 (2).

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The prototype of sec. 5 (3) is to be found in the Mechanics' Lien Act in the Consol. Stat. of Manitoba, 1880, ch. 53, sec. 17. The section as it then was provided that a mortgage or other encumbrance existing before the commencement of the work "shall not have priority over a lien under this Act to any greater extent than the actual value of such land was at the time the improvements were commenced."

The section was continued in that form in all subsequent Mechanics' Lien Acts until the Act of 1898, 61 Vict. ch. 29, sec. 5 (3). Up to this time the Act had been framed so as in express terms to take away from a prior encumbrance its right to priority to any greater extent than the actual value of the land at the time the improvements were commenced. That is to say, it preserved to the encumbrancee his security to the full value that it possessed before the improvements were commenced. Nothing was taken from him which he before had; but if the property upon which he had his charge was increased in value by the labour or material of others, as to such increased value those whose labour or material contributed to it had the first claim. The security holder could not complain because the value of his security had not been increased at the expense of others and those by whose labour or materials were expended upon the land were given a first charge for such expenditure to the extent that its value had been enhanced by their labour or material. The express language of all Acts up to 1898 clearly gave effect to that equitable principle. In that year, however, an unfortunate change in the language of the section was introduced. Instead of re-enacting the section as it had stood for over 18 years and which clearly expressed the legislative intention, the wording was changed. The former section had denied to the incumbrancees priority to any greater extent than the actual value when the improvements were commenced. As it was now enacted and as it has since remained, it gives to the encumbrancee priority to the extent of such actual value. It does not say that he is not to have priority to any greater extent than such actual value or to that value only, but merely enacts that he shall have priority to the extent of the actual value when the improvements were commenced. Does such an enactment in any way affect the encumbrancee? Sec. 5 of the Act (R.S.M. 1913) is the one by which the lien is given. By it the lien attaches upon the estate of the "owner," as defined

by the statute, alone. An unpaid vendor or a mortgagee who merely stands by and sees improvements being made upon the purchased or mortgaged property is not an "owner" upon whose interest or estate the lien attaches.

If sec. 5 (3) were not in the statute the plaintiffs would have priority over the lien-holders to the extent of their whole claim without regard to whether or not the value had been increased by the improvements in the making of which their liens were acquired. That must necessarily be so, because the purchaser held subject to the plaintiffs' claim and the lien-holder's claim was upon the interest of the purchaser alone. That is to say, the plaintiffs would then have priorty for their whole claim not only to the extent of the actual value of the land when the improvements were commenced, but also as to the increased value due to the improvements.

Now what does sec. 5 (3) say? It says the encumbrancee "shall have priority over a lien under this Act to the extent of the value of the land at the time the improvements were commenced." But the plaintiffs had priority without this provision to the extent of the value of the land when the improvements were commenced, and if their claim was greater than that, they had priority to the full extent of their claim whatever the value of the property. The statute does not say that the mortgagee's priority over the lien-holder shall be to the extent of the actual value when the improvements were commenced *only*. Had it done so it would have expressed the same idea as was conveyed by the former section. Then does this section limit the priority of the mortgagee over the lien-holder "to the extent of the actual value," etc., and give the lien-holder priority as to the increased value, if any? If it does not then it has effected a very important change in the law as it existed prior to the 1898 Act. In *Robock* v. *Peters*, 13 Man. L.R. at 124, the late Killam, C.J., said, "these liens are wholly of statutory creation and in derogation of ordinary rights. They can be given only such effect as the statute clearly warrants."

There are, however, two considerations which must not be lost sight of in construing this particular section. In the first place, it must be assumed that the legislature meant something by it. After a careful reading of the Act, I can discover no effect that it can be given unless it was intended to give a lien-holder

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priority as to the increased value. In the second place, the law as it formerly stood did give such priority. Ordinarily a change in language pre-supposes a change in meaning. But where, as here, the Act in its new form, if interpreted strictly, is senseless, I must, I think, presume that a change in the law was not intended, and that sec. 5(3) is to be read as though the word "only" were inserted after the word "Act" in the second last line.

Although the point did not arise in *Hoffstrom* v. *Stanley*, 14 Man. L.R. 227, by reason of the fact that the lien-holder conceded to the vendor priority to the extent of his whole claim, Killam, C.J., appeared to think that it might have been contested as to the increased value.

The lien-holders have priority over the plaintiffs to the extent of the value of the land over and above the actual value when the improvements were commenced. These rights cannot, however be worked out in this foreclosure action. The lien-holders' rights can alone be given effect to in an action brought to enforce their liens. I cannot accede to the lien-holders' motion because they are proper parties; but, at the same time, if they are forced to redeem before these rights are determined, they may be compelled to pay a larger amount than the actual value of the land. Either the judgment should be amended so as to give the lien-holders a right of redemption upon paying the actual value of the land at the time the improvements were commenced, or the proceedings herein should be stayed for a reasonable time to allow the lien-holders to prosecute to a conclusion their lien action. This latter course would, I think, be preferable. As the applicants have failed in their motion the costs of this application will be as against them to the plaintiffs in any event, and may be added to the costs of the reference. *Motion refused.*

B. C.

C. A.

FOSTER v. GOODACRE.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. April 3, 1917.

SPECIFIC PERFORMANCE (§I E—30)—SALE OF LAND—DESCRIPTION—ENCROACHMENT.

Where an agreement of sale of land sufficiently describes the land, a minor encroachment upon the land does not prevent the vendor from making title in accordance with the contract, specific performance will be decreed.

Statement.

APPEAL by defendant from judgment of Hunter, C.J.B.C.,

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decreeing specific performance of an agreement for the sale of land. Affirmed.

W. J. Taylor, K.C., for appellant.

E. C. Mayers, for respondent.

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

MARTIN, J.A.:—No good reason has, I think, been advanced for disturbing the judgment of the trial Judge, and therefore the appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I think the Chief Justice below was right, and would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the judgment of Hunter, C.J.B.C., decreeing specific performance of an agreement of sale of certain lands in the city of Victoria, the main defence set up and sought to be established was that the lands agreed to be sold were not ascertainable or definable upon the ground or in the books of the Land Registry Office, and that upon application by the vendees for registration, registration was refused; this refusal in the light of other documentary evidence later found upon the files of the Land Registry Office was in error, as the alley-way referred to in the agreement of sale was shewn to exist and of record, although, at the time of the refusal of registration, overlooked.

It is clear that, taking the description as contained in the agreement of sale, the land was capable of being defined upon the ground by a land surveyor, the evidence of D. R. Harris, a B.C. land surveyor of long experience and high standing in his profession, well establishes this fact, and no uncertainty existed as to the lands described, and the vendor (the plaintiff), was able to make a title to the property in accordance with the contract. Then it is well understood law that it is sufficient if the vendor is able to make a good title at the time fixed for completion of the contract even though he was not in a position to do so at the date of the contract (Snell's Principles of Equity, 17th ed. (1915), 537; *Cattel* v. *Corral* (1840), 4 Y. & C. 228).

Were this a case admitting of the purchasers (the defendants) repudiating the contract upon any of the grounds alleged, which, in my opinion, was not the situation upon the facts, the objection came too late, as the defendants, after becoming aware of all that is alleged, and amongst other contentions, it was alleged that

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there was adverse possession and encroachment of buildings to the extent of a few inches, continued to treat the contract as subsisting. In the headnote to *Halkett* v. *Dudley* (*Earl*), ([1907] 1 Ch. 590,) 76 L.J. Ch. 330, we find this language:—

> The right of a purchaser to repudiate the contract on account of a defect in title which the vendor cannot remove is merely an equitable right arising out of want of mutuality and affecting the equitable remedy by way of specific performance, and is distinct from the legal right of rescission. The right of repudiation must be exercised as soon as the defect is ascertained; and if, after ascertaining it, the purchaser continues to treat the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose, and must give the vendor a reasonable time to cure the defect. Further, after a decree of specific performance, a defendant purchaser cannot repudiate the title or the contract without the leave of the Court. If he discovers a defect of title which might, but for the decree, give rise to a right of repudiation he must move to be discharged from the contract, and he is not entitled to be discharged as a matter of course. The vendor may perfect his title at any time before certificate, while the purchaser is not confined to objections taken by him before or at the hearing, and in each case the Court will consider the circumstances and grant or refuse the relief as may appear to be equitable.

The judgment in that case was the judgment of Parker, J., (now Lord Parker of Waddington) and to a large extent the facts of the present case are in their nature similar, as shewing the dealings of the purchasers with the vendor after discovery of the objections now pressed; all demonstrating that the purchasers continued to treat the contract as subsisting.

Considerable stress was laid upon the fact that a notice of discontinuance of the action was served and a second action brought for rescission of the agreement of sale, following upon the service of a notice demanding payment of the moneys due and, in default, forfeiture of the moneys paid under the terms of the agreement of sale, all that need be said with reference to the steps taken, in my opinion, is this, that later, leave was granted to the plaintiff by the order of Macdonald, J., all parties being heard, to withdraw the notice of discontinuance, and that all proper amendments be made. Amended pleadings were thereafter delivered and issue joined. The plaintiff having elected to proceed for specific performance, it was not open to later claim rescission by the service of the notice, under the terms of the agreement of sale. It may be further pointed out that during the course of the trial the plaintiff, through his counsel, offered to accept a decree of rescission carrying with it the forfeiture of all the moneys already paid, which

would have absolved the defendants from any further payments under the agreement of sale, but counsel for the defendants did not choose to accept the offer made, but contended that the action for specific performance should be dismissed and that the defendants upon their counterclaim should recover all moneys paid, together with interest thereon, taxes and damages. Some considerable reliance was placed upon ch. 43, sec. 28 (3), Land Registry Act Amendment Act, 1914, which reads as follows:—

(3) It shall be the duty of the grantor or other party in any conveyance or instrument heretofore or hereafter executed by him, or on his behalf, to so describe the parcels of land intended to be conveyed or otherwise dealt with that the title to such parcels shall be registrable; and to that end to provide and supply any and all necessary maps, plans, or sketches required by the registrar:

(*a*) In case of refusal or neglect for 30 days after demand duly made in writing upon such grantor or party to comply with the above requirements, the person entitled to be registered or the applicant for registration may procure such necessary description, maps, plans, or sketches; and the expenses and costs of procuring the same, including the expenses of any necessary surveys, may be recovered in any Court of competent jurisdiction from such grantor or other party so refusing or neglecting as aforesaid.

The contention being that there was a statutory breach of duty upon the part of the plaintiff in not describing the land so as to enable registration of the agreement of sale, in my opinion, the facts, developed at the trial, shew that there was proper description, and if I were wrong in this, all that the statute provides by way of penalty is to be answerable in case of default taking place, for the expenses and costs of procuring the necessary description, maps, plans or sketches and the necessary surveys, and the defendants have not made out any case under the statute. The evidence at the trial, established title to the land agreed to be sold, and it was sufficiently described, and as to the very minor encroachment that was shewn to have been removed, or was in the course of being removed, and by the decree which issued in pursuance of the judgment of the Chief Justice, all proper safeguards were made ensuring to the defendants an absolute title to the land agreed to be sold. It is instructive upon the points of law so ably argued upon this appeal to refer further to the language of Lord Parker of Waddington (then Parker, J.), in *Halkett* v. *Dudley*, *supra*, at 336.

Finally it may be said that at most, in the present case, it was a defect of conveyance only, but as to that I do not agree, as, in

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my opinion, the agreement of sale was in its description of the land sufficient. However, assume that it was a defect of this nature, I would then refer to the language of Kay, J. (afterwards Kay, L.J.), in *Hatten* v. *Russell* (1888), 38 Ch.D. 334, 57 L.J. Ch. 425, at 347.

> No doubt there are certain authorities which say that where the defect is a defect of title the purchaser is not bound to wait after the day fixed for completion for an indefinite time until the vendor can make a title to the thing he purports to sell; but I do not know that that doctrine has ever been carried beyond a case in which the defect is a defect of title and that is why I have taken some pains to shew that in my opinion the defect is not a defect of title. I do not think that is the doctrine of this Court as far as I am aware where the defect is a mere defect of conveyance. (Also see *Chattock* v. *Muller* (1878) 8 Ch. D. 177.)

I am therefore of the opinion that the Chief Justice of British Columbia (Hunter, C.J.), was right in decreeing specific performance and dismissing the counterclaim. The judgment should be affirmed and the appeal dismissed. *Appeal dismissed.*

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GAGE v. REID.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Kelly and Masten, JJ. January 31, 1917.

NEW TRIAL (§ II—5)—IRRELEVANT EVIDENCE—REMARKS BY COUNSEL—ALIEN ENEMY.

The admission of evidence irrelevant to the issue, calculated to prejudice the jury, is *primâ facie* a "substantial wrong or miscarriage," and the onus of proving that it is not is on the party on whose behalf the evidence is given. (Comments upon the improper admission of evidence of the plaintiff's nationality.)

Statement.

AN appeal by the plaintiff from the judgment of MIDDLETON, J., at the trial at Belleville, on the 18th and 19th April, 1916, upon the findings of a jury, in favour of the plaintiff in an action for false imprisonment, for the recovery of $3 damages and Division Court costs, with a set-off to the defendant of the excess of his costs in the Supreme Court of Ontario, in which the action was brought, over the costs to which he would have been entitled had the action been brought in a Division Court.

The defendant was a constable, who arrested the plaintiff at Orillia on the 7th February, 1916, upon a telegram sent to him by one Stokes from Tweed. The plaintiff was taken by the defendant to Belleville after a detention in the lock-up at Orillia for nearly two days, and was kept in gaol at Belleville for forty days.

The plaintiff was a foreigner, a subject of the Emperor of

Austria and King of Hungary, but, according to an affidavit made by him in the action, was of the Serbian race, and professed his readiness to become a British subject by naturalisation.

Questions were left to the jury, which, with their answers, were as follows:—

1. Did the defendant act in good faith in arresting the plaintiff? A. He did.

2. Assuming that the arrest was legal, but that the defendant's liability came to an end when he handed the plaintiff over to the Belleville constable, what damages do you allow? A. $3.

3. Assuming that the defendant's liability came to an end when the plaintiff was brought to the county of Hastings, what damages do you allow? A. None in addition.

4. Assuming that the defendant's liability did not come to an end till the writ was issued (20th March, 1916), what damages do you allow? A. None in addition.

5. Assuming the damage can be assessed to the 28th March, what damages do you allow? A. None in addition.

The appeal was upon several grounds; the principal one was that the jury were prejudiced against the plaintiff by evidence improperly admitted and remarks made at the trial by counsel for the defendant in regard to the plaintiff being an alien enemy; the plaintiff sought to increase the damages and costs, and asked for a new trial.

An affidavit of the plaintiff's solicitor, filed in support of the motion for a new trial, was as follows:—

"2. At the opening of the Court on Tuesday the 18th day of April, 1916, E. Guss Porter, Esquire, the leading counsel for the defendant, spoke to the motion to dismiss or stay the action, on the ground that the plaintiff was an alien enemy, earlier coming before Mr. Justice Middleton in Toronto, whose conclusion on the latter branch of which had been reached at Toronto, on the 15th day of April, 1916, by which the stay applied for was denied.

"3. The Judge, however, when announcing that he would not stay the action—the authorities not warranting such course—stated that he would hold judgment on the whole case over until the trial.

"4. Said counsel, though he well knew that the body of jurors empanelled for the sittings were, with hardly an exception, in attendance—having answered to their names on the roll being

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called by the Deputy Clerk of the Crown—and must have heard all that he said, renewed the argument of such motion, alluding to various portions of the material which had been used before the Judge by his Toronto agent; and insisted, with marked emphasis, upon the alleged convictions under the Liquor License Act of the plaintiff—the method of enforcing one or both of which gave rise to the action—having the effect of depriving the plaintiff of the benefit of the Governor-General's proclamation bearing upon the immediate question discussed.

"5. During the course of his address to the jury, counsel for the defendant, turning around and pointing to the plaintiff, in scornful tones desired them to consider what kind of person this man, who solicited damages at their hands, was; then, recording his own judgment upon him for their better understanding of him, declared that he was one that, if given a chance, would attempt, or endanger, by any means which might be placed within his reach, the lives of the gallant boys or splendid fellows the country had sent and was sending to the front—his remarks, at least in this particular, being substantially what is here set down.

"6. Continuing, the said counsel, eager to have the jury know the destination of any considerable sum the plaintiff should be fortunate enough to recover, by way of damages—to lighten the pocket of his unoffending, generous-minded client—said that he would take care to apply it, in some way, for the enemy's advantage, in helping them to carry on the war—the remarks, at least in this particular, of said counsel being substantially what is here set down.

"7. The said counsel could not fail to have been aware that his Toronto agent, Mr. H. S. White, had specifically brought up this matter of the alleged violations by the plaintiff of the Liquor License Act before the Judge when the adjournment in Toronto was had; and that, upon my pointing out that both charges antedated the declaration of war, the Judge—a decision to which he adhered in Belleville—held the ground so advanced to be ineffectual.

"8. Said counsel did not think proper to mention the circumstance sworn to on the motion in Toronto of the plaintiff's denial that he was an alien enemy, or his contention that he was of Serbian nationality; nor did the learned Judge combat his argument

on this point by any reference thereto, but allowed him to proceed therewith as on the unchallenged theory that the position of matters was as the said counsel represented.

9. "Finally, before completing the division of his speech to the jury, treated of in paragraphs 5 and 6 hereof, the learned counsel quoted the wording of the statement of claim, wherein it appeared that the plaintiff, through his solicitor, claims from the defendant such damages as a jury of his countrymen may see fit to award, going on to say: 'Let him go then to his compatriots, the Austrians, and not to a body of loyal Canadians for a verdict'—his remarks, in this particular, being substantially what is here set down."

D. O. Cameron and *J. B. Mackenzie*, for appellant.

Edward Bayly, K.C., for defendant, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—But for some doubt expressed by one of my learned brothers at the close of the argument of this appeal, I should have thought the case one of a most obvious and regrettable mistrial; and now, after giving the fullest consideration to the views expressed by that learned Judge since the close of the argument, I feel bound to say that I am still of the same opinion, and to add that I should have hoped that the expressly objectionable features of this trial could not have happened in any of our courts, and that I hope nothing like it may ever occur again.

In a court of justice, in this Province, a defendant, sued for false imprisonment, was allowed to give evidence, wholly irrelevant to the issue, that the plaintiff was a subject of a nation then and now at war with Great Britain, and, based upon that evidence, counsel for the defendant was permitted to urge the jury to assess the plaintiff's damages, because of his nationality, at little or nothing, in words set out in the uncontradicted affidavit of the plaintiff's solicitor.

And the wrong was the more flagrant because the plaintiff had admitted his nationality throughout the action, and was proceeding with it as a resident of this country under its proclamations extending protection to such aliens as he; and there was no pretence, or suggestion, of any character, of any violation by him of any of its provisions, or any kind of misuse of, or intention or disposition to misuse, its protection. We have to deal with this case and its actual facts, not with some fanciful case upon the facts of other cases, or upon imaginary facts.

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To say that the question of a man's nationality might be in some cases a question for a jury, is to say something so obviously irrelevant as really to need no observations upon it, yet it may be said: in this case it was not in question even in the remotest way; nor could it have been, because it was admitted; and, if it had been, it justly could not have affected the question of damages or of the defendant's liability for false imprisonment in the remotest way. If the man's nationality had had any effect upon his action, it could only have had the effect of staying it during the war: there should not have been any other trial of any issue between the parties: it would have been improper to have assessed damages or have tried whether the plaintiff had been falsely imprisoned by the defendant. There is no sort of excuse for the introduction of such evidence, and it could have had no purpose but that of an unjust discrimination because of the man's nationality: a thing so obviously inexcusable that it is surprising to me that there should be any attempt to excuse it, not to speak of attempting to justify it. It was just as bad as attempting to influence a jury to disregard their duty and their oath of office, in denying justice to any one on account of his creed or colour; and in its effect was worse in this case, because it was so easy to stir up the animosities of the jury against an alien enemy, whilst it might have been difficult, if not impossible, on account of colour or creed.

To attempt to justify or excuse the admission of such evidence, because the trial Judge had not yet finally disposed of a motion to stay proceedings in the action, because of the plaintiff's nationality, is again something so obviously erroneous as hardly to need comment: but what excuse could there be for admitting irrelevant and improper evidence to the jury because the Judge might want evidence for his enlightenment upon a fact never in dispute—always admitted—that the plaintiff is an Austrian; and one which was quite immaterial if the plaintiff were protected by the orders in council and proclamations respecting alien enemies resident in Canada: see *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284. But the evidence was not so improperly admitted, it was improperly admitted as relevant to the questions which the jury had to determine; and was given *and used* for the sole purpose of inducing the jury to deny the man his lawful rights because of their bitter

feelings against the monarch to whom he owed allegiance: a use which could not be too strongly condemned and rebuked.

No case in any British court has been cited in which anything of the kind happened; I hope no such case exists: and, having regard to the first principle of justice as administered in such courts, it seems to me to be quite unlikely that there could be more than few, if any, such cases.

But in the numberless courts of the United States of America, where sometimes counsel seem to be under less self, or other, restraint, a number of such cases have occurred, and some of them are reported.

In one of them—*Fathman* v. *Tumilty* (1889), 34 Mo. App. 237—counsel in his address to the jury said that the plaintiff was a Dutchman and the defendant the son of an Irishman, and that it was nothing but an attempt on the part of the Irishman to beat a Dutchman out of his honest debt: a new trial was granted, the trial Judge having failed to "rebuke" counsel.

In another case—*Moss* v. *Sanger Bros.* (1889), 75 Tex. 321—a new trial was granted because counsel had been permitted to speak of the plaintiffs as "all Jews, or Dutch Jews, and that is worse," whose "every thought is how to cheat and swindle." And *Freeman* v. *Dempsey* (1891), 41 Ill. App. 554, and *Cluett* v. *Rosenthal* (1894), 58 N.W. Repr. 1009, are cases of a similar character.

In the case of *Rudolph* v. *Landwerlen* (1883), 92 Ind. 34, the plaintiff was a parish priest, and opposing counsel in his address to the jury said it was for the jury to consider whether it was not a doctrine of the church, of which the plaintiff was a priest, that one of its members might swear falsely as a witness and be forgiven by a priest for that sin so as to absolve him from all moral guilt; adding that, if that were not so, let the plaintiff stand up and deny it, and that would be the end of it. He was stopped and rebuked by the trial Court, but that Court refused to direct a new trial: on appeal it was held that the trial Court erred in refusing to grant a new trial.

It is only fair to counsel in those cases to say that they took the risk of arousing the animosity of some juror or jurors against themselves; a risk of which there was no kind of danger in this case, the animosities could be but one way, and it was so easy to play upon them; circumstances which make the misconduct

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of the trial the more objectionable, and the need for a new trial, so that there may be something like even-handed justice done, the more urgent.

Some point has been made of the failure of counsel for the plaintiff to interrupt and object, at the moment, to the misconduct of counsel for the defendant in his address to the jury; but what has that to do with such a case as this? It is true that, in things affecting a party's rights in the action only, it may be said, and generally is said: "You should have objected at the time, when all you complain of might have been avoided; you cannot let such things pass as right at the trial, and take your chances of a verdict in your favour, and afterwards insist upon another chance, through that always regrettable, sometimes oppressive, method, a new trial." But the Court has power to grant or direct a new trial, whether objection has been made or not; and I know of no case in which a new trial should be more promptly directed than in this case, in which the wrong done not only worked an injustice to the plaintiff, but affects the administration of justice generally and is a blot upon the Court, in which all men, entitled to its protection and aid, must be upon an equality, notwithstanding nationality, colour, or creed. The Court not only may but must keep its own skirts clean.

And it must be borne in mind that the trial Judge is not a mere machine, unable to act except upon the "motion" of a party to an action. It is his duty to see that in all things there is regularity and propriety.

But from the standpoint of the plaintiff only: why should he have objected again, after firmly and frequently objecting to the admission of the evidence as to nationality, evidence which could have been given only for the use to which it was put by counsel for the defendant in his address to the jury, and after having all such objections promptly overruled? The admission of such evidence was the beginning of the wrong, the extremely reprehensible words of the address, based upon it, were but the logical and direct conclusion of that wrong.

And, in regard to the suggestion that a new trial should not be given because the evidence improperly admitted caused no "substantial wrong or miscarriage:" The Judicature Act, R.S.O. 1914, ch. 56, sec. 28: it is enough to say that it is obvious that it did. The plaintiff was falsely imprisoned in Orillia, and taken

thence to Belleville and there so held for forty days: or, more accurately speaking, the jury were directed to assess the plaintiff's damages as if that were so, and they assessed them accordingly at the nominal sum of $3, and, in answer to a question put to them, said that the damages would be the same whether the imprisonment in Belleville, which I have mentioned, was lawful or unlawful. One needs to close his eyes very firmly against the truth to be unable to see that the verdict was the result of the evidence as to the plaintiff's nationality and the highly improper appeal to the jury based on such evidence.

It should not be forgotten that liberty is more than life to many men; and that there can be no excuse for interfering with any man's liberty except in manner authorised by law. There can be no excuse for any officer who, in defiance of the law, arrests any one: and all officers should know that, when making an arrest upon a warrant, it is their duty to have the warrant with them and to produce it if required. If that were not so, the door would be opened to wrongs of the most flagrant kind, from which no one would be secure.

It was not suggested at the trial that sec. 10* of the Public Authorities Protection Act, R.S.O. 1914, ch. 89, applied to the case: and, if it did, the jury should have been directed to bring in a verdict in accordance with the provisions of that section. The case went to the jury for the single purpose of the assessment of the plaintiff's actual damages by reason of the false imprisonments of which he complained; and so it must be dealt with here, whatever may be the result of a new trial, and however this question, if raised, may be dealt with there.

Let it be supposed that the nationalities of the parties were reversed, that evidence had been admitted for the purpose of proving that the defendant was an Austrian and the plaintiff a British subject, and that counsel had been permitted to play upon these facts and to suggest to the jury that every dollar awarded by them to the plaintiff was just so much money taken from the Austrian, and added to the British war funds, would the damages have been assessed at $3?

Besides that, according to the cases, the onus of shewing that there was "no substantial wrong or miscarriage" by the improper

*This section provides that in certain cases no more than nominal damages shall be recovered.

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admission of evidence, is upon those who seek the benefit of the law in that respect, that is, in this case, the defendant: an onus that no one can, with any pretence of reason, contend has been satisfied: see *Anthony* v. *Halstead* (1877), 37 L.T.R. 433; and *White* v. *Barnes*, [1914] W.N. 74: and that that must be so in every case in which it may be that the improper evidence had some substantial effect on the jury, seems to me to be obvious. A very substantial wrong is done to a party by wrongly admitting evidence which may substantially prejudice his case in the eyes of the jury; and, consequently, unless the opposite party can shew that actually it did not, the case is very plainly one in which "some substantial wrong" was done.

The case seems to me to be one, of the very plainest kind, of a mistrial.

I would allow the appeal, and direct a new trial; and the plaintiff should have his costs of this appeal; and so he should have his costs of the wasted trial, but for the doubt as to the scale of costs on which they should be taxed: if his action should have been brought in a Division Court, it would not be right that he should have costs on the Supreme Court scale: the proper scale cannot be determined until there has been a new and fair assessment of damages. All things considered, it is best to leave these costs to be dealt with by the next trial Judge, who will have a discretion as to all the other costs of the action also. He will, no doubt, award the costs of the mistrial to the plaintiff, upon the proper scale, subject to such set-off, if any, as may be proper.

Kelly, J.

KELLY, J.:—In my opinion, a new trial should be granted, with costs of the appeal to the appellant; the costs of the former trial to be disposed of by the Judge presiding at the new trial.

Riddell, J.

RIDDELL, J.:—I agree.

Masten, J.

MASTEN, J.:—In this case I have the misfortune to differ from the opinions entertained by the other members of the Court, and it is needless for me to say that my views are expressed with the greatest diffidence and with a full appreciation of the superior weight and value which belongs to the opinions of my brethren, long and intimately familiar as they are with the procedure at jury trials. None the less, the defendant is, I assume, entitled to a statement of the opinion which I have reached and of the reasons for it.

This is an appeal from the judgment at the trial, which was held on the 18th and 19th April, 1916, before Middleton, J., and a jury. The action is for wrongful arrest, and at the trial the plaintiff was awarded nominal damages of $3.

The facts giving rise to the action were as follows. On the 10th August, 1914, the plaintiff was in two cases convicted before Stewart Masson, Police Magistrate in Belleville, for selling liquor and for keeping liquor for sale without a license, and he was fined $250 in each case, and in default of payment was directed to be committed for three months to the county gaol, Belleville, with hard labour, in each case; terms to run consecutively. On the night before these convictions were made, he jumped out of the window of his house, left the neighbourhood of Belleville, and disappeared from view. On the 7th February, 1916, he was arrested, near Orillia, by the defendant (who is the Chief of Police in the town of Orillia). The arrest was made in pursuance of a telegram dated the 7th February, from Tweed, Ontario, as follows: "John Reid, constable, Orillia. Arrest Joe Gage and hold him till officer arrives. Notify my expense when you get him. John Stokes, Inspector."

The plaintiff was arrested about three or four o'clock in the afternoon, and was detained in close custody during that night. The next day* he was handed over to one Donovan, a police officer of Belleville, who produced the warrants of commitment which had been issued pursuant to each of the above convictions. The warrants were not "backed" by a magistrate of the county of Simcoe, and the arrest appears to have been technically illegal. The prisoner was then conveyed to Belleville by railway train, and incarcerated there pursuant to the warrants of commitment.

At the trial of this action the illegality of the arrest was not contested, and the sole questions for determination were: (1) the status and rights of the plaintiff as an alleged "alien enemy;" and (2) the assessment of damages.

The plaintiff moves for a new trial on fourteen grounds, and among them on the following:—

"(7) The learned Judge at the trial should not have permitted the defendant's counsel to argue the question as to the plaintiff's

* In the examination for discovery of the defendant, read at the trial, the defendant said that the plaintiff was locked up at Orillia from the 7th February, at 4 p.m., till the morning of the 9th February.

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being an alien enemy in the presence of the panel from which the jury afterwards trying this action were selected, and was not empowered to retain the motion launched in that connection, or to intimate that he would do so, until it might be seen whether something would arise during the trial to justify a dismissal of the action, for the reason put forward.

"(8) The learned Judge at the trial erred in dealing with the situation referred to in the preceding objection as an issue arising on the trial; and one which the jury might legitimately consider, and the defendant's evidence thereon was improper.

"(9) The said verdict and the answers to all questions left to the jury were perverse; and such verdict and answers ought to be set aside, for the reason, in particular, that the defendant's counsel addressed to the jury inflammatory language of the most violent description, on the assumption that the plaintiff was an alien enemy, which said language, instead of being discountenanced, was not even restricted by the learned Judge."

I address myself more particularly to the three grounds just quoted. These grounds divide themselves naturally into two separate categories:—

First, the question raised by grounds 7 and 8, namely, that the capacity of the plaintiff as an alien enemy was not a legitimate subject for consideration at the trial, and that evidence ought not to have been admitted in respect of it.

Second, that there has been a mistrial on account of the inflammatory language used by the defendant's counsel, and not corrected by the trial Judge.

I deal with these points in order.

On the 11th April last, a motion was launched on the part of the defendant asking that the action should be dismissed, or that all further proceedings should be stayed, on the ground that the plaintiff, at the commencement of the action, was, and still was, an alien enemy, the subject of a country at war with His Majesty, and therefore incompetent to maintain the action.

The motion came on for hearing before Mr. Justice Middleton, who, after hearing argument, decided that he would not then postpone or stay the trial of the action, but directed that the question so raised should be disposed of at the trial. The action of the Judge in reserving the question of "alien enemy" to the

trial appears to be warranted by the general practice and also to be covered by precedent.

In the case of *In re Mary Duchess of Sutherland, Bechoff* v. *Bubna* (1915), 31 Times L.R. 394, there was a motion on the part of the defendant to stay proceedings on the ground that one of the plaintiffs was an alien enemy. Mr. Justice Warrington dismissed the application, but, on appeal to the Court of Appeal, the Court, after hearing the question discussed on different occasions, determined that the evidence on which the question of "alien enemy" hinged could best be given at the trial of the action, and ordered accordingly.

The practice in such cases is somewhat elaborately considered by the late Chancellor Boyd in the case of *Luczycki* v. *Spanish River Pulp and Paper Mills Co.* (1915), 25 D.L.R. 198, at pp. 200 *et seq.*, and he quotes (p. 203) with apparent approval the conclusions reached in the *Law Quarterly Review* for April, 1915 (31 L.Q.R. 167). In the case before the Chancellor the position of the plaintiff as an "alien enemy" was clearly demonstrated on the motion, and consequently the direction of the Chancellor was that, so long as the plaintiff remained quiescent during the war, no order to stay proceedings was really needed; but, if the plaintiff ventured to make any move in the case, it was at her own risk. Should any intervention of the Court be asked, it is not to be by way of dismissal (when everything is tied up by the war) but at most by way of staying proceedings till the termination of the war. In that case the Chancellor considered the earlier history relative to the plea of "alien enemy." Modern practice concerning the question does not appear to be fully settled as yet.

Undoubtedly it is proper practice in an apparently clear case, if the plaintiff does not remain quiescent, for the defendant to move summarily for a stay; but, where there is an issue of fact as to whether the plaintiff is or is not an alien enemy, the question would seem to be properly adjourned for final determination on the trial of the action—and that was the course adopted by Mr. Justice Clement in *Newman* v. *Bradshaw* (1916), 28 D.L.R. 769, after a full consideration of the more recent cases. Reference may also be had on this question of procedure to *Princess Thurn and Taxis* v. *Moffitt*, [1915] 1 Ch. 58, and to *Von Hellfeld* v. *Rechnitzer*, The Times, December 11th, 1914.

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No authority has been cited nor any reason given against the action taken in adjourning till the trial the question raised by the motion to stay; and, in my opinion, the disposition so made was proper. The question so adjourned for determination at the trial was a question of fact and not of law: *Simon* v. *Phillips* (1916), 85 L.J.K.B. 656.

Whether a particular plaintiff who is an alien residing within the realm comes within the class of "alien enemies," or within the class of alien friends, depends necessarily upon his actions. If an alien, though pursuing his ordinary avocation during the daytime, should be engaged at night in dropping bombs upon the people of the realm, or in communicating military intelligence to the enemy by wireless telegraphy, he would undoubtedly be not only an alien, but an alien enemy.

The order in council of the 13th August, 1914, provides in clause 1: "Such persons (immigrants of Austro-Hungarian nationality quietly pursuing their usual avocations), so long as they pursue their ordinary avocations, shall not be arrested, detained or interfered with unless there is reasonable ground to believe that they are engaged in espionage or attempting to engage in acts of a hostile nature or to give information to the enemy or unless they otherwise contravene any law, order in council or proclamation."

Whether the plaintiff in this case was conducting himself according to these provisions was a question of fact which was not determined on the motion (nor indeed could it have been on the conflicting affidavits then filed), but it was sent forward for determination at the trial.

Even if the Judge in Chambers had determined that he would not summarily stay the proceedings till the conclusion of the war, such an order would not, in my opinion, have prevented the defendant from questioning at the trial the status of the plaintiff. Much more then was this the case when, instead of refusing the motion, he adjourned its further consideration to the trial.

The question might have been determined at the hearing of the motion, or the motion might have been held over to be determined by the Chambers Judge after the trial of the action, or it might have been specifically referred to the Judge at the trial to be dealt with by him as a Judge sitting in Chambers at the trial.

None of these courses appears to have been adopted, but the subject-matter of the motion, viz., the personal capacity of the plaintiff to sue, appears to have been left in a somewhat general way for determination at the trial. At p. 7 of the evidence, the learned trial Judge says: "One object I had in adjourning this motion—it affects the procedure—was that, when evidence is given in this case sufficient to justify me, if there is sufficient to justify me, execution should not issue, or that the money should not be paid over to this man if there is any danger of it reaching an alien enemy."

And again on p. 9:—

"Mr. Porter: In that case it seems to me that this case is distinguishable from nearly all those cases. This man is a violator of the law.

"His Lordship: That is the only question of fact; that he is a violator of the law seems to me to be insufficient, because the only violation appearing on the material before me, was violation before the proclamation, and I thought that was waived by the proclamation.

"Mr. Porter: Then it would be open to me during the trial to shew he was escaping from justice.

"His Lordship: I will see how the facts develope in the course of the trial, before disposing of the motion."

It appears to me from the above that some confusion has arisen, and that the question of "alien enemy" has been treated exactly as it might have been had the trial of the action been carried on before a Judge alone, without a jury, in which case the present difficulty would not have arisen. I incline to think that it was in the mind of the trial Judge that the question of "alien enemy" should be decided by him independently of the jury, but he made no precise ruling to that effect, and when he directed as he did that the question of alien enemy should be heard and determined at the trial, when the question to be determined was a question of fact, and when the only tribunal at the trial having jurisdiction to deal with a question of fact is a jury, it seems to me that the inevitable result was that this question of fact fell to be determined by the jury; consequently, that the evidence bearing upon the question of whether the plaintiff had been acting in compliance with the requirements of the order in council, or

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had afterwards demeaned himself as an "alien enemy," was a question of fact for the jury, which the defendant's counsel was entitled to have submitted to the jury, just as much as the plaintiff's counsel was entitled to have any other fact arising in the action submitted to the jury: and, therefore, that the evidence which was adduced on this question was properly adduced in the presence of and before the jury.

It is quite true that no amendment was made to the record so as to raise on it the question of the capacity of the plaintiff to sue, but in the present state of the practice I do not consider that that was necessary. That issue had been fully put in question by the motion to stay, and had been directed to be determined at the trial, so that no one was taken by surprise; and, while the record might well have been amended if either party had sought to have that done, the fact that no amendment was actually made in the record does not, in my opinion, vitiate the trial. Any proper amendment for that purpose could now be made so as to make it conform to the evidence. It is true that in the early case of *Flindt* v. *Waters* (1812), 15 East 260, it was held that, no proper and adequate plea raising the objection as to the personal capacity of the plaintiff to sue having been set up, the question could not be raised; but in that case the plaintiff was not an alien but a British subject, and it was essential that the question to be determined should be raised by a special plea setting forth the particular circumstances and the fact that the plaintiff, though a British subject, represented an alien enemy, on whose behalf the suit was in truth and in substance brought. The judgment proceeded upon the footing that, as the plaintiff on the record, a British subject, was not an alien enemy, no advantage could be taken of the objection without a plea of "alien enemy." The circumstances were entirely different from the present case, and the elasticity of practice has increased since 1812. I therefore do not think that *Flindt* v. *Waters* affords any objection to the course that was here pursued, nor to the view that the facts bearing upon the question of the plaintiff's capacity were, without formal amendment of the record, proper for investigation before the jury.

The question was further considered in the case of *Janson* v. *Driefontein Consolidated Mines Limited*, [1902] A.C. 484. That also was an action upon an insurance policy. A company incor-

porated under the laws of the South African Republic had insured, with Janson and other underwriters, a cargo of gold. The gold was, during its transit, seized on the 2nd October, 1899, by order of the Government of the South African Republic, and on the 11th October a state of war began between the British Government and the Government of the Republic. The insurer was resisting payment on the ground that the company insured was an alien enemy and the insurance was void, having been made in contemplation of hostilities. At p. 496 of the report, Lord Halsbury says: "To apply what I have said to this case, I do not deny that a Judge has a right to consider whether the thing incriminated is an adherence to the King's enemies, or something calculated to assist them." At p. 499, Lord Davey says: "The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace. In the present case the third rule would have constituted a defence to the present action; but the parties, being desirous to obtain a decision on the merits of the case, waived the objection. I have some doubt whether it was competent for the parties to take this course, for it humbly appears to me that, the objection being one based on considerations of public policy affecting the Sovereign, his Courts should be held bound to take notice of the plaintiff's inability to sue, and I do not think that this observation is inconsistent with *Flindt* v. *Waters*. But the point is now happily academic, and I do not desire to make it a ground of judgment."

The last word upon the subject is pronounced in the case of *Daimler Co. Limited* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Limited*, [1916] 2 A.C. 307. The circumstances of that case are not at all similar to this present case, but I refer to it because it indicates plainly that the Court will, on the trial of any such action, investigate and determine the question whether the plaintiff is an alien enemy, and whether his position is such, as an alien enemy, that the action is wholly barred or that his remedy ought to be suspended during the currency of hostilities.

I note also that the capacity of the plaintiff to sue was considered, evidence received, and the question adjudicated upon

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at the trial, in *Oskey* v. *City of Kingston* (1914), 32 O.L.R. 190, at p. 194, 20 D.L.R. 959.

For these reasons, I am of opinion that the capacity of the plaintiff as an alien enemy was a legitimate subject for consideration by the jury at the trial, and that the evidence bearing on that issue was properly admitted. The fact that it fell short of establishing such facts as prove the plaintiff to be an alien enemy has no bearing on the admissibility of the evidence—nor upon its discussion in the Court.

The conclusion at which I arrive is, that the issue as to the status and capacity of the plaintiff as an alleged alien enemy was properly before the Judge and jury, like any other issue arising for determination at the trial; and, consequently, that evidence as to the plaintiff's nationality, and proper comment on that evidence by counsel for the defendant, was admissible, and was a right on which the defendant was entitled to insist.

Coming now to the second ground of appeal, mentioned above, I find more difficulty. An affidavit is filed in support of the application from which I extract the relevant statements as follows:—

"5. During the course of his address to the jury, counsel for the defendant, turning around and pointing to the plaintiff, in scornful tones desired them to consider what kind of person this man, who solicited damages at their hands, was; then, recording his own judgment upon him for their better understanding of him, declared that he was one that, if given a chance, would attempt or endanger, by any means which might be placed within his reach, the lives of the gallant boys or splendid fellows the country had sent and was sending to the front—his remarks, at least in this particular, being substantially what is here set down.

"6. Continuing, the said counsel, eager to have the jury know the destination of any considerable sum the plaintiff should be fortunate enough to recover, by way of damages—to lighten the pocket of his unoffending, generous-minded client—said that he would take care to apply it, in some way, for the enemy's advantage, in helping them to carry on the war—the remarks, at least in this particular, of said counsel being substantially what is here set down."

"9. Finally, before completing the division of his speech to

the jury, treated of in paragraphs 5 and 6 hereof, the learned counsel quoted the wording of the statement of claim, wherein it appeared that the plaintiff, through his solicitor, claims from the defendant such damages as a jury of his countrymen may see fit to award, going on to say: 'Let him go then to his compatriots, the Austrians, and not to a body of loyal Canadians for a verdict' —his remarks, in this particular, being substantially what is here set down."

No answer is filed to this affidavit, and the statements which it contains must be accepted as setting forth substantially what was said. The remarks quoted are not to be approved, but in considering this appeal two facts are specially to be noted.

First, at the trial no objection was raised to these remarks by counsel for the plaintiff. I have the authority of the trial Judge for stating that he was present in the court-room during the addresses of counsel and that he failed to observe the objectionable remarks now complained of. Had his attention been called to them, I cannot doubt but that any prejudice to the plaintiff that might be supposed to have arisen would have been promptly and effectively dealt with, because the learned trial Judge is intimately familiar with the branch of practice in question, having recently been a member of the Appellate Division which decided the last case in our Courts: *Dale* v. *Toronto R.W. Co.*, 24 D.L.R. 413, 34 O.L.R. 104.

I have perused the cases cited to us by counsel and some others, but I have not found any case in which effect has been given to an objection of this kind, unless objection has been taken at the time by counsel for the opposite party. Indeed, while the jurisdiction undoubtedly exists and has been continuously asserted in our Courts to grant a new trial under such circumstances, no instance where that jurisdiction has been exercised has come to my attention. The jurisdiction has been exercised in American cases, but in none of them unless the objection was taken at the time by opposing counsel.

On this point, the late Chancellor Boyd, in the case of *Sornberger* v. *Canadian Pacific R.W. Co.*, 24 A.R. 263, says at p. 272: "Then the defendants moved for a new trial on the ground of the license of speech on the part of the plaintiffs' counsel in his address to the jury, inasmuch as he went into irrelevant matter which would tend to warp their judgment and aggravate

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the damages. But no objection was lodged at the time by the defendants—no appeal was made to the presiding Judge, who was there for the very purpose of seeing that the trial was duly and properly conducted, and whose intervention should have been claimed while the alleged transgression was being committed. It is a practice not to be encouraged to allow matters eminently proper to be disposed of by the Judge to be passed over *sub silentio* before him, and then made subjects of complaint in an appellate forum: *McDonald* v. *Murray*, 5 O.R. 559, at pp. 575 and 582. He, present, hearing and seeing, can best rule as to whether there has been an undue invasion of the large privileges of counsel addressing the jury; and if the best and most immediate remedy of closure or the like is not invoked before him, it must be taken that the gravity of the situation was not so serious at the time of the address as it afterwards looms up in the light of the verdict."

The same view was entertained by the Court in the case of *Dale* v. *Toronto R.W. Co.*, and I can add nothing to the discussion of the matter which appears in the judgment of my brother Riddell in that case.

Different considerations, no doubt, apply in criminal cases. In regard to them it was observed by Hodgins, J.A., in *Rex* v. *Nerlich*, 25 D.L.R. 138, 34 O.L.R. 298, at 317, as follows: "I am unable to find anything in the Criminal Code which justifies the granting of a reserved case on the ground that the address of counsel for the Crown was inflammatory and tended to prejudice the jury. It is within the discretion of the presiding Judge to interfere if he deems the speech of counsel improper. If so, how can the discretion of the appellate Court be substituted for what is vested in the trial Judge? The atmosphere of the trial and the tone and gestures of counsel must necessarily be important elements in determining the judicial discretion. If, therefore, the Judge is the only tribunal who can properly decide, I do not see what question of law arises."

I quote the above observation as emphasising the extent to which the conduct of the trial is in the discretion of the trial Judge, and the supreme necessity of requesting his interference at the moment, instead of keeping quiet, taking chances, and then raising the question on an appeal.

The second important point to be borne in mind in considering this branch of the appeal is the fact that the verdict is one which

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commends itself, at least to my mind, as the only proper verdict that could be given. The plaintiff has not been really and substantially injured. The fact that he was not regularly arrested depends upon a pure technicality. No real harm has been done him, either in person or in reputation: see *Southwick* v. *Hare*, 24 O.R. 528.

If I could reach the conclusion that the verdict of the jury was unfair or unjust, and that such injustice had resulted from a mistrial owing to the occurrence now complained of, I would willingly concur in granting a new trial, even though no objection had been taken by counsel for the plaintiff; but where, as here, it appears to me that justice has been done, that the verdict is right, that there has been no resulting injustice, I think that that fact, coupled with the failure of the plaintiff's counsel to bring his complaint to the attention of the trial Judge, raises so strong a position against him that his appeal ought to be dismissed.

I refer on this to the recent case of *Rex* v. *Banks*, [1916] 2 K.B. 621, at p. 623.

Order for a new trial; MASTEN, J., *dissenting.*

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Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Drysdale, Harris and Chisholm, JJ. March 10, 1917.

ESTOPPEL (§ III H—110)—BY REPRESENTATIONS—RETRACTING BEFORE ACTED UPON.

Representations by the owner of a sand beach that it was public property, in reliance on which one has spent money for equipment to remove sand therefrom, will not create an estoppel against the owner, if before the representations were acted upon they were retracted, and the owner's true position disclosed.

Statement.

APPEAL from the judgment of Russell, J., in favour of plaintiff in an action to recover damages for the removal of material from a sand beach of which plaintiff was owner. Affirmed.

L. A. Lovett, K.C., for appellant.

W. E. Roscoe, K.C., for respondent.

Drysdale, J.

DRYSDALE, J.:—The plaintiff sues for the value of sand taken from a beach lying north of his dyke land near Grand Pre. On the trial before Russell, J., plaintiff recovered, and this appeal is from such recovery.

As the owner and occupant of 12 acres of dyke near Boot Island plaintiff claims the sand beach lying north of his lot as far out as ordinary high water mark, and it was from this sand

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beach the sand in question was taken. I think plaintiff established title to the sand beach in question. The defendant's main contention before us was estoppel. That is to say, counsel on behalf of defendant company urged that because of plaintiff's representations to officials of the defendant company to the effect that the beach in question was a public beach and that everybody that required sand helped himself at this beach, the plaintiff under the circumstances disclosed should not be permitted to assert ownership. It was urged that defendant company took the sand on the faith of statements made by plaintiff that plaintiff did not own the said beach; that after such statements were made the defendants relying thereon expended money in equipment to handle the sand and changed their position to the company's detriment by reason of plaintiff's representations that he was not the owner, and that under the circumstances disclosed plaintiff should be held as estopped from now claiming ownership respecting the sand carried away by defendant's servants. An examination of the facts in this connection convinces me that at a date subsequent to the alleged representation, and before defendant company acted upon it, the defendant company, through their servants and foreman, Stewart, had distinct notice of plaintiff's true claim and position. Before defendants took any sand, and at a time when their men were on the way to dig it, under a foreman of the defendants named Stewart, express notice of plaintiff's position was given to Stewart. This notice was, I think, good notice to the company. Stewart was the company's servant entrusted with and in charge of the company's men to dig and carry away the sand. Any notice given to him in connection with the sand he was sent to get is, I think, notice to the company. It would be within the scope of his employment to receive a notice touching the company's right to the sand and equally his duty to communicate any such notice to his employers. This, in my opinion, being clearly so, I think the ground work of defendants' estoppel fails because the early representation relied on was entirely done away with or retracted by the notice to and through Stewart.

The other points submitted by counsel for appellant did not impress me. In short, I think there is nothing in them. I would be inclined on the evidence as to quantity and value to

reduce the damages and dismiss the appeal. I would fix the damages on the evidence at $192.

SIR WALLACE GRAHAM, C.J., and CHISHOLM, J., concurred with Drysdale, J.

HARRIS, J.:—The plaintiff sued for the value of sand taken from a beach which he claimed to own and Russell, J., gave judgment in his favour for $230 and the defendant has appealed.

The plaintiff's property is bounded on the north by the Basin of Minas and consists of upland and dyked lands and beyond the dyke on the north the flats extend out for a long distance. The plaintiff claims that his deed gives him a title to the beach out as far as medium or ordinary high tide mark and I did not understand this proposition to be seriously disputed by the defendant's counsel. This I understand to be the law. *Mellor* v. *Walmesley*, [1905] 2 Ch. 164.

It appears, however, that after the time when the greater part of the sand had been taken, the plaintiff applied to the Crown for a grant of a water lot and in his application he bounded the lot applied for by the dyke; that is, he applied for a grant of the beach as well as the land below ordinary high tide and it was argued that by so doing he admitted superior title in the Crown of the beach. I am unable to see how this affects the matter. The question still is whether he had or had not a good title to the beach, and if he had the application to the Crown does not take it away.

Then it was argued that plaintiff, before defendants had taken any sand, had told two of the officials of the defendant company that the sand was free and everybody got what sand they wanted from the beach. It was argued that plaintiff was thereby estopped from claiming title to the beach. But it appears that on the very first occasion when defendant's men came there to get sand, the plaintiff forbade their foreman, Stewart, taking any sand until arrangements had been made to pay for it. This was on or about August 6, 1912. Other men were again forbidden to go on the property about a fortnight later. The defendant company, notwithstanding this, went on and early in October built a tramway over the property and carried away a quantity of sand. I do not propose to consider what the effect might have been if the defendant company had spent

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money on the property relying upon the statement of the plaintiff that the beach was free to everybody. That question does not arise here because there is no evidence that any money was spent before the plaintiff forbade the defendants' foreman going on the property. The notice to Stewart was in my opinion a good notice to the defendant company and that was a revocation or withdrawal of what had been previously said and after that the defendant company could no longer rely upon the previous statement. 13 Hals. 383. *White* v. *Greenish*, 11 C.B. (N.S.) 209.

In *Dunston* v. *Paterson*, 2 C.B.N.S. 495, the sheriff having a writ commanding him to arrest A. took B. who represented herself to be the person named in the writ. It was held that though B. might be estopped by her misrepresentation from suing the sheriff for the original taking he could not justify detaining her after he had notice that she was not the real party.

In *Ruggles* v. *Lesure*, 24 Pick. 190, the plaintiff owned land adjoining the highway and he agreed with the defendant that he would throw part of his land into the highway if the defendant would set back the plaintiff's wall and prepare the road for use. The plaintiff threw a portion of his land into the highway and the defendant set back the plaintiff's wall and while he was removing earth from the portion of the land given out as a road by the plaintiff, the plaintiff forbade his removing any more earth. It was held that the agreement was a mere license and that it was revoked by the plaintiff's prohibition.

The question as to expenditure of money on the building of the tram line is in my opinion of no importance because it was spent after notice had been given to Stewart and anything done after that cannot be justified under the authority which had been cancelled.

It is claimed that the plaintiff and his son, after the notice was given to Stewart, were employed hauling sand for the defendant from the plaintiff's own property, and it is said that leave and license is to be presumed from this. So far as the plaintiff is concerned he says that he was not employed directly by defendant to do this work, but by his son who had a contract with the defendant company.

It is unnecessary to decide whether he was employed by his

son or directly by the defendant, but I am inclined to the view taken by the trial Judge. Admitting, however, that the true view of the fact is that the plaintiff was hired directly by the defendant company, I do not see in that anything which can be construed into leave and license. The plaintiff had given his notice and Stewart had said they were going on notwithstanding; and they did go on without asking permission of the plaintiff and I can see nothing in the plaintiff's hiring with the defendant which can be taken to estop the plaintiff from asserting his rights. No authority was cited to us on this point and I think this contention does not assist the defendant company.

In my opinion the plaintiff is entitled to recover and the only question is as to the amount. Personally I think the damages should be reduced to $192, that is, 64 scow loads at 54 tons, equal to 2,880 tons, which is the equivalent of 1,920 c. yds. at 10 cents per c. yd.

All parties agree as to the value per c. yd. The Judge has found that there were 64 scows loaded. The evidence of McNutt I think shews that they would not average over 45 tons per scow, and I would be inclined to accept his estimate on that point under the circumstances.

I do not think the quantity of sand which actually went into the work can be taken as conclusive. The question is how much sand was removed from the plaintiff's premises and there is nothing to shew whether any was lost from the scows between the points of loading and discharging.

I would reduce the amount of the damages to $192 and dismiss the appeal with costs. *Appeal dismissed.*

ATKINS v. DAVIS.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Hodgins and Ferguson, JJ.A. February 7, 1917.

INDIANS (§ II—5)—JUDGMENT AGAINST—EXECUTION—"PROPERTY" ON RESERVE—"PERSON."

Sec. 102 of the Indian Act (R.S.C. 1906, ch. 81) which prohibits any "person" from taking any security whether by judgment, mortgage or otherwise, upon the property of any Indian applies also to a judgment recovered by an Indian as endorsee of a promissory note given by an Indian to one not an Indian, and is therefore not enforceable against the property on the Reserve; the word "person" in the section, includes an Indian.

Statement.

AN appeal by the plaintiff from the judgment of the County Court of the County of Brant in favour of the defendant in an

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issue directed to try the question whether sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, had the effect of preventing the plaintiff from enforcing a judgment against the defendant by seizure and sale of his goods and chattels upon his premises or dwelling-place in an Indian Reserve. Both the plaintiff and the defendant were Indians, and the judgment against the defendant was recovered in an action upon a promissory note made by him to the order of one Thompson, not an Indian, who endorsed and transferred it to the plaintiff.

H. Arrell, for appellant.

W. A. Hollinrake, K.C., for respondent.

A. M. Harley, for the defendant Sarah Davis.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 15th November, 1916, of the County Court of the County of Brant, pronounced after the trial of the action without a jury on the previous 3rd October.

The question for decision is, whether or not sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, has the effect of preventing the appellant from enforcing his judgment against the respondent by seizure and sale of his goods and chattels on the Reserve upon which the respondent resides.

Both parties are Indians, and the judgment against the respondent was recovered on a promissory note given by him to a man named Thompson, who is not an Indian, who endorsed and transferred it to the appellant.

Section 102 provides that: "No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three preceding sections: provided that any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid."

There are three classes of property which are, by the sections referred to, subject to taxation, viz.: (1) real property held by the Indian or non-treaty Indian in his individual right under a lease or in fee simple, or personal property, outside of the Reserve or special Reserve; (2) real property of an Indian acquired under the

enfranchisement clauses of Part I. of the Act, after it has been declared liable to taxation by proclamation of the Governor in Council published in the Canada *Gazette*; (3) land vested in the Crown or in any person in trust or for the use of any Indian or non-treaty Indian or any band or irregular band of Indians or non-treaty Indians, with certain exceptions which for the purposes of the appeal it is unnecessary to mention.

Section 103 provides that: "Indians and non-treaty Indians shall have the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel the performance of obligations contracted with them . . ."

Section 104 provides that: "No pawn taken from any Indian or non-treaty Indian for any intoxicant shall be retained by the person to whom such pawn is delivered; but the thing so pawned may be sued for and shall be recoverable, with costs of suit, in any court of competent jurisdiction by the Indian or non-treaty Indian who pawned the same."

And sec. 105 provides that: "No presents given to Indians or non-treaty Indians, and no property purchased or acquired with or by means of any annuities granted to Indians, or any part thereof, and in the possession of any band of such Indians, or of any Indian of any band or irregular band, shall be liable to be taken, seized or distrained for any debt, matter or cause whatsoever."

The appellant contends that, read in connection with clause (*c*) of sec. 2, which provides that, unless the context otherwise requires, "person" means an individual other than an Indian, sec. 102 provides that "no individual, other than an Indian, shall take . . .;" and that, as the appellant is an Indian, the prohibition does not extend to him.

The draftsman of the Act evidently supposed that, unless provision were made for Indians suing for debts or in respect of wrongs and for the performance of obligations contracted with them, they could not do so; and the provisions of sec. 103 are therefore found in the Act; but there is nothing which says that property which cannot be seized as provided by sec. 102 can be levied upon under an execution issued on a judgment which an Indian has recovered.

It is reasonably clear that, in some instances at least, as the

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draftsman must have thought was the case, the word "person" is not used in the restricted sense mentioned in clause (c) of sec. 2. The word is used in sec. 104, and it can hardly have been intended that its provisions should apply only where a person other than an Indian had obtained a pawn for an intoxicant. So, too, the provisions of secs. 129, 130, 131, and 132, cannot have been intended to apply only to individuals other than Indians. Again, if in sec. 136 "person" has this restricted meaning, all that would be necessary to avoid the effect of the prohibition which it enacts would be to have the boat in charge of an Indian, and, so far as the section is concerned, an Indian might have charge of the boat from or on board of which intoxicants might be supplied to Indians with impunity.

Coming back to sec. 102, if the contention of the appellant is to prevail, there would be nothing to prevent its provisions from being evaded. All that would be necessary for a non-Indian having a claim against an Indian to do would be to transfer it to an Indian, and so to convert a claim, a judgment upon which could not be enforced upon the property which sec. 102 in effect declares shall not be taken in execution, into one a judgment upon which could be so enforced.

If Thompson, who held the promissory note upon which the judgment was recovered, had given it to the appellant, the respondent would have had no answer to the latter's action upon it, and judgment must have gone against him.

I cannot conceive that it was intended that that should be possible, and I am forced to the conclusion that the context requires that the word "person," as used in sec. 102, is not to be read with the restricted meaning which clause (c) of sec. 2 would otherwise give to it.

I would affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

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GUAY v. PROVIDENT ACCIDENT & GUARANTEE CO.

Quebec Court of Review, Fortin, Guerin and Lamothe, JJ. November 30, 1916.

INSURANCE (§ VI B—345)—ILLNESS CONFINING TO HOUSE—NEURASTHENIA—TOTAL DISABILITY.

A nervous breakdown, or neurasthenia, for which a person is ordered by a physician to abstain from any kind of work, is an illness that "necessarily confines to house," and "totally disables" from work within the meaning of a sick benefit policy.

APPEAL from a judgment of Panneton, J., dismissing an action on an insurance policy. Reversed.

The facts of the case are as follows:—

The plaintiff was insured for 1 year against illness in the defendant company. He was to receive $25 a week, in case of complete inability to work, and $12.50 a week during the convalescence. He claims $175 for 7 weeks' illness which confined him to the house, at $25; plus $75 for 6 weeks' convalescence at $12.50; and $20 for two surgical operations, as provided by the policy.

The company defendant claims: (*a*) The illness that the plaintiff suffered has not necessarily confined him to the house; (*b*) the said policy in question does not cover the illness of the plaintiff; (*c*) the illness is not established by the proofs given by the plaintiff; (*d*) the surgical operations pleaded by the plaintiff did not arise from his illness, and do not give him any right to an indemnity.

McLennan, Howard & Aylmer, for plaintiff.

Mousseau & Gagne, for defendant.

The judgment of the Court was delivered by

GUERIN, J.:—At the date of the issue of the policy, the plaintiff was 33 years of age, a married man, residing at St. Joseph-de-Beauce, manager of a branch of the Canadian Bank of Commerce. During the continuance of the policy, at the beginning of August, 1912, the plaintiff was taken ill. He had overtaxed his strength, working overtime, owing to the projected amalgamation of his bank with the Eastern Townships Bank; he was worried on account of the serious illness of his child, whose condition had necessitated many all night vigils; he was suffering as a consequence from insomnia, loss of appetite, nervousness, a lack of power to co-ordinate his thought, and to concentrate his mind on the correspondence and numerical calculations incidental to his duties as a bank manager. Guerin, J.

Dr. Belanger, his physician, pronounced his case to be nervous prostration, termed neurasthenia. The doctor was of opinion that the patient's nerves required a complete rest, and that it was necessary for his recovery to normal conditions, that he be removed immediately from his desk in the bank. He ordered the plaintiff to rest in the house for the first days, but not to take

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to the bed, as this would only aggravate his condition instead of improving it, and advised him to take plenty of fresh air, in order to increase his appetite, and thus accelerate a general improvement in his health.

Heeding this advice, on August 3, 1912, the plaintiff left the bank as well as his home at St. Joseph-de-Beauce, and went to visit with his mother-in-law at St. Joseph-de-Levis, with whom he resided in company with his wife and his young child for a week or 10 days. During this period, he rested in the house, lounged on the verandah, drove occasionally in the cars to see his medical adviser, whose office was only a few minutes' walk from his mother-in-law's home, and abstained from any and all kinds of work. After this visit, he moved away with his wife and child to a house about 1 mile distant from his mother-in-law's residence, and there remained till September 21. There he also rested, abstaining from work, but he took exercise walking in the open air and riding in the tramcars; he also visited Quebec to go under two minor operations to remove a growth in his nose, and owing to the exhaustion after leaving the surgeon, he slept overnight at Quebec on two occasions.

On September 21, at the request of the Bank of Commerce and with the permission of his physician, he went to Fraserville in company with an officer of the bank in order to advise as to the renting of a suitable office to open a new branch of the bank at Fraserville. He went to see what the workmen were doing; his companion, however, took all the responsibility on his own shoulders, and the plaintiff profited by this trip to enjoy the sea breezes at his leisure. On November 2, he was pronounced by his medical adviser to be a cure, and he resumed his work in the bank; he had been absent from his work and ordinary avocations of life through illness and on the advice of a duly licensed physician from August 3 up to November 2, 1912, in all, 13 weeks. The first week or 10 days was the acute stage; during the balance of the time he was gradually convalescing. During the whole term, he was under the continuous care and supervision of his physician, who saw him every 2 or 3 days.

The defendant's contract, which is styled a "Perfect Disability Policy," is not free from ambiguity either in its name or in some of its enacting clauses. It purports to insure the plaintiff against:—

(2) Illness as hereinafter defined contracted by the assured during the term of 350 days . . .

It does not, however, define illness except by a process of exclusion:—

Article 32. This policy does not cover (1) any illness contracted while the assured is engaged in military or naval service in time of war; (2) any illness for which the assured is not treated by a licensed physician; (3) women, except as beneficiary; (4) any illness contracted or suffered outside of the limit of the United States, Canada, and Europe, not including Alaska or the insular possessions of the United States.

It is the rule that where the law ordains as to certain cases which it enumerates, the law is presumed to have excluded the other cases from its disposition: *inclusio unius est exclusio alterius.* 5 Rolland de Villargues, Dict. Droit civil, vo. Exclusion.

This rule should be applied in determining what illness is covered by the policy, except in so far as further modifications may be found in the instrument itself.

The defendant relies upon the following:—

Article 11. If any illness contracted by the assured during the term specified in part 2 of the insuring clause, and not covered under article 13, and not hereinafter excepted, necessarily confines the assured to the house for a period beginning during the said term, and prevents the assured throughout the period of such confinement from performing any and every kind of duty; the company will pay the assured for the period of such confinement, not exceeding 52 consecutive weeks, twenty-five ($25) a week.

Article 12. If the assured is confined to the house and disabled within the terms of the preceding article, and if continuously thereafter the illness causing the said confinement to the house totally disables and prevents the assured (but not necessarily to the extent of confining him to the house) from performing any and every kind of duty, the company will pay the assured for the period of said disability, if any, subsequent to he said confinement to the house and within 52 weeks from the beginning thereof, $12.50 a week, and after the said 52 weeks so long as the assured continuously suffers said disability defined in this article, and is under 70 years of age, the company will pay the assured $6.25 a week.

During the first period of the plaintiff's illness, dating from August 3, 1912, during his stay with his mother-in-law, was he necessarily confined to the house, within the meaning of the policy? The answer to this question will practically decide the issue between the parties. Should there be any doubt as to the true meaning and import of the words: "necessarily confined to the house," the weight of authority impressively determines that the interpretation must be against the pretensions of the insurance company.

We read in Sirey: Recueil général des lois et des arrêts, vol.

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de l'année 1846, Jurisprudence des cours royales, etc., p. 14, in a case of *Comp. le Sauveur* v. *C. Tugot*, the opinion of the Court as to the interpretation of an ambiguous clause in an insurance policy, as follows:—

Considering that in supposing the declaration contained in the insurance policy presented any ambiguity, this ambiguity should be taken against the company who received it and wrote it out, and which the company has to attribute to itself, for not having specified, in a clearer way, the declaration by which the exception is alleged.

We read also in the French Pandectes, vo. Assurances en general, No. 544:—

The general rule, in case of interpretation of policies, concerning printed or manuscript clauses, is that the doubt must be favourable to the assured.

Lord Mansfield's view of the construction of policies was that:—

It is certain that in the construction of policies the *strictum jus* or *apex juris* is not to be laid hold of; but they are to be construed largely for the benefit of trade and for the assured: Porter, Insurance (5th ed.), p. 33.

The terms of a policy of life insurance being the language of the company must be taken most strongly against them. This view is in accord with *Anderson* v. *Fitzgerald*, 4 H.L.C. 484, where Lord St. Leonards says:—

It (the policy) is of course prepared by the company, and if therefore there should be any ambiguity in it, it must be taken according to law more strongly against the person who prepared it.

Where the words of a policy are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favour of the assured; *Wallace & Germass American Ins. Co.*, 41 Fed. Rep. U.S. 742.

The intention of the parties to a contract of insurance is indemnity and this intention is to be kept in view and favoured in construing these provisions. Having indemnity for its object, a policy of insurance is to be construed liberally to that end and its conditions and provisos therein will be strictly construed against the insurers because their object is to limit the scope and defeat the purposes of the principal contract, 142 S. W. 763.

We read in Cooley: Briefs on Law of Insurance, pp. 3293-4, in discussing the proper interpretation of the words "confinement to house," in policies promising indemnity for disability due to any injury or to ill health, the following:—

It has, however, been held, in construing this condition in connection with the right to sick benefits under contracts of mutual benefit associations, that the right of recovery depends on the disability of the insured and not in his confinement to the house, which is merely an evidentiary fact, and that insured is totally disabled, though he remains much of the time in the open air under the direction of his physician; *Scales* v. *Masonic Protective Ass'n*, 70 N.H. 490, 48 Atl. 1084. So it has been held that one is confined to the house, within the provisions of an accident policy, when by reason of sickness

there is a complete and enforced withdrawal from business or work, though he is occasionally able to leave the house and take the car to his doctor's office; *Mutual Ben. Ass'n.* v. *Nancarrow*, 71 Pac. 423; 18 Colo. App. 274. As was said in *Hoffman* v. *Michigan Home & Hospital Assn.*, 128 Mich. 323; 87 N.W. 265; 54 L.R.A. 746, where the insured was confined to the house most of the time, leaving it only to go to his physician's office or under the direction of his physician to constitute a compliance with the provision it is not necessary that the insured should remain in the house continuously during the entire time of disability, and to go out of doors now and then, or to occasionally visit the office of his physician, is not a violation of the condition. It may be that occasional airing is essential to a speedy recovery, and a rule which would make nugatory a contract having for its special object indemnity on account of sickness, because the insured took an occasional and necessary airing, would be unreasonable.

Another case in point is a Mo. Appeal, 1912, which will be found in 13 American Digest, verbo Insurance, No. 525, in *Ramsey* v. *General Acc. Fire & Life Ins.*, 142 S.W. 763.

In the present case, the appellant during the first 10 days of his illness was totally disabled from all work; he was confined to the house, except in so far as he sat on the verandah, which is an extension and part of the building.

He had been removed from his office owing to his illness; he was incapacitated from doing any work; he was living under the care and instruction of his physician and rarely left the house, and then only to drive a short distance to see his physician.

Under such circumstances the plaintiff was necessarily confined to the house within the meaning of the policy.

He is therefore entitled to $25 indemnity for the first week of his illness, counting from August 3, 1912, and to $12.50 a week during the 12 weeks that his convalescence lasted up to November 2, 1912, $150; in all $175.

We are unanimously of opinion that the judgment should be reversed and the defendant condemned to pay the plaintiff $175 with interest from service, and the costs of both Courts.

Considering that by the terms of the policy, the defendant has insured the plaintiff against all illnesses which would have the effect of confining him to the house, and that the neurasthenia suffered by the plaintiff rendered him incapable of working from August 3 to November 2 and confined him to the house during the first week of his sickness, which gave him a right to claim $25;

Considering that, during the 12 weeks following, the plaintiff was not confined to the house, but was incapable of attending to his business as manager of a bank, and that he was able to return

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to work only after 12 weeks' disability, which gives him a right to claim $12.50 for each week, viz., $150;

Considering that, during those 13 weeks the plaintiff has been constantly under the care and following the advice and instructions of a licensed physician;

Considering that the plaintiff proved the essential allegations of his declaration to the extent of $175;

Considering that there is error in the judgment rejecting the suit of the plaintiff;

Reverse the judgment of the Superior Court of this district of June 30, 1914, which has rejected with costs the suit of the plaintiff; and, proceeding to render the judgment which should have been rendered, reject the defence of the defendant; condemn the defendant to pay to the plaintiff $175 with interest from May 8, 1913, date of the summons; reject the suit as to the difference and condemn the defendant to pay the costs of the Superior Court and Court of Revision.

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OYEN SCHOOL DISTRICT v. MINISTER OF EDUCATION (ALTA.)

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 9, 1917.

SCHOOLS (§ IV—70)—DEBENTURES—APPROVAL OF MINISTER—STATUTORY REQUIREMENTS.

The Minister of Education may refuse to countersign debentures for school building purposes, where the site and the building contract have not received his statutory approval, in virtue of the School Ordinance (Alta.), sec. 130, which empowers him to countersign the debentures if satisfied that the requirements of the Ordinance have been substantially complied with.

Statement.

APPEAL from an order of Simmons, J., refusing an order of mandamus to compel the defendant, the Minister of Education, to countersign debentures of the plaintiff. Affirmed.

J. E. Varley, for Board of School Trustees.

Harvey, C.J.

HARVEY, C.J.:—The School Ordinance provides that if it appears desirable to the Board of any district to borrow money upon the security of the district for the purposes of a school site or a school building as well as some other purposes it may pass a by-law for that purpose and then give notice of intention to apply to the Board of Public Utilities Commissioners for authority to borrow the money. Twenty ratepayers may demand a vote of the ratepayers in which case a vote is had as provided, but not otherwise. Then the application is made to the Public Utilities

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Board and, the proper evidence submitted; it will if "satisfied that the several conditions required by this ordinance have been substantially complied with" authorize the trustees to borrow the sum mentioned or a less sum (secs. 110 and 128). The debenture or debentures then, after being prepared and signed by the chairman and treasurer of the Board of Trustees, are to be sent to the Minister of Education for registration before issue (sec. 129).

Sec. 130 then provides that:—

> The Minister shall thereupon if satisfied that the requirements of this ordinance have been substantially complied with and if the authority to make the loan has not been withdrawn register and countersign the debenture, and such countersigning by the Minister shall be conclusive evidence that the district has been legally constituted and that all the formalities in respect to such loan and the issue of such debenture have been complied with and the legality of the issue of such debenture shall be thereby conclusively established and its validity shall not be questionable by any Court in the Province of Alberta, but the same shall to the extent of the revenues of the district issuing the same be of good and indefeasible security in the hands of any *bonâ fide* holder thereof.

The Board of Public Utilities Commissioners has authorized the plaintiff to borrow $6,000 for the purpose of erecting and equipping a brick or brick veneer school building, repayable in 20 equal consecutive annual instalments. A debenture has been signed by the plaintiff's officers and has been sent to the defendant for registration and counter signature.

The defendant supports his refusal to countersign on two grounds, viz.: that the site has not been affirmed and that the contract for the school building has not been affirmed. By sec. 46 as enacted in 1916 (ch. 9) it is provided that "In every rural and village school district the Board shall acquire a site at such point in the district as shall be approved or selected by the Minister." By the same Act an addition was made to sec. 95 by which it was directed that in rural and village districts school buildings should be erected only under contracts which were not to be executed by the trustees until approved by the Minister.

It is not denied that these provisions of the ordinance have not been complied with, but it is argued that they are not requirements of the ordinance within the meaning of sec. 130, the only requirements that that contemplates being those relating to the procedure respecting debentures. It is to be observed, however, that the section makes no such limitation and having regard to the effect of the countersigning which conclusively establishes

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the right of the debenture holder and the liability of the district even though the district may not have been constituted as required by the ordinance, it is apparent that a very considerable responsibility is imposed on the Minister.

The questions of the site and of the construction of the school building are very closely connected with the borrowing which is for the purpose of constructing and equipping a school building upon the school site.

If the Minister must countersign the debenture, then the money may be spent in constructing a school building on the site which has not been approved and the requirements of the ordinance respecting both of these matters would be entirely nullified and while the trustees would be liable to a penalty under sec. 46(4) they would not be otherwise liable. It may be said that the trustees could be enjoined from spending the money in that way, but if that were so I would consider that, rather than compel proceedings of that nature to be taken, the Court, in the exercise of its discretion, should refuse to do that which would necessitate such steps being taken to protect the rights of all parties.

In my opinion, however, there is no reason for thinking that the requirements of the ordinance upon which the defendant relies are not such as are contemplated by sec. 130 and that he is in error in insisting on compliance with them before signing the debenture.

I have not referred to the facts which were detailed in the argument, but I would merely say that a perusal of all the evidence, in my opinion, gives no warrant for thinking that the defendant is actuated by anything but a desire to protect the interests of which he is a guardian and I see no reason for making any comment as to the conduct of the plaintiffs.

I would dismiss the appeal with costs.

Walsh, J.

WALSH, J., concurred with HARVEY, C.J.

Stuart, J.

STUART, J.:—I agree with the views expressed in this case by the Chief Justice, but I would like to add a word or two. I think it is merely because other proceedings under the ordinance had in *fact*, to the knowledge of the Minister, been taken in regard to the acquisition of a site and also in regard to a contract for the erection of a school building that he was entitled under the ordinance to enquire into the regularity of these proceedings.

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But I would hesitate to say that he was entitled to anticipate. Logically, I think the Board of Trustees might have decided to issue debentures before acquiring any site or entering into any negotiations either in regard to a site or the erection of a school. Of course they would have to make some estimate of their probable requirements in the way of money, but if they had done nothing more than make enquiries and were able to say that they had not taken any proceedings under the sections dealing with the acquisition of a site and with the making of a contract for the erection of a building it would appear to me to be very much open to question whether the Minister could withhold his signature from the debentures until he saw what was going to be done in those respects. There does not appear to be anything in the ordinance itself making it necessary either to agree to buy the site or to enter into a contract for the erection of a building before the issue of debentures. All that sec. 107 says is that "should it appear desirable to the Board . . that a sum of money should be borrowed . . for the purpose, etc." But in the present case proceedings had *in fact* been taken by the Board for the acquisition of a site and for the erection of a building and that being so, I think the Minister was entitled for the reasons given by the Chief Justice to have regard to those proceedings and to consider whether the requirements of the ordinance in regard thereto had been complied with.

Moreover, one cannot overlook the fact that sec. 107 gives the Minister the right to fix the form of the by-law to be passed for the issue of debentures, and it would therefore be quite open to him to make it necessary to specify therein the particular site to be purchased or the particular building contract upon which it was proposed to spend the money. This, of course, was not done in this case, but the fact that the Minister has power to fix the form of the by-law seems to me to strengthen the view that the purchase of the site, the contract for building and the issue of debentures are all so intimately connected that the words "requirements" in sec. 130 ought to receive the wider construction adopted by the Chief Justice.

BECK, J.:—I concur in the result.

Beck, J.

Appeal dismissed.

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MARTIN v. ERLENDSSON, Re BIFROST MUNICIPAL ELECTION.

Manitoba Court of Appeal, Perdue, Cameron and Haggart, JJ.A. March 10, 1917.

ELECTIONS (§ II C—65)—TIE VOTE—COUNTING REJECTED BALLOT—CONTEST—QUO WARRANTO.

On a petition alleging that the respondent was not elected by a majority vote, an irregularity by the returning officer in opening a packet of rejected ballots, counting some of them as good, and declaring a candidate elected on the strength thereof, is not a ground for voiding an election; it may be raised by information in the nature of *quo warranto*.

Statement.

APPEAL from the judgment of Patterson, J., annulling an election on a petition under the Municipal Act (R.S.M. 1913, ch. 133). Reversed.

F. Heap, for appellant; *H. A. Bergman*, for respondent.

Perdue, J.A.

PERDUE, J.A.:—This is an election petition questioning the election of a councillor for the Rur. Mun. of Bifrost in this province. The petition was presented under the provisions of the Municipal Act, R.S.M. 1913, ch. 133, relating to controverted elections (secs. 192-249). The petitioner, the respondent named in the petition, and one Dzydz were the candidates. There was only one polling place for the election. According to the statement of the deputy returning officer given under sec. 133 of the Municipal Act, the petitioner and Erlendsson, respondent, each received 56 votes. The other candidate received only 31 votes, and he is not a party to, or concerned in, the petition. The statement shewed that 3 ballots had been rejected. On the day following the election the secretary-treasurer of the municipality, in the capacity of returning officer, held a meeting at which the petitioner, the respondent and the deputy-returning officer were present. Instead of giving his casting vote to break the tie and decide the election, the returning officer opened the envelope containing the rejected ballots, examined them, counted 2 of them for Erlendsson and 1 for the petitioner and declared Erlendsson elected by 1 vote. The returning officer assumed to do this under sec. 140 of the Act.

The only ground upon which the petition seeks to void the election is that the respondent in the petition was not elected by a majority of lawful votes under sec. 192, sub-sec. (*c*). On the trial of the petition the ballot box was produced, but it was not opened and no scrutiny of the ballots took place. The County Court Judge, on the above facts, declared the election

of Erlendsson void, on the ground that he was not elected by a majority of lawful votes.

Sec. 140, under which the returning officer assumed to act in examining the rejected ballots, provides that where the deputy-returning officer and an agent of a candidate cannot agree as to the written statement to be made by the deputy-returning officer, the packets of ballots may be opened by the returning officer in presence of the deputy and the candidates or their agents, and the returning officer shall finally determine the matter in dispute and sign the statement. No circumstances were shewn which justified the returning officer in acting under the section and opening the packet of rejected ballots. His action was irregular.

Sec. 176 of the Municipal Act provides that no election shall be declared invalid by reason of non-compliance with the provisions of the Act as to taking the poll or counting the votes, or by reason of any irregularity if it appears to the tribunal having cognizance of the matter that the election was conducted in accordance with the principles of the Act and that the non-compliance, mistake or irregularity did not affect the result of the election. Now, although the returning officer was guilty of an irregularity in opening the envelope containing the ballots rejected by his deputy, still the rejected ballots were in fact examined by the returning officer in the presence of the candidates and the deputy and pronounced by the returning officer to be valid ballots which should have been counted. Two of these were marked for Erlendsson, thus giving him a majority of one. The presumption, therefore, is very strong that Erlendsson did receive a majority of the lawful votes. Neither in the petition nor on the argument was the ground taken that the 3 ballots in question had been properly rejected by the deputy. The petitioner's contention is based upon the irregular act of the returning officer and on the alleged *primâ facie* effect of the certificate of the deputy. The irregularity is not taken as a ground for setting aside the election. Such a ground could not be set up in a petition under sec. 192, there being no provision in the section enabling a complainant to do so. The section confines the grounds of complaint under a petition to the 3 matters specifically mentioned. If there is any other ground than those mentioned in the section the complainant must proceed by

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information in the nature of *quo warranto*. See *Tod* v. *Mager*, 1 D.L.R. 565, 3 D.L.R. 350, 22 Man. L.R. 136.

The ground of complaint upon which the petitioner relies, and which he must establish in order to succeed, is that the respondent in the petition was not duly elected by a majority of lawful votes. In order to properly deal with such a question there should be a scrutiny of the ballots. Sec. 147 provides means for obtaining production of the ballots for the purposes of a petition. The ballot box in this case was in fact produced by the secretary-treasurer of the municipality at the hearing of the petition, but the ballots were not examined. The petitioner simply offered in evidence the certificate of the deputy-returning officer and relied upon it as making a *primâ facie* case. It no doubt afforded *primâ facie* evidence that the deputy had found that 56 votes had been cast for the petitioner and the same number for the respondent. The certificate also shewed the fact that 3 ballots had been rejected, but it did not furnish any legal decision as to whether the rejected ballots indicated lawful votes or the reverse. This was a question upon which the Judge who heard the petition was required to give a judicial pronouncement. Setting aside the election of a municipal councillor is a serious matter which might involve the municipality in troublesome complications. The best evidence obtainable should be furnished to the Judge. The petitioner had in Court the best evidence bearing on the subject of his complaint, namely, the ballots themselves, but he did not put that evidence in. He relied on a certificate of the deputy-returning officer which shewed that all the votes had been counted by that officer and that enough ballots had been rejected to affect the result of the election. According to the returning officer who had examined them, these ballots were improperly rejected and the effect of them was to give the respondent a majority of lawful votes. Although the opening of the envelope containing the rejected ballots may have been irregular, the result of examining the ballots cast such doubt upon the deputy's action in rejecting them that reliance should not be placed upon the certificate in so far as the lawful effect of the rejected ballots was concerned.

The petitioner could have had the question raised in the petition decided speedily and cheaply by a recount. He allowed

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the time to go by and adopted the more expensive method of presenting a petition.

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

HAGGART, J.A., concurred with Perdue, J.A.

CAMERON, J.A. (dissenting) after stating the facts:—It seems to me clear that the returning officer had no authority to act in this case under sec. 140. The deputy-returning officer made a complete written statement under sec. 133, and delivered to the petitioner's agent the certificate under sec. 134. There were no circumstances, therefore, that arose that authorised the returning officer to open the envelope containing the rejected ballots and his action and declaration must be disregarded as without legal validity. To dismiss the petition would, it seems to me, simply validate the invalid declaration of the returning officer.

What then was there before the trial Judge? There was practically nothing more than the certificate (ex. 2). As to the admissibility of this I think there can be no doubt. The deputy-returning officer was a public official and he examined and counted the ballot papers pursuant to the statute and gave ex. 2 in compliance with sec. 134.

The certificates of public officers, entrusted by law with authority for the purpose, are evidence of the facts authorized to be certified, but not of extraneous matters.

Phipson on Evidence, 4th ed., 335. The principle is that where the law has appointed a person to act for a specific purpose, it will trust him so far as he acts under its authority.

Certificates made by a public officer entrusted with authority for that purpose have been treated as public documents and as such they are competent evidence as against all persons of the facts which he is empowered to certify: Cyc. XVII., 313. It follows then, on the general principle, that the certificate (of a public officer) is admissible only for those facts covered by the terms of the authority, and, conversely, that it is admissible to prove all the facts thus included: Wigmore on Evidence, Can. ed., p. 2083.

In my opinion the provisions of sec. 176 do not apply. Here the respondent was declared elected by the returning officer as a result of proceedings taken by him which he had no authority to take. It cannot, therefore, be said the election was in accordance with the principle of the Act, nor that the results of the election were not affected thereby.

The evidence before the trial Judge, therefore, gave the respondent and the petitioner an equal number of votes. In my

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judgment the petitioner met the onus placed on him and has shewn that the respondent was not elected by a majority of lawful votes.

It is true that this result leaves the respondent in a difficult position, as it is not now open to him to ask for a recount. There was nothing, however, that prevented him from taking such proceedings within the statutory time. There has been a case in this province where a successful candidate asked for a recount. The respondent was not justified in relying upon the unauthorised declaration of the returning officer, and did so at his own risk.

I would dismiss the appeal. *Appeal allowed.*

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IDINGTON v. TRUSTS & GUARANTEE Co.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Walsh, JJ. March 9, 1917.

MORTGAGE (§ VII C—155)—EXTENDING TIME FOR REDEMPTION—WHEN GRANTED.

The principle upon which the Court should be guided in enlarging the time for the redemption of a mortgage is that the security is sufficient and that there is a probability that the mortgagor will be able to pay off the mortgage if the extension is granted.

Statement.

APPEAL by plaintiff from the judgment of Harvey, C.J., dismissing an application for a final order of foreclosure in a mortgage action. Reversed.

G. H. Ross, for appellant; *L. H. Fenerty*, for respondent.

Stuart, J.

STUART, J.:—I agree entirely with the judgment of Walsh, J., in this case. Aside from the law and justice of the case I think the defendant Haslam is attempting to pull against too strong a current and that he ought to write off what loss he has suffered in regard to this land and devote his energies to his 800 acres at Sunnyslope. Perhaps, however, he would crave leave to be the judge of matters of policy himself. But I am thinking of the question of the conscience of the Court in refusing further indulgence to a mortgagor in arrear. In this case I think the indulgence can be refused with a good conscience. It is often a mercy to a grievously wounded animal to kill it and put it out of misery.

I would like to add, however, that I do not think this judgment need necessarily be taken as overruling what I understand has been frequently done recently by the Master. Each case must depend on its own facts. Where the security is admittedly ample, I do not think it is necessary, in order to avoid foreclosure,

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to shew also that there is a reasonable probability that at the end of the extended period the *whole* of the debt will be paid. I think in many cases a reasonable probability that a very substantial payment will be made ought to be enough to justify a further indulgence by refusing foreclosure or even sale, which latter, of course, is always an alternative. In this case it is the clear absence of *both* conditions, *i.e.*, sufficient security and reasonable probability of any substantial payment on principal, that renders the defendant's prayer for further indulgence an impossible one to consider.

Walsh, J.

WALSH, J.:—The plaintiff in this mortgage action appeals from an order of the Chief Justice dismissing his application for a final order of foreclosure or sale. These proceedings were set on foot on April 9, 1915, under a mortgage for $6,050 and interest made to the plaintiff by one Metcalfe. Three instalments of the principal money amounting to $4,500 were then overdue and wholly unpaid, the fourth and last instalment of $1,550 not having then matured and there being as well a considerable amount of interest in arrear. On June 1, 1915, an order *nisi* was made by the Master in Chambers at Calgary for the payment by the defendant company as administrator of the estate of the deceased mortgagor Metcalfe and by the defendant Haslam as the registered owner of the land of the sum of $6,822.66 thereby found due to the plaintiff for principal, interest and costs and directing a sale of the lands unless that amount with subsequent interest was paid within 5 months from its service. This order was served on June 24, 1915. A conditional final order of foreclosure and vesting order was granted by the Master on April 25, 1916, which, on appeal to the Chief Justice, was varied by his order of May 15, 1916. The order as thus varied foreclosed the defendants, directed the issue of a new certificate of title to the plaintiff, gave him the right to the possession of the mortgaged lands except the buildings and that part of the lands then being cropped by the defendant Haslam, whom I shall hereafter refer to as the defendant, provided that the defendant should crop the rest of the land and cut, harvest, haul and thresh the crops grown thereon at his own expense and deliver to the plaintiff one-third of the grain produced therefrom and directed that if he paid to the plaintiff $1,000 inclusive of the value of his one-third share of said grain on or before November 15, 1916, the order should not be

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registered in the Land Titles Office without further leave of the Court, but if said sum was not so paid the plaintiff should be entitled to register the order without further order. The plaintiff's share of the grain called for by this order was delivered to him within the time limited and he realized $1,297 out of it. Both parties thereafter applied to the Chief Justice for a further order. The plaintiff sought a final order of foreclosure and a vesting order with possession or in the alternative a final order of sale with leave to issue execution on his judgment. The defendant sought to vacate the conditional vesting order of May 15, 1916, and asked for a stay of proceedings until after the next harvest. The Chief Justice dismissed the plaintiff's application and directed a stay of proceedings until November 15, 1917, upon the condition that the defendant should crop all the cultivated acres of the said lands during the present year and deliver to the plaintiff one-third of the grain produced therefrom and pay to the plaintiff, including the value of his one-third of the grain, $1,000 on or before November 15, 1917. Further provision is made by it for the summer fallowing by the defendant of 50 acres of the land this year in which event the payment to the plaintiff is to be reduced to $750. It provides for the registration in the Land Titles Office of the order of May 15, 1916, if the defendant fails to perform the above conditions and also reserves to the plaintiff the right to make any further application upon 2 days' notice if the defendant fails to perform any of the conditions of the order as to the cropping and cultivation of the lands. It is from this order that the appeal is taken.

The mortgage sued upon is a second mortgage. The plaintiff has been compelled in his own protection since this action was commenced to pay the amount secured by the first mortgage and it has been assigned to and is now held by him. The amount due to him under it on January 17, 1917, was $1,102.04. The amount due to him under the mortgage sued upon is on a rough calculation of the interest since the date of the order *nisi* and a reasonable estimate of the subsequent costs $6,250. His claim against the land under these two mortgages is therefore over $7,300. The only evidence of the value of the land that we have is in the affidavits and valuations made by two disinterested men in the locality in March, 1916, in support of the application then made for a final order of foreclosure and the affidavit of the

plaintiff's son made in January, 1917. The two former put the then value of the farm at $6,637, approximately $700 less than the present amount of the plaintiff's charges. The latter affidavit says that the present value of the land is from $800 to $1,000 less than in 1916 for reasons which the deponent gives. There is absolutely nothing in the defendant's material upon the question of value. Mr. Fenerty, in a memorandum handed in since the argument, says that "the land has materially increased in value since May 15, 1916," but I can find nothing in the appeal book to warrant this statement, and I can only conclude from the material before us that the present value of the land is less than the amount due to the plaintiff under his two mortgages.

It is practically conceded that the defendant's only hope of being able to make even the moderate payment of $750 or $1,000 as the case may be imposed upon him under the terms of this order lies in the abundance of this year's harvest and the maintenance of the abnormally high prices for grain that are now prevailing. If he has a good crop and current prices are maintained he may be able to pay it, but even then when the subsequent interest is taken into account there will be no margin in the land for him. If the harvest is a failure or prices become normal he won't be able to pay at all. If he does pay, the evidence is absolutely silent upon the question of his prospects of being able to make further payments. This is an exceedingly unsatisfactory security. The defendant's failure to keep the first mortgage in good standing forced the plaintiff into an additional investment of over $1,000 to prevent Court proceedings under it. His default under the mortgage sued upon has been notorious and long-continued. For more than 4 years, principal has been in arrears although some of these arrears accrued before he acquired the property and there never has been a time in his ownership of the land when the interest has not been largely in arrear until last fall when, under force of an order of the Court, the arrears of interest were nearly wiped out. He has not paid last year's taxes on this land, amounting to about $85, a fact which still further prejudices the plaintiff's position. He has not kept up the insurance on the buildings and seems quite indifferent about it; the insurance premium for the current policy forming a part of the plaintiff's claim under his first mortgage. He has no farming implements or horses of his own and so far as this

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necessary equipment is concerned he is dependent upon what appears to be a most improvident arrangement with one Driscoll, who supplies the same and takes for his reward one-half of the crops grown upon the place. He does not live on the farm, his wife and family being in Calgary, some 40 miles away. He has, as I have said, practically no interest in the farm for it is not worth what the plaintiff has against it and he has so little practical interest in this year's crop that it would be almost a charity to him to prevent him from putting it in for when Driscoll's half and the plaintiff's third are taken out he has a paltry one-sixth for himself. It looks very much as if he and Driscoll were speculating with what is really the plaintiff's land. He is under a heavy liability in respect of the purchase of an 800-acre farm in the Sunnyslope district and there is an execution of about $900 in the sheriff's hands against his land. His financial condition appears to be most unsatisfactory.

The order appealed from was made by the Chief Justice in the exercise of his discretion and should not be interfered with unless he has proceeded upon a wrong principle. *McGregor* v. *Peterson*, 27 D.L.R. 788, 9 S.L.R. 196, and cases there cited. It is necessary, therefore, to determine the principle upon which the Courts act in enlarging the time for payment by a mortgagor.

In 21 Hals., p. 296, the result of the authorities is thus stated:

> After the order for foreclosure *nisi* . . the mortgagor can apply for, and in suitable circumstances and on certain conditions, obtain, an order enlarging the time for redemption . . Enlargement of the time is not a matter of course. There must be some reason for it, such as that the security is ample, and that the mortgagor has a reasonable probability of obtaining the money to pay the mortgage debt . . Successive enlargements can, however, be obtained, and if there is really a strong case the application may be granted three or four times, and a further enlargement has been allowed notwithstanding that the last preceding order purported to be peremptory. In such circumstances there should be evidence of unexpected delay in getting the money and a strong probability that it will be got.

In Coote on mortgages, 8th ed., at p. 1068, it is thus stated:—

> An order to enlarge the time for payment in a foreclosure suit is not a matter of course and may be refused where no excuse for the default is stated and where the security is not shewn to be ample.

In vol. 2 of White & Tudor's Leading Cases in Equity, 8th ed., p. 58, the rule is stated to be "the order to enlarge the time for payment is by no means of course; and though a strong reason is not required, it will be refused where none is assigned or where the security does not appear ample."

The authorities upon which this unanimous opinion of those text writers is based are very old, the most recent being *Forrest* v. *Shore* (1884), 32 W.R. 356, but they seem to leave no doubt as to the principles by which the Court should be guided in enlarging the time. Two of the things that it should be satisfied of in making such an order are the sufficiency of the security and the probability of the mortgagor being able to pay off the mortgage if the enlargement is granted. Instead of these conditions existing here, the exact opposite of them prevail, as I have already attempted to shew. It does seem to me that the plaintiff who it the only person who has a dollar's worth of substantial interess in the property should now be allowed to get title to and possession of it so that he may out of it get as much of his money as he can.

The only fact that appears to me as an argument in support of the order is that the order of May 15, 1916, provides that the defendant upon payment of the sum of $1,000 by November 15, 1916, should have liberty to apply for a further extension of time for payment not exceeding one year and the plaintiff has received as his share of last year's crop grain to the value of $295 more than this. It is argued that it would be inequitable for the plaintiff to obtain the lands and at the same time retain the payment thus made. There would be some force in this if the defendant had made this payment out of his own means, but such is not the case. The money was produced out of this land and it represents but one-third of the gross returns from it, the defendant having retained for himself and his partner the remaining two-thirds. He has, therefore, been in no sense prejudiced by this payment for it is the direct outcome of his possession of the land assured to him under the order and he has either by himself or with his partner profited to a much greater degree than the plaintiff has by it. This provision of the order is by no means an assurance that upon payment of this sum the time for payment of the balance would be extended for a year. If that was the intention the order would have so expressly provided instead of simply reserving to the defendant liberty to apply. All that it means, I think, is that if his payment is made the Court may upon a consideration of the then existing conditions give the defendant a further indulgence. In my view of these conditions

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he has not made out such a case for a further extension of time as in the light of the authorities is necessary to entitle him to it.

I would allow the appeal and set aside the order appealed against and grant the plaintiff a final order of foreclosure and a vesting order in the terms of paragraphs 1 and 2 of the order of May 15, 1916, and an order that he shall forthwith be entitled to enter into possession of the mortgaged premises and every part thereof.

BECK, J., concurred with Walsh, J. *Appeal allowed.*

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ELECTRICAL DEVELOPMENT Co. of ONT. v. ATT'Y-GEN'L FOR ONTARIO AND HYDRO-ELECTRIC POWER COMM. of ONT.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. January 12, 1917.

ACTION (§ I B—5)—FIAT OF ATTORNEY-GENERAL.

In the exercise of discretionary power, the Lieutenant-Governor in Council cannot be controlled or directed or declared bound by contracts, by the Supreme Court of Ontario. When a statute provides that an action cannot be commenced without the fiat of the Attorney-General, and he has refused it, it is an abuse of the process of the Court to name the Attorney-General as a party to the action, and endeavour to proceed with it.

Statement.

APPEALS by the plaintiffs from the judgment of Middleton J., dismissing an appeal from orders of the Master in Chambers, made upon the applications of both defendants, setting aside the writ of summons, on the ground of a statutory requirement that an action should not be brought against the Commission without a fiat from the Attorney-General, which had been refused, and on the ground that the Attorney-General should not have been made a party. (See sec. 16 of the Power Commission Act, R.S.O. 1914, ch. 39.) Affirmed.

The judgment appealed from was as follows:—

MIDDLETON, J.:—These appeals fail. The statute provides that no action shall be brought against the Commission without a fiat first obtained from the Attorney-General. A fiat was refused, and the writ was then issued in the face of the statute. Whatever remedy may be open to the plaintiffs, I think it is clear that the statute cannot be ignored.

The question of the invalidity of the statute as being for any reason beyond the competence of the Province is not open upon this motion, as sec. 33 of the Judicature Act, R.S.O. 1914, ch. 56, has not been complied with. In any event, the decisions in *Smith* v. *City of London* (1909), 20 O.L.R. 133, and *Beardmore*

v. *City of Toronto* (1909-10), 20 O.L.R. 165, 21 O.L.R. 505, will probably be found to conclude this question so far as any Court of first instance is concerned.

The writ being improperly issued, I can only affirm the order setting it aside, and am not called upon to consider whether an action will lie against the Attorney-General for the purpose of obtaining a declaration of the invalidity of the recent statute. By sec. 20 of the Judicature Act, the Court is given power to determine the validity of a statute at the instance of the Attorney-General; but it by no means follows that the Attorney-General may, against his will, be compelled to appear as a defendant to uphold the validity of a provincial Act. This question does not, in my view, require solution upon the present motion.

The appeals should be dismissed, and costs follow the event.

D. L. McCarthy, K.C., for appellants.

I. F. Hellmuth, K.C., for the defendant Commission.

Edward Bayly, K.C., for the Attorney-General.

The judgment of the Court was delivered by

HODGINS, J.A.:—Appeal by the plaintiffs from two orders of Middleton, J., dated the 15th September, 1916, dismissing the appeals of the plaintiffs from orders of the Master in Chambers which set aside the issue and service of the writ in this action against each of the defendants. Hodgins, J.A.

The writ claims a declaration: (1) that the Hydro-Electric Commission has no right to divert water from the Niagara or Welland rivers, notwithstanding the powers in that regard granted it by 6 Geo. V. chs. 20 and 21, and that the Lieutenant-Governor in Council has no power to authorise them so to do; or (2) that the covenants in paragraphs 16 and 20 of the agreement between the Queen Victoria Park Commissioners and the appellants' assignors are binding on the Lieutenant-Governor in Council notwithstanding those statutes. An injunction is also asked against the Hydro-Electric Commission.

The action has thus for one of its objects the restraining of the Hydro-Electric Commission from acting under the statutes mentioned. Its further purpose is to have the rights and legal powers of the Lieutenant-Governor in Council defined and controlled and to have it declared that the Lieutenant-Governor in Council must not obey the statutes and must do nothing in-

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consistent with the covenants in the agreement already referred to.

In order to give some appearance of applying legal procedure to the enforcement of the last mentioned claims the Attorney-General for Ontario is made a party defendant.

It is of course obvious that the Attorney-General may be a proper party to certain proceedings against or affecting the Crown. *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, [1912] 1 Ch. 158, is a case in point, and there are many precedents cited in it which establish that very general proposition.

A summary of them will shew that they form no authority for the present proceeding. *Pawlett* v. *Attorney-General* (1667), Hardres Rep. 465, *Reeve* v. *Attorney-General* (1741), 2 Atk. 223, *Casberd* v. *Attorney-General* (1819), 6 Price 411, and *Hodge* v. *Attorney-General* (1838), 3 Y. & C. Ex. 342, all dealt with the rights of the Crown in regard to the legal estate in lands or leaseholds which it had acquired by attainder, escheat, execution, or by reason of felony. In all of them it is recognised that the Court could pronounce no judgment affecting directly the Crown's legal estate, though it could deal with the rights of the other parties.

This view was expressed in this Province as early as 1864 in *Dunn* v. *Attorney-General*, 10 Gr. 482.

Colebrooke v. *Attorney-General* (1807), 7 Price 146, *Attorney-General* v. *Laragoity* (1816), 2 Price 172, *Deare* v. *Attorney-General* (1835), 1 Y. & C. Ex. 197, raised the question of the jurisdiction of the old Court of Exchequer, and were all cases where the relief sought was in aid of the defence in actions at the suit of the Attorney-General.

In the *Dyson* case, as in *Burghes* v. *Attorney-General*, [1912] 1 Ch. 173, the Attorney-General could sue for penalties if the information demanded by the Commissioners of Inland Revenue under the Finance Act, 1910, was not forthcoming. The plaintiffs asked that the statute be construed so that they might know what to comply with in filling out their forms, and thus avoid the threatened penalties (see *Burghes* case, p. 189). So that there is a somewhat close resemblance to those cases in which the suit had actually begun and relief was asked so as to make a proper defence.

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Lord Justice Farwell in the *Dyson* case indicates that there is some difference between the proceeding by petition of right against the Crown and that by action against the Attorney-General. He says[1] ([1911] 1 K.B. at p. 421): "It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side, could and did make declarations and orders which did affect the rights of the Crown." But Cozens-Hardy, M.R., and Moulton, L.J., do not admit that distinction. It is perhaps more a difference as to what is meant by "the rights of the Crown," for it appears that in none of the cases cited was any direct judgment pronounced against the Crown in respect of any of its rights or interests, although the result was to recognise as against the Crown the interests of others and to protect them so far as could be done without directly compelling the Crown.

In an earlier case, *Young* v. *S.S. "Scotia,"* [1903] A.C. 501, Lord Halsbury, L.C., says (p. 504): "It is vain to argue that, where the property belongs to the Crown, the Crown can be impleaded, whether in this form" (*i. e.*, action *in rem*) "or in any other form."

However this may be, none of these cases afford any sort of justification for the proposition that the Lieutenant-Governor in Council can be controlled or directed by the Court or be declared bound by covenants in an agreement. If that be so, then naming the Attorney-General as a party is futile. That rights of the Crown, both direct and indirect, may be dealt with in an action framed in that way, is established by the *Dyson* and other cases. But this is not one of these rights. The argument is that this Court is entitled and bound to make a declaration which shall tie the hands of the Executive of this Province and define exactly the limits within which it can act. The practical results of such an experiment would be rather perplexing. If the Executive chose to disregard the judgment of the Court, how would it be enforced? If the Lieutenant-Governor wished to

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conform and his Ministers refused, is he to dismiss them? If, on the other hand, the Executive obeyed the declaration of the Court, if that were in the plaintiffs' favour, it would then run counter to a statute which recites the public necessity for its enactment, and empowers the Government, *i.e.*, the Lieutenant-Governor in Council, to carry out its provisions, and declares that in so doing it does not contravene any provision of the Park Commissioners' agreement (see sec. 7 of 6 Geo. V. ch. 20). It looks to me as if the appellants were desirous of inducing the Court to give advice to the Lieutenant-Governor in Council without waiting to be asked for it; a course which would, I think, astonish most students of constitutional law, and would completely ignore the relation implied by the enactment of the Constitutional Questions Act, R.S.O. 1914, ch. 85.

I have ventured in the case of *Murdock* v. *Kilgour*, 22 D.L.R. 752, 33 O.L.R. 412, to express the view that the course here proposed is an impossible one, and I adhere to that opinion. I think it will be found to coincide with the expressions of Judges whose experience as public men gives their statements additional weight.

Cameron, C.J., in *Re Massey Manufacturing Co.*, 11 O.R. 444, at p. 465, in granting the writ of mandamus against the Provincial Secretary, adds: "I need hardly say that if the signing of the notice by the Provincial Secretary was an act that in the remotest degree affected or could affect the policy of the Government, or the proper control or management of any department of the Government, the Courts could not interfere."

In *Church* v. *Middlemiss* (1877), 21 L.C. Jurist 319, Taschereau, J., later Chief Justice of Canada, thus indicates his position (p. 322): "He forgets that the acts of the Lieutenant-Governor in Council are Her Majesty's acts; that, if he suffers grievances in consequence of these acts, he can, by petition of right, complain and ask redress of Her Majesty and of her alone. The members of the Executive Council can be dismissed by Her Majesty or her Lieutenant-Governor in her lieu and stead. The House of Representatives can express its disapproval of their stewardship and oust them from power. But they are not in law individually and personally responsible towards any one of Her Majesty's subjects in the Province for any of their acts as advisers of the Crown: they cannot be called to account before a Court of

Justice for the advice given by them, and each of them, to the Sovereign in Her Councils. Their acts are not their personal acts. The Crown acts by them, and their acts are those of the Crown."

This view he adheres to in *Liquidator of the Maritime Bank* v. *Receiver-General* (1889), 20 S.C.R. 695. See also *per* Boyd, C., in *Re Trent Valley Canal*, 11 O.R. 687, at p. 699; and, *per Curiam*, in the Australian case of *The King* v. *The Governor of the State of South Australia* (1907), 4 Commonwealth L.R. 1497.

Todd in his Parliamentary Government in the British Colonies, in discussing the status of the Lieutenant-Governor and his Council, as indicated by the language of the British North America Act, says (p. 591): "These words unmistakably shew that the Imperial Parliament has ratified and enjoined a continuance of the exercise of executive power in the various Provinces of the Dominion, in accordance with the usages of responsible government; and that it contemplates that the Lieutenant-Governors therein should occupy, towards their Executive Council and towards the Local Legislature, the identical relation occupied by the Governor-General in Canada and by the Queen in the United Kingdom towards their several Privy Councils and Parliaments."

The latest case of interest on this subject is *Commercial Cable Co.* v. *The Government of Newfoundland*, [1916] 2 A.C. 610, 29 D.L.R. 7.

In discussing this matter I have stated that the question involved is whether the Executive can be subjected to the control of the Courts where its discretion is involved. This is the real point at issue. But there is another aspect which this case presents. Can the Court make a declaration against the express words of an Act of the Legislature? Section 3 of 6 Geo. V. ch. 20 says that: "The Government may authorise the Commission to . . . (*c*) erect, maintain and operate works for the purpose of diverting the waters of the Niagara river," etc. Section 7 says that: "The exercise of the powers, which may be conferred by or under the authority of this Act, or any of them, shall not be deemed to be a making use of the waters of the Niagara river to generate electric or pneumatic power within the meaning of any stipulation or condition contained in any agreement entered

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into by the Commissioners for the Queen Victoria Niagara Falls Park."

That Act enables the Lieutenant-Governor in Council to authorise the Commissioners to do certain things which shall not be deemed to contravene the covenants in the Park Commissioners' agreement. The discretion of the Crown rests, therefore, upon an Act of Parliament, and Parliament has expressly stated that its exercise does not offend against that agreement. I do not see how it is possible for this Court to declare that "the Lieutenant-Governor in Council has no right or legal power . . . to make use of the waters of the Niagara river for the production of electrical power or to authorise the defendant the Hydro-Electric Power Commission to do so," or that the provisions of the agreement in question are "binding upon the Lieutenant-Governor in Council, the Ontario Niagara Development Act, being the statute of 6 Geo. V. ch. 20, notwithstanding," when the statute expressly gives authority to do the one, and directly contradicts the other. The appeal, so far as the Attorney-General is concerned, should be dismissed with costs.

The appeal as to the Hydro-Electric Commission seems to be completely covered by the cases of *Florence Mining Company Limited* v. *Cobalt Lake Mining Co. Limited*, 18 O.L.R. 275; *Smith* v. *City of London*, 20 O.L.R. 133; *Beardmore* v. *City of Toronto*, 21 O.L.R. 505. But counsel in support of the appeal cited Appendix A. in the 3rd volume of R.S.O. 1914, embodying ch. 322 of R.S.O. 1897, as indicating that the Act prohibiting suit except on the fiat of the Attorney-General was *ultra vires* of the Legislature. Section 2 enacts that no man shall be disseised or put out of his freehold, franchises, or liberties, unless he be brought in to answer and prejudged of the same in due course of law; and that the King shall not deny to any man justice or right. But that section is part of an Act of the Legislature itself, while its predecessors, embedded in English statutory enactments, have been expressly repealed by 2 Edw. VII. ch. 13, sec. 6. So that whatever was enacted in 1897 was enacted as a statute of the Ontario Legislature. It carries with it the express power of repeal or amendment under the Interpretation Act, R.S.O. 1914, ch. 1, sec. 13, originally passed before 1897. I add this to what Mr. Justice Riddell said, in reference to

those earlier statutes, in *Smith* v. *City of London*, 20 O.L.R. at p. 140. In the cases already referred to of *Smith* and *Beardmore*, the right further to maintain the action was taken away absolutely. The legislation now in question is conditional in that it merely interposes the antecedent requirement of a fiat from the Attorney-General, and is a modification, not at all unusual, of the general right of resort to the Courts, and a legal legislative curtailment of that right.

The appellants urge also that this is *ultra vires*, relying on the Judicature Act, R.S.O. 1914, ch. 56, sec. 16, clause (*g*),* contending also that under that clause no consent can be required. This point has, I think, already been answered, but it may be useful to consider it in the light of English decisions as to the fiat of the Attorney-General.

In *Ex p. Newton* (1855), 4 E. & B. 869, Lord Campbell, C.J., who had filled the office of Attorney-General, said, in a case where the applicant had been convicted of a criminal offence, at p. 871: "I completely agree in thinking that, a probable cause being shewn, the Attorney-General, *ex debito justitiæ*, ought to grant his fiat; but he is to exercise what is in the nature of a judicial function. If he refused to hear and consider the application for a fiat, we should compel him by mandamus to hear and consider it; but, when he has heard and considered, and refused, we cannot interfere. The Attorney-General may be made responsible in Parliament. If he has made an improper decision the Crown may and, if properly advised, will dismiss him; but we cannot review his decision. No authority has been cited, nor does any exist." With this view Wightman, Erle, and Crompton, JJ., agreed. See also *Ex p. Lees* (1858), E. B. & E. 828. Brewster, L.C. (Ireland), in *Re Pigott* (1868), 11 Cox C.C. 311, in refusing a mandamus to the Attorney-General to issue a writ of error, says (p. 313): "All the modern cases were against

*(*g*) Subject to the foregoing provisions for giving effect to equitable rights and other matters of equity and the other express provisions of this Act, the Court and every Judge shall recognise and give effect to all legal claims and demands, and all estates, rights, duties, obligations and liabilities existing by the common law or created by any statute in the same manner as the same would have been recognised and given effect to prior to the Ontario Judicature Act, 1881, by any of the Courts then existing and whose jurisdiction is now vested in the Supreme Court.

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the idea that the Courts could interfere with the discretion of the Attorney-General."

This view of the position of the Attorney-General was adopted by A. L. Smith, L.J., in *Regina* v. *Comptroller-General of Patents*, [1899] 1 Q.B. 909, in these words (p. 914): "Where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney-General, and no Court in the kingdom has any controlling jurisdiction over him."

Halsbury, Laws of England, vol. 10, p. 31, in a note (*p*), says: "It has been suggested that it is the duty of the Attorney-General to advise the Crown to grant its fiat to all petitions except those which are frivolous; but it is doubtful whether there is any real ground for this view. In any case the Attorney-General could only be responsible to Parliament in the matter, and not to the Courts."

It is perhaps useful to mention two clear instances of similar legislation which seem to render it difficult to understand how such a requirement, even though it makes the right of access to the Courts dependent upon the discretion of the Attorney-General, is open to any objection. These are: 38 & 39 Vict. ch. 55, sec. 69, requiring the local authority under the Public Health Act to obtain the sanction of the Attorney-General before bringing action to restrain pollution of watercourses; and 39 & 40 Vict. ch. 59, sec. 10, under which no appeal to the House of Lords can be taken without the consent of the Attorney-General where previously his fiat had been required.

As compensation is provided for under the Hydro-Electric Commission Act, the assessment of damages by the method therein set out must form the only way in which the Crown can be proceeded against. If this case is not within those provisions, then it must be assumed that the requiring of a fiat before an action is brought limits claims which are not to be answered by compensation to those for which the Crown is willing to be sued.

Another ground relied upon by the appellants in their endeavour to distinguish the cases already referred to of *Smith* and *Beardmore* was that the legislation of last session interfered or authorised interference with navigation, and that the appellants as riparian proprietors were entitled to sue without a fiat in

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regard to their right of navigation, which, it was said, the Provincial Legislature could not curtail. This contention is hard to follow, for, granting the absence of power in the Legislature to interfere with navigation, that right is not in question, but only that of resort to the Courts.

In *Baldwin* v. *Chaplin* (1915), 21 D.L.R. 846, 34 O.L.R. 1, it is pointed out that the right of access to the water by a riparian proprietor is a private right, and that the right of navigation is a different and public right, the infringement of which gives no cause of action in the absence of special damage accruing by reason of the interference with access due to the obstruction of the public right of navigation.

It cannot follow that the mere possession of a common right over which the Dominion Parliament has jurisdiction can oust the power of the Province over its inhabitants in regard to other and different rights, which are civil rights, as riparian rights undoubtedly are. I regard resort to the Courts of this Province also as a civil right, which may be taken away, modified, or controlled by the Legislature here, unless preserved as the necessary consequence of Dominion legislation on a subject within its exclusive powers or saved by the Royal Prerogative. This was the opinion of Moss, C.J.O., in the *Florence Mining Co.* case (*ante*).

However, in this case we were referred to nothing that indicated in any way that the appellants are riparian proprietors, nor can I find anything in the agreement appended to (1905) 5 Edw. VII. ch. 12 that gives colour to any such status as existing by virtue thereof. On the contrary, the grant is of a license to erect a plant and machinery upon the lands under the jurisdiction of the Park Commissioners, which conveys no riparian proprietorship, as that term is understood.

While I have dealt with this case on the assumption that the appellants, if a fiat had been granted, had some enforceable right, I may add that I have found no single precedent for such a claim as is presented in this writ. The petition of right is more limited in its range than an ordinary action, and I think the judgment might well be supported on the ground that the appellants had no right as to which a petition of right could be properly presented.

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It perhaps should be added that, as is clear from the foregoing, this action is not one that ought to be allowed to proceed to trial in the usual way.

The Hydro-Electric Commission are protected against an action by the terms of the statute. The Attorney-General is made a party only to represent the Lieutenant-Governor in Council, as is evident from the writ of summons, and for a declaration that that body is powerless in view of a certain contract, although an Act of the Legislature expressly says that what is authorised may be done notwithstanding that contract.

To allow the action to proceed against either defendant would be an abuse of the process of the Court, so long as the statutes in question remain unrepealed.

The appeal, therefore, relating to the Hydro-Electric Commission should also be dismissed with costs.

Appeals dismissed.

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RIDDELL v. McRAE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. March 17, 1917.

LIENS (§ I—1)—FOR TAXES PAID ON ANOTHER'S LAND.

One paying taxes on another's land under the mistaken belief that the land belonged to him, acquiesced in by the true owner, is entitled to a lien upon the land for the amount paid.

Statement.

APPEAL from a judgment in an action claiming a lien for taxes paid.

C. B. Reilly, for plaintiff; *A. M. Sinclair*, for defendant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—The plaintiff is the administrator of the estate of James Riddell, deceased, who died on August 27, 1906. The deceased was the legal and beneficial owner of lot 11, in block 14, plan B. 1, Mission, now within the limits of the city of Calgary.

On August 27, 1887, the defendant became the registered owner of the adjoining lot number 12.

The locality in which these lots lie was originally granted by the Crown to the Oblate Fathers, and became known as "The Mission." They subdivided it and afterwards it formed part of a R.C. Separate School District, being subject to no taxes (until subsequently comprised in the village of Rouleauville), except in respects of lots owned or occupied by Roman Catholics; neither

the deceased nor, so far as appears, McRae was a separate school supporter. When the village of Rouleauville was constituted is not clearly shewn. It was shewn that the deceased had occupied lot 11 "fully 20 years ago." There was also evidence that for a time, while occupying lot 11, he also occupied lot 12, and had them both for a time at least enclosed by fence as one parcel. He had a shack on the parcel; but it is not quite clear whether the shack encroached upon lot 12 or not. At all events, on the whole evidence, I think it is not possible to make, what the plaintiff asks, a declaration that the plaintiff is entitled to lot 12 as against the defendant by reason of long adverse possession.

The plaintiff, however, as administrator of the deceased, has proved that, when he came to take charge of the property of the deceased, he supposed that the deceased had been the owner of lot 12 as well as of lot 11, and he accordingly in good faith paid taxes subsequently accruing. He says he paid those for the years 1908 to 1916, amounting to $761. Letters from the deceased to the defendant, commencing in date October, 1891, and ending December, 1899, are in evidence. They shew that the deceased claimed to be in occupation of and to have some claim to or against the lot in question; that the deceased was at least to look after the payment of taxes, should any be assessed upon the lot. It was in 1909 or 1910 that the defendant learned that the deceased had died. He had visited Calgary a number of times—the last time, he thinks, was in 1905. Besides this lot 12 he had other property in Calgary, which was referred to in the correspondence, and which the defendant expected the deceased to look after for him. It seems a fair inference that he must have learned of the development and expansion of the city and must have been under the impression that the lot in question had become subject to taxation, and that either someone, presumably the deceased or his representatives, was paying the taxes upon it or that it had been or was in danger of being entirely lost to him by being sold for arrears of taxes.

Under these circumstances, I am of opinion that the plaintiff is entitled to a lien upon the defendant's lot—lot 12—for the above-mentioned taxes. Had deceased or the plaintiff made lasting improvements upon the defendant's lot at least under circumstances from which it ought to be inferred that the defendant

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was standing by and consenting, the Court would, as I shall shew, declare a lien. The case of the payment of taxes whereby the land which, in default of payment, would have been entirely lost to the owner, seems to me to be a stronger case for the application of the same principle.

The principle is put in Story's Equity Jurisprudence, 2nd ed., pp. 385-8, under the head of "Constructive Fraud"; in Hals. Laws of England, vol. 13, under the head of "Estoppel," pp. 560 *et seq.*, where it is said (p. 397) that the Courts would not allow one who had stood by with the knowledge that another was expending money on his land under a mistaken belief as to his own rights, and in ignorance of those of the true owner, afterwards to assert his title without at least making compensation for the money so expended, or otherwise doing equity to him who had laid it out. *Oxford's (Earl)* Case (1615), 1 Ch. Rep. 1, (21 E.R. 485); *Burrowes* v. *Lock* (1805), 10 Ves. 470 (32 E.R. 927); *Pilling* v. *Armitage*, 12 Ves. 79 (33 E.R. 31); *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129, 140, 141, 168; *Willmott* v. *Barber* (1880), 15 Ch. D. 96; *Civil Service Musical Ins. Ass.* v. *Whiteman* (1899), 68 L.J. Ch. 484, 13 Hals. pp. 166-7. The question is dealt with in Jones on Liens, 2nd ed., pp. 1131 *et seq.*

There seems to be good authority for the position that acquiescence by the true owner is necessary to be established only where formerly he would not have been obliged to go into equity to assert his right; but that, where he was obliged to go into equity, proof of acquiescence was not necessary.

American decisions of some States, following in this the Roman Civil Law, would not require proof of the true owner's acquiescence in any case. How far this Court may go in the same direction does not now call for an answer, for, as I have said, it is clear enough, it seems to me, that the defendant ought to be taken to have known that someone, and presumably James Riddell, or his representatives, was actually preserving this property of his from sale and forfeiture for nonpayment of taxes. The case comes, as I have indicated, well within the most conservative statement of the principle of law referred to.

Quite probably the plaintiff's right to a declaration of a lien for the taxes paid is supportable on the principle of subrogation. This subject is treated at length, 37 Cyc., tit. "Subrogation";

27 Am. & Eng. Ency. of Law, 2nd ed., tit. "Subrogation"; Sheldon on Subrogation, 2nd ed. (1893); and a number of definitions are given in "Words and Phrases Judicially Defined," tit. "Subrogation." Though a right of subrogation will not, it is sometimes said, be enforced in favour of a mere volunteer, this, it seems, is to be interpreted as meaning a mere officious intermeddler. There seems to be direct American authority for subrogation in the case of payment of taxes, but the reports of the cases are not available. Sheldon, pars. 9, 36*a*; 27 Am. & Eng. Ency. of Law, p. 265.

The plaintiff's claim was apparently, in the first instance, based on a belief that the deceased had purchased the lot from the defendant; and it was only when this ground could not be established that a title by possession was sought to be maintained. Naturally, this being the view with which the plaintiff commenced his action, no claim was made in the alternative for a lien for taxes paid.

As all the available evidence relevant to such a claim has undoubtedly been given, I think, though it was not asked for at the trial, an amendment setting up such a claim should now be made. It is not unlikely that had such an amendment been asked at the trial and the question been fairly argued before the trial Judge, a judgment, to the effect I have now proposed, would have been given.

I, therefore, think that there should be no costs of the appeal. I think, too, in view of the result, the defendant should have the costs of the action to the end of the trial; these costs to be taxed on the 2nd column of the tariff of costs.

The judgment will, therefore, be to the effect that there be a declaration that the plaintiff is entitled to a lien on the defendant's interest in lot 12 for the sum of $761.90, the arrears of taxes paid by the plaintiff thereon, without interest. I think there is no right to a personal order for payment; but there should be a set-off of the costs against the amount of the claim. The judgment ought to contain a provision authorizing an application to a Judge for an order to enforce the lien if the defendant does not satisfy the claim within, say, 3 months.

Judgment accordingly.

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TUCKWELL v. GUAY.

Manitoba Court of King's Bench, Metcalfe, J. January 10, 1917.

LIENS (§ I—1)—FOR IMPROVEMENTS UPON LAND UNDER MISTAKE OF TITLE.
Note:—This judgment contains a valuable discussion (not essential to the issue) on the right to a lien on land for improvements made by a person who mistakenly believed that he was the owner.

Statement. ACTION claiming (1) possession; (2) injunction; (3) mesne profits; (4) damages, in regard to land which defendant claims he entered on and improved under the *bonâ fide* belief that the land was his own.

B. L. Deacon, and *Claude Isbister*, for plaintiff.

W. Boston Towers, and *L. P. Roy*, for defendant.

Metcalfe, J. METCALFE, J.:—The defendant admits title, but claims he entered on the said land in 1913 under the *bonâ fide* belief that the land was his own, which mistake he said was caused by an erroneous survey of his land by a licensed surveyor. He further claims that he caused the lands to be fenced, and that he scrubbed and cleared the bushes from and broke 15 acres of the said land, whereby he made lasting improvements, which enhanced the value of the land.

At the commencement of the trial, counsel for the plaintiff said that as he did not intend to claim for mesne profits, nor for damage (except nominal damage), he would offer no evidence on these points.

The defendant's father was the registered owner of the N.½ S.W. ¼ of said section 8. He told the defendant that he intended to give him the "80 acres," and that he had better go and work it and make a living out of it. In pursuance of this arrangement it was thought well to get the lines surveyed. Notwithstanding that the land was under the Real Property Act, and not encumbered, from which I may safely assume the certificate of title was in the father's possession, neither he nor his son took the slightest care to inform the surveyor of the correct legal description. The father says that he did not carry the details of the description in his head. Without informing himself from the certificate of title or otherwise as to the exact legal description of the land, he went to a Mr. Talbot, a real estate agent, and asked him to get a land surveyor to survey the "80 acres," trusting to Mr. Talbot to give the detailed instructions. Unfortunately, Mr. Talbot thought that Guay owned the west half instead of the north half of the quarter section.

Talbot, to the best of his knowledge, gave the instructions to the land surveyor. It was because of his erroneous instructions, and not because of an unskilful survey, that the lines were run for the west half of the quarter section instead of the north half.

Considering the ease with which Guay could have informed himself as to the correct legal description of the land; considering the length of time that he had owned it, the sectional survey system, the length of time that he had paid taxes on this parcel of land, and the circumstances generally, and considering further, that neither the father nor the son appeared to be at all below the average in intelligence, I think they were guilty of gross carelessness.

The father had a certificate of title. There was no cloud upon his title. That certificate of title shewed clearly the legal description of the land.

The defendant says that when he went out to take possession in 1913, he found the lines and honestly believed the land surveyed was the land he was to take from his father; that, having made the improvements, he is entitled to relief under the King's Bench Act, r. 601 (Unskilful Survey) or, in any event, under r. 603 (Mistake of Title). As I have already pointed out, I do not think it was an unskilful survey, and therefore the defendant cannot succeed under r. 601.

To give full effect to the contention of the defendant that he may succeed under r. 603, I think it incumbent to find that, no matter how careless or how foolish; one who occupies land of another, may have a lien for lasting improvements against the owner, however innocent, if they enhance the value, whether the occupier has colour of title or not; and that so long as the value is enhanced, no matter how little, he has a lien, whether the "lasting improvements" are of any real value to the owner or not.

This is advanced legislation. I would hesitate, without direct binding authority, to go that far. I have been referred to some Ontario cases. This legislation is identical with that of Ontario.

Prior to the Ontario legislation, a stranger who had entered upon land, even under a colour of title, could not, as against the true owner, claim to be paid for his improvements.

Except in an action for mesne profits where the party was

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sometimes allowed to recoup himself by setting off the value of the improvements, and in cases where a legal title had been in the person making the improvements and the equitable title in another who was obliged to resort to a Court of equity for relief, no allowance was made for improvements: *Beattie* v. *Shaw*, 14 A.R. (Ont.), 600 at 608, 609. The history of the legislation is referred to in *Beattie* v. *Shaw* in detail.

Insofar as it affects us, the history is as follows: In 1910 the Manitoba legislature, by ch. 17 of that year, being an Act to amend the King's Bench Act, enacted as follows: 13. The said Act is hereby further amended by inserting immediately after r. 580, the following rule:—

IMPROVEMENTS UNDER MISTAKE OF TITLE. 580*a*. In every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements (or shall be entitled or may be required to retain the land if the Court is of the opinion or requires that this should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land if retained, as the Court may direct).

The brackets are my own, the use of which will appear later.

This section, by the revision, became sec. 603 of the King's Bench Act, under the heading, "Improvements under Mistake of Title."

In 1873, the Ontario legislature passed an Act intituled: An Act for the Protection of Persons Improving Land Under a Mistake of Title, 36 Vict. ch. 22. This Act consisted of one section, which was similar to that part of sec. 580*a*, down to the commencement of the brackets.

In R.S.O. (1877), we find this provision carried to sec. 4 of ch. 95, being, An Act to Amend Law and Real Property in Ontario. The amendment of 1877, similar to that portion of sec. 580*a* in brackets was added, and the section thereupon became identical with our sec. 580*a*, and is found under the heading "Improvements under a Mistake of Title." Carried through the subsequent revisions under a similar heading, and without change, this enactment is now found in the Act respecting the Law and Transfer of Property, 1 Geo. V. ch. 25, sec. 33.

The first case which I find dealing with the Ontario statute is *Carrick* v. *Smith* (1873), 34 U.C.Q.B. 389.

The defendant pleaded an assignment from the lessee of the

widow of the late owner of the property; and that believing, under the lease, the premises were his own for the term thereby granted, he had erected valuable buildings and made valuable improvements. The plaintiff applied to have such pleadings struck out.

It was urged that he set up a right for the widow which she never claimed for herself, and that the lease could be no more than a lease made by any other unauthorized person.

It appeared, however, that the widow had a claim for dower, and also for the amount of a mortgage paid off by her. The Court thought it better that the question of fact should be proved before settling the question of law. (See p. 400.)

Wilson, J., in delivering the judgment of the Court, takes occasion, at p. 399, to discuss the statute passed the previous year, 36 Vict. ch. 22. The Judge says:—

This is a very extensive protection, and perhaps it may be called very advanced legislation to give a lien *in every case* to a person who has made improvements, even *lasting* improvements, on any land *under the belief* that the land was his own.

If a person buy lot 20 and enter by mistake—his own mistake—on lot 19, under the belief that he was on lot 20, and build a brick house on it, is the owner of 19 to be subject to the payment of that useless or expensive building, before he can occupy his land, or sell it free from encumbrances?

P. 400. This seems rather a sharp legislation, but it is unfortunately, too absolute in its terms, and it is directed against the only innocent man there is in the transaction, and he is without redress. He should be allowed at any rate, if he elect, to abandon his land, on being paid the value of it. There would be some equality in that.

Such a statute must be carefully executed in all cases. Now, in this case, did the lessee or his assignee believe the premises were their own for the period of the term? . .

In no case does ignorance of the law excuse a person for liability, for, or from the consequences of, his own act and conduct. . .

They cannot be excused because they may have thought she could, by law, make such a lease. They were not under the belief that the land was their own by the lease, if the law does not excuse their ignorance in thinking the widow was the competent legal person to make it. . .

P. 401. I am not disposed to attribute much weight to the claim which is made under the statute . . although on a fuller argument, it may be that more may be made of the statute than I am disposed to think.

In *Smith* v. *Gibson* (1875), 25 U.C.C.P. 248, the vendor to the defendant had built a house on the land after being previously warned by the married woman, through whom title was claimed, not to do so, as the property was that of her husband.

Galt, J., at p. 251, says: "The very slightest enquiry must have satisfied him that the land was her husband's."

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Hagarty, C.J., at p. 252, says:—

It is unfortunate that the statute is so general . . If I thought the evidence shewed a real belief, however unreasonable, I should further consider the question; although I think I must assume that the legislature only meant to protect the purchaser who could shew that in good faith, as a reasonable man, he made improvements on land he had reason to believe his own. . . If the argument urged for the defence be sound to its full extent, the statute, which was doubtless intended to act beneficially, could be made a means of great oppression and hardship to owners of property.

The next case is *McCarthy* v. *Arbuckle* (1879), 29 U.C.C.P. 529, decided after the amendment shewn in brackets.

In this case there was a *bonâ fide* dispute as to title. The owner of the paramount title succeeded in ousting the occupant, who claimed a lien for his improvements, the nature of which does not appear.

Galt, J., says: "We entertain no doubt, from the evidence of this case, that at the time when the defendant made the improvements he did so under the belief the land was his own, and consequently he is entitled to the relief pointed out by the statute" (p. 537).

In *McGregor* v. *McGregor* (1880), 27 Gr. 470 at 476, the defendant, who had built a house upon the land, was allowed for such as improvements made under a mistake of title. It appeared reasonable and probable from the evidence that he really was under a mistake as to his title, and that he might reasonably and honestly have believed that a conveyance of the lands to him from his father had conveyed to him an absolute title.

In *Fawcett* v. *Burwell* (1880), 27 Gr. 445, the plaintiff and his wife had resided on the premises for several years. On the property was situate a mill in very bad state of repair. The property belonged to the plaintiff's father-in-law, and in the belief that he had died intestate, and that his wife was solely entitled, the plaintiff made improvements.

After the death of the plaintiff's wife, a will was discovered, by which the wife took a life estate only. The plaintiff having made improvements under a mistake of title, believing the land to be the property of his wife, filed a bill to enforce his claim. There was no contest as to the plaintiff's right to recover, the only dispute being as to the method of estimating the amount of his claim. The nature of the improvements was not disclosed.

In *Chandler* v. *Gibson* (1901), 2 O.L.R. 442, the defendant,

believing that under a will his grantor took an estate in fee tail, went into possession, and made lasting improvements (the nature of which is not disclosed), under the belief that he had acquired a title in fee simple. It was a mistake of title depending on a question of interpretation of the will.

Citing Wilson, J.'s, remarks in *Carrick* v. *Smith*, *supra*, Moss, J.A., delivering the judgment of the Court, says that the statute affords a very extensive protection to a person who has made lasting improvements which may be found in favour of the mistaken party, even though the mistake was one of title depending upon a question of law (p. 448).

Continuing, the Judge points out that the intention appears to be to make it a question in each case for the tribunal to determine whether the person claiming for the improvements made them under a *bonâ fide* belief that the land was his own.

In *Corbett* v. *Corbett* (1906), 12 O.L.R. 268, one Martin Corbett had provided in his will that, subject to a life estate of his widow, a certain town property should go to the eldest son, Michael Corbett. The defendant, who believed her husband was the eldest son of Michael Corbett, remained in possession and made improvements. She had always believed that the property would then come to her under her husband's will. It appears that she was mistaken in the belief that her husband was the eldest son of Michael Corbett. A search in the registry office would not have disclosed the defect. The whole difficulty arose over the will.

Mabee, J., found that the defendant's belief was *bonâ fide*.

The improvements extended over a long period. The nature of the improvements is not stated.

Under the circumstances it was held that the defendant was entitled to her improvements and a reference was directed.

I have not been referred to, nor, after a somewhat diligent search, have I found any cases which go further in support of the defendant's contention than the cases reviewed.

In *Beattie* v. *Shaw*, 14 A.R. (Ont.) 600, there was an effort to apply the statute as against a mortgagee.

While the question is referred to by Hagarty, C.J.O., as "very embarrassing," the attempt was unsuccessful.

The Judge, in referring to a similar enactment in the United

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States called "Betterment Laws," says: "They seem generally framed with more care than our statutes."

In this statement I concur. Generally speaking, the American enactments are expressly declared to be for the benefit of an occupier under a colour of title, who in judicial investigation shall be ousted by the owner of the paramount title.

For instance, in Arkansas, "If any person believing himself to be the owner either in law or equity under colour of title—"

In Vermont, "Supposing at the time of such purchase such title to be good in fee—"

In Ohio, "Purchase in good faith and receive a deed properly authenticated—"

In Illinois, "If he can shew a plain title in law or equity without actual notice of adverse title without notice."

I have not been referred to any cases where the occupier under the circumstances of this case has been allowed for his improvements. Neither have I been referred to any *ratio decidendi* which supports the defendant's contention.

I therefore have to take the statute as I find it, and construe it as best I can.

Does the section mean that when a stranger, guilty of the grossest carelessness, comes upon the land of an innocent owner and "makes lasting improvements" thereon which may enhance (ever so little) the value if the land were sold, the land is thereupon charged with the value of such "improvements," although of no use or benefit to the innocent owner?

I would hesitate to give any such wide effect to the statute. But I do not think I have to decide that question here. Before passing over that point, however, I lean to the view that the statute was not intended to deal with what (if I may use the expression) is in reality a mistake of identity; but was rather intended to apply to a mistake of the legal effect of a title. The form of the Ontario Act of 1873 would, I think, favour that construction.

Looking at the Manitoba statute of 1910, introducing the legislation, it would seem as though it were intended to be embodied in our statute so as to retain the construction which would seem to be the true construction of the original Ontario Act, and to limit its application to "improvements under a mistake of title." However, I do not think I have to decide that question.

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Under all the circumstances, and considering the local conditions, to which I do not think I would be justified in closing my eyes, I am of the opinion that the work done by this defendant is not a "lasting improvement" within the Act.

During the progress of the trial counsel for the plaintiff said he did not want to retain the benefit of the improvements, but that he wanted possession. He further said that the defendant might take his fence.

There will be judgment for the plaintiff, for possession, and except that the defendant will be entitled to enter upon the premises for the purpose of removing his fence only, there will be an injunction as prayed.

The plaintiff will have the costs of the action.

Judgment for plaintiff.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Kelly and Masten, JJ. January 19, 1917.

COURTS (§ II A—160)—DIVISION COURTS ACT—JURISDICTIONAL AMOUNT—EVIDENCE OF—GUARANTY.

In an action on a guarantee the amount due cannot be proven by the production of the guarantee solely, but "other and extrinsic evidence" must be given; therefore a Division Court has not jurisdiction in such an action under sec. 62 Division Courts Act, R.S.O. 1914, ch. 63.

Statement.

APPEAL by the defendant William Sylvester Webb from the judgment of the First Division Court of the United Counties of Northumberland and Durham in favour of the plaintiff for the recovery of $200 from both defendants, for one year's rent of land. The appellant was not the tenant, but was made a party to the lease, and therein covenanted to pay the rent in case William P. Webb, the tenant (co-defendant), made default. The appellant disputed the plaintiff's claim and the jurisdiction of the Division Court to entertain the action as against him, the amount claimed, as he contended, not being ascertained in the manner required by sec. 62 of the Division Courts Act, R.S.O. 1914, ch. 63.

F. Regan, for appellant.

The plaintiff and the defendant William P. Webb were not represented on the appeal.

Riddell, J.

RIDDELL, J.:—An appeal from the First Division Court of the United Counties of Northumberland and Durham.

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The plaintiff sued the defendant William P. Webb as tenant under a written lease dated the 19th September, 1912, for $200 for rent from the 1st March, 1915, to the 1st March, 1916—he joined in the action the defendant William Sylvester Webb, who had been made a "third party" in the lease, and had "covenanted and agreed to pay said lessor said rent in case the lessee makes default in payment of same when due and payable."

The defendant W. S. Webb filed a dispute-note claiming (amongst other things) that the Division Court had no jurisdiction. The learned County Court Judge held against that contention, and on the merits gave judgment for the plaintiff against both defendants.

The defendant William Sylvester Webb now appeals.

There were several grounds of appeal urged by counsel—but it is not necessary to deal with more than one, namely, the want of jurisdiction in the Court.

For a long time there was much difference of judicial opinion as to the "extended jurisdiction" of the Division Court—and the Legislature made several attempts to put the matter beyond controversy. The curious will find a quotation of the cases, etc., in Bicknell and Seager's Division Courts Act, 3rd ed. (1916), pp. 104 *sqq*. At length there was passed 4 Edw. VII. ch. 12, sec. 1, the original of our R.S.O. 1914, ch. 63, sec. 62 (1) (*d*), clause following (iii).

The statutory provision now is that the Division Court has jurisdiction in "an action for the recovery of a . . . . money demand where the amount claimed . . . does not exceed $200 and the amount claimed is ascertained by the signature of the defendant;" but "an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it." There can, I think, be no possible doubt of the meaning of this enactment, and the cases such as *Renaud* v. *Thibert*, 6 D.L.R. 200, 27 O.L.R. 57, and *Re Harty* v. *Grattan*, 26 D.L.R. 795, 35 O.L.R. 348, do nothing more than say that the statute means what it says.

This case goes down to trial, the plaintiff puts in the lease, and proves the signatures—as against the tenant, who expressly and unconditionally covenanted to pay, he may rest—but what

of the guarantor? He had not unconditionally promised to pay—he had promised to pay, not simply when the rent became due, but if and when that happened and the tenant made default. He must prove that the condition upon which the liability of the guarantor was based had been fulfilled—he could not do that by producing the document, but he must "give other and extrinsic evidence."

In such a case the Division Court has no jurisdiction.

Where an appeal succeeds on the ground that the Court appealed from has no jurisdiction, the proper course now is to allow the appeal with costs and dismiss the action with costs (Rule 766)—and there is no reason why this course should not be followed here.

MASTEN, J.:—I agree and have nothing to add.

Masten, J.

KELLY, J.:—On the ground of want of jurisdiction in the Division Court to entertain the claim against the appellant, I think the appeal must be allowed. Section 62 of the Division Courts Act (R.S.O. 1914, ch. 63), which confers jurisdiction upon Division Courts in an action for the recovery of a debt or money demand where the amount claimed exclusive of interest does not exceed $200 "and the amount claimed is ascertained by the signature of the defendant or of the person whom as executor or administrator he represents," qualifies that provision thus: "An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it."

Kelly, J.

There is, I think, a distinction to be drawn between cases where, in order to establish his title to the document sued upon, a plaintiff has to resort to evidence other than the production of the document and proof of the defendant's signature, and cases where, the ownership being beyond question, he is under the necessity of proving by other and extrinsic evidence the liability of a party against whom a claim is made. Of the former class is *Renaud* v. *Thibert*, 6 D.L.R. 200, 27 O.L.R. 57.

In the form of which the document here sued upon appears, it cannot be said that its production and proof of the appellant's signature to it established, even *primâ facie*, his liability. To shew that the appellant ever became liable further proof is necessary—that there was default in payment by the lessee. That is

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not supplied by production of the document and proof of the appellant's signature.

It should not be lost sight of that when the action was commenced it had not been proven that there was default by the lessee, and both defendants disputed the plaintiff's claim.

In *Kreutziger* v. *Brox* (1900), 32 O.R. 418, the late Chancellor Boyd said: "The jurisdiction of the Division Court is extended to cases where the balance claimed on such an ascertained amount does not exceed $200, but it was not intended in such cases to throw open in the lower forum disputed matters as to the proper completion of the contract—the due fulfilment of all conditions and the like."

Applied to the present case, the latter part of this quotation expresses my view; and in saying so I am not leaving out of consideration the changes as to jurisdiction made by sec. 62 of the Division Courts Act of 1910, 10 Edw. VII. ch. 32.

In my opinion, this is a case where to prove the claim against the appellant "other and extrinsic evidence" such as the Act refers to was necessary; and the appeal should be allowed.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If the learned County Court Judge was wrong, and my learned brothers of this Court are right, upon the question of the jurisdiction of the Division Court in this case, then the law respecting the extended jurisdiction of Division Courts is clumsy and unsatisfactory, as the result of this appeal amply proves.

The defendants are father and son, the plaintiff is the landlord of the son, who holds under a lease in which he and his father covenanted to pay the rent; the father being a surety for the payment of the rent only.

The year's rent is the fixed sum of $200: the amount is certain in all respects, and the time of payment is certain: the third year's rent is admittedly past due; and there has been, and indeed could have been, no real contention that any part of it has been paid. The only answer made by the father at the trial to the claim against him was that the plaintiff should have distrained upon the son's property for the rent before it became due, under the provision in the lease giving him power to do so.

As a witness in his own behalf at the trial he put his defence to the action in these words: "In January, 1915, I told Walsh on the road that I did not wish to have anything to do with the

lease, as Patrick was going to the bad. In October, 1915, Walsh came to see me about rails, and I told him . . . I wanted him to seize on him, as he was fooling away everything. Walsh went to the house and came back and said he would see about it. Walsh came back the next day and I told him the same thing. . . . He said there was no use asking for rent from Patsy. Miss Walsh came to my home, as she says, and I told her that they must look to Pat for rent." The rent in question is for the year ending the 1st March, 1916, and was payable on the 1st December, 1915; at which time, it seems, the son had left the demised land, having to that extent, apparently, gone "to the bad;" and at the trial no one seems to have known where he was, though there represented by counsel representing his father.

The learned County Court Judge held that he had jurisdiction over the case in the Division Court, and gave judgment against both defendants for the amount of the rent, less $3, the amount of a debt of the plaintiff to the defendant the father, for straw sold and delivered by this defendant to the plaintiff.

This appeal is brought against the judgment of the County Court Judge upon the merits as well as on the question of jurisdiction.

Upon the merits, nothing reasonably can be said against the judgment. Assuming that all that was testified to by the defendant the father, though denied by the plaintiff, is true, how could it relieve any one from liability, upon a covenant, to pay? What obligation was there on the plaintiff to distrain before the rent fell due, and probably subject himself to an action of trespass? Whether the distress would have been legal or illegal depended on a question of fact. It ought not to be necessary to do more than point to the effect of that which it is contended the plaintiff should have done, to make it plain, even to the appellant, that his contention must be erroneous. The very purpose of having the father liable for the payment of the rent was to make the plaintiff sure of payment of it, not to make him risk an action for damages for the father's benefit; or terminate the lease, and relieve the father altogether from further liability under it.

But it is said that, though the appellant must fail upon the merits of the case, he may succeed on the question of jurisdiction. If that be so, the results are more than unsatisfactory: the law

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regarding the extended jurisdiction of Division Courts may seem to be more open to Bumbleian vituperation than to the common praise of the law as being common sense.

Father and son both are liable under the one deed, for the one fixed sum, and sued in the one action for it; is each to have a diametrically opposed judgment pronounced as to him? The plaintiff is to have judgment against the son, and have his action dismissed as to the father for want of jurisdiction in the Division Court; and is to be obliged to bring another action in another Court against the father before he can have the same judgment against him as he can have, and has, against the son.

And let it be stated plainly what that new action must be: one to recover a debt to which there is no defence. An action to be tried by the same Judge who has already tried it, and to be tried in the same manner as it has already been tried, and with the same right of appeal to this Court as has been taken in this case; to end in affirmance of the judgment of the County Court Judge.

If this be the appellant's right, it is a cruel one, and one of which no one sensibly would avail himself with a full knowledge of the results: a mere waste of time and money going over the same ground to reach the same end.

It is not put quite in this way, but what is meant in the contention against the jurisdiction of the Division Court is this: You need not prove against the son that the rent has not been paid, it is for him to prove that it has, if he can: you need to prove against the father that the rent is not paid, because he is a surety only, and so liable only if the debtor, his son, has not paid: and, because you have to prove this as to the one and not as to the other, there is not jurisdiction as to the one, but is as to the other.

If that be the law, with the consequences I have mentioned, every one should be agreed that the sooner it is changed the better. It must always be remembered, in considering the question of jurisdiction, that, in such a case as this, there is an appeal to the same court of appeal as that to which there is an appeal from any County Court and also from the High Court Division of the Supreme Court of the Province: where no appeal lies, it may be well to keep inferior courts firmly within their jurisdiction by means of prohibition, but that is an essentially different thing: prohibition in such a case as this ought to be prohibited,

if it be intended that this Court shall consider the question of jurisdiction, if the appeal to this Court is not given in cases in which there is jurisdiction only.

But is the appellant right in this contention? The extended jurisdiction of Division Courts includes: "An action for the recovery of a debt or money demand where the amount claimed . . . does not exceed $200 and the amount claimed is ascertained by the signature of the defendant," or is the balance, not exceeding $200, of the claimed amount, so ascertained.

So far this case, as to both father and son, is well within the jurisdiction thus extended; the amount claimed is the $200 which both father and son covenanted to pay. It is the "amount" only that is to be ascertained, and the amount "claimed" only, not the amount recoverable: no question of liability is involved: under former enactments that question was, but the provisions involving it have been repealed; and now the sole question is, whether the amount as claimed is ascertained, by the defendant's signature.

All that is not disputed, but it is said that further words of the extended jurisdiction enactment curtail the effect of the words I have read, such words being: "An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it."

If these words are to be applied to the facts of each particular case, then they are quite inapplicable to the facts of this case. It was not necessary for the plaintiff to give any evidence upon the only question of fact which was tried. There was, at the trial, no denial of the signatures to the lease, nor even a suggestion that the tenant had paid the rent; indeed the whole defence of the father was based upon the son's default, which he contended should have caused the plaintiff to recover the rent by means of a distress.

It need hardly be said that a surety's liability is only a secondary one, under ordinary circumstances; and that admissions made by a debtor do not bind the surety upon the question of the amount of the surety's liability; nor does a judgment against the debtor in an action to which the surety is not a party: but of course it may be very different in an action to which both are parties, as they are in this case; and it does seem to me to border upon

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burlesque if the law does not permit the same Court to deal with these two defendants, sued for the same money, payable under the same deed; to say that the plaintiff may prove, against the son, that he owes the debt, and that the plaintiff may have judgment against him for the amount of it, yet he cannot have judgment against the father because as to him the Court has not power to say whether the son owes or does not owe the money, though in truth the father does not really deny it. The situation, baldly stated, seems to me to be rather "Gilbertian" than "common sense."

But, if we are not to deal with the facts of the case, but are to assume a case in which all possible technical objections have been taken; to deal with each case solely upon the question whether "production of a document and proof of the signature to it" would ascertain the amount claimed: why is not this case within the extended jurisdiction?

We must not confuse the "amount claimed" with any question of liability; that confusion seems to me to have been accountable for some of the confusion created by the cases upon the subject. Nor must we fail to observe the words now in force and their marked difference from those formerly in force and upon hich so many of the cases were decided. In view of these changes, expressing the will of the Legislature in different and changing manner, it seems to me that we cannot look upon any of the cases decided before the legislation took its present form as at all authoritative, or as a safe guide.

Before the legislation took its present form, instead of the "amount claimed" being the criterion, "the claim of the plaintiff or the amount which he is entitled to recover" was; and those words were said to have been enacted to give effect to the narrower view of the jurisdiction taken in some of the Courts of the Province: see *Re Thom* v. *McQuitty* (1904), 8 O.L.R. 705: but in the case of *Slater* v. *Laberee* (1905), 9 O.L.R. 545, it was still contended that all that was necessary was that the amount of the claim should be ascertained by the signature of the defendant, and the Court refrained from expressing an opinion on the question, so that, when the marked change was made by the Legislature from the words I have last quoted to those now in force, there was yet some question, not finally settled, whether the narrower view ought to prevail, and that question seems to me to have been finally

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settled by the Legislature in favour of the wider interpretation, in repealing the words "the claim of the plaintiff or the amount which he is entitled to recover," and making the criterion the "amount claimed," eliminating altogether from consideration any question of the plaintiff's right to recover.

That being so, how is it possible to say that the "amount claimed" by the plaintiff—the year's rent, $200—is not ascertained, absolutely, over the father's signature, in the lease? The question whether he is liable for that sum is an entirely different question, and one with which, under the present legislation, we have no concern on the question of jurisdiction.

And is not this the "common sense" view of the matter, quite apart from the absurdities the other view of it inevitably leads to? The legislation must be treated as remedial legislation and receive a liberal interpretation; not the proverbial conservative judicial construction. It was not, as has been said sometimes, the purpose of the Legislature to confine Division Court jurisdiction to simple cases: the purpose was to confine it in regard to amount: just as difficult questions of fact and law may arise over smaller as over larger amounts; and, there being an appeal to this Court in cases such as this, there could be no reason why simplicity should be a controlling ingredient. But the door was not to be thrown open to cases in which there might be a conflict of testimony as to the amount required to give jurisdiction: in cases where the defendant had by his own signature fixed the amount of the plaintiff's claim and in such cases only was there to be jurisdiction; but, the *amount* being so fixed, there was no limit to the contest, any more than there would be in any other Court.

This is all quite in accord with the ruling of the Court of Appeal of this Province in the case of *Ostrom* v. *Benjamin* (1894), 21 A.R. 467, in which a like attempt was made to have a narrow interpretation put upon like words respecting the jurisdiction of the County Courts. The words there in question were, "where the amount is liquidated or ascertained by the act of the parties;" and the Court held that to mean merely the amount to be recovered: in this case the statute makes it clearly the "amount claimed;" but that which is important is that it was held to mean the "amount" only, or as put by one of the Judges (p. 472): "The statute does not require anything else to be ascertained by the act of the parties than the amount . . . Everything else

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may be at large and may require proof in the usual way . . . In the present case the amount the plaintiff was to receive for his services was liquidated and ascertained by mutual agreement. It was to be $250, no more no less, and I think the County Court, therefore, had jurisdiction." In this case the amount claimed in the criterion, and that is ascertained by the signature of each defendant, it was the rent, $200, no more and no less, and it is not sought to give, in any sense, any evidence affecting that amount, other than the lease signed by each of the defendants.

And in like manner the Court of Appeal in England takes the wider view of such legislation. The case of *Workman Clark & Co. Limited* v. *Lloyd Brazileño*, [1908] 1 K.B. 968, is an instance. The words there under consideration were "debt or liquidated demand in money;" and I refer to it for two purposes: (1) as shewing that the wider view of such legislation should be taken; and (2) that we are not to go back to ancient practice or forms of pleadings for guidance in such cases as this: that is stated by one of the learned Judges in these words (pp. 980, 981): "That being so, the question is whether the claim is for a 'liquidated demand in money' within the meaning of Order iii, rule 6; and, there being, so far as I can see, now that we have no longer to deal with the ancient forms of pleading or to apply reasoning that depended on those forms, nothing which compels us to take the contrary view, the conclusion at which upon the whole I arrive is that this claim is for a liquidated demand in money within the meaning of the rule."

It may be advisable again to state how those observations affect this case. Here the question, "How can there be jurisdiction as to the son and not as to the father?" is met by a resort to old methods of pleading and procedure: it is said that you could have judgment against the son without proving that the rent is unpaid because payment is a defence which it is incumbent on him to plead and prove, but that as to the father it is incumbent on the plaintiff to prove that the son has not paid. All that in theory may be still applicable in the higher Courts, but it never was applied to the inferior Courts, in which there are no pleadings, and in which "the Judge shall hear and determine in a summary way all questions of law and fact and may make such orders and judgments as appear to him just and agreeable to equity and good conscience . . ." And indeed in the higher Courts, even

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in cases of the defendant failing to appear at the trial, I cannot but think that a presiding Judge would fail in his duty if in the plaintiff's proof of his claim he did not require proof that at the time of the trial the sum claimed, and for which he was to give judgment against the defendant, was still wholly unpaid. In such a case as this, I cannot imagine any Judge being satisfied with mere production of the document and proof of the signature as sufficient ground upon which to pronounce judgment against the son; and the less so in an action to which the father is a co-defendant. And, if that be so, the extended jurisdiction would come to naught, according to the appellant's contention, because the trial Judge would lose all his authority and power in asking the question, "Is this sum you ask me to give you judgment for all now due and payable to you?" And, besides this, the special provisions of the Division Courts Act permitting judgment by default, before and at the trial, without any proof of the plaintiff's claim, would complicate matters. Would a judgment under sec. 98 or under sec. 99, in such a case as this, be valid; and yet one given, as that in question was, after a trial at which each defendant was represented by the same counsel, invalid? The narrow view of the extended jurisdiction legislation seems to me to fail at every test, and more abundantly so when its results are looked at.

Such results, for instances, in addition to those I have mentioned, as: that no action would lie upon a deed, because sealing and delivery are essential to its taking effect, proof of signature only would be ineffectual; that no action would lie against an endorser of a promissory note or bill of exchange, even if sued jointly with the maker or acceptor, because, being a surety merely, proof of non-payment by the principal debtor would be necessary, if it be necessary in this case. In one of the cases it seems to have been considered that where a note had been protested the protest might be one of the documents by which proof is permitted under the Act, but that decision was under the former, not the present, legislation, and the present legislation seems to me to make it plain that the document or documents must be signed by the defendant. Besides this, presentment and notice of dishonour need not be by notary. So, too, if extremely narrow views are to prevail, in all cases, theoretically, proof of the identity of the defendant with the person whose signature is relied upon as

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bringing the case within the legislation would be necessary: and so the whole intended to be extended jurisdiction would be brought to naught, unless some liberality, some common sense, were applied to the interpretation of the enactment so that proof of the signature to a document would include proof of the identity of the signer and the defendant.

Upon the whole case, I can find no excuse for turning the parties to this appeal out of Court and making "scrap" of all the time, and money, anxiety and annoyance, which they have been put to in coming here to have their real dispute determined, and for turning them back, merely to come up again to the same place by substantially the same road, only labelled County Court instead of Division Court, to have the very same dispute determined both below and here by the very same Judges. If that be the law, the sooner it is changed so that the action may at any stage in either Court be formally transferred—for it is purely a matter of form—to the County Court, the better from every point of view—such legislation as that contained in sec. 22 of the County Courts Act, R.S.O. 1914, ch. 59.

I am entirely in accord with the learned County Court Judge in all things determined by him, and entirely in disagreement with the other members of this Court on the question of jurisdiction; though we are all agreed as to the merits of the case.

In accordance with the views of my learned brothers the appeal is allowed, and the action must be dismissed for want of jurisdiction; both with costs.

Appeal allowed: MEREDITH, C.J.C.P., *dissenting*.

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CHAPMAN v. McDONALD.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Longley, Harris and Chisholm, JJ. March 10, 1917.

CHATTEL MORTGAGE (§ IV—45)—HIRE AGREEMENT—REGISTRATION—PRIORITIES.

An unregistered chattel lease which provides that the lessee may acquire a similar chattel from the lessor for the total amount of the rental is not as against creditors null and void under the Bills of Sale Act (R.S.N.S. 1900 ch. 142 as amended by 1908 ch. 24), whether the chattel delivered at the outset is the identical subject-matter of the hiring or otherwise.

[*Chapman* v. *McDonald*, 32 D.L.R. 557, reversed; *Guest* v. *Diack*, 29 N.S.R. 504, 32 D.L.R. 561, followed; see Annotation in 32 D.L.R. 566.]

Statement.

APPEAL from the judgment of Ritchie, E.J., 32 D.L.R. 557, in favour of plaintiff, with costs, in an action claiming damages

for the wrongful seizure and removal of a piano and stool and the conversion of the same to defendant's own use. Reversed.

F. L. Milner, K.C., for appellant.

A. G. Mackenzie, K.C., for respondent.

SIR WALLACE GRAHAM, C.J.:—This is a contest over a piano between the mortgagee of the piano acquired by one Miner from the defendant company under an instrument in writing in the same terms as that which was contested in the case of *Guest* v. *Diack*, 29 N.S.R. 504, 32 D.L.R. 561, and the defendant.

As the decision of this Court in that case was appealed to the Supreme Court of Canada and sustained (unreported), one can with more or less safety refer to it in other cases.

But since that decision the legislature has amended the legislation, that is, the Bills of Sales Act, R.S.N.S. 1900, ch. 142, by the Act of 1908, ch. 24, and the effect of the amendment will be seen by noticing the words added to the principal Act now inserted in brackets for convenience.

This is the provision as amended using those words of it most applicable to the case in hand:—

1. Every hiring, lease . . of chattels accompanied by an immediate delivery and followed by an actual and continued change of possession whereby it is agreed that the property in the personal chattels shall remain in the . . lessor . . until payment in full of . . the rental or price agreed upon by future payments or otherwise (and whether the personal chattels so delivered be the identical subject matter of the hiring, lease, bailment, or bargain for sale or otherwise, shall be evidenced by instrument or instruments in writing, etc.)

2. (Within 10 days after the delivery of such piano a true copy of such instrument) shall be filled in the registry of deeds for the registration district, etc.

6. If a copy . . be not filed as required by sub-sec. 2 the agreement that such property . . shall remain in such person letting to hire, lessor . . shall as against the creditor, purchasers and mortgagees of the person to whom such personal chattels are hired, of the lessee, of the bailee or the bargainee, be null and void.

[The agreement under which the defendant parted with the piano is fully set out in 32 D.L.R. 558.]

It is contended now that the effect of the amendment is to displace the application of the case of *Guest* v. *Diack*, 29 N.S.R. 504, 32 D.L.R. 561. And the Judge who heard it says this in his judgment (32 D.L.R. 560):—

The contention on the part of the plaintiff was that *Guest* v. *Diack* had no application in consequence of the amendment to the Act made by ch. 24 of the Acts of 1908. I am of opinion that the contention on this point is sound and must prevail.

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It is unfortunate that the reason was not given because when the same counsel argued the appeal before us the only reason he gave in effect was that the legislature had legislated apparently with the object of displacing the application of *Guest* v. *Diack*, therefore it must have done so. What the legislation says is the best evidence of its meaning. In my opinion if that was its object it has not in this instance been successful, no doubt because of the obvious mistake of a draftsman.

Of course, the words that are used have to be interpreted notwithstanding any mistake and one must regard the words which were sought to be amended as they were before the amending legislation. It is now strange phraseology. It deals with an instrument in writing which is described as: "A hiring or lease of a chattel accompanied by immediate delivery . . whether the chattel so delivered is the subject matter of the hiring or lease or otherwise."

It is contradictory and by reference to the opinion of Henry, J., in *Guest* v. *Diack*, *supra*, one can see, I think, how the draftsman of the amendment made the mistake principally in not catching the point of that Judge. I will quote at length, because it shews what the peculiarity of this instrument is and the ground for holding that it is not covered by the statute in question. Henry, J., at 29 N.S.R. 510, 32 D.L.R. 563, said:—

> What has to be specially noted is that the enactment applies exclusively to cases where the subject matter of the agreement, whether for hiring or sale, is the thing—the identical thing—which, upon the carrying out of the agreement, is to become the property of the person into whose possession it is delivered under the agreement, or, putting the matter conversely, the Act applies only to cases where the thing which is in the future to become the property of the hirer or bargainee, is the identical thing, the delivery of which, to the hirer, or bargainee, accompanies the making of the agreement. This position calls for no argument. It is only necessary to read the enactment.

Now, let us see what, in this connection, were the rights of the hirer, under the agreement now in question. Upon the payment of the whole of the amount stipulated for, whether paid by the $10 monthly instalments or otherwise within the 30 months he would become entitled, not to the piano in his possession, no more than to any other piano, or any other chattel of the defendant Miller, but only to demand a piano equal in value to the hired piano. According to this agreement, the property in the piano, was not, to use the words of the Act, to "remain

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in the hirer (bailor) lessor or bargainor until the payment in full of such price or value," and then pass. It was not to be affected in any way whatever by the payment or by anything to be done under the agreement. It was not to go out of the bailor or bargainor at all.

For the reasons given in *Guest* v. *Diack*, the statute as it was as well as with the added words still does not fitly describe the instrument in question or require it to be filed, and, therefore, the main provision of the instrument is not cut down as against this mortgage.

The words "whether the personal chattel so delivered be the identical subject matter of the hiring, lease, &c." mean nothing. The chattel delivered is also the subject matter of the hiring, lease, &c., but it is not to become the property eventually of the lessee; another of equal value is. Then there is the expression "or otherwise." That does not, in my opinion, help the description. That sentence with the expression "or otherwise" in it can only mean, "whether the personal chattel so delivered is or is not the identical subject matter of the hiring."

That does not deal with the difficulty raised in *Guest* v. *Diack*, 29 N.S.R. 506, 32 D.L.R. 561. I suppose the draftsman meant to say something like this: "Whether the chattel delivered being the subject matter of the hiring is the identical thing which is ultimately to become the property of the person into whose possession it is delivered or another equal in value to it."

I am of opinion, for the reason given in *Guest* v. *Diack*, and which the amendment for the reasons here given has not displaced, that the mortgagee did not as against the plaintiff acquire this article.

Moreover, I wish to add that I see no reason why there should be applications to the legislature to destroy the utility of instruments providing for the acquisition on the instalment principle of musical instruments, sewing machines and a very few other useful articles in favour of the person supplying them when that practice is known all over the country and an occasional money lender when he takes security on such an article, or gives credit on the strength of it, must know that it is likely to have been acquired by that practice of paying by instalments. The banks are not subject to this Bills of Sale Act and a certain

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amount of every man's household property is free from its operation and from seizures under execution.

I see no good reason for trying to make those who furnish the musical instruments or sewing machines subject to its provisions.

The appeal must be allowed and the action dismissed with costs.

Longley, J.

LONGLEY, J.:—The vendors of pianos, sewing machines, &c., were in the habit of selling their instruments and taking a bill of sale on them conditioned upon the buyer paying for them or their taking them back in case he failed. The Legislature of Nova Scotia thought it desirable that such instruments be registered, and so enacted.

Then the sellers of pianos, sewing machines, &c., thought it was desirable to lease pianos, &c., to certain persons, making a condition of the agreement that after the period of time which was declared, they would deliver to the lessee an instrument equal in value to the above named instrument, &c. This was an attempt to make an agreement for the payment of an instrument equal to that which they had leased, and retain the property of the instrument entirely in the hands of the seller. Such an agreement came before the Court of Nova Scotia in the case of *Guest* v. *Diack*, 29 N.S.R. 504, 32 D.L.R. 561. The whole question was thoroughly gone into in that action and the document, &c., was not registered and the Supreme Court of Nova Scotia gave a judgment in favour of such instrument not being recorded, holding that it was purely an agreement of lease and conveyed no property in the lessee. This case was carried to the Supreme Court of Canada (unreported) and, by unanimous judgment, the judgment of the case in Nova Scotia was upheld.

Now a similar case (*Chapman* v. *McDonald*, 32 D.L.R. 557), has come before the Court. The defendant company leased a piano to a certain man named Miner in July, 1911. On October 26, 1915, the plaintiff became a *bonâ fide* mortgagee of the property to secure him payment of the sum of $125. Subsequently the defendant took possession of said property under the provisions of said agreement and has kept possession of the piano ever since. The question came before Ritchie, J., at the last term of the Supreme Court at Amherst and he has given a judgment

based upon a certain amendment of ch. 142 R.S.N.S. 1900 (ch. 24, 1908). This is all discoverable by sub-sec. (*b*) of sec. 8 of said chapter:—

> In case of a bargain for sale that a lien thereon for the price thereof or any portion thereof shall remain in the person letting to hire, the lessor, the bailor or the bargainor, until payment in full of the hire rental or price agreed upon by future payments or otherwise, and whether the personal chattels so delivered be the identical subject matter of the hiring, lease, bailment, or bargain for sale or otherwise, shall be evidenced by instrument or instruments in writing shewing the terms of such agreement and be signed by the person to whom such personal chattels are hired, the lessee, bailee, bargainee, or his agent thereunto duly authorized in writing, and shall have written or printed therein the post office address of the person letting to hire, lessor, bailor, or bargainor.

Upon these words "and whether the personal chattels so delivered be the identical subject matter of the hiring, lease, bailment, or bargain for sale or otherwise" it is claimed that the validity of the contract upon which the case of *Guest* v. *Diack* was determined has been changed.

It is with great difficulty that I am able to discover that such words are intended to have such an application. It is suspected that they were inserted in the session of 1908 as a means of getting rid of the effect of *Guest* v. *Diack*. No evidence was submitted to the Court that such was the intention, but if they had not that intention I cannot conceive why an amendment to the Act should have been sought, and I find it very difficult to understand that the words "and whether the personal chattels so delivered be the identical subject matter of the hiring, lease, bailment, or bargain for sale or otherwise" can, with respect to the meaning of the words, be interpreted as overruling the decision of *Guest* v. *Diack*. The trial Judge evidently thought they had that effect and gave judgment for the plaintiff. I, on the other hand, am unable to get any such meaning or meaning that would be equivalent to repealing the decision of *Guest* v. *Diack*.

The other point made for the defendants is that because the defendants are a joint stock company and because the expression "personal chattels" is declared not to include "shares or interests in the stock, funds or securities of any government or municipal body, or in the capital or property of any incorporated or joint stock company" this does not apply to this piano. This I

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regard as entirely a mistake and the plaintiff is not entitled to judgment upon this ground.

The appeal is allowed and judgment is to be entered for the defendants.

HARRIS, J.:—I find myself unable to read the amending Act of 1908 so as to take this case out of the decision in *Guest* v. *Diack*, 29 N.S.R. 504, 32 D.L.R. 561 (annotated).

If this amendment was an attempt to get rid of the difficulty which stood in the way of applying the Act to the facts in *Guest* v. *Diack* I think the attempt has failed.

It is practically impossible to give the amendment in question any intelligible meaning, but it is sufficient to say that no reading of which it is capable has been, nor so far as I can see, can be, suggested which assists the plaintiff's contention.

I agree that the appeal must be allowed with costs.

Chisholm, J.

CHISHOLM, J.:—I agree. *Appeal allowed.*

[ED. NOTE.—This decision is in accord with the views expressed in the Annotation published in 32 D.L.R. 566.]

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MAKOWECKI v. YACHIMYC.

Alberta Supreme Court, Scott, Stuart, Beck and Walsh, JJ. January 13, 1917.

WATERS (§ II G—125)—SURFACE WATER—NATURAL DRAINAGE—RIGHTS OF UPPER AND LOWER PROPRIETORS.

Surface water flowing intermittently through a depression in land, pursuing a course of natural drainage, does not confer riparian rights on the owners of land through which it flows, and any owner may retain the water or divert it, and owners of lower levels have no right of action for such retention or diversion, but no owner may change the course of the water so as to throw it upon land over which it was not wont to flow, without consent of the owner of such land, or so as to increase the flow upon a lower owner.

Statement.

APPEAL by defendant from the judgment of Crawford, D.C.J., awarding the plaintiff damages and an injunction restraining the defendant from obstructing the flow of a stream. Affirmed.

G. H. Van Allen, for appellant.

H. H. Hyndman, for respondent.

Beck, J.

BECK, J.:—The statement of claim alleges that the plaintiff is the owner of a certain quarter section of land, through which there naturally flows a stream of water, which he is entitled to have flow through his land without obstruction or hindrance; that about June 16, 1916, the defendant wrongfully obstructed the flow of the stream by erecting a wall or dam in the body of the stream at a point where it leaves the plaintiff's and enters

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the defendant's quarter section, and thereby penned and forced back the water of the stream, so that it was hindered and prevented from flowing by and away from the plaintiff's land as by right it ought to have done, and thereby overflowed and flooded the plaintiff's land and occasioned him great loss and damage, and that the defendant still continues the obstruction. He claims damages and an injunction.

One of the allegations of the defence is that about 2 years previously the plaintiff constructed a ditch, running from a large body of water on his land and extending to the boundary line between the two properties, whereby the body of water was caused to flow through the ditch on to the defendant's land; that the defendant requested the plaintiff to desist, which he neglected to do, wherefore the defendant caused the artificial ditch to be partially obstructed by erecting a dam on the defendant's land.

The judgment was for $100 damages and costs, and an injunction restraining the defendant from making a dam or wall for the purpose or having the effect of holding back the water and flooding the plaintiff's land, and a mandatory injunction that the defendant remove the present obstruction on or before April 15, 1916, unless in the meantime he has placed a culvert in it to permit the water flowing away.

The trial Judge has given no reasons for judgment, and so we have not the benefit of his findings of fact. As I gather them from the evidence, the material facts are as follows:—

The plaintiff's land is the south-west quarter, and the defendant's the south-east quarter of sec. 32—56—21 west of the 4th M.

There is a natural depression on the plaintiff's land extending from near the north-west corner to the south-east corner.

This depression continues to the Saskatchewan River, about one and a half miles away. It also continues in a north-easterly direction about 4 miles at least. The water accumulating in it is, so far as is known, altogether surface water, there being no springs, so far as is known. Surface water collects in and runs down this depression for this distance of about 5½ miles, discharging itself into the river.

The plaintiff's first witness, Malcolm Stewart, says that following the depression on the plaintiff's quarter section—it ran from

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about a quarter of the distance from the north on his west boundary to about the south-east corner—there are no well-defined banks, except where it runs through a beaver dam or something like that; it is only a natural depression in the land; in other places there is a place where the water has had to wash out to get through. It is entirely dry every fall; if the water is let go through, it gets dry itself as soon as the summer rains get off—sooner or later, according to the rainfall. Last year, if the water had been let go, it should easily have been dry by August 10—that is an estimate—it should have been dry by that time because there is a good fall down to the river.

A creek in the neighbourhood, known as Deep Creek, is dry all the dry years; that is a big creek, and it is not running at all in the dry seasons. In some parts it has well-defined banks; in others there are no banks at all; it floods the land. It has not been absolutely dry in the fall of the past 2 years. It does not run, but there would be parts of it holding water—pools of stagnant water. There is no defined creek in some places of Deep Creek, except it is wet, where the water cuts through. In some places it is grass.

Q. This depression or water course or whatever you call it, is somewhere about 200 feet wide in some places? A. There is low ground 200 ft. wide. The water would not naturally spread that much unless there was a great rainfall or unless it was held back. It would have to be a very heavy one right there, because there is nothing to hold the water right there.

The dam, so-called, made by the defendant is about 200 ft. long and from 2-2½ ft. high at the lowest level of the land. It is made of earth. It lies wholly on the defendant's land, close to the fence on the boundary line between the plaintiff's and the defendant's land.

It was begun in 1914 and finished in 1915.

In Farnham on the Law of Waters (1904), vol. III., p. 2554, ch. xxix., sub-sec. 877, it is said:—

It has been seen in a former chapter (XIX.) that the owners of land bordering on *flowing streams* and on *permanent ponds and lakes* have certain rights, because of their location, which constitute a species of property, and which cannot be interfered with by other individuals or the public. These rights do not attach to water known as *surface water*.

The distinction here made between (1) permanent ponds and lakes, (2) flowing streams, and (3) surface water, is, in my opinion, absolutely correct.

I am satisfied on the evidence that, while Deep Creek should

be considered a flowing stream, notwithstanding there is not a continuous flow nor throughout all its course well-defined banks, the water which from time to time flows on the depression leading from a place about 4 miles away from the plaintiff's land, running through it and the defendant's land and then to the river, where the bulk of the water is discharged, must be considered a surface water having a natural drainage throughout the course of the depression; that, being surface water pursuing a course of natural drainage, it does not give to the owners of the land through which it flows the ordinary riparian rights enjoyed by the owners of land bordering on a flowing stream; that any individual owner has the right, if he wishes to do so, to retain it on his own and, to use it for his own purposes or divert it, if he can do so without interference with his neighbour's land; *i.e.*, the owner on a lower level, to whose land the water would naturally flow, has no remedy if the water is prevented from reaching his land; that he cannot change the course of the water from its original natural course to another course over a dissenting neighbour's land, or increase its flow to the detriment of owners whose lands are situate lower down the course of drainage, nor, as already indicated, can he dam it so as to prevent or obstruct its flow as in the ordinary course of natural drainage, though, if he keeps within these limits, he may on his own land restrict the spreading of the water by deepening its course or putting in artificial drains.

Farnham, in ch. XXIX. of his work already mentioned, has examined and discussed the law relating to surface water with great care and clearness, having regard to English, Irish, Canadian and American decisions and the rules of the civil and common law. He points out the distinction between the question of drainage, on the one hand, and the questions of ponds and living streams on the other (sub-sec. 877).

He states that "under the civil law and the English common law, so far as we have any trace of it, the rule is that the natural drainways must be kept open to carry the water into the streams, and that the lower estate is subject to a natural servitude for that purpose. (*Ib.*)

There is no right on the part of a lower proprietor to have surface water flow to his land from upper property. The owner of the soil on which it falls has an absolute right to it, and may

do with it what he pleases (sub-sec. 883). For this latter proposition the English cases of *Broadbent* v. *Ramsbotham*, 11 Ex. 602, 25 L.J. Ex. 115, 4 W.R. 290; and *Ennor* v. *Barwell*, 2 Giff. 410, 6 Jur. N.S. 1233, are cited. See also *Rawstron* v. *Taylor*, 11 Ex. 369, 25 L.J. Ex. 33.

The course of the flow of the surface water cannot be changed so as to throw it upon the neighbour's land in an unusual place, whether it be done by means of ditches or by levees and embankments. So the owner of higher land is liable if, in the course of changes on his property, he injures lower property by turning thereon surface water which would not naturally have flowed there (sub-sec. 886): *Young* v. *Tucker*, 26 A.R. (Ont.) 162.

If one landowner, by embankments or artificial erections of any kind on his own land, causes surface water to flow on to his neighbour's land in a manner in which it would not but for such erection, to the injury of the latter, the one making the erection is liable for the injury: (*Ib.*) *Hurdman* v. *N.E.R. Co.*, 3 C.P.D. 168, 47 L.J.C.P. 368, 38 L.T. 339, 26 W.R. 489.

Then, after considering the civil law, the common law and the English decisions, the author proceeds:—

> These precedents shew that the *right to drain along natural courses* was regarded as one of the doctrines of the common law. And in *Beer* v. *Stroud*, 19 O.R. 10, the Court said lower lands are, at common law, under a natural servitude to receive the surface water of higher lands flowing along accustomed and defined channels. . . In *Briscoe* v. *Drought*, 11 Ir. C.L.R. 250, 264, the Judge says that, while the flow of water along a regular course may be temporary and occasional, the course which it uniformly takes is not temporary and occasional and therefore there was a right to have the permanent condition maintained. The common and civil law therefore appear to be the same so far as the right to have the water follow its natural course is concerned. (Sub-sec. 889 *c*.)

The rule of drainage (as distinguished from the rule as to flowing streams) applies if the water has taken a definite course, although the flow is not strong enough to cut the sod or form a trench in the soil; it is enough that a natural depression forms a channel for the stream. (Sub-sec. 889*d*).

The result of the whole discussion is summarized in sub-s. 891.

In my opinion, Farnham, in sub-sec. 889*b*, establishes the proposition that what he has laid down is in accordance with the common law rule, or, in other words, that the common law rule and the civil law rule in respect to natural drainage agree. I quote at length from this section:—

In England the early extension of the common drains to all portions of the kingdom under the supervision of the commissioners of sewers, has rendered the discussion of the rights on the flow of surface water needless, and therefore there are no modern decisions upon the question. The only authorities which have been found tending to throw any light upon the question are passages in which the natural right of drainage has been assumed rather than decided, but the assumption is so clear and uniform as to leave no doubt that the doctrine is regarded as indisputable. In *Harcourt* v *Spicer* (12 Hen. VIII. 2, pl. 2) in which trespass *quare clausum* was brought for digging a ditch, and the defendant pleaded that the tenants of D. had common in certain property, and that it was every year covered with water, and that the defendant made the trench for which the action was brought to avoid the water; the record does not shew that a judgment was given in the case, and the main discussion turns upon the question whether the commoner has a right to make such an improvement of the property as was attempted in that case.

But during the argument Brundel said:—

If I have an acre adjoining your acre, and my acre is flooded I may make a course to avoid the water, and if I flood your acre yet I shall not be punished, for it is legal for me to make this ditch in my own land. And water is an element which naturally descends, and so you may make a course and so on until it comes to a river or drain.

This proposition was not disputed or questioned, and shews that the understanding of the common law at that period was that there was a right to have water follow the natural direction of the drainage, and that the law had been extended beyond the rule as established by the civil law so as to permit a hastening of the flow of the water. So in 8 Edw. IV., p. 5, pl. 14, Danby, J., said:—

If water flows through the land of M. and N. stops the water in its course so that my land is submerged, I may well abate the obstruction and he shall have no action for the entry on his close because the stopping of the water was his own doing. The word used in laying down that rule is the same as that used to describe water flowing from a roof, and means water generally, and there is nothing to shew that the Court was referring to a water course, to a ditch or to anything more than a mere flow of surface water along its natural course. Again in *Ward* v. *Metcalfe*, Clayton 96, action was brought for flooding plaintiff's land by not removing obstructions from the course of the water. The declaration alleged that a certain *rivus* ran there, and upon the evidence it appeared that it was only a land flood which was dry a good part of the year, but it was held to be properly described by the word *rivus* and the declaration was sustained.

Farnham then refers to the case of *Ewart* v. *Cochrane*, 4 Macq. H.L. 117, 7 Jur. N.S. 925, 5 L.T.N.S. 1, 10 W.R. 3. That was a case for interfering with a drain. Lord Campbell, L.C., said:—

I by no means proceed upon one ground which has been taken in reference to this new mode of acquiring servitude *rebus ipsis et factis*, irrespective of

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prescription, or grant, or natural *right*. . . Therefore it is not upon the ground of *res ipsi et facti* that I proceed in this case nor do I proceed upon the other ground taken, viz., that of *natural right* because it seems to me that in *this* case it is not made out that by the law of nature there is a right to this drain into the cess-pool. There seems to have been a natural descent there, the ground inclines so that the water would naturally fall to the north-east corner of this property, but there is no law of nature which would render it absolutely necessary that *this hole* should be the place into which it should flow, because it could only be *by percolation unseen* by the proprietor of the other tenement that the water would flow into that hole; and I am not prepared to say that the fact of there having been that unseen and unknown percolation would be sufficient to prevent the owner of what is called the servient tenement from cutting off and preventing the continuation of the percolation when it came to his knowledge. But the ground I proceed upon is this, that this is a servitude which the grant implies.

Lord Chelmsford:—

I agree with (the Lord Chancellor) in thinking that the right of the pursuers cannot be placed either upon the natural right or upon the *res ipsi et facti;* but that it must arise from an implied grant.

Lord Kingsdown was of the same opinion.

The case was a Scotch case, but there is no suggestion that there is a difference between the law of England and Scotland on any of the points raised—rather the contrary.

Farnham, on this case, observes that:—

While the Court did not act upon the right of natural drainage in that case, that right is recognized as an existing one and as thoroughly established and there is no justification for the language of the Lord Chancellor in the case unless the right of natural drainage was a thoroughly established and fundamental one. These precedents shew that the right to drainage along natural courses was regarded as one of the doctrines of the common law.

The question is also discussed at very considerable length in the note, *Quinn* v. *Chicago, etc., R. Co.*, 22 L.R.A.N.S. 789. This note is, no doubt, by Mr. Farnham, who is one of the editors of this series of reports. He here says:—

The cases dealing with the obstruction of surface water running in a natural drain way or depression present a question on which there has been much legal discussion, and an almost corresponding conflict of opinion. This conflict of opinion, however, is mainly due to the adoption within some jurisdictions of the civil law rule, and within others, due to a failure to understand the civil law rule (3 Farnham, Waters, pp. 2603-2605) the adoption of what they have been pleased to term the common law rule. Mr. Farnham in 3 Farnham on Waters, sec. 889 and following sections, has pointed out that the civil law rule, without any modifications, is merely that, when the water has its course regulated from one ground to another, that is when it has taken a definite course in a definite channel, it cannot be stopped up. This, says the same author, after a review of the English cases, was also the old common law rule.

The first instances of the recognition of the right to obstruct surface

water in a natural drain way *seem* to have been the results of repetitions of *dicta* to that effect of the Massachusetts Court, thus originating what Mr. Farnham calls the Massachusetts doctrine; and this is the doctrine which according to that author, some Courts now erroneously term the common law rule. The Massachusetts doctrine was subsequently enlarged by the New Jersey Court into what is known as the "common-enemy" doctrine . . It only remains to note that, although as above pointed out, historically there was no difference between the civil law rule and the common law rule, yet there can be no doubt that, at the present day, there are two well defined rules followed in the cases concerning the right to obstruct surface water in a natural drain way; one is termed the civil law rule and the other, erroneously it may be, the common law rule. By the doctrine of the former, as above stated, the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient estate, to discharge all surface water naturally accumulating in a natural depression upon or over the land of the servient owner as in a state of nature; and that such natural flow or passage of the water cannot be interrupted by the placing of a dam or other obstruction in the depression, to the injury of the estate of the dominant proprietor. By the doctrine of the latter, at least as applied in some cases, there exists no such natural easement or servitude in favour of the owner of the higher ground as to mere surface water, even though in a natural depression; and the owner of the servient estate may lawfully prevent such water coming on to his land without liability for injuries ensuing from such obstruction to the upper proprietor. . .

In a number of the States, the Courts, although professing an adherence to the so-called common law doctrine, evidently saw the necessity in certain cases of evading the disastrous effects to which a following of that rule would have led them, and, through one pretext or another, have held that a lower owner cannot obstruct surface water when it runs in a swale or other natural depression and thereby throw it back upon the upper proprietor. In fact, in 3 Farnham on Waters, p. 2605, the author says that practically all the Courts except the Supreme Court of the United States and the Courts of Indiana, New York, Missouri, Wisconsin and the lower Courts of New Jersey, agree that, when surface water is running down a natural depression, it cannot be obstructed by the lower proprietor. It will be noted that whatever the pretext may be of those Courts which, while stating that the common law prevails in that jurisdiction, yet do not permit the obstruction of a natural drainage channel, they, in effect, at least, follow the Civil law rule.

Beer v. *Stroud* (1888), 19 O.R. 10, was a decision of a Divisional Court consisting of Boyd, C., who gave reasons at length, and Robertson, J., who expressed concurrence in the reasons and conclusions of the Chancellor. The judgment of Ferguson, J., was affirmed.

The Chancellor said (p. 18):—

By the civil law, it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving without claim to compensation the water *naturally flowing* down to it (per Creswell, J., in *Smith* v. *Kenrick*, 7 C.B. 515 at p. 566). Such is, I think, also the common law when the rain, or surface water has *from the trend of the land formed*

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itself into a *defined channel* and so discharges itself through the servient tenement. The occupant below has no right in such a case to interfere with the *natural* outlet from the land above by the erection of obstruction or the filling in of the channel.

The question as to the rights in surface water *after getting into defined channels* has been but little considered in England. In *Williams* v. *Richards* (1893), 23 O.R. 651, Armour, C.J., giving the judgment of a Divisional Court, composed of himself and Street, J., says that he does not see anything in *Beer* v. *Stroud* which conflicts with early decisions or with that then given. It was there found as a fact that what was in question was "simply the case of surface water upon the plaintiff's land *caused only* by what falls from the clouds and not flowing in any defined channel, for that cannot be called a defined channel which has no visible banks or margins within which the water can be defined."

He misstates, I think, the civil law when he says "nor can the upper withhold" surface water.

I take the decision in *Arthur* v. *G.T.R. Co.* (1893), 25 O.R. 37, 22 A.R. (Ont.) 39, to approve of *Beer* v. *Stroud*.

In *Ostrom* v. *Sills* (1897), 24 A.R. (Ont.) 526, affirmed 28 Can. S.C.R. 485, it is true that Moss, J.A., following American decisions, antithesizes the so-called common law rule and the civil law rule, and says (p. 539):—

> The doctrine of the civil law has not been adopted by the Courts of this province. As regards mere surface water precipitated from the clouds in the form of rain or snow, it has been determined that no right of drainage exists *jure naturæ* and that as long as surface water is not found flowing in a defined channel with visible edges or banks approaching one another and confining the water therein, the lower proprietor owes no servitude to the upper to receive the natural drainage.

And among cases cited is *Beer* v. *Stroud*. The Supreme Court of Canada said nothing more, in effect, than that, on the *facts* as stated by Moss, J.A., the decision was right.

There is little in the way of treatises at hand to enable one to ascertain what the civil law is. Farnham quotes (sub-sec. 889*a*) Domat as follows:—

> If waters have their courses regulated from one ground to another, whether it be *the nature of the place*, or by some regulation or by a title or by an ancient possession, the proprietors of the said grounds cannot innovate anything as to the ancient *course* of the water. Thus, he who has the upper grounds *cannot change the course of the waters*, either by turning it some other way or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do anything that may hinder his grounds from receiving the

water which they ought to receive, and that in the manner which has been regulated (Domat, Civil Law, Cushings' ed., p. 616, 33, 1583); and Farnham adds:—It will be seen that by the rule as thus stated, in order to prevent interference by the *lower* owner, the waters must have "had their course regulated," which seems to imply that there has been something more than a general diffusion of water over the surface of the ground, merely finding its way without definite course from higher to lower property.

By the civil law, the right of drainage of surface waters, as between owners of adjacent lands of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. Note to *O'Donnell* v. *East Tennessee, etc., R. Co.*, 13 L.R.A. 394, citing Corp. Jur. Civ. 39, title 3, ss. 2-5; Domat (Cushings ed.) 616; Code Napoleon, art. 640; Code Louisiana, art. 656. The flow, however, may be hastened. Note to *Mantenfel* v. *Wetzel*, 19 L.R.A.N.S. 167.

The rule of the civil law continues apparently without change in the Province of Quebec. C.C. sec. 501, and cases noted in Beauchamp's Code Civil, (annote) pp. 395 *et seq.*, and see *Frechette* v. *La Compagnie Manufacturiere de St. Hyacinthe*, 9 App. Cas. 170.

If the common law rule was the same as the civil law rule, there seems little difficulty in ascertaining what that law is. If there was no ascertainable common law rule or if that rule, being different from the civil law rule, is not applicable to the conditions of this part of Canada, then the law is what reason and justice require, and this Court would be in like danger of going wrong if it adopted the civil law rule, for, as has been said in many forms by many distinguished jurists and as was said by Tindal, C.J., in *Acton* v. *Blundell*, 12 M. & W. 324, 67 R.R. 361.

The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from any books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the ground work of the municipal law of most of the countries of Europe.

I have correctly stated the civil law rule, it has been much misunderstood in many of the cases; but is correctly stated and applied in *Beer* v. *Stroud*; and if, as is there stated, the common

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law in this respect is the same, as Mr. Farnham contends, the result is this.

There is a clear distinction between a "water-course" in the sense of flowing stream with a definite channel, with a distinct bed and distinct banks or edges formed by the water cutting the soil; in respect of which both upper and lower properties have certain riparian rights each against the other; and a water-course in the sense of surface water coming from rains and melting snow, it may be throughout a long distance and in large bodies, and not being merely diffused generally over the surface, but flowing in a definite channel provided by natural gullies or ravines or depressions, but in which, when the water is not flowing, there is no distinct bed nor at any time any cutting of the soil, so as thus to mark the banks or edges of the channel, though doubtless in such cases a careful examination of the soil would shew the height to which the water rose on the last occasion and probably the line of its usual height; in respect of which there would be no riparian rights but on the part of any proprietor through whose land the channel passed to appropriate, if he wished, the whole of the water coming to him and on the other to require the next lower proprietor to receive it in its usual channel; the one is a case of a flowing stream; the other is a case of drainage.

In the course of the judgment in *Lambert* v. *Alcorn*, 144 Ill. 313, 21 L.R.A. 611, it is said:—

> One radical fallacy in this contention arose out of the restricted definition sought to be placed upon the term "water course" *as applied to drainage of surface water* from one tract of land on to another. If the conformation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a water course, within the meaning of the rule applicable to that subject (drainage). Doubtless such water courses can exist only where there is a ravine, swale, or depression of greater or less depth and extending from one tract on to the other, and so situated as to gather up the surface water falling upon the dominant tract, and to conduct it along a definite course to a definite point of discharge upon the servient tract. But it does not seem to be important that the force of the water flowing from one tract to the other has not been sufficient to wear out a channel or canal having definite and well marked sides or banks. That depends upon the nature of the soil and the force and rapidity of the flow. If the surface water in fact uniformly or habitually flows off over a given course, having reasonable limits as to the width the line of its flow, is, within the meaning of the law, applicable to the discharge of surface water, a water course.

The whole question is discussed at much length in the notes to *Gray* v. *McWilliams*, 21 L.R.A. 593. That case and the annotations, indeed, appear to refuse to accept the proposition that there is, in truth, any common law rule differing from that of the civil law. This is the conclusion at which I myself have arrived, and I am, furthermore, of the opinion that, if ever there existed a common law rule differing from that of the civil law, it never became part of the law of this province and should not now be adopted, inasmuch as it is wholly inapplicable to a country bounded upon one entire side by mountains and having within its limits large tracts of land broken by hills, valleys, ravines, swales and sloughs, through which streams of very considerable size and force of current formed from melting snows upon the higher lands and heavy rainfalls run at certain seasons of the year in quite definite channels without breaking the soil, and yet are of such magnitude as to be incapable of being dealt with as mere surface water according to the so-called common law rule. To attempt to apply any other rule than that which I have put down as my understanding of the civil law rule, which is, in my belief, also the true common law rule, would often create an intolerable situation in this province, while the rule as I have stated it would meet our requirements fully, and in the course of time, by reason of more close settlement of the country and the construction of drains by Government and municipal authorities, the necessity for appealing to any rule would in the course of time disappear.

Some observations on the same lines are to be found in Kinney's Law of Irrigation, sec. 569.

Some very general information as to the common law with reference to drainage may be found by reference to the following works: Bacon's Abridgement, vol. II., tit. "Of the Court of Commissioners of Sewers," pp. 539 *et seq.*, p. 864; Blackstone's Com., Bk. III., p. 73; MacMorran & Willis on Sewers and Drains, p. 39; Bouvier's Law Lexicon, tit. "Commissioners of Sewers."

There was some evidence directed to shew that the plaintiff, by cutting a ditch on his own land, increased the flow on to the defendant's land, but I think this is not established.

For the reasons I have given I think the plaintiff was entitled to succeed.

I would dismiss the appeal with costs.

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SCOTT and WALSH, JJ., concurred with BECK, J.

STUART, J. (dissenting):—The law involved in this appeal should be settled by legislation and not by the Court. But the parties are before us and it is necessary to decide what the law is. In the circumstances, I think the Court will practically legislate for the province on an extremely important point relating to water-courses and drainings.

The parties are owners of adjoining quarter sections of land.

The plaintiff, whose land lies on a higher level than that of the defendant, claims damages for the obstruction of the flow of water and for backing water up on his land. The trial Judge found that there was a water-course and gave the plaintiff $100 damages and an injunction. The defendant has appealed.

If the case depended merely upon the existence or non-existence of a water-course, I think there would be little difficulty, because I am, with respect, unable to discover any evidence which would justify a finding that there exists at the place in question, a "water-course" in the general accepted meaning of that term. I do not think there is a well-defined channel cutting through the surface of the soil with visible edges or banks.

But it appears that there is a gradual slope of the land of the plaintiff towards that of the defendant, that there is a wide depression in the surface originating some miles above even the plaintiff's land and passing through both premises and onward across the lands of still lower owners, along which, in times of heavy rains and floods, the water finds its way to an ultimate outlet in a river. The land is, in fact, practically what is generally called marshy or slough land. The defendant made a road by means of an embankment about 2 feet from the boundary line and being about 200 feet long and in some places 2 or 2½ feet high. I think it is clear from the evidence that this was done entirely for the purpose of a road, which the defendant found necessary to make in order to reach a highway.

The question is whether the rule of the civil law is also the rule of the common law. It seems clear that the civil law rule is that, in these circumstances, the lower owner must not interrupt the natural drainage. A number of the American States have adopted the civil law rule. Others have adopted what is said to be the rule of the common law to the effect that the lower

owner may properly interrupt the natural drainage in such circumstances without liability to the upper owner. But the origin of this so-called common law rule cannot be traced to any English decisions. It began apparently in Massachusetts with the decisions in the cases of *Park* v. *Newburyport*, 10 Gray 28; *Luther* v. *Winnisimet Co.*, 9 Cush. 171; and *Ashley* v. *Walcott*, 11 Cush. 192. But in no one of those cases is there a reference to any English authority.

On the other hand, Farnham, in his work on Waters and Water Rights, at pp. 2587 *et seq.*, takes the position that the common law rule was the same as that of the civil law, and refers to a few very old English cases which he claims support that view. His reasoning is, however, unsatisfactory to me, and I cannot find even in the citations he makes any definite authority for his contention. Two of them are mere casual expressions by early Judges during argument. One might very well refer to a definite water-course and in another the word "rivus" was actually used. This old case is *Ward* v. *Metcalf*, reported in Clayton, which are Nisi Prius reports, and from the statement in Farnham I would merely gather that the point involved was whether the fact that the "rivus" was dry except in flood times made any difference.

The House of Lords case from Scotland, *Ewart* v. *Cochrane*, 4 Macq. H.L. 117, 7 Jur. N.S. 925, was decided upon the ground of an implied grant; there are only vague expressions as to the more general law, and, in any event, the case came from Scotland, where the civil law in many respects prevailed.

Again, *Beer* v. *Stroud*, 19 O.R. 10, which Farnham quotes has the headnote:—

> A water-course entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character.

Boyd, C., did, indeed, after referring to the civil law rule, say: "Such is, I think, also the common law," but he added, "when the rain or surface water has from the trend of the land formed itself into a *defined channel*." I do not think his view supports Farnham's contention. Referring to the facts Boyd, C., said (p. 17):—

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Some of the evidence shews that the course of the water has worn a way for itself with *well-defined* banks as it neared the defendant's boundary. The defendant's son spoke of it as a "gully" and I cannot doubt that the flow of the rain and surface water for the twenty-five or thirty years spoken of has left distinctive and continuous traces of its course, which form a visible landmark from the plaintiff's into the defendant's property.

From this it seems clear that the Court there was dealing with a "water-course" properly so-called.

In *Ostrom* v. *Sills*, 24 A.R. (Ont.) 526, 28 Can. S.C.R. 485, the Ontario Court of Appeal, as it appears to me, did lay down what is held to be the common law rule on the points. Moss, J.A., said:—

As regards mere surface water precipitated from the clouds in the form of rain or snow it has been determined that no right of drainage exists *jure naturæ* and that as long as the surface water is not found flowing in a defined channel with visible edges or banks approaching one another and confining the water therein the lower proprietor owes no servitude to the upper to receive the drainage.

Of course, in that case the plaintiff was not an upper proprietor, but an adjoining one, upon whose lands water had been diverted by reason of the construction of a wall by the defendant in front of his property, opposite a drain or culvert across a street, which drain and culvert had been made by a municipal authority not in a natural water-course, but at a point merely of natural drainage. It would appear to me to be strange if an adjoining landowner, upon whose lands the water had been actually diverted, not having come from his land at all, could not maintain an action, and yet the upper proprietor, from whose land the water actually came, were entitled to recover. Upon principle, therefore, I think *Ostrom* v. *Sills*, *supra*, which was affirmed by the Supreme Court of Canada, is applicable, although the case is not exactly parallel, as, no doubt, clearly appears from a sentence at the close of the judgment of Moss, J., as follows:—

And I do not think that the plaintiff is entitled to assert as against the defendants the rights which the municipality or the upper proprietors *may* have possessed.

In *McBryan* v. *C.P.R. Co.*, 29 Can. S.C.R. 359, the general subject was discussed. In that case the water turned back was not natural drainage, but irrigation water turned into a natural drainage depression, but, in the judgment of Sedgewick, J., there are to be found very strong expressions of opinion upon the general question which point, in my view, towards a recognition of the so-called common law rule. See pp. 370, 371, *et seq.*

The highest Courts of Ontario, consisting of able and experienced Judges, have, as shewn by the cases cited in *Ostrom* v. *Sills*, *supra*, declared that the rule of the common law is not the same as that of the civil law, but have followed the Massachusetts view. These opinions, I think, are entitled to more weight than the vague references in the early cases cited by Farnham. I think Farnham had a preference for the civil law rule, and made an attempt, not at all successful, to shew that it had been adopted in England.

But there are authorities in other Canadian provinces. In *Harrison* v. *Harrison*, 16 N.S.R. 338 (1883), Sir John Thomson, delivering judgment for a Court of four Judges, used the following language (pp. 342-3):—

> As to the surface or subterranean water, percolating, oozing or flowing irregularly, and not in defined channels, from an upper territory, and escaping through or spreading over a lower territory the flowing of the water, for any length of time, does not create the presumption of a grant . . In this class of cases the water passes off, not by any act, or in the exercise of any claim of right, of one of the parties, which could be interrupted by *suit*, but simply by the process of nature. In consequence of this principle it has been held that the proprietor of the lower territory may, notwithstanding the long continued, natural flow in undefined channels, and sometimes in defined natural channels, raise his lands or alter its levels, in such a manner as to turn the water aside, and the principle is the same in regard to the flow of surface water from a highway. The natural right of the upper proprietor to have the surface or percolating water pass to the lower territory (by which he obviously means that he cannot be made by suit to stop it), and the right of the lower proprietor to turn such water aside or turn it back, are well established by the civil and common law as a natural incident to the respective properties. . .

Sir John Thomson may have misapprehended the civil law rule, but it seems clear that he accepted the so-called common law rule as it has been adopted in Massachusetts. I think it is impossible to suggest that he was thinking only of a general slope in one direction, and not of three slopes converging so as to form a wide depression. This distinction appears to me to be one which it would be impracticable to observe owing to the infinite variations in the conformation of the surface of the earth. Water always runs down hill and its action in this way is always natural drainage.

In *Wilton* v. *Murray*, 12 Man. L.R. 35, Bain, J., in a case practically identical in its facts with the present one, accepted the so-called common law rule, following the Ontario authorities.

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He also observed the true purport of the decision in *Beer* v. *Stroud*.

In *Graham* v. *Lister*, 14 B.C.R. 211, Irving, Morrison and Clement, JJ., dismissed an appeal from Martin, J., and accepted the so-called common law rule as laid down by Moss, J.A., in *Ostrom* v. *Sills*, *supra*.

In *Broadbent* v. *Ramsbotham*, 11 Ex. 602, cited by Smith, L.J., in *Bunting* v. *Hicks*, 40 L.T.N.S. 455, it was held that the lower proprietor had no right to the flow of the water from above in such a case as the present, and this would seem to be well established. It would seem to me to be unjust and illogical to say that he has no right to it if he wants it, but that he must take it when he does not want it.

In my opinion, this Court should accept the common law rule as settled, and also, I think as being more just and more encouraging to the improvement of the soil by human industry.

In any case I think the most that could be said is that the so-called common law rule cannot be found in English precedents, not that the civil law rule is the law of England. In this view, if we have to legislate by declaring the law upon right reason as an English Court in the early days would have done, I should at least be disposed to adopt the rule of New Hampshire and Arkansas, which is that, as long as the use made of his land by the lower proprietor is a reasonable one, he is not liable. See A. & E. Ency. of Law, vol. 30, p. 334.

In the present case I think the defendant made only a reasonable and fair use of his own property, and at least upon this ground is not liable in damages.

I would allow the appeal and dismiss the action. But, in view of the fact that we are now practically for the first time laying down the law for this province and in effect legislating, I think there should be no costs of the appeal or of the trial to either party.

The matter is clearly one which demands the attention of the legislature.

Since writing the foregoing, a further observation has occurred to me, which perhaps ought to be added. If we are practically legislating, we are really perhaps legislating for England rather than for Alberta. By a statute the common and statute law of

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England, as it stood on July 15, 1870, in so far as it is applicable and unaltered by statute, is in force here. Now Canadian Courts have frequently decided against the applicability of English statutes to Canadian conditions, but the rejection of those statutes has been based, not on an opinion as to their wisdom and good policy, but rather upon an opinion as to the "workability," if I may coin a word. But, although it is possible that a particular common law rule may be rejected for a similar reason, I do not think this has ever been done merely on the ground of the policy or wisdom of the rule. In *Uniacke* v. *Dickson*, James 287, Halliburton, C.J., said that it was only when the common law rule was "obviously inconsistent with their new situations" that the colonial Courts would reject it. This is by no means the same thing as a rejection based merely on a preference for another rule as being *on the whole* a better one for the colony in question. If it was the common law of England at the date mentioned that the upper proprietor in such a case as this could have no right of action, then I think it is the law of Alberta also. The common law is, in theory, always supposed to exist, and it is in force in the same way and to the same extent, except as modified by statute, or, perhaps, as in a particular colony, "obviously inconsistent" with its conditions, in all jurisdictions where it is in force at all. Therefore, peculiar local conditions in Alberta, though they may suggest the wisdom of another and better rule, cannot make the rule different unless perhaps it is "obviously inconsistent" with our conditions. If we are legislating, I repeat, it is for England we are doing it, little as that country would thank us for our services, perhaps. *Appeal dismissed.*

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Saskatchewan Supreme Court, Haultain, C.J., and Lamont, Elwood and McKay, JJ. March 10, 1917.

BRIDGES (§ II—11)—LIABILITY FOR NON-REPAIR—"HIGHWAY"—"PUBLIC ROAD."

The words "public road" and "highway" as used in sec. 218 of the Rural Municipalities Act (R.S.S. 1909, ch. 87) do not include bridges or approaches thereto, and a municipality is not liable for their non-repair under sec. 220 in the absence of evidence that the control of the bridge was transferred to the municipality.

Statement.

APPEAL by plaintiff from the judgment of Newlands, J., 33 D.L.R. 177, dismissing an action for damages against a municipality. Affirmed.

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ROBERTSON v. RUR. MUN. OF SHERWOOD.

McKay, J.

P. M. Anderson, for appellant;

H. M. Thomson, for respondent.

The judgment of the Court was delivered by

McKAY, J.:—The appellant on August 19, 1916, while driving in his motor car along a highway within the limits of the respondent municipality, drove his motor car into a hole in the approach to a bridge along said highway, thereby injuring his car to a considerable extent, and thereupon brought this action against the respondent to recover damages.

The hole was caused by the piles, supporting the bridge at the end, rotting and giving way, and in consequence the cribbing, which kept the earth forming the approach to the bridge, in its place, gave way, and the earth forming the approach gave way and made the hole. The hole was clearly caused by the defective bridge, and the evidence shews that it could not be repaired without first repairing the bridge.

The bridge in question was built by the Government of the North-West Territories some years ago, and was taken over as a public work by the government of the province.

The trial Judge found that there was no evidence that the bridge or the control thereof was transferred to the respondent and held it did not come within sec. 220 of the Rural Municipality Act, and therefore respondent was not liable, and dismissed the action. From this judgment the appellant appeals.

The sections of the Rural Municipality Act, ch. 87, of the R.S.S. (1909), bearing upon this appeal are 198 (3), 218, 219, 220.

For the appellant it is contended that in sec. 218 the word "highways" includes "bridges and approaches" as they form part of a highway, and that this section transferred to the council of the municipality the control of all bridges and approaches which at the passing of the section were under the control of some one other than the council of the municipality, and, as the bridge in question was built before the passing of this section, the control of the same was by virtue of said section transferred to the council of the respondent when this section was passed, and, therefore, comes within sec. 220, which imposes upon the council of the respondent municipality the obligation to keep in repair bridges and the approaches thereto.

It is also contended that, because the respondent made repairs to the bridge and approaches in years previous to the one in which

the hole in question was formed, it thereby assumed control of the same and is liable to repair as contemplated by sec. 220. I do not think either of these contentions can prevail.

While I admit that the word "highway" generally includes "bridges and approaches" along the highway, I do not think it is so used in sec. 218, as this section, in my opinion, must be read with sec. 220, which makes a distinction between the highway generally and certain portions of that highway, namely, "bridges, culverts . . . and approaches thereto," or, as the trial Judge so well puts it:—

> On a proper construction of these two sections, I take it that a bridge and the approach thereto is to be considered as distinct from the highway itself, and although sec. 218 puts the highway under the control of the municipality, sec. 220 reserves out of such control the bridges and the approaches thereto where the bridge has been built by the government, unless the government has transferred it to the control of the municipality.

It is also to be noted that sec. 198 (3), although using the word "road," also expressly mentions bridges and culverts, shewing that it is not intended that the use of the words "road" and "highway" in these sections should include bridges and approaches thereto. I am, therefore, of the opinion that the words "public road" and "highway" as used in sec. 218 do not include bridges and approaches thereto, but that these are specifically dealt with by sec. 220, and that the control of bridges and approaches thereto which have been constructed or provided by the province before the passing of sec. 218 is not transferred to the council of the municipality by sec. 218, but the control of the same continues to remain in the province until actually transferred by the province to the council of the municipality in some way other than by sec. 218. And I do not think the fact that the respondent has done some repairs to the bridge and approaches can affect a transfer as contemplated by sec. 220.

Counsel for appellant also contended that, even if the control of the bridge had not been transferred to the council of the municipality, there is no evidence that the approaches thereto were constructed or provided by the province, and as there is positive evidence that the municipality, for several years previous to the one in which the accident occurred, repaired the approaches, it must be assumed that it constructed or provided the same.

Even admitting this, I do not think it helps the appellant, as, in my opinion, the municipality is only to be liable, under sec. 220,

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for non-repair to approaches in cases where the bridge has been constructed or provided by the municipality or by any person with the permission of the council, or where the bridge has been constructed or provided by the province and transferred to the control of the council. In other words, the word "which" where it occurs in said section refers in each case to bridges, culverts and ferries, and not to "approaches." As there is no evidence that the control of the bridge in question was ever transferred to the council of the respondent municipality, this bridge and the approaches do not come within sec. 220, so as to make the respondent liable under that section.

As the appellant's action is one of nonfeasance, want of repair only, the respondent can only be liable by statute, and as I have come to the conclusion that it is not liable under above sec. 220, which is the only section that could make the respondent liable for nonfeasance, the respondent is not liable in this case, and the appeal should be dismissed with costs (*Geldert* v. *Pictou*, [1893] A.C. 524). *Appeal dismissed.*

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UNION BANK OF CANADA v. MURDOCK.

Manitoba King's Bench, Curran, J. February 24, 1917.

FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES—CONSIDERATION.

A *bonâ fide* conveyance by husband to wife for a past indebtedness, not equal to the full value of the property conveyed is not void, as against creditors, under the statute of 13 Eliz., ch. 5; the continuance in possession by the husband, in a case where he assisted the wife in conducting a hotel business on the property, is not a circumstance of fraud. But a conveyance to a child for past services, presumably voluntary when rendered and partly paid for, is void under the statute.

Statement.

ACTION by judgment creditors to set aside conveyances as void under the statute of 13 Eliz., ch. 5.

W. C. Hamilton, for plaintiff.

H. F. Maulson, K.C. for defendants.

Curran, J.

CURRAN, J.:—The plaintiffs are judgment creditors of the defendant Robert Murdock, but their respective judgments were obtained subsequent to the conveyances to the other defendants by him which are herein attacked. The recovery of such judgments, the issue and registration of same and the issue of *fi. fa.* goods to the sheriff of the northern judicial district, and the non-payment of such judgments, are all admitted by the defendants. The fact is that the plaintiff's debts, in respect of which these judg-

ments were recovered, were due and owing by the defendant R. Murdock at the time of the making of the conveyances and transfers to the defendants Maggie Murdock and Harold Murdock complained of as fraudulent and void as against the creditors of Robert Murdock.

The plaintiffs are attacking these conveyances under the statute of 13 Eliz. ch. 5, and not under the assignments Act, and so I must determine the issues here in the light of this statute only.

I am satisfied with and accept the evidence of the defendant Maggie Murdock corroborated as it is to some extent, as to the indebtedness due her by her husband for money lent to the amount of $995.05, and a further sum of $50, and I am inclined to believe that in addition to these sums her husband owed her some $400 more. The evidence as to this is, however, too indefinite to give effect to.

I find then that in December, 1914, the defendant R. Murdock was indebted to the defendant Maggie Murdock in the sum of $1,045.05, which money had been owing her for some time past, and though she made repeated requests to her husband for payment, she was unable to obtain anything from him.

The evidence discloses that the business of the hotel had been declining for some time past and that the defendant R. Murdock was careless and negligent in its conduct and management. The immediate future of the business, or at least the liquor end of it, was at this time menaced by the probable adoption of local option in the municipality of Russell, which would, if carried, deprive the hotel of a license and its most profitable source of revenue. As a matter of fact, the by-law was voted upon on December 15, 1914, and carried just 6 days after the execution of the alleged fraudulent conveyances, so that by the end of the following May, 1915, the license held by the defendant R. Murdock expired and could not be renewed. This meant a serious shrinkage in the value of the hotel property, which, from being under the license system a fairly profitable investment, became without a license almost an impossibility to keep open and run as an hotel with any prospect of realizing profits.

In view of this condition, which actually came to pass, I do not think the consideration which the defendant Maggie Murdock paid to her husband for the transfer of this property so grossly

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inadequate as to suggest either a contemplated fraud on creditors or an unreal sale. According to the evidence of J. L. McDougall, a practical hotel man, and former builder and contractor, who knows the premises, the building would cost in the neighbourhood of $12,000 to put up, the land was worth about $400, and the furnishings would have cost about $2,500 and $3,000 to put in—say $15,000 in all. It is mortgaged for some $4,000, leaving about $11,000 invested. Allowance should be made for depreciation and wear and tear, and the loss of the license and consequent loss of profitable trade.

The hotel building is a large one, 50 ft. square, 3 storeys high, with a lean-to for a kitchen, etc., of 2 storeys. It needs no very expert knowledge for one to reach the conclusion that under existing conditions affecting the hotel business in Manitoba, such a building, situate as it is in a small country village, on a branch line of railway, is altogether too large and unsuitable, and is too expensive to operate profitably for the requirements of the travelling public and such local trade as it is likely to secure. The witness McDougall said that, without a license, this hotel property would not be worth anything to him, and while this may not be literally true, it nevertheless indicates that the property in question, through the loss of its license, had greatly deteriorated in value.

Now, let me consider the law as enacted in 13 Eliz. ch. 5, and interpreted and applied by the Courts.

To avoid the statute, a conveyance must be both for good (*i.e.* valuable) consideration, and *bonâ fide*. The question whether a deed or transaction is voluntary or is made for good consideration is only of importance as against creditors where it is *bonâ fide*, for it is not *bonâ fide*, that is, if it is made with the actual and express intention of defeating creditors, that is sufficient to make it void under the statute, even if it be on full and valuable consideration.

There must be a real consideration paid, or a fair interchange of interests, for though mere inadequacy of price is not in general a circumstance which will of itself make an assignment void, yet, if the inadequacy is very great, at least if it is so palpable that it must be taken to have been a fraudulent contrivance between the parties, the transaction will be void as against creditors, especi-

ally if what little consideration was given consisted of an existing debt. And where gross inadequacy of price is coupled with the continuance of the vendor's possession, it will generally be fatal to the sale. May's Fraudulent Conveyances, 3rd ed., pp. 191, 192, 193.

The question of intent to delay, hinder or defraud creditors is always one of fact which the Court has to decide on the merits of each particular case, after taking all the circumstances surrounding the making of the alienation into account. Unlike the bankruptcy laws, the statute does not prohibit the debtor preferring one creditor to another: *Alton* v. *Harrison* (1869) L.R. 4 Ch. 622; *Middleton* v. *Pollock*, 2 Ch. D. 104, and *Maskelyne* v. *Smith*, [1903] 1 K.B. 671, and therefore a conveyance executed in favour of one or some only of the creditors of the grantor may be *bonâ fide* and valid notwithstanding that the grantor knows at the time that execution is about to be issued against him, or that he is insolvent, or even though the conveyance comprises the whole of the debtor's property: 15 Hals., pp. 83, 84, par. 172; and where the alienation is for valuable consideration the burthen of proof of actual fraud or fraudulent intent, and that the grantee was privy to the intent, rests upon the plaintiff: 15 Hals. par. 173. In transactions between relatives having the effect of defeating the claims of creditors, if the circumstances are suspicious, the onus is shifted to the purchaser of establishing judicially the *bonâ fides* of the transaction: *Merchants Bank of Can.* v. *Clarke*, 18 Gr. 594; *Langley* v. *Beardsley*, 18 O.L.R. 67; *Kilgour* v. *Zaslavsky*, 19 D.L.R. 420, but once the defendants have established that the agreement was *bonâ fide* made, and that the consideration was actually paid, the onus is shifted back to the plaintiff to prove an express intent to defraud to which the wife (grantee) was a party: *Kilgour* v. *Zaslavsky*, 19 D.L.R. 420, 25 Man. L.R. 14; 15 Hals. p. 84. Yet where it is shewn that the purchaser had means of her own, that she actually raised the money to make the purchase and that the money was actually paid over to the vendor, the reality of the transaction is established, and, although knowledge of the intent of the vendor to prefer certain of his creditors to others should be imputed to the purchaser, that knowledge does not of itself suffice to invalidate the sale and transfer of the business: *Langley* v. *Beardsley*, 18 O.L.R. 67.

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In *Middleton* v. *Pollock*, 2 Ch. D. 104 at 108, Jessel, M.R., said:—

> Now, it is clear that, in order to make the securities void on that ground (*i.e.*, under 13 Eliz. ch. 5), it must be shewn that they were not given for good consideration, and *bonâ fide*. . .
>
> The first argument was that Mr. Pollock intended to give a preference to his selected body of clients, that is, to give them a valid security against his property, but to give that valid security as a preferential payment or security. As between these preferred clients and the rest of his clients, whatever may be the morality of the case, as far as I know, there is no law which prevents a man in insolvent circumstances from preferring one of his creditors to another, except the bankruptcy law. . . It has been decided, if decision were wanted, that a payment is *bonâ fide* within the meaning of the statute of Elizabeth, although the man who made the payment was insolvent at the time to his own knowledge, and even although the creditors who accepted the money knew it . . I think that . . the payment was *bonâ fide* if it was intended to be a payment, and the security was *bonâ fide* if it was intended to be a security. *The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor.*

In *Re Moroney*, 21 L.R. Ir. ch. 27 at 54, it was laid down by Porter, M.R., that the test of *bonâ fides* under the statute was the reality of the transaction, not its honesty. It is submitted that to satisfy this requirement the transaction must be real with reference to its objects or purpose as well as in the acts which constitute it.

In *Alton* v. *Harrison*, L.R. 4 Ch. 622, the judgment reads, p. 625:—

> There can be no doubt that Harrison executed this deed at a time when he knew that a writ of sequestration would be issued against him. But at the same time there can be no question that the law was laid down by the Vice-Chancellor, in his judgment, quite accurately, and in accordance with a long course of authorities, when His Honour said: "In this, as in all other cases of the same kind, the question is as to the *bonâ fides* of the transaction. If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect.
>
> There is no question that under this deed the five creditors are to have the property, and are secured by means of it. Only two arguments have been raised upon the deed: 1, on account of the proviso that Harrison should retain possession of the property for 6 months unless any sequestration or execution was issued against him: and 2, upon the fact that the deed comprised the whole of the debtor's property. With respect to the first point, I think the proviso was consistent with the tenor and object of the deed. It was, in effect, a mortgage, not to become absolute for 6 months unless process should be previously issued against the mortgagor. With respect to the second point, it must be remembered that we are not now dealing with a case in bankruptcy . . I have no hesitation in saying that it makes no

difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide* —that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth.

Such an alienation will, however, be voided if it is a mere cloak to secure a benefit to the grantor: see *Maskelyne* v. *Smith*, [1902] 2 K.B. 158, affirmed in appeal, [1903] 1 K.B. 671.

Sterling, L.J., at p. 677, as to the first question whether the deed was fraudulent under the statute of Elizabeth, said:—

I entirely accept the law as laid down in *Alton* v. *Harrison*, by Giffard, L.J., as follows: "If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." That being the law, the question for us is whether this deed was executed *bonâ fide* for the benefit of creditors, or was a mere cloak for the purpose of reserving a benefit to the grantor.

I have already dealt in part with the question of the consideration paid by the defendant Maggie Murdock to her co-defendant R. Murdock. I have held that there has been established, by evidence which I accept as credible, the fact of an indebtedness from husband to wife prior to the conveyances challenged by the plaintiffs, on account of money which was unquestionably the property of the wife, lent by her to her husband, amounting to at least $1,045, for which she had no security whatever beyond her husband's promises of repayment oft repeated but never fulfilled.

I find the fact to be that the wife did not know anything of her husband's debts or liabilities beyond the mortgage upon the hotel porperty, some $4,000, and a trade debt for liquors with the wholesaler Strang; that she was honestly anxious about her claim and was worried by the lack of energy and business ability displayed by her husband in the conduct of the hotel business; that she was further anxious about her claims because of pressing obligations she herself owed upon mortgages upon her separate property, from the rentals of which I find she derived the money to loan her husband. And for these reasons she had pressed, and continued to press, her husband for payment or security up to the time the conveyance was actually given her. I find that the husband at first refused to satisfy her and was all along averse and unwilling to convey her the property but finally consented. In what she did I find that she was acting honestly and in furtherance of her undoubted right to protect herself.

I accept her statement, corroborated as it is by her solicitor

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Reed, that the transfer of the hotel property and contents was an absolute transfer and effected without any collusion on the part of her husband and without any secret or other reservations to the husband of any rights or benefits whatsoever in the property so conveyed to her. In short, that the transaction on her part was a real one and *bonâ fide* and not a mere cloak for the retaining by her husband of a benefit or interest in the property conveyed.

I think, under all the circumstances of the case, that the consideration was not so grossly inadequate as to suggest fraud. It might not have been the full price or value of the property, but, in my opinion, it was adequate to support this transaction.

I was pressed on the part of the plaintiffs with the argument that because the transaction included all the debtor's property, and moreover because the debtor continued in possession after the conveyances, that these facts constituted undoubted badges of fraud.

As to the first of these contentions, if the transaction had been a purely voluntary one I would give effect to it on the authorities; but in cases where a consideration is paid which is not so grossly inadequate as to suggest a fraudulent contrivance to defeat creditors, I do not think the presumption arising from the circumstances is in every case to be held a badge of fraud. In *Freeman* v. *Pope*, 39 L.J. Ch. 148, affirmed 39 L.J. Ch. 689, L.R. 5 Ch. 538, it was held that "in order to set aside a *voluntary settlement* as fraudulent against creditors, it is not necessary to prove an actual intention to delay creditors present to the mind of the settlor at the time. If the necessary consequence of the settlement is to hinder or delay creditors, the intention will be presumed." And so, where a debtor voluntarily alienates all his property, leaving nothing for his creditors, the presumption of his intention to defraud them by such an act would be, I think, irresistible; but where the transaction is *bonâ fide* and upon sufficient consideration, the law is otherwise, as appears from the authorities I have previously referred to.

The doctrine in *Freeman* v. *Pope*, *supra*, seems to have been somewhat questioned in its universal application by Lord Esher, M.R., in *Ex parte Mercer*, 17 Q.B.D. 290 at 298, 299. I need not, however, enter upon a discussion of this point here, as it does not arise.

With respect to the second point, namely, the continuance in possession by the defendant R. Murdock, I can only say that I do not regard this fact as of any serious moment, or as prejudicial to the wife's contention. The wife continued the business on her own account, and she was undoubtedly the actual proprietor. It was impossible to prevent the husband continuing in the hotel unless he had decided to separate from his wife. I am satisfied upon the evidence that he took no active part in the conduct and management of the business, but merely did small chores about the premises. It is true the license was not transferred, and that seemingly the balance of the license period was used by the wife without the necessary sanction of law. For the purposes of the present investigation, I do not think that this either is a matter of serious import. It became evident 6 days after the transaction that local option had carried, in which event a renewal of the license would be impossible, and Mrs. Murdock may well have thought, ignorantly perhaps, that there would be no harm in continuing the bar business under the existing license, without a transfer, notwithstanding the change of ownership.

The cases of *Cornish* v. *Clark*, L.R. 14 Eq. 184; *Strong* v. *Strong*, 18 Beav. 408, were cited by the plaintiffs, but upon considering them carefully, I do not think they are inconsistent with, or opposed to, the conclusions I have reached as to the transaction with the defendant Maggie Murdock, which I think can and ought to be upheld upon my findings of fact, and in the view of the law as I understand it to be from the numerous authorities I have cited.

I therefore dismiss the plaintiffs' statement of claim as to the defendant Maggie Murdock, and hold that the conveyances to her of the hotel property and contents must stand. She will be entitled to her costs of defence.

I will now deal with the conveyance of the farm to the defendant Harold Murdock. The evidence in support of his claim against his father, the defendant Robert Murdock, for wages earned in his employ during the 5 years immediately preceding the conveyance to him of the farm in question, is not satisfactory to my mind, and I cannot hold that this defendant has established any *bonâ fide* debt against his father which could be urged as a sufficient consideration to support this deed.

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This defendant claimed that his father owed him a considerable sum of money for wages, the amount of which he did not state in his evidence, and that, at his solicitation, and after frequent demands for payment and refusals or neglects on the part of his father, the father ultimately conveyed the farm in question to him as payment for such wages. I am unable to reach any conclusion upon the evidence, assuming that there was an understanding or agreement between the father and son that the latter should receive wages whilst living at home and assisting in the work of the hotel as to what sum, if any, was really due at the date of the conveyance.

The son says in his evidence at the trial that he had been working for about 5 years, but at no set wages, under a promise of his father that he should receive the going wages for the work that he was doing, which would be $35 or $40 a month, and board; that he worked off and on for 2 years whilst going to school, and steadily for the last 3 years, principally tending bar in the hotel.

It appears that he was only 20 years old at the time of the trial, which would make his age at the time he obtained the deed of the farm in December, 1914, about 18 years, so that when he began to work he would be only about 13 years old, and not more than 15 when he began to work for his father, as he says, steadily. He admits having received some $200 from his father at odd times, and a second-hand automobile, worth about $350 or $400. He got his board and clothes, and money from his mother from time to time.

His father's account of the giving of the deed puts a little different complexion upon the transaction from that claimed by the son. On p. 7, q. 7, of the defendant Robert Murdock's examination for discovery, he was asked:—

Q. How did you come to give him that deed? A. Well, he had been working around the house at home, and he was a good lad and I thought it was coming to him. He asked for it, and I thought it would be a good thing for him; we could work the farm along with the hotel.

Again,—

Q. If you had this idea of giving him a half section why did you finally convey to him simply a quarter? A. I found I was not going to be able to get that other quarter, and he wanted this one, and I said, all right, you can have it . . . Q. You wanted to make sure he would get the quarter anyway? A. Yes. Q. Your own circumstances were such you were getting uncertain what you could do for him? A. Yes.

Now, the farm was valued by the son at $16 per acre. It comprised 160 acres, and had upon it a shack and log stable and 70 acres under cultivation. It was encumbered to the extent of $800, thus leaving the defendant Robert Murdock's equity worth about $1,760, which, added to the moneys previously received, $200, and the value of the motor car, $350, would make a total payment to the son to the value of $2,310, for his 5 years' work, in addition to his board and clothes.

Really no allowance ought to be made in the way of wages for the first 2 years, as this defendant was then only a lad going to school. Such work as he then did for his father would surely be voluntary. In the last 3 years of steady work for a lad of 15 or 16 years of age, I think the remuneration that he had received was fairly adequate for the services rendered. The father seemed to view the transaction somewhat as a gift, and not as payment for services rendered, and I am constrained to hold that the conveyance of the farm to the son was voluntary and without good consideration within the proviso of the statute, and that its effect was to withdraw from the father's ownership and possession property which his creditors had a right to resort to for payment of their just claims, and I must hold that this transaction, unlike that with the mother, was not a real sale, but a voluntary parting with property by the defendant Robert Murdock, which hindered and delayed his creditors in the recovery of their just debts against him. The transaction cannot, in my judgment, stand, but must be set aside as prayed for by the plaintiffs.

There will, therefore, be judgment for the plaintiffs as prayed in their statement of claim setting aside the conveyance of the farm to the defendant Harold B. Murdock, and for a sale under the direction of the Court of this property to satisfy the plaintiffs' judgments. The plaintiffs will, of course, be entitled to their costs of suit as if there had been but one defendant, namely the defendant H. B. Murdock. *Judgment accordingly.*

COWIE v. McDONALD.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. March 10, 1917.

VENDOR AND PURCHASER (§IB—5)—PAYMENTS—RELIEF AGAINST FORFEITURE —TERMS.

A purchaser who does not offer to perform his part of the contract is not entitled to be relieved against a forfeiture of the payments; the Court in granting the relief may do so on terms that the purchaser pay

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Statement.

for the use and occupation of the land, together with the expenses and costs incurred in connection therewith.

APPEAL by plaintiffs from a judgment of Haultain, C.J., in an action to recover from the defendant the amount paid by plaintiffs under an agreement of sale which was never completed. Affirmed.

T. P. Morton, for appellants; *W. H. McEwen*, for respondent.

Newlands, J.

NEWLANDS, J.:—The evidence shews that, on account of a default in the payment of an instalment of purchase-money, the defendant, by virtue of a provision in said agreement of sale, cancelled the same and forfeited the moneys paid. Subsequent to this cancellation the plaintiffs paid a note for an instalment of purchase-money to the Union Bank, who held the same for collection on behalf of the defendant. The defendant on receiving a draft for this amount from the Bank returned it, with instructions to return it to plaintiffs, who refused to accept the same, and this amount remains on deposit in the Union Bank to the credit of defendant in trust and forms part of the plaintiff's claim.

After cancellation the defendant entered into possession, rented the land in 1913 and 1914 and summer fallowed it in 1915. On November 22, 1915, the plaintiffs made a tender of $3,060.40, which they claimed was the balance due, but defendant refused to accept the same, it not being, in his opinion, the correct amount.

Plaintiffs then brought this action. In it they make no offer to complete their agreement. Defendant in his defence states that he is able and willing to complete the agreement on his part.

The trial Judge, on these facts, relieved the plaintiffs against the forfeiture of the payments made, on payment of defendant's costs, and he set off against the amounts paid by plaintiffs $560 for rent of the land while plaintiffs were in possession, the taxes on the land paid by defendant during that time, and $75 for a shack which plaintiffs removed from said premises when they left the same.

The plaintiffs appeal against those parts of the trial Judge's judgment which allowed defendant rent for the land during the time it was occupied by the plaintiffs, and against payment of the costs of the trial; they also ask for interest on the amount allowed them.

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Newlands, J.

The plaintiffs' action is for relief against a penalty. The terms upon which the Court will relieve in such a case are set out in the judgment of this Court *en banc* in *Hole* v. *Wilson*, 5 S.L.R. 28. At p. 34 Lamont, J., said:—

But from the fact that the Court has jurisdiction to relieve, it by no means follows that the Court should relieve. Before a party appealing to the equitable jurisdiction of the Court is entitled to relief, he must make out a proper case for the exercise of that equitable jurisdiction to which he appeals. Has the defendant here made out such a case? I am very clearly of opinion that he has not. It is a principle of equity that he who seeks equity must do equity. Has the defendant done equity? He signed a contract by which he agreed to pay $2,000 on December 4, 1907, and he agreed that, if he did not pay it on that date, the plaintiff could declare the contract null and void, and he was to have no claim for the return of the purchase money paid. He did not make the payment; he was repeatedly requested to pay, and either refused or neglected so to do. In order to do equity to the plaintiff, he must offer her all the advantages she would have received from the performance of the contract—that is, the purchase-money and interest due thereunder—and when he comes to this Court claiming equity for himself, he must satisfy the Court that he was prepared and is still prepared to hand over to the plaintiff the purchase-money and interest due her under the contract and all other advantages which the performance of the contract would give her. This is a condition precedent to the granting of equitable relief to a purchaser against forfeiture resulting from his own agreement and default. If the defendant cannot shew this, he is not in a position to say that he has done equity, and that, so far as possible, he has remedied the default that occasioned the forfeiture. I agree with the language used by Prendergast, J., in the Court below, where he said: "In order to have a standing before this Court, the defendant must at least be in a position to say, 'I am ready to perform my part of the agreement; I ask the Court to compel the plaintiff to perform hers; and if she does not, I claim a return of the $2,000.'"

The plaintiffs not having offered in their statement of claim to carry out their part of the contract, have not complied with these conditions and are not entitled to be relieved of the forfeiture of the money paid, and they are, therefore, in no position to complain against the judgment of the Chief Justice, which gives them relief on certain terms, *i.e.*, payment of rent for the time they occupied the land and the costs of the action. Even if they were entitled to relief, these terms are by no means improper.

In *Dobson* v. *Doumani*, 2 S.L.R. 190, where Wetmore, C.J., relieved the defendant against a similar forfeiture, it was upon payment of costs; and in *Hall* v. *Turnbull*, 2 S.L.R. 89, I did the same. In the latter case a set-off for use and occupation of the land was refused, on the ground that the land was unimproved and the purchaser had never entered into possession.

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COWIE v. MCDONALD.

Lamont, J.

It goes without saying that if plaintiffs are not entitled to be relieved, they are not entitled to interest on the amounts paid.

The appeal should be dismissed with costs.

BROWN, and MCKAY, JJ., concurred.

LAMONT, J.:—By an agreement in writing dated April 25, 1910, the defendant agreed to sell and the plaintiffs agreed to buy the n-w ¼-34-29-25-w 2nd for $3,200, payable by instalments. The agreement contained the ordinary cancellation clause. The plaintiffs paid the cash payment of $200, and two instalments amounting together to $500, but not on the due date. The instalment due December 1, 1910, was not paid until November 6, 1911. On March 11, 1912, the plaintiffs being then in default, the defendant served a notice cancelling the contract. About the middle of March the plaintiffs forwarded through the Union Bank at Watrous the amount of their arrears. The defendant sent the money back to the bank, saying that the agreement was at an end and directing the bank to return the money to the plaintiffs. The money has ever since remained in the bank. From March, 1912, to November, 1915, no further payment was made or tendered, and the defendant was in possession of the land during that period.

In November, 1915, the plaintiffs sent $3,060.40 to the defendant's agent in full settlement and demanded transfer. The defendant said the sum was not sufficient to pay the balance of the purchase-money and that he would not take it unless they shewed him that it was the correct amount. He, however, intimated that, if the plaintiffs would pay him what was due under the agreement and the taxes he had paid up and some expenses, he would accept it and transfer the land.

On November 26, 1915, the plaintiffs' solicitors wrote the defendants saying that as he had refused to accept the balance of the purchase-money "our clients have instructed us to give you notice that any agreement which may have been between you and them respecting the n-w ¼-34-29-25-w 2nd is hereby rescinded and they demand repayment of the amounts paid to you on the purchase price of this land."

Shortly afterwards this action was commenced for a return of the amounts paid as money had and received for the use of the plaintiffs.

In his defence the defendant sets up the cancellation of the agreement, and in the alternative that he is ready and willing to give title to the plaintiffs on payment by them of the amount outstanding under the agreement.

The plaintiffs are not now willing to take the land; they do not want specific performance. In their reply they state that the clause providing for the forfeiture of the purchase money on cancellation of the agreement is a penalty and ask to be relieved from such forfeiture.

The action was tried before Haultain, C.J., who found the notice of cancellation to be a valid one. But he relieved the plaintiffs from forfeiture of the payments made, except as to the sum of $699.56 which he allowed the defendant to retain to compensate him for a shack removed from the land by the plaintiffs, taxes paid by the defendant and an allowance for rent for the period during which the plaintiffs occupied the land, and he directed the plaintiffs to pay the defendant's costs. From this judgment the plaintiffs now appeal.

The defendant having taken the position that irrespective of his legal rights he was willing to return the purchase-money, less the amount he claimed to be entitled to for taxes, rent, etc., is satisfied with the judgment and has not entered a cross-appeal.

In my opinion the appeal cannot succeed. The purchaser of land under a contract in which he agreed that upon default by him in his payments the vendor should be at liberty to cancel the contract and retain the purchase-money paid, can only be relieved from the consequences of his contract, in case the vendor has duly cancelled it, by shewing that he is ready and willing to carry out the contract but that the defendant is unwilling to do so, and that it would be inequitable to allow the vendor to retain both land and purchase-money paid.

Relief from agreed forfeiture cannot be granted against a vendor who, notwithstanding his cancellation notice, is still willing to transfer the land upon receipt of the purchase-price in favour of a purchaser who is not willing to pay the purchase-money. Here, the defendant in his statement of defence alleges that he is even now ready and willing to convey upon being paid the balance of the purchase-money. The plaintiffs, however, are not willing to pay it.

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Lamont, J.

Counsel for the plaintiffs, however, argued that there was not sufficient evidence that the notice of cancellation complied with the requirements of the agreement to justify a holding that the cancellation was valid.

I agree with the Chief Justice that, under the circumstances of this case, there was evidence from which a valid notice could be inferred, or, at least, that the plaintiffs accepted the notice they received as determining the contract. I am, however, of opinion that, so far as this action is concerned, it makes no difference whether the notice given by the defendant was sufficient to validly cancel the contract or not. If it was not, it did not determine the agreement. If the agreement was not determined and still subsists, the duty of the plaintiffs is to pay the balance of the purchase-money and take title. The giving of a notice which does not determine the contract, cannot give the plaintiffs a right to consider the contract at an end unless they accept it as the notice provided in the contract.

The contention most strongly urged by counsel for the plaintiffs was that the refusal of the defendant to accept the sum tendered and convey the property to the plaintiffs was a breach of the contract by him, which justified the plaintiffs in rescinding, and that, by the letter of their solicitors in November, 1915, they did rescind it, which entitled them to a return of the instalments paid on the principle of *restitutio in integrum*.

That rule provides that a party rescinding a contract for the other's breach is entitled to be restored to his former position, and is in general bound to return to the other any property or profits which he has himself received under the partial execution of the agreement: Williams on Vendor and Purchaser, 1906 ed., vol. 2, p. 950.

First: Was there a breach of the contract by the defendant? On the finding of the Chief Justice, in which I agree, there was not. Assuming, however, that there was; the next question is: When is one party to a contract entitled to treat the contract as at an end for breach by the other party of this provision?

In *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208, at 213, Lord Coleridge, C.J., says:—

> Where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon

and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decision in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

And in *General Billposting Co.* v. *Atkinson*, [1909] A.C. 118, at p. 122, Lord Collins says:—

I think the true test applicable to the facts of this case is that which was laid down by Lord Coleridge, C.J., in *Freeth* v. *Burr*, and approved in *Mersey Steel Co.* v. *Naylor*, in the House of Lords, "that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

Applying this test to the present case, I cannot see anything in the defendant's refusal to accept the money tendered which evidenced an intention on his part that he was no longer willing to be bound by the agreement. On the contrary, his attitude throughout was that if the plaintiffs would perform their part he would perform his.

Furthermore, the fact that the plaintiffs delayed tendering the purchase-money for nearly 4 years after receiving notice of cancellation, together with the fact that the defendant was to their knowledge in occupation of the land, is strong evidence that they were acquiescing in the cancellation of the agreement, or were abandoning the contract.

See *Enkema* v. *Cherry*, 5 S.L.R. 61. That case, which was decided by this Court, also established that the principle of *restitutio in integrum* had no application where the contract was determined under a provision in the contract for that purpose.

The appeal should be dismissed with costs. *Appeal dismissed.*

McEACHERN v. COREY.

Alberta Supreme Court, Scott, Beck, Stuart and Walsh, JJ. December 23, 1916.

DAMAGES (§ III A—62)—*Breach of covenant to convey—Nominal damages.*]—Appeal by defendant from the judgment of Harvey, C.J. (10 W.W.R. 1206, 34 W.L.R. 1196). Reversed.

B. Pratt, for respondents; *H. H. Hyndman*, for appellant.

WALSH, J.:—This action is brought to recover from the defendant the damages which the plaintiffs claim to have suffered by the breach of his covenant contained in an agreement of sale of land in which he is the vendor and their assignor is the pur-

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chaser. The covenant whose breach is complained of is that he would on payment of the purchase money and interest immediately transfer the land to the purchaser. The purchase money was paid in full with interest, but there was a long delay after that in getting the title in shape as a result of which one Ellison, to whom the plaintiff had re-sold the land, brought an action against the present plaintiffs for the rescission of his agreement with them. He succeeded in that action and the judgment awarded to him the full amount of the purchase money which he had paid the present plaintiffs and interest and costs. The Chief Justice, by his judgment after the trial of this action, gave the plaintiffs as damages the full amount of the judgment so recovered by Ellison against them with certain costs of their own, incurred in the defence of that action and reasonable costs incurred by them in trying to get title to the land. From this judgment the defendant appeals.

There is no doubt but that the Ellison action for rescission succeeded because the present plaintiffs could not give him title to this land. If this failure on their part resulted from the breach by the present defendant of his covenant to transfer this land to them upon payment of their purchase money, it may be that the proper quantum of damages has been awarded to them, but as to this I express no opinion for I have not considered the question at all. But if responsibility for the plaintiffs' inability to perform their contract with Ellison cannot be traced to the defendant, he, of course, cannot be held liable in damages for their loss on that account. Our first inquiry must therefore be into the facts which fortunately for this purpose at least are mostly to be found in the documentary evidence and with respect to which there is accordingly but little, if any, room for dispute.

The facts as to the title are few and simple. The Hudson's Bay Company was the registered owner of the land. It agreed to sell the same to one Coone who assigned this agreement to the defendant, and he therefore became entitled to a transfer from the company upon payment of the purchase money and interest called for by it. Whilst his only interest in this land was under this agreement, he agreed to sell it to one Goetz, and it is in this agreement the covenant sued on appears. Goetz assigned it to the plaintiffs so that they in turn became entitled to a transfer of the land from the defendant immediately upon payment in

full of the purchase money and interest payable under it. They then agreed to sell to Ellison. They paid to the defendant the full balance that he was entitled to under the Goetz agreement on July 15, 1913. He unquestionably should then have been in position to give them the transfer which he had bound himself to give them upon the happening of this event, but he admittedly was not. He was then 5 months in default under his agreement with the Hudson's Bay Company, and the amount which he owed it exceeded by over $350 the sum paid to him by the plaintiffs in settlement of the balance of their purchase money. The plaintiff knew, however, not only of his default but of the state of the title, and in the covering letter sent with their cheque for their final payment they said "kindly have title issued by the Hudson's Bay Company in the name of William W. Ellison, locomotive engineer, Edmonton, Alta." This request was undoubtedly prompted by a desire to save the cost of drawing and recording the intermediate transfer. In the ordinary course the company would have transferred to the defendant as the assignee of its purchaser, and he would have transferred title to the plaintiffs as the assignees of his purchase or to Ellison as their purchaser. From this point of view their suggestion was a reasonable one, and Mr. Milner, the solicitor who had the matter in hand, at once fell in with it. But, reasonable as it was, it is the cause of the doubt which exists as to whether or not the blame for the plaintiffs inability to give Ellison title to this land can be laid at the defendant's door, for his contention is that if this request had not been made, but the regular course as above outlined had been taken, the transfer from the company would have been forthcoming in plenty of time to have headed off Ellison's action for rescission, and none of this trouble would have occurred.

I think it is very easy to say from the events which actually happened whether or not this contention is well founded. All of the balance of his purchase money except $26.07 was remitted by the defendant to the company on September 8, 1913. A cheque for this sum of $26.07 was intended to be enclosed in a letter of November 14, 1913, but by oversight of the solicitors who sent the letter, it was not enclosed. The evidence shews, however, and the Chief Justice finds "that none of the delay which ensued appears to be attributable to that fact," and I take, therefore, November 14, 1913, as the date upon which the defendant's de-

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fault to the company was made good. With that letter went the various agreements and assignments forming the chain of title between the company and Ellison, with abstract of title, and Registrar-general's certificate. The letter requested that the transfer be made to Ellison.

Now, but for this request I take it, as I have said, that the transfer from the company would have been to the defendant, and to entitle him to it nothing but the surrender of the original agreement between the company and Coone and the production of the assignment of that agreement to him would have been needed. The correspondence shews conclusively how long it would have taken to get that transfer. On November 20, 1913, the company's solicitors returned to the defendant's solicitors the assignment from Coone to the defendant for correction in accordance with their pencilled instructions. On May 1, 1914, this assignment was returned to the company's solicitors and there is no suggestion in the subsequent correspondence of any further fault to be found with it. In the ordinary course of mail this would be in the hands of the company's solicitors by May 3. I am inclined to think that a lot of the time intervening between November 20, 1913, and May 1, 1914, was taken up by the defendant's solicitors in an attempt to clear up some of the many objections raised in the meantime by the company's solicitors to putting the title in the name of Ellison and that this assignment, though it might otherwise have been returned earlier than May 1, was held until it was thought that all of these other difficulties had been removed. But, be this as it may, I think it quite clear that early in May, 1914, the assignment to the defendant of the Coone agreement was in the hands of the company's solicitors and in proper shape for approval and that if the transfer was to be made to the defendant it would have been forthcoming in due course without anything more being required of the defendant. The company's letter of February 16, 1915, shews that it would have taken about 2 weeks after approval of the assignment to make delivery of the transfer.

Now, the Ellison action for rescission was not commenced until July 20, 1914, and Ellison himself, who was called as a witness for the plaintiff on the trial of this action, said in answer to a question from plaintiff's counsel that he was prepared to accept a transfer at any time up to the commencement of his

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action. It appears therefore that but for the plaintiff's unfortunate suggestion of having the company transfer direct to Ellison, the transfer from the company to the defendant would have been ready in plenty of time to have enabled the plaintiffs to give Ellison his title before he started his action. The assignment to Ellison was approved by the company on February 9, 1915, and that fact was communicated to the plaintiff's solicitors by letter dated on the 16th of that month. The day before that letter was written the Ellison action was tried and decided in his favour. It is evident that all of the delay between May 1, 1914, when the documents proving the defendant's right to a transfer in his own name were finally sent to the company's solicitors, and February 9, 1915, when the assignment to Ellison was approved, was caused entirely by the difficulties which the company's solicitors interposed in the way of a transfer direct to Ellison. It follows that the loss of the Ellison sale was due not to any neglect or default on the defendant's part, but to the fact that the plaintiffs wanted the title to come direct to Ellison from the company. I am unable to see how that placed the defendant under any liability, legal or moral, for the unfortunate consequences of that delay. It is true that if Mr. Milner was his agent rather than that of the plaintiffs or of both parties he acquiesced in that request and did what he could to have it carried out by the company, but I do not think that that extended the defendant's liability under his covenant. He was not bound to do this. His only duty was to get title in himself and then transfer to the plaintiffs or their assignee.

It would, I think, be a strange thing to say that simply because the defendant at the plaintiffs' request did something which he was not legally bound to do and damage thereby resulted to the plaintiffs, the defendant must indemnify them for that loss. The damages for which the defendant is liable are those which flow naturally from his breach of covenant. The loss of the Ellison sale does not flow naturally or at all from his breach of covenant but from a request made by the plaintiffs which in law they had no right to make and acquiesced in by the defendant without being under any legal compulsion to do so. While the matter was at first in the hands of Mr. Milner, the correspondence shews that in September, 1914, it was taken up by Mr. Pratt, acting for the plaintiffs, and was thenceforward carried on by him, although

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Mr. Milner intervened in it again for a short time. This correspondence indicates to my mind that the plaintiffs were well aware of the fact that the duty rested on them to clear up the difficulties which lay in the way of getting title to Ellison and that this was their duty is, I think, beyond question.

To sum up, while it is unquestionably the case that the defendant was guilty of a breach of his covenant, for instead of immediately transferring to the plaintiffs, as he had agreed to do, it was not until about a year after their final payment was made that he was in a position to do so, still that breach was in no sense responsible for the rescission of the Ellison agreement and he should therefore not be held responsible in damages for the loss which the plaintiffs thereby sustained.

It is suggested that in any event he is liable to return to the plaintiffs the purchase money that he received from them because, through his inability or refusal to give them title to the property for which they paid, they have got nothing for it. It is, of course, the law that in such an action as this damages on that basis can be awarded to the purchaser if the vendor has been unable or unwilling to give him title to the property contracted for. If that is this case the plaintiffs are entitled to that relief, but I do not think it is.

By letter dated on February 16, 1915, the company advised the plaintiffs' solicitors that "assignment in favour of William W. Ellison was approved of by the company on the 9th inst., and conveyance in this party's name is now in course of preparation and is expected to be ready for delivery towards the end of April next." This letter remained unanswered until March 11, 1915, when the plaintiffs' solicitors wrote the company stating that Ellison had repudiated his contract with the plaintiffs and his contract had been rescinded and the plaintiffs directed to repay to him his purchase money and concluding as follows: "and the transfer will not now therefore be required in Ellison's name and you had better hold same for the present." There the matter ended with the company and still rests so far as the record shews. Nor does it appear that any further negotiations took place between the plaintiffs and the defendant before the commencement of this action, on April 24, 1915.

The position, therefore, when this action was brought was this.

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The defendant had, partly through his efforts and partly through those of the plaintiffs, succeeded in getting the title in such shape that but for the letter from the plaintiffs' solicitors of March 11, 1915, a transfer to the plaintiffs' nominee, Ellison, would undoubtedly have been ready for delivery about the time this action was started. There had never been either a refusal or an inability on the defendant's part to make title. There had undoubtedly been delay on his part in the payment of his purchase money and in helping to remove some of the piffling objections which the solicitors for the company for more than a year had put in the way of the completion of the title in the name of Ellison. But when this action was begun all obstacles, from whatever cause arising, had been removed, and the company stood ready to give to the plaintiffs' assignee the title contracted for. Up to this time there had not been, and even yet there has not been, any repudiation or attempted repudiation of the contract by the plaintiffs upon any ground. On the contrary it has always been treated by them as a subsisting contract. If the plaintiffs' claim was for rescission only upon the ground of want of title I do not see how they could get it for the defendant's plain answer to it would be that whilst the contract was still on foot and unrepudiated he had put himself in a position and was then able to give to the plaintiffs the title for which they asked. Equally good it seems to me must be his defence to their claim for damages to the extent of the purchase money paid by them. I do not see how it is possible for them to recover such damages when as the fact is he is not only ready and willing but able to transfer it. Damages are on that basis, as I have said, undoubtedly recoverable when, but only when, the purchaser, having paid the price, does not get the property for which he has paid it. The whole theory of such a claim is that he has paid for something which he has not got and cannot get, and so he has lost the money which he paid for it.

I am treating the matter as though the defendant had actually procured a transfer of this property from the company to the plaintiffs as that is, I think, in substance, though not in form, what the position was when this action was commenced. Through the co-operation of the parties the preparation of a transfer to the party in whose name the plaintiffs had asked for it was in hand sometime before action and would undoubtedly have been executed and delivered but for the plaintiffs' statement to the com-

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pany that it would not now be required in that name, and their request "to hold same for the present." The plaintiffs cannot after that be heard to say that they have not got or could not get what they paid for, especially as the company can unquestionably be compelled to transfer to them. The title is in its present condition at the instance of the plaintiffs, whose duty, and not that of the defendant, it is, I think, to get it in themselves.

No other claim for damages is made. The defendant is, I suppose, liable in nominal damages for his breach of covenant. I would reduce the plaintiffs' judgment to $5, with such costs of action to the plaintiffs, and by way of set-off to the defendant, as that judgment will carry, and would direct the payment of the costs of this appeal by the plaintiff.

SCOTT, and BECK, JJ., concurred with WALSH, J.

STUART, J.:—In my opinion, so far as the liability of the defendant for breach of his contract is concerned, the view taken by Harvey, C.J., was right; and I think very little, if anything, need be added to the reasons he gave for coming to his conclusion. Corey held the land as assignor under an assignment from one Coone of an agreement by Coone to purchase it from the Hudson's Bay Co. He understood Coone's obligations to that company and knew of course that they must be fulfilled before he could in turn fulfil any obligations he might himself enter into as vendor to any new sub-purchaser. He entered into such obligations with Goetz, the plaintiffs' assignor. Yet, while under these latter obligations, he deliberately neglected to meet his obligations to the Hudson's Bay Co. and to get title from them so as to be in a position to fulfil his covenant with Goetz. He apparently thought more of pocketing his real estate profits than of fulfilling his covenants on either hand. If he had paid the Hudson's Bay Co. when his payments fell due and earnestly sought a transfer from them so that he could as quickly as possible fulfil his covenant to Goetz to transfer immediately upon payment by the latter, the land in fee simple, there obviously never would have been any trouble. Owing to the conditions of business dealings with the Hudson's Bay Land Department there no doubt would still have been some delay but that, I think, cannot be pleaded by Corey. That was a risk he took when he agreed to give Goetz title in fee simple on a certain date upon payment of the purchase price and there is nothing at all to shew that Goetz knew the position of

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the title when Corey agreed to sell to him. Neither, as the Chief Justice points out, was Corey entitled to the money of Goetz or the plaintiffs in order to pay the Hudson's Bay Co. Having entered into definite obligations to Goetz it was his duty to make ready to fulfil them promptly even if that involved anticipatory payments to the Hudson's Bay Company in order to have the title ready for Goetz at the stipulated time.

The only real argument on Corey's behalf rests upon the request of the plaintiffs to have title made direct from the company to their purchaser, Ellison. That request, however, was only made because they had found that Corey was not in a position, as he should have been, to give a transfer in fee simple at once. It is true the plaintiffs did not ask directly for a transfer from Corey. But everyone connected with the matter knew that Corey could not possibly give it and was grievously in default because he could not give it as he had agreed to do upon payment. And it would be strange indeed if when two parties to a contract recognize that one cannot possibly, owing entirely to his own neglect, do what he had covenanted to do, and then mutually agree to do the best they can to get the matter adjusted in another but equally satisfactory form, and these efforts fail, then the party originally in default is to be relieved from the consequences of that default. I think also a great deal of the delay afterwards was due to Corey's absence and inattention. Neither can he, in my opinion, take refuge at all behind the perversities of the Hudson's Bay Company's solicitors. Goetz had nothing to do with the Hudson's Bay Company nor had the plaintiffs. Even delays which no doubt would have arisen in Winnipeg if the request had been for a transfer from the company to Corey could not, in my opinion, have been pleaded by Corey. He had covenanted to give a title in fee simple at a certain time and upon payment and should, as I have said, been preparing himself to meet that obligation. He had, on the contrary, paid not the slightest attention to it.

It is, in my view, quite useless, indeed beside the point, to attempt to estimate what portion of the time between July 15, 1913, when the plaintiff paid the money, and July 20, 1914, when the purchaser Ellison brought his action, was attributable to the plan adopted in July, 1913, and to say just so much of the delay was thus caused and therefore but for the adoption of that plan

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Ellison would not have sued, because he would have been satisfied in time. The whole delay was caused because Corey was not ready when he should have been to give a transfer in fee simple as he had agreed to do.

I therefore think he is liable in damages.

But with regard to the quantum of damages I am unable with much respect to follow the view adopted by the trial Judge. The true rule for ascertaining the damages for breach of contract was laid down in *Hadley* v. *Baxendale*. With regard to damages for failure to make title under an agreement for the sale of land, an exception to this rule, was adopted in *Bain* v. *Fothergill*, L.R. 7 H.L. 158. I agree that there are circumstances in this case which distinguish it in turn from *Bain* v. *Fothergill*. But the result is simply that the rule in *Hadley* v. *Baxendale*, 9 Ex. 341, 23 L.J. Ex. 179, must still be applied.

But there are often, of course, difficulties in the application of the rule arising from the peculiar facts of an individual case. We must therefore remember what happened in the case before us. The plaintiff had resold to Ellison and Ellison was pressing for title. Finally he sued the plaintiff for rescission and return of his purchase money. That action began on July 20, 1914. The plaintiffs made no repudiation of their contract with the defendant. On the contrary, they continued to struggle and press for title while the Ellison suit was pending. They ran a neck and neck race in an endeavour to get title, striving to secure the property from the defendant before Ellison's case against them came to trial and judgment. The trial took place on February 15, 1915, before Walsh, J. It is not quite clear from the record, but it was stated on the argument to be the fact, that judgment was delivered on that same day rescinding the Ellison agreement. The formal judgment was not entered until April 1, 1915, but it is clear at least from the record and particularly from a letter of plaintiff's solicitors of March 11, 1915, that judgment had long before been given. On February 16, 1915, the Hudson's Bay Co. indicated their readiness to give a transfer to Ellison. But this came too late. On March 11, the plaintiffs' solicitors told the Hudson's Bay Co. that they no longer wanted the transfer in Ellison's name and *to let the matter stand for the present*. But up to February 16, when it was clearly indicated that the plaintiffs could get the title they asked for in the form they asked for it,

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they never repudiated the contract with Corey. Unless the present action could be treated as a repudiation there never was any repudiation even after that date. The situation, then, is that the plaintiffs were pressing urgently for title and never repudiated the agreement right up to the time when they were told they could get it and knew they could get it. Were they entitled in such circumstances to turn around even the next day and to say, "we won't take it now?" That is even assuming they had said that the next day, which they did not.

In my opinion, they could not take that position. I think altogether too much has been made of the re-sale to Ellison. We here come to the rule in *Hadley* v. *Baxendale*, *supra*, which is the rule to be applied. That rule is that the damages must either be such as naturally flow from the breach or such as can reasonably be held to have been in the contemplation of the parties at the time the contract was made.

Now, there is nothing whatever in the evidence to shew that Corey and Goetz knew or thought anything about a re-sale even to the plaintiffs, much less to Ellison, when the contract by telegram (itself the subject of a suit for specific performance) was made between them on February 29, 1912. In applying the second part of the rule in *Hadley* v. *Baxendale*, the cases clearly lay down that you cannot take into account matters arising subsequent to the contract. This must obviously be so because it cannot be known whether the parties would have contracted at all in the first instance if such facts or circumstances had been known to them.

It is to be observed that most of the cases dealing with the measure of damages for breach of contract have been cases of sales of, or contracts for the carriage of, goods and chattels. Goods and chattels are the recognized articles of commerce and English law has developed rules in regard to such commercial contracts. But so far, I am glad to say, real estate has not been placed exactly in the same category, although the course of events here in the West and the miasmatic mists of speculation have had a tendency perhaps to lead us to see real estate merely as goods and chattels. At any rate, to say the least, in the absence of any evidence shewing that re-selling at a profit as a speculation was in the minds of the vendor and purchaser of real estate at the date of their contract, I

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think that the proper assumption is that the purchaser was buying the land because he wanted to use it.

In *Elbinger Actien-Gesellschafft* v. *Armstrong* (1874), L.R. 9 Q.B. 473, a case of goods and chattels, Blackburn, J., dealing with the measure of damages speaks first of the ordinary rule, *i.e.*, the difference between the contract price and the market price at the time of breach, goes on to say that where from the nature of the article there is no market price this rule is not applicable and some other rule must be found, and he quotes from *Borries* v. *Hutchinson*, 18 C.B.N.S. 445, at 465, the words of Willes, J., where he said:—

> There was no market price to which resort could be had as a test of damage. We must therefore ascertain what was the value of the article contracted for at the time it ought to have been, and at the time when it actually was delivered.

Now, if we were entitled to treat real estate as a chattel which necessarily came within some rule because of course the exact parcel of land could not be obtained elsewhere in a market, it might be proper to measure the damages here as at the difference of value between July, 1913, and February, 1915. But I can find no precedent for applying to the sale of real estate by analogy such a rule as was laid down by Willes, J. Rather, I think, the measure of damages should be simply the value of the use of the property in the meantime as indeed was suggested even in *Elbinger Actien-Gesellschafft* v. *Armstrong*, *supra*, at p. 477, in the case of the chattels there in question.

In my opinion, if the purchaser repudiates in time, under circumstances entitling him to do so, he ought to get his money back with interest; or, if he insists, as he did here, on getting the property, until he knows he is absolutely sure of getting it in a short time and then fails to repudiate, even assuming that he would then be entitled to do so, I think he should only be given damages for the loss of the use of the property in the meantime. In either case, of course, where it is shewn as it was not shewn here in the slightest degree, that at the time of the contract special circumstances were known to the parties and that damages resulting therefrom could be reasonably held to have been in the contemplation of the parties at the time of the contract, as likely to result from a breach, some wider rule might, *perhaps*, be adopted. But there is no case made out here for any wider rule.

The rule I suggest is that adopted in *Lobel* v. *Williams*, 22

D.L.R. 127, in *Jaques* v. *Millar* (1877), 6 Ch.D. 153, 159, and in *Jones* v. *Gardiner*, [1902] 1 Ch.D. 191.

Damages for the loss of the use of the property ought not, in my opinion, for the reasons I have given, to include the use of the property in the way of re-sale at a profit, but merely the value of the possession and actual use of the property in the meantime. In some circumstances this might be very considerable but there is nothing in the present case to shew that the loss amounted to anything at all.

The formal judgment appealed from does not direct a rescission of the agreement, and I think in the circumstances quite properly so. The plaintiffs should keep the prperty and the defendants should be directed to complete the title.

I think, therefore, the appeal should be allowed with costs, the judgment below set aside and judgment entered for the plaintiff for $1 damages and for costs of the action, and that these should also include the costs as between solicitor and client to which the plaintiffs were put in their efforts to obtain title. These latter, no doubt, should be treated as damages rather than costs but the difference is immaterial. *Appeal allowed.*

CLARK v. HEPWORTH.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Scott, Stuart and Beck, JJ. December 1, 1916.

PRINCIPAL AND AGENT (§ III—30)—*Sale of land—Rescission—Fraud—Liability of agent—Concealment of relationship.*]—Appeal by defendants from the judgment of Ives, J., at a trial without a jury, in an action for rescission of an agreement for the sale of land. Reversed.

Frank Ford, K.C., for respondent; *W. E. Payne*, for appellant; *A. F. Ewing*, K.C., for defendant, Michener, Carscallen & Co.

HARVEY, C.J.:—I think it cannot be said that the defendant firm was under no obligation to the plaintiff in the purchase of the farm. Whether there was the ordinary relationship of agent and principal does not appear to me to be of great importance. They had been informed that they were being looked to as persons of integrity and judgment on whose advice the plaintiff and her husband could rely. Chadsey had been appointed attorney for certain purposes and whether they were to receive any remunera-

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tion from the plaintiff for their services in connection with the purchase or not they must have been aware that there was a relationship of confidence which made it incumbent on them to communicate to the plaintiff that they were interested in such a way that they could not honestly advise her or act for her. The letter to Chadsey asking him to secure the farm at $100 or less an acre clearly indicates an expectation that he will endeavour to get the best price for her that he can. His position as agent for sale with the right to a commission fixed by a percentage on the selling price made his interests conflict with the duty he owed to her in undertaking the task imposed by the letter. He did, in fact, nothing whatever in her behalf which would prejudicially affect his interest. Unless then the defendant Hepworth was entirely innocent and free from knowledge of the relationship of Chadsey to the plaintiff it appears to me that on the principle enunciated in the very recent case of *Hitchcock* v. *Sykes*, 13 D.L.R. 548, 29 O.L.R. 6, affirmed in appeal, 23 D.L.R. 518, 49 Can. S.C.R. 403, he cannot sustain the transaction since it is quite clear that the plaintiff knew nothing of the relationship between him and Chadsey and there is evidence to support the finding that if she had known she would not have purchased.

I agree with the trial Judge that when Hepworth read or had read to him the letter to Chadsey he became fixed with the knowledge of the relationship of confidence and trust between the plaintiff and Chadsey, for I think it must be assumed, in the absence of evidence to the contrary, that all the contents of the letter became known to him. As pointed out in *Hitchcock* v. *Sykes*, he should then have seen that she was informed of the relationship of Chadsey to him, but he did nothing, and according to the uncontradicted evidence of the plaintiff and her husband, he had indeed in the first interview joined with Chadsey in actively concealing that relationship.

It was argued that there had been such delay in taking action that the plaintiff should not succeed. The evidence does not, however, I think, establish that there was any unnecessary delay after the plaintiff learned that Chadsey had been agent and received a commission on the sale.

I am of the opinion, therefore, that the judgment is right in adjudging rescission.

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I cannot, however, see what there is to support a judgment against the defendant firm. Admitting that there was deceit on their part which would justify a claim for damages it appears clear to me that the plaintiff cannot have rescission and damages at the same time. Rescission involves the payment back of the purchase money, but it is the vendor who received it and he therefore is the one who must pay it back. The agents did not receive it and a judgment against them for the amount appears to me unfounded.

I would, therefore, allow this appeal with costs and direct that the action against them be dismissed, but, in view of their culpability in the matter, without costs.

I would dismiss the appeal of the defendant Hepworth with costs.

BECK, J.:—The defendants, other than Hepworth, were carrying on business at Red Deer as real estate agents under the firm name of Michener, Carscallen & Co.

The defendant Hepworth owned a farm—a half section, or rather 316 acres—near Red Deer, on which he was living. About May, 1912, he listed it with the firm of Michener, Carscallen & Co. —whether this listing was in writing or not is not clear—but it is clear that before the transactions in question in this action Chadsey, a member of the firm, knew that it was "listed" with the firm at $100 an acre, and had no notice of any change in Hepworth's intention. He had on a previous occasion after the farm had been listed introduced one Collbeck as a prospective purchaser, and had good reason to expect that if he introduced to Hepworth a purchaser at the price stated on terms of payment satisfactory to Hepworth, Hepworth would pay him a commission on the selling price of 5%. The trial Judge has found that the firm of Michener, Carscallen & Co., was agent for Hepworth for the sale of the land and his finding is, in my opinion, right in the sense that they were agents to find a purchaser.

Sometime in August, 1912, Lieut.-Col. Clark, an Indian officer, and his wife, the plaintiff, were travelling in Canada. They visited Edmonton. By this time they had thought that it would be well to acquire a permanent home somewhere in Western Canada for themselves (the husband contemplating retiring in a short time), and perhaps for some of their sons. While in Edmonton they had learned that Mr. Michener was the leader of the Con-

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servative party in the province, and they had also learned something of Red Deer which induced them on leaving Edmonton to stop there. Their stay in Red Deer on this occasion was only for a few days—preceding August 20, 1012, or thereabouts. Seeing the name of Michener, Carscallen & Co. advertised as real estate agents and learning that the Mr. Michener of whom they had heard in Edmonton was a member of the firm, they immediately visited the firm's office. They first saw Mr. Chadsey and afterwards for a short time and only on one occasion Mr. Michener himself; all subsequent interviews of consequence were with Mr. Chadsey only.

The evidence is too voluminous to extract and discuss, but my inference from it is that Col. Clark and his wife explained fully and openly to Mr. Chadsey what their object was; how much money they each had; that they were entirely ignorant of values and the methods of dealing in this country, and had come to Mr. Michener's firm for advice and direction because they were convinced they could depend upon the firm's integrity. What they wanted was a farm near the town. As a result of a talk with Mr. Chadsey, then with Mr. Michener, who referred them to Mr. Chadsey, and another talk with Mr. Chadsey, Mr. Chadsey next day drove them about the country in the neighbourhood of Red Deer. They were taken to Hepworth's farm. One of the contentions of the plaintiff is that Chadsey concealed the fact that his firm were agents for Hepworth, and also that Hepworth was privy to this concealment.

Chadsey was asked on examination for discovery about conversations at the Hepworth farm in a very general way without in any important particular having his attention called to any precise topic, and I should think, naturally enough, could not recall anything of consequence. At the trial he seems not to have been either examined or cross-examined upon the points involved in the evidence I have quoted, and, generally speaking, he is not clear in distinguishing between what occurred on the occasion of this and a subsequent visit to the Hepworth farm.

They looked over the Hepworth farm and the buildings and left without coming to any decision, and after having been driven to other farms by Chadsey, returned to town. They were driven by Chadsey within the next 2 or 3 days to see other farms. Then,

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after having been in Red Deer, as already stated, only a few days, they left for the Pacific coast.

Before leaving, however, they had executed a power of attorney dated August 20, 1912, in favour of G. W. Greene (then practising law at Red Deer) and Chadsey, empowering them "to sell, lease, or transfer," lands. ' The reason for giving this power of attorney was that Colonel Clark had made some investments on this—the first—occasion of their being in Red Deer.

The Clarks left Red Deer for the coast about the 21st August.

From Vancouver, Colonel Clark wrote the following letter, dated August 28, 1912:—

My dear Mr. Chadsey,—Since leaving Red Deer, we find that we have a balance of £130 odd in our favour with the City and Midland Bank, Weston-Super-Mare, England, which is lying idle, and have decided that if you can with this, secure Hepworth's farm for us (the first we saw) (two quarter sections, 320 acres or thereabouts) at $100 an acre or less, we will be obliged if you will do so. Of course you understand that the rest of the first payment will follow from India, and this is just to hold it for us. Send me a wire to above address just saving "secured" or "not secured." We will be back at Red Deer before many days are over, only you understand that we want the wire, so that we shall not be tempted to spend money elsewhere . . I think you will probably hear from me again to-day or to-morrow about another Indian client who will want townsites. Treat him well as he is an influential man, and I rather think that we can do a good deal of Indian business in Red Deer. Don't mention the farm project to anyone, as I want to keep it to myself, and expect we should live in the house ourselves for a time at any rate. I enclose the cheque payable to Merchants Bank and will advise the agent on receipt of your wire.

Please advise Mr. Greene also.

The trial Judge has drawn the inference from the evidence that the Michener firm did not become agents of the plaintiff (in which I think he was quite right), except by reason of the letter from Colonel Clark of August 28, asking Chadsey to obtain an option from Hepworth; but in drawing this latter implication from this letter I think the Judge was wrong.

The correspondence between Colonel Clark and Chadsey contains a plain implication that Colonel Clark quite well understood that the Michener firm had lands for sale as agents for a variety of vendors who would pay them a commission for effecting sales. I am convinced that the Clarks, in placing confidence in the firm, were placing confidence in them as men of integrity and high standing in the community who would in no way misrepresent things to them, but would advise them honestly, so far as

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consistent with their duty to their employers fully. Furthermore, it appears that Colonel Clark himself acted upon the same principle. I cannot see how, under these circumstances, a request by Colonel Clark, acting for his wife, that Chadsey, agent for Hepworth, should get his employer to hold the property open for purchase by him, and Chadsey fulfilling the request should convert Chadsey into Mrs. Clark's agent in any sense or to any extent beyond what the agency, if one chooses to call it such, which arises where one asks another to do something to oblige him. If there was an agency of any kind created, I cannot see any reason why it should not exist consistently with the admitted agency for the vendor.

On the whole I think that the plaintiff has failed to establish any concealment by Chadsey of his agency for Hepworth, and that there is no evidence whatever to fix Hepworth with any intention to be privy to any such concealment.

As I have intimated, I think there was no relationship of principal and agent constituted between Mrs. Clark and Chadsey. I think, too, that the evidence fails to establish the creation of any confidential or fiduciary relationship between them which would shift upon Chadsey a burden of proof and I do not find nor did the trial Judge find that in fact there was any improper conductor omission on Chadsey's part. Had there been not the relationship of principal and agent but some confidential or fiduciary relationship I doubt very much whether in the absence of knowledge of it on the part of Hepworth, it would have affected Hepworth's rights as vendor, or given the plaintiff any right of action except one against the Michener firm upon it being made to appear that there was improper conduct or omission from which damage resulted: See *Nocton* v. *Ashburton*, [1914] A.C. 932.

The evidence, however, satisfies me that though the land is undoubtedly now not saleable for the price for which it was purchased, all parties concerned honestly thought at the time that the price paid was a fair one. I can see nothing in any of the other alleged misrepresentations and in weighing what may be said in argument, some considerable weight should, I think, be given to the delay which occurred in taking steps to repudiate the transaction and to the fact that the purchase was made during a "boom" and the complaints made after the coming of a "slump."

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In the view I have taken of the facts, the obvious conclusion is that, in my opinion, the appeal ought to be allowed with costs and the action dismissed with costs and judgment should be for the defendant, Hepworth, on his counterclaim as prayed.

SCOTT, and STUART, JJ., concurred with Beck, J.

Appeal allowed.

DICKSON v. CITY OF EDMONTON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, Walsh, and Ives, JJ. February 9, 1917.

INJUNCTION (§ I J—84)—*As to use of municipal funds—Advertisement—Tax sale.*]—Motion in an action brought by the plaintiff suing on his own behalf and on behalf of all other ratepayers of the City of Edmonton for an injunction restraining the defendant from expending or in any way dealing with a certain appropriation of $40,000. Dismissed.

P. G. Thomson, for applicant.

J. C. F. Bown, for defendant.

STUART, J.:—My view in this matter is that the Court ought not to interfere. There was no case at all made out for stopping the sale itself. The only conceivable ground of complaint lies in the extremely large amount of money that the city is proposing to advance to cover the cost of publishing the necessary advertisements. Sec. 35 of the statute makes it obligatory to publish the advertisement in a daily newspaper published in the city. As there are admittedly only two daily newspapers published in Edmonton it is obvious that the city treasurer has not been given by the legislature very much opportunity for choice or business negotiation. The statute does not make it obligatory upon the newspapers to publish the advertisement. If they like they may refuse to do so altogether and then there can be no legal sale at all. The provisions of the Criminal Code in regard to illegal combinations in restraint of trade apparently do not refer to contracts for doing work such as building houses or railways or printing advertisements, but seem to deal only with trade in goods and merchandise. In any case I think there is scarcely enough in the evidence before us to shew that the city treasurer or the city council did not act in good faith and do the best they could do with the restriction placed upon them by the legislature and

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I would hesitate to hold that the publishers had done anything illegal when they are not before us to defend their action.

The advance of the necessary money out of the general city funds is temporary only. There is no suggestion made in the material before us that this advance will not be recouped out of the proposed sale. What is really happening is that a number of people who have not paid their taxes are complaining that the addition of $1.20 to the charges against each lot with respect to which they are in arrears, as for the costs of advertising that lot for sale, is unreasonable, and they want the Court to stop the sale on that account. They could stop the sale another way, that is by paying their taxes. Usually an injunction is not granted when there is another perfectly satisfactory remedy. Of course, if a certain lot is not sold the $1.20 which it will have cost to advertise it must in the meantime be paid out of the general revenue of the city, but it will be added to the charge against the particular lot and the city will have, I imagine, perfectly good security therefor. At least the evidence before us does not shew that it will not. The plaintiff says that he is suing on behalf of all the ratepayers of Edmonton. I doubt very much whether those ratepayers who have paid their taxes and whose burdens will be increased if the arrears from others are not paid are very much concerned over the addition of $1.20 to the charge upon each lot the taxes upon which are unpaid. The advantage of getting in some substantial amount of arrears will not, I think, in their minds be overshadowed by the fact that this amount will be too much decreased by the $1.20 added to the amount outstanding against each lot unsold and paid in the meantime out of the city's general funds.

All these, however, are questions which the city council as representing the ratepayers has doubtless fully considered. In their wisdom they have decided to go on with the sale even in the face of the necessity of advancing a large sum of money in the meantime.

Where the municipality is proceeding legally or where there will be no irreparable injury to the complainant or where the injured party has an adequate remedy at law an injunction will be refused. (22 Cyc. 889.)

I think every one of these conditions exists here.

There are surely some limits to the right of a Court to endeavour to guide the affairs of a municipality by injunction. I

think the case when examined is not by any means so serious a one as the plaintiff suggests. The bulk sum to be temporarily advanced looks outrageously large no doubt, but after all it is the amount added to each lot that is really involved. No doubt it may be the case that that sum is excessive. But the persons chiefly interested in that are the delinquent taxpayers, and by paying their taxes before the sale they can easily prevent the wrong if it is one. Of course, a mortgagor has a right to see that in fixing conditions of sale under the mortgage too large a sum is not to be added for advertising it. But here the question merely lies between adding $1.20 to the charges against the lot and adding some smaller sum. That is not a dispute which the extraordinary power of injunction should, in my opinion, be used to determine. The fact that the total sum, owing to the large number of lots, is startling in amount, should not be allowed to obscure the real point involved.

I think the application should be dismissed with costs.

HARVEY, C.J., and WALSH, and IVES, J., concurred with STUART, J.

BECK, J. (dissenting):—By an amendment to the Edmonton charter passed on April 19, 1916 (ch. 28 of 1916), it was enacted (sec. 34) that the assessor should, between October 1, 1916, and November 1, 1916, where any portion of the taxes on any land has been due prior to December 31, 1913, prepare and submit to the mayor a list in duplicate of such lands with certain particulars and that the mayor and city clerk shall authenticate the lists and that one shall be given to the treasurer with a warrant annexed commanding him to sell the lands for the arrears, etc.; and it was also enacted (sec. 35) that the treasurer shall prepare a copy of the list of lands to be sold, including a statement of the proportion of costs chargeable on each lot for advertising and the sum of 25 cents for each parcel advertised for sale, and shall cause the said list to be published at least once a week for 4 consecutive weeks in one or more daily newspapers published in the city and for the next following 4 consecutive weeks preceding the day of sale therein named shall publish a notice therein in a stated form.

Then sec. 41 says that at the time and place named the treasurer shall sell the lands, etc.

A list of lots was made up in accordance with these provisions

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and a duplicate with a warrant attached delivered to the treasurer. This list contains, he says, from thirty to thirty-two thousand lots.

The city treasurer requested the council to make an appropriation of $40,000 to cover the expenses of the proposed tax sale. The council did so by a resolution passed on January 2, last. The expenses of a tax sale beyond the cost of advertising are necessarily quite small. The treasurer made an arrangement for the advertising in relation to the tax sale and it was on the basis of that arrangement that he asked for the appropriation. He makes an affidavit in which he says:—

Before making arrangements for the advertising in connection with the said sale I obtained the rates from both the *Bulletin* and the *Journal*, being the two daily newspapers published in the City of Edmonton. The rate quoted to me by each paper was 10 cents per agate line for legal and municipal advertising, which I was informed would work out at $1.26 per lot for the necessary number of insertions. I then negotiated for a reduction in this rate on account of the amount of advertising matter and was quoted a rate by each paper of $1.12 for each lot for the 4 insertions with the required headings and other statutory notices.

I found that the difficulty of having the rates reduced was that it was a rule among printers that the mechanical departments of one paper would not print matter set up in another newspaper office. After further negotiation I was informed that an arrangement had been arrived at between the advertising managers and the workmen in the offices of said newspapers and that I could get a rate of $1.20 and have the advertisement issued in both papers, each paper to receive 60 cents for the four insertions, the papers themselves throwing in practically free of charge the headings and other statutory notices, which would mean 15 cents per lot per insertion.

The advertising manager of the "Edmonton Journal," says:—

I believe that the rates for municipal and legal advertising are the same for both the *Journal* and the *Bulletin*. The rate is 10 cents per agate line.

According to printers' measure, each perpendicular inch of column occupies fourteen lines measured as if the type was set without any space allowed for lines. This is the standard measurement and is the basis of calculating rates for advertising.

In setting up the tax sale advertisement according to this rate, the regular charge would be $1.26 per lot for 4 insertions, including the statutory notices and the notice required for the four following weeks.

Being asked by the treasurer of the city for a better rate, I quoted the rate $1.12 per lot, which would be the rate for the space occupied by the list of lots only, without headings and notices.

According to the rules of the Printers' Association, the workmen of one office will not print matter set up in another office, the rule being that each office or establishment must set up and print its own material.

On account of the quantity of advertisement matter required for the tax sale, the advertising managers of the *Journal* and *Bulletin* took the matter up with their employees and an arrangement was arrived at with the workmen

in each office whereby each paper should set up one-half of the advertisement including the necessary headings and notices for the 4 following weeks at the rate of $1.20 per lot—60 cents to each paper—which reduced the rate to a fraction over 6 cents per agate line per insertion.

The treasurer puts in telegraphic replies in answer to his enquiries shewing rates charged by newspapers in other cities as follows:—

Rate for municipal printing in all Toronto papers 25 cents per agate line. Ditto in Montreal papers 15 cents per agate line. In Winnipeg the charter requires only one insertion in the "Gazette." No advertisement in another newspaper is required. The legislature has fixed the charge in the "Gazette" at 25 cents per lot, and the following are stated to be the rates per agate line for legal or municipal advertising: "Free Press" (circulation 79,789) 15 cts.; "Tribune" (circulation 34,800), 8 cts.; "Telegram" (circulation 37,789), 8 cts. In Calgary the "Herald's" charge is, legal and municipal rate, 12 cts. per agate line.

In affidavits filed on the plaintiff's behalf it is stated on the information of telegrams that the "Manitoba Free Press" publishes tax sale advertisements similar to the one in question at 25 cts. per lot, and that for an advertisement of a tax sale held on June 5, 1916, published in the "Free Press" and in the "Gazette" at 25 cents per lot, containing 2,531 parcels, parcels comprising from 1 to 150 lots, the total rate per parcel did not exceed $1 per lot; and it is further stated that the "Edmonton Journal" quite recently inserted a tax sale advertisement—one insertion—for the Town of Beverley, adjacent to Edmonton, of 1,160 for $50, including the other printed matter and making, by calculation, the cost per lot about 3 cents. And it is further stated on the information of an official of the City of Calgary that quite recently, in contemplation of a proposed tax sale, the city obtained an estimate for advertising as follows: 21,000 parcels 12 cts. per line, or $168 per page, 1,400 lines to the page, total cost in one paper for 4 insertions $5,000.

The statements of the regular rates for municipal and legal advertisements charged by various papers seem to me to be practically valueless; the rate per agate line is stated but it is not stated whether the rate is for one insertion only, and if so what is the rate charged for subsequent insertions, which as a matter of common knowledge and of common sense is much less. The statements put in on behalf of the plaintiff are, I think, valu-

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able. They compare the prices which the "Journal" and the "Bulletin" have fixed with prices for exactly similar work as obtainable elsewhere, with the result that one's first impression that the prices proposed to be charged by these two newspapers are grossly exorbitant is very distinctly confirmed and established.

Can this Court interfere under these circumstances? I think it can do so. The relief asked by the plaintiff, suing on behalf of himself and all other ratepayers, is that an injunction be granted restraining the city from expending the appropriation of $40,000 which it has made for the purposes of the city's proposed tax sale and restraining the sale. I think there is no need for restraining the sale; but I think the Court has power and ought to exercise the power of enjoining the city from paying or providing for the cost of the necessary advertising on the basis of the present arrangement with the two local newspapers. What, in my opinion, ought to be done in the eventualities following upon such an injunction I shall intimate later after having stated what I think is the law applicable to the present case.

In Kerr on Injunctions, 5th ed., p. 588, where a number of cases are collected, it is said:—

> So long as they (public bodies) strictly confine themselves within the limits of their jurisdiction, and proceed in the mode which the legislature has pointed out, the Court will not interfere with them in the exercise of their discretion in carrying out their powers, *unless it be shown that they have not exercised their discretion bonâ fide.*

In *Westminster Corporation* v. *London & N.W. R. Co.*, [1905] A.C. 426 at 430, Lord Macnaghten says:—

> It is well settled that a public body invested with statutory powers such as those conferred upon the Corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably—possibly this is putting the rule too widely and that it would be correct to say rather: "If it acts obviously unreasonably, it will be deemed not to have acted *bonâ fide*. At all events if the act of the corporation, though in fact *bonâ fide*, is an act which it has been induced to do because of improper or illegal or unlawful conduct on the part of those associated with it in the act, it seems to me that whether or not the act can be said to have been done not *bonâ fide*, yet it will not be allowed to stand.

In a passage constantly quoted with approval, Brett, L.J., said:—

> I think I am entitled to say this, that my view of the power of pro-

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hibition at the present day is that the Court should not be chary of exercising it, and that whenever the legislature entrusts to any body of persons, other than to the Superior Courts, the power of imposing an obligation upon individuals, the Court ought to exercise, as widely as they can, the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament. (*R.* v. *Local Government Board*, 10 Q.B.D. 309 at 320.)

I think what is here said is not intended to apply solely to cases where the public body is exceeding its jurisdiction, but, at all events where the procedure is by way of injunction and not prohibition, the principle clearly should be acted upon in the alternative case of the body while acting within its jurisdiction, acting *malâ fide* or in an equivalent way.

It is to be noted that the contract which the two newspapers have, as I think is evident, forced upon the city is one which touches the public, *i.e.*, all the ratepayers of the city; and to such a body of the public applies, in my opinion, the rules of law imposing divers restrictions founded upon public policy for the protection of the public.

Dillon on Corporations, 5th ed., sec. 781.

I think the foregoing may be adopted as a sound exposition of the law. It is founded on numerous American authorities. Our municipal institutions and commercial methods so far as they touch the matters under consideration are more nearly like those in vogue in the United States than in England, where, nevertheless, the general principles expressed are equally recognized, though it is more difficult to find expressions in the decisions dealing so closely with the precise question now under consideration.

In view then of what I have said I am of opinion that the council acted improperly and illegally in approving of the arrangement entered into with the "Journal" and the "Bulletin" newspaper companies, and consequently in setting aside funds with the view of making payments upon the basis of that arrangement.

I think, therefore, that an injunction should go restraining the city from using any part of the appropriation of $40,000 for the purpose of paying any moneys in pursuance of the arrangement with the two newspapers.

In order to make this effective I think the injunction should also enjoin the city from paying any moneys whatever on account

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of that arrangement. On the other hand, I think in order that the proceedings already taken for the proposed tax sale may not be rendered abortive if the two newspaper companies are ready to complete the advertising for a fair remuneration and in order that they may themselves have an opportunity of shewing that what on the evidence before us appears, without hearing them, to be an exorbitant remuneration is in reality a fair remuneration, I would direct that the plaintiff add the two companies as defendants and that the city or either of the companies shall be at liberty to apply to a Judge to vacate or vary the order now made or to move for speedy hearing of the action or otherwise as they may be advised.

I would leave the costs of this motion to be dealt with on the final disposition of the action. *Injunction refused.*

MACKINNON v. ROYAL GEORGE HOTEL Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 9, 1917.

ASSIGNMENT FOR CREDITORS (§ III B—15)—*Rights of assignee —Lease—Surrendering possession—Rebate of rent.*]—Appeal by plaintiff from a portion of the judgment of Walsh, J., and a cross-appeal by defendant Cristall upon an item allowed as a rebate of rent for the period 24th to 30th April. Varied.

S. W. Field, for plaintiff.

F. Ford, K.C., and *H. A. Friedman*, for defendant.

The judgment of the Court was delivered by

IVES, J.:—In March, 1916, one Thomas W. McKernan was carrying on a hotel business in Edmonton upon premises demised to him by the defendant Cristall at an annual rental of $24,000, payable $2,000 monthly in advance. He assigned for benefit of creditors in this month to the plaintiff who is official assignee of the Edmonton district.

At the time of the assignment the term of the lease had some time to run, and the plaintiff went into possession under an arrangement with Cristall, the only particulars of which are found in the evidence of the plaintiff at the trial when examined as a witness for defendant.

Q. Do you remember what the arrangement was?

A. The only part that I remember was that I would endeavour to pay the rent *as called for by the lease*, but that Mr. Cristall wouldn't hold me per-

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sonally responsible, that there would be no personal obligation on my part. I think I asked Mr. Cristall to give me a letter to that effect and he did.

The plaintiff's claim sets up the payment of sums to Cristall at different times totalling $12,300 in which rent due April 1, $2,000, is included. The plaintiff disposed of the insolvent's assets to defendant company and had no further need of the premises after April 23, when he let defendant company into possession, they having obtained a lease from Cristall at $1,000 per month, payments to begin May 1.

There is no evidence anywhere that it was at Cristall's instance that plaintiff gave up possession on April 23. Certainly no question of rebate was discussed or arranged for. So that plaintiff is not entitled to any rebate by reason of an agreement therefor, nor under the terms of the lease. And he has entirely failed to give any evidence whatever of the mistake by which he overpaid and is now entitled to credit.

I think the appeal of the defendant Cristall should be allowed with costs and the judgment below varied accordingly.

QUEBEC BANK v. MAH WAH.

Alberta Supreme Court, Appellate Division, Scott, Stuart and Beck, JJ. February 12, 1917.

EXECUTION (§ I—11)—*Setting aside—Purchase-money judgment—Note—Land Titles Act, Alta., sec. 62, 1916, ch. 3, sec. 15.*]—Appeal from the judgment of McCarthy, J., dismissing an application by the defendant to set aside the execution issued by the plaintiff bank against the goods and chattels of the defendant. Reversed.

Sinclair, for appellant; *McGillivray*, for respondent.

The judgment of the Court was delivered by

SCOTT, J.:—The facts material to this appeal appear in the judgment of this division upon an appeal by the defendant from the judgment of Ives, J., in the action reported in 33 D.L.R. 133.

In view of the fact that the promissory note sued upon was a renewal of a note which stated upon its face that it was given for the final payment upon a certain lot of land, and that the transfer thereof was to be delivered when the note was paid, the plaintiff bank must be held to have taken the note sued upon with notice of

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the fact that it was given to secure the payment of the balance of the purchase-money under an agreement for sale of land. Such being the case I am of opinion that under sec. 62 of the Land Titles Act, as amended by ch. 3 of 1916, sec. 15, the plaintiff bank is not entitled to issue execution against the defendant upon its judgment until the necessary proceedings have been taken to obtain sale of the lands under the agreement and then only for the amount remaining unpaid upon the judgment.

Had the payee of the note obtained judgment upon it, he could not have issued execution until he had taken such proceedings, and the plaintiff bank having taken the note with notice of the circumstances, is not any better entitled to issue execution than the payee would have been. Beck, J., who delivered the judgment of the Court in the appeal from Ives, J., expressed virtually the same view when he says, at p. 135, that the plaintiff bank is under the same obligation as the payee.

I would allow the appeal, and direct that the execution be set aside, with costs to the defendant of the application in the Court below.

This appeal and the appeal from Ives, J., were heard together, and the material for both was contained in one appeal-book. In dismissing the appeal from Ives, J., the costs of that appeal were given to the plaintiff. That order as to costs should not have been made. As each party succeeded in one of the appeals, the costs should be divided. I would therefore direct that there be no costs of either appeal except that the defendant have one half the costs of the appeal-book. If the plaintiff has already obtained judgment for the costs awarded him, the judgment therefore should be set aside, and if they have already been paid by the defendant the plaintiff should refund them to him.

I see no reason why the necessary proceedings to obtain a sale of the land should not be taken in this action.

Appeal allowed.

ANNING v. ANNING. ONT.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Middleton and Masten, JJ. December 29, 1916.

HUSBAND AND WIFE (§ II G—100)—*Conveyances between—Trust—Delivery of deed—Registration.*]—Appeal by plaintiff from the judgment of Sutherland, J., in an issue as to the ownership of a house and land. Affirmed.

Gideon Grant, for appellants.

W. J. McWhinney, K.C., for defendants, respondents.

MIDDLETON, J.:—This case has given me anxiety, as I have the misfortune to differ from my Lord the Chief Justice. Were it not for his views, I should have regarded the case as free from all serious difficulty—and I should have been content simply to express my concurrence with the judgment appealed from.

On the 9th November, 1900, the land was bought by and conveyed to Charles Henry Anning, and no one has contended that at that time his wife had any claim, legal or equitable, thereto.

On the 18th October, 1901, Anning conveyed the land to his wife, "in consideration of natural love and affection and the sum of one dollar."

On the same day, Anning, for the like consideration, conveyed certain chattels, being all the furniture in the house, to his wife.

Each instrument recites the intention to confer an absolute title upon the wife.

Each instrument on its face purports to be "signed, sealed, and delivered," and is witnessed by Mr. Grant, an experienced solicitor, and on each is endorsed an affidavit by him that the deed was "duly signed, sealed, and executed."

The deed was registered on the 21st October, 1901, and the bill of sale was duly filed.

The reason assigned by Anning for these conveyances is one that shews that the transaction was intended to be and was a real one.

He was then in poor health, and expected an early demise. His wife was much younger and in good health. She had been a good wife to him, and had taken a large part in the conduct of his business. There had been trouble in the family over some difficulty in securing a bond for administration when a son-in-law

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died, and Anning determined to place the property in his wife's name so that she would have no trouble in the event of his death. The gift to the wife was, I think, intended to be an actual gift, immediately operative, and without any condition. The plaintiff now says that this was not the case, but that the arrangement was that the property was to become the wife's only in the event of her surviving him.

I find this statement incredible, because the plaintiff says that this intention was communicated to his solicitor at the time. Mr. Grant would never have drawn the documents as he did without first satisfying himself that they expressed the real intention of the parties.

The truth is that the property was intended to be the wife's, and that the event which happened was not expected or contemplated; as the plaintiff says, "But unfortunately I lived longer than her."

An attempt is now made to suggest that the deeds were not delivered. To establish that a deed which has been registered by the grantor or with his full knowledge and approval was not delivered ought to be an impossible task. A deed cannot be registered unless and until it is a complete and operative instrument.

In this case, in December, 1904, a mortgage was made by the wife with the knowledge and consent of the husband—this could only have been effectual if the deed was delivered, and this forms an additional reason for upholding it.

The husband seems to have fallen into error, thinking that the only conveyance was the duplicate of the deed, which he says he retained in his possession, and that so long as he retained it he retained some dominion over the property. The recorded instrument ceased to be in his custody or control when it was registered.

It is said that the production of the duplicate deed from the tin box in which it was kept, for the purpose of having the mortgage of 1904 prepared, amounted to a conditional delivery, "conditioned on the wife's surviving her husband." Such a delivery, as was no doubt well known to the solicitor preparing the deed, was quite nugatory. The deed, unless executed in such form as to amount to a testamentary instrument, would be void:

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Foundling Hospital Governors and Guardians v. *Crane*, [1911] 2 K.B. 367.

The next suggestion is that the wife held as trustee for her husband. This is clearly contrary to the facts. She was made the beneficial owner of the property—the idea of a trust never entered the mind of either husband or wife.

Then it is said that the transaction was void for improvidence. No such case was made upon the evidence. Nor was it suggested by counsel upon the argument. The whole trouble arises from the fact that this old man has now married a second time, and regrets the conveyance to his first wife, and so seeks to avoid it by any means, fair or foul.

The case would, I think, fail, even if full credit were given to the plaintiff, for lack of any corroboration—but it also fails, so far as I am concerned, from the fact that I do not credit the story told. It is asked, why not believe the plaintiff? I have already pointed out that in the vital matter his story is not only in conflict with the documents but also in conflict with the evidence of his solicitor and with what is probable, having regard to the circumstances. No solicitor would have prepared the deeds in question on the instructions sworn to.

But another matter indicates the character of the man. The deed is not produced and is not satisfactorily accounted for—it may be lost or it may be destroyed. As already said, and as stated by the plaintiff in his reasons, the plaintiff was not used to the system of registration, and so thought the document in his control of great importance. If he destroyed it, the property was his.

When a claim was made by the children, based on the wife's title, he consulted a solicitor, and the answer made to their proposition that he should have the rents for life, but should acknowledge the title of his children to the remainder, so that any question of the Statute of Limitations might be avoided, was: "Your clients appear to be in error, as the property never belonged to Mrs. Anning. We have the deeds in our custody and find that the house was conveyed to Mr. Anning on 8th November, 1900." Was it honest to conceal the deed to the wife at that time?

There are other matters, but this is enough to shew that the plaintiff's evidence must be received with caution.

The appeal should be dismissed with costs.

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RIDDELL, J., concurred.

MASTEN, J., agreed in the result.

MEREDITH, C.J.C.P., read a dissenting judgment, in which he examined the facts and law with great care. His conclusion was, that the story of the plaintiff Charles Henry Anning was true; that between him and his wife the expressed agreement was that the deed of the land in question from him to her was not to take effect unless and until she survived him; that, upon the authority of *Gudgen* v. *Besset* (1856), 6 El. & Bl. 986, 119 E.R. 1131, she having died before him, the deed never became operative as between them; and that her heirs at law had no higher right than she had.

The learned Chief Justice was of opinion that the appeal should be allowed and the issue found in favour of the plaintiff Charles Henry Anning. *Appeal dismissed.*

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Re ESTATE OF LEVOSE BENT.

Nova Scotia Supreme Court, Russell and Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. January 9, 1917.

EXECUTORS AND ADMINISTRATORS (§ IV C—100)—*Settlement of estate—Release—Validity.*]—Appeal from the judgment of Pelton, Co.C.J., for District No. 3, *ex officio* Judge of the Probate Court for the County of Annapolis, dismissing with costs an appeal from a decree of the registrar of the Court requiring the appellants to proceed with the settlement of the estate. Affirmed.

H. Mellish, K.C., and *H. C. Morse*, for appellants.

C. R. Chipman, for respondent.

The judgment of the Court was delivered by

CHISHOLM, J.:—On April 23, 1887, one Levose Bent made his last will and testament, and during the same year departed this life. In his will, after making certain pecuniary bequests, and devising certain parcels of his real estate, he disposes of the residue of his property by the following clause:—

> The balance of my estate, real and personal, I will and bequeath to my brothers, Ambrose and Edmund, they to have the use of the same so long as they live, then to go to the heirs of my brothers, share and share alike.

He appointed his said brothers, Ambrose and Edmund, to be the executors of his will. Besides his brothers Ambrose and Edmund, he had three brothers who died before 1887, namely:—George, who left two children, Charles and Mary Ellen; William,

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who had no children, and Seth, two of whose children were living at the time of the testator's death.

At the time of the testator's death, Edmund had 3 children, all of whom are now living; and Ambrose had 1 child, Malcolm, who died in 1897. Ambrose himself died in 1902, and Edmund, the surviving executor of the testator, died in 1914, leaving 3 children, as above stated, 2 of whom were appointed executors under his will and who took up the duties of their office.

The will of Levose Bent appears to have been proved in solemn form, but the estate has never been closed. In January, 1916, William W. Bent, one of the children of the said Seth Bent, presented a petition to the Probate Court asking for a citation requiring the executors of Edmund Bent, the last surviving executor under the will of the said Levose Bent, to settle the estate of the said Levose Bent; and on February 12, 1916, the registrar of probate issued a citation calling upon them to shew cause why they should not proceed with the settlement of the said estate.

It may be here mentioned that by an assignment or release dated October 25, 1890, the petitioner W. W. Bent, in consideration of the sum of $2,000, released and quitted claim to Edmund Bent and Ambrose Bent (the testator's executors) all his claims against them under and by virtue of the testator's last will and testament. It was after the execution of this document, to wit, on September 14, 1897, that Malcolm Bent, the son of Ambrose Bent, died, as the registrar finds, unmarried, intestate, and without leaving lawful issue. The position taken by the executors of Edmund Bent on the return of the citation was that the petitioner W. W. Bent had given a complete discharge of all claims which he had under the will in the estate of Levose Bent; and that by reason thereof he was not entitled to the citation as he was not, when he applied for the citation, one who had an interest in the estate. The answer of W. W. Bent to that contention was that the release was not effectual to divest him of all interest in the estate. The registrar decided that the release was not good because Edmund Bent and Ambrose Bent, to whom it was made, were, under the circumstances of this case, disqualified, on account of being trustees, from purchasing the interest of the petitioner. From the decision of the registrar the executors of Edmund Bent appealed to the Judge *ex officio* of the Court of Probate for

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the county of Annapolis. The Judge was unable to agree with the registrar's view that the release is void because of a fiduciary relation existing between the releasor and releasees; but he pointed out the other ground upon which the petitioner might be assumed, for the purpose of ordering a settlement of the estate, to be a party interested in the estate. The release was executed in the lifetime of Malcolm Bent, and it may be that under a proper construction of the residuary clause of the will, an interest in the estate not contemplated at the time by the parties to the release may have come to the petitioner by reason of Malcolm's death. The general words of a release are always construed to be limited to the things which were specially in the contemplation of the parties when the release was given. The Judge dismissed with costs the appeal from the registrar and directed the executors of Edmund Bent to proceed to the settlement of the estate. From his decision the present appeal is taken.

I think the executors should have taken the course directed by the Judge below. By doing so, all questions in controversy—the effect of the release—the interest given by the clause in the will dealing with the residue of the estate—and the interest, if any, which the petitioner now has in the estate—could have been inquired into and determined in the Probate Court. All the parties and all the disputed questions would be before the Court; and none of the parties could be prejudiced by that course. Instead of doing so, the executors have appealed and the Court of Appeal is asked to determine that the petitioner is not a person interested in the estate, and, likewise, to construe a portion of the will without all the parties interested in that question being represented. While all the parties to the release are before the Court, I am of opinion that the Court should not on an appeal from a preliminary proceeding below undertake to determine the effect of the release. The circumstances under which the release was given, the question whether or not the executors made such disclosure as the law requires of executors who purchase from legatees, and other matters of fact which might have to be established, should be open to the parties and fully investigated if any of the parties desired; and that can be done only on the settlement of the estate.

For these reasons I think the settlement of the estate should be proceeded with, as directed by the Judge below, all the ques-

tions in controversy being left open for determination by the Judge on such settlement.

The appeal will be dismissed with costs. *Appeal dismissed.*

WILSON v. ZELLER.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Lamont and Brown, JJ. March 10, 1917.

VENDOR AND PURCHASER (§ III—35)—*Assignment of agreement—Right to payments—Quit claim deed—Assignor's right to sue.*]—Appeal by defendant from a judgment for the plaintiff assignor of an agreement for the sale of land. Affirmed.

S. A. Hutcheson, K.C., for appellant; *D. Buckles*, for defendant.

NEWLANDS, J.:—On June 14, 1910, I. B. Miller, by agreement of sale, sold to Winfield Zeller the east half-33-18-16-W3rd for $4,500, payable $500 cash and the balance in half crop payments.

On April 27, 1911, Winfield Zeller assigned his interest in said agreement of sale to the plaintiff in consideration of the sum of $5,600, payable $1,000 down, $1,000 on August 27, 1911, and $3,600 on the 1st January, 1912. He also agreed to assume and make the payments under the original agreement of sale. On the 31st August, 1911, the plaintiff assigned all his interest under the last mentioned assignment to the defendant in consideration of $2,000, payable $1,000 down and $1,999 on October 1, 1912. Defendant also agreed to assume and make all payments to Miller under the original agreement of sale. On June 14, 1915, the plaintiff quit-claimed to Winfield Zeller all his interest in the above half-section.

The action was brought by plaintiff to recover from A. J. Zeller, the defendant, the sum of $1,999 he agreed to pay him under the last mentioned assignment.

The defence is that, by the quit-claim deed, the plaintiff assigned to Winfield Zeller the said $1,999. The trial Judge held that it did not contain apt words to assign said money and gave judgment for plaintiff.

The evidence at the trial shews that plaintiff gave the quit-claim deed to Winfield Zeller in settlement of what he owed him under the assignment from Winfield Zeller to plaintiff.

Now, if defendant had to pay to Winfield Zeller the amount which plaintiff agreed to pay him, and if the quit-claim deed was given to cover these amounts, then defendant has no right to set up the defence he has, because, having agreed with plaintiff to pay

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Winfield Zeller, he would be liable to plaintiff for all amounts plaintiff would have to pay owing to his, defendant's, default. The defendant, by his own statement, admits that he agreed to pay Winfield Zeller what plaintiff owes him; he also agreed to pay plaintiff the $1,999; the quit-claim deed was given—according to evidence put in on behalf of defendant—in settlement of what plaintiff, and, under his agreement, defendant, owed Winfield Zeller, and therefore it follows that defendant still owes plaintiff the amount sued for, either under promise to pay contained in the assignment or because of his default in not paying Winfield Zeller what plaintiff owed him. The appeal should be dismissed with costs.

HAULTAIN, C.J., and BROWN, J., concurred with NEWLANDS, J.

LAMONT, J.:—The only defence relied on is: that the plaintiff is not entitled because he gave a quit-claim deed to W. W. Zeller of all his interest in the land. Is this defence open to the defendant? W. W. Zeller, although at the trial, has not been made a party to the action.

It may be that, as between the plaintiff and W. W. Zeller, the latter is entitled to the $2,000; as to that there is no evidence. But, even so, I do not see how that can help the defendant. Even if the plaintiff had expressly assigned to W. W. Zeller the $2,000 which the defendant agreed to pay, the defendant cannot object that the action is brought in the name of the assignor.

This point was considered in *Covert* v. *Janzen*, 1 S.L.R. 429, where WETMORE, C.J., at p. 434, said:—

> It is clear, however, as before stated, that an action could not be brought in the common law Courts in the name of the assignee, it having to be brought in the name of the original creditor, and no doubt such creditor, if he recovered, would hold the proceeds for the benefit of the assignee, and no doubt equity in such case would enforce the rights of the assignee against the original creditor. Sec. 1 of ch. 41, C.O. 1898, provides for the assignment of choses in action and covers the question I am now considering, and that provides that the assignee of a chose in action "may bring an action thereon in his own name as the party might to whom the debt was originally owing or to whom the right of action originally arose, or he may proceed in respect of the same as though this ordinance had not been passed." It will be seen therefore that this ordinance does not interfere at all with the right to have an action brought in the name of the original creditor. I am, therefore, of opinion that there is nothing in this objection.

The provision in our present statute is the same as the ordinance referred to.

I am, therefore, of opinion that the defence set up cannot prevail. *Appeal dismissed.*

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FIRST NATIONAL BANK v. CUDMORE and LAW UNION & ROCK INSURANCE CO. LTD. (Claimant) Respondent, and FIRST NATIONAL BANK et al., Appellants.

Saskatchewan Supreme Court, Haultain, C.J., and Lamont, Brown and Elwood, JJ. March 10, 1917.

1. LANDLORD AND TENANT (§II D—30)—SURRENDER BY OPERATION OF LAW. The acceptance of a new lease operates by law as a surrender of the old term held under an attornment clause in a mortgage.

2. LANDLORD AND TENANT (§ I—1)—ATTORNMENT CLAUSE IN MORTGAGE—ESTOPPEL—DISTRESS. An attornment clause in a mortgage under the Land Titles Act (Sask.) does not create the relationship of landlord and tenant so as to entitle the mortgagee to the protection of the statute of 8 Anne, ch. 14, sec. 1. The clause creates by estoppel a personal right of the mortgagee against the mortgagor, not against a stranger.

[*Hyde* v. *Chapin Co.*, 26 D.L.R. 381, followed.]

Statement.

APPEAL from the judgment of a Judge in Chambers reversing the order of the Local Master in barring a claimant in an interpleader proceeding. Reversed.

T. D. Brown, K.C., for appellant; *D. H. Laird*, for respondent.

Haultain, C.J.

HAULTAIN, C.J.:—I agree with my brother Elwood that this appeal should be allowed for the reasons stated in his judgment. While this disposes of the appeal, it has been thought desirable to also dispose of the other important question raised. That question is, whether, under the attornment clause in the claimant's mortgage, the mortgagee can claim the protection of the Statute of 8 Anne, ch. 14, sec. 1?

The attornment clause in question is as follows:—

And for the purpose of better securing the punctual payment of the interest on the said principal sum, I, the mortgagor, do hereby attorn tenant to the mortgagees for the said lands at a yearly rental equivalent to the annual interest secured hereby to be paid yearly on each day appointed for the payment of interest, the legal relation of landlord and tenant being hereby constituted between the mortgagees and the mortgagor. Provided also that the mortgagees may at any time after default in payment hereunder enter into and upon the said lands or any part thereof, and determine the tenancy hereby created without giving me any notice to quit; but it is agreed that neither the existence of this clause, nor anything done by virtue thereof, shall render the mortgagees mortgagees in possession so as to be accountable for any moneys except those actually received.

And, further, that if I shall make default in payment of any part of the said principal or interest at any date or time hereinbefore limited for the payment thereof, it shall and may be lawful for, and I do hereby grant full power, right and license to the mortgagees to enter, seize and distrain upon the said lands or any part thereof, and by distress warrant to recover by way of rent reserved as in the case of demise of the said lands as much of such principal and interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.

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FIRST NATIONAL BANK v. CUDMORE.

Haultain, C.J.

The mortgage is, apart from other special provisions, a "mortgage" made and registered under the Land Titles Act, R.S.S. ch. 41.

On this point I agree with the decision of the Alberta Court in *Hyde* v. *Chapin* (1916), 26 D.L.R. 381, that an attornment clause in a "mortgage" under the Land Titles Act though it may create contractual rights between the parties does not create the relation of landlord and tenant so as to give the mortgagee the protection of the Statute of 8 Anne, ch. 14, sec. 1. The same view was held by the New Zealand Court in *Jellicoe* v. *Wellington Loan Co.*, 4 N.Z.L.R. 330. See also *Tadman* v. *Henman*, [1893] 2 Q.B. 168.

The far-reaching effect of a decision on this point may, perhaps, be my justification for its lengthy consideration.

The decisions of the English Courts must be distinguished at the very outset on account of the difference between a mortgage deed and a "mortgage" under the Land Titles Act. Under a mortgage deed, the legal title is vested in the mortgagee and the mortgagor remains in possession of the mortgaged premises either by sufferance of or agreement with the mortgagee, and, in that case, "the mortgagor is tenant within the strictest definition of that word:" *Partridge* v. *Bere* (1822), 5 B. & Ald. 604.

Although it is not quite clear from the authorities in what position the mortgagor stands in respect of the mortgagee, during the mortgagor's actual possession or receipt of the rents, it seems, however, to be established that he will be considered as tenant for a term or at will, or at sufferance or as a trespasser, according to circumstances: Coote on Mortg. (2nd ed.), 389.

See *Hitchman* v. *Walton*, 4 M. & W. 409.

In England, prior to the Bills of Sales Acts 1878 and 1882, attornment clauses in mortgage deeds, when valid, gave the same right of distress, including that of seizing the goods of third parties on the land, as though the tenancy was an ordinary tenancy. *Kearsley* v. *Phillips* (1883), 11 Q.B.D. 621; and a tenancy created by attornment in a mortgage deed came within the provisions of the Statute of Anne: *Yates* v. *Ratledge* (1860), 5 H. & N. 249.

In this case the mortgagees *who were clothed with the legal estate redemised* the premises to the mortgagors who attorned as tenant to them at a certain rent. See also *Brown* v. *Metropolitan Counties Life A. Society* (1859), 1 El. & El. 832, 28 L.J.Q.B. 236.

In connection with the foregoing cases, see also *Hobbs* v.

Ontario Loan and Debenture Co. (1890), 18 Can. S.C.R. 483; per Strong, J., at 492, 493; *Trust & Loan Co.* v. *Lawrason*, 6 A.R. (Ont.) 286; 10 Can. S.C.R. 679. The tenancy created by a mortgage deed with an attornment clause is a real tenancy, because the legal ownership is in the mortgagee and *the mortgagor is in possession of the land by redemise* and the rent is incident to the reversion. All the incidents of a real tenancy are there.

In the present case, all these elements are lacking. The legal ownership is in the mortgagor, there is no foundation for a redemise, and the "rent" is not incident to the reversion.

It is a maxim in law that the rent must be reserved to him from whom the state of the land moveth and not to a stranger. Co. Litt. 143 (*b*).

If the lord upon the donation had reserved to himself any gabel or rent and had afterwards granted the rent to a stranger though the tenant had attorned or consented to the grant, yet the stranger could not distrain for the rent; for as the power of seizure, so the distress that was substituted in its place belong only to him of whom the lands were held and in whom the right of reverter was when the feudal donation was spent: Bacon Abr., Rent, 7th ed., by Gwillim & Dodd, p. 2.

I shall now consider a number of cases cited on behalf of the respondent in support of the opposite conclusion.

Jolly v. *Arbuthnot* (1859), 4 DeG. & J. 224; 45 E.R. 87, is a case where a mortgage deed was made to the mortgagor and a receivership deed was made contemporaneously by which the mortgagor and mortgagee appointed a receiver and constituted him their agent and attorney to receive the rents of the mortgaged property and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver. On the mortgagor being found bankrupt it was held that, as against the assignees in bankruptcy, the relation of landlord and tenant had been created between the receiver and mortgagor, and that the receiver was entitled to distrain and take the goods that had belonged to the mortgagor on the mortgaged premises.

The fact that the mortgagee was a party to the deed containing the attornment clause distinguishes the facts of this case from the case of a mere attornment to a stranger. It would also appear that a private receiver may distrain when furnished with express authority: *Ward* v. *Shew* (1833), 9 Bing. 608 (131 E.R. 742) Lord Chelmsford, L.C., in giving judgment, in *Jolly* v. *Arbuthnot*, at 237 (45 E.R. 92), said:—

It appears to me, however, that the circumstance of the truth of the case

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appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done. If attornment to a mortgagee would be good to create a tenancy in the mortgagor (which seems to be provided for by the 11th Geo. II., ch. 19), why should not an attornment to a third person, with the consent of the mortgagee, operate either to create a tenancy or to estop all parties from denying that such a tenancy exists? The statement in the deed of the character with which Aplin was to be clothed in order to carry out the object of the parties, and the proof which it affords of his having no previous title to the land, appears to me to furnish no objection to the validity of the distress in question.

On the ground of estoppel alone the assignees in bankruptcy were bound by the agreement of their assignor, the bankrupt.

In *Dancer* v. *Hastings*, 4 Bing 2 (130 E.R. 667), a demise from a receiver was held *as against the lessee* to be a good lease to entitle the lessor to distrain and to estop the lessee from pleading non-tenant. In this case, the receiver was a receiver in Chancery and had a right to distrain: *Bennet* v. *Robins* (1832), 5 Carr & P. 379; *Pitt* v. *Snowden* (1752), 3 Atk. 750; see also *Ward* v. *Shew*, *supra*. A receiver appointed by the Court also has power to let for any term not exceeding 3 years: *Shuff* v. *Holdaway* (1863), mentioned in Daniell's Ch. Pr., 7th ed., vol. 2, p. 1443.

In the case of *Morton* v. *Woods* (1869), L.R. 3 Q.B. 658, a mortgagor in possession, having already mortgaged in fee, executed a second mortgage in fee to the defendants, and attorned tenant to the defendants at a certain rent. The defendants distrained for a year's rent. Shortly afterwards, the mortgagor was adjudicated a bankrupt and the plaintiffs were appointed creditors' assignees. The plaintiffs paid the defendants the rent and costs of distress under protest, and a question was stated for the opinion of the Court as to whether the distress was legal and valid. It was held that the parties having agreed that the relation of landlord and tenant should be established, the mortgagor was estopped from setting up that the defendants had no legal reversion. Here, again, the decision goes no further than to declare a tenancy by estoppel between the parties and those claiming under them.

In *Ex parte Punnett, Re Kitchin* (1880), 16 Ch.D. 226, the right of a second mortgagee to distrain under an attornment clause was upheld as against the trustee in bankruptcy. This case, again, goes no further than to decide that, notwithstanding the legal estate is outstanding in a prior mortgagee, a tenancy by

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estoppel or *quasi* estoppel can be created between the second mortgagee and mortgagor.

The main point for decision in *Re Threlfall* (1880), 16 Ch.D. 274, was whether a tenancy created by an attornment clause in a mortgage deed was a tenancy from year to year or a tenancy at will. The right of the mortgagee to distrain against the trustee in bankruptcy under the Bankruptcy Act 1869, sec. 34, was upheld.

In *Ex parte Voisey* (1882), 21 Ch.D. 442, the principal point for decision was whether the attornment clause in a mortgage deed was valid or merely a contrivance to defeat the law in bankruptcy. The attornment clause and the distress levied under it were held valid as against the trustee in bankruptcy. Sir George Jessel, M.R., at p. 456, says:—

> In this case we have an attornment to the legal owner by deed executed by the tenant in posession and delivered to the legal owner—very good evidence of a tenancy—evidence therefore of an agreement for a tenancy, and as was said in *Ex parte Punnett*, 16 Ch.D. 226, that is an estoppel *in pais* which would prevent the tenant from denying the tenancy.

In *Kearsley* v. *Philips* (1883), 11 Q.B.D. 621, a mortgage was created by way of demise for a term of years, and the mortgagor attorned and became tenant to the mortgagee at a certain rent. The mortgagor let the mortgaged premises to one King, who assigned his goods upon the premises to the plaintiff by a registered bill of sale. The mortgagees distrained under the attornment clause on goods assigned by King to the plaintiff. It was held that the distress was lawful. The cases of *Jolly* v. *Arbuthnot* and *Morton* v. *Woods*, *supra*, were cited by Lindley, L.J., in support of this finding, but Fry, L.J., at p. 626, says:—

> The question as to the effect of an attornment is in truth immaterial; the real point is whether by the so-called attornment clause the defendants redemised the premises to James Kearsley: I am of opinion that they did. But apart from that point the plaintiff's counsel have failed to satisfy me that in the case of a mere attornment the right to distrain a stranger's goods does not exist.

Nearly all the foregoing cases, as will be seen, deal with the right of the mortgagee under an attornment clause as against the trustee in bankruptcy. Apart from the limitation of the distress to one year's rent, the Bankruptcy Acts, from the earliest times down to the present, left the right of distress for rent intact, and from 1869 at least that right was reserved "to a landlord *or other person* to whom any rent is due from the bankrupt." In addition

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to that broad reservation, the doctrine of estoppel applies to the trustee in bankruptcy to the same extent as it does to the mortgagor.

From the foregoing, I come to the conclusion that the attornment clause in question cannot create a real tenancy, as in the case of a mortgage deed with a valid attornment clause in which case a tenancy is created, provided the true effect of the deed is to create such a tenancy. As Fry, L.J., said in *Kearsley* v. *Philips*, *supra*, which decided that an actual tenancy was created *by redemise*,—

> The question as to the effect of an attornment is in truth immaterial; the real point is whether by the so-called attornment clause, the defendants redemised the premises to James Kearsley.

As between the parties, this clause cannot do more than to create the relationship of landlord and tenant by estoppel. The mortgagor, or those claiming under him, must not be allowed to deny his deed. In other words, the deed must be truly interpreted, and effect must be given to that interpretation as between the parties. In that event it is only binding between the parties and their privies. It was argued by counsel for the respondent that an execution creditor is a privy, but I can find no authority for the statement, while *Richards* v. *Jenkins* (1887), 18 Q.B.D. 451, is a direct authority to the contrary. The estoppel should not be binding on execution creditors in any event, on the broad principle that a party should not be allowed by his own private instrument to defeat the object of an Act of Parliament to the prejudice of others who were not parties to the deed (Everest & Strode, p. 225).

The estoppel in this case is only an estoppel by deed and not an estoppel *in pais*, as in the cases of ***Ex parte Punnett***, *Ex parte Voisey*, *Morton* v. *Woods*, *Dancer* v. *Hastings* and other cases already referred to.

The true principle of this estoppel (*in pais*) between a landlord and tenant is, that a tenant while in possession is estopped from disputing that, at the time *when he received possession*, the landlord from whom he received it had a good title to the premises. Two conditions are essential to the estoppel: first, possession: secondly, permission: Everest & Strode, 268-9; *Cook* v. *Whellock* (1890), 24 Q.B.D. 658 at 661.

This was the principle underlying the decision in *Dancer* v. *Hastings, supra* (4 Bing. 2, 130 E.R. 667), where the tenant *received possession* from the receiver in Chancery. The same idea is expressed in *Morton* v. *Woods, supra*, where it was held that the mortgagor *had received possession* from the mortgagee and entered on the premises and, therefore, was estopped from denying that the legal estate was in the landlord (per Cockburn, C. J., at p. 668, and Lush, J., at p. 671).

This distinction, however, though interesting, is not material, as an estoppel *in pais* only extends to persons claiming possession under the tenant (*Jadman* v. *Henman*, [1893] 2 Q.B. 168).

In any event, where the person claiming as landlord is not the person by whom the tenant was let into possession of the premises, evidence may be received to shew that the relation of landlord and tenant does not in fact exist (13 Hals. p. 404; *Gregory* v. *Doidge*, 3 Bing. 474).

While a lease may be created by estoppel when the lessor has nothing in the law, it is only effective against the person estopped, see note (p) at p. 375, 13 Hals.

The clause in question, therefore, while it uses certain words "can have no effect at all upon the reality of the circumstances." Per Brett, L.J., in *Simm* v. *Anglo-American Telegraph Co.*, 5 Q.B.D. 188, at 205. It only creates a personal right in the mortgagor to enforce the clause, and a personal liability on the mortgagee to have the clause enforced. It does not make a "stranger" a landlord, or make what is not rent, rent.

It was also argued on behalf of the respondent that there has been express recognition of the mortgagee's right of distraint by several territorial ordinances and provincial statutes.

Ordinance No. 9 of 1884 enacted that, after January 1, 1885, "the right of mortgagees to distrain for interest due upon mortgages shall be limited to the goods and chattels of the mortgagor only, and as to such goods and chattels, only such as are not exempt from seizure under execution."

The "right of mortgagees to distrain for arrears of interest" must refer to the proviso in the short form of deed of mortgage in the schedule to Ord. No. 1 of 1881, "An Ordinance respecting 'Short Forms of Indenture." The short form of the proviso is, "provided that the mortgagor may distrain for arrears of interest," and the extended form is identical with the form in the Ontario

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Act, which was under consideration in *Trust & Loan Co.* v. *Lawrason*, *supra* (6 A.R. Ont. 286). In that case, the form in question was held not to create a tenancy, and the distress provided for was not to be for rent, but for interest to be recovered in the same way as rent.

Ordinance No. 16 of 1898, sec. 1, enacted:—

5. The right of a mortgagee of land or his assigns to distrain for interest in arrear or principal due upon a mortgage shall notwithstanding anything stated to the contrary in the mortgage or in any agreement relating to the same be limited to the goods and chattels of the mortgagor or his assigns and as to such goods and chattels to such only as are not exempt from seizure under execution: Sec. 5 of ch. 34 of C.O. 1898.

And the same provision is contained in our statute book to-day: (R.S.S. 1909, ch. 51, sec. 5).

I do not see how the use of the expression "the right of a mortgagee to distrain" can be taken as conferring any greater rights than he actually had at the time. The legislature can only be taken as saying to mortgagees, "Whatever rights you may have by law or by contract shall hereafter be limited." The principles of interpretation laid down in secs. 18 and 19 of the Interpretation Act (R.S.S. 1909, ch. 1), should apply.

For the foregoing reasons, I think the appellants are also entitled to succeed on their second ground of appeal.

Brown, J.

BROWN, J., concurred with HAULTAIN, C.J.

Elwood, J.

ELWOOD, J.:—The sheriff of the judicial district of Moose Jaw, under executions in his hands directed against the goods of one E. J. Cudmore, caused to be seized on August 3, 1915, certain grain. The claimant lodged a claim with the sheriff to the sum of $1,055 out of the proceeds of the grain so seized in priority to execution creditors, on the ground that Cudmore was a tenant of the claimant of the property upon which the grain was seized, under a lease in writing dated March 30, 1915, under which Cudmore obliged himself to pay $1,055 rent on September 1, 1915. Apparently this claim of the claimant's was disputed, and the Local Master at Moose Jaw made an order barring the claim without prejudice to any other claim claimant might have.

The claimant had, prior to this order barring the claim and while the above interpleader proceedings were pending, lodged with the sheriff a further claim alternatively for the sum of $504, being, as was alleged, one year's arrears of rent due January 1, 1915, under an attornment clause in a mortgage made by Cudmore

in favour of the claimant upon the land upon which the seizure was made. Interpleader proceedings were had under this last claim, and the Local Master at Moose Jaw barred the claim of the claimant. The claimant thereupon appealed to a Judge in Chambers, who allowed the appeal. From the latter judgment this appeal is taken.

It was contended on behalf of the appellant that by granting to Cudmore the lease of March 30, 1915, there was a surrender by operation of law of whatever term was covered by the attornment clause contained in the mortgage.

In *Dodd* v. *Acklom*, 6 Mann & G., 672 at 679, Tindal, C.J., says, as follows:—

By the old law, before the Statute of Frauds, if a lessee took a new lease from the lessor it would operate as a surrender of the former term, although the second lease were for a shorter period than the first, or were by parol; and the reason is, that the lessee, by taking the second lease, affirms that the lessor is able to make such lease.

In *Lyon* v. *Reed*, 13 M. & W. 285, at 306, Parke, B., is reported as follows:—

In order to ascertain how far those two cases can be relied on as authorities, we must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor.

It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender.

In *Nickells* v. *Atherstone* (1847) 10 Q.B., 944 (116 E.R. 358), Lord Denman, C.J., at p. 948, says as follows:—

The Judge who tried the case held that these facts constituted a surrender by operation of law, and, therefore, a defence against the plaintiff's claim for

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rent. The correctness of that holding has been brought into question before us in consequence of the opinion expressed by the Court of Exchequer in *Lyon* v. *Reed;* but we are of opinion that it is correct. If the expression "surrender by operation of law" be properly "applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued," it appears to us to be properly applied to the present.

And, further down on the same page, the following:—

Indeed the notoriety is essentially greater than that which accompanies *a parol redemise between the same landlord and tenant, which is a clear surrender by operation of law.*

It seems to me that applying the principles laid down in the above cases to the present case must lead to the conclusion that there was in this case a surrender by operation of law when Cudmore accepted from the claimant the lease of March 30, 1915. It seems to me that the claimant, to quote what was said in *Nickells* v. *Atherstone, supra,* "has been party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued."

It was contended on behalf of the respondents that we had not before us the lease of March 30, 1916, nor have we before us the grounds upon which the claim under that lease was barred, and that there could not be a surrender by operation of law if that lease were a void one. It is quite true that we have not before us the lease of March 30, 1915, but we have before us the letter of claimant's solicitors to the sheriff of November 19, 1915, and in that letter the claimant's solicitors state that Cudmore is a tenant of the property from the claimant under a lease in writing dated March 30, 1915, by which Cudmore obliged himself to pay $1,055, which rent became due on September 1, 1915. The seizure by the sheriff was of August 3, 1915; therefore there was at the time of the seizure no rent due, and, therefore, the claimant could not succeed under the Statute of Anne, and one can very well conclude that was the cause of the claim being barred.

In any event, the evidence being as above, and there being apparent a ground upon which the claim under the lease of March 30 could properly be barred and yet the lease be a valid one, I am of opinion that the onus was on the claimant to show that the lease was not one which would have the effect of a surrender by operation of law.

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Having come to the above conclusion, the result must be that, in my opinion, the appeal should be allowed and the order of the Local Master barring the claim be restored.

I have had an opportunity of perusing the very exhaustive judgment of the Chief Justice on the other point raised in this appeal, and I concur in that judgment.

LAMONT, J.:—I concur, in my opinion the taking of a lease operated to extinguish any relation of landlord and tenant existing under the prior attornment clause. *Appeal allowed.*

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Judicial Committee of the Privy Council, The Lord Chancellor, Viscount Haldane, Lord Dunedin, Lord Parker of Waddington and Sir Arthur Channel. January 25, 1917.

1. DAMAGES (§ III L—240)—EXPROPRIATION—COMPENSATION FOR LANDS COMPULSORILY TAKEN.

The possibility of an added utility for an expropriated property due to existing possibilities of development is, subject to limits, a right and proper subject for consideration in awarding compensation on expropriation; the value to be ascertained is the value to the seller of the property at the time of the expropriation, with all its existing advantages and all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired.

[*Cedars Rapids Mfg. Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569; *Sidney* v. *North Eastern R. Co.*, [1914] 3 K.B. 629; *Lucas* v. *Chesterfield Gas*, [1909] 1 K.B. 16, followed.

2. ARBITRATION (§ III—17)—INVALIDITY OF AWARD—POWER TO REMIT.

Under a statute making the award of arbitrators final and without appeal, the arbitrators' findings of fact and value are not free from challenge if they have exceeded their jurisdiction, as by assessing the value of the wrong thing.

Statement.

Appeal from the judgment of the Quebec Court of King's Bench, Appeal Side, 25 Que. K.B. 106. Affirmed.

Gore-Browne, K.C., *G. G. Stuart*, K.C. (of the Canadian Bar), for appellants.

Sir John Simon, K.C., *Lapointe*, K.C. (of the Canadian Bar), for respondents.

The judgment of the Board was delivered by the

Lord Chancellor.

LORD CHANCELLOR:—The appellants in this case are the plaintiffs in an action brought by them against the respondent and the defendants in an action brought by the respondent against them.

The object of the appellants' action was to enforce an award of arbitrators dated November 27, 1911, by which the sum of $75,700 was fixed as the sum to be paid by the respondent to

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the appellants in full compensation for the expropriation of certain property.

The action by the respondent was to set the award aside. The cases were consolidated at the trial and the Superior Court, by its judgment dated October 14, 1914, discharged the award with costs, and dismissed the appellants' action. The Court of King's Bench for the Province of Quebec (Appeal Side) by two judgments confirmed the Superior Court. The appellants have appealed from these two judgments and these appeals, which have been consolidated, constitute the present appeal.

The substance of the dispute is connected with a subject which has not been unfruitful in litigation, namely, the determination of the exact principle upon which prospects and possibilities of future development ought to be taken into account in determining the price to be paid for property compulsorily acquired.

The appellants are the owners of the banks and lands adjacent to the waterfalls of the Riviere du Loup, known as the Grandes Chutes. These falls are within the limits of the jurisdiction of the respondent city, by whom the water-power is required for the operation of a municipal system of electric lighting.

It appears that the value of these falls for industrial enterprise has long been recognized, and as far back as 1881 William Fraser, the predecessor in title of the present appellants, granted a lease of the falls and the adjacent lands to a paper pulp company for 20 years at the rate of $30 per year. This lease was extended from time to time, and in 1896 a final extension was granted to the then holder of the original lease for a period of 10 years.

In 1905, one year before the expiration of this lease, the then lessees, who had used the water to carry on a business of electric lighting, sold the lease and the business to the city for the sum of $60,000. Since that time the electric light system has been operated exclusively by the municipality, who have been in continuous possession of the Grandes Chutes for that purpose.

In 1906 an offer was made by the city to William Fraser for a new lease of 25 years, but, though this offer was accepted, no formal lease was executed, and William Fraser died in 1908 with the matter still in abeyance.

On July 10, 1907, the respondents adopted a by-law author-

izing them to construct a reservoir higher up the river in order to regulate the flow of water and also to expropriate all the necessary land for the purpose of this enterprise. At certain falls lower down the river there was at this time another mill established for the purpose of pulp manufacture, and the lease of the falls and adjacent land, which was of long duration, was held by a company known as the Riviere du Loup Pulp Co., Ltd.

The Riviere du Loup is fed by four tributary streams, which run down through valleys whose natural construction readily permits of the waters being dammed in reservoirs. It is of course obvious that if such reservoirs were constructed it would be possible to regulate the flow of water over the falls of the river so as materially to increase the amount of horse-power available at each fall throughout the year. The respondents accordingly in March, 1909, entered into an agreement with the Pulp Company, providing that the dams that they proposed to erect in the valleys should be exclusively used for the purpose of the storage reservoirs, and should not be parted with by the city without the express consent of the company, and for this consideration the company agreed to pay four-fifths of the total sum of $18,000, the proposed cost of expenditure, the future maintenance and repair of the reservoirs being divided between the city and the company in the ratio of one-third to two-thirds. These reservoirs were in course of erection, when on October 18, 1909, the city passed a by-law authorizing the town to acquire the ownership of the Grand Falls and of the adjacent property necessary for the electric light system, and it was thereby enacted that in default of agreement the property should be compulsorily acquired, and certain loans necessary for the acquisition were thereby authorized. A further by-law to the same effect was passed on June 20, 1910, and a further loan provided for.

On September 27, 1910, the respondents passed a resolution expressing their willingness to pay to the proprietors of the lands and the water-power the sum of $20,000 and this was served on the parties.

It is quite unnecessary to examine the authority under which this notice was given. There is no question in this appeal but that the city had full power to take the steps they did, and for the purpose of determining the value of the property they intended

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to acquire, September 30, 1910, the date on which the resolution was served, is accepted by both parties as being the critical date. On that date there were four persons who together owned the interest in the property of the falls and lands originally held by William Fraser. One was the mayor of the town, and he expressed his willingness to sell his share for $5,000. The remaining three proprietors, who are the present appellants, refused, and it therefore became necessary to determine the sum to be paid.

The procedure that regulates the fixing of this compensation is to be found in arts. 5790 to 5800 of the Revised Statutes of Quebec. Sec. 5795 is in these terms:—

If there be no agreement between the parties, the value of the immoveable in question, together with whatever goes in compensation of the value of such immoveable, shall be estimated by arbitrators named as follows: one by the council, one by the owner or on his behalf, and a third by the two former, or, if they cannot agree, by a Judge of the Superior Court, on demand of any of the interested parties.

Section 5798 is as follows:—

In any award rendered by them, the arbitrators shall mention the lot whereof the immoveable taken forms part, the name of the owner of such immoveable, and also the by-law or order of the council under which such immoveable is taken, and shall fix the amount of the indemnity, if they grant one, and, if they do not, a statement to that effect shall be entered in such award establishing their refusal.

While by sec. 5797 the award is made final and without appeal.

Under sec. 5795 the city council appointed Mr. Bertrand as their arbitrator, and the proprietors having failed to appoint one on their behalf, a petition was presented to the Judge of the Superior Court in a case No. 4573, requesting the appointment of an arbitrator on behalf of the other parties.

On July 21, 1911, the Court by consent appointed Mr. St. George on behalf of the appellants, and the two arbitrators appointed Mr. St. Laurent as the third arbitrator in accordance with the code. The arbitrators proceeded with their work, and on November 27, 1911, made the award which is in question in these proceedings. It is in these terms:—

To His Honour the Mayor and Council, City of Fraserville, County of Temiscouata, P.Q.—We the undersigned, the arbitrators appointed in this case, No. 4573, after having examined and valued the property, heard the parties and their witnesses, under oath, administered by one of us, do hereby certify that we award to the respondents the sum of seventy-five thousand seven hundred ($75,700) dollars, to be paid by the petitioner in full compensation for the expropriation of the property expropriated by the said petitioner.

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ARTHUR ST. LAURENT, PERCIVAL W. ST. GEORGE.—I cannot agree with above award, J. T. BERTRAND.

Except so far as the No. 4573 introduces into this award the details of the process to which it is a reference, it is plain that the award does not comply with the provisions of art. 5798 of the Revised Statutes in several material respects, and this was made one of the grounds of objection to the award on the part of the city; but it is not material to consider the effect of the omissions, for, even if this objection were maintained, the award could be remitted to the arbitrators to supply the necessary statements, and the substance of the award would remain. The real ground upon which the award is challenged is far more serious, and it is that the arbitrators have exceeded their jurisdiction and assessed the valuation on a totally wrong basis. There is nothing to support this contention on the face of the award; but in the course of the proceedings Mr. St. Laurent was called as a witness, and he produced a long and very elaborate system of notes of the evidence that he had taken and the calculations that he had made in order to arrive at his figures. He divided the subject-matter into two heads: the value of the lands and the water power in the physical condition in which they were found at the date of the valuation, and the value of the possibilities of development of those waterfalls by storing and regulating the waters through the medium of reservoirs. In doing this, their Lordships were of opinion that he was clearly right. The possibility of an added utility for any expropriated property due to existing possibilities of development is, subject to limits, to which their Lordships will refer, a right and proper subject for consideration, in ascertaining the compensation to be paid on expropriation. But, in the method which was adopted by Mr. St. Laurent for arriving at what he regarded as the measure of this compensation he did not, in their Lordships' opinion, fix, as he was bound to do, the value of the immoveable he was appointed to determine, but the value of another thing which was altogether outside his powers.

It is unnecessary to examine the evidence upon this point in close detail, because the statement of Belleau, J., in the Superior Court in these words:—

> They have, in the case above stated, made the mistake of making the expropriator share the profits of the greater value given to the property, by the realization of the object for which it was acquired. They make the city

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pay, not only the value of a water power developing 300 h.p., which is what the owners sell, but half of the value of an additional 1,200 h.p. which is what the city must realize by the execution of the works it has in view. This is not the value to the vendor but the value to the purchaser calculated on the profits that it must receive from the working of the property as intended by the expropriator. The vendor receives more than he gives, he shares in the value of the property to the purchaser. This is the indemnity which the city is called to pay. I repeat that this principle is wrong and vitiates the proceedings of the arbitrators.

and that of the Chief Justice:—

We see by the notes of the third arbitrator, Arthur St. Laurent, the manner in which he has proceeded. He has commenced by calculating the annual income that will be given by the 1,200 additional power, of the Grand Chutes, and he has arrived at the conclusion that this income would be $25,850, then he has deducted from this amount a sum of $23,875 for costs of exploitation, interest on the amount disbursed by the city, sinking-funds, and a reasonable share of the city in the profits, which left a balance of $1,975. He has given this balance of the income to the sellers being part of the profits which should come to them, and he has capitalized this income at 5 per cent. which forms a capital of $39,500. It is this last amount that has been granted by the arbitrators to the sellers as indemnity for the potential value of the Grand Chutes.

are in effect concurrent findings of fact which there is abundant evidence to support, that in truth the value which Mr. St. Laurent fixed was the value of the property to the person who was buying, and not to the person who was selling, and it was not this value that he was appointed to determine.

The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *Lucas* v. *Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, *Cedars Rapids Manufacturing Co.* v. *Lacoste*, [1914] A.C. 569, 16 D.L.R. 168, and *Sidney* v. *North-Eastern R. Co.*, [1914] 3 K.B. 629. The principles of those cases are carefully and correctly considered in the judgments, the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that this award cannot be supported.

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Their Lordships desire to add that it is plain, from the language of the statute making the award of arbitrators final and without appeal, that apart from evidence establishing that the arbitrators had exceeded their jurisdiction, their award could not be disputed. Their findings of fact and their findings of value, unless it be shewn that the value is not that which they were appointed to determine, are free from challenge.

The appellants have urged that in the present case, if the award is found to be bad, the matter should be sent back to the arbitrators to be reheard. It is quite possible that this is the proper course to pursue. It may be that the arbitrators are not deprived of their office by what has occurred, that they have merely done an informal and an invalid act, but this is essentially a question which ought primarily to be considered in the Courts of Quebec, and it does not appear to have been the subject of any close examination in any of the judgments which have been passed in these proceedings. It may well be that there is a recognized and established method of dealing with such cases acted on in those Courts, and without knowledge on this point their Lordships do not think it right to express any opinion at all upon the question as to whether the arbitrators can now proceed to make a new award, or whether they have no longer any authority to act. Their Lordships will accordingly humbly advise His Majesty that these appeals fail and must be dismissed with costs.

Appeal dismissed.

Re LITTLE AND BEATTIE.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Hodgins and Ferguson, JJ.A. February 7, 1917.

LANDLORD AND TENANT (§ III D—110)—RENT—CONDITION AS TO—DISTRESS FOR RENT DUE—APPORTIONMENT ACT.

A proviso in a lease that "if any Act preventing the sale of intoxicating liquors should come into force during the currency of this lease the rental to be paid shall be determined by arbitration" applies only to rent falling due after the happening of the event, and the landlord has the right to distrain for rent payable in advance, though for a term which includes some time after the Act came into force. The Apportionment Act (R.S.O. 1914, ch. 156) does not apply to rent payable in advance.

Statement.

AN appeal by a tenant from an order of the Judge of the County Court of the County of Essex.

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

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This is an appeal by the tenant from an order of the Judge of the County Court of the County of Essex, dated the 23rd October, 1916, dismissing an application made by the appellant under sec. 65* of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, for an order staying all proceedings under the distress for rent levied against his goods and chattels by the respondent, and directing that the rent which had been paid into Court by the appellant be paid out to the respondent.

The appellant is tenant to the respondent of a parcel of land in the township of Pelee, which consists in part of what is described as the hotel property of the lessor under a lease dated the 13th March, 1912, for the term of ten years from the 1st May, 1912. The rent reserved by the lease is $800 per annum, and it is payable quarterly in advance.

At the end of the lease there is the following proviso: "Provided that if local option or any Act or by-law preventing the sale of intoxicating liquors over the bar should come into force on Pelee Island during the currency of this lease the rental to be paid for all the premises leased while the same is in force shall be determined by arbitrators under the Arbitration Act."

On the 27th April, 1916, the Ontario Temperance Act, 6 Geo. V. ch. 50, was passed. By the provisions of its 149th section, the Act came into force at 7 o'clock in the afternoon of Saturday the 16th day of September last; and it is not open to question that the effect of the Act is to bring into operation the proviso of the lease which has been quoted.

The quarter's rent which was payable in advance on the first day of August last, was not paid when it became payable; and, not having been paid afterwards, the respondent distrained for it.

The appellant thereupon applied for the relief for which sec. 65 provides, and he was ordered to pay into Court the quarter's rent pending the disposition of his application, and it is from the order made upon this application that the appeal is brought.

A. C. McMaster, for appellant; *A. W. Langmuir*, for respondent.

*65. Where goods or chattels are distrained by a landlord for arrears of rent, and the tenant disputes the right of the landlord to distrain in respect of the whole or any part of the goods or chattels, or disputes the amount claimed by the landlord, the tenant may apply to the Judge to determine the matters so in dispute, and the Judge may hear and determine the same in a summary way, and may make such order in the premises as he may deem just.

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The judgment of the Court was delivered by

MEREDITH, C.J.O. (after stating the facts as above):—The question for decision is whether the effect of the lease and of what has happened is to entitle the appellant to refuse to pay the quarter's rent that fell due on the 1st August last, and to suspend the right of the respondent to distrain for it, and, if the result of the arbitration is to reduce the amount of the rent, whether the reduction will extend to that quarter's rent or to that portion of it which, if the rent had not been payable in advance, would have been earned after the Act came into force.

Apart from authority, I should think it clear that the appellant's contention is not entitled to prevail. What was there to interfere with the respondent's common law right to distrain for the rent that was in arrear and unpaid when he made the distress? In my opinion, nothing. It is not the case of rent falling due after the Act had come into force, and even as to such rent it is at least doubtful whether, until the award is made, there would be anything to prevent the landlord from distraining for it, whatever right the tenant might have, in the event of the result of the arbitration being to reduce the rent payable by the terms of the lease, to have repaid to him what he had paid in excess of the reduced rent.

None of the cases relied upon by the appellant's counsel supports his contention.

In *Bickle* v. *Beatty*, 17 U.C.Q.B. 465, the lease was for seven years from the 1st April, 1852, and the rent 15 shillings per acre for the land demised, which comprised 119 acres, and the taxes not exceeding £10 per annum, and the rent was payable half-yearly. The lease contained a provision that the landlord should "at any and all times have the power to sell and dispose of any part or parts of the said farm, making a reasonable and fair deduction from the rent in consequence thereof, and if any disagreement should arise as to the sum to be deducted, then it may be left to arbitration." The landlord conveyed part of the demised premises to the Grand Trunk Railway Company, and the company entered into possession of it, and he afterwards distrained for his rent, making a deduction from the rent reserved by the lease of what he determined to be a reasonable allowance for the loss by the tenant of the land conveyed to the railway company.

The facts do not appear fully in the report of the case, but

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there can be no doubt, I think, that the rent for which the landlord distrained was rent which fell due after the conveyance to the railway company.

In *Mitchell* v. *McDuffy*, 31 U.C.C.P. 266, as found by the jury, the tenant was to be rent free for the first year, and he was to be tenant for ten years on the understanding that he was to make such improvements as were necessary, and that at the expiration of ten years "the amount of the improvements, as also the amount of the rent, was to be determined by arbitration." The landlord contended that the rent was fixed by agreement at $200 per annum, with the privilege to the tenant of paying the rent for the first five years in improvements, the value of which was to be determined by arbitration at the end of the term, and the landlord distrained for rent which would have been due to him if his account of the bargain had been accepted. The jury awarded the plaintiff as damages double the value of the goods distrained. The majority of the Court was of opinion that the statute giving double value applied, but the whole Court agreed that the verdict was so much against the evidence that there must be a new trial unless the plaintiff would agree to reduce his verdict to single damages.

This case, therefore, was one in which no rent had been fixed by agreement of the parties, and has no application.

Hessey v. *Quinn*, 20 O.L.R. 442, differs from the case at bar. There the rent was fixed by the lease, but it was provided by it "that in the event of any law being enacted in the future which shall prohibit the sale of intoxicating liquors upon the demised premises, the said lessors shall make a reasonable rebate in said rent during the period of such prohibition." The holding was that, although the event provided for had happened, and the tenant was entitled to a reasonable rebate, the landlord had nevertheless the right to distrain for the rent reserved by the lease, and that the tenant's remedy, if the rebate were not made, was by action for breach of the covenant to make it.

In the case at bar, when the event for which the lease provides happens, the rent reserved by the lease ceases to be payable, and the tenant will thereafter hold at the reduced rent fixed by the arbitration; but, until the event happens, the reservation of the rent of $800 continues; and the landlord has, in my opinion, the right to require payment of the rent which falls due before the

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happening of the event, and, if it is not paid, to distrain for it either before or after the event happens.

It will be observed that what the proviso says is that "the rental *to be paid* . . . shall be determined . . ."—language which, in my opinion, is consistent only with the application of the proviso to rent which by the terms of the lease should become payable after the happening of the event mentioned.

It was also contended by counsel for the appellant that the Apportionment Act, R.S.O. 1914, ch. 156, applies, and that the rent should be apportioned, so that, with respect to the quarterly instalment which became due on the 1st August, the appellant should be liable up to the 16th September, when the Ontario Temperance Act came into force, for rent at the rate reserved by the lease, and after that day for the new rent fixed by the arbitrators.

This contention is not well-founded. The Apportionment Act does not apply to rent payable in advance: *Ellis* v. *Rowbotham*, [1900] 1 Q.B. 740. See also *Linton* v. *Imperial Hotel Co.* (1889), 16 A.R. 337, 343.

For these reasons, I would dismiss the appeal with costs.

BELANGER v. THE KING.

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S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. December, 11, 1916.

CROWN (§ II—25)—RAILWAYS—LEVEL CROSSING—NEGLIGENCE—LIABILITY.

The condition of a crossing whereby tracks are allowed to project above a highway level in violation of the Government Railways Act (R.S.C. 1906, ch. 36, sec. 16) is negligence which will render the Crown liable for an accident caused by round sticks placed between the rails by an unknown person to assist vehicles across the tracks.

Statement.

APPEAL from the judgment of the Exchequer Court of Canada, by which the suppliant's petition of right was dismissed with costs. Reversed.

Lane, K.C., and *S. C. Riou*, K.C., for the appellant; *R. V. Sinclair*, K.C., and *Léo Bérubé*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be allowed.

The Judge of the Exchequer Court in his notes of judgment says:—

It is true that sec. 16 of the Government Railways Act provides that no part of the railway which crosses any highway shall rise or sink below the level of the highway more than one inch; but assuming that the track at the place in question did not absolutely comply with such requirement, it cannot be contended that it was the cause of the accident. Obviously the proxi-

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mate, determining and effective cause of the accident was the encounter by the suppliant of the post upon the track and which is conceded by the pleadings to have been placed there by persons unknown. Had there been no post on the track there would have been no accident. The officers or servants of the Crown are not charged with having placed the *pieu* on the track, and no evidence whatsoever has been adduced to trace any negligent act on their part in that respect. The employees declare that if it had been there when they passed over the section in the morning they would have seen and removed it, and that is readily understood and believed. There might have been negligence on behalf of the employees if the evidence had established that the post had negligently remained on the track for several days or an unreasonable time.

It is quite certain, in fact it is practically admitted, that the rails at the highway crossing were laid in contravention of the statute, sec. 16, ch. 36, Government Railways Act, which provides that:—

> no part of the railway which crosses any highway, unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid,

and were so laid as to create a nuisance.

Not only did the Crown owe a duty to the suppliant to construct its line at the highway crossing in accordance with the provisions of the statute, but there was a clear breach of that duty for the consequences of which the Crown is liable unless the intervening act of some unknown third party in placing the round stick between the rails is, as the learned Judge finds, a reason for saying that the plaintiff's injuries were not the result of the Crown's breach of duty. As was said in *Crane* v. *South Suburban Gas Co.*, [1916] 1 K.B. 33, at 37-8:—

> The intervention of a third party may break a link in the chain which connects the wrong and the injury resulting from the wrong if the intervention is the near cause of the injury, that is, if the original wrongdoer had no reason to contemplate the possibility of the intervention.

But it is part of the Crown's case that by reason of the height at which the rails were left above the level of the highway the practice had grown up of placing such round sticks between the rails. The Judge says:—

> Some of the witnesses say there were often people travelling over the rails who would place round sticks of wood to enable them to cross easier, that they did it themselves, but that they usually removed those sticks of wood after passing.

As was said recently, people who create a dangerous nuisance on a highway will not save themselves by trying to divert the argument into refined discussion about negligence and intervening

acts of third persons. This dangerous practice should not have been tolerated and we cannot sanction the suggestion that as a result the Crown must escape liability.

Reference was made to the "Rules and Regulations" for the guidance of trackmasters and trackmen. But regulations cannot operate as amendments of the statute by virtue of which the crossing of a highway at rail level is permitted. A regulation may provide for something to be done consistent with the requirements of the statute, but it is not permitted, under guise of regulating the management and proper use and protection of Government Railways (sec. 46), to amend the statute which determines the conditions subject to which the railway may be carried across a highway at rail level.

Idington, J.

IDINGTON, J.:—There is no dispute as to the fact that appellant was seriously injured by reason of the road crossing the Intercolonial Railway being left in such a condition that someone, in order to get across the railway track, had resorted to the expedient of placing a stake between the rails in order that it would raise his sleigh above the rails and thus facilitate his crossing, and that stake being left there when appellant's team reached the same place rolled underneath the runners of his sleigh till it squeezed appellant's foot between it and the iron rail.

The trial Judge holds that this does not furnish a cause of action. I cannot agree with such holding. I think the condition of things at the time and place in question must be looked at as a whole and the causes thereof inquired into and the crucial question asked, if in truth the violation of the statute which fixed the kind of crossing to be made and kept there by respondent was not the true cause of that whole condition of things and the only answer to be made to the question so put.

The Government Railways Act, by sec. 16, provides as follows:—

> 16. No part of the railway which crosses any highway, unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid.

The railway in question at the time of the accident shewed the rails exposed 5 inches instead of 1 inch above the level of the highway, and thereby rendered it almost if not altogether impossible for loaded sleighs to cross such a barrier without those

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in charge thereof resorting to some such expedient as someone evidently had resorted to in placing a stake or other like material to help in crossing the iron rails.

This condition of things was so well known that counsel for respondent sets forth in his factum herein the fact and alleges it was well known to appellant.

He seeks to justify this by some regulations which, I hold, cannot override the statute. Indeed, so far as I can see, there is nothing in the statute authorizing the making of regulations which can in any way support or justify any regulation tending to suggest such an interference with the highway and violation of the statute.

The apparently notorious fact of teamsters being compelled to resort to such an expedient and habitually leaving the material so used on the railway track and highway renders the answer made of want of notice futile. A municipality if responsible for the continuation of such a state of things could not plead want of notice.

The allegation that the railway sectionmen removed such things when found by them, and that the track was clear or made clear when they came to work in the morning and that it was cleared on the morning in question, cannot avail much when it is quite clear that there was good sleighing on the highway on either side of the track but none over it on April 3, the day of the accident.

Indeed, at that time of the year, as any and every foreman must have known, the likelihood of someone adopting the only and well-known expedient in question in the course of a few hours ought to have induced him to restore the track to a travellable condition.

The plan of throwing a few shovels full of snow on the track in early morning to be melted away long before noon at that season of the year, seems but an idle trifling with the travellers on the highway who had a right to see the statute observed and whether observed or not to enjoy an easy and safe way to cross the railway provided by respondent.

The accident took place between 12 and 1 o'clock in the day time. What might have happened in the course of the night in such a case is not pleasant to contemplate.

Those who act in such a way as the servants of res-

pondent did in regard to this crossing cannot be held to have discharged their duty. Their conduct in this case was just such negligence within the scope of their duty as caused the injury to the appellant of which he complains, and for which the statute provides the remedy invoked herein.

The suggestion made in the respondent's factum that the appellant well knew the conditions with which he was confronted, and ought to have waited till an approaching train had passed and then picked up this wood on the track and avoided the possible accident, and that his failure to do so should be held contributory negligence, comes with rather a bad grace from respondent. That phase of the case is not dealt with by the trial Judge beyond saying appellant might have waited.

Experience teaches us that a team of horses is much easier managed when across the track than facing it to see a passing train, and the fair inference is that appellant in crossing was exercising due caution.

The damages are not assessed and in my view that the appeal should be allowed with costs throughout the case must go back to the learned trial Judge for the assessment of damages unless the parties can as they ought to agree upon the amount.

Duff, J.

DUFF, J.:—There are two questions for decision on this appeal. First: Has the suppliant proved that the injury suffered by him was "caused by the negligence of" some "officer or servant of the Crown while acting within the scope of his duties or employed upon, in or about the construction, maintenance or operation of the Intercolonial Railway," (sub-sec. *f*, sec. 20, Exchequer Court Act as amended by 9 & 10 Edw. VII. ch. 19)? Secondly, assuming the injuries were so caused in the sense that some such negligence was a *causa sine quâ non*, is it the proper conclusion that such negligence was not a juridical cause in view of the circumstance that the suppliant would probably have escaped injury had it not been for the intervening act of some other person or persons for whose conduct the government is in no way responsible?

The Intercolonial Railway crosses a public road, near Cacouna Station, and on the day on which the appellant suffered the injury in respect of which he claims reparation (April 3, 1913), the highway at the crossing being bare of snow and ice, the railway

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rose above the level of the highway to the extent of about five inches, thus constituting a considerable obstruction. Somebody had placed a post between the rails with the object, it may be assumed, of reducing the inconvenience due to the obstruction and facilitating the use of the crossing for the passage of sleighs. The appellant, walking beside his sleigh loaded with deals which his son was driving over the tracks, had his foot caught between this post and one of the rails and severely crushed by the pressure of the sleigh.

There is sufficient evidence of negligence on the part of some "officer or servant" of the Crown "acting in the scope of some duty or employment" in connection with the Intercolonial Railway in the fact itself that at this place the railway rose above the surface of the highway to the extent mentioned. This conclusion rests upon sec. 16 of the Government Railways Act, ch. 36, R.S.C., 1906, which is in these words:—

> No part of the railway which crosses any highway unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid: R.S. ch. 38, sec. 11.

The effect of this section appears to be that the government authority having charge of the government railways might rightfully carry the railway across a highway, but to this right, if the railway passes over by means of a level crossing, is attached the correlative duty to see that the railway does not rise above the level of the highway more than one inch; and this duty, I think, is a continuing duty resting upon the railway authority so long as the railway is maintained there. It was not, I think, incumbent upon the appellant, as suppliant, to name the particular servant or officer of the Crown alleged to be charged with the performance of this duty; it was enough, I think, to shew that the duty was undischarged. It may be presumed, if that be necessary to support the suppliant's case, that all necessary appointments had been made for carrying out the law.

All of which would appear to be sufficiently plain; but it is proper to notice an argument addressed to us on behalf of the Crown, which is that certain rules purporting to be made under sec. 49 of the Government Railways Act, require and sanction a practice which to some extent, it is said, modifies the rigour of sec. 16 and defines the duties of those responsible for the condition

of highway crossings. Under this practice, at such crossings the rails are laid in such a way as to leave a difference in level between the natural surface of the highway and the top of the rails considerably greater than one inch. During the seasons in which the roads are free from ice and snow, this difference in level is reduced by raising the highway level by means of planks; in winter these planks are removed, the natural filling of snow or ice serving the same office. This is pursuant to No. 48 of certain Rules for the Guidance of Trackmasters and Trackmen made professedly under the authority of sec. 49 of the Government Railways Act which is in these words:—

En la saison propice, le chef d'equipe devra donner instructions a ses contre-maitres de faire enlever des madriers prés des rails aux traverses de chemin pour permetter facilement les operations du "flanger."

The "flanger" commonly used cannot be operated, it is said, while the highway and the rails are maintained at the relative levels prescribed by sec. 16; and, consequently, while the "flanger" is in operation it is not practicable to employ such means for reducing the inequality of levels. In the regulations placed before the trial Judge, the rules of 1906, there is no specific provision requiring the highway to be planked; but the rules of 1893 contained this section:—

Sec. 32. All public road-crossings must be either planked and securely spiked or paved with blocks or other suitable materials.

The argument based upon these rules is that, under the practice observed at the date of the accident, the "flanger" being still in operation, it was the duty of those charged with the care of the track at the place named to keep the track clear and consequently, the existence of a state of things forbidden by section 16 cannot be imputed to them or any other officer or servant of the Crown for negligence—the rules and regulations enacted and promulgated for their guidance by the Governor in Council having, it is affirmed, been observed not only in the letter but in the only way which was practicable, due regard being paid to the necessities of railway operation.

There is, however, it may be noted, no evidence that the only practicable method of clearing the track of snow is by the use of a "flanger" of such construction as to necessitate the removal of the planks during the operation of it; nor is there any evidence shewing it to be impracticable to retain the planks in place so long as the flanger is not actually passing over the highway.

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In dealing with this argument it is necessary to consider the status of the rules in question relatively to sec. 16. Secs. 49 and 54 are the provisions we have to apply. They are in these words:

Sec. 49. The Governor in Council may, from time to time, make such regulations as he deems necessary,—

(*a*) for the management, proper use and protection of all or any of the Government railways, including station houses, yards and other property in connection therewith;

(*b*) for the ascertaining and collection of the tolls, dues and revenues thereon,

(*c*) to be observed by the conductors, engine-drivers and other officers and servants of the Minister, and by all companies and persons using such railways;

(*d*) relating to the construction of the carriages and other vehicles to be used in the trains on such railways: R.S., ch. 38, sec. 43.

Sec. 54. All such regulations made under this Act shall be taken and read as part of this Act: R.S., ch. 38, sec. 44.

The rules put before us would *primâ facie* fall within the authority of either sub-sec. *a* or sub-sec. *c* of sec. 49. It may well be doubted, I think, whether it is the proper construction of these general provisions to hold that under them any regulation dealing with any matter falling strictly within the specific enactment of sec. 16 is not beyond the scope of these sub-sections. The language of the last clause of sec. 16 is emphatic, the authority to carry the railway across the highway being given subject to the proviso that the railway and the highway shall be maintained at the relative levels therein provided for: *Grand Trunk Pacific R. Co.* v. *Fort William Land Investment Co.*, [1912] A.C. 224.

It is not, however, necessary to pass upon that question. For the purposes of this judgment I assume the effect of sec. 54 to be that regulations made by the Governor in Council which are of such a nature as to fall within the ambit of sec. 49 when that section is read and construed without reference to other sections of the Act are, when passed, to be "taken and read" as part of the Act and that the authority of the Governor in Council to pass such regulations is incapable of being called judicially in question. I assume, in other words, that these regulations are to be treated as the House of Lords treated the rule which was in question in the *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, at 360. On that assumption it necessarily follows that if there is a conflict between one of the provisions of the Act and one of the regulations passed under sec. 49 the question devolving for decision upon the Court having the duty of applying the regulation is first: Which

is the governing enactment, the section or the regulation? Lord Herschell in his judgment in the case just mentioned says (at p. 360) that where such a conflict arises the enactment itself would probably be treated as supplying the governing consideration and the regulation subordinate to it. In view of the last clause of sec. 16 to which I have just alluded I see no difficulty in holding that in this case the regulation, in so far as it is inconsistent with sec. 16, must give way; or, as it is perhaps better to put it, the regulation must be read as subject to an implied proviso that nothing in it shall be considered to sanction a departure from sec. 16.

It follows that there was neglect of duty within the Exchequer Court Act, sec. 20, sub-sec. *f*.

But was this neglect of duty the "*cause*" of the suppliant's injury in the sense that the Crown is responsible for the consequences of it within the meaning of that Act? The rails, in the condition in which they were, constituted, as I have said, a not inconsiderable obstruction to traffic upon the highway. The natural consequence of the physical condition of the crossing—and the consequence to be expected in view of the fact that upon this road there was the ordinary amount of travel—was the very thing which happened, namely, that somebody would endeavour to facilitate the passage of sleighs by some such device as that which was actually resorted to. This being so, the connection between the breach of the duty arising under sec. 16 and the appellant's injury is complete; the intervening act of the person who placed the post in the road does not interrupt the chain of causality. As Hamilton, L.J., said in *Latham* v. *Johnson*, [1913] 1 K.B. 398, at 413, a person who in violation of duty leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for a further intervening act of a third person that injury would not have occurred. The conditions of responsibility under sec. 20 of the Exchequer Court Act are therefore fulfilled and the suppliant is entitled to redress. I agree that the more convenient course is to refer the proceedings back to the Exchequer Court for the assessment of the damages.

ANGLIN, J.:—The plaintiff was injured at a highway level crossing of the Intercolonial Railway on April 3, 1913. The

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planking usually placed between and immediately outside the rails at such crossing had been removed for the winter season and had not yet been replaced. The snow and ice, which during the greater part of the winter fill up the space or depression left by the removal of the planking, between and outside the rails, had been thawed by the heat of the Spring sun, thus leaving the rails projecting some six or seven inches, it is said, above the level of the highway. No doubt to facilitate driving across the railway, some person had, earlier in the day, placed a log or fence rail between the tracks and had left it there. The plaintiff, when taking his heavily laden sleigh across, walked beside it. The runners of the sleigh instead of mounting the log or fence rail pushed it forward and the plaintiff's foot was caught between it and the projecting rail, thus causing the somewhat serious injury of which he complains.

The obligation imposed by sec. 16 of the Government Railways Act, R.S.C., ch. 36, that:—

> No part of the railway which crosses any highway unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch.

is absolute and unqualified. The carrying of the railway across the highway is made subject to this condition. It appears from the judgment of Audette, J., that sec. 22 of the rules and regulations for the guidance of trackmasters and trackmen passed in 1893, which, however, I do not find in the case before us, provided that: "All public road crossings must be either planked and securely spiked or paved with blocks or other suitable material."

This regulation was presumably made in compliance with the obligation imposed by sec. 16 of the statute. No such provision is found in the rules and regulations for employees of government railways, of 1906, put in at the trial, which, however, by rule No. 20, require that section-foremen shall see that crossings of public roads are kept in good condition and are not obstructed. Rule 48 directs that the chief of equipment shall at the proper season give instructions to his foremen to cause the planking next to the rails on highway crossings to be removed in order to permit flangers to operate easily. The book of rules and regulations put in, as ex. A., does not shew upon its face, nor do I find in the record any evidence, that the rules and regulations which it contains were made under sec. 49 of the Government Railways Act, which empowers the Governor in Council to make regulations:

(*a*) for the management, proper use and protection of all or any of the Government railways including station houses, yards and other property in connection therewith,

(*c*) to be observed by the conductors, engine drivers and servants of the Minister and by all companies and persons using such railways.

In dealing with this case, however, I shall treat rule No. 48 as within sec. 54 of the statute which enacts that: "All such regulations made under this Act shall be taken and read as part of this Act."

Under secs. 73 and 74 of the statute the contravention of rules so authorized is penalized.

That the rails on the crossing projected several inches above the level of the highway when the plaintiff was injured was conceded and counsel for the Crown sought to justify the existence of this state of affairs by invoking rule No. 48, to which I have referred. He also relied upon evidence to the effect that the use of snowploughs carrying an apron in front required the removal of the planking at such crossings midway between the rails as well as immediately next to them. A flanger had been used upon the crossing as recently as March 28, and there is evidence that its use was sometimes required in the month of April. Under these circumstances, if regulation No. 48 justified the planking being kept up until the season had so far advanced that the use of flangers and snowploughs was not likely to be further required, I would be disposed to agree with the contention of the respondent that failure to replace the planking before April 3, could not be regarded as negligence. But no regulation, although passed by the Governor in Council under sec. 49, can be allowed to override the explicit requirement of sec. 16 of the statute. If no construction can be placed upon regulation No. 48 which will bring it into harmony with that section, it cannot be regarded as having been made within the authority conferred by sec. 49, or, if so made, it must be treated as subordinate to the precise and definite prohibition of sec. 16. On the other hand it must, if possible, be given a construction which will not conflict with the statute: *Booth* v. *The King*, 21 D.L.R. 558, 51 Can. S.C.R. 20; *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, at 360. So, dealing with regulation No. 48, I would be inclined to construe it as authorizing the section foremen to keep highway crossings without planks next to and between the rails only at such times and during such periods as the spaces which the planks ordinarily occupy

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are actually filled up by other material (snow and ice, or gravel) in such manner that at no time shall the rails project above the highway more than one inch. As already stated, the obligation imposed by sec. 16 is absolute and unqualified, and the duty which it imposes is paramount. To a charge of a breach of that duty the regulation invoked does not afford an answer.

I entertain no doubt that the omission to perform such a duty is negligence in law. Negligence on the part of an officer or servant of the Crown while acting within the scope of his employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway, causing death or injury or loss to the person or property, is actionable, under sec. 20 (*f*) of the Exchequer Court Act (9 & 10 Edw. VII. ch. 19).

There remains the inquiry whether the negligence thus established was the cause of the injury sustained by the plaintiff. The learned assistant Judge of the Exchequer Court reached the conclusion that it was not—that that injury was rather attributable to the act of the person who had placed and left the log or fence-rail between the rails. But it is obvious that if there had not been the space or depression between the rails it would not have been necessary to place the log there to facilitate crossing, and that, if so placed, it would not have caused the jamming of the plaintiff's foot between it and the rails. It was because the rail projected as it did several inches above the highway, quite as much as because the log or post had been placed where it was, that the plaintiff's foot was caught and jammed between the two. The placing of the log between the rails was, no doubt, a contributory cause of the accident; but certainly no more so, and probably not as much so, as the unlawful projection of the rails above the level of the highway. It follows that the negligence of its servant who was responsible for leaving the crossing in the condition in which it was renders the Crown liable: *City of Toronto* v. *Lambert*, 33 D.L.R. 476, 54 Can. S.C.R. 200.

Although there was a suggestion that the plaintiff was himself guilty of negligence which contributed to his injury, there has been no finding to that effect in the Exchequer Court and the evidence, in my opinion, does not warrant our making such a finding.

The appeal should be allowed with costs in this Court and in

the Exchequer Court. As there has been no assessment of plaintiff's damages and it would not be satisfactory that we should attempt to make that assessment upon the evidence in the record, unless the parties can come to an agreement as to the amount proper to be allowed the case should be remitted to the Exchequer Court in order that the damages may be fixed. The assistant Judge of that Court saw the plaintiff and the witnesses and he is in a much better position than we are to determine either upon the evidence already taken, or upon additional evidence if he should deem it necessary, the amount the plaintiff should recover.

Brodeur, J.

BRODEUR, J.:—In virtue of the Government Railways Act, R.S.C. 1906, ch. 36, sec. 16, it is enacted that the crossings on the level of highways must not rise or sink more than 1 inch above or below the surface of the highways.

To fulfil the requirements of this statutory regulation, it was customary to place on the Intercolonial, planks between the rails to make it easier for carriages to cross.

But, on the contrary, the inhabitants, at Cacouna, where the accident in question happened, were accustomed to remove the planks during the winter season and leave a cavity of 4 or 5 inches in depth.

It was not inconvenient as long as there was snow, but in the spring, when the snow was melted, it was difficult for the carriages to cross the road, and posts were placed to facilitate the crossing over of the sleighs.

The appellant, on April 3, 1913, came to cross the track at Cacouna where a post had been placed by an unknown person. His vehicle was loaded, and he had much difficulty in crossing the track. The stake placed on the track was carried away by the vehicle and crushed his foot. For that reason, he claims damages resulting from the said accident.

There is no doubt that if the track had been kept according to law, if it had been erected not lower than 1 inch from the surface of the highway, the accident would have been prevented.

It is pleaded in support of the defence that by-laws have been passed by the Governor in Council authorizing the removal of those planks during the winter time.

This by-law may possibly be legal. But, on the other hand,

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the government is always obliged to observe the law, and to see that the track is never lower than the level of the highway. If the by-laws invoked cannot be observed without breaking that regulation of the law, then I consider they are unlawful; because the executive authority never has the right, in passing by-laws, to act contrary to the explicit regulations of the statutes.

To go further, the by-law invoked has not been observed itself, because it required that a certain quantity of planks be left in the middle of the track, and unfortunately this has not been done.

I must add, moreover, that since the accident happened, the planks have not been removed, and the track has been left as it was.

The first cause of the accident is then the violation of the statutes and by-laws. It is true that the post placed on the track by an unknown party contributed to the accident. But the railway authorities knew that the people were compelled to resort to such an expedient in order to cross the track; and, in fact, one of the employees of the Intercolonial tells, in his testimony, that every morning the posts were removed and the one found there when the appellant crossed the track, had evidently been placed there during the day.

Again, if the regulations of the law had been observed, there would have been no accident. And, moreover, I consider that the respondent is liable, in spite of the fact that one of the causes of the accident is the negligence of a third party who threw the post on the track. A person who has been the real cause of the accident is not allowed to attribute it to other causes.

I am, therefore, of the opinion that the judgment *a quo* dismissing the petition of the appellant is not a just one and must be dismissed.

As to the amount of damages, the parties must try to come to an understanding, and if this is impossible the case will be appealed to the Exchequer Court, which will determine the amount.

The appeal is maintained with costs. *Appeal allowed.*

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LEMON v. CHARLTON.

New Brunswick Supreme Court, McLeod, C.J. January 22, 1916.

EVIDENCE (§ VI J—570)—AS TO LEGATEE AND AMOUNT NOT NAMED—PAROL TRUST—STATUTE OF FRAUDS.

A person and an amount not named in a will, but referred to therein as having been made known to the executor, may be identified by ex-

trinsic evidence, and the bequest thereupon be established; it is not a parol trust within the Statute of Frauds.

ACTION for declaration and decree under a will.

G. H. V. Belyea, for plaintiff; *M. G. Teed*, K.C., for defendant.

McLEOD, C.J.:—William McLean, the deceased, died about Sept. 21, 1912, having made and executed a will on Nov. 6, 1909, of which Charlton was the sole executor. The will, leaving out the formal part, is as follows:—

I nominate, constitute and appoint my partner and son-in-law, William Charlton, to be the sole executor of this my said last will and testament. I direct my said executor, after paying all my just debts, funeral and testamentary expenses, to pay a certain person whom I have made known to him and whose name I otherwise desire to be kept strictly secret, a certain sum of money as soon after my decease as can conveniently be done, the amount of which is to be kept secret, but has been made known to him by me, and I rely upon my said executor to faithfully carry out this trust. All the rest, residue and remainder of my property, of every nature and kind wheresoever situated, of which I shall die seised, I give, devise and bequeath to my daughter, Elizabeth M. Charlton, the same to be and become her own absolute property.

Charlton took out probate of the said will on April 27, 1914. The plaintiff claims to be the person whose name was to be kept secret entitled to that legacy and made a demand for it on the defendant, who refused to pay it. She therefore brought this action asking a declaration and decree that she was the person entitled to the money under that paragraph in the said will, and that the defendant is a trustee of it and entitled to hold the same only for the benefit of the plaintiff. The defendant admits the will and the provision in it claimed by the plaintiff, but denies that the plaintiff is entitled to any money under the will. After the pleadings were filed the defendant claimed that a question of law was raised by the pleadings which it would be convenient to have decided before any evidence was given in the case, and accordingly obtained an order under O. 34, r. 2, to have determined the question whether under the provision in the will there was any bequest, and whether evidence could be given to shew to whom the bequest was to be paid. The question therefore now to be determined is, admitting that the testator did in fact direct the executor to pay a certain sum of money to a person made known to the executor, the amount of money also being made known to the executor, is a good bequest. The question certainly presents some difficulties. Mr. Teed, on behalf of the defendant,

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contends that it is not a trust because there is no bequest to Mr. Charlton, it is simply a bequest to some unknown person, and claims that Mr. Charlton is not therefore a trustee. On the other hand, it was claimed that Charlton, when he takes upon himself the duties of executor, is clothed with any trust that may be created by the will. A number of cases were cited, but it seemed to me none of them really covered this case. The case of *McCormick* v. *Grogan*, L.R. 4 H.L. 82, cited by Mr. Teed, differs from this case. In that case the testator had simply devised the whole of his property to a friend and then had left with it a letter to him telling him what he wished him to do with it. By that letter he also practically gave the devisee power to vary the instructions contained in the letter. *Re Hetley*, [1902] 2 Ch. 866, was also cited. In that the testator devised all his property to his wife for life and then he added, "and I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her." Joyce, J., held that parol evidence could not be admitted to shew what the testator's verbally expressed wishes were. The Judge distinguished it from *Re Fleetwood* (1880), 15 Ch. D. 594, and held it was an attempt to create a power and not a definite trust for particular individuals. In *Re Fleetwood* it was held that the nature of the trust could be established by evidence. In *Huxtable* v. *Crawfurd*, [1902] 1 Ch. 214, [1902], 2 Ch. 793, the bequest in the will was: "to my friend, Rev. Charles Hubert Payne Crawfurd, I leave the sum of £4,000 sterling for the charitable purposes agreed upon between us." Farwell, J., following *Re Fleetwood*, allowed evidence showing that it was the income of £4,000 that was to be delivered, and also gave evidence shewing what the charitable purposes were that had been agreed upon between the parties. On appeal it was held that the evidence was properly admitted to shew what the charitable purposes were that were agreed upon between the parties, but it was not proper to contradict the will by shewing that the agreement between the testator and legatee was that only the income of £4,000 should be used. The reason for that was that it tended to contradict the will. In this case the bequest is specific in that it directs the executor to pay to a certain person, who is made known to the executor by the testator, a certain amount of money, which is also made known to the executor by the testator, so that when the defendant took out

probate of the will and took upon himself the administration of the estate, he knew that the testator by that clause in the will had directed him to pay this sum of money to the person named to him, and I think it must further be taken—at all events at this hearing—that the executor, when the testator told him the person and the amount he wished paid, that he assented and agreed to do so when he was appointed executor. Now the question here to be determined is, is that a good bequest? It has been spoken of as a trust; I prefer to treat it as a bequest. It is perfectly clear that under this will the testator did intend to give a certain sum of money to a certain individual. The testator himself knew the amount he meant to give and he knew the person to whom he wished to give it, and he communicated that to the executor, so that, as I have said, the executor himself knew when he took out the probate of the will that by that will this testator was giving this money to this person, and both the amount and the person were known to the executor. It was said, that if it was a parol trust it would be bad under the Statute of Frauds unless fraud was shewn, and that here no fraud has been shewn. Under what are taken to be the facts in this case, I am inclined to the belief that fraud is shewn. It should be borne in mind that the residuary legatee is the wife of the defendant. If this bequest is not paid, it goes to the defendant's wife. If the defendant declines to make the payment, as he was orally requested to do by the testator, it would seem to me to be strong evidence of fraud. It was strongly claimed that in order to create a trust the bequest must be made to the trustee. I had said I do not treat this so much as a trust, as a bequest, but if this bequest is good, Charlton becomes a trustee, when he took out the probate of the will and becomes possessed of the property, he then has the legal title to all the personal property and must hold it subject to the disposition of the will. It does not seem to me that it makes any difference how he becomes a trustee, that is whether he is a trustee because the property is willed directly to him with oral instructions to pay it to someone else, or becomes a trustee by virtue of taking out probate of the will, having previously received instructions to pay a certain sum of money to a certain person. The evidence sought to be given does not in any way change the will or contradict it, it is sought to be given simply to shew how much money is to be paid and to whom it is to be paid. If the

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executor had carried out the provisions of the will and paid the amount communicated to him by the testator to the person to whom he was told to pay it, could anyone interested in the estate have objected? I think not. I have, therefore, with some doubt I admit, come to the conclusion that the bequest is a good one and the plaintiff is entitled to shew by evidence the amount of money to be paid and to whom it should be paid. The question of costs is reserved. *Judgment accordingly.*

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SMITH v. CITY OF REGINA.

Saskatchewan Supreme Court, Lamont, J. February 1, 1917.

1. NEGLIGENCE (§ II F—120)—ULTIMATE NEGLIGENCE.

Ultimate negligence is constituted by a repetition or continuance of the primary negligent act coupled with a present ability to discontinue or avoid it, and a failure to do so.

[*B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, considered.]

2. STREET RAILWAYS (§ III C—40)—ULTIMATE NEGLIGENCE—EXCESSIVE SPEED.

Running a street car at an excessive speed can only become ultimate negligence, for which there is liability notwithstanding the plaintiff's contributory negligence, in cases where the motorman could, or should have, avoided the accident, but failed to do so.

Statement,

ACTION to recover damages for injuries sustained in a collision of an automobile with a street car. Dismissed.

P. M. Anderson and *W. Rose*, for plaintiff; *G. F. Blair*, K.C., and *H. E. Grosch*, for defendant.

Lamont, J.

LAMONT, J.:—This action was tried before me with a jury. The plaintiff was proceeding in his automobile from west to east along 12th Ave., Regina. When he reached Albert St., where it is crossed by 12th Ave., he brought his automobile to a stop to allow a street car belonging to the defendants to pass. This car was proceeding along Albert St. from north to south. Albert St. is 90 ft. wide and has a double track for the defendants' street railway. This the plaintiff knew, and knew that cars were operated on both tracks. After the defendants' south bound car had passed, the plaintiff started his automobile across the track without looking to see if a car was approaching on the other track. On that track a north bound car was approaching, and as the front of the automobile reached the track it was struck by the north bound car. The automobile was considerably damaged and the plaintiff received a cut on his forehead.

The motorman said that he saw the plaintiff when he was about 25 ft. from 12th Ave., and that he checked the speed of

the car, but that he thought the plaintiff would not attempt to cross in front of his car. He testified that it was customary for pedestrians and automobilists to come quite close to the track and there wait until the car would pass, and that this is what he expected the plaintiff would do. He further said that it was not until he was within about 10 ft. of the plaintiff that he began to be afraid of an accident, then he immediately applied the emergency brake, but notwithstanding a collision occurred.

I submitted to the jury a number of questions which were approved by counsel for both parties. The questions, and the answers of the jury, were as follows:—1. Were the defendants guilty of negligence which caused or helped to cause the collision? A. Yes. 2. If so, in what did that negligence consist? (Answer fully). A. In the motorman running his car at a higher rate of speed than was really safe, while passing a south bound car so near the intersection of 12th Ave. and Albert St. 3. Was the plaintiff guilty of negligence which caused or helped to cause the collision? A. Yes. 4. If so, in what did that negligence consist? (Answer fully). A. In not taking proper precaution in crossing the street, and looking for any north bound traffic. 5. If you find that the plaintiff was guilty of negligence, could the motorman by using reasonable care, after he became aware of the danger to the plaintiff, have avoided the accident? A. No. 6. If so, what should he have done that he did not do, or what did he omit to do that he should have done? A. Could not do anything. 7. At the time of the collision was the street car going at a reasonable rate of speed? A. No. 8. If not, could the street car have been stopped between the time the motorman first realised the plaintiff's danger and the time of the collision, had the car been going at a reasonable rate of speed? A. Yes. 9. If the Court should on your answers think the plaintiff entitled to damages, what damages do you award? A. (a) Special damages, $174.50; (b) General damages, $200.00 = $374.50.

On the answers of the jury both parties claim to be entitled to judgment; the plaintiff, on the ground that the defendants' motorman by running his car at an excessive rate of speed had incapacitated himself from exercising such care as would have avoided the result of the plaintiff's negligence, within the principle laid down in the recent judgment of the Privy Council in

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B.C. Electric R. Co. v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719; the defendant, on the ground that the jury having found the plaintiff guilty of negligence, which caused or helped to cause the accident, he cannot recover.

Prior to the judgment of the Privy Council in the *Loach* case, the law applicable to the present case was well settled and may be stated as follows: Where a plaintiff himself has been guilty of negligence which contributed to the accident, he cannot recover unless it is established that, notwithstanding the negligence of the plaintiff, the defendant, after he was or should have been aware of the plaintiff's danger, could have avoided the accident by the exercise of reasonable care: *Radley* v. *London & North-Western R. Co.* (1876), 1 App. Cas. 754; *Grand Trunk R. Co.* v. *McAlpine*, [1913] A.C. 838, 13 D.L.R. 618; *City of Calgary* v. *Harnovis*, 15 D.L.R. 411, 48 Can. S.C.R. 494.

In *London Street R. Co.* v. *Brown*, 31 Can. S.C.R. 642, the findings of the jury were similar to those in the case at bar. There, as here, the jury found that the defendants were guilty of negligence in running their street car at too high a rate of speed; that the plaintiff was guilty of contributory negligence in not using more caution in crossing the tracks, and that the defendant's servant after the position of the plaintiff became apparent, could not, by the exercise of reasonable care, have avoided the accident. It was held the plaintiff could not recover. In that case, an argument seems to have been put forward very similar to the one advanced on behalf of the plaintiff in this case. In his judgment, Davies, J., at p. 651, says:—

> The respondent's counsel, both in his factum and in his oral argument before this Court, pressed very strongly the contention that the sixth question could have been put in an altogether different form and that the evidence shewed the negligence of the defendants' servants to have been so gross that no exercise of care on their part could have prevented the accident after the plaintiff's position on the track was discovered and that they therefore must be held liable. In support of this proposition he relied upon a statement made by Mr. Smith in his book on the law of negligence. But for this statement no authority was cited by Mr. Smith, and it does not seem to me at any rate applicable to a case such as this where the jury have really found that the accident would not have occurred but for the plaintiff's negligence. If any such doctrine could be invoked to destroy the legal consequence of a negligent act or want of action which was the proximate cause of the injury complained of, it would go far to destroy the doctrine of contributory negligence altogether.

Unless, therefore, the decision in the *Loach* case makes an

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alteration in the law, the plaintiff is debarred by his own negligence from recovering.

In the *Loach* case, the plaintiff was the administrator of one Benjamin Sands, who was killed by a collision with the defendant's car. The jury found that the defendants were guilty of negligence in running their car at too great a speed under the circumstances, and that Sands had been guilty of contributory negligence in not taking precautions to see that the road was clear before crossing. They also found that had the brake on the car been in effective condition the motorman could have stopped the car and prevented the accident. This latter, I take it, was really a finding that after the danger to Sands became apparent the motorman could not have done anything to avoid the accident, but that, had the brake been effective, he could have avoided it. On these findings the Privy Council held the defendants liable, on the ground that, although Sands was guilty of negligence, the defendants:—

> could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it.

By sending out a car with a defective brake, the defendants had incapacitated the motorman from exercising the care necessary to avoid the result of the plaintiff's negligence, or the result of the combined negligence of the plaintiff and himself.

Mr. Anderson for the plaintiff contends that, in the case at bar, the finding of the jury that the motorman could have stopped the street car between the time that he first realized the plaintiff's danger and the time of the collision had the car been going at a reasonable rate of speed, brings this case within the principles of the *Loach* case; he claims that, by running the car at an excessive rate of speed the motorman had incapacitated himself from avoiding the consequences of the plaintiff's negligence. To my mind there is a clear distinction between that case and the present one. In both the street car was running at an excessive rate of speed, but in the *Loach* case the brakes were defective, in the present case they were in perfect working order. In that case, had they been in proper condition, the motorman could

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have stopped the street-car notwithstanding its excessive speed and thus have avoided the collision. In this case he could not.

In the *Loach* case it was argued that the negligence relied on as an answer to contributory negligence must be a new negligence. The initial negligence which founded the cause of action being spent or disposed of by the contributory negligence. Their Lordships answer that argument, at p. 8, as follows:—

> As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian Courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called "primary" or "original" negligence. The defendant may answer that by proving against the plaintiff "contributory negligence." If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called "ultimate" or "resultant" negligence. The opinion has been several times expressed, in various forms, that "original" negligence and "ultimate" negligence are mutually exclusive, and that conduct which has once been relied on to prove the first cannot in any shape constitute proof of the second.
>
> Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

It will be observed that the repetition or continuance of the primary negligent act constitutes an answer to contributory negligence when,—but *only* when—it is "the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises." That duty arises when the plaintiff's danger is, or should be, known to the defendant. Anglin, J., in *Brenner* v. *Toronto R. Co.*, 13 O.L.R. 423.

It is, therefore, only from the time the plaintiff's danger is or should be apparent to the defendant that the repetition or continuance of the act of primary negligence becomes ultimate negligence for which the defendants are liable. It becomes ultimate negligence because the defendant could and ought to have avoided the accident.

The repetition of the act of primary negligence, to become ultimate negligence, implies that the previous act had become innoxious, to the extent at least that with it alone, without the repetition, the accident would not have occurred. It becomes

ultimate negligence because there is a duty on the defendant not to repeat it and he fails to perform that duty. A failure in the performance of his duty rendering him liable, implies that he could have performed it but did not. The repetition might, in my opinion, be properly designated a fresh act of negligence within the established rule. A continuance of the act of primary negligence to become ultimate negligence implies that the defendant could and should have discontinued it, but omitted to do so. It is only where a defendant, notwithstanding his own primary negligence and the plaintiff's contributory negligence, should avoid the accident, that he is held liable.

In the present case, the only act of negligence of which the defendants were found guilty was in running the car at an excessive rate of speed. The plaintiff was guilty of contributory negligence. The act of ultimate negligence charged against the defendants was the continuing to run at excessive speed after the plaintiff's danger was or should have been apparent. The jury have found that after that time the motorman could not have avoided the accident. Not being able in fact to discontinue the excessive speed, the next consideration is: was he, or the defendants, responsible for any act or omission which incapacitated him from avoiding the result of the dangerous situation created by his own excessive speed and the negligence of the plaintiff? Counsel for the plaintiff says, "Yes, he incapacitated himself by running at an excessive rate of speed." To my mind that is begging the question. It is not enough for the plaintiff to shew that the defendant could have avoided the result of the dangerous situation by not allowing the danger to exist. What he has to shew is that, notwithstanding the existence of the danger, although created in part by his excessive speed, the motorman should have avoided it. Or, in other words, predicating the excessive speed as existing, it was the duty of the motorman to avoid the accident and that he failed to take the necessary steps to do so. His failure to perform his duty may be shewn in two ways. One, by shewing that he had a present ability to avoid the accident and he failed to do so. The other, by shewing that although he had not the present ability, he would have had it but for some incapacitating act on his own part or on the part of the defendants. This incapacitating act, as in the *Loach* case, will be found in some act other than the act the existence of which is predicated and the consequences of

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which it is his duty to avoid. It must either alone or in conjunction with the act of primary negligence be the reason why the accident was not avoided. Their Lordships in that case did not hold that the incapacitating act was simply in running at too great a speed, but in having a defective brake which prevented the motorman from nullifying the effects of his excessive speed. What they did point out was that the continuing of the excessive speed might become ultimate negligence when it was the reason why the motorman did not avoid the accident, but, as I have already pointed out, the continuance could only be the ultimate negligence in cases where he could and should have discontinued but did not do so. The motorman in this case not having a present ability to discontinue his speed and there being no other incapacitating act, the plaintiff's action, in my opinion, fails.

To give effect to the plaintiff's contention would be to hold that in every case where the defendants were guilty of running at too great a speed and an accident occurred, they would be liable no matter how negligent the plaintiff on his part had been. It would, in fact, do away with the doctrine of contributory negligence. A perusal of the *Loach* case satisfies me that no such result was intended. That this is so, seems abundantly clear from the following paragraph of the judgment (p. 10):

> The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to the jury in terms of the decided cases, its application is plain enough.

This language does not indicate any violent alteration of established principles. The judgment does indeed negative the argument that a plaintiff cannot succeed if the negligence relied on as an answer to his own contributory negligence existed prior to the time when the defendant knew or should have known of the plaintiff's danger, and it may necessitate the addition of a clause to the statement usually made of the rule, to the effect that, where contributory negligence is known to exist, the plaintiff cannot succeed unless it is established that after the plaintiff's danger was or should have been known to the defendant, he could by the exercise of reasonable care have avoided the accident, or would have been able to do so but for some act or omission for which he is responsible which incapacitated him from avoiding it. Beyond this, I cannot see that the judgment makes any alteration of the established law.

The action will be dismissed with costs. *Action dismissed.*

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck, and Walsh, JJ. March 30, 1917.

RAILWAYS (§ III—45)—ACCIDENTS AT CROSSINGS—EXCESSIVE SPEED—ULTIMATE NEGLIGENCE.

The findings of a trial Judge that an injury to a person by a moving train at a highway crossing was caused by operating the train at an excessive rate of speed, which could have been avoided by a slackening of the speed immediately upon seeing the person, will not be interfered with on appeal; the crossing being in a thickly peopled portion of the city the onus was upon the railway company to shew its compliance with sec. 275 (3) of the Railway Act (R.S.C. 1906, ch. 37, as amended in 1909, ch. 31 sec. 13).

[*B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, applied.]

Statement.

APPEAL by the defendant from a judgment of Simmons, J., in favour of plaintiff, in an action to recover damages for personal injuries caused by the negligent operation of a railway. Affirmed.

A. G. MacKay, K.C., for respondent; *N. D. McLean*, for appellant.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The plaintiffs are husband and wife. The husband was a mail clerk on the G.T.P.R. Co. They lived in Edmonton on Ottawa Ave., an avenue which runs approximately north and south and which is crossed nearly at right angles both by the railway line of the defendant company and that of the G.T.P.R. Co. The main tracks of these two lines are, at the crossing on Ottawa Ave., about 45 or 50 feet apart, the defendant's line being the northerly one. Ottawa Ave. is some distance east of the Union Station used by the two railway companies.

On December 18, 1914, the plaintiff, the wife, started to go down town to attend an early morning bargain sale and was walking southerly on the sidewalk on the west side of Ottawa Ave. and approaching the track of the defendant when a Grand Trunk Pacific passenger train which had left the station at eight thirty or a few minutes later on an eastward trip crossed the avenue. The husband was in the mail car on this train and was at the door on the north side of the car. He saw his wife coming along the sidewalk and she saw him. They waved their hands to each other and then the wife proceeded to cross the C.N.R. track. In doing so she was struck by the engine of a C.N.R. freight train that was then coming in from the east, and was thrown some distance south-westerly and severely injured. She did not recover consciousness till December 24, and neither then nor at

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any time up to the trial of the action, which took place on November 8, 1916, did she remember anything that occurred between the evening of December 17, that is, the night before the accident, and December 24, when she recovered consciousness. She stated in her evidence that she remembered intending on the evening of December 17 to go down town early next morning to the bargain sale but did not remember anything that occurred that morning.

The injured plaintiff could therefore throw no light upon the question of the real cause of the accident. The accident was observed, however, by several people, including the husband, and there were other witnesses who testified as to the speed of the defendant's train and as to where the injured plaintiff was found.

The trial Judge found that the defendant's train was going at a speed of at least 15 miles an hour and that that was a dangerous rate of speed at the place in question. He does not refer in his judgment to any particular clause of the Railway Act, and it would appear as if he intended to attribute general negligence to the defendant company in operating its train at an unreasonable rate in view of the character of the locality.

He also found that the injured plaintiff was guilty of negligence in not looking. He said "the evidence is not very convincing as to whether she looked or not, but I think the inference is that she did not look or she would not have been on that track when that train was so close."

The trial Judge considered that the principle of *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, applied. He said that he was satisfied upon the evidence that the engineer operating the train saw the injured plaintiff soon enough to be able to stop the train and that he could have done so in time to avoid the accident if he had not been going at an excessive rate of speed. That negligence, he said, continued up to the moment of the accident.

The appellant asks for a reversal of the judgment on several grounds both of fact and law. The finding of fact with which we are chiefly asked to interfere is that as to the rate of speed at which the defendant's train was moving. As to this the evidence was contradictory. The engineer said that he was going "about

six to eight miles an hour." On his examination for discovery he had said "about 8 miles an hour." The fireman said that the train was "going anywhere from 6 to 8 or 9 miles an hour. I couldn't say for sure, but it was going very slow anyway." The brakeman said the train was going "probably 6 or 8 miles an hour, I am not positive." The conductor said that they "came along fine and dandy" until they came to Ottawa Ave., but he was not asked by defendant's counsel to say how fast, in his opinion, the train was going, a circumstance of some significance perhaps.

The plaintiffs' witnesses, of course, told a different story. The husband, who was on the G.T.P. train, said the defendant's train was going 20 miles an hour, that the schedule rate for his own train was 23, and that this helped him to decide. He said that his own train was moving only 4 miles an hour at the time, that he did not think it could be 6 and that it could not be 7. On his examination for discovery he had said his own train was moving 6 or 7 miles an hour. A witness, Clendennan, a passenger on the G.T.P. train, said the G.T.P. train was moving very slow, about 5 miles an hour, that he saw the C.N.R. train and saw it strike the plaintiff, that that train was going 20 miles an hour, that that was a conservative estimate and a fair estimate of its speed, and that it was more from the way some Hart Convertible cars, which were in the C.N.R. train, were rattling past that he gauged the speed. One Sturmer, a mail clerk on the G.T.P. train, said that his train was going not more than 6 miles an hour, that he was busy checking registered articles when the noise of a freight train attracted his attention, that he looked through the window and saw the C.N.R. train coming, that he thought to himself it was travelling pretty fast in the city limits, and that he would judge it was travelling 20 miles an hour. Then one Dunlop, a road-master on the G.T.P., said that he was on the G.T.P. train that morning, that he saw the C.N.R. train, that its speed was at least 20 miles an hour, that not under that would be a fair estimate.

Some attempt was made to depreciate the value of the testimony of the plaintiffs' witnesses because of their being themselves on a moving train and of the alleged difficulty in such circumstances of forming a fair opinion as to the rate of travel of another train. There is no doubt considerable in this observation. But

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the G.T.P. train was going slowly, probably not more than 5 miles an hour, there can be no doubt on that point. The C.N.R. track is nearly 50 feet away. Clendennan, Sturmer and Dunlop were the most disinterested witnesses. They had long been accustomed to trains, and I should myself attach great weight to their opinion, even if they were themselves on a slowly moving train. Then, there were some other independent circumstances, such as the distance the plaintiff was thrown (a matter of course itself in dispute), and the distance the defendant's train went before it stopped (for which also of course a special reason was given), which throw at least a little light on the matter, and, according to his view of the truth of these matters, may have influenced the trial Judge considerably.

On the whole, therefore, I cannot see any good ground for interfering with the finding of fact made by the trial Judge, and we must, I think, take it to be a fact that the defendant's train was travelling at least more than 15 miles an hour.

There might be a question whether it is open to a jury or a Judge acting as such to find merely general negligence in going at an unreasonable rate of speed through a city. As Sedgewick, J., pointed out in *Grand Trunk Pacific R. Co.* v. *McKay*, 34 Can. S.C.R. 81, at 89-91, this might involve the exercise of greater power by a jury than even a provincial legislature could exercise. It is apparently quite unnecessary to trouble with this point because sec. 275 of the Railway Act fixes the rate of speed in such a case as the present, and leaving undisturbed the Judge's finding as to the speed of the train, the result is that the statute was clearly violated. Sec. 275, (3) says:—

> No train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than 10 miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing or unless permission is given by some regulation or order of the Board.

There was no allegation by the defendant company, nor was there any evidence to shew, that the crossing was protected in accordance with any regulation of the Railway Board, nor was there any evidence of any permission by the Board. It would appear to me that the onus of alleging and proving an exemption from the limitation to 10 miles an hour upon the ground of com-

pliance with the orders of the Board or of a permission given by it lay upon the defendant company. Assuming, therefore, that the crossing in question was in a thickly peopled portion of the City of Edmonton a violation of the statute seems to be established.

As to the nature of the neighbourhood some photographs were put in evidence showing quite a number of houses situated closely together upon the street in question. The injured plaintiff stated that the neighbourhood was "thickly populated." The attempt upon cross-examination to break down this statement was not very earnest. She admitted that there was a "patch of bush" on the north side of the C.N.R., but everyone in the west knows that in new western towns one vacant lot may be a "patch of bush." The defendant company had no evidence upon the subject at all. Dunlop, one of the plaintiff's witnesses, said, "it is all settled the full length of the track." "It is an old part of the city," and he did of course speak of a block on the south side being "grown up with small poplars," but this might be true even where there are houses. He was not cross-examined upon the point at all. Then it was shewn that the place in question was only some 6 or 7 blocks east of the Union Station of the C.N.R. and G.T.P. in Edmonton.

Although the trial Judge in his oral judgment made no express finding upon the point, I think we are justified upon this evidence in finding ourselves that the portion of the city in question was at the time a thickly peopled portion within the meaning of sec. 275 of the Act.

It seems to me that the trial Judge was clearly right in thinking that the facts he found brought the case within *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719. In that case the deceased was guilty of negligence, as the injured plaintiff was here, in going upon the track without looking. In that case the defendant company was negligent in two respects, first, in running its car at an excessive rate of speed, and, second, in sending it out with a defective brake. In this case we have only the excessive rate of speed. In that case the motorman could, after he saw the danger, have stopped his car in time to avoid it had it not been for his defective brake. In this case the Judge found that the engineer could, after he saw the danger, have avoided

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the accident had it not been for the excessive speed at which he was going. In both cases the person injured was not found guilty of any negligent omission after she or he saw the danger. In the *Loach* case Lord Sumner said, p. 6:—

> There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective, he could, as the jury found, have pulled up in time. . . . It was the motorman's duty on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company and not his own, though it was a close thing.

Now here the brakes were in perfect working order. But owing to the excessive speed at which the train was moving they could not do what they could have done if the speed had been less, namely, retard the engine sufficiently to allow the injured plaintiff to pass. It is clear that she just nearly succeeded in passing as it was. Even more than in the *Loach* case "it was a close thing." The witness Clendennan said that the plaintiff was taking quick steps to get out of the way when he saw her. He thought she was almost over. He saw the pilot, *i.e.*, the front part of the engine, come past her a little. He said, "she missed the cow-catcher but I should imagine the cylinder hit her." This view of how nearly she escaped is confirmed by the direction in which she was thrown. It is therefore evident that a retardation of the train only very slightly greater than that actually made by the brakes would have allowed the plaintiff to get clear. And there is no doubt that it was owing, in this case entirely owing, to the excessive speed that the brakes did not cause a greater retardation. There appears to me to be no ground for distinguishing an inability to stop in time, caused partly by a defective brake and partly by excessive speed, from an inability to stop in time caused entirely by excessive speed.

I have read with much interest the observations of Lamont, J., upon the effect of the decision in the *Loach* case in his judgment in *Smith* v. *Regina*, 34 D.L.R. 238. He had practically the same problem to deal with as we have here. In his opinion: mere

excessive speed could not be treated in the same way as a defective brake. But, acute as his reasoning is, I find myself, with respect, unable to follow it. It is true that in the *Loach* case the jury found that if the brake had been a proper one the motorman could have avoided the accident. In the present case also, we know that even with a proper brake the engineer was unable to avoid the accident, at least when he started the attempt. But, even assuming that he started the attempt as soon as he saw the danger, I still think that the engineer's inability to avoid the accident when he saw the danger was an inability of his own creation and that therefore the defendant company is not entitled to take advantage of it. Lord Sumner said, p. 8:—

> If, however, the same conduct which constituted the primary negligence, is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

In the *Loach* case it was just as impossible to mend the defective brake or to put a good one in its place after the motorman saw the danger as it was here to reduce the speed sufficiently. I can see no logical difference between a defective condition of the brakes created by a prior act and a defective or, if you like, improper, condition of the train consisting in its excessive rate of speed, created by a prior act. The one condition as well as the other was a continuing one, and each it was impossible to remedy in time.

But I think in the present case there is another circumstance which I think is sufficient to support the judgment. The engineer admitted that he did not attempt to decrease his speed the very moment he saw the plaintiff walking toward the track. It was a perceptible time after, viz.: when he became convinced that she was not going to stop that he applied the brakes. Now if he had been going at not more than 10 miles an hour, that is at the rate allowed, I think he would not perhaps have been to blame for waiting till he saw for certain that she was going on the track, particularly if he had noticed her looking towards him. But when he was going at a forbidden and excessive rate of speed, when he noticed the plaintiff stepping toward the track, when he did not observe any sign that she recognized the approach of his train, I think he was guilty of negligence in not applying his brakes *at once* and so reducing his speed. In other words, for the

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engineer in such circumstances I think the moment of perceiving the danger must be held to have been when he first saw the woman at all and that he could then, by applying the brakes, clearly have avoided the danger.

The engineer said that he first saw the woman when the pilot of his engine was about 10 or 15 feet east of Ottawa Ave. This would be about 80 ft. from the place of collision. At the rate he was found to have been going it would take him only between 3 and 4 seconds to go that 80 ft. The woman could not have then been so far from the track as to leave him in much doubt as to her intention. She could not have walked up very far in 3 or 4 seconds.

Indeed, I am strongly inclined to the view that the engineer and the brakeman were not telling exactly the truth when they said that the danger whistles were given only 10 or 15 ft. east of Ottawa Ave. I strongly incline to the opinion that the engineer saw the plaintiff a good distance further east. The brakeman, indeed, on cross-examination, fell away from his story and admitted that the danger whistles were given about 150 yards further eastward.

There seems to me to be no reason to doubt that the engineer did not attempt to slacken his speed as soon as he ought to have done and that this was itself negligence, and that if he had done so the plaintiff would have escaped injury.

For these reasons, I think the appeal should be dismissed with costs. *Appeal dismissed.*

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CALGARY BREWING & MALTING CO. v. ROGERS.

Saskatchewan Supreme Court, Newlands, Lamont, Brown and McKay, JJ. March 10, 1917.

BILLS AND NOTES (§ IV D—104)—"CHEQUE"—PAYMENT—WITH DRAFT—DISHONOUR—BANKING.

A dishonoured draft on another bank, given in return for a cheque, does not discharge the maker's liability on the cheque in the absence of evidence that the draft was accepted as payment. A cheque drawn on a private bank is not a cheque within the meaning of the Bills of Exchange Act (R.S.C. 1906, ch. 119, sec. 165) but a bill of exchange and subject to the provisions applicable to instruments of that kind.

[*Donogh* v. *Gillespie*, 21 A.R. (Ont.) 292, followed.]

Statement.

APPEAL by defendant from the judgment of Haultain, C.J., 33 D.L.R. 173. Affirmed.

N. R. Craig, for appellant; *P. M. Anderson*, for respondent.

Lamont, J.

LAMONT, J.:—The facts of this appeal are simple, and, as

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stated by the Chief Justice in his judgment now appealed from, are as follows:—

The defendant was a hotelkeeper at Bienfait, Sask., and was a customer of the plaintiff company. The plaintiff company had apparently been in the habit of drawing on the defendant through a chartered bank at Estevan. The defendant wrote to the plaintiff and requested it to draw in future through the Bienfait branch of the Estevan Security Co. as he did his banking with that company, and it would be more convenient for him.

On November 11, 1914, the defendant sent the plaintiff his cheque of that date for $700 to be applied on his account. The cheque was drawn on the Estevan Security Co. of Bienfait. The cheque was deposited by the plaintiff in the Bank of Montreal, Calgary, for collection. The Bank of Montreal sent the cheque to the Estevan Security Co. by mail, the Estevan Security debited the account of the defendant with the amount of the cheque and sent the Bank of Montreal a draft for the proceeds of the cheque drawn on the Union Bank, Winnipeg. This draft was dishonoured. Very shortly afterwards the Estevan Security Co. failed with very heavy liabilities. The question now is whether the plaintiff or the defendant is to suffer the loss.

On the back of Rogers' cheque the following endorsements appeared:—

Pay to the order of the Bank of Montreal: The Calgary Brewing & Malting Co., Ltd. A. E. CROSS, President.

Pay Bank of Montreal or order: For Bank of Montreal, Calgary, Alta. A. M. PETERS, Manager.

Pay to the order of any bank or banker, for Bank of Montreal, Calgary, Alberta. A. M. PETERS, Manager.

In *Donogh* v. *Gillespie*, 21 A.R. (Ont.) 292, the facts were very similar. There, the plaintiff on July 2, 1892, put through his bank, which was the Canadian Bank of Commerce, Toronto, a three months' draft on the defendant, who was doing business at Alvinston, for $299.18. The Bank of Commerce forwarded the draft to Conn & Co., private bankers at Alvinston, "for collection and returns." Conn & Co. presented the draft to the defendant who accepted it, payable at Conn & Co.'s banking office, Alvinston. On October 11, Conn & Co., without any special instructions from the defendant, charged the draft to the defendant's account, marking it paid, and sent the Canadian Bank of Commerce, Toronto, their own cheque on the Merchants Bank, St. Thomas. The same day Conn left Alvinston. On the 12th he made at Sarnia an assignment for the benefit of his creditors and next day absconded. His cheque on the Merchants Bank was dishonoured. The plaintiff then sued Gillespie. The Court of Appeal for Ontario held that he was entitled to recover, on the ground that the duty of Conn & Co. as agents of

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the Canadian Bank of Commerce was to collect the amount from Gillespie; that is, to obtain payment in money, which they did not do, but instead they purported to set-off an indebtedness of their own to Gillespie, and that, in so doing, they had not acted within the scope of their agency so as to bind their principals. The judgment of Burton, J.A., is as follows:—

> The case must be looked at in the same way as if the Canadian Bank of Commerce were suing, and the fallacy is in treating this debit as payment of money. Conn & Co., it may be, were debtors to the defendants, but that would not justify them in setting-off that debt. Their authority as agents was limited to receiving payment in cash and nothing else.

Unless that case can be distinguished, the principle there laid down, in my opinion, governs the present case.

The facts differ only in this: that in the *Donagh* case a bill of exchange was sent for collection to an agent; in this case it was sent to the one on whom it was drawn, not for collection but, according to the endorsement on the back of the cheque, for payment.

As Rogers' cheque was drawn on a private bank it was not a cheque within the meaning of the Bills of Exchange Act; *Trunkfield* v. *Proctor*, 2 O.L.R., 326, at 331. It was simply a bill of exchange payable on demand and subject to such provisions of the Act as apply to an instrument of that kind.

Maclaren on Bills, Notes and Cheques, 1916 ed., p. 423. Being payable on demand, it was payable in cash on presentment for payment.

The only instructions in evidence from the Bank of Montreal are those endorsed on the back of the cheque, which are: "Pay to the Bank of Montreal or order" or "to the order of any bank or banker for the Bank of Montreal." The demand on the Security Co. was to pay, which means payment in cash unless the party to whom payment is to be made consents to some other form of payment or satisfaction: *Guardians of Lichfield Union* v. *Green* (1857), 26 L.J. Exch. 140, 1 H. & N. 884; *Boyd* v. *Nasmith*, 17 O.R., 40 at 47.

The bank having sent the defendant's order on the Security Co. to the company for payment, Rogers is not discharged unless it is paid, and to be paid means paid in cash unless the Bank of Montreal, as the agents of the plaintiffs, elected to take settlement in some other form. The Security Company did not pay in cash; what they did was to send the Bank of Montreal an

order on the Union Bank, Winnipeg, for the amount less exchange. This, the Union Bank refused to honour. How, then, can it be said that the Security Co. paid the amount which Rogers requested them to pay?

It was contended that the Bank of Montreal, by sending the draft to the Union Bank for payment, elected to take the draft instead of cash. This, in my opinion, cannot be supported.

A creditor who takes a bill in respect of a pre-existing debt, takes it as conditional payment of the debt. If the bill is paid in due course, the payment of the debt becomes absolute at the time of the taking of the bill. If the bill is dishonoured, the condition of the payment is broken and the debt revives: Falconbridge, 2nd ed., p. 722.

Apart from the sending of the draft to the Union Bank, there was absolutely no evidence upon which could be founded an inference that the Bank of Montreal was willing to accept anything short of payment in cash. Without such evidence the forwarding of the draft by them cannot, in my opinion, be construed as anything more than an acceptance thereof conditional upon its being paid. The draft on the Union Bank not being paid, Rogers' order on the Security Company to pay the amount was not complied with by the company. Stress was laid upon the fact that the Security Co. had debited the defendant's account with the amount of his order. This the company had no right to do until they paid the amount.

The appeal, in my opinion, should be dismissed with costs.

NEWLANDS and MCKAY, JJ., concurred with LAMONT, J.

Newlands, J.
McKay, J.

BROWN, J. (dissenting):—The facts in this case are sufficiently set out in the judgment of my brother Lamont, which I have had the privilege of reading.

Brown, J.

With great deference to his views and conclusions, especially as the same are concurred in by the other members of the Court, I do not think that the case of *Donogh* v. *Gillespie*, 21 A.R. (Ont). 292, is applicable to the case at bar.

In that case the Canadian Bank of Commerce sent the draft forward to Conn & Co. for collection or payment, and instead of getting payment, Conn & Co. had same accepted, payable at their bank, and on due date, without any special instructions from defendants, charged the same against the defendants' account and forwarded their own cheque on the Merchants Bank at St. Thomas. The Court there held the defendants liable on the

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ground that Conn & Co. had no authority under the circumstances of that case to obtain payment by adjustment of their account with the defendants. Their duty, under their instructions from the Canadian Bank of Commerce, was to obtain payment in cash.

But, as I see it, the facts there are materially different from those of the case at bar. The cheque that the defendant gave here—and it does not appear to me material whether it is called a cheque or bill of exchange—was at most a representation by the defendant that he had, or would have when the cheque was presented for payment, sufficient money in the hands of the Security Co. with which to make payment, and that the Security Co. would honour the cheque when so presented.

The plaintiffs, in forwarding the cheque to the Security Co., must be held to have known that, so far as the defendant is concerned, it would be paid in the very manner in which it was paid; namely, by charging the cheque up against the defendant's account. Immediately it was so charged up, or in this way honoured, it was, as between the Security Co. and the defendant, paid. The defendant had no longer any right to a withdrawal of the funds; had no longer any control over them, no matter what information he may have received as to the insecurity of the bank.

If as between the Security Co. and the defendant the cheque was paid, and paid in the manner in which the plaintiffs must be held to have known that it would be paid, then, in my opinion, it must also be held to have been paid as between the plaintiffs and the defendant.

In this case, as distinguished from the case of *Donogh* v. *Gillespie* (*supra*), it was not in getting payment in the way they did that the Security Co. exceeded their authority, but rather in sending their own draft on the Union Bank, Winnipeg, instead of sending the cash.

Can it be said that if the defendant had, when the cheque arrived at the Security Co.'s bank, paid in cash to the Security Co. sufficient to meet the cheque, the mere fact that the Security Co. did not forward the money to the plaintiffs but appropriated it to their own use and sent on their own worthless cheque, would relieve the plaintiffs? As I understand it, *Donogh* v. *Gillespie* is authority to the very contrary.

It seems to me that the plaintiffs are in no better position than if the payment had been made in that way. They were paid, in so far as the defendant is concerned, in the manner in which both he and they expected to be paid; and, under such circumstances, it seems to me that the plaintiffs rather than the defendant should stand the loss.

I would, therefore, allow the appeal with costs, and have the judgment of the trial Judge varied accordingly.

Appeal dismissed.

THE KING v. POWER.

Exchequer Court of Canada, Cassels, J. May 18, 1916.

1. EMINENT DOMAIN (§ III C—144)—COMPENSATION—WATER-LOTS—HARBOUR COMMISSIONERS—VALUE—AMOUNT OFFERED IN PRIOR EXPROPRIATION.

A right reserved to the Crown, in Quebec, to resume possession of waterside property for public purposes, upon payment for improvements thereon, is vested, under 22 Vict. ch. 32, in the Quebec Harbour Commissioners. In an expropriation of the property compensation must be made for the interests of the owners and the Commissioners respectively; an amount offered and accepted in a previous expropriation, which had been abandoned, is not to be treated as conclusive evidence of the value of the land.

2. ADVERSE POSSESSION (§ I K—55)—EXERCISE OF STATUTORY RIGHTS.

A user of a riparian right as authorized by statute does not give title by adverse possession.

Statement.

INFORMATION filed by the Att'y-Gen'l for the Dominion of Canada for the expropriation of certain lands required for the construction of the National Transcontinental Railway, a public work of Canada.

G. F. Gibsone, K.C., appeared for the Crown; *A. C. Dobell*, for the Harbour Commissioners; *G. G. Stuart*, K.C., for the defendants other than the Harbour Commissioners and the Rector and Church Wardens of St. Paul's Church; and *R. Campbell*, K.C., for the Rector and Church Wardens of St. Paul's Church.

Cassels, J.

CASSELS, J.:—This was an information exhibited on behalf of His Majesty the King to have it declared that certain lands described in the information are vested in His Majesty and to have the compensation therefor ascertained.

The lands expropriated are shown on the plan Ex. No. 3. The plan expropriating the lands in question was deposited on November 8, 1913, and it is as of this date that the compensation has to be ascertained. The Crown offers by the information the sum of $12,000, as sufficient and just compensation for the lands

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expropriated. The defendants other than the Harbour Commissioners and the Church claim the sum of $79,608.95.

Before dealing with the question of compensation I wil consider some of the questions in dispute. That portion of the lands in question shewn on the plan and lying to the south side of the parcel marked 2415 and bounded on the north by a line south of the end of the wharf having number 60 marked on it and extending south to the Harbour Commissioners' line is not claimed by the defendants other than the Harbour Commissioners. A small parcel of land shewn on the plan to the north of the piece coloured yellow and marked on the plan "Leased to Messrs. Atkinson Usborne Co. 25th April, 1842 (99 years) Area; 720 sq. ft." is held by the defendants Power *et al.* under an emphyteutic lease from the rector and church wardens at a nominal rental of one penny a year.

I am relieved by counsel of the task of deciding the question of the separate amounts to be paid Power *et al.* and the Church as it has been agreed between counsel that the land shall be assessed as if owned by Power *et al.*, the Church and Power *et al.* agreeing to adjust their rights in respect to the compensation outside of Court. In reference to the property on the south end of that portion of lands marked 2411 on the east side of the property and designated on the plan: "Grant to R. C. Bishop, 29th November, 1854; area 6335 eng. feet." As alleged on behalf of the Crown, the patent contains the following provision:—

> Provided further and we do also hereby expressly reserve unto us, our heirs, and successors full power and authority, upon giving 12 months previous notice to the said corporation to resume for the purpose of public improvement the possession of the said lot or piece of ground hereby granted, or any part thereof upon payment to the said corporation of a reasonable sum as indemnity for the ameliorations and improvements which may or shall have been made on the said lot or piece of ground or such part thereof as may be so required for public improvements, and in default of the acceptance by the said corporation of such sum, so as aforesaid tendered, the amount of indemnity, whether before or after the resumption of possession by us, our heirs or successors, shall be ascertained by two experts, one of whom shall be nominated and appointed by our governor of our said province for the time being, and the other by the said corporation, or in the event of a difference of opinion arising between the said experts, by either of them, the said experts, and the tiers-expert or umpire chosen by them.

The date of this patent is of November 16, 1854. It is claimed by Mr. Gibsone on behalf of the Crown that no compensation should be allowed for this piece of property, the reason put forward

being that the Crown has notified the owner of its intention to take back this piece, and as no improvements or ameliorations have been placed on this particular piece of land the Crown contends there is no value in them to the defendants. I am not aware of any such notification by the Crown except the statement of Mr. Gibsone, which is no doubt correct.

In a case of *Samson* v. *The Queen*, 2 Can. Ex. 30, at 32, Burbidge J., dealt with a case similar in respect to the one in question. The view of the Judge was to the effect that proceedings having been taken under the Expropriation Act and not under the terms of the grant, compensation had to be arrived at: but that in assessing compensation regard must be had to the provision in question which, no doubt, would seriously affect the value of the land to the grantee. The property in question in the *Samson* case was situate on the south side of the St. Lawrence (Levis side) and was not vested in the Harbour Commissioners. The case was decided in 1888.

In the case before me I am of opinion that the rights of the Crown in respect to this particular piece of land is vested in the Harbour Commissioners under the provisions of the statute, 22 Vict. ch. 32, to which I will have to refer to later. The result is, in my opinion, that the compensation to this particular piece of land must be paid to the defendants Power *et al.* for their interest under the grant in question and to the Harbour Commissioners for whatever their interest may be in respect of having the right to resume the parcel of land. I will deal later as to the method of apportionment.

A further question arises in respect of the piece of property shown on plan ex. 3 lying between the two portions of lot 2411 and marked on the plan 2411 and not coloured yellow. It runs from low water mark to the Harbour Commissioners' line. This parcel of land contains 6,503 sq. ft. It has never been conveyed and is vested in the Harbour Commissioners, unless Power and Sharples have acquired a title by adverse possession. It is claimed on behalf of Power *et al.* by Mr. Stuart that they had proved a title of possession of more than 10 years and that the property in question is the property of his clients. He relies in support of his contention on a case of *Quebec Harbour Commissioners* v. *Roche*, 1 Que. S.C. 365, a case decided by Andrews, J., in 1892.

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That was a case in which it was held that the prescription of 5 years barred the right of the Harbour Commissioners as to rents payable in respect of the property in question in that action. I may mention that in most of these cases and also when dealing with the Quebec Harbour Act, "rent" means interest on the purchase money, the lands having been sold out and out, the purchase money not paid down but allowed to stand as a charge, the interest thereon being paid. In the case before Andrews, J., the property in question in respect of which a claim was made for the rents was not within the harbour of Quebec. Without further consideration I am not prepared to hold that the rule adopted in the case of Roche would be applicable to the case before me, as this particular piece of property is unquestionably part of the harbour and is vested in the Harbour Board on the trusts specified in the Act.

I have not considered this question as I think the evidence falls short of any proof of title acquired adversely by Power *et al.* I think, moreover, that the question of whether or not a title by possession had become vested in the owners of these two parcels on either side thereof is considerably weakened by the terms of the statute of 1858. This statute reserves to the owners of the ripa fronting this particular lot certain rights of user. These lands had been granted to low water and any user of the open water would be a user sanctioned by the statute.

The statute 22 Vict. (1858) is intituled an Act to provide for the improvement and management of the Harbour of Quebec. It also defines the boundaries of the harbour. Clause 2 provides that: "All land below the line of high water on the north side of the River St. Lawrence within the said limits." It is admitted that under clause 1 these limits are high water mark on the north side of the St. Lawrence and comprise the lands in question. This clause 2 declares that all the lands below the line of high water on the north side within the said limits *now belonging to* Her Majesty whether the same be or be not covered with water are vested in the corporation.

This lot in which the claim is made for a possessory title had never been granted at the time of the passing of the statute in question. It belonged to Her Majesty at the date of the enactment and passed to the harbour commissioners, under the pro-

visions of this clause 2. I think, also, that on a fair reading of the statute the right of resumption of the other parcel of land to which I have referred on the east side of 2411 and marked on the plan "Grant to R. C. Bishop, 29th November, 1854," also passed to the Harbour Commissioners. The right was certainly an interest in land. This clause 2 also provides that:—

all rents and sums of money now due or hereafter to become due to Her Majesty and not already by law appropriated or directed to be applied exclusively to any other purpose, either for interest or principal, or in any other way, in respect of any land below the line of high water within said limits heretofore granted by Her Majesty, whether the same be or be not covered with water, shall be vested in the corporation hereinafter mentioned.

This therefore vests in the harbour commissioners lands belonging to Her Majesty and also rents and sums of money due or to become due in respect of lands theretofore sold, which would vest the rentals due by Power *et al.* in the Harbour Board.

Then comes the provision which, I think, is of importance as showing preservation of the riparian rights over the lot in question:—

Provided always that every riparian or other proprietor of a deep water pier, or any other property within the said boundaries, shall continue to use and enjoy his property and mooring berths in front thereof, as he now uses the same, until the said corporation shall have acquired the right, title and interest which any such proprietor may lawfully have in and to any beach property or water lot within the said boundaries; nor shall the rights of any person be abrogated or diminished by this Act in any manner whatever.

If any user were proved it would be a user as authorized by the statute and could hardly be claimed as an adverse user. As I have stated, I think the evidence falls short of what would be required to make a title by possession. I agree, however, with Mr. Stuart's argument that the riparian right exists and any further rights given by the statute and that the harbour commissioners could not utilize the property in question in such a manner as to deprive the owner of the ripa of his right. This would necessarily add an additional element of value to the lot to the north of this water and also to the properties on either side.

In 1889, 62-63 Vict. ch. 34, a statute intituled: An Act to amend and consolidate the Acts relating to the Quebec Harbour Commissioners was enacted. By clause 6, the harbour of Quebec is defined and by sub-sec. 2 it is provided:—

But for the purposes of this Act, except as the application of by-laws, etc., the harbour of Quebec does not comprise: (*a*) Any lands, buildings, wharfs, quays, piers, docks, slips, or other immovables, in respect of which the Quebec

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Harbour Commissioners have not acquired the right, title and interest of the owner and proprietor, or a right to the possession, occupation or use thereof.

This statute contains various provisions amongst others, sec. 20:—

to take, acquire and purchase such immovable property as it considers necessary for the purposes of extending and improving the harbour of Quebec or the accommodations thereof, including the construction for such purpose of wet and dry docks, wharfs, piers, slips and other such works, etc.

And there is a provision authorizing the Harbour Commissioners to dispose of the said immovables.

It is contended by Mr. Gibsone that this only conferred power on the corporation to sell and dispose of such lands as they acquired and did not extend the lands vested in them by the statute. I do not see the materiality of this question. I should think, however, that the right of the corporation is not so limited. Sub-sec. 2 provides that:—

the sale of any deep water lot forming part of the property vested in the corporation shall not be valid or effectual until sanctioned by the Governor in Council.

This provision would negative the contention put forward by Mr. Gibsone. Sec. 21 re-enacts the provisions in respect to the vesting in the corporation of the property acquired in respect of which the corporation could sue or be sued.

The question of compensation to be allowed is one of considerable difficulty. There is a great divergence of opinion on the part of the various witnesses. Some facts in connection with the case stand out prominently. The property in question is situate at a considerable distance west of what is known as the Queen's wharf off Champlain Street.

It has to be borne in mind that the end of the wharf on lot 2415 and the right to build the wharf is at a very considerable distance to the north of the harbour commissioners' line. The lot on the westerly part of 2411 and immediately to the west of the vacant lot vested in the corporation has a frontage of 70 feet, 3 inches. The lot forming part of 2411 on the east part of the property in question and immediately to the west of the vacant property contains a frontage of about 88 ft., and the wharf in question is about 71 feet north of the harbour commissioners' line. This property could hardly be utilized for the mooring of large steamers, there not being a sufficient wharf frontage. Another matter, to my mind of importance, is the fact that these properties

were conveyed to the defendants Power and Sharples on October 5, 1901, the one parcel to Sharples, viz., 2411 for the sum of $9,326 and the other to Power, viz., 2415 for $3,000, the whole property having been purchased for the sum of $12,326.

I was informed at the trial that the Harbour Commissioners' line dated back to the year 1842. Mr. Gibsone stated that at the time there was some question of grants along the harbour front and the then Commissioner of Public Works, the Government, instructed a Mr. Ware, a land surveyor, to lay out a plan in which he should take into consideration all the circumstances and recommend to the Government a line beyond which concessions were not to be made.

Prior to the purchase in 1901 for a considerable time and right down to the date of expropriation these lands had never been utilized. The timber trade was a thing of the past in Quebec. The owners received no return in the way of revenue therefrom. The wharves were depreciating in value. At least 5 ft. from the top would have to be removed and to put the wharves in proper order it would cost at least $20,000 for the wharves on lot 2411 alone. Evidence giving the value of properties further east in the lower town of Quebec, one bought by the Imperial Bank, to my mind have but little bearing on the value of properties such as the one in question in this action. All this evidence tends to shew unquestionably that between 1901 and the date of the expropriation there was a marked advance in the value of property in Quebec. Speaking of Quebec in a general way this is no doubt correct. It by no means follows because the value of properties in certain parts of Quebec had considerably increased that the same relative increase applied to the property in question.

Mr. Gignac, one of the witnesses for the defendants, placed the advance at about 40%. Having regard to what was paid in the year 1901 and to the amounts paid for the Lampson and other adjoining properties and to the evidence of Mr. Couture whose opinion is entitled to weight, my opinion is that the offer Mr. Gibsone made on the argument of what he considered to be a fair value and which he was willing to allow on the part of the Crown is about correct and, I think, ample.

On October 2, 1911, His Majesty exhibited an information in this Court asking to have it declared that certain lands therein

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described being a portion of lot 2411 described in the present information should be declared vested in His Majesty and offering as compensation $42,597 therefor. By the defence of that information the defendants accepted this amount. This information was discontinued and the lands revested in the defendants in the same manner as the lands were revested in *Gibb* v. *The King*, 27 D.L.R. 262, 52 Can. S.C.R. 402.

Mr. Stuart claims this offer should be treated as conclusive of the value of that portion of the lands in question in this action. I do not agree with this contention. The officials of the Crown who made the valuation upon which the tender in the previous information was based were not called as witnesses and the offer may have been based on altogether erroneous information and basis as to the value. The Crown discontinued that information and I have to determine the value on the evidence before me, of course not losing sight of the previous offer.

On behalf of the harbour commissioners for the land not coloured yellow and situate between the two parts of 2411, Mr. Dobell on behalf of the harbour commissioners is willing to accept 25 cents a sq. ft., which, I think, is reasonable. I make the area of this land 6,503 sq. ft., which, at 25 cents a sq. ft., would amount to $1,625.75.

In regard to the piece of land on the east side of 2411 to which I have referred marked "Grant to R.C. Bishop, etc.," the area as I make it is 6,335 sq. ft. Mr. Gibsone for the Crown places the sum of $2,000 as the value of this piece, an amount which the Crown is willing to pay and I think this amount is a fair sum to allow. I am not prepared to divide this amount between the harbour commissioners and the owners, there being no evidence before me. Failing an agreement between counsel, there will have to be a reference to ascertain the relative proportions. I figure the area of all the lands owned by Sharples & Co., including the small piece containing the 742 sq. ft. leased to the Church and excluding the piece to the south of the east part of lot 2411, as amounting to 55,751 sq. ft. For this land I would allow the sum offered by Mr. Gibsone on behalf of the Crown at an average of 30 cents per sq. ft., which would amount to the sum of $16,725.30. As to the wharf properties as they stand, Mr. Gibsone on behalf of the Crown offers the sum of $1.50 per cubic yard which I think

under the circumstances of the case is ample. I figure out the contents of the various wharves to be 13,366 cu. yds., which at $1.50 would amount to $20,049.

To this sum of $36,774.30, which is payable to the defendants Power, Sharples *et al.*, should be added whatever proportion of the $2,000 (the amount the Crown is willing to pay) for the 6,335 ft. for the lot on the south of the east side of lot 2411 marked "Grant to R.C. Bishop, etc." that may be determined as being properly payable to the defendants Sharples & Co. I would suggest this $2,000 should pass one-half to Sharples & Co. and one-half to the harbour corporation, but it is merely a suggestion. Interest should be allowed from November 8, 1913, on the total amount.

I am of opinion that the defendants Power *et al.* will be fairly and fully compensated for all claims in respect of their interest. If the harbour corporation enforce their claim against the Crown, they are entitled to the proportion of this lot on the south of the east part of lot 2411 and to 6,503 ft. for the water lot between the two portions of lot 2411 and to 2,220 ft. being the water lot on the south side of 2415, namely, 6503 and 2217, equal to 8,720 sq. ft. at 25 cents = $2,180, to which will be added their portion of the lot to the south of the eastern portion of lot 2411 and interest on their claim from November 8, 1913.

The defendants are entitled to their costs of the action.

Counsel can put me right as to the area of the different parcels if I have erred and I will be glad to have their views. Counsel facilitated the trial materially by their manner of conducting the trial and I have no doubt they can agree on the quantities—the price being found. *Judgment accordingly.*

W. CLARK, Ltd. v. BAIRD & PETERS.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. November 24, 1916.

PRINCIPAL AND AGENT (§ II A—6)—SALES—SCOPE OF AUTHORITY—APPROVAL.
One dealing with an agent, with knowledge that orders taken by him were subject to acceptance and that the prices were subject to change, cannot hold the principal to a sale made by the agent on terms which the principal refused to accept.

Statement.

APPEAL from the decision of Armstrong, J., County Court of St. John, allowing the defendants' counterclaim in an action by the plaintiff company against Charles H. Peters and Alexander

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P. Paterson, doing business under the name style and firm of Baird & Peters, for goods sold. Reversed.

J. F. H. Teed, for appellant; *W. A. Ewing*, K.C., for respondents.

The judgment of the Court was delivered by

GRIMMER, J.:—The plaintiff company is the manufacturer of canned goods, having a head office in the city of Montreal. The defendants are wholesale grocers. The plaintiff sells goods by agents or travellers on price lists issued from time to time, upon which lists are found the words, "Prices subject to change without notice and to goods being in stock. Orders taken by agents subject to acceptance." Also, "Prices subject to change without notice. Orders taken by agents subject to acceptance." Their invoices or billheads also contain the words, "All orders taken by agents are subject to acceptance. Prices subject to change without notice."

On October 21, 1915, the defendants gave an order to the local agent of the plaintiff for 200 cases of canned pork and beans, but without specifications of the varieties required, or when the goods were to be shipped, even when asked for the same. The agent was asked to wire the order, but did not do so, feeling that a letter would reach the plaintiff as soon for business purposes. The day the order was given the plaintiff advanced the price of its goods, advising its St. John agent by night lettergram. On October 22, plaintiff received the order and at once notified its agent it could not accept the same at the old price, but would do so at the new. Some correspondence took place between the parties as to the order and the acceptance thereof by the plaintiff, with the result that the plaintiff adhered to the refusal to accept the order save at the advanced price for the goods. The defendants claimed the plaintiff had broken the contract made by the agent and claimed damages amounting to $68, as and being the difference they were compelled to pay for the goods on October 22 as against the price of same when the order was given. The defendants owed the plaintiff for goods purchased previous to the date of the order referred to, for which they refused to pay. The plaintiff thereupon brought this suit in the St. John County Court. The defendants made a tender of the sum admittedly due the plaintiff from them, and counterclaimed for damages for

breach of contract, and the County Court Judge found they were entitled to their counterclaim of $68, and reduced the plaintiff's claim by this sum. Against the judgment on the counterclaim the plaintiff appeals.

Under the facts stated the question arises whether in fact any contract was entered into between the parties for the sale of the goods which was or might become binding in law. The plaintiff was a well established firm that had been doing business with the defendants for some 25 or 30 years, and it may reasonably be assumed the defendants were perfectly familiar with the terms upon which the plaintiff usually accepted orders and sold its goods. If there could be any doubt about this it was admitted by the defendants they had from time to time been furnished with price lists, upon which in plain print appeared the words, "Orders taken by agents subject to acceptance," and "Prices subject to change without notice." These words were doubtless placed thereon by plaintiff for its own protection, as well as to give notice to its customers and the trade generally, upon what terms the company was prepared to do business. To make it more certain and sure the plaintiff's bills and invoices for goods sold also bore the words, "All orders taken by agents are subject to acceptance," and "Prices subject to change without notice." It follows, then, that in the course of a long business experience between the parties the defendants must have known, and did know, that any orders for goods sent to the plaintiff through its agent or representative, would not merge into a completed contract until the same was accepted by the company. It could make no difference whether the order was submitted by wire or letter, the same conditions would obtain, and as it is very clear under the evidence the plaintiff never accepted the order as presented, therefore no contract for the sale of the 200 cases of goods was ever entered into on the part of the plaintiff. It has very often been laid down, and quite recently affirmed in this Court as well established law, that a principal can only be bound by the acts of his agent which are within the scope of his authority. In this case the agent, whether he be called agent or representative, had no authority other than to solicit and take orders for goods which were to be forwarded to the plaintiff for acceptance, and the orders so taken in no case ripened into contracts until they were passed upon by the plaintiff. In my opinion he could not in any

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case confirm an order so as to make it an absolute sale, nor could he pledge or bind the plaintiff to ship the goods for which he might or did secure orders. To hold otherwise would be to carry the relationship of principal to agent to a degree not contemplated or sanctioned by law. I am, therefore, of the opinion the Judge was in error in ordering judgment for the defendants upon their counterclaim, and the same should be set aside, and the verdict be entered for the plaintiff for the full amount of the claim sued for, and that the cause be remitted to the St. John County Court to so enter a verdict for the plaintiff, with costs. The plaintiff will also be allowed the costs of this motion. *Appeal allowed.*

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SAIR v. WARREN.

Saskatchewan Supreme Court, Lamont, J. February 22, 1917.

BILLS AND NOTES (§ I A—1)—SIGNING BLANK NOTE.

The mere signing of a blank form of promissory note, not done negligently, creates no liability thereon in the absence of authority, or of an intention, to issue or negotiate the document as a promissory note.

[The Bills of Exchange Act, R.S.C. 1906, ch. 119, secs. 31, 32, considered.]

Statement.

ACTION on a promissory note. Dismissed.

W. J. Perkins, for plaintiff; *J. C. Martin*, for defendant.

Lamont, J.

LAMONT, J.:—The plaintiff sues on a promissory note. The note was called into existence under the following circumstances. One R. F. Dygert was endeavouring to syndicate a stallion at $1,800. He had a form of agreement which he asked the defendants to sign, and which provided that if he did not get a certain number of farmers to sign (6 or 8), the document was not to be binding and to be of no effect. If he got the requisite number of signers, then notes were to be drawn up and signed on the purchase price. Apparently a blank form of promissory note formed part of the agreement, so that the persons signing the agreement affixed their signatures at the bottom of the blank form of note. Both defendants signed the document. Subsequently Dygert came back and announced that he had been unable to recover the requisite number of signatures. He then sold the stallion to the defendant Warren himself for $1,500, and received settlement for same. Subsequently, he severed the portion of the agreement containing the signatures of the two defendants from the remainder and filled out the blanks, making the document a promissory note for $1,050, and bearing date July 23, 1914.

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On July 31 he transferred the note to the plaintiff, who is also a horse dealer. On that note the plaintiff has brought this action.

Two questions are involved: (1) Is the document a promissory note binding on the defendants in the light of the fact that they had no intention of signing a note at all, and (2) if so, is the plaintiff a *bonâ fide* holder thereof for value?

Secs. 31 and 32 of the Bills of Exchange Act.

It will be observed that under these sections the signed paper must be delivered by the signer "in order that it may be converted into a bill" to be enforceable against the maker thereof.

The corresponding sections of the English Bills of Exchange Act are practically the same as the sections above cited. The English cases are, therefore, applicable.

In *Foster* v. *Mackinnon* (1869), 4 C.P. 704, the principle adopted was, that where a person is induced by a false representation as to the nature of an instrument to give his signature on a bill or note, he is not liable on it if he acted without negligence.

In *Smith* v. *Prosser*, [1907] 2 K.B. 735, the defendant signed his name on two blank lithographed forms of promissory note and handed them to his agent, with instructions that they should be retained in his custody until the defendant should, by telegram or letter, give instructions for their issue as promissory notes and as to the amounts for which they should be filled up. The defendant never gave any instructions, but the agent filled out the notes for considerable sums and sold them to the plaintiff, who took them in good faith and gave full value therefor. In an action by the plaintiff to recover the defendant was held not to be liable on the ground that he had not handed the notes to his agent with the intention that they should be used as negotiable instruments.

The case of *Smith* v. *Prosser* was followed in *Hubbert* v. *Home Bank*, 20 O.L.R. 651. There, the plaintiff signed a blank, or partly blank, form of promissory note and handed it to one Stirton, the agent of an insurance company, who had been pressing him to take insurance. The understanding and condition upon which the plaintiff signed it was that nothing was to be done with it unless the plaintiff passed the requisite medical examination, when the document was to become a promissory note for $440.50.

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The plaintiff never passed the medical examination as he never presented himself to the medical examiner. The agent filled out the blanks in the document, making it a promissory note for $440.50, and cashed it with the United Empire Bank which forwarded it to the defendant bank where the defendant had his account. The defendant bank paid it and charged the amount to the plaintiff. The plaintiff sued to recover the amount, and was held to be entitled to do so on the ground, that the document had been handed to Stirton by the plaintiff not as a note, or to be negotiated as a note, but merely as the custodian of it. This judgment was affirmed by the Divisional Court, and leave to appeal refused by the Court of Appeal.

In *McKenty* v. *Vanhorenback*, 21 Man. L.R. 360, the defendant signed a cheque for the wages of one of his men, leaving it payable to bearer. After signing it he put it in his desk, from which it was abstracted and cashed by the plaintiff. It was held by the Court of Appeal that the defendant was not liable, as he had never issued it as a negotiable instrument. He could not be said to have been guilty of negligence, as he could not reasonably be called upon to foresee that a crime might be committed, and his act of leaving it in his desk was what a reasonably prudent man might have done.

See also *Ray* v. *Willson*, 45 Can. S.C.R. 401.

The latest case I have been able to find is that of *McMillan* v. *London Joint Stock Bank* (1917), 33 T.L.R. 140, [1917] 1 K.B. 363. In that case the plaintiff firm had in their employment a clerk in whom they had confidence and to whom they entrusted the filling in of cheques for signature. The clerk produced to one of the partners a cheque on the defendant bank, where the plaintiffs had an account, for £2 petty cash. The amount was written in figures, but the space for the words was left blank. The partner, who was in a great hurry, signed the cheque. The clerk filled in the words "One hundred and twenty pounds" and altered the £2 to £120. He cashed the cheque at the defendant bank and absconded with the money. The plaintiffs brought action against the bank to recover the difference between the £2 and £120. Sankey, J., held they were entitled to recover, on the ground that they had only given the bank a mandate to pay £2, and that they had not been guilty of negligence which misled the bank. In giving judgment the Judge said: "At the most all the plaintiffs did was to give a

clerk whom they rightly trusted an opportunity of misleading the bank. When the only negligence suggested against a customer is that he has given an opportunity for a clerk to commit forgery such negligence is not sufficient to make a customer liable for the forgery. The opportunity is not the proximate cause of the loss."

If, under the facts of the various cases above cited, negligence could not be attached to the persons affixing their signatures, I fail to see how it can be charged against the defendants in the case at bar. They never issued nor authorized the issuing of the document in question as a note or negotiable instrument, and their conduct in leaving the agreement with their signatures attached thereto in the hands of Dygert was no more than what a reasonably prudent man might have done. The defendants are, therefore, not liable.

On the second point also, the defendants, in my opinion, are also entitled to succeed. As I view the facts, the plaintiff cannot be said to have established that he was a *bonâ fide* holder for value. I do not believe his statement when he says that shortly after getting the note he mailed a notice, written by his daughter, to the defendants informing them that he had the note. The defendants never received any such notice, and the daughter who he says wrote it was not called to corroborate his statement. A perusal of his evidence confirms the opinion I formed at the trial that the transactions between the plaintiff and Dygert constituted a scheme by which the plaintiff's note, through Dygert, was to get into the hands of a firm in Kentucky, and the Dygert note in question into the plaintiff's hands, so that each being in the hands of a third person for value they could be collected as against the makers, which they probably could not have been in the hands of the original holders.

The plaintiff's action will be dismissed with costs.

Action dismissed.

GEORGE WHITE & SONS v. JASHANSKY.

Saskatchewan Supreme Court, Lamont, J. February 26, 1917.

CONTRACTS (§ III G—295)—VIOLATION OF FARM IMPLEMENTS ACT—RIGHTS OF SELLER.

An agreement of sale of threshing machinery in violation of the Farm Implements Act (Sask.) is not illegal, but merely unenforceable, and the seller has the right to recover the machinery and the profits made therewith by the buyer.

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S. C.

GEORGE WHITE & SONS v. JASHANSKY.

Lamont, J.

Action for the price or value of a threshing outfit.

Hon. W. F. A. Turgeon, K.C. and *H. Thomson*, for plaintiffs.

P. M. Anderson, for defendant.

LAMONT, J.:—The plaintiffs claim: (1) instalment of the purchase-price of a threshing outfit sold to the defendant; (2) in the alternative, that, if the agreement should be held invalid, they claim the value of the outfit, on the ground that the machine got into the defendant's hands without any intention on the part of the plaintiffs to make a gift thereof to the defendant and that the defendant has converted the same to his own use, and (3), in the further alternative, that the defendant has used and thereby depreciated the value of the plaintiffs' machine and that they are entitled to damages therefor.

On the evidence, I find that the agreement entered into between the plaintiffs' agent and the defendant was, that the defendant would purchase a threshing outfit at $4,800 and that he should pay for the same by turning over to the plaintiffs the Scovorenski notes of $4,300, and in addition pay $500 in cash. The machinery was delivered to the defendant, the Scovorenski notes and $400 in cash were turned over to the plaintiffs, the defendant retaining $100 until a tank, hose, pump and truck, which he claimed had been omitted, were delivered.

The agreement entered into does not comply with the requirements of the Farm Implements Act, and is, therefore, invalid, and will not support an action therein.

The agreement being invalid, it can create no legal rights. It is, however, not illegal. There is a distinction between contracts which are illegal and contracts which are invalid, but not illegal. The former are void and cannot be sued upon because of the illegality. In such cases the Courts leave the parties where they find them, excepting where the parties are not *in pari dilecto*, or where one party is protected by statute, or where there is oppression: *Haug Bros.* v. *Murdoch*, 26 D.L.R. 260, 9 S.L.R. 56.

The latter are also void and cannot be sued on as contracts, but there is an equitable right to a return of the property parted with, or compensation for the same, which the Courts will enforce. *Trades Hall* v. *Erie Tobacco Co.*, 29 D.L.R. 779, 26 Man. L.R. 468.

The plaintiffs cannot succeed upon the contract, for that,

being void, will not support an action. Neither can they succeed upon the ground of conversion, for there has been none, and the use made by the defendant of the machine is exactly the use the plaintiffs intended he should make of it.

I am, however, of opinion that the plaintiffs are entitled to a return of any profit the defendant may have made with their machine. The plaintiffs have not asked for this profit in their original statement of claim, but did by an amendment on the argument and the amendment should be allowed. A reference will be had to the local registrar to ascertain this profit, and on the return by the plaintiffs of the Scovorenski notes and the $400, less any profit found to be due from the defendant, the defendant will return the machine to the plaintiffs. The defendant is entitled to his costs. *Judgment for plaintiff.*

SASK.

S. C.

GEORGE WHITE & SONS v. JASHANSKY.

Lamont, J.

THE KING v. CARSLAKE HOTEL CO.

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Exchequer Court of Canada, Audette, J. September 7, 1915.

DAMAGES (§ III L—240)—EXPROPRIATION—VALUATION OF PROPERTY—INTEREST—COSTS.

In fixing compensation for land taken, the value of the property must be assessed as of the date of expropriation, at its market value, in respect of the best uses to which it can be put, taking into consideration any prospective capabilities that the property may have for utilization in a reasonably near future; the "quantity survey method," while disclosing the intrinsic value, does not necessarily establish the market value. Intrinsic value is that which does not depend upon any exterior or surrounding circumstances. Where there has been no tender of compensation, interest and costs will be allowed in addition.

Statement.

INFORMATION exhibited by the Att'y-Gen'l of Canada, for the expropriation of certain lands for a post office building in the City of Montreal, P.Q.

Peers Davidson, K.C., and *L. H. Boyd*, K.C., for plaintiff; *H. A. Montgomery*, K.C., for defendant.

Audette.

AUDETTE, J.:—This is an information exhibited by the Att'y-Gen'l of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendant company, were taken and expropriated, under the authority and provisions of the Expropriation Act (R.S.C. 1906, ch. 143) for the purposes of a Post Office Building, in the City of Montreal, by depositing a plan and description of such property, on April 7, 1914, in the office of the registrar of deeds for Montreal West.

The defendant's title is admitted.

The Crown by the information tendered the sum of $325,532.

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However, at the opening of the trial, on the application of counsel for the Attorney-General, the information was by leave amended by withdrawing this offer of $325,532 or any sum as compensation to the defendants, the Crown intimating its willingness to pay for the property in question such sum as the Court might determine to be sufficient and just. In the result the case is to be treated as if no offer or tender were made on behalf of the Crown, the whole matter being entirely left to the Court for determination.

The defendant, the Carslake Hotel Co. Ltd., by its defence, claims it is alone entitled to recover the compensation for the lands taken—the other defendant, George T. O. Carslake, who, by a declaration filed of record, submitted himself to justice—having assigned all his rights to the defendant company.

The defendant company by its defence further claims the sum of $712,330, as compensation for the property taken. However—in the course of the trial—it having been made clear that the $60,000 deed of December, 1910, covered part payment of the land and property in question, the defendant company withdrew, as part of their claim, the sum of $53,000 mentioned in their particulars filed on December 18, 1914. In this amount of $712,330—as shewn by the particulars—there is also a sum of $64,757 for a 10% allowance for forceable deprivation—and that 10% is taken on an amount including the $53,000 so withdrawn, as above mentioned. Therefore, the defendant company's claim is as follows, viz.: Lands taken, 20,394 sq. ft. at $25 per foot, $509,850; buildings, including fixtures, $84,723 = $594,573; forceable deprivation $59,457.30; their claim as amended then stands at the total sum of $654,030.30.

Now this property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, namely, as a hotel-site—taking into consideration any prospective capabilities that the property may have for utilization in a reasonably near future.

On behalf of the owners, witness Dorsey, following the Davies rule, placed a value upon the property of $535,000; witness Ogilvie at $536,215 for the lands and buildings; and witness Findlay, for the first time using the Davies rule, at $438,723, for the land only. On behalf of the Crown witness Brown placed a value of $219,000; witness Ross $240,000; witness Ferns considers the assessed value

at $160,000 to be the actual value of the property as between any one desiring to buy and one desiring to sell, but not the speculative value; and witness McBride values the whole property at $284,000.

On behalf of the proprietors there is also this additional evidence in respect of the value of the surrounding small shops and shacks, returning comparatively very high rents. Together with the evidence of witness Maxwell, who proceeding to value the building, inclusive of permanent fixtures, at $84,000 upon the replacement or intrinsic value without allowing any depreciation. This witness obviously proceeded on a wrong principle or basis.

Indeed, this replacement value, without taking any depreciation into consideration, is an appraisal of the building under what is called the "quantity survey method," which, while undoubtedly it may disclose the intrinsic value of the property, does not necessarily establish its market value. The intrinsic value is the value which does not depend upon any exterior or surrounding circumstances. It is the value embodied in the thing itself; the value attaching to the objects or things independently of any connection with anything else. For instance, had we to fix a proper compensation upon a discarded shipyard, formerly used in the building of wooden ships, we would be facing launch-ways, logs and piers of perhaps great intrinsic value; but, if the property were thrown upon the market for sale it would have, indeed, very little commercial or market value. *The King* v. *Manuel*, 25 D.L.R. 626, 15 Can. Ex. 381.

A great deal has been said with respect to the "Davies Rule" of valuing a piece of property—a rule which was explained by witness Davies himself, the person who formulated it. The rule is based on the true fact, I must admit, that every square foot of a lot has a different value. This rule may be followed with advantage for a normal lot—a lot of an ordinary shape. Two necessary elements, or two paramount essential requirements must first be established to work out the rule in a satisfactory manner. (1) The basis value of a standard lot in that locality must first be established beyond peradventure or uncertainty. (2) It must be applied to a lot, the conditions of which are normal. That is to a lot with a certain defined frontage, the depth of which is to be ascertained with common sense and ordinary business acu-

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men. The fallacy of applying the rule to the valuation of the present property is that in doing so one would overlook the shape or natural conformation of the lots. While the property has a frontage of 63.11 ft. on St. James St. and 65.06 feet on Windsor St.—the corner lot between St. James and Windsor intervening between them—one cannot overlook, on glancing at the plan, that the small Windsor St. lots of 56.3 in depth, on the northwest, upon which small shops and buildings are erected, were not full lots. That is when these 56.3 ft. lots were sold, part of them only were required and the back part—or the yards of these 56.03 ft. lots were not purchased—as not required for the small purpose for which they were acquired and that, in the result, all that piece of property, to the back of these lots, cannot, consistent with common sense—be tacked on and added to the St. James St. lot. That would be working the "Davies Rule" in the narrowest sense of which it can admit and thereby destroy its practical use. The fallacy of adding these back premises of the small 56.03 lots on Windsor St. to the St. James St. lot has been made possible to induce some of the witnesses to use the "Davies Rule," from the fact that the St. James St. lot is situate one lot removed from the corner, and that very fallacy has obviously made the Davies rule unreliable in a case like the present one. The Davies rule, like every other rule, is subject to the ever necessary good judgment, common sense and business acumen of an honest valuator, reckoning also with exceptions. It is like an ordinary syllogism, your premises must be true and sound before you can draw your conclusion, before your conclusion can follow.

Much has been said in comparing the respective value of St. George's Church property with the Carslake Hotel. The former has a frontage of 329 ft. on Windsor St., 310 ft. on Stanley St., and 182 ft. on Osborn St., and was recently sold at $20 a foot—$1,180,000.

This property faces Windsor Station on one street, is surrounded by three streets giving it light and air, and it is situate in a good locality which caters to surroundings of a higher class. Besides the locality, the conformation or shape of the lots must be taken into consideration before arriving at a conclusion on the relative value of the two properties. The Carslake property has no corner. It has a frontage of 63.11 feet on St. James St. and a

frontage of 65.06 ft. on Windsor St., with the back premises of the properties adjoining to the north—that is a large wedge running in along these back premises. There is no comparison between the two properties, there is no similarity in both locality and shape and the St. George's Church property is most decidedly of greater value and very much more advantageous to build upon. The balance of the commercial advantage of the respective properties is also in favour of the St. George property. While the Carslake hotel is opposite the Bonaventure Station—the St. George is opposite the Windsor Station, without any street railway intervening between the station and the property, but with the advantage of the street railway on Windsor St. and the neighborhood of the Canadian Northern Railway Station within a very near future would also turn the scale in favour of the St. George property in tha respect.

Without going into the details of the negotiations which preceded the sale of this property to witness Dorsey by defendant Carslake, it may be stated that in the result this property was, on December 1, 1910, sold for the sum of $150,000, this sum to cover the land, the buildings, the furniture, the good-will of the hotel business as a going concern, and the transfer of the license—subject to the proportional payment of its unexpired life. Of this amount of $150,000 the sum of $60,000 was paid in cash, but the purchaser had, up to May 1, 1916, to pay the balance if he exercised his right to purchase under the deeds.

During the time this property was run as a hotel from the date of that sale, or from the beginning of 1911, to the delivery of possession under the expropriation proceedings, name'y, during 3 years and 10½ months, the returns of this property, valued in the light of great optimists, only apparently returned the net sum of $10,648.79. But this return is obtained without making any allowance for any interest on the sum of $60,000, part payment of the $150,000 under one of the deeds of December 1, 1910, fully explained in the evidence. In the result this hotel ever since its purchase by witness Dorsey was run at a loss. It would therefore not be quite fair to assess its value on a revenue basis.

Witness Dorsey states that the present building is too small for the size of the land and he caused to be prepared, for the purposes of this case, filed as exhibits "O," plans of a large hotel which could be erected upon the whole area of the land taken,

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containing 400 or 480 rooms, at a cost of $1,485,000, represented as follows: land, $535,000; building, $800,000; furniture, $150,000=$1,485,000.

Whether any business-man would venture in such a scheme and risk the sum of $1,485,000 in such an enterprise, with a building lighted by the 9 feet wells in question, giving also very unsatisfactory air, taking in consideration the returns of the former Carslake hotel, is a question beyond the sane comprehension of the ordinary person gifted with common sense.

The best answer to such a scheme is perhaps found in the evidence of witness Painter, who was chief architect for the C.P.R. during 6 years, who has had experience in remodelling and readjusting hotels for the latter company. Speaking of these plans, exhibits "O," he says that they are apparently a set of preliminary studies and he does not think the question has been gone into to the bottom, and he does not consider them as final designs. From an investment standpoint it is an impossibility to erect a hotel according to these plans. A hotel, ten storeys high, with only 8 to 10 ft. of a well for light and air, is inadequate where the adjoining property is built up to the same height—adding you must have enough air and light to make the place "*livable.*" He would not advise a client to build on these lines—he would not advise building more than four or five storeys high, and would try and persuade him to buy the corner lot and make a real building out of it. The most he would advise would be to put up a medium price hotel, not more than $300,000 on the whole venture, with not more than 200 rooms.

There is also the question of the options given from time to time by the witness Dorsey. On October 19, 1911, he gave an option to one Tabatchnick at $15 a square foot, which on 20,394 sq. ft. represented $305,910, with the additional sum of $10,000 for the contents of the hotel. Then there is the option to witness Brown on January 30, 1912, for $315,000, inclusive of contents of hotel, extending to April 30, 1912, but kept alive, as shown by the June telegram from witness Dorsey, and to September, 1912, by the latter's letter, and according to witness Brown kept alive up to the time the negotiations were started with the Government, and under which only one offer was made of $10 a foot by one Mr. Vannier and refused by Mr. Dorsey. Then witness Brown

adds that witness Dorsey was always open to an offer, indicating he was willing to take a price less than that mentioned in the option—this left the matter an open question, although the so-called option or agreement was for a definite period. It is well to bear in mind that these two so-called options are given to real estate agents who were to deduct their commission from the purchase price—a commission of 2½% in the case of witness Brown is specified in the agreement, and it must be inferred that the other agent was not selling without any commission.

There is a material conflict in the evidence respecting the appreciation of the market fluctuations from 1910 or 1911, up to the time of the expropriation. Some witnesses contend that while property in certain parts of Montreal went up in value to a great extent, some contend the property within that period did not appreciate to any degree in the locality of the Carslake hotel. Witness Ogilvie, heard on behalf of the owners, testified that within that period or rather from December, 1910, to the beginning of 1913, when the boom was at its height in the business district of the Carslake, there was an increase of 50 to 100%. If this view be accepted in favour of the defendants, taking the property at $150,000 on December 1, 1910, although that amount covered the furniture, good-will, license, etc., and allowing the average increase of 75% on the purchase price, we will arrive at the sum of $262,500. To this amount should be added the usual 10% for compulsory taking, for, although it may be said that Mr. Dorsey was willing to dispose of the property, it was not sold to the Government, but expropriated, and the question is one of compensation and not of price under a purchase. More especially should this 10% be added here, because the value of the good-will, an important factor in determining the compensation payable, is not susceptible upon the evidence of being moneyed out with precision, although its substantial character is beyond dispute. The allowance of this additional 10% also covers any loss and all other expenses incidental to the closing down of a going concern.

I have had the advantage of viewing the premises in question accompanied by counsel for both parties, and I am of opinion that if the sum of $288,750, figured on that basis as a whole, *en bloc* is allowed, a fair, sufficient and very liberal compensation will have been paid to the proprietors, taking into further consideration the price at which properties in the neighbourhood were sold.

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Audette, J.

The sum of $175,000 was paid on account of the expropriation on September 21, 1914, and the further sum of $45,000 was also paid on December 3, 1914, making the total sum of $220,000 paid on account of the compensation.

The defendants gave up possession of the premises between October 15 and 20, 1914, when the keys of the building were handed over to the Crown. The date will be fixed as of the 15th, since the profits were calculated for that year at 10½ months.

This is an expropriation matter wherein the defendants' property has been compulsorily taken from them and where no tender or offer of any amount has been made as compensation therefor. In such a case the defendants are entitled to both costs and interest on the compensation money.

Therefore, there will be judgment as follows, viz.:—1.—The lands and property expropriated herein are declared vested in the Crown from April 7, 1914, the date of the expropriation, including all such rights the defendants had in the passage in common from Windsor St. as shewn on plan filed herein. 2.—The compensation is assessed at the sum of $288,750 with interest and costs. 3.—The defendant the Carslake Hotel Co. Ltd. is entitled to be paid, upon giving to the Crown a good and sufficient title, free from all encumbrances and hypothecs, the balance of the said compensation (it having already received the sum of $220,000 as above mentioned), namely: the sum of $68,750 with interest thereon from October 15, 1914, to the date hereof, together with interest on the said sum of $45,000 from October 15, 1914, when the same was paid to the defendants. 4.—The defendants are also entitled to their costs. *Judgment accordingly.*

EDITOR'S NOTE.—Affirmed on appeal to the Supreme Court of Canada, June 13, 1916.

SASK.

S. C.

NORTHERN CROWN BANK v. ELFORD.

Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Brown and Elwood, JJ. March 10, 1917.

1. MERGER—INTENTION—NOTE—MORTGAGE.
A mortgage given by way of additional security for a note does not operate as a merger of the note in the mortgage where there is a plain intention of the parties that it should not have that effect.

2. PARTNERSHIP (§ VI A—25)—LIABILITY OF RETIRING PARTNER—RELEASE.
One cannot be held on a partnership note after he ceased to be a member of the firm, with knowledge thereof by the holder, particularly where the liability was released by the taking of other securities.

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NORTHERN CROWN BANK v. ELFORD.

Elwood, J.

APPEAL by defendants and cross-appeal by plaintiff in an action on a note. Dismissed.

B. D. MacDonald, for appellants; *Fred B. Morrison*, for respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—The evidence shews that in March, 1913, the defendant, H. H. Elford, signed a guarantee to the plaintiff, whereby he guaranteed the indebtedness to the plaintiff of the firm of Elford & Cornish. It was a continuing guarantee and it further provided that it should not be affected by any change in the name or membership of the firm. Thereafter, in December, 1913, at the suggestion of plaintiff's manager, H. H. Elford assumed the liabilities of the firm of Elford & Cornish, and at that time gave the bank certain securities. From then on the liability of the firm of Elford & Cornish to the bank was evidenced by promissory notes signed in the firm name of Elford & Cornish by H. H. Elford. H. H. Elford says that when he went to sign these notes he wished to do so in his own name, but the manager told him to do it in the name of the firm.

Apparently, in the fall of 1912, Mercie A. Elford, who had for some time been a member of the firm, ceased to be such.

In view of the arrangement which, in December, 1913, was entered into between Frank Cornish and H. H. Elford, I cannot see how H. H. Elford can escape liability. He is liable, either on the note as one of the signers, because after he entered into the arrangement with Frank Cornish he, in effect, carried on the business of Elford & Cornish as the sole member of the firm and he would therefore be liable on the note, or he would be liable under the guarantee which he gave the bank in March, 1913. So, from whatever aspect of the case one views it, it seems to me that he is liable.

It was contended, however, that as, after signing the note sued on, he had given the plaintiff a real estate mortgage his liability was only under that mortgage and that the note became merged in it.

The note sued on is dated September 13, 1915, and is payable 2 months after date, with interest at 8% per annum. The mortgage is dated October 2, 1915, is payable on demand, bears interest at 7% per annum, and is for not only the indebtedness of Elford

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& Cornish but an additional indebtedness of H. H. Elford. It states on the face of it that it is given by way of additional security, and contains a provision as follows:—

This mortgage having been given and taken as additional security for the said indebtedness to the bank it is distinctly understood and agreed that the said mortgage shall not operate by way of merger and shall not prejudice or affect the present or accruing rights to the bank in respect of said indebtedness or any part thereof, nor shall the same, prejudice or affect or release any surety or sureties, security or securities now or hereafter held by the mortgagees in respect of the said indebtedness.

It was contended by the appellant, on the authority of *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476, that the promissory note became merged in the mortgage.

At p. 483 of the above report I find the following:—

But, if that is to be understood as importing that a merger of a simple contract debt in a debt of a higher nature is effected by law, merely by the existence of an identical covenant, and notwithstanding the plain intention of the parties to the contrary, that is a proposition which their Lordships would hesitate to assent to. It would appear to be contrary to other decided cases (*Twopenny* v. *Young*, 3 B. & C. 208), and the authorities collected and classified in Fisher on Mortgages, 3rd ed., secs. 1328 to 1334. Indeed, in the subsequent case of *Boaler* v. *Mayor*, 19 C.B. (N.S.) 76, in the same Court, one of the learned Judges, who had been a party to and concurred in the judgment in *Price* v. *Moulton* 10 C.B. 561, seems to have implied that the Court in the case of *Price* v. *Moulton* had no intention of laying down any such general rule, and to have done so with the assent of the very learned counsel who had argued the case in the contrary sense.

In the case at bar, in addition to this mortgage of October, 1915, the plaintiff holds other securities as collateral to the indebtedness. Some of these securities are title deeds to lands. It seems to me, therefore, in view of the fact that the plaintiff does hold these other securities, that the mortgage of October, 1915, bears a different rate of interest from that contained in the promissory note sued on, that it was payable on demand, that it purports to be given as collateral security and that it contains the provision above quoted with regard to there being no merger, it was never the intention of the parties that there should be a merger.

I am, therefore, of the opinion that the defendant's appeal should be dismissed.

The plaintiff gave notice of cross-appeal from that part of the judgment of the trial Judge which dismisses the claim as against the defendant, Mercie A. Elford. The evidence shews and the learned trial Judge found that the plaintiff entered into the ar-

rangement in December, 1913, whereby H. H. Elford assumed the liabilities of the firm of Elford & Cornish; the evidence also shews that, in consequence of this arrangement, Frank Cornish asked what he had to shew that he was released and that the plaintiff's manager said, "You don't need anything to shew; I am taking Elford and his security for the Elford & Cornish account." That in consequence of this arrangement H. H. Elford did give the bank security, that H. H. Elford understood that the firm of Elford & Cornish was released, and that, if he had not so understood, he would not have given the security. The evidence, shews too, that Mercie A. Elford ceased to be a partner in 1912, and that the plaintiff's said manager knew of this at that time. I think, that under all of these circumstances, the defendant, Mercie A. Elford, is not liable. Her liability can only be as a member of the firm of Elford & Cornish; evidence, as I have pointed out above, shews that she ceased to be a member of the firm in 1912, and that the plaintiff's manager knew that at the time, therefore, when the note was taken, the plaintiff knew that she was not a member of that firm.

Then, I am further of the opinion that the arrangement entered into with H. H. Elford in December, 1913, and the subsequent receipt by the plaintiff from him of the various securities, operated as a release of any claims against Mercie A. Elford. In my opinion, therefore, the cross-appeal should be dismissed with costs. *Appeals dismissed.*

PHILLIPS v. UNITED INVESTORS Ltd.

Manitoba King's Bench, Macdonald, J. January 17, 1917.

PAYMENT (§ IV—30)—APPLICATION—PRINCIPAL AND INTEREST.

In the absence of any appropriation by the purchaser, a vendor is not bound to apply payments in discharge of interest rather than of principal, if at the time the payments were made the manner of application was immaterial to both parties.

[*Burge* v. *Fines*, 29 D.L.R. 360, 26 Man. L.R. 99, considered.]

SPECIAL case submitted under rule 463 *et seq.*

Statement.

E. A. Cohen, for plaintiff; *E. R. Chapman*, for defendants.

MACDONALD, J.:—The plaintiffs are the vendors to the defendants of certain lands in Manitoba under an agreement of sale dated February 24, 1912. The purchase price is $26,337, and made payable as follows:—Cash at the date of purchase, $6,584.25; February 24, 1913, $7,000.00; February 24, 1914, $4,376.38;

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February 24, 1915, $4,376.37; and the purchaser assumed a mortgage of $4,000.00 = $26,337.

Interest at 6% per annum was payable on February 24 in each year with the usual provision whereby any overdue interest became principal and bore interest at the said rate.

Afterwards by an agreement dated March 26, 1914, the defendants agreed to pay to the plaintiffs interest at the rate of 15% from January 15, 1914, on the balance overdue on March 26, 1914, until such time as the arrears were paid.

On February 24, 1912, the sum of $3,267.40 of the cash payments was unpaid, and on March 6, 1914, this balance was still due on the cash payment, and also the following amounts:—Taxes paid by the plaintiffs $221.56, cash paid by the plaintiffs on account of the mortgage assumed by the defendants $503.12, making in all the sum of $4,092.08. $4,000 on March 6, 1914, was paid and applied on this indebtedness, leaving a balance of $92.08 still unpaid on these items as well as the interest that had accrued and the instalments of principal that had fallen due on February 24 in each of the years 1913 and 1914.

The following further payments were made by the defendants:—$2,500 on April 26, 1914, and $2,000 on May 18, 1914. The first of these two payments was insufficient to cover all the interest that had accrued up to the date of the payment, and more than sufficient to cover the interest that had accrued on February 24, 1913.

The plaintiffs appropriated the balance of the first payment, after deducting the $92.08 above mentioned, in payment first of the interest which fell due on February 24, 1913, and then in reduction of the instalment of principal which fell due on that date and the second payment they applied wholly on principal. This would leave the interest which fell due on February 24, 1914, still unpaid. The defendant claims that those payments, after deducting the $92.08 above mentioned, should be applied in payment of interest until such interest is fully paid before applying any portion of it in reduction of principal.

The question for the opinion of the Court is whether the plaintiffs are bound in law to apply the balance of the payments mentioned towards the payment of all interest which had accrued due to the date of such respective payment, before applying any

part in the reduction of the principal moneys payable under said agreement.

It is an admitted rule of law that when a man is indebted in respect of two or more debts, he is entitled when making his payments to direct how his money is to be applied by the creditor, but that if he fails to give such a direction, the creditor may appropriate as he chooses.

This general rule, however, is subject to the qualifications that the creditor must make such appropriation that will be equitable for the debtor.

At the time of the payments made as stated, it was immaterial to both debtor and creditor how the payments were to be applied, and there was no circumstance then in sight creating a benefit one way or the other as to how the payments were to be appropriated, and there could be nothing in the mind of either necessitating an appropriation other than on account generally.

The occasion subsequently did arise when it became a matter of importance to the creditor how to apply these payments, and he then elected as stated.

"The creditor may, at any time, elect how the payments made to him shall retrospectively receive their application. There is, certainly, a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of *Goddard* v. *Cox*, 2 Str. 1194; *Wilkinson* v. *Sterne*, 9 Mod. 427, by the ruling of the Lord Chief Baron in *Newmarch* v. *Clay*, 14 East 239, and by *Peters* v. *Anderson*, 5 Taunt. 596. . . . That the creditor may make the application to what debt he pleases, has been extended . . . to authorize the creditor to make his election when he thinks fit, instead of confining it to the period of payment. *Devaynes* v. *Noble*, *Clayton's* case 1 Mer. 572 at 606-7 (35 E.R. 781 at 792).

In *Deacon* v. *Webb*, 2 O.W.R. 110, the Court held: "It was not open to doubt that the mortgagor when making the payment of $700 was entitled to stipulate that it should go in reduction of the principal money, and that no part of it should be applied upon the interest," and having so stipulated that appropriation became binding on the mortgagee.

The defendant relies on the case of *Burge* v. *Fines*, 26 Man. L.R. 99, (29 D.L.R. 360), and cases there cited. The head-notes to that case are somewhat misleading, and the cases there cited do not seem to me applicable here.

Cockburn v. *Edwards*, 18 Ch. D. 449, and *Wrigley* v. *Gill*, [1906] 1 Ch. 165, were cases of mortgagee in possession and in receipt of rents of the mortgaged premises, and although the

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mortgagees collected sufficient rents to pay the interest, if so applied, they did not appropriate such payments.

It was held that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest, would not, by itself, prove that there was no interest in arrear if no appropriation was shewn to have been made. But that, as in an account sent by the mortgagee to the mortgagor, the interest was treated as satisfied up to a certain day out of the rents—there was evidence of an arrangement that the rents should be applied in discharge of the interest.

In neither of the above cases is the principal enunciated that payments made by a mortgagor on account generally in a mortgage under which there is both principal and interest in arrears, that the mortgagee without any appropriation by the mortgagor is bound to apply the payment first in payment of interest.

In *Burge* v. *Fines*, *supra*, I take it the Judge finds that there was an appropriation by the mortgagor contrary to which the mortgagee applied the payment.

It seems to me reasonable and proper that the balance remaining out of the $2,500 paid in April, 1914, should after payment of the interest up to February 24, 1913, be applied on the principal in view of the fact that such balance was insufficient to pay the year's interest due on February 26, 1914.

The payment of $2,000 in May, 1914, the plaintiffs applied towards a further reduction of the principal then in arrears.

I have considered the defendants' position as urged by their counsel that, appropriating the payments according to the plaintiffs' contention, deprives the defendant of the benefit of the Act respecting contracts relating to land, commonly known as the Moratorium. That Act provides that no proceedings shall be brought to enforce a covenant for payment of principal, where the agreement provides for the payment of interest so long as the interest, taxes and insurance premiums are paid. That is, the principal can never be collected if the payments mentioned are made. This Act was not in force at the time of the payments made by the defendants, and the necessity to appropriate to payment of interest was not manifest. When this Act was passed it was in the plaintiffs' interest to apply it to the claim which they could not by law collect, and I think they were amply justified in so appropriating.

The conclusion I have come to from a perusal of the authorities is that they are not bound in law to apply the balance of the payments mentioned in paragraph four of the stated case towards the payment of all interest which had accrued due to the date of such respective payments, and were within their rights in appropriating in reduction of principal, as they did.

Judgment accordingly.

EXECUTORS AND ADMINISTRATORS TRUST CO. v. HOEHN.

Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Elwood and McKay, JJ. March 10, 1917.

PLEADING (§ VI—355)—SET-OFF—BREACH OF WARRANTY—NOTE.

Unliquidated damages for breach of warranty may be pleaded as a set-off to an action on a purchase price note in the hands of an assignee or trustee.

Statement.

APPEAL by the plaintiff from a judgment for defendant on his set-off for breach of warranty. Affirmed.

Charles Schull, for appellants.

G. E. Taylor, K.C., for defendants.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—The promissory note sued on herein is held by the plaintiffs as trustees for the payee, George Smith. The plaintiff cannot stand in any better position than the payee, *De La Chaumette* v. *Bank of England*, 9 B. & C. 208, and the various questions which have arisen in cases where the plaintiff is holder for value after maturity do not arise in this case.

Cases such as *Tye* v. *Gwynne*, 2 Camp. 346, and *Trickey* v. *Larne*, 6 M. & W. 278, particularly at p. 281, shew that before the Judicature Act the defendant could not, in an action on a bill, claim as a defence a partial failure of consideration where the amount claimed for such failure was unliquidated. But, in my opinion, that condition of affairs is changed since the introduction of the provisions of our Judicature Act and our Rules of Court. Rule 147 is as follows:—

A defendant in an action may set off or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and cross-claim. But the Court or a Judge may, on application of the plaintiff before trial, if in the opinion of the Court or a Judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

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It is contended, however, that the defendant in this action should have counterclaimed, and had not the right to set up by way of defence or set off allegations that the horse, on account of the purchase price of which the note in question was given, was not as warranted and was of no value.

In *Automobile Sales Ltd.* v. *Moore*, 10 D.L.R. 184, it was held in Ontario, in effect, that such a defence could only be raised by counterclaim. The Ontario rule, however, does not provide as our rule does that a defendant may set off, whether such set-off *sound in damages* or not.

In *Young* v. *Kitchin*, 3 Exch. D. 127, statement of claim alleged that the plaintiff sued as assignee by deed of a debt due by the defendant to the assignor on a building contract, and defendant alleged by way of set-off and counterclaim that he was entitled to damages for breach of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them. It was held that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor, and that the form of the *defence* must be amended accordingly. This decision was followed by the Privy Council in *Government of Newfoundland* v. *Newfoundland R. Co.*, 13 App. Cas. 199, and at p. 213 I find the following:—

> Unliquidated damages may now be set off as between the original parties and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also gave rise to the subject of the assignment.

See also *Lillie* v. *Thomas*, 6 Terr. L.R. 263, particularly at p. 266.

The matter raised by the defendant does not seem to me to be a counterclaim but solely a defence. If the plaintiff were to discontinue the action, the defendant could not proceed with the counterclaim because the counterclaim only can succeed in the event of the plaintiff recovering something against the defendant, and it is only in that event that the defendant is entitled to set up or set off by way of defence the damages which he has sustained. If the plaintiff were to make an application for security for costs of the counterclaim I apprehend such an application would be

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unsuccessful, see *Neck* v. *Taylor*, [1893] 1 Q.B. 560, and the ground of the refusal would be that what would be set up in the counterclaim would be in the nature of a defence.

Banks v. *Jarvis*, [1903] 1 K.B. 549, was an action to recover a debt due to the plaintiff as a trustee. The defendant was held entitled to set up as a defence that the *cestui que trust* was indebted to him in a sum for unliquidated damages exceeding the amount of the claim.

It seems to me, therefore, that the authorities shew that the damages alleged to have been sustained by the defendant in consequence of the breach of warranty can clearly be pleaded as a defence to the plaintiff's action, and that, therefore, the trial Judge was correct in giving judgment for the defendant.

The result, in my opinion, is that the appeal should be dismissed with costs. *Appeal dismissed.*

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New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. November 24, 1916.

1. NEW TRIAL (§ II—8)—MISDIRECTION.
An isolated mis-statement of law in a Judge's charge to a jury is not misdirection, as grounds for a new trial, if in its entirety the charge fairly states the law bearing upon the case from its different aspects.

2. NEW TRIAL (§ III C—20)—DISQUALIFICATION OF JUROR—RELATIONSHIP —FAILURE TO CHALLENGE.
Disqualification of a juror because of affinity with the plaintiff, known to the defendant before the trial and not challenged, does not affect the verdict, and is no ground for a new trial.
[See also *Montreal Street R. Co.* v. *Normandin* (P.C.), 33 D.L.R. 195.]

Statement.

APPLICATION to set aside the verdict and for a new trial in an action for damages for injuries resulting from the negligent driving of a motor car by the defendant. The trial took place before Barry, J., and a jury at the Albert circuit on May 31 and June 1, 1916. The jury found, in answer to questions, that the accident which caused the injury complained of was due to the negligence of the defendant, and consisted in his not stopping his car or turning to the left soon enough, and that defendant could have avoided the accident by the exercise of ordinary care. They assessed the damages at $299.40 and a verdict was ordered to be entered for that amount.

The defendant moved to set aside the verdict for the plaintiff and for an order to enter a verdict for the defendant or for a new trial or reduction of damages. In addition to the grounds

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of misdirection, and that the verdict was against evidence, the defendant took the ground that the jury that tried the cause was not properly constituted, and in support of this ground produced an affidavit that the wife of one of the jurors was a first cousin of the plaintiff's wife. In answer the plaintiff read an affidavit shewing that the defendant was informed of the alleged disqualification before the trial and that he did not raise the objection or challenge the juror. In an affidavit in reply the defendant admitted that he had been informed by the juror of the affinity of his wife with the plaintiff, but that he did not credit his statement, believing that he merely wished to escape serving on the jury.

E. A. Reilly, K.C., and *M. G. Teed*, K.C., for the defendant, supported the application. The fact that the wife of juror Garland was a first cousin of the wife of the plaintiff is sufficient to entitle the defendant to a new trial: *Bailey* v. *Macaulay* (1849), 13 Q.B. 815, *Atkins* v. *Fulham Borough Council* (1915), 31 T.L.R. 564, *Oulton* v. *Morse* (1843) 4 N.B.R. 77 (2 Kerr).

[WHITE, J.:—Defendant knew of the affinity before the trial. Why did he not exercise his right of challenge?]

It is true that Garland told plaintiff of the relationship of his wife to the plaintiff's wife, but he did not credit it; he considered it a device to escape serving on the jury.

[MCLEOD, C.J.:—He was put on his guard and he elected to take the chance of a favourable verdict. It is too late now to raise the objection.]

The jury were misdirected in telling them that: "The mere occasion of an injury is sufficient to raise a *primâ facie* case where the injurious agency is under the management of the defendant." This statement of the law is found in 1 Beven on Negligence (1908 ed.), p. 118. The Judge appears to have overlooked the fact that the author was dealing with the legal import of the phrase *res ipsa loquitur*, and is not applicable to the case under consideration. The effect of the charge may well have been to have impressed the minds of the jury with the idea that the burden was on the defendant to shew that there was no negligence. The misdirection is not cured by considering the charge as a whole: *Blue* v. *Red Mountain Railway Co.*, [1909] A.C. 361, *Bray* v. *Ford*, [1896] A.C. 44, at 49, 53 and 56. If there has been a mis-

direction, the party supporting the verdict must shew that no substantial wrong or miscarriage is occasioned in order to avoid a new trial: *Anthony* v. *Halstead* (1877), 37 L.T., N.S. 433, *Jones* v. *Spencer* (1898), 77 L.T. 536.

H. A. Powell, K.C., *contra*. The defendant relies for a new trial mainly on the alleged misdirection contained in the statement in the charge quoted by my learned friend Mr. Teed. It is submitted that the statement is a correct statement of the law. The most that can be said against it is that as applied to this case it is too broad. Even that criticism is not warranted. A person in the use of property or machinery from which damage results is in one or the other of two situations—either the property is dangerous when used with reasonable care or it is not dangerous when used with reasonable care. In the former case the person in control is presumptively liable, and in the second case he must be presumed to be guilty as the accident would not have happened if he had used reasonable care; in either case the principle *res ipsa loquitur* applies.

Assuming, however, that the contention is valid that the statement is a misdirection and standing alone would be a ground for a new trial, it is not so when taken in connection with the other qualifying statements in the charge. It is difficult to conceive how taking the charge as a whole the case could have been left more plainly to the jury, and their duty and province as to the facts more clearly pointed out. Again, assuming that the extract from the charge was wrong in respect to the application of the principle *res ipsa loquitur*, and assuming also that it was not qualified by the context of the charge, the error could not have in any way affected the jury in giving their answer to the question as to the particular act of negligence which caused the accident. They did not proceed on any presumption of negligence. The finding was not general. They found that the specific act of not stopping the car or turning to the left soon enough was the negligence responsible for the accident.

As regards the alleged disqualification of juror Garland. The affidavit is not sufficient as it does not state the defendant was not aware of the objection at the trial, and it does not shew that defendant has suffered by reason of the juror's presence: *In Bishop* v. *Goff* (1866), 11 N.B.R. 389.

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Grimmer, J.

[McLEOD, C.J.:—You need not argue that point.]

The judgment of the Court was delivered by

GRIMMER, J.:—This action was tried at the Albert Circuit Court in May last before Barry, J., and a jury, and was brought to recover damages for injuries to the plaintiff which it was claimed were the result of careless or negligent driving of a motor car operated by the defendant.

On October 8, 1915, the plaintiff and his wife left their home in Coverdale, Albert county, and proceeded with a horse and buggy to drive towards Moncton. The day was rainy and the roads muddy. The plaintiff was driving on the left hand side of the road, which is described as the westerly side, and when about 2 miles from Moncton, saw a motor car approaching from the opposite direction, which later on proved to be driven by the defendant, who was accompanied by one Emily A. Grace. The top of the car was up, and all side curtains on. When first seen the defendant was driving his car on the westerly side of the highway, being the same side the plaintiff was on. When the team and the car got close together, the plaintiff's horse became alarmed and bolted across the road in front of the car, leaped a ditch, upset the wagon, threw both the plaintiff and his wife out and ran away, with the result that the plaintiff had two ribs broken, the wagon was considerably damaged, and the horse was somewhat cut. The plaintiff was unable to do any work for 2 months and incurred medical expense as a result of his injuries. The plaintiff and his wife both testified that the defendant kept his car upon the westerly or wrong side of the road until he was within 25 ft. of the team, or until the horse became frightened and bolted, and that just as the horse bolted the defendant turned the car towards the east or his right side of the road, and that as the wagon passed the car, the left-hand mud-guard thereof struck the left-hand wheel of the wagon, causing it to upset. Also that the plaintiff's wife shouted to the defendant to stop the car, and held up her hand. That the horse he was driving was a quiet animal and was used to motors and street cars and until this occasion had never exhibited alarm upon meeting a car, and that he believed it was the closeness of the car in front of the horse that caused it to bolt, and become unmanageable.

The defendant and Mrs. Grace both testified that they

sighted the team with the plaintiff and his wife therein not less than 200 ft. away, and that he, the defendant, at once turned the car to the east side, or his right side of the road, until he got beyond the centre thereof, where he kept the car, so that at the time of coming up with the team he was strictly upon his proper side of the highway. That they observed signs of alarm in the horse and finally saw it bolt, run away, upset the wagon, etc., but they did not hear any request to stop the car by the plaintiff or his wife, nor did they see her hold up her hand. The defendant states that as the wagon passed the car, the left mud-guard and left hind wheel of the wagon touched, but so lightly that no damage was done to the car. There is a plain and distinct difference in the statements of how the accident happened so far as these witnesses are concerned, one upon which the jury, having seen and heard the witnesses, were fully competent and entitled to pass. Evidence was also given to shew that the car had been driven slowly, and that when it stopped it was standing practically parallel with the road, and that only one of the forward wheels had crossed the track made by the wagon as it passed in front of the car.

The Judge submitted three questions to the jury, who found that there was negligence on the part of the defendant, and that it consisted in not stopping the car, or turning it to the left soon enough, and they assessed the damages at $299.40.

Objection is taken to the charge of the Judge to the jury, on the ground of misdirection, but, while if some isolated statements in the charge were alone considered there might appear some ground for the support of the objection, yet in my opinion, taken as it must be altogether and in its entirety, the charge fairly states the law bearing upon the case from its different aspects, and the objection must fail. From an examination of the record it is very apparent the questions in issue in the Court below were purely matters of fact, which were properly left to the jury by the learned Judge, and while in some respects I find it somewhat difficult to arrive at the same conclusion the jury did, I am not prepared to say there was not sufficient evidence to justify their findings, nor that reasonable men, hearing the statements of witnesses and having in mind all the circumatances, might not fairly have found as they did.

Application dismissed.

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Re TOWN OF ALLISTON AND TOWN OF TRENTON.

Ontario Supreme Court, Hodgins, J.A. January 3, 1917.

MUNICIPAL CORPORATIONS (§ II C—60)—BONUS BY-LAW—"BUSINESS ESTABLISHED ELSEWHERE IN ONTARIO."

Bonusing an industry already existing elsewhere in the province is not permitted in two municipalities, even though the same individual carry on the business in both.

Statement. MOTION by the Corporation of the Town of Alliston to quash a bonus by-law of the Town of Trenton.

W. A. J. Bell, K.C., for the applicant corporation.

I. F. Hellmuth, K.C., and *A. Abbott*, for the respondent corporation.

Hodgins, J.A. HODGINS, J.A.:—Motion to quash by-law No. 1157 of the Town of Trenton, passed the 31st August, 1916, granting a bonus of $11,000 to the Benedict Manufacturing Company, of Syracuse, N.Y., in respect to a silver plated ware business to be carried on by them in Trenton. I allowed an affidavit to be filed on behalf of the applicant alleging, under sec. 285* of the Municipal Act, R.S.O. 1914, ch. 192, that the Town of Alliston was injuriously affected; as I think it is.

There is a business already in existence in Alliston, known as the Benedict Proctor Manufacturing Company, and it is said that this, being a business "established elsewhere in Ontario," the Municipal Act, R.S.O. 1914, ch. 192, sec. 396, sub-sec. (c),† prohibits any bonus being granted by the Town of Trenton such as is contemplated here. Both counsel agreed that this sub-section (c) deals with the ownership and not with the character or species of the business, and submitted the question as depending

*285.—(1) Where it is alleged that a by-law injuriously affects another municipality or any ratepayer of it, and that the by-law is illegal, in whole or in part, the corporation of such other municipality, or any ratepayer of it, may apply to quash the by-law.

†396.—By-laws may be passed by the councils of all municipalities for granting a bonus for the promotion of manufacturers in the municipality . . .

(c) No by-law shall be passed granting a bonus in respect of a business established elsewhere in Ontario, or which has been removed to the municipality from another municipality in Ontario, whether the business is to be carried on by the same person or by a person deriving title or claiming through or under him or otherwise or by such person in partnership with another person or by a joint stock company or otherwise.

wholly on the identity or otherwise of the two concerns in point of proprietorship. I therefore dispose of this case on that assumption, giving "ownership" and "proprietorship" their largest meaning, notwithstanding that the language of the sub-section might suggest a wider application of its terms.

The case made by the applicant is that the Alliston company is a branch or subsidiary concern of or is controlled by the Syracuse company, and that sub-sec. (*c*) is intended to prevent the removal of such an undertaking in the way here adopted, *i.e.*, by separating the off-shoot from the parent stem, while remaining in control of the operations as completely as if the connection had not been severed.

The answer made by the respondent is that, if the legal separation is complete, the statute does not prohibit bonusing two persons or corporations so situated, but merely those businesses which are carried on, within the meaning of the sub-section, *i.e.*, by the same person or by those who in some way derive title through him or can be legally identified with him.

There can be no doubt, upon the facts presented on this application, that the business has not been yet removed to Trenton. It still exists in Alliston; and, if one accepts the professions of the respondent, it is a new industry that is proposed for Trenton.

If, however, it appears to be made out that legal separation had come about before the by-law was passed, and yet that commercial control of the Alliston concern was established in or continued by the Syracuse company, so that the transfer of the assets and the discontinuance of the business were entirely within the latter's discretion, and were in fact likely to be a matter of course, then it seems to me that the mischief against which the statute was intended to guard would have presented itself. The difficulty lies in the disappearance of the words of 63 Vict. ch. 33, sec. 9 (*e*), "to secure the removal of an industry established elsewhere in the Province."

The amendment made in 1903 by the Municipal Act, 3 Edw. VII. ch. 19, sec. 591, sub-sec. 12 (*e*), added to those words the following: "or which has been removed to such municipality from another municipality in the Province, whether such industry is to be carried on by the same proprietor as in the locality from which it has been or is to be removed or is to be carried on by some

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other person deriving title or claiming through or under such proprietor or otherwise or by such proprietor in partnership with other persons or by a joint stock company or otherwise."

This addition affects the removal, whether threatened or accomplished, and was no doubt intended to prevent its being said that, when the transfer had taken place before the by-law was passed, the decision of *Re Village of Markham and Town of Aurora* (1902), 3 O.L.R. 609, had no application.

I think the meaning of the sub-section is that bonusing an industry already existing elsewhere in Ontario is not permitted in two municipalities, even though (1) the same individual is to carry on both, or (2) some other person deriving title or claiming through or under him or otherwise is to do so, or (3) the same proprietor operates it in partnership with others or by means of a joint stock company or otherwise. The use of the phrase "or otherwise" shews that the definite exceptions are not exhaustive, but that in each case the carrying on of the business in some other way is not to save the situation. What is aimed at apparently is the entire eliminating of competing bonuses, so that an industry once established shall have no incentive to move, and that a municipality granting a bonus will be able to enjoy the fruits of it without any greater danger than the attractions of a rival locality, unable to offer a similar bait.

The verbal changes in this sub-section found in 3 & 4 Geo. V. ch. 43, sec. 396, and in R.S.O. 1914, ch. 192, sec. 396, do not add any clearness to the atmosphere, but the sense remains the same. As now expressed, no by-law shall be passed granting a bonus "in respect of a business established elsewhere in Ontario, or which has been removed to the municipality from another municipality in Ontario, whether the business is to be carried on by the same person or by a person deriving title or claiming through or under him or otherwise or by such person in partnership with another person or by a joint stock company or otherwise."

The issue here hangs largely on the meaning and effect of the transaction which took place at Syracuse on the 5th July, 1916. There are some circumstances which afford means of judging the exact position which it should occupy. Proctor, the president of the Alliston company, was and is a sick man, who has undergone two operations this year. He is treated in the evidence of Bene-

dict and Dorner as a negligible quantity except as a salesman. His activity both in Benedict's tour of Ontario and in the negotiations is incomprehensible if the purchase by him of all the shares in his company is real, because it was helping to set up a larger rival to his own factory, and one with the backing which, up to this time, had been his own chief support. Why he should go with Benedict to look over the various towns, negotiate with Trenton, and then go to Syracuse, buy up the shares in his company, and take part in framing an agreement that would turn his largest creditor into the field in competition with himself, is not easy to understand, unless some advantage was to accrue to him or his company not disclosed by the evidence.

And this consideration is emphasised when it appears that the Syracuse company, which had been in practical charge and control of the Alliston factory, instead of relaxing its grasp, continued it even after the sale of the 5th July, and fastened it more completely upon that concern by the vote of Proctor's own directorate. This is abundantly evidenced by the following resolution, passed on the 30th September, 1916, the date at which the 5th July transaction was formally ratified:—

"There having been no assistant-treasurer appointed, it was considered that, pending the completion of the financial arrangements rendered necessary by the purchase by Mr. Proctor and others of the stock in this company held by Mr. Benedict, Mr. Rowantree, Mr. Crouse, Mr. Kingsley, Mr. W. I. A. Proctor, it was considered advisable and necessary, in view of the interest of those parties, that the bookkeeping of the company should be conducted at Syracuse by Mr. Rowantree, who had previously had charge of the books of the company, and for this purpose it was considered advisable to appoint Mr. Rowantree assistant-treasurer with power to perform the duties of the treasurer, and to appoint Mr. Benedict as second vice-president to perform the duties of the vice-president where it was found necessary that documents or cheques or commercial papers should be signed by the vice-president.

"It was thereupon moved by Mr. Ogden—seconded by Mr. Bowlby

"That Mr. R. B. Rowantree be appointed assistant-treasurer of the company to perform the duties of the treasurer as he may find necessary from time to time. "Carried."

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"Moved by Mr. Ogden—seconded by Mr. Bowlby

"That Mr. H. L. Benedict be appointed second vice-president of the company with power to perform the duties of first vice-president from time to time as he may find it necessary. "Carried."

The extraordinary thing about this resolution is that neither Rowantree nor Benedict was either a shareholder or director. On the 28th September, 1916, the transfer of their shares had been formally confirmed. By-law No. 21 requires the second vice-president and the treasurer to be shareholders.

It appears that for a long time, in view of the heavy indebtedness of the Alliston company to the Syracuse company, the former was put on a weekly allowance of cash for petty expenses and pay-roll, all the large accounts being paid direct from Syracuse. In other words, the Syracuse company was in complete charge of the whole operations at Alliston, so much so that, instead of that company holding directors' meetings, there were only informal meetings at Syracuse, attended by Proctor, Benedict, and Crouse, which dealt with and directed its affairs.

On the letter-paper of the Syracuse company are the words "Canadian Factory, Alliston, Ontario;" and, although this is airily disposed of by Benedict as simply untrue, and by Dorner, the superintendent at Alliston, as for "stationery purposes," that explanation does not sufficiently account for the wording of the letter of the Syracuse company to the Mayor of Alliston of the 3rd March 1916. In that communication "our plant," "our lease," "our taxes," "our present plant," and "our manager in Alliston," appear to indicate accurately the position occupied by the Alliston company. It also contains a hint of removal, in these terms: "Our lease of our present plant expires the 1st July, and if we stay in Alliston . . . we are asking you," etc.

It may be noted that on the 16th May, 1913, the Alliston company is referred to as a branch of the Syracuse factory, which they had just opened up in Toronto, and that that company then bought the Defries assets at Alliston and moved there.

The Mayor of Alliston deposes to a conversation with Proctor in February, 1916, to the effect that they had offers from other municipalities, and if Alliston had any offer he would be pleased to receive it. On the 30th May, 1916, Benedict begins his tour of Ontario towns. In June, 1916, Elliott deposes to another con-

versation with Proctor to the effect that the Syracuse company was complaining of the overhead charges in Alliston, and proposed moving the business from Alliston. On the 5th July, 1916, Proctor went to Syracuse, after the negotiations in Trenton, and the Syracuse company's holdings in his company were offered to him for $12,500, for which he gave his demand note, receiving cash for his stock in the Syracuse company. On the 9th or 10th July, Mayor Ireland and his solicitor went to Syracuse with an agreement drawn up, which was there revised and signed by the Benedict Manufacturing Company. It was taken to Trenton and signed by that town, and on it the present by-law is founded.

The unratified transfer of share interests in Syracuse did not become, under sec. 60 of the Companies Act, R.S.O. 1914, ch. 178, "valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other."

It remained in that state till the 28th September, 1910, when the transfers were confirmed, but in a different form. However, the result was that Proctor owned 246 shares out of 250.

The financial position of the Alliston company appears, though not very clearly, from the examination of Benedict. It does shew that that company operated for three years at a loss of $20,000; that it owes the Syracuse company $16,985.24; that Proctor owes also on loans $7,000; and that in its assets the machinery and plant acquired in 1913 for $4,400 are taken in at a value of $35,200.

I have dealt with the apparent disregard by Proctor of the business interest of his company in what he did, and I cannot help suspecting that that company is not in a position to carry on unless the Syracuse company assist it as in the past, notwithstanding the argument presented to me on behalf of the respondent that it was doing a larger business than ever before, that it could not fill its orders, and had discharged no workmen. This depends on some statements of Dorner, who volunteers the remark that "they are too busy to think of moving," and that they had "more business than they could get out." But these general statements are, I think, more than offset by his answers to the effect that he told some of the employees a month or so before the 3rd November, 1916, that "maybe we would" move to Trenton and asked one or two if they would go, and that Proctor, about the 1st September, 1916, told him, "We are going to move or expect to

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move to Trenton." This may explain his reference to more business than they could get out, as to which he says, "It will never be got out."

The activities of Trenton's Mayor should not be ignored: before going to Syracuse, he met Proctor in Toronto and dined with him, went to Alliston in his company, and next morning went over the factory. Dorner says he shipped 25 samples of their work to him shortly after. Mayor Ireland remembers little of what occurred on that trip; and, whether due to a hint from Proctor, or because, like Alan Breck, he had a "grand memory for forgetting," he cannot recall any conversation concerning the object of his trip nor any inquiries about Alliston. His fondness for yachting and sports supplied, according to him, topics for his conversation with Proctor during his visit. However, when he got back, he talked over with O'Rourke and other members of the Trenton council what he had heard and seen at Alliston, though what these things were he fails to relate.

Mayor Ireland produces two accounts purporting to shew the amount expended, after the agreement was signed in Trenton, by the respondent's engineer, Melville, in preparing to occupy the plant in Trenton. On examining these, it appears that there is nothing in them shewing any expenditure on machinery or plant, unless it be some trifling amount for accessories. The agreement itself contains no provision for new machinery or plant nor any minimum expenditure for it so that second-hand articles would suffice. Nor is there any time in which it is to be installed.

Considering these facts which I have outlined, I arrive at the conclusion that there is in what has been done here a design, to which the respondent was a party, to accomplish that which the statute was intended to prevent. This is of course not enough unless what has been done is contrary not only to the intent of the statute but to its meaning as expressed in the words used. The design that has been carried out is one which, while vesting the stock of the Alliston company wholly in Proctor and divesting any shareholding interest by the Syracuse company, yet leaves the one company completely in the hands of the latter in every other essential as its creditor and manager and financial director.

The time at which the status and relation of each company must be determined is that of the final passing of the by-law, the

31st August, 1916. As I have pointed out, the transfers then made were not such as legally to accomplish the intended separation of interests. Is this a business "carried on by the same person?" It must come under that clause or else under the last, "by such person . . . by a joint stock company or otherwise."

"There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things:" *per* Jessel, M.R., in *Erichsen* v. *Last* (1881), 8 Q.B.D. 414, at p. 416. As a matter of fact, the directors of the Alliston company did not, as such, carry on its business in the way in which companies are usually conducted. It has always been managed and controlled by those who owned one-half of its shares, and whose financial interests were considerably involved. This case presents a way of managing a company different only in method from that in *St. Louis Breweries Limited* v. *Apthorpe* (1898), 79 L.T.R. 551, the reasoning in which case contains much that is *à propos* here.

The real control was and has always been vested in those who, as they admit, represented the Syracuse company. Notwithstanding the transaction of the 5th July, 1916, that state of affairs continued, and I think it can be properly said that, even after formal action was taken in September to regularise the share situation, no change in control was contemplated or accomplished.

The bonusing statute is not penal but enabling, and its construction should be dealt with, having regard to the aspect of municipal development presented by the bonus sections.

It would be, as it strikes me, as absurd in this connection to say that the Alliston company carried on its business in Syracuse if it had been managed by directors living there, as it would be to declare that its business was carried on by those legally entrusted with its management if the fact were otherwise. Yet these conclusions may be quite reasonable when the case is being looked at from some totally different standpoint.

The question is rather one of fact than of law. This is recognised by all the Courts that considered and decided such cases as *San Paulo* (*Brazilian*) *R.W. Co.* v. *Carter*, [1896] A.C. 31.

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My finding would be that the proposed factory in Trenton is to be carried on by the same persons who carried on and still in fact carry on the Alliston business, and that the latter enterprise was in fact a branch or subsidiary company of the Syracuse concern, just as the Trenton factory is and will be. It must be obvious that, if the by-law stands, it will be quite possible for these same persons, either from their position as creditors of the Alliston company or creditors of its chief shareholder, and as controlling that company's financial affairs, to compel or induce the transfer of the plant and machinery of the Alliston company to Trenton. This suggests a reason why in December there are no contracts for machinery or plant produced or proved. Benedict's evidence establishes the absence of any binding commitment.

It is also clear that, if my view is not sound, and if the legal entity is alone to be considered, the prohibition in the statute will be totally ineffective. The shares and direction of the company before the by-law is passed, may be completely changed immediately afterwards so that the separate entities will become one in interest, and the business and assets in one place may then without difficulty be transferred to a more favourable locality.

In my opinion, the by-law cannot be supported, and must be quashed with costs.

[Affirmed by a Divisional Court of the Appellate Division on the 13th February, 1917.]

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TUCKER v. NORTHWEST FIRE INS. CO.

Nova Scotia Supreme Court, Russell, and Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. January 9, 1917.

COSTS (§ I—14)—ON MOTION FOR SECURITY.

The Court upon refusing an application for security for costs cannot make the costs of the application costs in the cause. Russell and Drysdale, JJ., contra.

[*Att'y-Gen'l* v. *Cameron*, 43 N.S.R. 49, considered.]

Statement.

APPEAL from the judgment of Pelton, J., of the County Court for District No. 3, and Master *ex officio* of the Supreme Court, refusing an application by defendant for security for costs under O. 63, r. 5, sec. 1 (*d*).

E. C. McNutt, for appellant.

J. McG. Stewart, for respondent.

Russell, J.

RUSSELL, J.:—The County Court Judge, Pelton, J., was applied to for security for costs on the ground that the action

was for the same cause as another in which costs were still unpaid, which should have been paid to the defendant. The Judge decided that the actions were for different causes and refused the order for security, making the costs of the application costs in the cause, as he had discretion to do. It is now argued that he did not exercise his discretion, but merely considered that he was bound by the authority of *Att'y-Gen'l* v. *Cameron*, 43 N.S.R. 49. What he says is: "For these reasons I refuse the application. Costs will be costs in the cause." I do not see why we should infer from this citation that he did not exercise his discretion, and I, therefore, read his reference to the case in 43 N.S.R. 49, as having been inserted merely by way of compliance with the rule requiring the Judge to give reasons for his decision in the matter of costs. Whether that rule was applicable or not need not now be determined. But the Judge must have known that the Court did not intend, in deciding the case referred to, to repeal the rule giving the Judge discretion.

I am also of opinion that the appeal should be dismissed on the ground that it cannot be shown that the order was not essentially right. The defendant applies for security for costs and it is refused. The costs are made costs in the cause. That means that if the plaintiff succeeds he will tax against defendant the costs of opposing the order for security. He will have had no grievance. If the defendant succeeds it will be because the plaintiff should not have brought the action against him. If it be said that nevertheless there is no reason why defendant should have put him to the added expense of an improper motion for security, that raises the very question and the only question in the case. It does not follow, because defendant's motion was unsuccessful, that he did anything that a discreet counsel ought not to have done in making it. Both actions, it is conceded, arose out of the same matter, and it is only in a severely technical sense that they were not both for the same cause. The Judge might very well have had doubts, to say the least, whether the defendant should not have been allowed to realize the unpaid cost of the first action before being troubled with the second. If under the pressure of such doubts, or for any other reason, he saw fit to exercise his discretion, by making the costs of the application costs in the cause, I think we should not reverse his decision, nor should we establish any rule which tends to limit

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the discretion of a Judge in such a case, or to encourage appeals on mere questions of costs which have the effect of adding unnecessarily to the burdensomeness of litigation.

DRYSDALE, J.:—I agree with the opinion of RUSSELL, J.

HARRIS, J.:—The difficulty of understanding the case of *Att'y-Gen'l* v. *Cameron*, 43 N.S.R. 49, to which the learned Master referred, led me to examine the printed case on file and I find that in that case there was an application by the defendant for security for costs, which was heard by the Judge of the County Court at Sydney, on January 14, 1908. The Judge filed his decision on January 20, 1908, granting the application for security and stating that the costs of the motion would be costs in the cause. The order was taken out on January 21, 1908, and in it the costs were reserved.

Apparently there was some discussion about costs when the order was taken out which led to the change. The cause was tried and decided on February 27, 1908, by the Judge of the County Court in favour of the plaintiff with costs. Subsequently there was an appeal from this judgment, and an application to the Judge to stay execution on the judgment and also to settle the question as to the costs on the motion for security for costs which had been reserved in the original order. The Judge then decided that the defendant should have the costs of the motion for security. There was an appeal from this decision which came on to be heard at the same time as the appeal from the judgment in the action. This explanation of the facts seems to be necessary in order to understand the report of the case in 43 N.S.R. 49.

It will be seen that the Court was dealing with the costs in the ordinary case of an application for security which succeeded, and what Lawrence, J., was referring to was the practice on a successful motion. Of course, a Judge has a wide discretion as to costs, but the word discretion as used in the rule is to be understood in a judicial sense.

In this case, I understand from the judgment appealed from that the Master considered himself bound by the decision of this Court, to which he referred, and which obviously did not apply. He did not exercise his discretion at all, and we must therefore make the order proper under the circumstances of the particular case, which I think is that the costs should be the plaintiff's costs in the cause.

The order appealed from will be varied accordingly and the defendant must pay the costs of the appeal.

RITCHIE, E.J., and CHISHOLM, J., concurred.

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CROMWELL v. MORRIS.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 17, 1917.

CONTRACTS (§ V C—390)—RESCISSION—REPUDIATION.

Repudiation of a contract by one of the parties thereto does not operate as a rescission unless accepted by the other party; a right to withdraw from a contract, and to recover back payments thereon, may arise from the terms of the contract.

APPEAL by defendant from the judgment of Ives, J., in an action for repayment under a contract for the sale of timber licenses. Varied. Statement.

C. C. McCaul, K.C., for appellant.

HARVEY, C.J.:—I agree with the conclusions of my brother Beck and his reasons therefor. Harvey, C.J.

I did have considerable doubt whether the plaintiff should be allowed to maintain this action while there is still pending an action for rescission of the agreement, but after fuller consideration I have come to the conclusion that there is no necessary inconsistency in his attitude. The agreement to return the moneys paid, upon which this action is founded, is independent of the agreement to sell and buy the interest in the limits. If this were an action to enforce the latter agreement by a transfer it would be quite inconsistent with an attempt by action to have it declared that that agreement was null and void, but the plaintiff is entitled to the return of $15,000 in any event. If the agreement was induced by misrepresentation he is entitled to have it back with interest and without any deduction, but if that agreement is binding he is still entitled to recover it back under the special agreement to that effect, but without interest and subject to deductions specified because of obligations imposed by the main agreement.

BECK, J.:—The action is one for the repayment of the sum of $15,000 in pursuance of a clause in an agreement for the sale by the defendant to the plaintiff of a half interest in certain timber licenses. The following is the agreement:— Beck, J.

Agreement of sale between John Morris, of Edmonton, Alberta, broker, and Frederick R. Cromwell, M.P., of Cookshire, Que., entered into this 19th day of December, 1913, by which John Morris agrees to sell to F. R. Cromwell

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one-half interest in the following British Columbia timber licenses, situated on the Blue River and tributary to the North Thomson River, B.C., containing 36 sq. miles, more or less.

The said licenses numbering from 5389 to 5424 inclusive for the following consideration of $30,000, to be paid as follows: The sum of $15,000 to be paid on or before December 31, 1913. The sum of $7,500 to be paid June 30, 1914. The sum of $7,500 on or before December 31, 1914, without interest.

On receipt of final payment the said J. Morris will deliver and transfer to F. R. Cromwell a legal transfer and assignment of one-half interest in the above-mentioned property.

The said Morris further agrees, that after the expiration of 2 years from this date, should Cromwell wish to withdraw his interests from the said property, Morris will return all moneys received from Cromwell without interest, providing Cromwell assigns and delivers to the said Morris all his interest in the said property.

The above parties will share equally in all government dues, assessments and rentals covering the said property from the date hereof.

(Signed) JOHN MORRIS.
(Signed) F. R. CROMWELL.

Cromwell paid the $15,000 payable on December 31, 1913.

In the end of April, 1914, the matter having been the subject of correspondence between Cromwell and Morris, Morris made a contract with a firm named McElhanney Bros. for the cruising and surveying of the timber limits. In the middle of June, 1914, Cromwell came to Edmonton, bringing with him a timber-cruiser, and Morris joining him, the three went out and spent some time upon the limits. While there the party met the surveyors who had almost completed their survey.

Cromwell's cruiser's reports indicated a much less quantity of timber than the original reports which Morris had had, and had shewn to Cromwell prior to the agreement, and Cromwell's cruiser's report was in other respects unfavourable. The party returned to Edmonton in July. In the meantime the second instalment of purchase money owing by Cromwell to Morris became payable, *i.e.* on June 30. Some time after Cromwell's cruiser returned to Edmonton with his complete field notes, plans, report, etc., Morris spoke to Cromwell, who was still in Edmonton, about the payment of this second instalment. Cromwell, after taking a week or ten days to consider the matter, took the position that the timber had not come up to the representations made to him by Morris, and said he would not have anything more to do with the agreement, would pay no more, and wanted back what he had already paid. Then after the lapse of a couple of weeks he brought an action (August 6, 1914), for

rescission of the agreement on the ground of misrepresentation, and claiming a return of the $15,000 paid and damages. The action was tried and dismissed (September 29, 1915).

It seems to be the contention of counsel for Morris, the defendant, that by reason of the position taken by Cromwell followed by his action to set aside the contract—which is spoken of as a repudiation, and in a sense, correctly so—Cromwell ceased to have any rights under the contract. But his rights under the contract remain until it is rescinded. His repudiation entitled Morris to accept the repudiation, and thus bring about a rescission, but Morris did not accept the repudiaton, and the result was that there was no rescission, and, the contract remaining, Cromwell's rights as well as Morris's, remained.

I refer to two or three appropriate cases.

A mistaken attempt by one of the parties to an agreement to rescind it, does not, *ipso facto*, operate to rescind it; there is no effective rescission unless the other party recognizes the rescission. (*Marsden* v. *Sambell*, 43 L.T. 120; 28 W.R. 952). The promisee may treat a renunciation before the time of performance as a breach, but where the promisee has this option, he is bound to exercise it. He cannot treat the renunciation as a breach if he tries to hold the promisor to the contract. (*Hochster* v. *De la Tour* (1853), 2 El. & Bl. 678 (118 E.R. 922); 22 L.J.Q.B. 455. *Avery* v. *Bowden* (1856), 6 El. & Bl. 953 (119 E.R. 1119). *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460).

The promisee, if he pleases, may treat the notice of intention to repudiate as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but *in that case he keeps the contract alive for the benefit of the other party as well as his own;* he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous renunciation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. *Frost* v. *Knight* (1872), L.R. 7 Ex. 111.

To make this view clear was perhaps not of importance, because Morris, on October 6, 1915, after judgment in the former action, wrote Cromwell the following letter:—

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In regard to the option granted you on December 19, 1913, to purchase a half interest in my timber limits in British Columbia, while I am advised by my solicitor that on account of your default in making the payment of $7,500 on June 30, 1914, and your subsequent default in the payment of $7,500 on or before December 31, 1914, I am now entitled to declare the agreement at an end, and retain absolutely for my own use the $15,000 already paid to me, I beg to inform you that I will extend the time for payment of the above sums of $7,500 together with interest at 5 per cent. from June 30, 1914, and the sum of $7,500, together with interest, from December 31, 1914, for 15 days from this date; that is to say, until October 21 instant. Unless the above-mentioned moneys are paid to me on or before October 21, 1915, I hereby notify you, that without further notice to you, your option evidenced by the agreement between us of December 19, 1913, will be at an end, and absolutely determined, and that I shall retain for my own use and property the $15,000 already paid to me.

Cromwell gave notice of appeal from the judgment in the former action and the appeal still stands undisposed of. He made no further payments under the contract, and this action was commenced on April 28, 1916, to recover the $15,000 which he had paid at the time the contract was made.

The defendant Morris takes the position that the plaintiff cannot recover, and seeks to sustain his position virtually upon three grounds: (1) repudiation, which I think I have sufficiently dealt with; (2) that the contract is in effect merely an option, and not having been accepted promptly by payment within the time fixed for the payment of the first deferred payment, and then within the extended time allowed by the defendant's letter, the plaintiff has no rights—a view which I think is sufficiently answered by my saying that I cannot so construe the contract; and (3), that the plaintiff, having broken the contract by not making either deferred payment is so substantially in default that he cannot recover the down payment of $15,000 any more that he could enforce specific performance of the contract.

Now, there are some settled rules, though their application is not always easy.

(1) When a promise goes only to *part* of the consideration, and a breach thereof can be paid for in damages, it is an independent promise, and an action may be maintained for the breach of it, without averring performance or readiness: (3rd rule in *Pordage* v. *Cole*, 1 Wms. Saund. 319, (85 E.R. 449) quoted *Cutter* v. *Powell*, 2 Sm. L.C. 1 at p. 15).

(2) In every case the true question is whether the acts and conduct of the party evince an intention no longer to be bound

by the contract. (*Mersey Steel Co.* v. *Naylor*, 9 Q.B.D. 648; 9 App. Cas. 434). Applying this principle to the case before them, the House of Lords decided that the conduct of the defendants in withholding payment for a particular delivery of steel *under erroneous legal advice*, did not evince such an intention.

(3) The refusal to perform must go to the root of the contract as a whole; refusal to perform a particular term not going to the foundation of the contract cannot deprive the party of all his rights under the contract. *Rhymney R. Co.* v. *Brecon, etc., R. Co.*, 69 L.J. Ch. 813.

Applying as best I can these principles I think Cromwell entitled to recover under the express terms of the contract in question the $15,000 paid upon entering into the agreement there being deducted therefrom certain items by way of damages, resulting from the non-fulfilment by Cromwell of other terms of the contract.

The right of Cromwell to withdraw his down payment of $15,000 arose according to the terms of the contract only after the expiration of two years from the date of the contract, that is, December 19, 1915. In the interval the obligations upon Cromwell were (1) to pay $7,500 on June 30, 1914, and $7,500 on December 31, 1914; (2) To pay one-half of all government dues, assessments and rentals covering the property from the date of the agreement. Cromwell, upon payment of the down payment of $15,000, became the owner of a one-half interest subject to the payment of the balance of the purchase price and such other amounts as the agreement provided for, and on payment he was entitled to a legal transfer of one-half interest; that is, one year before he was entitled to withdraw his moneys he was entitled to become the legal owner of a one-half interest.

A question is raised as to whether Cromwell should have paid half of the cost of surveying the limits. The work and the report following upon it were for the benefit of the property, or, rather, for the owners for the time being, and it seems that they were of some permanent value to the owners. The mutual rights and liabilities of the parties in this respect do not depend on the original agreement, but on the special agreement relating to the survey. On the whole I think the cost properly falls on Morris as the owner henceforward of the limits.

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I think that the meaning of the agreement is that any *annual* payments payable to the Government of the Province for dues, assessments, rentals, etc., should be made up by equal contributions by the parties, and that Cromwell's share of these moneys was not part of the moneys which it was intended Morris should return to Cromwell in the event of Cromwell exercising his right to withdraw after two years. The agreement provides first for the payment of the purchase money by Cromwell to Morris; secondly, for Cromwell withdrawing, in which event "Morris will return all moneys received from Cromwell without interest," and, thirdly, for the sharing equally in—(not payment by Cromwell to Morris of one-half of)— "all government dues, assessments and rentals covering the property." There is nothing unreasonable in supposing that Cromwell was ready to lose not only his interest on the purchase price but also any *annual* outgoings in the event of his deciding ultimately to withdraw from the purchase. I therefore think that Cromwell being entitled to get back his $15,000 without interest is chargeable as against that amount with the following items: (1) interest on $7,500 at 8% from June 30, 1914, to January 5, 1916, $908.50; (2) interest on $7,500 at 8% from December 31, 1914, to January 5, 1916, $608.50; (3) half forest protection for two years, $480.00 = $1,997, and the judgment below on the counterclaim should be varied by increasing it to that sum. The annual rentals of the limits for the 2 years covered by this agreement have not yet been paid. They amount for the term to $8,280, to which is to be added as a penalty for their non-payment the sum of $1,800. As Morris has not paid these sums or either of them even in part he is not now entitled to credit for them, but if the door is still open to him to pay them and thus save his licenses, he should be allowed to do so, and in the meantime he should have protection in respect of Cromwell's share of them. I would direct that $5,040 of the amount payable to the plaintiff under the judgment as varied, being one-half of the aggregate of these two sums, be paid into Court and do remain there subject to further order, with leave to the defendant, on notice to the plaintiff, to apply to a Judge at any time before January 1, 1918, for payment of the same out to him or the Government of British Columbia for the purpose of being applied upon said arrears and penalties, and with leave to the plaintiff after said date and in default of

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any order for payment out on the defendant's application, to apply on notice to the defendant for payment out to him, upon which application the Judge may, if he sees fit, extend the time hereinbefore fixed for payment to the defendant or said government.

There should be no costs of the appeal.

STUART and WALSH, JJ., concurred with BECK, J.

Judgment varied.

Beck, J.

Stuart, J.
Walsh, J.

REX v. KELLY.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. November 7, 1916.

1. CRIMINAL LAW (§ II A—44)—PRISONER'S STATEMENT IN COURT—JUDGE'S DIRECTION TO JURY TO DISTINGUISH FROM SWORN TESTIMONY.

Where the accused person in addressing the jury on his own behalf has made statements of alleged facts outside of the sworn testimony, the trial Judge should warn the jury against treating the statement as the equivalent of sworn testimony; such warning is not an infraction of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, under which the failure of the accused to testify is not to be made the subject of comment by the Judge or by counsel for the prosecution.

[*R.* v. *Kelly* (No. 2), 27 Can. Cr. Cas. 140, affirmed on this point.]

2. APPEAL (§ VIII B—673)—CRIMINAL CASE—VERDICT ON INCONSISTENT COUNTS—DIRECTION AS TO SENTENCE.

Where the majority of the Court of Appeal in deciding a reserved case on counts for three separate crimes charged on the same facts, holds that the accused at least was properly found guilty of one of such crimes, and that the penalty should be imposed as for one crime only, a direction may be given under Cr. Code sec. 1020 that the trial Judge, in passing sentence which had been postponed until after the appeal, shall impose one penalty in respect of the three counts and regulate the extent of same by the maximum which would apply to the lesser offence. The Supreme Court of Canada, on a further appeal under Cr. Code sec. 1024, will decline to deal with the question of the validity of the conviction on the other counts as raising mere academic questions under such circumstances, if it finds the verdict for such lesser offence unassailable.

[*R.* v. *Norman*, [1915] 1 K.B. 341, and *R.* v. *Lockett*, [1914] 2 K.B. 720, 83 L.J.K.B. 1193, referred to; *R.* v. *Kelly* (No. 2), 27 Can. Cr. Cas. 140, considered.]

Statement

APPEAL from the judgment of the Court of Appeal for Manitoba, *R.* v. *Kelly* (No. 2), 27 Can. Cr. Cas. 140, upon a reserved case submitted by Prendergast, J., the presiding Judge at the trial of the appellant who was convicted upon four of the counts of the indictment preferred against him: *R.* v. *Kelly* (No. 1), 27 Can. Cr. Cas. 94.

The accused was tried on five counts of an indictment, in substance as follows: (1) Theft of money, valuable securities and other property, belonging to the King, in the right of the Province of Manitoba; (2) unlawfully receiving money, valuable securities

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or other property belonging to the King which had been embezzled, stolen or fraudulently obtained by means of a conspiracy between the accused and others to defraud the King, the accused then knowing the same to have been so embezzled, etc., by means of said conspiracy; (3) a count similar to the second count, but naming two additional co-conspirators; (4) obtaining moneys by false pretences from His Majesty for the accused and others; (5) unlawfully receiving moneys of His Majesty which had to the knowledge of the accused been obtained by false pretences with intent to defraud.

The jury acquitted the accused on the third count, but brought in a verdict of guilty on all the others.

The issues raised on the present appeal are stated in the judgments now reported.

The questions reserved for consideration by the Court of Appeal for Manitoba, with the answers ordered to be returned thereto by that Court were as follows:—

"1. Was I right in refusing to quash the whole indictment on the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

"2. Was I right in refusing to quash the first count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

"3. Was I right in refusing to quash the second count in the indictment upon the motion of counsel for accused upon the grounds urged by them in their argument before me? A. Yes.

"4. Was I right in refusing to quash the fourth count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. Yes.

"5. Was I right in refusing to quash the fifth count in the indictment upon the motion of counsel for the accused upon the grounds urged by them in their argument before me? A. No.

"6. If any of the said counts should have been quashed or otherwise dealt with by me, either before or during the trial, has there been a mis-trial of the accused on any other count or counts by reason of the admission of evidence upon such count or counts as should have been quashed or otherwise dealt with by me? A. No.

"7. Was I right in my charge to the jury on the first count of

the indictment as to theft or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused? A. To the first part of question preceding the word 'or'—Yes; to remainder of question—No.

"8. Was I right in my charge to the jury on the fourth count of the indictment as to what constituted the offence of obtaining money by false pretences or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused? A. To first part of question preceding the word 'or'—Yes; to remainder of question—No.

"9. Was I right in admitting evidence as to acts, conduct, admissions, conversations and facts relating to some one or more of those named in the second count, namely: Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson and Victor W. Horwood, to which the accused was not a party, and, if I have erred, was the same prejudicial to a fair trial of the accused? A. To first part of question down to and including the word 'party'—Yes; to remainder of question—No.

"10. Was there evidence upon which a jury could properly convict the accused—(*a*) On count Number 1; (*b*) On count Number 2; (*c*) On count Number 4; (*d*) On count Number 5. A. Yes.

"11. The jury having found the accused Thomas Kelly not guilty on the third count in the indictment, and evidence having been admitted on said count upon the trial, was the admission of such evidence prejudicial to a fair trial of the accused on the remaining four counts in the indictment upon which he was found guilty? A. No.

"12. Was I right in permitting the affidavits on production of Thomas Kelly, Lawrence Kelly and Charles Kelly, exhibits 62 and 63, in a civil action of the Attorney-General of Manitoba against Thomas Kelly & Sons to be put in evidence in the manner disclosed by the record against the accused Thomas Kelly, and, if not, was the same prejudicial to a fair trial of the accused? A. To first part of question down to words 'and, if not' —Yes; to remainder of question—No.

"13. Was I right in the admission of certain documents (as so called secondary evidence) at the instance of the Crown, and,

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if so, was the admission of such documents or of any other exhibits filed prejudicial to a fair trial of the said Thomas Kelly as set out in schedule 'D'? A. To first part of question down to and including the word 'Crown'—Yes; to remainder of question—No.

"14 Was any evidence admitted or allowed to be given which should not have been admitted or allowed to be given and which was prejudicial to a fair trial of the said Thomas Kelly, in regard to the matters set out in schedule 'E'? A. No.

"15. Was I right in my comments upon the statement of the accused to the jury, with respect to it not being made under oath, and, if so, was this prejudicial to a fair trial of the accused or a violation of the Canada Evidence Act? A. To first part of question down to and including the word 'oath'—Yes; to remainder of question—No.

"16. Similarly were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused or to be a violation of the Canada Evidence Act? A. The first part of this question 'Were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused?' is not a question of law that may be reserved for the Court of appeal under the Criminal Code. To the second part of the question—No.

"17. Was there in any respect, on my part, either a failure to direct the jury or an inaccurate direction to the jury with regard to the difference between a statement made by the accused to the jury and an address made on his behalf to a jury; or as to the weight that a jury is entitled to attach to the statements of the accused which are not made under oath or as to pointing out evidence favourable to the accused or in regard to correcting any mis-statements as to law or fact made by the Crown counsel during the trial or any addresses to the jury? A. No."

The majority of the Court of Appeal for Manitoba, upon the rendering of the judgment appealed from, by which the above answers were returned, consisted of His Lordship Chief Justice Howell and their Lordships Justices Perdue and Cameron. Their Lordships Justices Richards and Haggart dissented and were of opinion that there should be a new trial and that such new trial should be upon the fourth count of the indictment only.

Dewart, K.C., and *Harding*, for the appellant (*Sweatman*) with them.

R. W. Craig, K.C., for the respondent.

The opinions of the CHIEF JUSTICE and DAVIES, J., are delivered by Anglin, J.

IDINGTON, J.:—This appeal arises out of a reserved case in which the learned trial Judge had submitted to the Court below 17 questions. On the hearing of that appeal two of the learned Judges hearing it dissented, on points hereinafter referred to, from the judgment of the Court of Appeal. Idington, J.

Under the authorities cited in argument, including *McIntosh* v. *The Queen*, 5 Can. Cr. Cas. 254, 23 Can. S.C.R. 180; *Rice* v. *The King*, 32 Can. S.C.R. 480, 5 Can. Crim. Cas. 529; *Gilbert* v. *The King*, 38 Can. S.C.R. 284, 12 Can. Cr. Cas. 127; *Curry* v. *The King*, 48 Can. S.C.R. 532, 22 Can. Cr. Cas. 191, 15 D.L.R. 347; *Eberts* v. *The King*, 47 Can. S.C.R. 1, at p. 26; 20 Can. Cr. Cas. 273, 7 D.L.R. 550; *Mulvihill* v. *The King*, 49 Can. S.C.R. 587, 23 Can. Cr. Cas. 194, 18 D.L.R. 217, and other cases cited in the reports of these decisions, I do not think there can longer be a doubt that our jurisdiction to hear an appeal from a Court of appeal in a criminal case is bounded by the lines of clear dissent on any point raised therein relative to any of the questions of law properly involved in the submission of the reserved case.

A dissenting opinion relative to something outside that which can properly be made part of a reserved case or which fails to bear upon the points of law properly involved in such case as reserved, can form no part of what we are concerned with.

I respectfully submit that the expressions of the dissents herein are, as I read them, not clearly confined within these lines. For example: as regards the grounds taken relative to the questions raised by the matter in the address of counsel for the Crown I doubt if such an address can be in itself the subject of a reserved case. I shall presently deal at length with that subject and the arguments founded on what, for brevity's sake, I may call the conspiracy aspect of the case, when what I refer to will more fully appear.

I merely desire here to submit, respectfully, that for want of that definite application of each dissent to the reserved question it

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relates to, or of what are the exact grounds intended to be covered thereby, and as the dissents may have implied more than I might find appears, in order to avoid mistakes, I shall proceed to deal consecutively with each question in the whole reserved case. I am not, therefore, to be assumed as departing from what I have just now said of the limits of our own jurisdiction to act.

There is another boundary to our jurisdiction expressed in the language of sec. 1019 of the Criminal Code, which is as follows:—

"1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted."

Applying this section enables me, for my part, to dispose of the case, without entering at length, and in minute detail, upon some of the nice questions which may be involved in the dissenting opinions.

There was a motion made by counsel for the appellant to quash the indictment, and this was refused by the learned trial Judge.

The first six questions submitted concern the validity of this refusal and raise the further question of whether or not, if there be in any case an error therein, there was as a consequence thereof and of the admission of objectionable evidence a mistrial.

There are six counts in the indictment. The sixth, which is for perjury, was, with the consent of the Crown, directed to stand over and not to be tried with the others.

The fifth has been disposed of by the Court of Appeal.

The first and fourth are ordinary counts for theft and false pretences, respectively, and I fail to see how any serious question can have been raised as to them.

The second and third counts may be open to the criticism that they are of doubtful import, but as the first and fourth counts enabled the whole of the evidence to be given which was properly admissible on the trial, there cannot now, in face of the

section quoted above, be any question of serious import raised as to the validity of the learned Judge's refusal to quash.

The attempt to use the particulars delivered ten days later than this motion to quash, illustrates how absurd this part of the contention in the case is.

The complaint made that the learned trial Judge did not, in his charge, enter upon a specific attempt to deal in detail with, and direct the jury as to, each of these counts, and what they mean and might be held to imply, seems unfounded, for his mode of treatment left the appellant without any ground of complaint in regard thereto. Had he done as suggested I imagine there might have been some ground for suggesting that the minds of the jury had been thereby confused.

The case was presented by him in his charge as one of stealing, or receiving that stolen, or of obtaining by false pretences. He wisely abstained from needlessly entering upon such a field of mystification as we have had presented to us to deal with and hence his charge misled nobody.

There was at the close of the trial a distinct question put by the foreman of the jury which led the learned Judge to tell the jury they could not bring in a verdict of guilty on both these second and third counts, but must, if either were to be included in a verdict of guilty, select one or other thereof.

Their verdict was guilty on the first, second, fourth and fifth counts.

There was, therefore, no substantial wrong or miscarriage in the refusal to quash or in consequence thereof.

As to question 7, which is as follows:—

"7. Was I right in my charge to the jury on the first count of the indictment as to theft or was my charge insufficient in law so as to be prejudicial to a fair trial of the accused?"

There is raised thereby perhaps the most important and difficult question in the reserved case.

The learned Judge relied upon section 347 of the Criminal Code and I think he was right in doing so. It is a most comprehensive definition of theft and is as follows:—

"347. Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, any thing capable of being stolen, with intent—

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(*a*) to deprive the owner, or any person having any special property or interest therein, temporarily, or absolutely, of such thing, or of such property or interest; or,

(*b*) to pledge the same or deposit it as security; or,

(*c*) to part with it under a condition as to its return which the person parting with it may be unable to perform; or,

(*d*) to deal with it in such a manner that it cannot be restored to the condition in which it was at the time of such taking and conversion.

"2. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.

"3. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

"4. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting."

"Anything capable of being stolen" might not cover money in the bank to the credit of any person, but surely it does include a cheque to draw that money. I think a cheque, being an order for money, is a valuable security within the words of the indictment. Can it be said that the fraudulent means resorted to in order to induce the Lieutenant-Governor and others to do those acts which resulted in the preparation of the cheque and its due signature having preceded its existence, therefore the appellant, guilty with others in bringing those acts about, can have acquired a colour of right to use it or convert it to his use?

I think not, and that if the appellant by reason of his fraudulent acts was not entitled to have received any of the cheques issued to him, he had no right to convert them to his use.

They each remained the property of the Crown recoverable by respondent, if so advised, from appellant at any instant until passed into the hands of the bank without notice. The language of sub-sec. 4 seems clearly to bear this out and to cover just such cases as this.

The later sections dealing with what used to be called embezzlement are in harmony with this view. The evident purpose of the section, as a whole, was to make clear that the fraudu-

lent nature of the dealing was to be the test of whether or not the wrongful conversion was to be treated as theft or not.

Counsel for respondent in their factum suggest that the moneys had been stolen by the Minister and thereby there was a conversion of the money to which appellant was a party as accessory and hence he was liable as a principal.

My difficulty is in extending the section to a theft of money in the bank for it contemplates a taking which could not, I submit, be within the meaning of the section.

The same counsel in argument also submitted the amendment to the English Larceny Act in 1861, section 70, aimed at officers of the government, and that such amendment was introduced by the Act introducing English law into Manitoba.

In my view it is not necessary to pass any opinion upon this contention.

If appellant could be guilty of stealing the cheques, then there is no need for prosecuting the inquiry.

The eighth question seems upon the evidence hardly arguable. Clearly there was an obtaining of money by false pretences whatever may be said of the other charges as a matter of law.

The ninth question, which is as follows:—

"9. Was I right in admitting evidence as to acts, conduct, admissions, conversation and facts relating to some one or more of those named in the second count, namely: Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson and Victor W. Horwood, to which the accused was not a party, and if I have erred, was the same prejudicial to a fair trial of the accused?" raised at first, in argument, a doubt in my mind, when it was urged by counsel for appellant that the moneys obtained had all been obtained before the end of December, 1914, and the offences charged had then been completed and much of the evidence here in question related to later events.

It was alleged that what transpired later was in fact nothing but evidence of a new conspiracy and neither had nor could have had any direct relation to or be in any way a necessary result of the original conspiracy.

If the facts would justify this or some such way of looking at the admissibility of the later evidence I agree a grave question would have arisen.

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It is, however, quite clear when one is enabled by a knowledge of the evidence to grasp the actual situation that this contention of appellant is hardly worthy of serious consideration.

The Crown alleges in fact the existence of a conspiracy on the part of those named, or some of them, including the accused, to use the opportunity of the erection of the public buildings—known as Parliament Buildings—for the improper purpose of diverting funds ostensibly voted by the legislature for that purpose, and the property of the Crown as charged, into the hands of some one for the purpose of forming part of a political campaign fund, or possibly dividing or distributing amongst them, or some of them, moneys so diverted.

It matters not what the purpose was so long as moneys were, from time to time during the progress of such works, to be diverted from their proper purpose as designated by the legislature.

There was evidence that justified such an inference and it was of such weight as to entitle the Crown to have the whole [case] relative thereto fully developed.

Touching the mere questions of admissibility of such evidence the learned trial Judge had to consider the nature of the charges either as alleged in the pleadings or presented by counsel for the Crown, and then the evidence already presented tending to support any such pretensions and determine whether in view of all that had preceded, such later developments could reasonably be connected therewith.

In default of that being quite apparent from the case as developed, learned trial Judges often, for convenience sake, have to rely upon the undertaking of the counsel presenting such like evidence that it will be connected with that preceding or to follow in such a way as to be relevant to the issues in question and maintain the contention put forward.

The mere technical questions of admissibility as presented in the question does not therefore go very far.

If, however, it should in such case turn out that the evidence could not be connected with other evidence in a way to form an arguable case, the consequences would have to be dealt with effectively to see that there was no miscarriage of justice. Here it is not merely the admissibility as that is put in the question that might have been involved.

Not only was it contended that the evidence of the later acts I have referred to were inadmissible, but also that the whole evidence of conspiracy, or to put it in another and less controversial form, of agreement to act together in pursuance of the common purpose of diverting a part of the money appropriated for said buildings, so attacked was quite inadmissible unless appellant was present.

I cannot assent thereto. Whatever our reason will maintain as fairly inferable from the circumstances presented must be the test. The accused, of course, must be so connected with those circumstances or part thereof as to justify, by that test, the maintenance of the inference argued for.

But, unfortunately for the appellant, his connection with the later developments has been shewn in fact to be so intimate and close that there is no need for straining the application of the principles I am relying upon to bring home to him the desire to destroy evidence and hinder its production and promote thereby the concealment of all that had transpired which might tend to shew him and others as having designed by their co-operation to divert and to have succeeded in diverting moneys from their destined purpose.

And the desire to destroy, when existent in some bosoms, seems soon to produce destruction.

In each of the sections 69 and 70 of the Criminal Code there has been formulated a legislative guide expressive of the law which may be relied upon as an effective answer to all that has been put forward or that may be implied therein, in any way bearing upon the many questions or many forms of the same question in contending against the use of anything done by others unless clearly and expressly directed by him.

The second sub-section of said section 69, is as follows:—

"2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose."

The general and comprehensive declaration of the law binds and goes a long way to define what may be admitted in evidence in cases of this kind.

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It is but a deduction of that which in reason, must necessarily open the way to the introduction of ev 'ence, in order to lay before the Court those circumstances, from which it may be reasonable to infer concurrence of action on the part of the accused in regard to what is in question.

It is quite clear from the evidence that though the moneys got had been paid before the end of December, 1914, yet the scheme, as a whole, was far from complete, and had been only interrupted by steps in the way of inquiry before a committee of the legislature, which seemed likely to lead to an exposure that would prevent its full fruition. Hence it became necessary for those concerned, actively led by the accused as commander of the forces as it were, to destroy evidence and keep witnesses out of the way. He had been paid far in excess of the work done and was proceeding with further execution of the work. That payment, however, was a mere incident of all that had been planned.

I have no doubt that all that which was introduced as evidence at the trial in the way complained of, in order to prove concealment of a fraudulent purpose in relation to said payments, was properly admissible and evidence from which proper inferences might be drawn tending to establish that purpose and the character thereof.

I shall presently advert to another aspect of this question of conspiracy and its bearing on the case.

Question 10 seems, as put, hardly arguable.

Question 11 seems of the same nature and to call for the same reply, for, as put, it does not indicate that there was any evidence adduced which bore only upon the third count and could have an improper bearing upon other counts.

Question 12 was hardly pressed before us and I see no reason why such an affidavit should not be admitted under the circumstances. Moreover, the objection has no support in the dissenting opinions. On the contrary, it is overruled in that of Mr. Justice Richards.

The same answer may be made as to questions 13 and 14 save that the learned Judges dissenting made no observation anent same.

Question 15 is as follows:—

"15. Was I right in my comments upon the statement of the accused to the jury, with respect to it not being made under oath, and if so, was this prejudicial to a fair trial of the accused or a violation of the Canada Evidence Act?"

I desire to consider this and part of Question 17, together.

It seems difficult to understand how the proper remark of the learned trial Judge can be construed as an infringement of the Evidence Act.

It may be quite permissible for the accused, when undefended, to state his version of what has been given in evidence in order to bring home to the minds of the jurors the possibility that the evidence as it stands or, either by reason of the way in which it has been presented in the giving thereof or the summing up of Crown counsel may mislead, and by his statement induce a reconsideration of anything so tending. Any misleading construction put upon it to the detriment of the accused may thereby be cured.

When the accused in his address chooses to present his version and adds thereby something in way of statement of fact relevant to that which is properly before the jury, they are not only entitled but bound to consider what the accused has said including his statement of alleged fact.

But they, when considering same, can only properly consider it in the way of an explanation which may induce them to turn their minds towards the evidence which has been sworn to and see if as a whole it can properly bear the interpretation which the statement of fact made by the accused suggests as a possibility.

If on the evidence it cannot properly be so understood their duty is to discard the statement entirely for it is not evidence. That is in substance the effect of what the learned trial Judge told them and, therefore, his charge is in that regard unobjectionable.

The learned Judge undoubtedly erred as he suggests, in allowing the accused to wander far beyond the issues and introduce topics and allege statements of pretended fact which had nothing to do with the simple issues of fact properly before the Court. No one had the slightest right to do so, and above all things to make charges against or to insult opposing counsel by dragging in something as the accused did, which had nothing to do with the issues being tried.

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If the accused dispensed with counsel, as quite possibly he did in hopes of being allowed to drag in by way of his address something which was not permissible and what no counsel could or would venture upon doing, it is to be regretted he was permitted the measure of success he got.

As I gather from the learned Judge's charge he felt he had erred and tried to rectify it by pointing out that statements of the accused in an address are not evidence and are not to be treated as such. He would have erred if he had failed under such circumstances in making plain as he did the law on the subject.

Question sixteen is as follows:—

"16. Similarly were any of the observations of counsel for the Crown so inflammatory or improper as to prejudice the fair trial of the accused or to be a violation of the Canada Evidence Act?"

The question as presented does not, I incline to think, put forward any question of law and hence is beyond that which we are entitled to act upon. It is put forward, however, at great length and, if I may be permitted to say so, given undue prominence.

We have presented in appellant's factum extracts culled from an address which occupies twenty-five printed pages of the appeal book. It is not difficult when such extracts are taken from their context to try and create an unpleasant impression. Some of these extracts are unfair presentations of what was intended.

The late Sir James Stephen, in his History of the Criminal Law of England, vol. 1, p. 429, deals with the question of Crown counsel addresses, and there says:—

"It is very rare to hear arguments pressed against prisoners with any special warmth of feeling or of language; one reason for which no doubt is, that any counsel who did so would probably defeat his own object. Apart, however, from this, it is worthy of observation that eloquence either in prosecuting or defending prisoners is almost unknown and unattempted at the bar. The occasion seldom permits of it, and the whole atmosphere of English Courts in these days is unfavourable to anything like an appeal to the feelings—though, of course, in particular cases, topics of prejudice are introduced."

Some few things said by counsel in summing up perhaps transgress these traditions of the English bar.

But wherein exists the question of law raised?

It certainly does not appear in the question sixteen or in these extracts as self evident.

I am not prepared to lay down as law that out of a Crown counsel's address there cannot arise ground for a reserved case.

I can imagine a case (such as does not exist here) of counsel mis-stating the law and the fact in such terms as to call for the prompt interference of the trial Judge, and for his rectification of any wrong done thereby, by warning and directing the jury not to be misled thereby.

It is not the mis-statements in the address which alone can furnish ground for a reserved case upon a point of law, but those coupled with failure on the part of the learned trial Judge to see such errors rectified, that, in my opinion, can constitute grounds for a reserved case. In such event the least that should be required is a statement in the reserved case concisely setting forth exactly what is complained of. A general suggestion such as put in questions 16 and 17 does not satisfy what should be required.

It does not seem to me that we have here any such definite statement of what is in question as the statute requires to be set forth in a stated case reserved for the appellate Court.

In any event we are here confined to what appears in the dissenting opinions.

Mr. Justice Richards selects the criticism by the Crown counsel of the failure of the accused to be defended by counsel. The whole of the episode and real or affected resentment because a postponement of more than two weeks for preparation by counsel was refused deserved severe criticism. And I am not prepared to find any legal ground for interference merely because the language in which it was couched might have been better chosen, when the conduct in question deserved some observations from both Crown counsel and the learned trial Judge to have been passed upon it. A firm, temperate rebuke was in order if respect for the bench is to be maintained.

Mr. Justice Richards further selects the mis-statement of the law by the Crown counsel as to the crimes charged in the indictment, but, as I most respectfully submit, it may be my misfortune that my own view rather accords with that in substance which I take it was intended to be presented by the Crown counsel

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rather than what Mr. Justice Richards holds. I hardly think we can make much of that complaint.

Again he selects the expression as to accused thinking himself to be guilty. As I read the address it contains two pages of evidence quoted by counsel attempting to demonstrate in a fairly arguable manner that such is the inference to be drawn from the evidence quoted.

Counsel certainly on this occasion and others should not have stated, as he did, his own opinion, instead of making a submission of his contention for consideration by those addressed.

I am not prepared to hold that there was any substantial wrong or miscarriage created either thereby or by the omission of the learned trial Judge to specifically call attention to the error and warn the jury against it.

The remaining passages, selected by Mr. Justice Richards as the subject of observation, seem to me of the character which (as Sir James Stephen remarks in the quotation above) would tend to defeat counsel's object.

I am quite sure the matters with which they deal could have been presented in a calm, lucid way that would have carried more weight with the jury and had a crushing effect, if the evidence is to be believed, beyond anything that is complained of.

And hence I fail to find that the omission of the learned trial Judge to specifically deal therewith in each phase thereof, furnishes a reason to believe there has been any substantial wrong or miscarriage.

I repeat it is only by virtue of such omissions that a question of law can arise.

The learned trial Judge's charge was fair and in general terms covered all that is gathered thus from the address of counsel.

Mr. Justice Haggart assigns nothing further on this question than that already referred to by Mr. Justice Richards.

In parting with this part of the case I think it is due to Mr. Coyne to say that whatever may be said or thought of the error in the mode of address used by his leader in summing up, he ought not to have been attacked, as he has been, for he was doing no more than his duty in repudiating what accused improperly dragged into the case.

I cannot think that under the circumstances the granting

of a new trial, by reason of anything that is thus complained of, would conduce to the due administration of justice.

There remains for consideration the objection taken by Mr. Justice Richards in one form, and by Mr. Justice Haggart in another, relative to the charge of conspiracy alleged to be made in the second and third counts of the indictment and all bearing thereupon or flowing therefrom. These counts cannot, I submit, be held to be in law an indictment for conspiracy.

They are, by the express language used, clearly intended to be charges against the accused, of unlawfully receiving money, valuable securities or other property, belonging to the respondent which had been stolen by means of a conspiracy.

How can that be pretended to be a count framed to charge a conspiracy? If nothing had been adduced in evidence but that tending to establish a conspiracy and on the trial all reference to its successful accomplishment had been omitted, would any Court or Judge listen long to a prosecuting counsel professing to desire the charge of conspiracy to be submitted on such a count to a jury and proposing to ask them to find the accused guilty of conspiracy? I venture to think no Judge could be got to assent to such a proposition.

It seems to me this is the proper test to apply to what is suggested and elaborately argued relative to the infringement of the Extradition Treaty under which the accused was surrendered.

So tested, there is not a single ground upon which, in reason or authority, the claim to exclude evidence because it would tend to prove a conspiracy, can be maintained.

Again, suppose the words "by means of an unlawful conspiracy by fraudulent means of Thomas Kelly aforesaid, Rodmond P. Roblin, Walter H. Montague (since deceased), James H. Howden, George R. Coldwell, R. M. Simpson, Victor H. Horwood and others unknown to defraud His Majesty" had been omitted from each of these second and third counts and each then stood as a count in the ordinary form of obtaining money or valuable securities, or property by false pretences, and it had been attempted to prove exactly what has been proven and no one ever used the word "conspiracy" but the facts were offered to conclusively establish the means whereby the wrongs complained of had been accomplished, would any trial Judge rule out any of the evidence? On what ground could he?

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The charge is, in this amended count I suggest, that the money, or securities, or property had been theretofore stolen. The means used is not stated in the amended form I suggest. How could the Judge be asked to reject the evidence? Would he listen to, or give effect to, the argument that it had unexpectedly been disclosed that the accused was one of those who had counselled the original crime of theft and therefore he could not be convicted of unlawfully receiving that which he was an accessory to the stealing of?

The fact is notorious that in many criminal circles there exist men who act as fences. Could such a man secure his acquittal on a charge of receiving stolen goods, by proving that he had directed those usually doing the actual stealing and bringing him the goods, to take these goods in question from some one he had pointed out?

Such proof would constitute him a principal liable to be found guilty of the theft.

Whoever supposed that because it had in this or in some such way developed that the man accused of receiving stolen goods was in fact liable to be charged as a principal, he would be entitled to his acquittal?

Since when has it been law that a man indicted for a minor offence can claim acquittal on any such theory?

I have always supposed that the Crown was entitled to prosecute for that of which a man was clearly guilty even if he was suspected of being liable to be held for a higher or greater offence and a diligent inquiry might produce evidence thereof.

Whatever might be the duty of a Crown officer under such circumstances can have no bearing upon the legal result.

The Crown is entitled to lay the charge for whatever is deemed appropriate to the evidence at hand. And if tried for that for which the Crown has so chosen to indict him, the accused can never again be arraigned and tried for another offence upon the same facts.

Those apprehensive that the accused might suffer wrong by reason of such a proceeding will be relieved by a perusal of those parts of Archbold's Criminal Pleading, Evidence and Practice (22nd ed.), pp. 150 *et seq.*, where the work deals with the subjects of *autrefois acquit* and *autrefois convict*, and cites the numerous authorities on the subject.

So much for the possible wrong or miscarriage.

Moreover, does it not seem idle to argue about the wrong done by a suggested possibility of these counts containing more than one charge, in face of the provisions for inserting in one indictment any number of offences and only one or two, but none of these, are excepted from being so dealt with?

Then again we have the further provisions contained in section 951, of which the first sub-section is as follows:—

"951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included."

This alone should be held to cover all the objections revolving around these two counts and dispose of all except the conspiracy question already dealt with and about to be referred to. Though the section just quoted and others give wide scope for acting under [them] in order to relieve trials from the danger of being wrecked by some mere play upon words or trifling frivolities so dear to the hearts of ancient pleaders now dead, the duty remains to have it kept clear during the trial what the Court is about to try and is trying an accused for.

Not only, as I submit, was there no doubt in this case in the minds of any one, but special pains were taken by counsel for the Crown and the learned trial Judge to make clear that there was no charge of conspiracy made by the indictment, and the only reference made thereto was part of the inducement in the pleadings explaining the means whereby the crimes charged were accomplished. I imagine no juryman in Manitoba was ever stupid enough to fail to understand what he was thus told.

To meet some points pressed upon us though not open for action as I read the reserved case, I may add a few sentences and cite some precedents covering things so urged or pointed at. Even the question of a man being charged with receiving that which he might not only be charged with having stolen but was in fact guilty of, is covered by authority in the case of *Reg.* v. *Hughes*, Bell C.C. 242, 8 Cox C.C. 278.

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There might have been raised a more arguable case than some parts of this one on the ground of the verdict of guilty being entered for both the theft and the receiving of that stolen inasmuch as the punishments respectively assigned to such offences are not the same. Counsel for appellant seemed to think some such question was raised and put it forward in several ways. The case of *Rex* v. *Darley*, 4 East 174, and other cases referred to in Chitty's Criminal Law (18th ed.), when dealing with the law as it stood one hundred years ago, suggest the contention would have been unavailing.

What could be dealt with in a practical common sense fashion under the state of law then cannot surely furnish obstacles to the execution of justice now in view of the effort made by the legislature to remove such like barriers from the successful administration of justice and reduce all that is involved to the simplicity so much to be desired.

The appeal should be dismissed.

Duff, J.

DUFF, J.:—There was, I think, no evidence to support a conviction on the charge of theft. In each case the authorities having custody on behalf of the Crown of the moneys paid to Kelly intended to pass the property in these very moneys to Kelly. Except as to the contention advanced on behalf of the Crown to which I am about to refer, it is sufficient to say that touching this branch of the appeal I adopt the reasoning of Mr. Justice Richards.

The answer to the learned Judge's reasoning put forward by counsel for the Crown appears in the following extract from the factum:—

"Mr. Justice Richards errs in holding that count 1 of the indictment is negatived by the evidence. He apparently looks at the count as charging Kelly with actually himself stealing or embezzling the moneys. He apparently overlooks Kelly's position as an accessory before the fact to misappropriation of the public funds by the ministers. If he does not overlook this, then his view must be based on a restricted view of the definition of theft in the Criminal Code, sec. 347, which would limit the operation of that section to the *taking* of anything capable of being stolen, all the cases cited by him being judgments dealing with the question of the offence of larceny at common law. This leaves out of consideration theft by conversion under this section, which is com-

mitted whenever a person already in possession of personal property, with the owner's consent, fraudulently and without colour of right converts it to his own use or to the use of any other person than the owner of it with intent to deprive the owner of such property, or so to deal with it that it cannot be restored. The contention of the Crown is, and the evidence shews, that the cheques upon the funds of His Majesty the King in the right of the Province of Manitoba, and the moneys subsequently paid on those cheques were received under circumstances that constituted a theft or embezzlement by Messrs. Roblin, Coldwell, Howden and Montague in combination with Messrs. Kelly, Simpson and Horwood. To this Kelly contributed by being an accessory before the fact, and is therefore in law a principal in the commission of the offence, under sec. 69 of the Criminal Code, by reason of which there is no longer any distinction between a principal and an accessory before the fact. See Crankshaw, p. 72:—

"A principal may be the actual perpetrator of the act, that is, the one who, with his own hands or through an innocent agent, does the act itself; he may be one who, before the act is done, does or omits something for the purpose of aiding some one to commit it; he may be one who is present aiding and abetting another in the doing of it; or he may be one who counsels or procures the doing of it, or who does it through the medium of a guilty agent."

The assumption underlying this argument is that the Ministers Roblin, Coldwell, Howden and Montague being in possession of moneys of the Crown could be convicted of unlawful conversion of the moneys under section 347 of the Criminal Code. When pressed for evidence that these moneys were in the possession of these ministers in contemplation of law, that is to say, within the meaning of the enactment relied upon, counsel were unable to point to any evidence of such possession. The fallacy of the argument lies in taking it for granted that the political (as distinguished from legal) control of the machinery of administration which, subject in the last resort to the authority of the Lieutenant-Governor, rested in the hands of these persons was equivalent in law to such possession and that in putting such machinery in motion, which they were able to do by falsifying the facts and thereby enabling Kelly to procure the moneys in question, they were guilty of the criminal offence of conversion within the contemplation of section 347.

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The point may be illustrated by reference to the moneys paid under authority of orders-in-council. It was argued that as these ministers, or some of them, constituted a majority of the executive on whose advice the orders were passed, their acts in procuring the passing of them and indirectly, by means of the orders, the issue of cheques payable to Kelly, amounted to "conversion" in point of law.

But in truth these moneys were the moneys of His Majesty lawfully disbursable only on the order of His Majesty's representative, the Lieutenant-Governor (acting, it is true, on the advice of his Executive Council) and by the instrumentality of cheques signed by certain permanent officials, one of them being the auditor. The moneys were in the possession of the Crown subject to disposition only by following a procedure prescribed by law; and though the advice of the Executive was a necessary part of this procedure, it was by no means the whole of it. Nor were the other essential acts, such for example as the concurrence of the Lieutenant-Governor which in these cases was obtained by deceiving him as to the facts, of a character so purely ministerial as to justify the conclusion that these moneys were in law under the control of the ministers as depositaries. The truth is that, in law, the function of these persons was advisory only, the effective executive acts were the acts of others.

This is, of course, not to say that the conduct of Roblin and his associates, regard being had to their obligations as holders of high public office, was not (leaving out of view the law relating to conspiracy and obtaining money under false pretences) such conduct as the law notices and punishes as criminal under another head or other heads than theft.

The charge of receiving moneys knowing that such moneys had theretofore been embezzled, stolen or fraudulently obtained also, in my opinion, fails for the reason that up to the moment when the moneys in question were "received" by Kelly they remained in possession of the Crown and had not up to that moment been "obtained" by anybody not entitled to have them. The appellant is consequently entitled to have the conviction against him in respect of count No. 1 and count No. 2 quashed as being unsupported by evidence.

Counsel representing the Crown, quite properly stated

in the argument that the Crown submitted to the judgment of the Court of Appeal being treated as if it provided under section 1020 of the Criminal Code that the penalty should be limited to the lowest maximum penalty allowed by law to be imposed as the result of a conviction on the first, second and fourth counts.

I have nevertheless expressed my opinion upon the points above discussed because that, as I think, is due in strict justice to the appellant. In a Court of morals no difference may be perceptible between the crime charged in the first count and that charged in the fourth count; yet the law does (as the difference in severity of the penalties attached to these crimes respectively demonstrates) regard the first mentioned offence as much the graver and it is right I think to state my opinion that of the graver offence he could not properly be convicted.

Before coming to the crucial questions relating specifically to the conviction on count number four it is convenient to deal with the objection (which might have been a formidable one if founded in fact) that the trial as actually conducted was in truth a trial for conspiracy—a non-extraditable offence. The objection has no sub-stratum of fact. The officers of the Crown were entitled, and indeed it was their duty, in the circumstances, to bring before the jury all facts legally admissible in evidence which might tend to establish the fraud charged to the satisfaction of the jury. The design and the concerted action in furtherance of it were rightly proved and emphasized—not for the purpose of obtaining a conviction for conspiracy as a substantive offence—but as establishing the responsibility of Kelly for certain acts and as exhibiting the character and operation of the dishonest scheme which, as the Crown alleged, disclosed the criminal intent that was an essential ingredient in the offence charged under any of counts one, two or four.

The appellant asks for a new trial in respect of the fourth count of the indictment on the ground that the law was departed from at the trial in (1) comments alleged to have been made on his failure to testify on his own behalf; (2) the reception of inadmissible evidence; (3) unfairness of the trial in respect of extreme and inflammatory observations by counsel for the Crown.

As to the first of these grounds I can find nothing, which,

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when fairly construed, amounts to such comment within the meaning of the statutory prohibition.

As to the second ground (which was also put in the form of an objection that the learned Judge failed to point out to the jury the evidence admissible under counts one and two that would not be admissible under count four) the only exception requiring comment is that relating to evidence of acts which were done after the last of the payments in question had been made (December, 1914), and to which Kelly was not proved to be an immediate party. Kelly, it is said, could not be held to be a party to these acts indirectly or constructively by reason of the conspiracy proved to obtain these moneys by fraud, as the object of that conspiracy was completely accomplished when the last payment was made. This objection is not, I think, well founded. These acts it was argued with a great deal of force (and I am inclined to think the argument is sound) which were concerned with measures for the prevention of discovery and disclosure were well within the original design. But be that as it may there is sufficient evidence of concert in preventing discovery and disclosure to establish a subsidiary conspiracy in which Kelly was involved with that as its object; and acts done in furtherance of such a conspiracy would be admissible in support of the charge of *mens rea*.

As to all these alleged grounds for granting a new trial it should be observed that the jurisdiction of the Court of Crown cases reserved in Manitoba as well as the jurisdiction of this Court in criminal appeals is derived from statute and that in exercising that jurisdiction both Courts are strictly bound by the rule that no new trial can be granted unless there has been some error, by which "some substantial wrong or miscarriage" has been occasioned "on the trial" (Crim. Code, sec. 1019).

The guilt of the appellant as regards the offence charged by the fourth count (obtaining money by false pretences) is demonstrated by evidence indisputably admissible. No jury directing its attention exclusively to that evidence could, unless bent upon not giving effect to the law, have failed to find a verdict of guilty on that count.

In these circumstances there was obviously no "miscarriage;" and assuming there was some technical "wrong" there can be, in

my judgment, no "substantial wrong" from the admission of inadmissible evidence if it must be affirmed that relatively to the whole mass of admissible evidence that which is open to exception is merely negligible and that in the absence of it the verdict could not have been otherwise. This conclusion is in no way inconsistent with the acceptance of the criterion suggested in *Makin's* case, [1894] A.C. 57, at pages 70 and 71, 63 L.J.P.C. 41. In such a case the impeached evidence cannot in any practical sense be supposed "to have had any influence upon the verdict."

As to the ground numbered three upon which a new trial is prayed it may be added that although some of the observations of the learned Crown counsel were no doubt excessively heightened, it is impossible to think that in the circumstances of this case the accused could suffer in consequence of them. Such expressions could not deepen the effect of a bare recital of the facts in the story which the officers of the Crown had to put before the jury.

The opinion of the Chief Justice, Mr. Justice Davies, and Mr. Justice Anglin, was delivered by

Anglin, J.

ANGLIN, J.:—Although the conviction of the appellant on three distinct counts in an indictment—No. 1, for theft, No. 2 for receiving, and No. 4 for obtaining money by false pretences—was upheld by a majority of the learned Judges of the Court of Appeal for Manitoba, the Chief Justice, as we understand with the concurrence of Mr. Justice Perdue and Mr. Justice Cameron, said, [*R.* v. *Kelly* (No. 2), 27 Can. Cr. Cas. 140.]

"It is difficult to see how the accused should for one crime be found guilty on the first, second and fourth counts. That he has committed a crime seems by the evidence to be clearly established, and it is perhaps best established under the fourth count.

"I assume that the trial Judge in pronouncing sentence will consider that the accused was found guilty of but one crime, and in considering the maximum sentence allowed by law I think he should be guided by the lowest maximum fixed by law for either of the three crimes set forth in the first, second and fourth counts.

"This course being taken, I do not think such substantial wrong or miscarriage was occasioned at the trial as would justify a new trial under sec. 1019 of the Code.

"There seems no necessity to interfere with the finding of guilty on the inconsistent counts. He was certainly guilty of one of

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them and as he will be punished on one only, I would follow the course taken in *Rex* v. *Lockett*, [1914] 2 K.B. 720, at p. 733, 83 L.J.K.B. 1193."

The formal judgment of the Court, however, does not direct that the penalty to be imposed shall be so limited; but counsel for the Crown while vigorously insisting that the conviction on all three counts should be sustained, stated at bar in this Court that, as counsel representing the Crown, he submitted to the judgment of the Court of Appeal being dealt with as if it contained a provision under section 1020 of the Criminal Code limiting the penalty as indicated by the learned Chief Justice.

Having regard to all the circumstances of the case, and especially to the possible embarrassment which may have been caused by the trial together of five separate counts, and to the fact that the learned trial Judge, while he carefully defined each of the offences charged, deemed it advisable to abstain from instructing the jury as to the facts in evidence bearing upon each branch of the indictment, we think the position taken by counsel for the Crown eminently proper and that "we ought to treat the verdict as a verdict on the lesser charge," namely, that of obtaining money by false pretences: *Rex* v. *Norman*, [1915] 1 K.B. 341, at page 343; *Rex* v. *Lockett*, [1914] 2 K.B. 720, at pages 733-4.

On this charge we find no dissent in the Court of Appeal on the two propositions; that the count itself was properly laid and that there was sufficient evidence to justify conviction upon it. The appellant urges as grounds for a new trial on this count, warranted by the opinions of the two dissenting Judges (*a*) that the conduct of the case may have given the jury the impression that the accused was on trial for conspiracy—a non-extraditable offence; (*b*) alleged comment on the failure of the accused to testify on his own behalf; (*c*) inflammatory and improper observations of Crown counsel; (*d*) failure of the learned trial Judge to direct the attention of the jury to evidence favourable to the accused and to correct mis-statements of law by Crown counsel; and (*e*) the reception of inadmissible evidence and the failure of the learned Judge to instruct the jury that certain evidence, though admissible on other counts, should not be considered in disposing of the fourth count.

If ground (*a*) is covered by any question in the reserved case,

in view of the explicit and reiterated warning given to the jury by the trial Judge (emphasizing similar statements made to them by counsel for the Crown and by the defendant himself) that "the accused is not charged with conspiracy"—"what he is charged with is not conspiracy"—and again, "Remember that it is not the direct charge he is answering"—it is impossible to accede to the suggestion that the jury may have been misled as to the offences really charged; (*b*) There was no comment whatever on the failure of the accused to testify. His right to do so was not mentioned during the trial. The learned Judge merely discharged his duty in warning the jury against treating the statement which he had allowed the accused to make as the equivalent of sworn testimony; (*c*) Whether there is any question of law reserved on this point is, to say the least, questionable.

But without dwelling further on the several grounds urged, and without determining that in regard to any of them there has been such error in law as would, if "some substantial wrong or miscarriage (had been) thereby occasioned on the trial" (Crim. Code, sec. 1019), have entitled the appellant to a new trial, we are of the opinion that his guilt on the fourth count has been established by uncontradicted evidence, of which the admissibility upon that count has not been and could not be successfully challenged, so complete and so convincing that in regard to that count a substantial miscarriage on the trial is out of the question and the matters complained of, whether taken singly or cumulatively, are "most unlikely to have affected the verdict:" *Ibrahim* v. *The King*, [1914] A.C. 599 at 616, 83 L.J.P.C. 185, 24 Cox C.C. 174, if indeed it is not impossible that they could have had any influence upon it: *Makin* v. *Attorney-General of New South Wales*, [1894] A.C. 57, at pages 70-1, 63 L.J.P.C. 41.

So overwhelming is the proof furnished by the evidence not excepted to, that no honest jury could have returned other than a verdict of guilty of obtaining money by false pretences had the conduct of the case been entirely free from all the alleged errors of omission and commission. No substantial wrong was occasioned on the trial of the fourth count, and the conviction upon it is, in our opinion, unassailable.

Since we also concur in the view of the learned Chief Justice of Manitoba that the punishment of the appellant should not exceed

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the maximum penalty which might be imposed had the conviction been upon the fourth count alone, the questions raised as to the first and second counts, to use the language of counsel for the Crown, have become academic. We therefore express no opinion upon them. *Appeal dismissed.*

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Re TOWNSHIP OF ASHFIELD AND COUNTY OF HURON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. February 7, 1917.

BRIDGES (§ I—1)—OF COUNTY OR TOWNSHIP—LENGTH—APPROACHES.

The embankments which afford approaches to a bridge should not be considered part thereof in declaring it a county bridge under sec. 449 of the Municipal Act, R.S.O. 1914, ch. 192.

[The Municipal Act, R.S.O. 1914, ch. 192, secs. 442, 449, considered; *Re Mud Lake Bridge*, 12 O.L.R. 159, distinguished, *Re Township of Maidstone and County of Essex*, 12 O.W.R. 1190, overruled.]

Statement.

AN appeal by the Corporation of the County of Huron from an order of the Judge of the County Court of that county, made under sec. 449 of the Municipal Act, R.S.O. 1914, ch. 192, declaring a bridge built by the Corporation of the Township of Ashfield, crossing Nine Mile river, to be a county bridge.

Section 442 of the Municipal Act and the following provisions of sec. 449 are applicable to the questions arising upon the appeal:—

442. The council having jurisdiction over a bridge shall have jurisdiction over the approaches to it for 100 feet next adjoining each end of the bridge.

449.—(1) A bridge of a greater length than 300 feet in a town having an equalized assessment of less than $1,000,000 or in a township may, on the application of the council of such town or township, be declared to be a county bridge where

(*a*) it is used by the inhabitants of other municipalities;

(*b*) it is situate on an important highway affording means of communication to several municipalities; and

(*c*) on account of its length, and for the reasons mentioned in clauses (*a*) and (*b*), it is unjust that the burden of maintaining and repairing it should rest upon the corporation of the town or township.

(2) An order declaring the bridge to be a county bridge may be made by a Judge of the County Court of the county in which it is situate on the application of the council of the town or township.

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(5) If the Judge is of opinion that for the reasons mentioned in sub-section 1 the bridge should be declared to be a county bridge he shall by his order so declare, and in that case he shall determine whether the expense of maintaining and repairing the bridge shall be borne by the corporation of the county or partly by it and partly by the corporation of the town or township, and if he determines that it should be borne partly by each he shall fix the proportions in which the expense is to be so borne, and his declaration and determination shall be embodied in the order.

(7) An appeal shall lie from the order of the Judge to a Divisional Court, and the proceedings upon and incidental to the appeal shall be the same as in the case of an appeal from a Judge of that court sitting in court.

C. Garrow, for the appellant corporation.

W. Proudfoot, K.C., for the township corporation, respondent.

The judgment of the Court was delivered by

Meredith,C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the Corporation of the County of Huron from an order dated the 14th October, 1916, made by the Judge of the County Court of the County of Huron, on an application to him by the Corporation of the Township of Ashfield, under sec. 449 of the Municipal Act, R.S.O. 1914, ch. 192, to declare a bridge described as the bridge which crosses the Nine Mile river on the 4th and 5th concessions of the township of Ashfield, to be a county bridge.

The order leaves it uncertain what is probably that which the parties desire to have determined, viz., what is the bridge which is declared to be a county bridge?

The road allowance between the 4th and 5th concessions of the township of Ashfield crosses a deep ravine about 1,500 feet in width, through which there runs the river mentioned in the order, and it also is crossed by the road allowance.

In his reasons for judgment the learned Judge says that "the bridge consists of a middle section 119 feet in length and about 17 feet high, with approaches at the east and west, constructed of earth, stones, and timber;" and it was, no doubt, intended, though there is nothing in the order to shew it, that it was all this that the order should declare to be a county bridge to be maintained and repaired as the order provides.

It may be conceded that, if a bridge had been built across the ravine for its whole width, it would have been proper, if the other

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requirements of the section existed, to declare it to be a county bridge, but that is not this case. What the township corporation has done is to build a bridge only 119 feet in length and embankments at each end leading up to and from it.

I am unable to see how, in any fair and reasonable sense, these embankments can be called part of the bridge, and indeed the learned Judge seems to have been of that opinion, for he speaks of the embankments as "approaches." It may well be, but I express no opinion as to it, that, if the township corporation had chosen to construct, instead of the embankments, a bridge at the lower level more than 300 feet in length, the respondent corporation might have been entitled to the relief which it is seeking; but we have not to deal with what it might have done, but with what it has actually done.

Section 442 of the Municipal Act indicates that the Legislature treated the approaches to a bridge as something independent of the bridge itself; and it is reasonable to conclude, when, in sec. 449, bridges are again dealt with, that it was intended that only the bridge itself, and not the bridge with its approaches, should be taken into consideration in determining the length of the bridge for the purposes of that section.

What I have said is not, I think, inconsistent with anything that was decided in the case of *In re Mud Lake Bridge*, 12 O.L.R. 159. In that case there had existed a bridge, 643 feet in length, crossing the waters of Mud Lake, which was replaced by a wooden section, 243 feet long, spanning the narrows, with embankments at each end, of the respective lengths of 140 feet and 260 feet. The wooden section spanned the waters of the lake at low water, but at high water they spread out for practically the whole width of 643 feet, and there was the important circumstance that the embankments were raised upon the timbers of the old bridge, which were sunk to the bottom of the lake.

If the respondent's contention were well-founded, there would be no escape from holding a small bridge built across a rivulet which ran through a swamp to be a bridge over 300 feet in length, if the length of the made-up road leading to and from the bridge were to be included in measuring the length of the bridge, and they together with what I may call the bridge proper exceeded in length 300 feet, and that because in the spring and fall the swamp would have been impassable if the road had not been made-up.

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I am not prepared to give to sec. 449 a meaning that would bring about such a result, and a meaning which I am satisfied the Legislature did not intend it should bear.

The decision of a Divisional Court in *Re Township of Maidstone and County of Essex*, 12 O.W.R. 1190, is apparently opposed to the view I have expressed, and undoubtedly the approaches were in that case treated as part of the bridge. It is difficult from the report of the case to know what the conditions were, but in the judgment of the Judge of the County Court, p. 1190, it is said: "There is no doubt that the creek" (i.e., the creek which was spanned by the bridge) "at this point was originally much wider than it is at present. The creek spreads to a width of 2,000 feet or upwards immediately south of the point in question." The learned Judge who stated the opinion of the Court said (p. 1191) that "the profile shews the banks to be well-defined." What the bearing of that may have been it is difficult to say; it may mean that the width of the creek within these banks was upwards of 300 feet; and, if that were the case, it may account for the conclusion to which the Court came; but, if the case is not distinguishable because of its special circumstances, it was, in my opinion, wrongly decided.

For the reasons I have given, I would allow the appeal and reverse the order appealed from and substitute for it an order dismissing the respondent's application, and I see no reason why the respondent should not bear the costs throughout of the litigation, and I would so order. *Appeal allowed.*

Re COLONIAL ASSURANCE CO.; CROSSLEY'S CASE.

MAN.

K. B.

Manitoba King's Bench, Macdonald, J. January 11, 1917.

COMPANY (§ V F—255)—LIABILITY OF SHAREHOLDERS—RELEASE—COMPROMISE—ULTRA VIRES.

A transfer by shareholders, in compromise of an action, of partly paid shares in a company, in trust for the company, under an agreement relieving the shareholders from any liability thereon, does not amount to a dealing by the company in its own shares, and the shareholders cannot be held as contributories; the agreement cannot be attacked on the ground of *ultra vires* by a company which has received full benefit thereunder.

Statement.

ACTION under the Winding-Up Act to enforce shareholders' liability.

W. L. McLaws, for Colonial Co.

G. L. Lennox, for Crossley.

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RE COLONIAL ASSURANCE CO.

Macdonald, J.

MACDONALD, J.:—Prior to May 20, 1913, certain litigation was pending to which the Colonial Assurance Co. was a party and the matters in dispute were settled and compromised on that date by the parties thereto.

At the time the said settlement agreement was entered into, the name of Frederick Crossley appeared in the books of the company as the holder of 60 shares of stock on which the sum of $1,200 had been paid and the sum of $4,800 was still unpaid.

The said Crossley was not in any way a party to the litigation or to the settlement agreement mentioned, but one William Smith, a party to such litigation and settlement agreement, was largely indebted to the said company and by the terms of the said settlement agreement and in settlement of the company's claim against him, he agreed to convey and transfer to a trustee certain properties for the benefit of the said company and others in the said agreement mentioned, among the said properties being the stock in the said company owned by or in the name of Crossley above mentioned, as well as stock in said company owned by other parties.

The agreement contains the following clause:—

> Immediately upon the transfer of the said stock in the assurance company to the said trustee, the present holders thereof are to be relieved from all further responsibility or liability upon or in respect of the said stock and shares.

This agreement was confirmed at a regular meeting of the directors of the company.

Mr. Crossley duly transferred the stock to the trustee as covenanted by the said William Smith, but on what terms and conditions or what interest he had in the said stock (if any) does not appear. The settlement agreement was fully carried out.

The Colonial Assurance Co. is now in liquidation, the date of the winding-up order being April 22, 1915.

Counsel have agreed that in the event of the Court being of the opinion that the said Crossley is entitled to relief that an order issue striking his name from the list of contributories, notwithstanding the fact that through his non-attendance he has been placed upon the list of contributories.

The liquidator of the company contests the right of Crossley to be released from liability notwithstanding the settlement agreement referred to and contends that it is *ultra vires* of the

company to deal in its own shares or release a subscriber from payment of the balance due on his shares.

If this were a dealing in its own shares or a release of payment from balance due within the contemplation of the powers of the company, I am of the opinion that the objection would be a sound one; but I do not think that this is a dealing in its shares.

A corporation ought not to be allowed to avail itself of the doctrine of *ultra vires* as against a party seeking to enforce the contract which has been performed by him and has resulted in a corresponding benefit to the shareholders.

McDonald v. *Upper Canada Mining Co.*, 15 Gr. 179; *State Board of Agriculture* v. *Citizens Street R. Co.*, 17 Am. 702.

It seems to me most inequitable that the company which solemnly entered into the agreement referred to should be permitted to take the full benefit of it and repudiate its part of it by taking the stand that it had no power to enter into the agreement.

Brice in his work on Ultra Vires, 3rd ed., at p. 693, says:—

Does not the fact that such an engagement has been acted on, and *a fortiori* that one side has completed his share, prevent each party thereto, either by reason of estoppel or upon equitable grounds, from setting up the defence of want of power in the corporation?

Counsel for the liquidator relies for his position upon the case of *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409.

This was the case of a limited company. Several of the articles of association dealt with the purchase of shares by the company.

Art. 179. Any share may be purchased by the company from any person willing to sell it, and at such price, not exceeding the then marketable value thereof, as the board think reasonable (p. 413).

The company went into liquidation and a claim was made against it by the executors of a deceased shareholder for the balance of the price of shares sold by the executors to the company. It was held that they could not recover as the company had no power to purchase its own shares.

The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital (p. 414).

The memorandum of association did not authorize the purchase by the company of its own shares, and it is settled since *Ashbury*

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Railway Carriage and Iron Co. v. *Riche*, L.R. 7 H.L. 653, that a company cannot employ its funds for the purpose of any transactions which do not come within the objects of its incorporation.

The Colonial Assurance Co. unquestionably had no power to traffic in its own shares and if the transaction in question could be so classified there is no question in my mind as to its being *ultra vires;* but it does not present itself to me in that light.

This is an isolated transaction with a troublesome shareholder and debtor, and it cannot be said to be a trafficking in shares; the capital of the company was not reduced, nor was there an extinguishment of the shares and a consequent reduction of the capital of the company. On the contrary, by the transfer of the shares by Mr. Crossley, the company benefits to the extent of the $1,200 which has been paid on them and for which they cannot be called upon for any return, and the shares might be sold over again. The company does not become the owner; they are transferred to a trustee for the benefit of the company, and are re-issuable and not intended to be retained by the company.

There are special circumstances here. The unsatisfactory character of William Smith's position with the company, his large indebtedness and the necessity in the interests of the company for an adjustment and the agreement it would seem was in the company's interest. To undo that part of the agreement which protected Mr. Crossley and yet permit the company to claim the benefit of the agreement seems to me an injustice.

From the best consideration I can give the matter, I am of the opinion that Mr. Crossley's name should be stricken off the list of contributories. *Shareholder discharged.*

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REX v. GIRVIN.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Simmons and McCarthy, JJ. December 23, 1916.

1. EVIDENCE (§ XC—699)—DECLARATIONS OF ACCUSED—EQUIVOCAL STATEMENTS AS TO ALLEGED FORGERY.

Where the person charged with attempting to utter forged documents is not implicated with the commission of the alleged forgery, his statement made subsequent to his attempt to pass the document that the same is a forgery and that he "knew they were forged" is not necessarily a sufficient admission that he knew them to be forged at the time when he attempted to utter them; the admission is an equivocal one which has to be construed with reference to the surrounding circumstances, and if these indicate merely that he had formed an opinion from knowledge acquired after the attempt that the documents were forged, it affords no proof either of the forging itself or of knowledge of the forgery

at the time of the alleged offence of attempting to utter forged documents.

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2. FORGERY (§ I — 10)—UTTERING OR ATTEMPTING TO UTTER FORGED PAPER.

A conviction for uttering or attempting to utter a forged document cannot properly be made unless it be shewn that the document in question was really forged; it is not enough to shew that the accused believed it to be forged and yet attempted to pass it.

[See Annotation on "Forgery," 32 D.L.R. 512.]

3. EVIDENCE (§ X C—699)—OF DECLARATIONS BY ACCUSED—EXPLANATORY CIRCUMSTANCES.

In order that the true sense of the statement of the accused put in evidence against him may be ascertained, he is entitled to shew the facts and circumstances surrounding the making of it to the like extent as in the case of a contract he is entitled to shew them in order to assist in its interpretation. (*Per* Beck, J.)

Statement.

MOTION for leave to appeal following the refusal of Harvey, C.J., to reserve a case at the trial.

E. B. Cogswell, for the Crown.

A. G. MacKay, K.C., and *G. R. Porte*, for the accused.

Stuart, J.

STUART, J.:—In my opinion a conviction for uttering or attempting to utter a forged document cannot properly be made unless it is shewn that the document in question was really forged. It is not enough to shew that the accused believed it to be forged and yet attempted to pass it. It seems to me to be quite plain that the statement made by Girvin to the solicitor McCaffrey that "he knew it was forged" was nothing more than an expression of his conclusion based on the same evidence that was before counsel and the Court, viz: the obvious alteration in the document and the existence of a duplicate which everyone assumed, upon what evidence I do not quite understand, to be the genuine one. Even the so-called genuine one, or the so-called genuine abstract which accompanied the so-called genuine warranty deed, was shewn to bear exactly the same alteration as the so-called forged deed and abstract.

With respect, I cannot but think that there was no evidence upon which it could reasonably be concluded that the documents in question had been altered subsequently to their execution by Ben Trusty. Just why everyone assumed that Chapman held the right documents I confess I cannot understand; all he said was that he got them from one Gillieland. Where the latter got them no one knows. These warranty deeds for Kentucky lots were all signed in blank, the name of the transferee or grantee not being inserted. They were passed and traded around Edmonton like chattels and passed by delivery. There were forty

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of them in number and Porte said that one was in duplicate though he did not *think* it was for lot No. 16. But surely it *may* have been. There was not enough in that from which a jury in a criminal case would reasonably conclude that the one which was in duplicate was *not* the one for lot 16. Besides, Ben Trusty may very well have sent up as many as he liked for lot 16, even to other people. I see no reason why both the innocence and the infallibility of Ben Trusty of Kentucky and of his clerks and attorney should merely be assumed in order to predicate guilt in the accused. In a civil case, of course, if the parties seem to have conducted the trial on the assumption that a certain fact was not in dispute it might not be open to one of them to dispute it on appeal, but that is not so in criminal matters. There was in my view no admission by the accused that the document was forged. He said that "he knew it was forged" but even that is equivocal because it is quite open to the construction that he meant that he acquired such knowledge as he had after the attempt charged had been made and that he therefore got what he *thought* was the right one and kept the other one in his pocket hoping to get his deal through by means of the former and not have it go off through arousing suspicion on account of the discovery that had been made.

How does the expression "I knew it was forged" prove the fact of forgery? In one or other of two ways. Either the Crown asks the inference to be made from it that Girvin was present either during the act or assisting or abetting it when it was done or arranged to have it done beforehand in which cases he should have been charged with the forgery itself. That he was not so charged is a rather strong reason for thinking that not even the Crown thought any such inferences could reasonably be drawn from the words. And I do not think they could. Or, on the other hand, the inference to be drawn is that Girvin had been told by someone that it was forged. In which case we are asked to say that it is sufficient evidence to go to a jury of the fact of forgery that Girvin told McCaffrey that someone had told him that it was forged. That needs no answer.

I would refer to the old case of *Morris* v. *Miller*, 4 Burr. 2057, cited in Cyc., vol. 16, p. 1042, where a Court presided over by Lord Mansfield held that in an action of crim. con. there must be a non-suit for lack of evidence to go to the jury where

the only proof that the woman was the plaintiff's wife consisted in the admission by the defendant contained in the statement made by a third party, an innkeeper, "she is Morris's wife and I committed adultery with her." That was held no evidence of the marriage to go to the jury. It was a civil case and it has not been overruled. The principle is of stronger application in a criminal charge.

I would allow the appeal and order the conviction to be quashed.

Beck, J.

BECK, J.:—This is an appeal from the refusal of the learned Chief Justice to reserve a case for the opinion of the Appellate Division on the ground amongst others that there was no evidence to justify the conviction.

The charge contained two counts; one for uttering a forged document based on section 467 of the Criminal Code; the other a charge of false pretences.

Both charges were sought to be sustained at the trial by the same evidence.

The documents—for there were two—alleged to have been forged were documents purporting to be an abstract of title to lot 16 being 250 acres in Johnson County, Kentucky, and a warranty deed for the same lot.

Four witnesses were examined for the Crown—Lemm, McCaffrey, Burns and Chapman.

Lemm was a farmer with whom Girvin the accused was negotiating for an exchange of lot 16 for a band of cattle. McCaffrey was a solicitor to whom they both went to have the deal carried out. Girvin had what purported to be a warranty deed and abstract for lot 16 and these were left with McCaffrey by Lemm to whom Girvin had given them.

Chapman also had a similar warranty deed and abstract purporting to be for the same lot.

A considerable number of similar warranty deeds for lots in the same tract had been brought to Edmonton by one Fraser. In all of them the name of the grantee was left blank and sale of some of the lots had been made and concluded by handing over a warranty deed in this form to the purchaser.

That handed to McCaffrey by Lemm and that which Chapman had were in this form.

The theory of the Crown was that Fraser had forged the

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warranty deed and abstract handed by Lemm to McCaffrey by altering them by erasing the lot number—the documents are typewritten—and substituting "sixteen" for the number erased; and the fact is patent on the face of the documents that in both something had been erased and "sixteen" typewritten in its place; and a further part of the Crown's theory was that the warranty deed and abstract which Chapman had were, or were considered by all the parties interested to be, the genuine documents relating to lot 16; but the curious thing is, as discovered by my brother McCarthy, and apparently he was the first to discover it, that the abstract—though not the warranty deed—in Chapman's hands had been similarly altered.

Two things were essential in order that the prisoner could be found guilty (1) that the warranty deed and abstract first referred to, or one of them, was forged and (2) that the prisoner Girvin when uttering it or attempting to utter it knew it to be forged.

At the time of the trial, Fraser had left the country and was not a witness.

Outside of what the trial Judge thinks were suspicious circumstances, but which I think he somewhat exaggerated, and which I think are clearly consistent with innocence of the offence charged and which the witnesses for the Crown furnish Girvin's explanation of, as he gave it to them and as they learned it, while the affair was in progress, and which the evidence for the defence gives an explanation of which is not improbable or unreasonable; there is in my opinion no evidence upon which argument before us was heard that calls for consideration except an admission by Girvin to McCaffrey. How he came to make that admission I shall explain.

On the 14th September, about 2 p.m., Lemm handed the warranty deed and abstract in question to McCaffrey to whom he gave instructions as to the arrangement between him and Girvin, McCaffrey at the time making some notes of these instructions on the documents. Lemm had got the documents from Girvin about 12 o'clock. Early in the afternoon it had been arranged that Lemm and Girvin should go to McCaffrey's office and close the deal. Burns (a Crown witness) and one Gartke (otherwise called Cannell)—a witness for the defence—were interested in some way with Girvin.

Before this time Girvin had been negotiating with Chapman (a Crown witness) for the purchase from him of this lot 16. Chapman had left town without a bargain having been concluded; Burns on the 14th September met Chapman who apparently had just returned to town and remarked to him: "I see you sold your lot;" the witness was stopped before he gave Chapman's reply, but went on to say that he and Gartke went together to see Girvin, and Burns said: "What is the matter here, Mr. Girvin? There seems to be something wrong; you told me that Chapman never owned this land and that you had got it from someone else; Mr. Chapman has still got his land." Girvin said: "Well, where is Mr. Chapman?" Burns said: "He is up the street." "Well," Girvin said, "you go and get Chapman and bring him down here to the hotel." Burns also says that he told Girvin "that there must be something wrong about this land; Chapman still says he has it—that he had not sold it to anyone—that Girvin said: "This man Fraser must have slipped it over on me—all I want is the right title and I don't want to put anything wrong over on Lemm."

Girvin, Burns and Gartke went to see Chapman with the result that Girvin arranged with Chapman to get Chapman's title to lot 16 and that none of these three had any doubt about Chapman's title being the right one and Fraser's title not being good; and they also were agreed that it would be best that Lemm should know nothing about these matters and so they went together to McCaffrey's office, got Lemm to get back the so-called forged papers from McCaffrey and bring them downstairs and before going upstairs to McCaffrey's office Girvin interchanged the two sets of papers and the Chapman papers were handed to McCaffrey as if returning the Fraser papers. Owing to his having made notes on the Fraser papers, McCaffrey discovered the substitution and this is what led to the so-called admission by Girvin.

All this appears from the evidence given on the part of the Crown.

Lemm who was present puts the admission this way:

Mr. Girvin jumps up; he said: "I will unravel the whole thing now:" he jumps up and he takes the set of papers which were produced here now (those he had handed to Lemm and which Lemm had handed to McCaffrey) and he said "these are the

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papers you (McCaffrey) had this morning; these are the forged papers that you had this morning; but you have the right ones now. I am going to have Fraser arrested;" . . . Anyhow it came around he was going to have Fraser arrested and he throwed those papers over to Mr. McCaffrey and he said: "Here, you keep them. I am going to have Fraser arrested before ten o'clock to-night and I want you to prosecute."

McCaffrey puts it in this way:

"So then Mr. Girvin suddenly got up and put his hand to his hip pocket; he said 'Well, Mr. McCaffrey I will unravel the whole thing!' He said: 'Here are the forged papers. I knew they were forged and I am going to have Fraser arrested before ten o'clock to-night . . . Those are the right ones;' (the ones I had been given) . . . He took them (the first set) up to the window shewing where it had been forged—16 had been put in."

Girvin went to Porte, Fraser's solicitor, and became satisfied, so he said, that Fraser was innocent. Lemm said that next morning Girvin told him so and wanted Lemm to go with him and he would get Fraser and Chapman together and satisfy him that he, Girvin, at all events was innocent. Lemm refused, but laid or caused to be laid an information against Girvin, while nobody seems to have given a thought to laying an information against Fraser who was present at the preliminary at the Police Court, but was not examined and remained about till shortly before Girvin's trial. Girvin naturally would not do so because in consultation with Porte and Fraser he was satisfied that Fraser was innocent.

When the Crown, or a party wishes to use as evidence a confession or admission, the Crown or the party must ordinarily prove the confession or admission in its entirety, that is, with what is favourable as well as with what is unfavourable to the accused or the opposite party and when there is not this strict obligation or when it is not fulfilled the accused or the opposite party has a right to put in the favourable portion which has been omitted; and the favourable portion is evidence for the accused or the opposite party, equally with the unfavourable portion, at least in this sense, that it must be taken as interpreting the unfavourable part, which cannot be given a meaning as if it stood by itself but only as modified by the favourable part.

Nevertheless, the jury or the Judge when sitting without a jury is not bound to give equal credence to every part. Yet, if the exculpatory part is disbelieved, the contradictory of it cannot be found as a fact unless there is affirmative evidence of it.

As Littledale, J., said in *R.* v. *Clewes*, 4 C. & P. 221: "If it is to be said that the prisoner did more than is stated in his confession, *there should be some evidence of that*, which is not to be found in this case;" and Parke, J., in *R.* v. *Steptoe*, 4 C. & P. 397: "You are to take what he says all together. You are not bound to take the exculpatory part as true, merely because it is given in evidence; but you will say, *looking at the whole case*, whether you think the prisoner's statement consistent with *the other evidence* and *whether* you believe that it is really true;" and Bosanquet Serjt. (sitting as Judge at assises) in *Rex* v. *Jones*, 2 C. & P. 628; "There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; *if there be either no other evidence in the case, or no other evidence incompatible with it*, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, for their consideration, precisely as in any other case, where one part of the evidence is contradictory of the others."

See generally Taylor on Evidence, 10th ed., pars. 725 *et seq.* 870-1; Wills on Cir. Ev., 6th ed., pp. 116 *et seq.*, Phipson on Ev., 5th ed., pp. 218, 253; Wigmore on Ev., pars. 2099 *et seq.* and 2113 *et seq.*

So that not only is a prisoner entitled as of right to have a statement made by him considered in its entirety and in the absence of evidence of the falsity of any exculpatory portion, to have that exculpatory portion accepted as true; but, as another aspect of the same thing, he is entitled as of right to have such a statement considered in its entirety so that the true meaning of his statement may be made manifest for it is but in accordance with the plain dictates of justice and common sense that his statement, if used against him, shall be used only in the true sense in which he made it.

And not only is he so entitled, but, in order that the true sense

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of his statement may be ascertained, he is entitled to shew the facts and circumstances surrounding the making of it to the like extent that in the case of a contract he is entitled to shew them in order to assist in its interpretation.

Taking then the so-called confession of the accused; looking at it as a whole as we are bound to do, taking into account the facts and circumstances existing at the time at which it was made—and without doing this, the statement would in this, as in many, if not in most cases, be incapable of being intelligently applied to the charge against him—it is to my mind impossible to take from the so-called confession of the accused more than this: that, *after having given to Lemm* the Fraser documents, he had, from what he had learned, that is, from hearsay, formed the opinion that they had been forged; an admission which by implication asserted that when he handed them to Lemm he had not that opinion. Obviously, in my opinion, the so called confession affords no proof whatever either that the documents were in fact forged, or that, supposing they were, the accused knew it when he uttered or attempted to utter them.

I would therefore allow the appeal and direct that the case be reserved or, if the Crown consents to dispense with the actual stating of the case and further argument, I would quash the conviction and discharge the prisoner.

Simmons, J.

SIMMONS, J. (dissenting):—The defendant was charged with uttering a forged document, namely, an abstract of title and a warranty deed for lot No. 16 in Johnson County, State of Kentucky, and also upon a second count the defendant was charged with attempting to obtain from Matthew Lemm and Rosie Lemm a bill of sale for 63 head of horses, with intent to defraud said Lemms. He was tried by the Chief Justice without a jury and convicted, and upon application of defendant's counsel the Chief Justice reserved for the opinion of this Court the following questions:

"1. Was the warranty deed as to lot 16, . . . a false document within the definition of forgery?"

"2. Was there evidence to justify a conviction as to the first count of the indictment?"

"3. Was there evidence to justify a conviction as to the second count of the indictment?"

The defendant tried to trade lot 29 in Johnson Co., Kentucky,

for Lemm's horses, but he was informed by Lemm that the latter would not deal for lot 29 as he did not know anything about it. A man named Kavanagh, of Edmonton, had approached Lemm a short time before this on a proposition to trade lot 16 for horses and Burns and Cannel were Kavanagh's associates in this proposition.

About a week later the defendant went from Edmonton to Holden pursuant to an appointment over the telephone and the defendant informed Lemm that he had bought lot 16 and was prepared to deal for it. The terms were arranged, namely, that Girvin would give lot 16 and $500.00 cash for Lemm's 63 head of horses and that they should come to Edmonton to have the agreement completed. Lemm said he preferred to see a solicitor before closing the deal.

It appears that Burns and Cannel were in some way associated with Girvin and were to receive $200.00 each from him if the transaction was completed.

The next morning Girvin and Lemm met pursuant to arrangement of the day before and Lemm asked Girvin for the warranty deed and abstract for lot 16 and Girvin gave these to him and instructed Lemm to let no one else but his lawyer see them. The documents were left with a solicitor, Mr. McCaffrey, for inspection and he made some pencil notes on them.

Lemm came to McCaffrey's office again in the afternoon and expected to meet Girvin there pursuant to arrangement, but a messenger from Girvin to McCaffrey's office came with an order from Girvin for the documents. Lemm refused to give them to the messenger and he was called downstairs by the messenger to speak to Girvin and the latter, who was apparently waiting at the foot of the stairs with Burns and Cannel, requested Lemm to return the deeds as there was some money to be paid yet or something to be done before the deal could be closed and Lemm handed the documents to him.

In a few minutes Girvin returned to McCaffrey's office and produced what purported to be the same documents of title. The solicitor asked Girvin if these were the same documents and Girvin replied that they were. The solicitor questioned the accuracy of this and mentioned the endorsements which he made on the documents. After some argument in which Girvin stoutly maintained the identity of the documents and the solicitor

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refused to accept his declaration, Girvin suddenly got up and said: "I will unravel the whole thing. Here are the forged papers, I knew they were forged and I am going to have Fraser arrested before ten o'clock to-night." Girvin then took the alleged forged documents to the window and shewed the solicitor the alteration that had been made by inserting "16" on the documents.

The Chief Justice in referring to the statements made in the solicitor's office by Girvin observed: "I can not reconcile that at all with the idea that he honestly thought that the documents he had given to Mr. Lemm were true and honest documents. It seems to me it is only consistent with the view that he knew they were not such.

"Such conduct, coupled with his statement that they were forged, satisfies me beyond doubt that they were forged to his knowledge."

The Chief Justice sitting as a Judge without a jury was the absolute judge as to the credibility to be attached to the statements of the witnesses.

The defendant when under a cross-fire in Mr. McCaffrey's office admitted that the document in question had been altered in a material way.

Admitting that the defendant may not have apprehended the proper significance of the terms "forgery" and "forged" as defined in section 466 of the Code yet there is his plain, unequivocal declaration that the document had been altered in a material way.

This narrows the issue to the consideration of whether the defendant knew or had reason to believe that it had been fraudulently altered when it was handed to Mr. Lemm in the solicitor's office on the occasion of the first visit to this office, and that it was intended that Mr. Lemm should exchange his horses for it.

In the first place, the defendant wanted to trade lot 20 for Lemm's horses. He then found out that Lemm would only deal for lot 16. Burns brought him in touch with Chapman and Chapman offered to sell lot 16 to him, but the price was too high. He was informed then that Chapman had the title. Chapman went out of the city and Burns says Girvin knew Chapman was going away.

Girvin then made a deal with Fraser and got from him the alleged forged documents.

Girvin did not inform Burns that he had made a deal with Fraser and Burns assumed Girvin had obtained the title from Chapman. On the day the documents were left in McCaffrey's office Burns happened to meet Chapman who had returned to Edmonton and learned from Chapman that Girvin was not purchasing from him. Burns then saw Girvin and asked for an explanation.

Burns said to Girvin:—

"What is the matter here, Mr. Girvin, there seems to be something wrong? You told me that Chapman had never owned this land and that you had got it from someone else;" I said, "Mr. Chapman has still got his land;" and he said, "Well, where is Mr. Chapman;" I said, "He is up the street;" "Well," he said, "You go and get Mr. Chapman and bring him down here to the hotel." Upon cross-examination Burns says: "He said I want to get the land Chapman has got."

Girvin also remarked, "this man Fraser must have slipped it over me."

Now at this time Girvin had paid Fraser $25.00 in cash and put up a cheque for $275.00 with a Mr. Dechene to be delivered to Fraser when the deal with Lemm was completed and had also agreed to deliver to Fraser title to lot 29 as part of the consideration for lot 16.

Girvin explains to his associates that he must get in touch with Chapman and buy the same identical property from Chapman. He gets in touch with Chapman who refuses to deal unless he gets the cash in his hand and Girvin pays Chapman $300.00 cash and gives him the title to lot 29 in exchange for lot 16. Girvin and his associates, Burns and Cannel, then arrange to switch the documents and the documents in the solicitor's office are obtained upon a misrepresentation and the new title deeds which have been obtained from Chapman are submitted for inspection and delivery to Lemm when the solicitor's inquiries produce an admission. There is no attempt up to this time to implicate Fraser further than the implication that Fraser had got the best of him in the deal.

But when the solicitor brands the transaction as fraudulent Girvin's moral indignation rises and he says it is a forgery, and he will have Fraser arrested, something which he has not yet

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done, nor does he at the trial implicate Fraser in any fraudulent intention.

The trial Judge rejected the explanations given by the defendant.

It is suggested that when Girvin said in Mr. McCaffrey's office, "Here are the forged papers; I know they were forged;" he was expressing a conclusion arrived at by himself after the discovery that Chapman claimed to have the title to lot 16.

In my view the effect to be given to these words was solely a matter of inference within the absolute right of the trial Judge exercising the functions of a jury, arriving at a conclusion as to the true intent and meaning of the words spoken. His conclusion was to the effect that the words were an admission that the defendant knew when he delivered the documents to Lemm in the first instance that there had been a material alteration.

It is contended on behalf of the defendant, however, that even though the above conclusion is substantiated by the evidence that the offence of forgery has not been established unless the Crown prove that the document in question was an original document.

There does not arise any question as to whether the document was original, duplicate or fictitious. If there is a making or an altering of any document with intent that it shall be used or acted upon as genuine to the prejudice of anyone, or knowing such a document to be forged, a dealing with it as if it were genuine, forgery has been committed.

At common law forgery has been defined as "the fraudulent making or alteration of a writing to the prejudice of another man's right" (Russell on Crimes) or "the fraudulent making of an instrument which purports to be what it is not" (Russell on Crimes).

If an agent has a general authority to sign bills or cheques and exceeds his authority he may be guilty of fraud, but he cannot be indicted for forgery. On the other hand, if his authority is limited and he exceeds that limited authority by filling an amount larger than authorized, he may be guilty of forgery. Per Erle, J., in *R.* v. *Bateman*, 1 Cox 186.

In *Regina* v. *Stuart*, 25 U.C.C.P. 440, the defendant with intent to defraud wrote out a telegraph message purporting to be sent by one C. of Hamilton to Hugh McKenzie of Woodstock,

authorizing the latter to furnish the defendant with funds, and upon the faith of this McKenzie endorsed a draft drawn by the defendant upon C. for $85.00 which was cashed by the defendant. It was contended on behalf of the defendant that as the document on its face did not purport to be anything more than a copy, the original of which was in the telegraph office at Hamilton, that there could not be a forgery. Hagarty, C.J., Gwynne, J., and Galt, J., agreed that this constituted a forgery.

Rex v. *Ward*, 2 Lord Raym. 1461, was cited as settling the law that the *counterfeiting* of *any writing* with fraudulent intent whereby another may be prejudiced is forgery at Common Law.

The evidence in this case is to the effect that a number of warranty deeds similar to the one in question for lots in Johnson Co., Kentucky, with the name of the transferee in blank, were in circulation in Edmonton and were used in the way of trade and barter. They purported to be signed by Ben Trusty.

The one in question shews on its face that No. "16" has been written with a typewritter upon another character.

The defendant when accused of fraud by Mr. McCaffrey was able at once to put his hand upon the alteration and point it out.

There is in my opinion one question only involved, namely, did he have knowledge of the alteration and of a fraudulent intention in the same when he delivered the document to Mr. Lemm?

This was a conclusion of fact to be arrived at solely upon the effect of the evidence and for this reason I am of the opinion that the conviction is right.

I would therefore answer each of the three questions in the affirmative.

McCarthy, J., concurred with STUART, J.

Motion granted, SIMMONS, J., *dissenting*.

WILEY & CO. v. CHEESMAN.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J. February 5, 1917.

COMPANY (§ VII C—375)—ACTION BY FOREIGN COMPANY—REGISTRATION—REPEAL OF STATUTE.

The repeal of the Foreign Companies Act (R.S.S. (1909) ch. 73) pending an action by a foreign company unregistered thereunder, but subsequently registered under the new Act (The Companies Act, 1915, ch. 14), removes the disability to sue under which the plaintiff company would otherwise have been.

ACTION on contract by a foreign company.

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WILEY & CO. v. CHEESMAN.

Haultain, C.J.

Acheson & Co., for plaintiff; *D. MacLean*, for defendant.

HAULTAIN, C.J.:—The plaintiff company is a company incorporated under the laws of the Province of Manitoba, and was never registered under the Foreign Companies Act, R.S.S. 1909, ch. 73. It was, however, registered on October 16, 1915, under the Companies Act (Statutes 1915, ch. 14), pending this action and before trial.

According to the evidence, the plaintiff company employed one Finch, a resident of Delisle in the Province of Saskatchewan, to buy wheat for it on contract at Delisle. Finch procured from the defendant a written contract to sell and deliver to the plaintiff, a certain quantity of wheat, at the price and on the terms and conditions set out therein. The agreement was executed by the defendant at Delisle on June 8, 1914, and was forwarded to the plaintiff at Winnipeg for confirmation and acceptance. The plaintiff executed the agreement and sent back a copy signed by it, together with the following letter:—

Mr. Wm. Cheesman, Winnipeg, June 10th, 1914.
Delisle.

We beg to confirm having purchased from you for October delivery two thousand bushels wheat at 70c basis One Northern, f.o.b. Delisle, and are enclosing herewith copy of contract duly signed and witnessed.

(Sgd.) Wm. Thos. Low, Wiley & Co. Ltd.
Sec. Treas.

The present contract is one of several of the same kind, secured under the same circumstances at Delisle by the plaintiff in 1914, and Mr. Low, the secretary-treasurer of the plaintiff company, stated in his evidence that his company had made contracts of a similar nature in Saskatchewan in previous years.

This action was begun on May 25, 1915. On June 24, 1915, the Foreign Companies Act was repealed and legislation respecting foreign companies was included in the repealing Act, the Companies Act, ch. 14 of the Statutes of 1915. A number of the provisions of the Foreign Companies Act are included in the new Act, but sec. 10 of the Foreign Companies Act was not re-enacted, and, consequently, stands repealed as of June 24, 1915.

This contract, in my opinion, comes within the provisions of sec. 10 of the Foreign Companies Act, The plaintiff company was at the date of the contract an unregistered foreign company, having gain for its object, and, in securing these contracts, was carrying on business in Saskatchewan. The contract in question

was partly made in Saskatchewan in the course of business carried on without registration, and the plaintiff was therefore incapable of maintaining this action, up to, at least, June 24, 1915.

Notwithstanding the repeal of sec. 10 and the subsequent registration of the plaintiff under the new Act, it is urged on behalf of the defendant that the provisions of sec. 10 of the Foreign Companies Act still apply to this contract and that the plaintiff is still incapable of maintaining this action.

I am of opinion, however, that the repeal of sec. 10 by the Statute of 1915, pending the action, removed the disability under which the plaintiff would otherwise have been. The Foreign Companies Act did not make contracts coming within its provision void or even voidable. It merely suspended the right of maintaining an action in respect of them. Reading secs. 3 and 10 together, the Act does not prohibit carrying on business in Saskatchewan without registration. It imposes a penalty for so doing, but sec. 10, which suspends the right of maintaining an action, by using the words "while unregistered" and later on "without registration," clearly provides that subsequent registration shall remove the incapacity for maintaining an action in respect of a contract made in connection with business carried on without registration. *Slater Shoe Co.* v. *Burdette*, 14 D.L.R. 519, 6 A.L.R. 457; *Smith* v. *Western Canada Flour Mills Co.*, 3 A.L.R. 348.

A defence under sec. 10 is only effective while the disability continues, and the repeal of that section, pending litigation, in my opinion removed the disability.

The right of the defendant to raise this defence is not a "right" which is preserved in spite of repeal under sec. 14 of the Interpretation Act (R.S.S. ch. 2).

In any event, the plaintiff became registered before trial under the provisions of the Companies Act, 1915, which were substituted for the corresponding provisions of the Foreign Companies Act. The plaintiff is therefore, in my opinion, entitled to succeed. One of the clauses of the contract is as follows:—

I furthermore agree that in case of default in the delivery of the grain as stipulated above (*i.e.*, 70c per bushel) or by such date as the buyer may extend the time of expiration of this contract, to pay as liquidated damages the difference between the price as above stipulated and the market value of same grain and grade on date this contract is closed by buyers.

October 31 is shewn by the evidence to be the date on which

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the contract "was closed" by the buyers. It was, in any event the last day upon which the defendant was bound to deliver the wheat at Delisle. It is admitted by counsel that the market price at Delisle on that date was $1.0145 per bushel. The plaintiff is therefore entitled to damages at the rate of $0.3145 per bushel for 2,000 bushels, making the sum of $629, and the costs of this action. *Judgment for plaintiff.*

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Re LASCELLE AND WHOLEHAN.

Ontario Supreme Court, (Appellate Division) Meredith, C.J.C.P., and Riddell, Lennox and Masten, JJ. November 3, 1916.

1. JUSTICE OF THE PEACE (§ II—6)—PROTECTION ORDER ON QUASHING CONVICTION.

On quashing a summary conviction to which the Public Authorities Protection Act, R.S.O. 1914, ch. 89, applies, the order of protection of the magistrate from civil action may stipulate an exception as to anything done by the magistrate maliciously and without reasonable and probable cause.

2. CERTIORARI (§ II—15)—APPEAL FROM PROTECTION ORDER.

An appeal lies under the Judicature Act, R.S.O. 1914, ch. 56, sec. 26, from so much of an order quashing a summary conviction as grants protection to the magistrates under the Public Authorities Protection Act, R.S.O. 1914, ch. 89, from a civil action in respect of the conviction so quashed.

Statement.

APPEAL by Lemuel Lascelle from an order of MIDDLETON, J., in Chambers, of the 7th September, 1916. The order quashed the conviction of the appellant by the Police Magistrate for Chesterville for the use by William Lascelle, infant son of the appellant, of grossly insulting language to a lady in a public street in Chesterville, but protected the magistrate from action against him, on payment by him of costs. The appeal was from the part of the order which protected the magistrate.*

*The following provisions of the Public Authorities Protection Act, R.S.O. 1914, ch. 89, are applicable to the questions discussed in the argument and judgment:—

2. In this Act "Justice of the Peace" shall include a Police Magistrate, a person who is *ex officio* a Justice of the Peace, and a person who has by law the powers of a Justice of the Peace, either generally or with regard to any particular matter.

3. No action shall lie or be instituted against a Justice of the Peace for any act done by him in the execution of his duty as such Justice with respect to any matter within his jurisdiction as such Justice, unless the act was done maliciously and without reasonable and probable cause.

4.—(1) For any act done by a Justice of the Peace in a matter in which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, or for any act done under a conviction or order made or a warrant issued by him in such matter, any person injured thereby may maintain an action against the Justice in the same case as he might have heretofore done, and it

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G. A. Stiles, for the appellant, said that the conviction by the Police Magistrate had been quashed on an application under sec. 63 of the Judicature Act; but an order had been made at the same time protecting the magistrate under sec. 8 of the Public Authorities Protection Act, R.S.O. 1914, ch. 89; that section is permissive, and not mandatory. The evidence shews that there were absolutely no grounds for the conviction, and nothing could be obtained by an action against the constable. It could not be said that an action against the magistrate would be of a vexatious nature, and it was not a case in which protection should be granted. He referred to *Rex* v. *Nelson* (1908), 18 O.L.R. 484, at p. 487; *Webb* v. *Spears* (1893), 15 P.R. 232; *Rex* v. *Peart* (1914), 23 Can. Cr. Cas. 259, 7 O.W.N. 126.

J. A. Macintosh, for the Police Magistrate, said there was no case dealing directly with the point. He referred to *Rex* v. *Lapointe* (1912), 20 Can. Cr. Cas. 98, *per* Riddell, J., at p. 102, 4 D.L.R. 210, 3 O.W.N. 1469, where he says that "it is the rule of the Court to go as far as possible for the protection of non-professional magistrates." The magistrate here acted in good faith, and without malice or anything of that kind. The discretion exercised by Middleton, J., in granting protection, should not be interfered with.

Stiles, in reply, said that he was instructed that the magistrate was influenced in his action by personal malice.

The judgment of the Court was delivered by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The appellant, treating the "conviction" in question as a conviction which, under sec. 4 of the Public Authorities Protection Act, must be quashed before any action can be brought against the respondent for anything done under it, moved, under sec. 63 of the Judicature Act, to quash it, and, upon that motion, it was quashed; but, at the instance of the respondent, it was provided by the order quashing the con-

shall not be necessary to allege or prove that the act was done maliciously and without reasonable and probable cause.

(3) No such action as is mentioned in this section shall be brought for anything done under a conviction or order or under a warrant issued by a Justice of the Peace to procure the appearance of the party, which has been followed by a conviction or order in the same manner, until the conviction or order has been quashed.

8. Where an order is made quashing a summary conviction the Court may provide that no action shall be brought against the Justice of the Peace who made the conviction.

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viction, under sec. 8 of the Public Authorities Protection Act, that no action should be brought against the respondent, who is a Justice of the Peace and who made the "conviction."

The appellant desires to retain the quashing order, but to get rid of the protection provision of it; the respondent is content that the quashing order stand, provided that his protection under it stand also; and so the only questions in which we are now concerned are: (1) whether an appeal lies against the protecting provision of the order; and, if so (2), whether that provision ought to stand. The question whether sec. 4 of the Public Authorities Protection Act applies to the case is not raised.

If sec. 4 be applicable to the case, it takes away the common law right of action which the appellant would have if that which was done by the respondent was done in a matter in which by law he had not jurisdiction, or in which he had exceeded his jurisdiction, until the conviction or order has been quashed; but, under sec. 8, the Court, quashing the conviction, "may provide that no action shall be brought against the Justice of the Peace who made the conviction."

It is difficult to suggest any good reason why an appeal should not lie against such a provision depriving a person of a right of action which otherwise he would have. It hardly can be that it was intended to confer the power to deprive a person of such right of action without any right of appeal.

Under sec. 26 of the Judicature Act, subject to two exceptions not in point, an appeal lies to this Court from any judgment, order or decision of a Judge of the High Court Division in Court, and from any judgment, order or decision of a Judge in Chambers in regard to a matter of practice or procedure which affects the ultimate rights of any party.

Under sec. 63 of the Judicature Act, a motion to quash a conviction is to be made in Chambers, and the like practice applies to a motion to quash a conviction for a crime, under Rules of Court made under the provisions of the Criminal Code.

Under sec. 8 of the Public Authorities Protection Act, it is the Court which may provide that no action shall be brought.

So it may be that in strictness of practice the conviction should be quashed by order in Chambers and the protection afforded by order in Court; but, for the purposes of this appeal, that is immaterial.

Then should the unqualified protection, which the order in appeal affords, stand?

If it should, then the respondent is in a better position than if he had acted within his jurisdiction, and so had the benefit of sec. 3 of the Public Authorities Protection Act; he seems to be protected against malice and want of reasonable and probable cause; and that should not be.

The case is by no means as favourable for the appellant as a mere statement that he was convicted for an offence committed by his son would indicate. According to his own testimony, given upon his summary trial, he was only across the road from his son, who is said to be only eight years of age, when the son was pestering the complainant, an old woman. If the complainant's story were true, it may be possible that the father might have been well-convicted of the offence as an accessory; he would unquestionably have been morally much the more blameable; and, if that be so, the father might also have been prosecuted for a more serious offence, having testified that his son was innocent—on the occasion when the father was there—of the offence charged against him. Beside that, the man seems to have made no objection to the charge being laid against him instead of against his son, nor any attempt to pay or get rid of the fine imposed upon him.

In all the circumstances of the case, protection to some extent seems to me to have been properly given, but it should not have been unqualified, it should not have been extended to things done, if any, maliciously and without reasonable and probable cause.

I would vary the protection to that extent and in other respects dismiss the appeal, without costs.

Appeal allowed in part.

WENBOURNE v. J. I. CASE THRESHING MACHINE Co.

Alberta Supreme Court, Hyndman, J. March 3, 1917.

1. MERGER—MORTGAGE—LIEN NOTE.
The taking of a mortgage as collateral security does not operate as a merger of the simple contract debt (lien note) nor affect the remedy thereunder.

2. SALE (§ I C—15)—LIEN NOTE—SUB-SALE—CONVERSION.
One who takes possession of goods held under a conditional sale, in the form of a registered lien note, is liable in conversion to the conditional vendor.

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Statement.

ACTION for an injunction to restrain the defendants and each of them, their servants, agents and employees, and the servants, agents and employees of each of them from interfering with certain machinery claimed by the plaintiff as his property. The defendant Haering did not defend the action. Defendant company, in addition to entering a defence, counterclaimed for damages by reason of the detention or conversion of the goods in question by the plaintiff.

C. F. Harris, for plaintiff.

Hyndman, J.

HYNDMAN, J.:—The question of the sufficiency of registration of the lien notes to preserve the defendant company's title to the property in the goods in question was settled in favour of the defendant company by the Appellate Division of this Court on a stated case in this action and reported in 27 D.L.R. 379, 9 A.L.R. 285.

The issues remaining are shortly:—1. Whether the sale from Haering to the plaintiff was made by him as agent for the defendant company or in his personal capacity only to the knowledge of the plaintiff. 2. Whether the defendant is estopped from denying Haering's right to dispose of the goods to the plaintiff by reason of a certain alleged telephone message from plaintiff to the manager of the defendant company at Calgary. 3. Whether by reason of the defendant company taking certain securities by way of real estate and chattel mortgages a merger took effect and extinguished the lien notes in question and consequently title of the defendant to the goods.

At the close of the trial I intimated that the evidence convinced me beyond any doubt that the transaction was one solely between Haering personally and the plaintiff and I now so hold.

As to the second question, taking plaintiff's own version of the telephone conversation, it would seem to me that this, even in the absence of the defendant company's evidence on the point, would not be sufficient to create an estoppel, there being no absolute proof that it was the general manager at Calgary or some other person in authority; but the only two authorised officials, Atkinson, the general manager, and Mumford, the collection agent, both gave evidence and emphatically deny any such conversation as related by the plaintiff, although Atkinson says he recollects someone calling him on the long distance

telephone from Tabor to ascertain if the Haering engine was paid for and that he answered, "No"; that he was also asked for particulars of the amount owing which he refused to give because of a rule of the company against giving such information without the consent of the debtors. It is clear to my mind that estoppel cannot be held against the company in view of the evidence adduced.

On the last question—merger—I think also the plaintiff must fail. Both real estate mortgages and the chattel mortgage expressly provide against a merger and state that such securities are taken as collateral only, for the payment of the said notes, and that they are not intended to operate as a merger of the simple contract debts nor in any way to prejudicially affect the rights, remedies and powers of the company, the only alteration being an extension of time contained in the real estate and the chattel mortgage of April 11, 1913. Counsel for the plaintiff urged that the mere fact of the defendant company taking the mortgages, they being of a higher nature than the original debt, and notwithstanding the provisions therein against merger, that a merger did in fact take effect and cited *Saunders* v. *Milsome*, L.R. 2 Eq. 573; and *Price* v. *Moulton* (1851), 10 C.B. 561, 138 E.R. 222, 20 L.J.C.P. 102; Broom's Common Law, 10th ed., vol. 2, 669; Addison on Contracts, 10th ed., 176. Examination of these and other authorities convince me, however, that no merger took effect under the circumstances. In *Gore Bank* v. *McWhirter*, 18 U.C.C.P. 293, Wilson, J., delivering the judgment of the Court, at p. 296, says:—

> the general rule is that where a security of a higher nature is taken for the same debt, it merges the lower security. The law does not permit distinct securities of different degrees for the same debt, but it allows of any number of collateral securities for it. . . . Merger is an operation of law not depending upon the intention of the parties. Satisfaction arises from the act of the parties, and is not controlled by law, but by their own agreement: *Sharpe* v. *Gibb*, 16 C.B.N.S. 527.

And at p. 298 he goes on to say:—

> To create a merger the simple contract debt must in its entirety become a specialty, and the remedy on the deed must be co-extensive with that for the simple contract debt; but there is no merger if the higher security is only collateral and the remedy is left on the simple contract debt.

In *Shaw* v. *Crawford*, 16 U.C.Q.B. 101, Robinson, C.J., at p. 103, says:—

> We are of opinion that the effect of the stipulation in the mortgage given by Polley, the maker of the note to Shaw and others, the endorsees, that it was

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agreed between them that the mortgage should operate as a collateral security only, is to save to the plaintiffs, the endorsees, their remedy upon the note, so that they may enforce payment of the note against the maker, Polley, in the meantime, according to the terms of the note.

In view, therefore, of what I have said I am of opinion that the plaintiff must fail in the action and was not entitled to an injunction.

In their original statement of defence the defendant company claimed damages only by reason of the detention, but have since amended and now counterclaim for the value of the engine in question because of conversion by the plaintiff. I think they are entitled to succeed. In *Mason* v. *Bickle*, 2 A.R. (Ont.) 291, the plaintiffs sold to one R. an organ on credit and received from him a conditional hire receipt containing the stipulation that the signer might purchase the organ for $130 payable in certain instalments and that the organ should remain the plaintiff's property on hire until fully paid for and that they might resume possession on default although part of the purchase money might have been paid or notes given on account thereof. Before paying in full for the organ R. transferred it to J. W. B. as security for a debt. He represented that he had paid the purchase money and produced as evidence a note which had been returned to him on its renewal and they acted upon this misstatement. The note bore marks as evidence of being discounted but there was nothing to connect it with the organ. While the organ was in the possession of one of the defendants it was seized by the plaintiff's agent and removed to the express office. From there it was taken by the other defendant, G. B., under J. W. B's. direction and carried back to the house in which they both lived. Subsequently J. W. B. sold the instrument to G. B. It was held, reversing the judgment of the County Court Judge, that the plaintiffs were not estopped where there was no representation by the plaintiffs and no neglect of any duty owing to the defendants and that there was ample evidence of conversion.

In the case at bar the plaintiff, in his evidence, stated that since the interim injunction he has used the engine and treated it as his own.

On the question of value the plaintiff's evidence was, briefly, that he paid Haering the sum of $1,600 in cash, his own engine, which he valued at $2,000, and that the plows which he gave in exchange were considered equivalent in value to the plows re-

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ceived by him, therefore, making the value of the engine alone $3,600. He says that since then he has increased its value by various additions and repairs. But I think that the sum of $3,400 would be a very fair value. The amount still owing on the notes is greater than $3,400.

The net result, therefore, will be a declaration that the goods in question were those of the defendant company, that the plaintiff has converted same to his own use, and there will therefore be judgment for the defendant company on their counterclaim for the sum of $3,400, the value of said engine, together with costs of the action and counterclaim.

This is, no doubt, a very unfortunate result for the plaintiff, and while he has my sympathy he must be held chargeable with carelessness in not satisfying himself as to the plaintiff's right to dispose of the engine before completing the purchase.

In my opinion he was grossly misled or deceived by the defendant Haering and although no claim was set up for relief as against Haering, with the exception of the claim for the injunction, I am willing to hear counsel on that point if plaintiff so desires. *Judgment for defendant.*

THOMAS v. PARKER.

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Nova Scotia Supreme Court, Graham, C.J. October 23, 1916.

MORTGAGE (§ VI I—135)—FORECLOSURE—DEFICIENCY JUDGMENT—POWERS OF MASTER—REDEMPTION.

Under the Nova Scotia practice rules, a Master, in making an order for foreclosure and sale in a mortgage action, has not the power to give a personal judgment for any deficiency, though defendant had appeared to the action; the order is particularly invalid if it fails to provide for redemption.

Statement.

APPLICATION to set aside an order of a County Court Judge, sitting as Master, entering a deficiency judgment against the defendant in an action for the foreclosure of a mortgage. Granted.

H. W. Sangster, in support of application.

H. H. Wickwire, K.C., and *L. A. Lovett*, K.C., *contra*.

Graham, C.J.

GRAHAM, C.J.:—In this case a County Court Judge sitting as a Master of the Supreme Court has made an order for the foreclosure of a mortgage and the sale of the mortgaged premises. But he has gone further, he has included in that order the following clause: "And it is further ordered that the plaintiff have judgment against the defendant for any deficiency in payment of his said principal, interest and costs after foreclosure and sale

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of said lands and premises." While in the prayer of the statement of claim there is added to the claim for foreclosure, sale and possession these words: "together with judgment against the defendant to cover any deficiency for foreclosure and sale," the statement of claim does not set out any claim on a covenant (if any) in the mortgage or any bond collateral with the mortgage.

The jurisdiction in England to join the remedies upon a mortgage in one action and obtain a personal judgment for any deficiency only came into existence after the Judicature Act was passed. But there must be something in the statement of claim to shew that the plaintiff is going on the covenant or bond as well as for the foreclosure of the mortgage. *Wethered* v. *Cox* (1888), W.N. 165; *Law* v. *Philby*, 35 W.R. 401.

It is not enough, as was done in this case, to pray for it without setting out in the statement of claim the material which would entitle a plaintiff to pray and proceed in that way.

Moreover, I also am of opinion that such a Master has not power to give a personal judgment for the deficiency in a foreclosure and sale action.

In the rules, O. 13, r. 12, and O. 27, r. 10, the expression "Court or a Judge" does not give a Judge in Chambers jurisdiction to order a judgment to be entered. *Greenwood* v. *Briggs*, 41 Sol. J. 409. Granted that O. 55, r. 1 (*g*), gives such a Master power to sell the lands in actions for foreclosure and sale, an order for a personal judgment is not covered by that provision.

The action for foreclosure and sale is an equitable action both in Nova Scotia and in England. In the latter country it would be a Judge sitting as a Court in the Chancery Division which would have jurisdiction to grant a personal judgmen . At least until quite recently this was so. There is now in England jurisdiction for foreclosure on an originating summons in Chambers in Chancery (English O. 55, r. 5*a*). But that order has not been made in Nova Scotia.

In my opinion it is only a Judge sitting as a Court who can make an order for foreclosure and sale. The sale of land requires an express statutory power to be given to the tribunal to order such a sale and as to the personal judgment on the covenant or bond for the deficiency it is not a mere judgment by default at common law.

The N.S. Judicature Rules, O. 55, only give, at most, a Master the powers of a Judge at Chambers (with some express exceptions) and to sell land in actions for foreclosure and sale, but nothing further. He cannot order a personal judgment for the deficiency.

The plaintiff relies on *Thomson* v. *Pitts*, 26 N.S.R. 108. Any provision which would enable a mortgagee to recover the land mortgaged to him plus a personal judgment for the excess over his bid ascertained by the sheriff's sale requires binding precedent. There is no English authority for such a proceeding.

I am familiar with *Kenny* v. *Chisholm*, Cass. Dig. (2nd ed.) 539, in the Supreme Court of Canada. I was in that case. But it does not come up here. In *Thomson* v. *Pitts*, already cited, there was a claim on the covenant in the mortgage. Moreover, the motion for the personal judgment was made after the sale had taken place and the deficiency ascertained. In *Northup* v. *Jean* (N.S.), 2 Thom. 232, during the exceptional period in Nova Scotia when there was a complete fusion of law and equity, a personal judgment was asked for, but Bliss, J., held that there must first be notice or order to shew cause. In this case there was neither.

In *Reliance Savings Co.* v. *Curry*, 34 N.S.R. 565, notice of motion was given by service on the prothonotary of the Court under a provision contained in the rules.

This judgment is irregular in the following respects as well. There is no provision in the order or any order for redemption on payment of the whole amount due. *Ryan* v. *Caldwell*, 32 N.S.R. 458. It is all very well for counsel now to say there is readiness to allow redemption on payment of the amount due. It must be expressed in the order. I doubt if the Master could, without more, grant a conditional order of that sort in advance. The deficiency surely should be fixed in some way, not leaving it to the solicitor's power to take *carte blanche*, tax the costs without notice, fix what the balance is, tell the prothonotary to enter a judgment for that sum and issue an execution.

The plaintiff relies on O. 27, rule 9*a*, rule 12 of O. 13, and the amended rules passed in 1905, provide the procedure for obtaining sale and fixing the amount due on the mortgage in cases where the appearance is entered.

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Then O. 27, r. 9*a*, provides that if the defendant appears but does not plead a defence the plaintiff may proceed as if the defendant has not appeared.

In a mortgage action it is very exceptional for a defendant to have a defence to plead. But it is very common that he should wish to attend at the taking of the accounts or at the taxation of the costs or to be heard as to the mode of sale. I do not quite see how he can do any of these things without appearing. The amended order 13, r. 12 (3), surely contemplates an appearance, and I do not understand why an appearance, because no statement of defence has been delivered, is to be ignored. However, there is the Rule of Court. But it is not a rule which should be extended beyond its very letter. I hold that it does not apply to a case in which a plaintiff is trying to get a personal judgment for a deficiency. That is something over and above the ordinary action of foreclosure and sale. The plaintiff should not have a judgment against the defendant for the deficiency where the defendant has appeared and has had no notice giving the place and date of the motion for the order for the personal judgment.

In my opinion the personal judgment entered up against the defendant and the execution, levy and proceedings thereunder should be set aside and the clause of the order permitting such judgment should be struck out and with costs.

Judgment set aside.

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REX v. HASSALL.

Manitoba County Court Judges Criminal Court. Cumberland, Co.Ct.J. December 27, 1916.

1. THEFT (§ I—8)—SPECIAL PROPERTY—CROP-SHARING TENANCY—SALE OF CROP BY TENANT IN FRAUD OF LANDLORD—MAN STAT. 1915, CH. 13—CR. CODE 1906, CAN. SECS. 347, 352.

Where the terms of an agricultural tenancy are such that the landlord is to receive an aliquot part of the crop as his rent, *ex. gr.*, a one-third share to be taken to a grain elevator by the tenant and stored on account of the landlord and in the landlord's name as owner thereof, the landlord does not become the owner of any specific portion of the crop until it is divided, notwithstanding the provision in Manitoba statutes 1915, ch. 13, sec. 2, giving the landlord in such case certain preferential civil rights in regard thereto. The tenant who sells the entire crop in fraud of his landlord is not subject to indictment on a charge of stealing the number of bushels of wheat which would have constituted the landlord's share had a division actually been made; but, *quære*, whether Cr. Code sec. 352 would not apply to the statutory right declared by the Manitoba statute upon an indictment for theft of the undivided one-third share.

Statement.

TRIAL of a charge of theft in respect of the alleged misappropriation of a share of crop grown under a crop-sharing agreement

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Statement.

between landlord and tenant. By Cr. Code sec. 347, the statutory offence of theft includes "the act of fraudulently and without colour of right converting to the use of any person anything capable of being stolen with intent . . . to deprive any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest."

By Cr. Code sec. 352, theft may be committed by one of several joint owners, tenants in common or partners of or in anything capable of being stolen, against the other persons interested therein.

R. M. Matheson, for the Crown.

G. R. Coldwell, K.C., for the accused.

Cumberland, Co.Ct J.

CUMBERLAND, Co.Ct.J.:—In this case the accused is charged with having stolen a "quantity of wheat, to wit, three hundred and eighty-five bushels, the property of one William H. Maher."

The evidence shews that during 1914 and 1915 the accused had certain farm lands leased from Maher at a rental, each season, of a one-third share of the crop to be grown on the land, the arrangement between them being that the accused should put this one-third share in a certain elevator in Maher's name. In 1915 he did not do this with the landlord's share of the wheat, but put it, as well as the other two-thirds, in the elevator in his own name, sold the whole and appropriated the money received for it to his own use.

During November and December, 1915, Maher, on two occasions, asked the accused about his share of the crop, on each occasion the accused stated that he had not yet taken the wheat to the elevator, but before the end of the second conversation he acknowledged that he had sold all the wheat, explaining that he had been in need of money to pay one Bolton and promising to "make it good." In the following spring and again in harvest time, Maher saw the accused and asked him to pay him for the wheat; on the first occasion the accused said he would try to get money and pay; on the second, he said he could not do anything then but would try to make a settlement later on. Some time afterwards this prosecution was launched.

Counsel for the defence urged in the first place that the accused when doing what he did had no fraudulent intent. I have, however, no hesitation in holding that, assuming the presence of the other elements of theft, there was not an absence of *mens rea*.

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At one time during the trial I thought the accused might have understood the arrangement between him and Maher to be such that he should sell, or was permitted to sell, the one-third share of the wheat and account for the price to Maher, in which case, whatever might be said about his failure to account, he should not be held guilty of stealing the wheat. It became clear, however, from the evidence, that this position was untenable; the accused's statements to Maher and the other witnesses tend to shew that he understood the arrangement as Maher did and he has offered no evidence to indicate that he did not.

But the main contention of the defence is that Maher was not the owner of, and had no special property or interest in, the wheat in question and that, therefore, the act of the accused was not theft within the meaning of the Criminal Code.

Neither counsel was able to find any criminal case in which the point involved here was decided or even discussed, and apparently if there ever was a case where a tenant was charged with stealing the share of the crop going to the landlord as rent, either in England or in Canada, either before or since the passing of our Criminal Code, it has not found its way into the reports. There are, however, a number of civil cases, the decisions in which have a bearing on the question involved. See *Haydon* v. *Crawford*, 3 U.C.R. (O.S.) 583, *Campbell* v. *McKinnon*, 14 Man. L.R. 42; *Robinson* v. *Lott*, 2 Sask. L.R. 276. In each of these cases it was held that under an arrangement such as existed here "*no* property in *any* of the wheat vests in the landlord until the tenant has divided it and delivered the landlord's share to him."

It is argued by counsel for the Crown that while these cases are authority for the proposition that the landlord is not the *owner* of the share of the wheat, he should be held to have *a special property or interest* in it. I cannot find any case or any text-book in which any attempt is made to explain comprehensively the meaning of this expression, but from the cases in which instances are given of certain rights that fall within it, I think it probably was intended to cover nothing that was not covered by such expressions as "special ownership" and "special property" as used in larceny cases in England. If this is so, I take it *possession* is a necessary element of such special property or interest. All the instances of special property that I find in the English

authorities were cases of bailees, pawnees, carriers, agisters and such like, where the persons said to have such special property in a chattel were in possession of it. In Russell on Crimes, 7th ed., at p. 1288, it is said that to sustain an indictment for larceny "it must appear in evidence that the party in whom the goods are laid had either the property or the possession of them."

If then, the law as to the property in a share of crop going to a landlord as rent is the same as it was when *Campbell* v. *McKinnon*, 14 Man. L.R. 42, was decided, it seems clear that the accused should not be found guilty of theft.

But counsel for the Crown refers to section 2 of ch. 13 of the Manitoba Statutes of 1915, and urges that, under it, Maher was the owner of the one-third share of the wheat or had a special property or interest in it.

This section reads as follows: "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 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 Bills of Sale and 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 lessee, whether as execution creditor, purchaser or mortgagor (*sic*) or otherwise, it being the intention of this Act that in all such cases the share of crops or of the proceeds thereof, so agreed to be reserved for the lessor shall not, under any circumstances, be capable of alienation by the lessee, whether voluntary or by any legal process against him."

Counsel for the defence contends that the Legislature of Manitoba has no power to pass legislation that will make the Criminal Code applicable to cases to which it was not applicable before, and that even if it has the power to do so it has not done so in the section referred to.

I think a Provincial Legislature *can* pass legislation that will

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affect the applicability of provisions of the Criminal Code. Parliament, not only in the Code but in other statutes, frequently deals with situations created not by itself but by the Provincial Legislatures in the exercise of their jurisdiction over property and civil rights. The Bills of Exchange Act, for instance, contains provisions as to the effect of fraud and illegality of consideration upon bills and notes, but what fraud is, what illegality is, is determined by the Legislatures of the Provinces.

The Criminal Code in the section dealing with theft provides that certain acts interfering with the rights of owners of property shall be punishable as crimes, but it is the Provincial Legislatures that have to do with fixing the relationship between individuals that constitutes ownership. Parliament, I presume, might have defined what it meant by ownership but it has not done so.

Has, then, this Act of 1915 the effect claimed for it?

It goes without saying that the Legislature, when passing the Act, had no thought of what its effect might be upon the applicability of any provision of the Criminal Code. The purpose of it was to give a landlord some civil right that he had not previously had, or afford him some civil remedy not previously open to him. Especially, I take it, its purpose was to afford him the relief denied him in some of the cases above referred to.

It so happens that this Act nowhere uses any of the expressions found in the definition of theft, neither ownership nor property nor interest, the expression used is simply "right." The landlord is declared to have the right to the crop to the extent of the share reserved as rent as against the lessee or any person claiming through him.

"Right" is a word of wide significance, and though it is not ordinarily used in statutes to indicate a present ownership of, or property in, chattels, this much must be assumed that the Legislature in using it intended to declare that the landlord should have a claim enforceable by some process of law.

But whatever the expression means, does the Act give a landlord the ownership of any specific portion of the crop while it is still undivided? I think it will afford a satisfactory protection to landlords in interpleader issues between them and execution creditors of the tenant, and it is in such cases that protection has been most needed in the past. But will it, for instance,

enable a landlord to bring an action of replevin for a specific portion of the undivided crop? I do not think so, not even if its effect should be to make the landlord and tenant owners in common of the undivided crop.

On the whole I cannot see that the landlord is, under the Act, any more than he was before it was passed, the owner of any particular part of the crop so as to make it proper to convict him of theft, at any rate upon an indictment in this form. If it be suggested that the accused is guilty of theft under sec. 352 of the Code, because of a tenancy in common created by the Act of 1915, the indictment would require to be, in more respects than one, different from the indictment here.

I enter a verdict of not guilty.

Since writing the foregoing, I have seen a Quebec case, *Reg.* v. *Tessier*, 5 Can. Cr. Cas. 73, in which Mr. Justice Wright discusses the meaning of the expression "special property or interest."

Defendant acquitted.

STOKES-STEPHENS OIL Co. v. McNAUGHT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 30, 1917.

ARBITRATION (§ I—2)—AGREEMENT FOR—STAY OF PROCEEDINGS.

The Court has power, under sec. 5 of the Arbitration Act (Alta. 1909, ch. 6), to stay an action for breach of a contract which provides for a submission to arbitration of any dispute arising "during the prosecution of the work or after the completion thereof."

Statement.

APPEAL by defendant from the judgment of Hyndman, J., dismissing an application under the Arbitration Act to stay the proceedings on the ground that the parties had agreed to submit their differences to arbitration. Reversed.

J. H. Charman, for plaintiff, respondent.

Harvey, C.J.

HARVEY, C.J.:—February 25, 1915, the plaintiff and defendant entered into an agreement for the drilling of a well for the discovery of oil or gas.

The well was to be drilled 2,500 ft. and begun with 15½ inch casing and completed if reasonably practicable with 8¼ inch casing, but in any event with casing not less than 6 inch casing, the practicability being left to the decision of the plaintiff's mananging director which was to be final.

The agreement contains provision for further depth as well as for abandonment by plaintiff at any depth but with the condition

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that the defendant should receive pay for a minimum of 1,800 ft. and for abandonment by defendant and drilling a new well. The agreement contains the following provision:—

That if at any time during the prosecution of the said work, or after the completion thereof, any dispute, difference or question shall arise between the parties hereto, or any of their representatives, touching the said work, or the construction, meaning or effect of these presents, or anything herein contained, or the rights or liabilities of the parties or their representatives, under these presents or otherwise in relation to the premises, then every such dispute, difference or question shall be referred to a single arbitrator if the parties agree upon one, otherwise to three arbitrators, one to be appointed by each party to the reference and the third arbitrator to be appointed by the first named arbitrators, in writing, before they enter upon the business of the reference; and if either party shall refuse or neglect to appoint an arbitrator within 5 days after the other party shall have appointed an arbitrator and shall have served a written notice upon the first mentioned party requiring such party to make such appointment, then the arbitrator first appointed shall, at the request of the party appointing him, proceed to hear and determine the matters in difference, as if he were a single arbitrator appointed by both parties for that purpose, and the award or determination which shall be made by the said arbitrators or the majority of them, or by the said arbitrator, shall be final and binding upon the parties hereto, their executors, administrators, successors and assigns, and for the purpose of such arbitration, this clause shall be deemed a submission within the meaning of the Arbitration Act.

The defendant proceeded under the contract, and when a depth of slightly more than 2,400 ft. had been reached, in December, 1915, a joint of the casing collapsed, and in attempting to repair the damage by withdrawing the casing it broke, leaving 300 ft. in the bottom of the well. This occurred in March. Defendant reported the accident to plaintiff's managing director and asked whether he should abandon the well or go on with it with a 6 inch casing, which he said he could do to a depth of 3,000 ft. He was instructed to go on with the drilling but was not instructed as to the size of the casing. Communications continued, by correspondence and otherwise, on this point until May 22, plaintiff's managing director declining to authorise a smaller casing than 8¼ inches without convincing evidence that it was impracticable to continue with the 8¼ inch casing and refusing to act on the evidence which was offered.

On May 26, defendant appointed an arbitrator and called upon the plaintiff to do the same under the terms of the arbitration clause above quoted, "to deal with all questions between the parties, including the indemnification of the contractor against all losses sustained by him from delay or otherwise on account of the neglect or default of the owner."

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On May 30, plaintiff commenced an action for "an order restraining the defendant, his solicitors and agents and the arbitrator from proceeding or attempting to proceed with the said arbitration," and on the same day obtained an interim injunction. The motion to continue the injunction to trial was dismissed on June 9, and on June 15 the defendant notified the plaintiff, owing to the inability of the arbitrator first named to act, of the appointment of a new arbitrator. On the same day the plaintiff notified the defendant of the appointment of an arbitrator, at the same time notifying that it maintained that no dispute had arisen and that the appointment was without prejudice to its right to so maintain, and to dispute the validity of any award. A third arbitrator was subsequently named and an award was made on July 4 which was unanimous. The award states that the only evidence submitted was on behalf of the defendant. It held that it was impracticable then to complete the well at its then diameter and that the delay was due to the plaintiff and its managing director and awarded defendant compensation for 2,400 ft. at the contract price.

This action was begun on February 26, 1917. The statement of claim alleges that defendant has broken his contract by reason of his discontinuance of the drilling and abandonment rendering the well useless, and claims a return of the moneys paid, and from the bank a return of the moneys remaining on deposit as security. This is an appeal from a refusal of my brother Hyndman to stay proceedings in the action under sec. 5 of the Arbitration Act (ch. 6 of 1909) which is as follows:—

> If any party to a submission or any person claiming through or under him commence any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred to any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings apply to that Court to stay the proceedings and that Court, or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings.

The Judge was of opinion that an action for a breach of the contract such as the present did not come within the terms of the submission.

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Counsel for respondent contends that this is so and also that in any event the Court should not exercise its discretion by granting the application to stay.

On both these points the case of *Willesford* v. *Watson* (1873), L.R. 8 Ch. 473, is instructive. In that case there was a lease of mines. The lessees drove a shaft through the leased mines into an adjoining property of which they had a lease and used it for purposes of mining in that property. The action was for an injunction to restrain this. The submission naturally would be deemed to relate to rights under the lease, and the claim for injunction could only rest on the ground of breach of the agreement. On the application to stay under a provision from which ours is taken it was argued that the matters complained of were not within the agreement to refer, that an injunction could not be obtained on an arbitration and the lessors' rights could not be protected. A part of the head-note is:—

Held, on the construction of the lease, that the Court would not decide, but would leave it to the arbitrators to decide whether the matter in dispute between the parties were within the agreement to refer.

Held, that neither the want of any appeal, nor the inability of the arbitrators to grant an injunction, formed any objection to a reference.

Lord Selborne, L.C., on the question of discretion, at p. 480, said:—

If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a *primâ facie* duty is cast upon the Courts to act upon such an agreement,

and in *Hodgson* v. *Railway Passengers Assurance Co.* (1882), 9 Q.B.D. 188, it was held that the burden lay on the plaintiffs to shew some sufficient reason why the dispute should not be referred to arbitration, and Jessel, M.R., said: "If they cannot do so, the Judge is quite justified in being satisfied that there is no reason."

If the head-note to the first mentioned case is correct it would not seem to be necessary to decide whether the dispute indicated by the statement comes within the agreement to refer, but the Lord Chancellor in the course of his judgment does state that "there is no reason to doubt that the present controversy is within the terms of the agreement of reference," but the principle of the objection there is much the same as it is here.

The wording of the present submission is quite as comprehensive as would seem to be possible, and unless it is limited by the

opening words there seems no doubt that a dispute over a claim arising out of a breach of contract would be covered by it. Counsel, however, contends that the work has never been completed and that it is not now in prosecution and therefore the submission has no application. It is apparent that if that is the correct view it would apply to any dispute and would not be limited to a claim for breach of contract. The opening words relate to time and not condition of the work and the parties would naturally be considering the contract as one to be performed and not one to be broken and in that case everything would happen "during the prosecution of the work or after the completion thereof," and in their contemplation at the time of the making of the agreement it appears to me that these words would be considered comprehensive enough to cover every question that might arise out of the contract.

Then it may be that the work has been completed. It is true that the work has not been completed by the drilling of a successful well, but if that is due to the default of the plaintiff the work has been completed in so far as the contract imposes any obligation on the defendant to complete it, and the arbitrators have so found.

I am of opinion, therefore, that the plaintiff's claim does come within the terms of the submission. The defendant not merely has been and is ready to do all things necessary in the conduct of the arbitration but actually has gone ahead and done it. The fact that the award has been already made should certainly not prejudice the defendant, for if so it would always lie in the power of a party to a submission to appoint an arbitrator under protest as was done here and wait for the award and then say that the conditions of the statute do not apply, for it is in his power to delay the commencement of an action as he wishes. The validity of the award can be questioned in a proper manner but cannot be considered here. The only question now is whether the defendant has a right to have the matter determined by arbitration rather than by action.

I would, therefore, allow the appeal with costs and direct the stay of proceedings applied for.

WALSH, J., concurred with HARVEY, C.J. Walsh, J.

STUART, J.:—I agree with the views expressed by the Chief Justice in this case, but would like to add a word or two. It Stuart, J.

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seems to me that it is not open to a party to an agreement containing a submission clause to bring an action and, by framing his statement of claim as he pleases, that is, by stating the ground of dispute in his own way, to claim that it does not come within the submission.

I think we are entitled to look at the affidavit evidence and discover what the real dispute is about. It is all very well to say that an alleged complete breach of the contract does not come within the submission, but the question whether there has been a breach may obviously depend ultimately upon the question as to which of the parties is right in regard to certain disputed matters which clearly come within the terms of the submission. I think that is the case here.

Beck, J.

BECK, J. (dissenting):—The application was made in pursuance of the Arbitration Act (ch. 6 of 1909) sec. 5, which provides that if any party to a submission commence legal proceedings in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps, apply to the Court to stay the proceedings and the Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced, and still is, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying proceedings.

This section is in the same terms as sec. 4 of the English Arbitration Act, 1889.

The action is based upon an agreement dated February 25, 1915, whereby the defendant agreed to drill for the plaintiff to the depth of 2,500 ft., at least, and if required by the plaintiff, 3,500 ft., a well for the purpose of discovering oil or gas on certain lands belonging to the plaintiff.

It is alleged that the casing for the well was to be supplied by the defendant and it was a term of the agreement that the plaintiff should after the completion of the well have the option of buying from the defendant so much of the casing as the plaintiff desired at a price to be ascertained pursuant to the agreement.

It was further alleged that the defendant has never completed the well to a depth of 2,500 ft. but on the contrary has discontinued

drilling and has destroyed the well by withdrawing the casing therefrom without affording the plaintiff any opportunity of exercising, if it so desired, any option to purchase the casing or any part thereof.

It is then alleged that as a result of the defendant's breach of the agreement and his abandonment of the well, the well is now worthless since it cannot further be proceeded with and the plaintiff has wholly lost the moneys paid to the defendant on account of the drilling thereof; and the plaintiff claims damages. The agreement does contain provisions to the effect alleged.

It contains also a provision for arbitration in these words: (See judgment of Harvey, C.J.)

The plaintiff submits that this arbitration clause does not comprise the cause of action in respect of which the action is brought—that the clause is expressly confined to "during the prosecution and after the completion" of the work; that the cause of action alleged is a breach; that a breach cannot be said to be committed either during the prosecution or after completion of the work. The material before us shews that the fact is that an award has actually been made.

The defendant appointed an arbitrator on June 15, 1916; the plaintiff (without prejudice) appointed an arbitrator soon afterwards: and a third arbitrator was appointed on June 28. On July 4 the three arbitrators made a unanimous award which was favourable to the defendant.

I understand that the defendant is not ready to abandon this award but that he claims that sec. 4 of the Arbitration Act is equally applicable whether there has been an arbitration or not, the only condition being a submission.

The words of the section, however, seem to contemplate the case of a submission which has not yet been followed by an award—the words are: "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration."

A case may possibly arise where it may be proper to apply it where the submission has been followed by an award, *e.g.*, where an award has been precipitated before the applicant could well

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have made his application to stay, but I think it is not necessary to pursue this view in the present case. It may be that the case alleged in the statement of claim will not ultimately be proved before either tribunal. Whether the real cause of complaint established comes within the terms of the submission, that is to say, the arbitration clause in the agreement, seems to me to be a question much more easy of solution after a consideration of further evidence, whether evidence in this action or the evidence upon which the arbitrators made their award.

If we were now to stay the action, it would be, I think, only on a definitive decision that the matter in dispute is within the terms of the submission. As I have intimated, I think this can be more safely decided at a later stage. If there is a stay, one or other of the parties will, without doubt, move in respect of the award—the plaintiff to set it aside; the defendant to enforce it. In either case, if it is found to be invalid for any reason the matter can be remitted to the arbitrators for reconsideration and thus the dispute will ultimately be decided by the arbitrators. If a stay is not given, the defendant will doubtless plead the award. Assuming that it is valid on its face, any defects must be, I suppose, taken advantage of by a motion, but it, or a substituted award, would, if the dispute be within the submission, settle the dispute. If the matter is not within the submission the action must proceed—we have no power to stay it. So that whether we stay the action or not, the arbitrators will settle the dispute if the matter is within the submission.

In the result I would dismiss the application to stay and leave the costs to be dealt with by the trial Judge.

Appeal allowed.

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REX v. MELVIN.

Ontario Supreme Court, Clute, J. December 7, 1916.

1. INTOXICATING LIQUORS (§ III G—89)—ILLEGAL KEEPING—IRRELEVANT EVIDENCE AFFECTING STATUTORY PRESUMPTION FROM FINDING.

Where the magistrate's discredit of the defendant's evidence on a charge of keeping liquor given in rebuttal of a statutory presumption arising under the Ontario Temperance Act from the finding of a small quantity in defendant's shop, may have been influenced by irrelevant evidence of a kind which would be likely to cause prejudice to the accused, the conviction will be set aside on *certiorari*.

[*R.* v. *Lapointe*, 20 Can. Cr. Cas. 98, 4 D.L.R. 210, 3 O.W.N. 1469, applied.]

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MOTION to quash a summary conviction of the defendant.

F. R. Blewett, K.C., for defendant.

R. S. Robertson, for the Crown.

CLUTE, J.:—Motion to quash the conviction made by John A. Makins, Police Magistrate in and for the City of Stratford, on the 10th day of November, 1916, on an information laid by one W. J. Lancin, of Stratford, on the 8th November, 1916, against William Melvin, finding him guilty of the following offence: "That the said William Melvin on the 17th day of October, A.D. 1916, at the city of Stratford, in the county of Perth, in his premises, unlawfully did have or keep liquor at his barber-shop and cigar-store at 85 Downey street, the same not being a private dwelling-house at which he resided, and for which place he did not have a license under the Ontario Temperance Act authorising him so to do."

The information was laid under sec. 41, sub-sec. 1, of the Ontario Temperance Act, 1916; the clause reads as follows: "41.—(1) Except as provided by this Act, no person by himself, his clerk, servant or agent shall have or keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do, and then only as authorised by such license."

There were a number of grounds taken in the notice of motion. They may be shortly stated as included under: (1) no evidence to support the conviction; and (2) improper admission of evidence, namely, the evidence of one Broadley, called in rebuttal.

The evidence shewed that, on the 17th October last, there was found on the defendant's premises, which was a pool-room and cigar-store at 85 Downey street, the premises being other than the private dwelling-house in which the defendant resides, a bottle with cherries and a small quantity of liquid therein, which, by the certificate signed by the Government Analyst, contained 52 per cent. proof spirit. The bottle was found in a cupboard. The constable said there was an ordinary wine-glass of liquid in the bottle. Another person who was present said there was a good half-glass of liquid.

The defendant was called, and stated that he carried on business at 85 Downey street, a shaving and pool parlour, under a municipal license, that he had been so engaged for seven years.

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The Chief of Police and Constable Broadley said they had reason to believe there was liquor on the defendant's premises. The Chief of Police had no search-warrant; at the time, he was not an officer under the Temperance Act, but was subsequently appointed.

The defendant admitted that there was a bottle of cherries and some liquid upon them in a place where he threw "discarded things" such as "trash;" that he put it there himself; that it was about two years ago since he put it there; that he kept it for indigestion, under the direction of his doctor; and that there was also some senna tea in the bottle; that he used the liquid until the bottle was empty, except the cherries; that during the two years he had renewed the liquid, and that it was two years since he had used any of it; that he had discarded the bottle and had forgotten it entirely; that, if he had known it was there, he would have thrown it out; that he had not interfered with the Chief when he made the search, but told the Chief that it was choke cherries, and that he had been using it for medicine; that there was no intent on his part to break the law, and that he had not knowingly kept any spirits on his premises; that the bottle was all dusty when the Chief took it out, and that there was not more than a tablespoonful of liquid in it.

This evidence was corroborated by one Crawford, who worked for Melvin at the time the seizure was made. He says the bottle was dusty when it was found; he thought there was about a tablespoonful of liquid in the bottle; that he never had seen any one drink from the bottle; and, so far as he knew, no one knew of it; and that no liquor had been kept there or sold or drunk. If that had occurred, he would have seen it. He never saw the defendant touch the bottle, and no one else took anything out of it. Thereupon John Broadley was recalled. "(Mr. Blewett objects to question as to reputation of Mr. Melvin's place, and asks for a ruling. Police Magistrate rules there is a reason for police going there for the search, and such reason should be brought out and such evidence admissible)." The witness then proceeds to give the following evidence:—

"Tuesday, September 26th. William Melvin and two other men came out of the pool-room at 4.30 p.m., very much under the influence of liquor. Friday, September 29th. William Melvin at morning 30th, 12.30 a.m., with three other men came out of his

shop all under the influence of liquor. Saturday, October 14th. Four men with Melvin at 12.30 a.m., morning of 15th, came out of the defendant's pool-room, all five under the influence of liquor. I saw all this myself."

Cross-examined: "I remember Melvin being prosecuted before. I made a raid, and charge was tried before Dy. P. M. Coughlin, who dismissed the case. I am not sore about the result of that case. We did find liquor there that time. McLean swore there was no one there but him. I was not sore or offended about that dismissal. I had been watching this place lately on account of complaints by other people. I had instructions from the Chief to watch. On the first time, 26th September, I recognised Henry Footwinkler as one. On the 29th, I recognised James Mayes and James Lloyd. I had no talk with any of them. I was on the street, passed them twice. I was about three feet from them first time. Second time as close, and third time I was across the street. I reported to Chief next morning. All these occasions were before the 17th October."

Section 88 of the Act provides that, if, in the prosecution of any person charged with committing any offence against any of the provisions of this Act in the selling or keeping for sale or giving or keeping or having or purchasing or receiving of liquor, *primâ facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, then, unless such person prove that he did not commit the offence for which he is so charged, he may be convicted accordingly.

If the magistrate had been satisfied that the defendant had discarded this bottle and its remaining contents two years before, as he says, it is clear, I think, that there should have been no conviction, for he did not have it in the sense implied by the statute, or did not knowingly have it at all; but that is a question of fact for the magistrate, and by his conviction I must assume that he did not accept the contention put forward by the defendant. I must further hold that the liquor being found upon the premises raised a *primâ facie* case against the defendant, which was not, to the satisfaction of the magistrate, answered.

The suggestion as to the insufficiency of the certificate of the Government Analyst, and the fact that the bottle was retained for

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four days by the Chief of Police before it was sent to the analyst, are, in my view, untenable objections.

The sole point left for consideration is, whether or not the evidence taken in reply was properly admissible, and, if not, whether upon that ground the conviction should be quashed. Counsel for the Crown did not contend that the evidence was of such a character that it was not likely to have any influence upon the magistrate's decision, nor is there any statement upon the part of the magistrate that it did not affect his mind in regard to the guilt or innocence of the defendant. It was argued, however, on the part of the Crown, that the evidence was properly admissible as tending to shew the character of the place and raising a probability that liquor was being kept upon the premises for use.

It is a well-known principle of criminal law that each case ought to stand on its own merits, and should be decided on the evidence given with relation to that particular charge: *per* Pollock, B., in *Hamilton* v. *Walker*, [1892] 2 Q.B. 25, at p. 28. In that case the Justices had two informations before them, and, having heard the evidence on one charge, they determined to proceed with the hearing of the second, and, having done so, thereupon convicted of the offence charged in the first. The conviction was quashed.

In *Regina* v. *Fry* (1898), 19 Cox C.C. 135, at the conclusion of the first case the Justices postponed their decision thereon, and proceeded to hear the other informations, which related to a different charge of an offence committed on a different day. They dismissed the second and third informations. They then announced that they had decided to convict at the close of the first case, but that they adjourned their decision and the consideration of the amount of the penalty until after the other charges were disposed of, and that in adjudicating on each case they applied to that case the evidence that was given in reference to it, and no other. It was held that the postponement by the Justices of their decision in the first case until they had disposed of the other cases did not, under the circumstances, render the conviction in the first case bad in law.

In *Rex* v. *Lapointe* (1912), 20 Can. Crim. Cas. 98, 4 D.L.R. 210, where these and other cases are referred to, the Police Magistrate told the solicitor for the defendant that all the evidence on the three charges was set out in the depositions forwarded, and that the said evidence was utilised by him on each and all of

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the said charges. The one ground taken to quash the conviction was that, having three informations before him, the Police Magistrate proceeded to hear evidence on all three cases, and did then find the defendant guilty in all three cases.

Riddell, J., while not prepared to say that, if all the evidence given was applicable to that particular charge, the conviction must be quashed simply because the other informations were before the Police Magistrate, and evidence applicable to the three charges was heard, said that, if any of the evidence could not be applicable to the Joseph Dubie charge, it was to his mind clear that the conviction could not stand. Certain evidence he considered admissible in answer to an *alibi*, but, "notwithstanding all this, it may have been that the magistrate would not have accepted the statement of Joseph Dubie that he had bought whisky at all, had it not been sworn that two others had bought whisky the same evening. We are left in the dark as to this—the magistrate has not vouchsafed any explanation. In that view, as the sale to the two others is not evidence of the sale to Joseph Dubie, I think the doubt should be solved in favour of the defendant, and the conviction quashed."

While the facts in the present case differ considerably from those in the *Lapointe* case, I think the principle there applied is applicable here. I do not think that the evidence offered that the defendant and others had come from the pool-room, on different occasions before the one in question, in a state of intoxication, had anything to do with the charge in question. It may have been perfectly true that they were intoxicated on several occasions, but it did not follow that they became intoxicated from liquor drunk on the premises; and, if it did, it was no evidence that liquor was found upon the premises on the day in question; nor was the evidence in reply relevant to the question of guilty knowledge. It may be that, had the evidence gone further and to the effect that liquor had been drunk on the premises, it would have been admissible upon the ground that the defendant had knowledge that it was there, and therefore guilty knowledge, but the evidence did not go far enough for that.

There is no evidence whatever that liquor, at any time on any of the occasions mentioned, was drunk upon the premises. I do not say that this would be necessary to support a conviction. I think there was evidence upon which the magistrate might have

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found, exclusive of the evidence in rebuttal, that the defendant had liquor upon his premises contrary to the Act, if he disbelieved the defendant's story, as evidently he did; but the question is whether that disbelief of the defendant's story might not have arisen partly from the evidence offered in reply, which, in my opinion, was not admissible. If that evidence had any effect upon the mind of the magistrate in reaching a conclusion, the defendant was prejudiced in his trial. The magistrate has not stated whether it had or had not. It is not necessary to decide what the effect of such a statement might have been—it is sufficient that the defendant may have been prejudicially affected in the result by the admission of irrelevant evidence.

Reference may also be made to *Rex* v. *Bullock and Stevens* (1903), 6 O.L.R. 663; *Regina* v. *Hazen* (1893), 23 O.R. 387, reversed in appeal, 20 A.R. 633; *Rex* v. *Haslam* (1916), 12 Cr. App. R. 10; *Rex* v. *Banks*, [1916] 2 K.B. 621; *Perkins* v. *Jeffery*, [1915] 2 K.B. 702. It is pointed out in this case that the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it was relevant to any point before the Court: *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, at p. 65; *Rex* v. *Bond*, [1906] 2 K.B. 389, at p. 409; *Regina* v. *Ollis*, [1900] 2 Q.B. 758.

In the *Perkins* case, [1915] 2 K.B. 702, the question of the admissibility of evidence tending to shew the commission of other crimes, when it is relevant to some issue involved in the case, is discussed. Thus, as is pointed out at p. 708, quoting from Stephen's Digest of the Law of Evidence (8th ed.), art. 12: "When there is a question whether an act was accidental or intentional, the fact that such an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant." Avory, J., then proceeds: "It is, we think, open to doubt whether evidence is admissible to prove 'a system or course of conduct' unless it is relevant to negative accident or mistake, or to prove a particular intention: see the judgment of Lord Reading, C.J., in *Rex* v. *Boyle and Merchant*, [1914] 3 K.B. 339, at p. 347, where he said: 'We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which

is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to shew generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to shew that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible.'" Avory, J., then proceeds: "Having regard to what was said in the House of Lords in the case of *Rex* v. *Christie*, [1914] A.C. 545, as to the practice in a criminal case of guarding against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury out of proportion to its true evidential value, we think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake . . . is definitely put forward."

Rex v. *Kurasch*, [1915] 2 K.B. 749, is an instructive case. It was a case of conspiracy by the appellant and four other men, who were tried and convicted for conspiring by means of false pretences to defraud the prosecutor, the false pretences being the holding of a mock auction. The defendants denied the false pretences and alleged that they were all merely servants of a woman who was the proprietress of the auction business. Evidence was given for the prosecution that the appellant had said at the time of his arrest that one of the other defendants was employed by him. The appellant gave evidence, and was asked in cross-examination whether it was not the fact that he and the proprietress were at the date of the offence living together as man and wife. The appellant answered the question in the affirmative. The appellant appealed against his conviction upon the ground that this question was a contravention of the Criminal Evidence Act, 1898, sec. 1(*f*), in that it tended to shew that he was a person of bad character. It was held that, the defence having raised the issue that the defendants were only the servants of the proprietress of the business, it was material to shew what were the real relations existing between her and the appellant, and that the question

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was therefore admissible. Lord Reading, C.J., after setting forth the facts, and the bearing of the question upon the issue, said: "The question is not whether the matter remotely bore on the issue, but whether it was really relevant to it."

In *Rex* v. *Rodley*, [1913] 3 K.B. 468, 472, the following passage from the judgment of Channell, J., in *Rex* v. *Fisher*, [1910] 1 K.B. 149, at p. 152, was quoted by Bankes, J., in delivering the judgment of the Court: "The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence." And then Bankes, J., went on to say: "As here pointed out by Channell, J., the governing rule must always be that any evidence to be admissible must be relevant to the issue."

I do not desire in the least to depart from the principle of law laid down in the *Fisher* case, where, at the trial of a prisoner on an indictment charging him with obtaining a pony and cart by false pretences on the 4th June, 1909, evidence was admitted that on the 14th May, 1909, and on the 3rd July, 1909, the prisoner had obtained provender from other persons by false pretences different from those alleged in the indictment. The prisoner was convicted:—Held, that the evidence was wrongly admitted; and that, although there was sufficient evidence of the false pretences alleged to justify the conviction, the evidence as to the other cases might have influenced the jury; and the conviction was therefore set aside.

In the *Rodley* case, it was urged that, in spite of the admission of evidence which was irrelevant, there had been no substantial miscarriage of justice. Bankes, J., said ([1913] 3 K.B. at p. 475): "The rule adopted by this Court, however, has been that

it will not act upon the proviso in any case in which it appears to it clear that the jury may have been influenced by the evidence wrongly admitted."

After the most careful examination of the evidence which I have been able to give, and notwithstanding the able argument of Mr. Robertson, I am unable to see that the evidence offered in rebuttal was relevant to any issue before the Court. The defendant is not charged with keeping a disorderly house. The evidence offered in rebuttal did not go far enough to prove that liquor was kept upon the premises on the various previous occasions to which it referred, even if that would be sufficient.

The inference is sought to be raised that, because the persons named left the defendant's premises with the defendant when, it is said, they were intoxicated, therefore they became intoxicated from liquor received on the premises. An inference of this kind might arise if the premises were proved to be one where liquor was kept or sold, but to infer that it was kept because the parties were intoxicated, and further that they were intoxicated because they partook of the liquor upon the premises, no fact being proven of it having been kept there or partaken of there, is arguing in a vicious circle; and, having regard to the circumstances of the case, I think the evidence offered was wholly irrelevant and inadmissible, but was nevertheless just that kind of evidence that would be likely to affect the mind of the magistrate prejudicially against the accused. Counsel for the Crown admitted as much, and I think it altogether probable that it did; the fact that it may have done so is sufficient.

In my opinion, the conviction should be quashed, but, under the circumstances, without costs—the magistrate and constable, as far as I have power to protect them, to be protected.

Conviction quashed.

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Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Longley and Drysdale, JJ. March 10, 1917.

DAMAGES (§ II A—5)—EXEMPLARY OR PUNITIVE—TRESPASS TO LAND.
Trespass to land, without malice and unaccompanied by any violence or aggravation, does not entitle the injured person to claim exemplary or punitive damages.

Statement.

APPEAL by defendants from a judgment of Chisholm, J., allowing plaintiff, a lessee, in addition to damages for trespasses

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to the property, exemplary or punitive damages, holding that the case was one in which the damages ought to be sufficiently large to prevent a recurrence of the trespasses. Reversed.

H. Mellish, K.C., for appellants.

L. A. Lovett, K.C., for respondent.

GRAHAM, C.J.:—I think that this was not a case for the allowance of exemplary damages. It is an action for trespass to land. No matters of a personal nature came into the transaction. The matter was carried on by interviews and correspondence, all of a gentlemanly character, and there were no circumstances of aggravation about the trespass to the land. There was no malicious or indirect motive or vio ent conduct.

The defendants, who are contractors for the government in connection with a great public work at Halifax, the Ocean Terminals, entered upon a long disused tramway from a stone quarry to a stone wharf on the North West Arm, and putting it in a condition of repair to enabl them to get the stone from the contractors' quarry to the wharf. The quarry and the wharf and the roadway had all belonged years ago, I believe, to the Imperial government, no doubt in view of their forts then built of rock. The contractors had already bargained with the plaintiff for the use of this wharf for this purpose; they had also acquired from him the use of one or two fields for houses for their workmen. The boundaries of what they had actually acquired were not clear to them and the plaintiff himself was anxious to have his own quarry developed and negotiations were possible. The contractors relied upon making a satisfactory arrangement with the plaintiff. They laid a track upon it. They removed no stone or materials. The plaintiff rather abruptly notified them when it was too late to discontinue their operations on the property and has brought this action for damages. The government of Canada, in view of the delay that would happen to the execution of the public work, expropriated the land, very properly, as I think. I have no objection when a public work comes to Halifax that there should, in anticipation, be competition to acquire advantageous sites and positions, so that there may be speculation and in view of land damages, I believe that is considered part of the advantage of obtaining the public work. But in the usual course I have never heard of the claimants going for exemplary damages.

I think with deference that the use of such expressions as "insolent," "wanton," "defiant," etc., are not at all applicable to the trespasses in this action. One may find them in actions for some other kinds of torts. They might perhaps be applicable in a case like *Smith* v. *Boutilier*, 42 N.S.R. 1. This Court however did not use them nor give exemplary damages.

In *McIsaac* v. *Inverness Railway*, 40 N.S.R. 579, a *nisi prius* decision of Meagher, J., exemplary damages were not given. But the principle of *Whitwham* v. *Westminster Brymbo Coal Co.*, 1896] 1 Ch. 894, on appeal, [1896] 2 Ch. 538, was used. Indeed, in an action at law, as this is, for trespass to land, either here or in England, exemplary damages are rather unusual. I cannot think of one in our own Courts. Of course there are old cases in England, but one has only to read the judgments to observe that there was more involved than the mere trespass to land. There were personal things coupled with it—some matter of aggravation, and Heath, J., in *Merest* v. *Harvey*, 5 Taunt. 442 (128 E.R. 761), cited in the judgment, said:—

> It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages.

This case and a number of cases of exemplary damages were cited in the case of *McArthur & Co.* v. *Cornwall*, [1892] A.C. 75. They are called penal damages in that case. The Judicial Committee, said, p. 88:—

> These consequences are inflicted upon the defendants, because, it is said, they have defied British law, and committed a trespass unauthorized and wilful in its inception, and persistent and definite in its continuance. Assuming in Cornwall's favour that such conduct would authorize what is in its nature a fine or penalty, and is not damage to the plaintiff by reason either of pecuniary loss or of such loss combined with injury to the feelings (a proposition which appears to their Lordships open to grave question) their Lordships cannot take so severe a view of the conduct of the defendants.

I think the whole amount (whatever it was) allowed for exemplary damages should be disallowed.

Then as to actual damages. The trial Judge, on the authority of the case of *Whitwham* v. *Westminster*, *supra*, and the way-leave cases, says:—

> I think that on the authority of these cases I must allow the plaintiff such damages for the wrongful acts of the defendants on his land as would be a reasonable rent therefor for that period.

The other element which was also present in that case, besides the user, namely, the diminution of the value of part of it, could

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not very well be added here. Here the value of the land was not diminished to any extent but rather the reverse. There might be nominal damages, of course. But in respect to the user or reasonable rental, it would appear that the exemplary damages must have largely contributed to the amount allowed by the Judge, viz., $1,500, because the user or rental of such a way, merely occupation for repairing it for 2 months, would not be a large item.

The counsel for the plaintiff sought to put a speculative value upon the user because getting the plant up there in some other way would have cost the defendants a large sum of money. This, I think, is remote. In my opinion, the amount allowed for damages is excessive.

No reasonable proportion exists between the amount of damages as found and the circumstances of the case. *Praed* v. *Graham* (1889), 24 Q.B.D. 53; *McGrath* v. *Bourne*, 10 Ir. Rep. C.L. (Ex.) 160.

I think the amount paid into Court exceeds the amount of damages justly payable. But as the learned counsel for the defendants, at the hearing, said he was satisfied with an assessment at that sum, I do not propose to deal with that matter. No doubt this amount will come into the assessment in the Exchequer Court in the expropriation action. The appeal will be allowed with costs and the defendant will have judgment upon the issue in connection with the payment into Court being sufficient, with the costs.

Russell, J.

RUSSELL, J.:—The defendants are working a quarry to the south of plaintiff's property and taking out granite therefrom for construction work on the new terminals. They have rented a wharf on the plaintiff's property and there being a sort of roadway from the wharf over the plaintiff's property the defendants found it convenient to haul their granite over this roadway to the wharf for shipment. Plaintiff, I should have said, is only a lessee of the property over which the road runs as aforesaid to the wharf. Defendants rented the wharf from him and have connected it with the quarry which they are working by means of a tramway along the shore. But this seems not to be a suitable mode of transporting the heavier stone and there is no practicable way of getting such stone to the wharf without going over the

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plaintiff's roadway. Negotiations were entered into, therefore, between the plaintiff and the defendants for the use of the road over plaintiff's property, and defendants, assuming that these negotiations would result in an arrangement, began building up the road, putting it in good condition and laying rails over which to haul their stone. No arrangement was come to and plaintiff ordered them to remove their property from his land. They did not immediately do so but continued to use the tramway for some weeks and induced the government engineer to procure the institution of proceedings for expropriation of the roadway.

Defendants paid into Court $1,000 on being sued for damages for the trespass. On the trial of the cause the trial Judge increased these damages to $1,500. He held that the proper elements of damage were the use by the defendants of the plaintiff's property and an addition to this amount because of the wantonness of the trespass. In other words, he held that the case was one for punitive or exemplary damages.

At the argument the further point was made for the plaintiff that the expropriation proceedings were not regular and vested no rights in the Crown of which defendants could avail themselves. I think for the reasons given by the learned trial Judge that plaintiff cannot succeed in this contention, and I also agree with the learned trial Judge that the plaintiff is entitled to compensation for the use of the defendant's road under the authority of the case cited by the Judge, *Whitwham* v. *Westminster Brymbo Coal and Coke Co.*, [1896] 1 Ch. 894, and on appeal, [1896] 2 Ch. 538. But I cannot agree that there is anything in this case to justify the infliction of punitive damages. The defendants did not act from any evil motive or use any insolent language or act in any such manner as to justify the attribution to them of the spirit described in the Greek word which Sir Frederick Pollock makes use of in his discussion of this subject, and for which our printing offices do not provide type. The defendants merely used the road because it was convenient, in the same way that a farmer would cross his neighbour's property as a short-cut to his own wood lot. They, no doubt, expected that they should be called on for damages if the matter were not amicably arranged and they have paid $1,000 into Court, considering this a generous compensation for the injury.

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To my judgment, it seems an ample compensation from every possible point of view. I cannot see that any injury whatever has been done to the property. For any use to which it can ever be put it seems clear to me that it has been improved. The defendants should pay a reasonable amount for the use of the roadway, but that ought not be be an amount levied upon them in the nature of a "hold-up." In this respect also I think the plaintiff is "well paid for his rabbits." I should have been inclined to assess his damages at about $500, considering that he is getting a fine rental for his wharf and will be well compensated for his roadway which can have no other utility than that of a road through a pile of rocks for which there does not appear to be any clamorous demand.

I think the appeal should be allowed and the plaintiff confined to the amount paid into Court, which I should have felt inclined under the evidence to reduce if the defendants had pressed for a reduction. I understood that no such claim was made and defendants were content that the plaintiff should receive the sum paid into Court.

Longley, J. Drysdale, J.

LONGLEY and DRYSDALE, JJ., concurred. *Appeal allowed.*

MAN.

K. B.

Re A COMPANY.

Manitoba King's Bench, Macdonald, J. April 3, 1917.

COMPANIES (§ VI B—315)—WINDING-UP—GROUNDS—INSOLVENCY—IMPAIRMENT OF STOCK—PETITION BY SHAREHOLDER.

The Court will not entertain a petition for the winding up of a company not made for a *bonâ fide* purpose, in the interest of the company, but merely with an object of bringing pressure on the company to repay the petitioner money he paid on shares; under sec. 12 of the Winding-up Act (R.S.C. 1906, ch. 144), a shareholder has no *locus standi* to such petition on the ground of insolvency; his petition on the ground of an impairment of the capital stock must be accompanied by evidence thereof apart from his affidavit to the petition.

Statement.

MOTION to continue injunction restraining the presenting or publishing a petition for the winding-up of a company. Granted.

W. L. McLaws, and *Ward Hollands*, for petitioner.

C. P. Fullerton, K.C., for the company.

Macdonald, J.

MACDONALD, J.:—James Gilbert Munro, a shareholder of above company, gave notice to the company of his intention to present a petition for the winding-up of the said company under the provisions of the above Acts.

The petition alleges that the said company is insolvent and that the capital stock of the company is impaired to the extent

of 25% thereof and over, and that the lost capital is not likely to be restored within 1 year. The petition is verified by the usual statutory affidavit.

Immediately thereafter the said company secured an injunction order restraining the said James Gilbert Munro, his solicitors, counsel, servants and agents from presenting or publishing the petition.

In support of the motion for the injunction mentioned, there were filed several affidavits denying the allegations of the said Munro that the said company was insolvent, one of which is the affidavit of Adam Reid, the president of the said company. Upon this affidavit, Mr. Reid was cross-examined on behalf of the petitioner Munro, and on such examination the said Reid, on advice of counsel, refused to answer any questions relative to the financial position of the company beyond the statement that the company was perfectly solvent, and it was agreed between counsel that an adjournment should be made to enable the petitioner to move in Court to compel the witness to answer the questions asked him, and it was further agreed that this motion be made on the return of the motion to continue the injunction.

The grounds for the attitude taken by the company are that:—(1) The petition is not made in good faith, and is an abuse of the process of the Court in furthering the personal ends of the petitioner to compel the company to pay him back the money he has paid on his shares in the company. (2) That the petitioner has no *locus s andi* under the Winding-up Act, R.S.C. 1906 ch. 144, and Acts in amendment thereof.

As to the first ground, it is abundantly clear that Dr. Munro was not actuated in his proceeding by any consideration for the interests of the company or anyone connected with it save himself. He was elected a director of the company on July 20, 1915, and continued as such until January 25, 1917. He first subscribed for 10 shares and paid on account thereon the sum of $450, on April 13, 1911. In May, 1911, he subscribed for 5 shares and paid thereon $225; then on April 15, 1915, he subscribed for 5 shares, paying thereon $225.

On April 15, 1915, he subscribed for 30 shares, which, under the company's act of incorporation, qualified him for election as a director of the company, and on July 20, 1915, he was elected medical director, and was in receipt of fees as such.

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RE A COMPANY.

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On the purchase of the 30 shares referred to, he gave his promissory note for $1,000, which was renewed from time to time up to January 4, 1917, when a further renewal was asked for but the request was refused and on January 22, 1917, 3 days prior to the annual meeting, this note was paid in full.

On January 25, 1917, the annual meeting of the shareholders of the company was held and the said Munro was nominated a candidate for election as a director, but he was not re-elected; while the ballots were being counted, and before the result was known, a resolution was passed thanking the president, directors and staff for their energetic and efficient services during the year. The said Munro addressed the meeting, referring to the substantial and satisfactory improvement in the company's affairs during the past year and assured the shareholders that the directors had actually directed the affairs of the company, thereby taking their full share in bringing about the statement the directors were now enabled to present to the shareholders.

On the same day (January 25, 1917), Dr. Munro wrote the company with reference to disposing of his shares, to which the president replied on January 26, 1917: "There will be no objection offered to Mr. Fillmore disposing of your stock for you."

This is followed by a letter to the company from Dr. Munro's solicitors, dated January 29, 1917, which clearly shews the object in view in Dr. Munro's mind. It contains these sentences:—

> Unless a settlement is at once made with our client proceedings will be taken against your company for the winding-up of the same. Mr. Munro, as perhaps you are aware, is fully acquainted with the present standing of the company. It would be to your interests to take this matter up with us at once.

To this letter the managing director of the company replied:—

> I am at a loss to understand what settlement you refer to, as we owe the doctor nothing, and he recently discharged a liability to this company of over $1,000, that has been standing against him for about 2 years, so that we are now absolutely square.

On February 15, 1917, notice of intention to present the petition for winding-up before this honourable Court on Thursday February 22, 1917, together with the petition, was served upon the company, against which proceeding the injunction referred to issued.

Nothing happened in any way creating any change in the affairs or condition of the company from the date of the annual

meeting on January 25, up to the time of the instituting of proceedings by Dr. Munro and there is no doubt that had Dr. Munro been elected a director of the company at that meeting, everything would have gone on smoothly and these proceeding never would have been thought of, and it is evident that the object of the petitioner was to precipitate the destruction of the company unless the demands of Dr. Munro were complied with. The contention therefore that the petition was not for a *bonâ fide* purpose but for the object of bringing pressure to bear upon the company to pay Dr. Munro back his money, seems to me sufficiently evident.

In *Cadiz Waterworks Co.* v. *Barnett*, L.R. 19 Eq. 182, it was held that where petition was not for a *bonâ fide* purpose, but for some collateral and sinister object, on that ground it will be dismissed.

In *Re London and Paris Banking Co.*, L.R. 19 Eq. 444, the object of the petition was not to obtain a winding-up but to put pressure on the company. Petition was dismissed.

In *Re A Company*, [1894] 2 Ch. 349. Petition not presented in good faith, but for other purposes, such as putting pressure, ought to be stopped if likely to cause damage to the company.

The petitioner appears to my mind to be within these cases and for that reason should be restrained.

Now as to the second ground:—Under sec. 12 of the Winding-up Act, ch. 144, R.S.C. 1906, the application for such winding-up may, in the cases mentioned in paragraphs (*a*) and (*b*) of sec. 11, be made by the company or by a shareholder; (*a*) where the period fixed for the duration of the company has expired or where the company is dissolved; (*b*) where shareholders passed a resolution requiring the company to be wound up, and in the case mentioned in paragraph (*c*) of sec. 11 by the company or by a creditor for the sum of at least $200; (*c*) when the company is insolvent, or 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 and in the other cases mentioned in the said sec. 11, by a shareholder holding shares in the capital stock of the company to the amount of at least $500. The other cases mentioned in sec. 11, being (*d*) when the capital stock of the company is impaired to the extent

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of 25% thereof and when it is shewn to the satisfaction of the Court that the lost capital will not likely be restored within 1 year, or (*e*) when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up.

It seems clear then that a shareholder cannot be a petitioner for the winding-up of a company when the company is insolvent, but it is equally clear that if within the Act a shareholder can petition when the capital stock is impaired as stated, and where it is shewn to the satisfaction of the Court that the lost capital will not likely be restored within 1 year. The only evidence of the probable latter condition is the affidavit of Dr. Munro verifying the petition.

The statutory affidavit is strictly no proof of anything. The petitioner should be prepared with evidence of impairment of capital, instead of which he seeks to make out his proof of that condition by the cross-examination of the managing director of the company. There is not sufficient evidence before me to justify a finding that the lost capital will not likely be restored within 1 year.

Is this petition, however, within the Act? Sec. 6 says:—

> This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada or by or under the authority of any Act of the late Province of Canada or of the Province of Nova Scotia, New Brunswick, British Columbia or Prince Edward Island, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada, and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock and incorporated trading companies doing business in Canada wheresoever incorporated and
>
> (*a*) which are insolvent, or
>
> (*b*) which are in liquidation or in process of being wound up and on petition by any of their shareholders or creditors, assignees or liquidators, ask to be brought under the provisions of the Act.

Sec. 12, as already noticed, provides, that in case of insolvency only, a creditor of the company can petition for winding-up. The company does not, therefore, come within sec. 6 to entitle a shareholder to file a petition under sec. 12 of the Act.

Under these conditions, the petitioner is not entitled to cross-examine Mr. Reid, the managing director of the company, on his affidavit filed, and the injunction, in my opinion, must be continued.

Costs against the petitioner. *Injunction continued.*

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. April 17, 1917.

COURTS (§ II A—150)—JURISDICTION—"PERSONAL ACTIONS FOR TORT"—INJURY TO LAND.

The jurisdiction of County Courts under sec. 57 of the County Courts Act (R.S.M. 1913, ch. 44), over "personal actions for tort," applies also to actions for injury to land caused by fires.

Statement.

APPEAL by defendant from the judgment of a County Court Judge in an action for injury to land caused by fire. Affirmed.

W. Boston Towers, for plaintiff, respondent.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff sued the defendants in the County Court for negligently setting fire to hay upon a quarter section of land belonging to him and for burning holes in the soil of the said land thereby injuring it for the purpose of growing hay. He claimed damages to the amount of $500. Besides denying the allegations in the statement of claim the defendants denied that the plaintiff was the owner of the land in question. On the trial defendants objected that the County Court had no jurisdiction to entertain an action for injury to land. This objection was overruled and a verdict was entered for $500 damages. The jurisdiction of the County Court is the only question involved in this appeal.

By sec. 57 of the County Courts Act, R.S.M. 1913, ch. 44, the County Courts shall have jurisdiction to hear and determine, "(*a*) all personal actions of tort where the damages claimable do not exceed $500, and actions of replevin where the value of the goods to be replevied does not exceed $500." It is argued on behalf of the defendant that the expression "personal actions of tort" does not include trespass to land.

In *Crayston* v. *Massey-Harris*, 12 Man. L.R. 95, decided by the Full Court of Queen's Bench in this province, it was held that the phrase, "personal actions," used in the County Courts Act, refers to the old division of actions at law into real, personal and mixed, and as it is a rule of construction that where technical words are used in reference to a technical subject, they will *primâ facie* be understood to be used in the sense they have acquired in that subject.

The term "personal action" is defined as "one brought for the specific recovery of goods and chattels, or for damages or other redress for breach of contract, or other injuries, of whatever

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description, the specific recovery of lands, tenements and hereditaments only excepted, Wharton's Law Lexicon, 11th ed., p. 647; Stephen on Pl., 7th ed., p. 4. Stephen mentions trespass and trespass on the case as two of the most common forms of personal actions and the context shews that he refers to trespass to the person, or property, either personal or real, of the plaintiff: Pleading, pages 10-12.

The following definition is given in Chitty on Pleadings, 7th ed. 110; 16th Am. ed. 142: "Personal actions are for the recovery of a debt, or damages for the breach of a contract, or a specific personal chattel, or a satisfaction in damages for some injury to the person, personal or real property." See also the authorities cited by the writer.

Blackstone speaks of personal actions: "As such whereby a man claims a debt or personal duty, or damages in lieu thereof: and likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs . . Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like. See Blackstone's Com., Vol. III., p. 117.

The present action is for negligently setting fire to the hay on the plaintiff's land and causing injury to the land. Under the common law form of pleading, throwing live coals or sparks on the plaintiff's land would be trespass: *Vaughan* v. *Taff Vale R. Co.*, 3 H. & N. 743, 752 (see also 5 H. & N. 679). If the defendants kept their fire negligently and it spread from their land to the plaintiff's, the action would be in case: Viner's Abr., vol. I., p. 218. Either of these is a personal action of tort and comes within the scope of sec. 57 of the County Courts Act.

By 3 & 4 Wm. IV., ch. 27, secs. 36 & 37, all real and mixed actions except writ or right of dower, dower, quare impedit and ejectment, were abolished, but the widely inclusive term, "personal actions," still remains.

By the English County Courts Act (51 & 52 Vict. ch. 43) a County Court has jurisdiction with certain exceptions, in "all personal actions, where the debt, demand, or damage claimed is not more than £50." Of this enactment it is said in Hals. Laws of England: "The phrase 'personal actions' includes a great

variety of actions and claims, and, subject to the limit of amount and certain exceptions hereafter stated, includes any claim which may form the subject of an action in the King's Bench Division." See 8 Hals. p. 428. Under that Act the jurisdiction to try an action involving the question of title to any corporeal or incorporeal hereditament is limited to cases where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof exceeds £50 by the year (sec. 60). But within the above limit actions for trespass to land are maintainable. See *Howarth* v. *Sutcliffe*, [1895], 2 Q.B. 358, and cases there cited.

In our County Courts Act, since the coming into force of 7 & 8 Edw. VII. ch. 10, sec. 2, the fact that the right or title to corporeal or incorporeal hereditaments comes, or may come, into question in the action, no longer ousts the jurisdiction of the County Courts. The only limitation to the jurisdiction of these Courts in a case of trespass to land is that the damages claimed are not to exceed $500 (sec. 57 (*a*)).

In *Neely* v. *Parry Sound River Improvement Co.*, 8 O.L.R. 128, it was held by Anglin, J., that an action for damages to land is not a personal action within the meaning of R.S.O. ch. 109, sec. 64 (Unorganized Territory Act). But the case, as it appears to me, turned upon the fact that the title to land was in issue.

In *Re Harmston* v. *Woods*, 12 O.W.N. 23, 24, Middleton, J., followed the *Neely* case and held that an action of trespass to land is not a "personal action." He says:—

> "Personal actions" is a flexible term, and is here used in a narrow sense, not including either actions on contracts, in which jurisdiction is especially conferred, or trespass to land, in which a limited jurisdiction is conferred upon the County Courts. . . but not upon the Division Courts.

With great deference to the Judge's interpretation of the expression "personal action" as used in the Ontario statutes, I cannot apply it to secs. 56 and 57 of our County Courts Act. I have read the other cases to which the Judge refers in support of his view, as applied to the Ontario Acts, and I would say with great respect that they appear to me to afford little assistance in arriving at an interpretation of the same expression when used in our Act.

Whidden v. *Jackson*, 18 A.R. (Ont.) 439, was an action in a County Court for a declaration of right. Only one Judge out of

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four in the Court of Appeal expressed the view that "personal action" was confined to debt or chattels or damages to them or for injury to his person. Two of the Judges express no opinion as to the meaning of the phrase, and the fourth took the view that the action was a personal one.

In *Re M'Gugan* v. *M'Gugan*, 21 O.R. 289, the only expression I can find relating to the point in question is that of Armour, C.J., who, in giving the judgment of the Divisional Court, said, "the term 'personal action' is a term signifying, as used in this statute (the County Court Act), a common law action.

Att'y-Gen'l v. *Lord Churchill*, 8 M. & W. 171, was an information for intrusion on the lands of the Crown. The point was the right of the Crown to change the venue under an old decision that, "The King has his prerogative to try his personal actions where he pleases." As pointed out in the argument by the Attorney-General and supported by the authorities cited, "information of intrusion is not real, but personal, and to be resembled to trespass. . . the land is not demanded or recoverable but damages only, as in trespass." Parke, B., giving the judgment of the Court, pointed out that the word "personal" is capable of two different meanings. "Actions," he said, "may be personal, as contradistinguished from real or mixed; the first being actions against the person only, for damages, the second for recovery of real estate, and the third for both. In this sense of the word 'personal,' there appears to be no question, but that an information of intrusion is a personal action, for its object is the recovery of damages, not the recovery of the estate, for the Crown has never in contemplation of law lost it. But the word 'personal' may mean such actions as are for the recovery of debts or damages to the person or personal effects; and in this sense of the word, a writ of intrusion is not a personal action." In the old authority referred to (*Rex* v. *Webb*, 1 Vent. 17 (86 E.R. 12), and 1 Sid. 412 (82 E.R. 1187), one report spoke of the action as one for embezzling the King's goods and the other report said: "The King has his prerogative to try his personal actions where he pleases." Parke, B., held that the meaning of *Rex* v. *Webb*, probably was that with respect to all personal actions, in the sense of transitory actions, the Crown had a privilege which the subject had not to try his actions anywhere.

In the above case, *Att'y-Gen'l* v. *Churchill*, the Court was not

interpreting a statute where an expression bearing a commonly received legal import was used, but was merely arriving at the meaning to be drawn from two conflicting reports of a legal decision. The case, in fact, is an authority supporting the view that the phrase "all personal actions of tort" includes actions for damages caused by the defendant in respect to the real estate of the plaintiff.

The amendments to the County Courts Act by 7 & 8 Edw. VII., ch. 10, struck out of sec. 56 of the original Act the exception to the jurisdiction contained in sub-sec. (*d*) of actions in which the right or title to any corporeal or incorporeal hereditaments comes in question. The plain intention of the amendment was to give the County Courts jurisdiction in respect of such actions, subject only to the limit in respect to damages provided in sec. 57. Unless we give to the words "all personal actions of tort," the legal meaning applied to them in the authorities I have cited, the intention of the amending Act will, in so far as sec. 56 (*d*) is concerned, be defeated.

I think the County Court had jurisdiction to try this action and as that is the whole question before this Court, the appeal should be dismissed with costs.

HAGGART, J.A.:—The plaintiff, as the owner of the north-west quarter of sec. 10, tp. 11, r. 3 W., sues the defendants for negligently setting fire to the hay and grass upon the said quarter section, causing serious damage. The trial Judge assessed the damages at $500, the amount claimed by the plaintiff after abandoning the excess so as to bring the action in the County Court.

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The express provisions of the County Courts Act, ch. 44, R.S.M. 1913, referring to the matter in question, are sec. 56 which enacts that:—

> The County Courts shall not have jurisdiction in any of the following cases:—
>
> (*d*) Actions of ejectment or for the recovery of land.

And sec. 57, which enacts:—

> The County Courts shall have jurisdiction in, and the Judge holding the said Courts may hold plea of, and may hear and determine in a summary way, for or against persons, bodies corporate or otherwise:—
>
> (*a*) All personal actions of tort where the damage claimable does not exceed $500.

It is quite clear that the plaintiff is not excluded by sec. 56 (*d*) because this is not an action of ejectment or for the recovery of land.

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In their appeal the defendants challenge the jurisdiction of the County Court on the ground that the County Court has no jurisdiction to entertain an action for alleged injury to land. No such defence is set out in the dispute note. If the defendants have not waived their right to raise this defence on the appeal, then the sole question here will be settled by the meaning we shall give to the words "all personal actions of tort."

We have been referred to many authorities for our consideration as to the meaning that should be given to these individual words, but these authorities do not give us much help.

I have read with interest the reasons of Perdue, J., in which he collects and discusses the interpretation given by some Judges and text-writers.

I do not think, however, that the use of the word "personal" confines the suits solely to actions in respect of damages to *personal* property, and it is not very clear whether the word "personal" does not refer to one or other or to both the parties to the suit, and I do not think it is used as contradistinguished to "real." I think I would consider the matter as having the meaning we would give to the expression *in personam* when it is used as contradistinguished to *in rem*.

We must read both these sections together to ascertain the real intention of the legislature—sec. 56(*d*) only excludes suits for ejectment and for the recovery of land. Both of these actions are suits *in rem*. The Act in terms does not anywhere exclude suits for damage to real property. I would interpret it in the way the County Court Judge did.

I concur with Perdue, J., in the conclusion he has arrived at. I would dismiss the appeal.

Howell, C.J.M. Cameron, J.A.

HOWELL, C.J.M., and CAMERON, J.A., concurred.

Appeal dismissed.

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CITY OF RED DEER v. WESTERN GENERAL ELECTRIC CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 26, 1917.

TAXES (§ I F—80)—EXEMPTION—"SPECIAL FRANCHISE"—ASSIGNEE—ASSESSMENT OF FRANCHISE.

A municipal tax exemption, except for school taxes, of the real and personal property of a company includes also its "special franchise," and inures to the benefit of an assignee, although the words "successors and assigns" were not used in the by-law creating the exemption, but were used in the agreement incorporated with the by-law, the municipality assenting to the assignment; it also extends to taxes imposed for

liabilities subsequently incurred by the municipality. As to school taxes, the special franchise is assessable, under sec. 123 of the Municipal Ordinance (Alta. 1913, 2nd sess., ch. 36, sec. 12), with reference to its value as a right apart from the visible assets.

Statement.

APPEAL by plaintiff from the judgment of Ives, J., dismissing the plaintiff's action to recover taxes imposed upon the defendant in respect of the assessment of its special franchise for the years 1914 and 1915, amounting in all with the penalties added for non-payment to $5,050.08. Reversed.

W. E. Payne, for appellant; *Frank Ford*, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—I agree with the opinion and conclusions of my brother Walsh.

I have spent much time in trying to understand the provisions of the Municipal Ordinance as applying to the plaintiff corporation relating to the assessment of land and special franchises, and have finally abandoned the attempt to make any sensible and consistent meaning out of the words of the different sections and have adopted the interpretation which seems to me most consistent with the language used taking the different sections together and having regard to the facts and conditions.

The definition of "special franchise" is simple enough. It is the right to exercise certain powers and privileges on the public ways and places of the city.

The provisions of sec. 121 that the taxes shall be levied upon (1) land, and (2) special franchises in the city, also, so far as this case is concerned, seem clear enough. But when we look to see how land and special franchises are to be valued for assessment purposes, difficulties present themselves.

In the absence of any provision I would take it for granted that they would both be assessed at their real worth or at some definite proportion of their real worth, so that all assessable property in the city would bear the burden of taxes equitably. We find, however, by sec. 123 that land is to be assessed at its fair actual value exclusive of the value of any buildings thereon.

Land is defined as including lands, tenements and hereditaments, and any estate or interest therein and as also including:—(a) land covered with water, and water thereon; (b) trees, etc., and crops, etc., growing on the land; (c) mines and minerals under the land, and (d) in case of special franchise, but in no other case, machinery, fixtures, buildings, structures and other

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things existing, erected, or placed upon, in, over, under or affixed to land, or any highway, road, street, lane, public place, or square or water, but not the rolling stock of any railway or street railway.

It is clear that the things specified are to be deemed land and consequently assessable as land under some circumstances but what "in case of special franchise" means is difficult to understand. It is clear that a special franchise is not any kind of land that can be deemed to have the extended significance and I assume because it seems to me it is probably what was intended that it means that the machinery, fixtures, etc., when owned, or, perhaps, used, by the owners of a special franchise, and used in the exercise of that franchise shall be deemed to be land. The result would be not merely that the machinery, etc., on his own land but also the rails, pipes, or poles as the case might be, situate on or under the public places of the city would be land and the latter would be distinct from the land on or under which they were situate.

This interpretation seems to be somewhat helped by sec. 123 (2). That section as already stated deals with the manner of assessing lands. Sub-sec. (2) provides that:—

> The owner of a special franchise shall, in addition to an assessment on any land owned or occupied by him be assessed on the actual cost of the plant and apparatus used in operating the special franchise, subject to a reasonable deduction for depreciation.

Now it is to be noted that it says he is to be assessed on the plant and apparatus in addition to the land, from which it seems naturally to follow that the plant and apparatus are not land and as only land and special franchises are the subject of assessment —the plant and apparatus apparently must be the special franchise, and my brother Beck concludes that that is what the legislation intends. To my mind a complete answer to this conclusion is that "a right" to do something which a special franchise is, cannot possibly be "plant and apparatus." And if we would be justified in looking at the Edmonton Charter as he does, I cannot see that it furnishes any assistance. It is perfectly true that the legislature could have directed that to ascertain the value of a special franchise for assessment you shall take the value of the plant and apparatus. But it is apparent to any one that the value of a franchise must decrease as it nears the end of its existence while in a growing town or city in most cases the require-

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ments for plant and apparatus would naturally increase and it would become of greater value except for depreciation which if the plant remained serviceable could only be of a limited amount so that if at any time their respective values bore any definite relation to each other that relation must constantly vary.

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Then of what does the plant and apparatus consist? Surely of the machinery, buildings, etc., which are mentioned as being included in the word land when dealing with the assessment of special franchises. It appears to me fairly clear that the word "land" as used in sub-sec. 2 is not used in the sense of the definition which applies "only when not otherwise indicated by the context." I think it rather means "land" as qualified by the first sub-section for assessment purposes, in other words, "land exclusive of buildings."

In this sense sub-sec. 2 is only dealing with assessment of land as we would expect that being the subject matter of the first sub-section, and as the first sub-section directs the method of arriving at the value for assessment of the land without buildings the second directs the method of arriving at the value for assessment of the buildings, etc. This of course leaves a blank as to the method of ascertaining the value of the franchise for assessment, but in the absence of direction one would suppose that it would be assessed at its actual value, however hard it might be to determine that, and such an assessment would be equitable compared with the assessment of land.

Walsh, J.

WALSH, J.:—By agreement of May 29, 1903, made between the Western Telephone Co., Ltd., and the plaintiff, it was agreed by the plaintiff that it would submit to its ratepayers "a by-law providing for the granting to the company immunity from all municipal rates and assessments on all their property during the continuance of this agreement, and upon receiving the approval of the electors entitled to vote thereon, they will promulgate the said by-law and do all acts necessary to be done in order to bring the same into force and effect." By-law No. 51 was passed on December 28, 1903, after being submitted to and receiving the assent of the ratepayers, in which, after reciting the above agreement, it is enacted, "That the property of the Western Telephone Co., Ltd., both real and personal, now or hereafter situate in the said town of Red Deer and used in and appertaining to the said

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business of telephone, electric light, and electric manufacturing works to be so established by the company shall be exempt from assessment and taxation (except for school taxes), for the term of 25 years, commencing with the year 1904." By agreement of September 8, 1904, made between the Western Telephone Co., Ltd., and the defendant, in which the above-mentioned agreement of May 29, 1903, is recited, the Telephone Company did thereby sell, assign, transfer, and set over unto the defendant all of its properties, real and personal, assets, licenses, franchises, including land, buildings, machinery, plant, equipment, materials, good-will, agreements, contracts, rights, remedies and privileges of every nature and kind whatsoever by virtue of incorporation or otherwise. By indenture of October 5, 1904, the Telephone Company granted, bargained, sold, assigned, transferred and set over to the defendant all its estate, right, title, interest, claim and demand whatsoever, both at law and in equity, of, in, and to, *inter alia*, the agreement of May 29, 1903, and all rights, privileges and advantages to be derived therefrom. The plaintiff is a party to this indenture and it thereby assented to and accepted the said assignment.

The principal contention of the defendant is that under the agreement of May 29, 1903, and the plaintiff's by-law No. 51, the Western Telephone Co., Ltd., is absolutely exempted from the payment to the plaintiff of all taxes, except school taxes, for the term of years mentioned, and that it, the defendant, as assignee of the Telephone Company under the agreement and indenture hereinbefore referred to, stands in the position of the Telephone Company with respect to this exemption, and is entitled to enjoy the same immunity from taxation as is thereby conferred upon its assignor.

The first answer that the plaintiff makes to this contention is that it is by-law No. 51 and not the agreement of the parties which creates the exemption upon which the defendant relies, for under the provisions of the Municipal Ordinance applicable to the case such exemption could only be granted by a by-law which before its final passing had received the assent of the ratepayers, and under the by-law it is the property only of the Telephone Company which is exempted, and the Telephone Company alone which can claim the exemption.

If the assessment upon which these taxes have been imposed is of something in respect of which the Telephone Company would have been entitled to exemption, I think that the defendant is equally entitled to it, for, in my opinion, the defendant stands in the Telephone Company's shoes in this particular. In the agreement of May 29th, 1903, the Telephone Company and its successors and assigns are expressly included in the expression "company" which, throughout the agreement, is used to describe it and them, so that the plaintiff by that contract undertook to submit to its ratepayers a by-law granting to the Telephone Company, its successors and assigns, the immunity from taxation above described. By-law No. 51 purports to be submitted in fulfilment of this obligation, for it recites that part of the agreement of May 29, which provides that the council should submit to the electors a by-law granting this exemption, which, though it does not say so in so many words, must, by the practical incorporation of the agreement in the by-law, mean the company, its successors and assigns; and it therefore enacts that the property of the Western Telephone Co., Ltd., which means, I think, the company described in the agreement, shall be so exempt. The indenture of October 5, 1904, was made after the passing of the by-law. Its obvious intent was to substitute the defendant for the Telephone Company under the agreement of May 29, 1903. It recites that the Telephone Company was to provide certain services "upon the terms and conditions therein specified." It assigns "all rights, privileges and advantages to be derived therefrom" to the defendant, which in turn covenants with the plaintiff, "to do and perform all the covenants, conditions, acts, and things in the said hereinbefore in part recited agreements contained, which the company of the first part"—(the Telephone Company)—"in the said agreements covenanted and agreed with the corporation to do." And the plaintiff thereby consented to and accepted the said assignment. The legislature, by sec. 104 of ch. 39 of the statutes of 1906, ratified and confirmed and declared to be binding upon the parties thereto certain agreements set out in the schedule to that Act, and, *inter alia*, the above mentioned agreements of May 29, 1903, and October 5, 1904, and enacted that the plaintiff should "be deemed to have had at the dates of the said agreements respectively full power and authority by its officers to grant the rights and privileges thereby intended to be

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conferred." I think that the effect of the document of October 5, 1904, was to pass to the defendant with the consent of the plaintiff not only the burden but the benefit of the agreement of May 29, 1903, and that even i the plaintiff's contention as to the narrowness of the by-law is well founded, the legislative sanction since given to the last-mentioned agreement is sufficient to broaden it so as to make it apply to the defendants. What I mean is that the plaintiff, by the document of October 5, accepted the defendant as its contractor in the place of the Te ephone Company, and impli dly at least consented that it shou'd have all of the benefits to which the Telephone Company was entitled under it, including exemption from taxation, and that the ratification and confirmation of it and the declaration respecting it contained in the above-mentioned section are sufficient to make it binding upon the plaintiff.

It is quite true that enactments exempting from taxation are construed with strictness, for, as Sir William Ritchie, C.J., put it in *Wylie* v. *City of Montreal* (12 Can. S.C.R. 384, at 386), "taxation is the rule and exemption the exception and therefore to be strictly construed." But here the plain intention of the plaintiff was to exempt from taxation the properties covered by the agreement of May 29, 1903, regardless of whether the franchise thereby conferred was operated by the party named in it or by some other to whom, with the plaintiff's consent, its burdens and its benefits were transferred. It certainly would be most inequitable to permit the plaintiff which has, with the sanction of the legislature, expressly admitted the defendant to the advantages of this contract to cut down those advantages as it seeks to do for so technical and unsubstantial a reason as that which it sets up in support of its attempt to do so.

The next contention is that, even if the defendant is entitled to the protection of the agreement and the by-law, there is no exemption under them from the taxes for the recovery of which the plaintiff sues. The agreement was to submit a by-law exempting the company from taxation on all its property. The by-law is that the property of the company both real and personal shall be exempt. The assessment here is upon the defendant's special franchise, which it is contended is not property at all, either real or personal, and so is not within the protection of the

by-law. It is admitted that the franchise sought to be taxed is that conferred by the agreement of May 29, 1903. In 1903 the plaintiff was subject to the provisions of the Municipal Ordinance, ch. 70 of the Consolidated Ordinances of 1898, sec. 118 of which enacted that "all land and personal property and income in the Territories shall where no other express provision has been made in this respect be liable to taxation," subject to certain exemptions, and where the ratepayer had both income and personal property liable to assessment they were added together and made to constitute his personal property. When this by-law was passed, therefore, all that the company could have been made liable for in taxes was on its assessment for real and personal property. By sec. 121 of the Municipal Ordinance as enacted by sec. 12 of ch. 36 of the Acts passed in the second session of the year 1913 it is enacted that "subject to the other provisions of this Act the municipal taxes of the City of Red Deer shall be levied upon (1) land and (2) special franchises within the said city, and it shall be the duty of the assessor to make an assessment of all the rateable land and special franchises in the manner herein provided." Sub-sec. 10 of sec. 3 of the same Act defines a special franchise in the following words:—

10. "Special franchise" shall mean every right, authority or permission whether exclusive or otherwise to construct, maintain or operate within the city in, under, above, on or through any highway, road, street, lane, square, public place, or public water under the jurisdiction of the city, any poles, wires, rails, tracks, pipes, conduits, buildings, erections, structures or other things for the purpose of bridges, railways, tramways, or for the purpose of conducting steam, heat, water, gas, natural gas, oil, electricity, or any property, substance or product capable of being transported, transmitted or conveyed for the supply of water, heat, light, power, transportation, telegraphic, telephonic or other services.

And sub-sec. 12 of the same sec. 3 says that:—

Land includes lands, tenements, and hereditaments and any estate or interest therein or right or easement affecting the same and also includes

(*d*) In the case of special franchises, but in no other cases, machinery, fixtures, buildings, structures and other things existing, erected or placed upon, in, over, under, or affixed to land, or any highway, road, street, lane, public place or square or water, but not the rolling stock of any railway or street railway.

Then sub-sec. 2 of sec. 123, as enacted in the above sec. 12, says:—

The owner of a special franchise shall, in addition to an assessment on any land owned or occupied by him, be assessed on the actual cost of the plant and apparatus used in operating the special franchise, subject to a reasonable deduction for depreciation.

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This is obviously a new form of taxation, rather, it is the creation of something as a subject of taxation which before was not so subject. Sub-sec. 10 of sec. 3 says what it is, and that is, a right, authority or permission to do some one or more of the things in the sub-section enumerated. It is not the property either real or personal which the party assessed owes and uses in the operation of the franchise, for he may not have a dollar's worth of either and still be liable to assessment in respect of the bare right, authority or permission which he has to construct, maintain or operate one or more of the specified systems. I see no difficulty in the language of clause (*d*) of sub-sec. 12. What it means, I think, is that when one who is assessed in respect of a special franchise is also assessed for land there shall be included in the latter the value of the machinery, fixtures and other things enumerated in the clause. That has nothing whatever to do with the assessment of the special franchise, for if the owner of it has no land the clause is simply ineffective as there is nothing for it to operate upon. Nor, in my opinion, is sub-sec. 2 of sec. 123 to be read as limiting the assessment in respect of a special franchise to the cost of the plant and apparatus used in operating it subject to deduction for depreciation. All that that sub-section means, I think, is that in the case of a special franchise the cost of the plant and apparatus is to be assessed on the basis provided for by the sub-section. Sec. 12 plainly says that taxes are to be levied upon land and special franchises. Sub-sec. 10 of sec. 3 clearly defines what a special franchise is. It would, I think, be doing violence to the language of the statute, which, in so many words, says that the taxes are to be levied upon the right, authority or permission to do one or more of the things specified in the definition, to hold that they are not to be so levied but must be limited to something which is in addition to, and not in substitution for, the thing which the statute says is to be taxed. The expression "special franchise" is not to be found in the Municipal Ordinance which is the plaintiff's charter, nor is it used in the amending Act of 1913 except in connection with matters of assessment or taxation. The provision of sec. 121 that "it shall be the duty of the assessor to make an assessment of all the rateable land and special franchises in the manner herein provided" does not, in my opinion, mean, as counsel for the defendant suggested, that the assessment of a special franchise is

to be made by assessing the actual cost of the plant and apparatus with a depreciation under sub-sec. 2 of sec. 123, and thus limiting it to that. The words "in the manner herein provided" refer I think to the manner of making the assessment for which ample provision is made by other sections, and not to the basis upon which it is to be made. Secs. 124 to 127 inclusive contain full instructions to the assessor as to how his work is to be done, and it is to such provisions as these that I think the reference is in sec. 121. The statute says that taxes shall be levied upon special franchises and that means that taxes shall be levied upon special franchises. It says that a special franchise is a right, authority or permission to do one or more of several specified things, and therefore the statute means that that right, authority or permission must be taxed. If the legislature meant to direct the taxation only under the head of what is specified in sub-sec. 2 of sec. 123 it would, I should think, have defined a special franchise to be the actual cost of the plant and apparatus used in operating every right, authority or permission, etc. Sub-sec. 3 of sec. 3 as enacted by sec. 12 of the amending Act of 1913 provides that "no person who is assessed in respect of any special franchise shall be liable to pay a license fee in respect of such special franchise" which lends some strength to the plaintiff's argument. My opinion, which, because of the view that I take of the next point that I shall discuss, is of importance only upon the question of the quantum of the defendant's liability for school taxes, is that under this amending legislation what is to be assessed as a special franchise is the right, authority or permission which the defendant enjoys under the agreements with the plaintiff and in addition, either as land or as special franchise the actual cost of its plant and apparatus less depreciation.

I think, however, that even in this view the only liability of the defendant for taxes in respect of this assessment is for school taxes, for, in my opinion, the right, authority or permission which the defendant so enjoys is property within the meaning of the by-law and is therefore exempt from taxation except for school purposes. There is to be found in Williams on Real Property, 22nd ed. at pp. 3 and 4, an explanation of the term "property," which Chitty, J., in referring, doubtless, to the same language in an earlier edition of this work, says in *Re Earnshaw-Wall*, [1894] 3 Ch. 15 , 63 L.J. Ch. 836, is "a well-reasoned explanation of the

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term as meaning both the thing to which a person stands in the relation of proprietor and the relation in which the person stands to the thing." In that explanation the author says that the word "property" is mainly used by lawyers in three senses, one of which is "as denoting valuable things,—things which can be turned into money or assessed at a money value; in other words, rights which may be exchanged for the ownership of money. It is in this last sense that the word "property" seems to be used when a man speaks of all his property or of his real as opposed to his personal property. Property, then, may mean either (1) ownership or (2) the objects or an object of ownership, or (3) valuable things, according to the context." He then proceeds, "and property, as meaning valuable things, includes incorporeal as well as corporeal things. That is to say, property consists of two kinds of things, (1) tangible things in their owner's possession, (2) valuable rights of various kinds unaccompanied with the possession of anything corporeal." In *Jones* v. *Skinner*, 5 L.J. Ch 87, Langdale, M.R., at p. 90, says: "It is well known that 'property' is the most comprehensive of all terms which can be used, inasmuch as it is indicative or descriptive of every possible interest which the party can have." This, however, was a case involving the construction of that word in a will, which might, perhaps, make some difference. In *Comm. of Inland Revenue* v. *Angus* (1889), 23 Q.B.D. 579, in the Court of Appeal, Lord Esher, M.R., at p. 590, says:—

> Now the property which was to be conveyed in the present case is a legal property. I have no doubt that the "good-will" of a business is "property" within the meaning of the section. It is always treated as property between a purchaser and a seller, and it is a legal property.

The section there under consideration was sec. 70 of the Stamp Act which required the affixing of a stamp to every instrument by which any property upon the sale thereof is legally or equitably transferred.

In *Potter* v. *Commissioners of Inland Revenue*, 10 Ex. 147, 23 L.J. Ex. 345, the same conclusion was reached. In Armour on Real Property, 2nd ed., at p. 17, it is said:—

> An incorporeal hereditament is a right issuing out of a thing corporate, (whether real or personal) or concerning, or annexed to, or exercisable within the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like, but something collateral thereto, as a rent issuing out of those lands or houses or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance which may

be always seen, always handled; incorporeal hereditaments are but a sort of accidents which inhere in and are supported by that substance, and may belong or not belong to it without any visible alteration therein. Their existence is merely in idea and abstract contemplation, though their effects and profits may be frequently objects of our bodily senses.

And he gives a franchise as an instance of an incorporeal hereditament, as do all the text writers.

The exemption given by this statute is of the property of the company, both real and personal. These words are exceedingly broad, for there are but two kinds of property, real and personal. The right which the defendant is entitled to enjoy under the agreement with the plaintiff and which the plaintiff now seeks to tax is the exclusive right to enter upon and use the streets, lanes, thoroughfares, rights of way, bridges, public squares and any other property under the jurisdiction and control of the plaintiff for the purposes of lighting the streets of the city and for its other purposes. That is a right which is an integral part of the defendant's system and is therefore of great potential value to it, for without it the system would be incapable of operation. That, in my opinion, makes it property within the meaning of the by-law, and it is therefore exempt from taxation except for school purposes.

Finally, it is argued that the exemption created by this by-law only extends to such taxes as are levied to meet such indebtedness as the plaintiff had at the time that it was passed and does not carry immunity to the defendant from rates imposed to meet liabilities which the plaintiff has since contracted. In 1903 when the by-law was passed the annual payment on the plaintiff's debenture indebtedness was but $341. In 1915 it had been increased to $26,679 by borrowings for waterworks, sewers, parks, sidewalks and office building. The authority relied upon for this proposition is *Sion College* v. *The Mayor, etc., of London*, [1901] 1 K.B. 617, a judgment of the Court of Appeal which held that under a statute vesting reclaimed lands in the adjoining owners, "free from all taxes and assessments whatsoever," the exemption applied only to then existing taxes and assessments or others substituted for them and that a rate which was substantially a new assessment was not within it. This case, however, was under review by the House of Lords in *Associated Newspapers* v. *City of London*, [1916] 2 A.C. 429, a case arising under the

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same statute as the *Sion College* case; and it was thereby overruled in so far as it decided that the exemption granted by the Act applied only to taxes and assessments in existence at its date. But for the judgment in the *Sion College* case I should have thought the point not open to argument, but with that judgment overruled as it has been by the House of Lords it can no longer be relied upon by the plaintiff and so effect cannot be given to this contention.

For these reasons I am of the opinion that the judgment, in so far as the purely municipal taxes are concerned, is right. The plaintiff is, in my judgment, entitled to recover the school taxes. The trial Judge concluded his reasons for judgment by saying that "the plaintiff's action to recover municipal taxes from the defendant should be dismissed with costs," but said nothing about the school taxes. The formal judgment, as entered by the defendant's solicitors, wholly dismisses the action; a plain intimation of their understanding that, in the opinion of the trial Judge, the defendant was not under liability even for the school taxes. It was stated on the argument, however, that the entry of the judgment in this form had been a subject of correspondence between the solicitors and that notwithstanding such entry the question of the intention of the trial Judge with respect to the school taxes was still an open one, though Mr. Ford at the trial said, "We have never disputed the liability for the school taxes." The attitude of defendant's counsel, however, throughout the argument of the appeal, and until near the close of it, was strongly suggestive of at least a hope on their part of being able to free their client from liability for the school taxes. I would vary the judgment entered after the trial by providing for the payment to the plaintiff by the defendant of the school taxes for 1914, amounting to $630 and for 1915, amounting to $585, making in all $1,215, and the penalty upon each of these two sums under and calculated in the manner provided by sec. 156 of the Municipal Ordinance as enacted by sec. 16 of the above mentioned amending Act of 1913, and otherwise I would dismiss the appeal except as hereinafter directed with respect to costs.

The plaintiff should have its costs down to and including the trial. It sued for $4,580 as taxes and in addition for the penalty imposed by the Act for non-payment. The school taxes were included in this sum, there being no distinction in the claim

between municipal and school taxes. There is no admission in the defence of the defendant's liability for the school taxes; on the contrary, the defence, as a whole, is a denial of the defendant's liability for any of the taxes sued for. The plaintiff was forced to a trial to get judgment for the school taxes. It is therefore in the position of one who having sued for $4,580 and penalties as one entire claim gets a judgment for $1,215 and penalties, and for this reason should have its costs on the proper scale down to judgment.

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In view of the divided success on the appeal, I think a fair order as to the costs of it would be to direct that the plaintiff pay to the defendant two-thirds of its costs of the appeal taxed under column 4, and that otherwise there be no order as to such costs, and I would so order.

Stuart, J.

STUART, J., concurred with WALSH, J.

Beck, J.

BECK, J. (dissenting in part):—My brother Walsh holds (1) that the defendant company is entitled to the benefit of the agreement in question made between the city and the Western Telephone Co. Ltd.; (2) that the defendant company is, by virtue of that agreement, entitled to exemption from municipal taxation (excluding school taxes) and that such exemption exempts the company's "special franchise."

He would, therefore, affirm the judgment of the trial Judge so far as it relates to strictly municipal taxes. To this extent I agree with him.

There is, however, the further question, namely, the company being admittedly liable for school taxes, is the assessment of the company's "special franchise" a valid assessment for the purpose of assessment for school purposes. The provisions of the law relating to Red Deer with reference to the taxation of a special franchise, ch. 36 of 1913, 2nd sess., sec. 3, sub-sec. 10 and sub-sec. 12 (quoted by WALSH, J.) are, in my opinion, in effect, provisions limiting and restricting the power of assessment and, to the extent that they do so, are provisions for exemptions.

Where, in the face of such provisions, an assessment is made in contravention of them, it is not necessary that there should be an appeal to the Court of Revision, and, if such an appeal is taken, a refusal to recognize and allow the claim of exemption is ineffective—because it is a question of jurisdiction—and the question

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can be raised on an attempt to collect the taxes. See *Rural Mun. of Bow Valley* v. *McLean*, 26 D.L.R. 716; *Varson* v. *Vegreville*, 28 D.L.R. 734.

The provisions quoted relating to special franchises are certainly taken from the Edmonton Charter (ch. 19 of 1904). In that Charter "Special Franchise" is defined by sec. 2 sub-sec. 8, Title I., in the same words as in the provision relating to Red Deer.

Sub-sec. 12 reads: "'Land' includes lands, tenements and hereditaments and any estate or interest therein or right or easement affecting the same and (subject to the provisions hereinafter contained 'land' also includes for assessment purposes." The sub-clauses (*a*), (*b*), (*c*) and (*d*) are substantially in the same words as the provisions relating to Red Deer.

In the Edmonton Charter "Special franchise" is referred to in more than one place dealing with such a privilege apart from the question of assessment or taxation.

Then under the caption "Title XXXII—Taxation" sec. 1, the Edmonton Charter provides that municipal and school taxes shall be levied upon (1) land, (2) businesses, (3) income, and (4) special franchises; and sec. 3 lays down the *mode* of taxation (1) land, (2) businesses, (3)—no mode is *here* laid down but a mode has already been laid down by the interpretation clauses. (Title I. sec. 2, sub-sec. (6)) and (4) the mode of assessing a special franchise is laid down in these words:—

> The owner of a special franchise shall not be assessed in respect of business and income but, in addition to an assessment on land, shall be assessed for the actual cost of the plant and apparatus less a reasonable deduction for depreciation.

The provisions relating to Red Deer must, in my opinion, be interpreted in the same way.

The definition of special franchise (1913, 2nd Sess. ch. 36, sec. 3, sub-sec. 10) has its application quite apart from the assessment and taxation clauses. Such special franchises are provided for by ch. 21 of 1901, an ordinance respecting water, gas, electric and telephone companies, and possibly by special statute.

When the question of assessment comes up we go to sub-sec. 12 and sec. 123, and the only things to be assessed are (1) land, (2) special franchise. Under "land" there would be assessed not only land (sub-sec. 12, (*a*)) but (sub-sec. (*d*)) "machinery, fixtures, buildings, structures and other things existing, erected

or placed upon, in, over, under or affixed to land or any highway, road, street, lane, public place or square or water."

Under "Special franchise" there would be assessed (sec. 123 (3)) not land proper; not the various structures above defined to be included in "land" for assessment purposes; but the actual cost of the plant and apparatus, not included in the above definition.

I think it clear that though a special franchise is a right and something distinct from visible property, yet for assessment purposes, both under the Edmonton Charter and equally under the Red Deer Charter, the value of that right,—one difficult of estimation and varying year by year,—is not intended to be taxed, but only the visible assets of the franchise holder. Doubtless the idea of the framers of the legislation was that the municipality would probably in most cases receive its fair return for the grant of the special franchise by way of some share in the annual profits derived from the franchise.

Coming to the actual assessment, it does not appear what was the basis of it for the year 1914, but for the year 1915 it appears that there was an attempt to value the special franchise as a right and that the actual cost of the plant and apparatus was not taken into account.

On these facts I would declare the assessment for 1915 invalid, and would let judgment go in favour of the plaintiffs for $630 only, with the statutory penalties and interest for the school taxes of 1914. *Appeal allowed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Duff, Anglin and Brodeur, JJ. February 6, 1917.

1. DAMAGES (§ III L—255)—EXPROPRIATION—DATE OF VALUATION—BENEFITS—SEVERANCE.
In fixing compensation for lands expropriated under the Ontario Railway Act, the date for valuation is that of the service of notice to the owner under sec. 68. Benefit to other lands not taken should not be considered when fixing compensation for the land taken. Where the land expropriated forms an important part of one holding, as in the case of subdivision lands, compensation must be made for consequential injuries resulting from severance, and of loss of access hampering the use and disposal of the remainder.

2. ARBITRATION (§ III—17)—REVIEW OF AWARD—CONCLUSIVENESS.
An appellate Court treats an award as a judgment of an inferior Court, and in the absence of error or misconduct on the part of the arbitrators will not interfere with it.

3. EVIDENCE (§ XI F—790)—VALUE OF LAND—SALES.
Evidence of sales subsequent to the date of filing expropriation plans is admissible to prove the value of the lands expropriated.

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Fitzpatrick, C.J.

Davies, J.

Duff, J.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Ontario affirming the arbitrators' award on an expropriation of respondent's land by the appellant company. Affirmed.

R. B. Henderson and *O'Connor*, for appellant.

FITZPATRICK, C.J.:—I concur in the judgment of ANGLIN, J., dismissing this appeal with costs.

DAVIES, J.:—I assent to the judgment proposed dismissing this appeal, with very great reluctance. That reluctance is occasioned by my belief that the damages awarded are greatly excessive.

If I had been sitting in the first Court of Appeal, I think I should have voted to set the award aside on the ground that the valuation of the arbitrators was excessive and not justified by the evidence.

But sitting in this final Court of Appeal, I cannot ignore the fact that the Court of Appeal for Ontario (2nd Division) has unanimously confirmed that valuation. I have not been able to find that the arbitrators proceeded upon any wrong principle in making up their award.

For some time I wavered considering whether, under the proved facts and the evidence, I should not, even in the face of the approving judgment of the Court of Appeal, allow the appeal on the ground that the valuation was so excessive as almost to shock one.

After reflection and consultation with my colleagues I have decided to assent to the judgment dismissing the appeal.

DUFF, J.:—The first question is: What is the date with reference to which the value of the land taken and compensation for damages are to be ascertained? The decision upon this question must be the same whether the rights of the parties are ruled by the Ontario Railway Act of 1906 or by the Ontario Railway Act of 1913.

I think it is the Act of 1906 to which we must look, for the reason that, when the Act of 1913 came into force (July 1, 1913) the respondent's right to compensation had accrued. This follows from a consideration of certain provisions of the Act of 1906 as amended by an Act of 1908. This last mentioned Act (ch. 44, sec. 5), amending sec. 68 of the Act of 1906, provides for the

service of a notice upon the owner giving a description of the land to be taken, a declaration of readiness to pay a specified sum or rent as compensation giving also the name of the person to be appointed as arbitrator on behalf of the railway company and for the appointment of arbitrators in the case of failure on part of the owner to accept the sum offered and the ascertainment of the proper compensation by the arbitrators so appointed. Service of this notice is an election by the railway company to take the lands to which it relates subject to the right of abandonment given by sub-sec. 17. Notwithstanding this provision for abandonment I think the right of the owner upon the service of notice becomes a right which may be put into effect by the appointment of an arbitrator subject, however, to defeasance by the exercise on part of the railway company of the right of abandonment on the conditions prescribed by sub-sec. 17. He, therefore, has a status not prejudicially affected by repealing or amending legislation in the absence of some express or necessarily implied enactment that such legislation shall so operate: *Main* v. *Stark*, 15 App. Cas. 384. It follows that the right of the respondent was a right to be compensated according to the principles laid down by the Act of 1906 and the amendments which had been passed down to the time the notice was given. Sec. 68 of the Act of 1906 as amended in 1908 evidently contemplates a valuation as of the date of the notice. But if we are governed by the Act of 1913, by sec. 89 (2) of that Act the date of the "acquisition" of the property is the decisive date when the property is not acquired within one year after the deposit of the plan and book of reference.

The contention advanced on behalf of the appellant railway company that compensation is to be ascertained by reference to the date of the deposit of the plan, profile and book of reference (sec. 89, sub-sec. 2 of 3 & 4 Geo. V., ch. 36) therefore fails, and compensation must be ascertained by reference to a date not earlier than the date of service of the notice under sec. 68 of the Act of 1906 amended as above indicated. The arbitrators have decided that it is immaterial as affecting the amount of compensation to be awarded whether this date be taken to be that of the notice which was March 3, 1913, or that of the warrant of possession which was April 2 in the same year. There seems to be no reason to doubt the correctness of this and consequently the view of the

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arbitrators on the first point is one to which I think no exception can be taken.

The next question to be decided is whether certain provisions of the Ontario Railway Act (ch. 207, sec. 20, sub-sec. 9, R.S.O., 1897), are applicable which require the arbitrators in deciding upon the amount of compensation to be awarded are to ascertain the increased value given to the lands not taken by reason of the "passage of the railway through or over the same or by reason of the construction of the railway where the railway is to pass through such lands" and that such increased value is to be set off against the "inconvenience, loss, or damage arising from the taking possession or the using of such lands."

The argument is based upon sec. 44 of the company's special Act, passed in 1901 (1 Edw. VII., ch. 91), and it is in substance that this sec. 20, sub-sec. 9, of the Ontario Railway Act (ch. 207, R.S.O., 1897), is by the provisions of the special Act made an integral part of that Act and that it continues to apply to the company and company's works by force of the special Act itself quite independently of the Railway Act, R.S.O., 1897, ch. 207, and that consequently it remained unaffected by any amendment of the last mentioned enactment. The conclusive answer to this argument is found in the last sentence of sec. 44 of the special Act:—

> And the expression "this Act" when used herein shall be understood to include the said clauses of the said Railway Act and of every Act in amendment thereof so incorporated with this Act.

The concluding words "so incorporated with this Act" cannot be read as governing the words "every Act and amendment thereof" without depriving these last mentioned words of all office because the "clauses of the Railway Act of Ontario" (meaning indisputably ch. 207, R.S.O. 1897), specified in the earlier sentence of sec. 44, are the provisions which have been "so incorporated." That expression "clauses of the Railway Act of Ontario" either does or does not include amendments of those clauses. If it is to be read as including them, then *cadit quæstio;* if it does not, then "every Act and amendment thereof" must be taken to add something to the phrase "the said clauses of the said Railway Act" and if the phrase add anything, there is no reason for putting any limitation upon the meaning of it which would exclude the amendment by which sec. 20 (9), of the Railway Act became non-operative.

The next question is whether under the Railway Act of 1906 itself, which does not include any provision corresponding to sec. 20 (9) of the Railway Act (ch. 207, R.S.O. 1897), the arbitrators are bound to allow a set-off as against the compensation that would otherwise be payable in respect of injurious affection.

Mr. Henderson argues that as the owner is entitled only to compensation for loss it is necessarily involved in this, that in estimating the amount of compensation allowance must be made for any increase in value due to the construction of the railway.

"The principles," said Lord Buckmaster delivering the judgment of the Judicial Committee of the Privy Council in *Fraser* v. *City of Fraserville*, 34 D.L.R. 211, 33 Times L.R. 179, January 25, 1917:

> which regulate the fixing of the compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *Lucas* v. *Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; *Cedars Rapids Manufacturing Co.* v. *Lacoste*, 16 D.L.R. 168, 30 Times L.R. 293, [1914] A.C. 569, and *Sidney* v. *North-Eastern R. Co.*, [1914] 3 K.B. 629, and the substance of them is that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired.

To this may be added a reference to Lord Justice Moulton's observations in *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, that the owner receives for the lands he gives up their equivalent, that is, that which they are worth to him in money. The property is therefore not diminished in amount but to that extent is "compulsorily changed in form."

A good deal, no doubt, may be said in favour of the view that a rigorous application of the principle of compensation thus stated excludes from consideration, in estimating the value of the lands taken on the appropriate date, any elements of value due to the existence of the railway scheme and as regards damages would necessitate the taking into account of any augmentation of value in the lands with respect to which damages are claimed that would flow from the construction or operation of the railway.

I think this is not the correct principle for estimating value or damages under either the Act of 1906 or the Act of 1913. By the Act of 1913 a date is given with reference to which the value of the land taken, or damages as the case may be, must be ascer-

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tained and it is not denied that where this value can be ascertained by reference to the price which could be obtained on a sale to others than the railway company, the claimant is entitled to compensation to the full extent of the value so ascertained.

The Act of 1906, it is true, does not explicitly appoint a time with reference to which the value of the lands taken is to be fixed, but having arrived at the conclusion that the statute sufficiently indicates for that purpose the date of the service of the notice the same result follows.

As to damages, it is clear, I think, that the claimant is entitled to demand as compensation the difference between the value of the property affected on the date with reference to which the damages are to be appraised, as it would be if the railway were not to run through part of it and that which it is in fact worth to the owner in money on that date taking into consideration the fact that it is to be traversed by the railway.

Mr. Henderson's next point is that compensation has been awarded on the assumption that the block of 27 acres would be subdivided and sold in lots; on that assumption the owner would not, he argues on the authority of *Holditch* v. *C.N.R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536, be entitled to compensation for damages in respect of the whole of the block, but only in respect of those lots which the railway actually crosses. The owner, he contends, cannot claim compensation on two inconsistent assumptions that the property is to be subdivided and sold, and compensation for damages in respect of the part not taken on the assumption that it is to remain as it is.

I think the arbitrators have not proceeded upon inconsistent assumptions, they have, I think, considered the property as a property capable of subdivision and of producing certain returns for the owner in that state. And as compensation they have allowed the difference between the value of the block as of the appropriate date if it were to remain untouched by the railway and its value on the hypothesis that it is to be traversed by the railway. I think they were right in this. The claimant is entitled to say: "My block of land in its existing condition would now be worth so much in its entirety for the purposes of subdivision without the railway; it is now worth so much less if the railway is to cross it. I claim compensation for the difference."

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The final contention of Mr. Henderson is that the amount awarded is demonstrably excessive.

The whole block, of which part (a strip along Dundas Street 40 ft. wide) was taken, was an area of 27 acres, about 10 miles west of the Toronto market, which about 3 weeks before the notice was served had been bought by Everson for the price of $926 an acre, about $25,000 in the aggregate. The land actually taken had an area of three acres, and for it the arbitrators allowed as compensation a little over $5,000 as well as $3,000 as compensation for injury to the part retained.

The right of appeal from the award of the arbitrators is given by sub-sec. 15 of sec. 90 of the Ontario Railway Act of 1913 in language not substantially different from that of R.S.C. (1906), ch. 37, sec. 209(1), which language was under consideration in *Atlantic and North West R. Co.* v. *Wood*, [1895] A.C. 257, where Lord Shand delivering judgment for the Judicial Committee stated the effect of the enactment to be the providing for a review of the judgment of the arbitrators as if it were the judgment of a subordinate Court, it being the duty of the first appellate Court to examine the evidence and while not superseding the arbitrators entirely, giving effect to the Court's own view if satisfied that the view of the arbitrators is wrong. The fact that the Ontario Court of Appeal whose duty it was so to review the decision of the arbitrators has unanimously confirmed the award and without comment, is a serious obstacle in the way of the appellants here. In *Johnston* v. *O'Neill*, [1911] A.C. 552, at 578, Lord Macnaghten said:—

> The appeal is in reality an appeal from two concurrent findings of fact. In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong. In a Scotch case, *Gray* v. *Turnbull*, L.R. 2 H.L. Sc. 53, where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither Court saw the witnesses, Lord Westbury, after referring to the practice in Courts of equity to allow appeals on matters of fact, makes this observation: "If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever." In an English case, *Owners of the P. Caland* v. *Glamorgan Steamship Co.*, [1893] A.C. 207, Lord Watson expressed himself as follows: "In my opinion it is a salutary principle that Judges sitting in a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous, and the principle appears to me

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especially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability."

The appellants' situation is not improved where the first tribunal has had the advantage of a view and where the controversy relates entirely to the value of land, a subject in most instances full of uncertainty. There is a crowd of recent cases in which this principle had been accepted; *Montgomerie & Co.* v. *Wallace-James*, [1904] A.C. 73; *Greville* v. *Parker*, [1910] A.C. 335; *The Glasgow*, 112 L.T. 703, are examples. Except in regard to the points already discussed and disposed of Mr. Henderson does not argue that the award itself gives evidence of the arbitrators having misdirected themselves; his contention is that the evidence supplied by actual sales of property in the vicinity and of the price paid for this very block only three weeks before the service of the notice, conclusively demonstrates—if the price paid on actual sales is to be accepted as the true test—that the actual selling value of the property taken was much less than the arbitrators found it to be; and that the arbitrators erred in principle by largely disregarding the proper inferences from the facts proved in relation to actual sales and in giving predominant weight to the opinions of real estate experts which could not be supported by reference to actual transactions.

I do not think that there are sufficient grounds for inferring that the arbitrators failed to appreciate the distinction between evidence of this class and evidence of value supplied by actual sales of the very property to be valued within a short space of time before or after the appointed time with reference to which the valuation was to be made. The area taken by the railway was about one-ninth of the total area of the block, and taking the price paid by Everson as a guide, $25,000, and treating all the property as of equal value, the value of the property taken would be about $2,600, while the compensation awarded for this property was $5,300; but this seeming disparity must be considered in light of the fact that in proportion to its size this area was by far the most valuable part of the property. And, moreover, I am not convinced that the arbitrators were wrong in thinking, as they evidently did think, that Everson's vendor had not appreciated the advantages to be gained by subdividing the property.

I think the appeal should be dismissed with costs.

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ANGLIN, J.:—The majority award on an arbitration under the Ontario Railway Act allowed to the landowner as compensation for land taken and injury to his remaining property $8,365. The Appellate Division, after reservation of judgment, but without assigning reasons, unanimously dismissed an appeal by the railway company. From that dismissal the company now appeals on these grounds:—

(a) The lands should have been valued as of the date of filing the plan, profile and book of reference—22nd February, 1912—and not as of the date of the notice served on the owner under sec. 68(1) of the Railway Act 1906—3rd March, 1913.

(b) Enhancement of value of the owner's property not taken, due to the advent of the railway, should have been deducted from the damages awarded.

(c) Evidence of sales subsequent to the filing of the plan and even to the order for possession was wrongly received.

(d) The compensation allowed was grossly excessive; the value of the lands was fixed arbitrarily, or by compromise or average, and was not based on market value; the lands should have been valued as farm lands on an acreage basis and not as building lots on a frontage basis.

(e) If valued as business lots compensation should not have been allowed in respect of lots of which no part was actually taken, there having been as to them no severance entitling the owner to compensation; and nothing should have been allowed for loss of, or interference with, access.

(a) Whether the Railway Act of 1906 (6 Edw. VII., ch. 30), or the Railway Act of 1913 (3 & 4 Geo. V., ch. 36), should govern, the valuation was properly made as of the date at which the notice to the owner was given. The order for possession followed this notice within one month and there was no material change in the interval. More than a year having elapsed between the filing of the plan and the actual acquisition of the land, if the Act of 1913, governs, under sec. 89(2) compensation must be ascertained as of the date of such acquisition. If the Act of 1906 applies, although notice of the deposit of the plan is by sec. 67 declared to be general notice to all persons owning lands shewn thereon of the lands required for the railway, until the notice to the owner prescribed by sec. 68 is given, the land to be taken is not fixed, since the

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company may desist, or may deviate within the limit of one mile from the line as located on the filed plan (sec. 59, sub-sec. 13). Moreover, this notice must be accompanied by a declaration of the company's readiness to pay a sum certain as compensation for the land or damages, which a disinterested Ontario land surveyor must certify to be fair. No other date being mentioned, the compensation here referred to is presumably based upon valuation as of the date of the notice and certificate. There is no provision in the Ontario Railway Act of 1906, such as is found in the Dominion Railway Act (R.S.C. ch. 37, sec. 192(2); 8 & 9 Edw. VII. ch. 32, sec. 2), and in the Ontario Railway Act of 1913 (sec. 89 (2)), making the date of deposit of the plan, profile and book of reference the date with reference to which compensation shall be ascertained if the lands are actually acquired within 1 year thereafter. Under these circumstances I think the notice to the owner given by the company as directed by sec. 68 of the Act of 1906, under which it professed to proceed, should be regarded as the equivalent of the notice to treat under the English Lands Clauses Consolidation Act of 1845. The compensation was properly ascertained as of the date when it was given.

(*b*) Sec. 53 of the Ontario Railway Act of 1906 (sec. 59 of the Act of 1913; compare sec. 16 of the English Railway Clauses Act of 1845; the Lands Clauses Consolidation Act of 1845 has been held to imply the same right of compensation: *The Queen* v. *Vestry of St. Luke's*, L.R. 6 Q.B. 572, at 576; *Ricket* v. *Metropolitan R. Co.*, L.R. 2 H.L. 175, at 187, 7 Q.B. 148, at 152), requires railway companies to "make full compensation . . to all parties interested for all damage by them sustained by reason of the exercise of (the companies') powers."

Neither in that Act nor in the Act of 1913 is there any provision, such as is found in the Ontario Municipal Act, directing that the compensation to be allowed shall be confined to damages "beyond any advantage which the owner may derive from the work," (R.S.O. 1914, ch. 192, sec. 325(1)), or such as is found in the Dominion Railway Act (R.S.C., 1906, ch. 37, sec. 198), that arbitrators in fixing compensation shall take into consideration and shall set off against the inconvenience, loss or damage occasioned the increased value, beyond that common to all lands in the locality, that will be given to any lands of the opposite party

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(*i.e.*, in a case such as this, of the owner) through or over which the railway will pass by reason of the passage of the railway through or over the same, or of the construction of the railway. In the absence of any such provision the authorities under the English Lands Clauses Consolidation Act seem to establish that no deduction from the set-off against the full satisfaction . . for all damage (Railway Clauses Consolidation Act, sec. 16), which the company is required to pay, may be allowed for any benefit or advantage to the owner's lands—whether common or peculiar—due to the advent of the railway: *Eagle* v. *Charing Cross R. Co.*, L.R. 2 C.P. 638; *Senior* v. *Metropolitan R. Co.*,2 H. & C. 258.

By a former Railway Act of Ontario (R.S.O., 1897, ch. 207) express provision was made in sub-sec. 9 of sec. 20 for the set-off of increased value similar to that in the earlier Dominion Railway Acts of 1879 and 1888, upon which *Re Ontario and Quebec R. Co. and Taylor*, 6 O.R. 338, 348, and *James* v. *Ontario and Quebec R. Co.*, 12 O.R. 624, at p. 630; 15 A.R. (Ont.) 1, were decided. In the Ontario Railway Act of 1906, which repeals ch. 207 of the R.S.O., 1897, sec. 68 replaces sec. 20 of the Revised Statute, which it amends by omitting sub-sec. 9 and in lieu thereof inserting as sub-sec. 8 (sub-sec. 9 of sec. 90 in the Act of 1913), a clause directing the arbitrators, besides awarding the value of the lands taken, to state the total amount payable for damages. It would therefore seem that, instead of limiting the set-off to benefit peculiar to the owner's lands as distinguished from that common to all lands in the locality, as the Dominion Parliament had done by the Railway Act of 1903, sec. 161, the Ontario legislature deliberately eliminated consideration by the arbitrators of any benefits or advantages to owners and did away with any deduction or set-off on that account in favour of the railway companies.

There appears to be no distinction between sec. 53 of the Ontario Railway Act of 1906 and the proviso to sec. 16 of the English Railway Clauses Act of 1845. The appellants, therefore, cannot escape the application of the decisions in *Eagle's* and *Senior's* cases. But for the line of decisions to which those cases belong, and the peculiar course of the Ontario legislation, to which I have adverted, I should have required to consider very carefully what I conceive may have been the view of the late Mr. Justice

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Street, that compensation to a landowner, part of whose property has been taken, for the damage he sustains from the execution of a work authorized in the public interest, implies recouping him for his net loss thereby occasioned after credit has been given for such benefit as will accrue from the work to his remaining property: *Re Pryce and City of Toronto*, 16 O.R. 726; *Re Richardson and City of Toronto*, 17 O.R. 491, at 493. But it may be that in these cases the learned Judge was merely expressing his view of the effect of the Ontario Municipal Act, which provides for deduction of the value of any advantage to be derived by the landowner from the work.

Pierce, in his work on Railroads, says at p. 211:—

> The general rule of damages, which covers the part taken and the remaining land, is, that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking.

This method of adjusting the compensation gives the railway company credit for benefit or advantage derived by the owner. See too *Bauman* v. *Ross*, 167 U.S.R. 548, at p. 574.

Mr. Henderson argued that because sec. 20 of ch. 207, R.S.O. 1897, was expressly incorporated in the appellant company's private Act (1 Edw. VII., ch. 91), sub-sec. 9 of that section, notwithstanding its repeal, remains in force as to it. But the incorporating section (No. 44), though awkwardly phrased, seems to make it reasonably certain that it was the purpose of the legislature that amendments from time to time made to such provisions of the general Railway Act as were incorporated in the appellant company's special Act should be automatically embodied therein. It therefore seems unnecessary in this case to reconsider the effect of the provision of the Interpretation Act (now found in ch. 1 of the R.S.O. 1914, as sec. 16 (*b*) dealt with in *Kilgour* v. *London Street R. Co.*, in which the decision of the Appellate Division, 19 D.L.R. 827, 30 O.L.R. 603, which also supports the respondent's contention, was affirmed in this Court upon an even division of opinion.

(*c*) Evidence of sales between the date of deposit of the plan and that of giving of notice to the owner was properly received. To whatever objection the evidence of sales subsequent to the latter date may be open, any such evidence admitted would appear not to have affected the result. Evidence of *bonâ fide* sales within

a short time after an expropriation accompanied by proof that there had been no material change in value in the interval, would seem to me relevant and admissible.

(*d*) While I incline to the view that the compensation awarded is excessive and that sufficient weight was possibly not given by the arbitrators to the sale of the property in question at a price equivalent to $926 an acre made by Wood to Everson only 3 weeks before the notice to the owner was served, the record undoubtedly contains a substantial body of evidence which supports the view that the value of the property was properly estimated on a basis of subdivision and that at the date of the expropriation there was a market for it as building lots at prices at least as great as those on which the arbitrators proceeded. The reasons for the award given by the majority of the arbitrators shew that they made what they deemed the real value of the property to the owner at the date of expropriation the basis of their valuation. They "tried to look at the matter in the way that would produce the least damage." The amount awarded, while considerably larger than the railway company's estimate of the proper compensation, was very much less than the owner's claim and the estimates of his witnesses. It is true that the precise values on which the arbitrators base their award are not to be found in the testimony of any witness on either side. But it must not be forgotten that they had the advantage of a view of the property. They were not bound to adopt the estimate or opinion of any witness or set of witnesses as to value: *Calgary and Edmonton R. Co.* v. *MacKinnon*, 43 Can. S.C.R. 379. That they did not do so by no means warrants the conclusion that the result at which they arrived was reached by compromise or by averaging the values deposed to by witnesses on either side. Not disregarding the evidence, but giving effect to such of it as they deemed credible and trustworthy, and taking into account the facts disclosed by their view of the property and their knowledge of surrounding conditions, it was the arbitrators' duty to form and to express their own opinions as to value and damages and there is nothing to shew that duty was not conscientiously discharged.

The right of appeal is conferred by sub-sec. 15 of sec. 90 of the Ontario Railway Act of 1913 (R.S.O. 1914, ch. 185, sec. 90, sub-sec. 15) in terms similar to those of the Dominion Railway

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Act (R.S.C. 1906, ch. 37, sec. 209 (1). The Court is directed to "decide any question of fact upon the evidence taken before the arbitrators as in a case of original jurisdiction."

The effect of this provision has been determined by their Lordships of the Judicial Committee to be that the Appellate Court "should review the judgment of the arbitrators as they would that of a subordinate Court, in a case of original jurisdiction, where review is provided for." *Atlantic and North West Railway Co.* v. *Wood*, [1895] A.C. 257, at 263. Demonstrable error in principle should not be exacted as a condition of interference: *James Bay R. Co.* v. *Armstrong*, [1909] A.C. 624, at p. 631. The Appellate Court is bound to examine the evidence, not entirely superseding the arbitrators, but correcting any erroneous view of it which it is apparent they have taken. Due regard is to be paid to their findings, and the provision of sub-sec. 16 of sec. 90 of the Act of 1913, that:—

> Upon the appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from an award under the Arbitration Act

is not to be lost sight of. A similar provision of the Dominion Railway Act is noticed by Lord Shand in *Atlantic and North West R. Co.* v. *Wood*, [1895] A.C. 257, at 263. I shall deal with the award in the manner laid down by these high authorities as I understand them.

While by no means satisfied that if disposing of the matter as a Judge of first instance, or if at liberty here "to entirely disregard the judgment of the arbitrators and the reasoning in support of it" and "to consider the evidence as if it had been adduced before the Court itself," I should not have allowed a substantially smaller amount for compensation, treating the award as the judgment of a subordinate Court subject to re-hearing as outlined in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704, or as an award appealable under sec. 17 of the Arbitration Act (R.S.O. 1914, ch. 65), and, in either case, affirmed by an intermediate Appellate Court, *Montgomerie & Co.* v. *Wallace-James*, [1904] A.C. 73, at pages 78, 82; *Greville* v. *Parker*, [1910] A.C. 335, at 339; *The Glasgow*, 112 L.T. 703, at 707, 709-10, I am not prepared to hold it so unreasonable or so clearly wrong that we would be justified, without having had the advantage of seeing the witnesses or of a view, in setting it aside or in substituting for it an allowance based upon our own estimate of the proper compensation, which

might, as Lord Shand put it in *Atlantic and North-West R. Co.* v. *Wood*, [1895] A.C. 257, "be liable to criticism equal to that to which the award was open."

I am, therefore, somewhat reluctantly obliged to decline to interfere on the ground that the compensation awarded is excessive. Upon the evidence I cannot say that the amount awarded clearly exceeds the actual loss of the landowner based on the real worth of the property to him ascertained by taking into account its market value (*Dodge* v. *The King*, 38 Can. S.C.R. 149) any restrictions to which its user and enjoyment in his hands were subject, all its potentialities estimated at their present value (*The King* v. *Trudel*, 19 D.L.R. 270, 49 Can. S.C.R. 501, and the use made of it by him (market price alone not being a conclusive test): *South Eastern R. Co.* v. *London County Council*, [1915] 2 Ch. 252, at 258, or that the arbitrators reached their conclusion by process of compromise or average or that it does not truly represent their honest opinion as to damages or that their basis of valuation was erroneous.

(*e*) In support of this ground of appeal Mr. Henderson cited the very recent Privy Council decision in *Holditch* v. *Canadian Northern R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536, affirming the decision of this Court, 20 D.L.R. 557, 50 Can. S.C.R. 265. Their Lordships' disposition of that case would appear to have depended entirely upon their appreciation of its facts as expressed in this passage of Lord Sumner's judgment at p. 18:—

> In the present case the appellant's relation to the property had been definitely fixed before any notice to take land was served at all. He had parcelled out the entirety of his estate and stereotyped the scheme, parted with numerous plots in all parts of it without retaining any hold over the use to be made of them, and converted what had been one large holding into a large number of small and separate holdings with no common connection except that he owned them all. There was one owner of many holdings, but there was no one holding, nor did his unity of ownership conduce to the advantage or protection of them all as one holding.

The facts in the present case differ *toto coelo* from those stated by Lord Sumner. The owner here had parted with none of his "large holding." The subdivision of it into building lots is merely a scheme to which he may resort for its profitable exploitation. The land taken was part and parcel of one entire estate held by one owner and of especial value to the whole as its most important and useful frontage—it was, again to quote Lord Sumner—

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So connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.

The appellants' railway is not to be constructed upon a public highway, as was the case in *Grand Trunk Pacific R. Co.* v. *Fort William Land Investment Co.*, [1912] A.C. 224, referred to by Mr. Henderson. It will occupy a private right of way acquired from the respondent. This will lie between his remaining property and Dundas St. to which in lieu of the immediate access formerly enjoyed, access can hereafter be had from his remaining land only across the railway tracks of the appellants. Part of his land having been taken he is entitled to compensation for all consequential injuries affecting the remaining land to be occasioned by the exercise of statutory powers, whether in the construction of the railway or in its subsequent operation: *Cowper-Essex* v. *Local Board for Acton*, 14 App. Cas. 153.

Brodeur, J.

BRODEUR, J.:—This is an appeal from the judgment of the Second Appellate Division dismissing an appeal by the appellant railway company from an award in favour of the respondent, Everson for $8,365.

The lands owned by Everson consisted of 27 acres in the Township of Etobicoke and the part expropriated represents about 1¼ acres. The front of those lands is situate on the main road called Dundas St.

The expropriation took place under the provisions of the Ontario Railway Act and the first question which presents itself is whether the property should be valued as of the date of the filing of the plan or of the date of the notice of expropriation or order for possession.

The Ontario Railway Act of 1906 (6 Edw. VII. ch. 30), contains no express provision as to which compensation is to be fixed. It differs in that respect from the provisions of the Dominion Railway Act.

Sec. 59 deals with the plans and surveys of the railway and sec. 67 declares that the deposit of the book of reference and the notice of such deposit shall be deemed a general notice to all persons whose property may be expropriated.

It is declared also (sec. 59) that deviations of not more than 1 mile from the line assigned on the plan might be made.

The effect of these provisions is that when the plan is certified

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by the Board and deposited the parties are notified of the proposed route and are entitled to appear and object. So far no question of compensation is dealt with. As a question of fact the plan might when deposited affect one part of a piece of land; but in virtue of the power which the company possesses it might locate its lines a mile further and then the property which was first marked on the plan would not be taken at all.

It seems to me clear that the object of the deposit of the plan is to give notice to the parties who might object if they find it advisable to do so.

By sec. 68 as amended in 1908 it is provided that a notice might be served upon the owner giving him a description of the land to be taken, the offer of a certain sum of money and the name of the arbitrator of the company and will be accompanied by the certificate of the land surveyor to the effect that the land shewn on the map is required for the railway or is within the limits of deviation allowed by the Act. Within 10 days of the service of the notice the owner must appoint his arbitrator.

According to these different provisions of the Act and in view of the fact that the deposit of the plan might not specifically contain the land not expropriated, it seems to me that the date at which the amount of compensation should be ascertained would not be the date at which the plan has been deposited; but the date at which the notice has been given to the owner. That was the decision reached by the arbitrators and in which I concur: (*Saskatchewan Land and Homestead Co.* v. *Calgary and Edmonton R. Co.*, 21 D.L.R. 172, 51 Can. S.C.R. 1).

In 1913, after the notice of expropriation had been served but before the arbitrators began to proceed, an amendment was made to the Ontario Railway Act by which it was provided that the date of the deposit shall be the date with reference to which compensation should be ascertained.

I don't think that this new provision of the law would have a retroactive effect with regard to the facts of this case. As I have said, the effect of expropriation should be from the date at which compensation is ascertained.

Besides, the company had taken possession of the land before this new law had come into force.

Everson, the respondent, acquired the property on February

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10, 1913, about a month before the service of the notice of expropriation took place. He purchased the 27 acres of land for the sum of $25,000, or about $926 an acre. His witnesses, however, valued it at $103,000, instead of $25,000, the purchase price, and claimed that by the taking of 1¼ acres Everson suffers damage for $35,000, or $10,000 more than he paid for the whole property.

The arbitrators, however, would not accept entirely the evidence of those witnesses but awarded the very large sum of $8,365.

The property is 3¼ miles from the western limits of the City of Toronto and it is pretty evident that it will be many years before this property can be converted into town lots.

The law requires that the market price of the land expropriated should constitute the basis of valuation in awarding compensation. That market price can be determined by the sales of property in the neighbourhood. We have in this case properties similarly situated which in the same year, 1913 were sold at prices varying from $413 an acre to $645 an acre. Some other farms were even sold at a smaller price. But none of them reached the sum of $926, which the respondent Everson paid on February 10, 1913.

I consider then that Everson paid a very high price. A month later, on March 3, the notice of expropriation was given and on April 2, 1913, an order of possession was granted. Would not that sale of a month or two months previous constitute the best basis for determining the market value of that property? I would not hesitate one moment to answer affirmatively to that question.

There was no user of the land nor any special circumstances to make it worth more than the market value which was established by the price for which it was sold shortly before the expropriation. (*Dodge* v. *The King*, 38 Can. S.C.R. 149.)

I am, therefore, of opinion that the sum of $926 an acre should have been awarded to the respondent. That would entitle him to get $1,157.50 for the 1¼ acres expropriated. Besides, I would grant him $3,000, the sum found by the arbitrators for damages caused to the rest of the property.

The appeal should be allowed with costs of this Court and the Court below and the award reduced to $4,157.50.

Appeal dismissed.

AUGUSTINE AUTOMATIC ROTARY ENG. Co. v. SATURDAY NIGHT Ltd.

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Ontario Supreme Court, Appellate Division, Clute, Riddell and Lennox, JJ. and Ferguson, J.A. February 26, 1917.

1. LIBEL (§ III C—110)—FAIR COMMENT—ESSENTIALS OF PLEA—TRUTH. Where fair comment is pleaded in a libel action, the defendant must prove the truth of the facts upon which the comment was based, and that it was honestly and fairly made upon a matter of public interest.

2. NEW TRIAL (§ II—7)—IRRELEVANT EVIDENCE—LIBEL—FAIR COMMENT. The admission of evidence in a libel action, of facts not set out in the particulars of the plea of fair comment, is ground for a new trial.

Statement.

AN appeal by the plaintiff company from the judgment for the defendant company directed by BRITTON, J., at the trial, to be entered, on the verdict of the jury.

The following statement of the facts is taken from the judgment of CLUTE, J.:—

The action is one of libel. The plaintiff is an incorporated joint-stock company under the laws of Ontario; the defendant, also a joint-stock company, is the proprietor and publisher of "Saturday Night."

The plaintiff claims to be the owner of Canadian patents for rotary engines, and in its statement of claim complains that on the 6th February, 1915, the defendant in the said newspaper falsely and maliciously published as to the plaintiff, and concerning its business and mode of conducting the same, an article headed "Authorities should Squelch B. F. Augustine and his Stock Selling Promotion in Canada." Then follows the article in full, covering five typewritten pages, a copy of which is hereto attached.* And the statement of claim continues: "meaning

*The article is too long to print in full. The following extracts from it shew the nature of it:—

"Benjamin F. Augustine, the sleek and smooth proprietor of the Augustine Automatic Rotary Engine Company, has taken quite enough money from artless 'investors' in Canada. It is time to close this oleaginous gentleman and his toy engine scheme up, and it should be done in such a way that shareholders in the Augustine Automatic Rotary Engine Company of Canada will get back all the money that has still stuck to what Augustine calls his treasury.

"'Saturday Night' has just saved the authorities of the Town of Chatham, Ontario, from being victimised by this specious promoter. Augustine worked his fine arts—posing, as he has done for over four years in Canada, as an inventor, manufacturer, and proprietor of a *bonâ fide* engine plant—to endeavour to induce the town officials of Chatham to sell to his company for $18,000 the old 'Defiance' factory, which has stood idle in Chatham for some time. Augustine's scheme, as suspected by 'Saturday Night,' would have been to buy the plant at $18,000, pay $1,000 down and $4,000 more before the expiry of one year, and forthwith make tons of financial hay out of the resi-

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thereby that the engine, the manufacture and sale of which is the plaintiff's business, was not what it is represented to be; that it was not a *bonâ fide* engine, but was a mere toy and plaything; and that the plaintiff's enterprise of building and selling the said engine was nothing but a fraudulent device, and was being used by the plaintiff for fraudulent purposes; that the plaintiff was about to defraud the Corporation of the Town of Chatham in connection with a certain contract to purchase certain property from the said town; that the capital stock of the company was worthless, or all but worthless; and that the business of the plaintiff was a wholly fraudulent business, and was devised and was being carried on for the purpose of defrauding the public and any one who buys shares of the stock. By reason of the premises the plaintiff is greatly injured in character and reputation and its business of vendor and maker of engines, and was unable to complete the proposed contract with the Town of Chatham, and makes a claim of $50,000 damages."

The defendant denies publication; says that the words published did not refer to the plaintiff; that the said words did not mean what is alleged and were incapable of such meanings.

"3. The defendant further says that, if it did publish the words complained of in the 4th paragraph of the statement of claim, the said words, in so far as they consist of allegations of fact, are true in substance and fact, and, in so far as they consist of expressions of opinion, they are fair and *bonâ fide* comments made in good faith and without malice upon the said facts,

dents of Chatham and district through selling stock. 'Saturday Night' warned Chatham, in plain words, that Augustine might put up $5,000 in twelve months, which would go into the town treasury for the purchase of the plant, and Augustine might then take $20,000 or $40,000 out of the town in the way of money paid to him for his shares of almost worthless stock.

"Augustine . . . is peddling almost worthless stock to persons throughout Canada, virtually under false pretences. He has been doing it for four years, without let or hindrance. He is making a fat living out of it. He sells stock instead of selling engines. . . . His whole flotation scheme is a yellow calcium glare. . . .

"Augustine journeys over the border to Canada, secures incorporation for a Canadian company, on the strength of statements which appear to be untrue, and proceeds to scatter his worthless paper through Ontario and Canada. . . .

"Official action should be taken against Augustine. He should be forced to turn back what is left of the money that has come in to him through the sale of shares in Canada."

which are matters of public interest, and the publication of the same was for the public benefit, and submits the action should be dismissed."

In respect of this defence the plaintiff obtained an order in Chambers of the 5th May, 1916, for particulars: (1) of the allegations of fact that are true in substance and in fact referred to in the 3rd paragraph of the defendant's statement of defence; (2) (*a*) particulars of the allegations that consist of expressions of opinion that are fair and *bonâ fide* comments made in good faith and without malice; (*b*) the facts in said article upon which said expressions of opinion were founded; (*c*) which of said facts are matters of public interest and the publication of which are for the public benefit.

Particulars under this order were delivered; and, these particulars not proving satisfactory, an order of the 14th June, 1915, in appeal from an order of the Master in Chambers of the 4th June, was made, striking out paragraphs (*c*), (*d*), (*e*), and (*f*), with liberty to the defendant to amend its particulars, "stating the allegations of fact which it alleges to be true in substance and in fact." "3. It is further ordered that, under paragraph 2 of said particulars (*a*), (*b*), and (*c*), the defendant shall state what the allegations are which are said to be fair and *bonâ fide* comment."

At the trial there was an almost continual protest on the part of the plaintiff's counsel that evidence was being admitted which was inadmissible, tending to prove facts which were not set out in the particulars as forming the basis for fair comment, and that the facts as set out in the particulars were not proven; and, upon these grounds, at the close of the defendant's evidence, the plaintiff's counsel moved for judgment, and contended that, upon the pleadings and evidence, it was now simply a question of damages.

The present motion is for a new trial, upon substantially the same grounds, that is, that evidence was given of facts not set out in the particulars upon which it is alleged fair comment was based, and that the facts alleged as forming the foundation for fair comment were not proven.

I. F. Hellmuth, K.C., and *W. J. Elliott*, for appellant company.

M. K. Cowan, K.C., and *G. M. Clark*, for defendant company, respondent.

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Clute, J.

CLUTE, J.—Before referring to the evidence at the trial, it will be convenient to consider the law as applied to the issues here involved. Publication being admitted, and the article having undoubted reference to the plaintiff, and the trial Judge having ruled that the words bear a defamatory meaning, the plaintiff rested its case, and the further defence raised is contained in the third plea above quoted—that the words, in so far as they consisted of allegations of fact, are true in substance and in fact, and, in so far as they consist of expressions of opinion, they are fair and *bonâ fide* comments, made in good faith and without malice, upon the said facts, which are matters of public interest, and the publication of which was for the public benefit.

What then is the defendant bound to prove, and what is permissible as evidence under such a plea? The question is an important one, as it affects the right of publication of matters affecting the public interest, and deals with the limitation of fair comment. On matters of public interest every one has a right to comment, provided his comment is fair and *bonâ fide*. The law bearing upon this question is of comparatively recent growth. In *Henwood* v. *Harrison* (1872), L.R. 7 C.P. 606, it was said that fair comment is a branch of the doctrine of privileged occasion, under which publication is protected if the Judge rules that the occasion is privileged and that there is no evidence of express malice; but this view was disapproved in *Merivale* v. *Carson* (1887), 20 Q.B.D. 275; and the defence of fair comment is now regarded as a denial that the words complained of are really defamatory; fair criticism, it is said, is not defamation. It is not sufficient that the comment is *bonâ fide* if it is without foundation.

In *Digby* v. *Financial News Limited*, [1907] 1 K.B. 502, 507, 508, Collins, M.R., draws a distinction between a plea of justification and a plea of fair comment, and says that, when justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel, and that, in a plea of fair comment, "Comment, in order to be fair, must be based upon facts, and if a defendant cannot shew that his comments contain no misstatements of fact, he cannot prove a defence of fair comment. . . . If the defendant makes a misstatement of any of the facts upon which he comments, it at

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once negatives the possibility of his comment being fair. It is therefore a necessary part of a plea of fair comment to shew that there has been no misstatement of facts in the statement of the materials upon which the comment was based."

See also *Dakhyl* v. *Labouchere*, [1908] 2 K.B. 325.

In *Hunt* v. *Star Newspaper Co. Limited*, [1908] 2 K.B. 309, Cozens-Hardy, M.R., says (p. 317): "The defence of fair comment only arises in the event of the plea of justification failing, but the plea of justification may fail by reason of the facts stated not being substantially true. But there still remains the question whether, if, and only if, the facts are substantially true, the comment made by the defendants, based upon those true facts, was fair and such as might, in the opinion of the jury, be reasonably made." And he adopts the language of Kennedy, J., in *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K.B. 292: "The comment must . . . not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated."

The distinction between justification and fair comment is clearly pointed out by Buckley, L.J., in *Peter Walker & Son Limited* v. *Hodgson*, [1909] 1 K.B. 239, at p. 253. He points out that in a plea of justification it is necessary to prove every injurious imputation which the jury may think is to be found in the alleged libel. "Assuming that he fails in that defence, then fair comment is a weapon which comes into action when justification has failed. . . . Upon the plea of fair comment the substratum must, I think, upon the authorities, be laid by shewing that, notwithstanding that the words are defamatory, yet the facts upon which the comment is based were truly stated, and that the comment was honest and was not without foundation. Fair comment does not negative defamation, but establishes a defence to any right of action founded on defamation. To succeed upon the plea of justification the defendant must prove not only that the facts were truly stated, but also that the innuendo is true. He must justify every injurious imputation. Upon fair comment, however, if it be established that the facts stated are true, the defence of fair comment will succeed even if the imputation or innuendo be not justified as true, but be fair and *bonâ fide* comment upon a matter of public interest."

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And reference is made to *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, where Cockburn, C.J., said that "the plea of fair comment will succeed if the defendant had an honest belief in the truth of his statements, and his belief was not without foundation. The criticism must be 'not only honest, but also well-founded.'"

This being the law as applicable to the present case, an examination of the evidence admitted and of the alleged failure to prove the facts upon which fair comment is claimed will be necessary.

Much of the article complained of has especial reference to the Buffalo company and to B. F. Augustine, its promoter. The Canadian company was also promoted and organised by Mr. Augustine. Both the trial Judge and the jury evidently took the view that the article in question has reference to matters of public interest, and that the publication was *bonâ fide*. Of this I think there can be no doubt. The defendant took very considerable pains and went to very considerable expense in making the inquiries as to the financial condition and prospects of the Buffalo company and of the plaintiff company, and for that purpose sent its financial editor to Buffalo and elsewhere to prosecute the inquiry.

One Simon, a director, and a man apparently of considerable wealth, living in Buffalo, was appealed to, and the article purports to state what he said. His evidence was taken by commission and put in by the defendant, but he was not called. The effect of his evidence is practically a refusal to admit or deny much of what he said to Harris, the defendant's financial agent, who gave evidence at the trial. In reading Harris's evidence, and that of Simon as well, while it is admitted that Harris did not take down what Simon said verbatim, yet one is impressed with the view that his statement of what Simon did say is substantially correct. It still leaves such statement unverified in part, while admitting that he and Sutton had resigned as directors because they were dissatisfied. The article does not purport to say that these statements of Simon are true, but it treats them as true and as some of the facts upon which comment is made.

Counsel for the defendant, before calling his evidence, opened the case to the jury, and Mr. Hellmuth objected that reference

was made to facts not appearing in the particulars: for instance, to the advertisement, the prospectus, and the Canadian stock; and repeated his objections throughout the trial when evidence was offered of facts other than those stated in the particulars. In answer to this objection Mr. Cowan stated: "The article itself is set out in full, and in reply the defendants say that they rely upon facts, that what were the facts stated in that article were facts, that it was a matter of public interest and fair comment. Then we were asked what facts in that article were referred to as facts, not asking all the facts by any means that we had in our knowledge or possession at the time the article was written. That would be giving away our whole case."

Thereupon the defendant took the position that it was at liberty to prove any fact, whether stated in the particulars or not, which the defendant was possessed of at the time the article was written, and which would tend to justify the article, and evidence of other facts from time to time was given.

The article was published on the 6th February, 1915. A copy of advertisements appearing in the "Globe" of the 18th November, 1911, and an article in "Saturday Night" of the 25th November, 1911, and of the 28th November, 1911, and certain conversations between Mr. Augustine and Harris, were also admitted. This evidence, including the prospectus, was admissible to shew that the subject-matter was of public interest and in good faith, and this applies to the articles published in "Saturday Night" of the 2nd, 9th, and 16th December, 1911, and the letters between Harris and Augustine of the 7th, 22nd, and 23rd February, 1912; in short, all that took place between Harris and Augustine in the early stages of the inquiry, and other evidence which was offered tending to shew the matter to be of public interest and the article to be *bonâ fide*.

The defendant, I think, under proper pleadings and particulars and for the purposes of the trial, was entitled to prove such facts as came to the knowledge of the defendant upon which fair comment was based. I think what the financial editor, Harris, did in making his inquiries is admissible, and that this would include his conversations with various persons and what they said, not as proof that what they said was true, but that as stated in the article the conversations took place, and that further

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evidence might be given that the statements so made were true. The comment itself must be on some matter of public interest and be fair and made without malice. The question of public interest is for the Judge. The onus of proving that the words are a comment on a matter of public interest lies on the defendant: *Peter Walker & Son Limited* v. *Hodgson*, [1909] 1 K.B. at p. 249.

If the words complained of contain allegations of fact which are denied by the plaintiff, and which the defendant cannot prove to be true, there must be a verdict for the plaintiff. It is of no avail for the defendant to urge that he honestly believed them to be true: Odgers, 5th ed. (Can.), p. 197; *Campbell* v. *Spottiswoode*, 3 B. & S. 769.

The privilege which covers fair and accurate reports of proceedings in Parliament and Courts of Justice does not extend to fair and accurate reports of statements made to the editors of newspapers. The distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used: *Davis* v. *Shepstone* (1886), 11 App. Cas. 187. In that case Lord Herschell said (p. 190): "It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

After a careful reading of the whole evidence, including that of the defence, and especially the portion taken under commission, I am unable to say that there was not evidence to go to the jury of facts forming the foundation upon which the comment was made. Whether it was sufficient, and whether the comment was fair, were questions for the jury, but a number of these facts were not mentioned in the particulars, and were objected to at the trial, and may have influenced the jury in coming to their conclusion. For instance, exhibits 11 and 12, prior articles in the "Saturday Night," were put in as evidence, and might be considered as derogatory to the plaintiff's undertaking. They were objected to, and the trial Judge, apparently doubting their admissibility, said that if they were put in they were at the defendant's risk.

The notice of motion is general in form, and does not help

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the Court as to the points upon which the plaintiff relies. There is much evidence for the defence tending to support the comment made. There was evidence of the *bona fides* of the defendant; and that the matter was of public interest was clear. Nevertheless, I reluctantly reach the conclusion, on the authorities to which I have referred, that there must be a new trial, upon the ground that evidence, for which no particulars were given, and which might influence the jury, was admitted in support of the defendant's plea. There has been a miscarriage in the trial, owing partly to the plaintiff not clearly defining what was complained of in an article, portions of which did not refer to the plaintiff, and to the particulars not fully covering the ground upon which the defendant offered evidence. Both parties should be allowed to amend the pleadings and particulars as they may be advised.

The plaintiff is entitled to the costs of the appeal; the costs of the former trial to abide the event.

Riddell, J.

RIDDELL, J.:—This action has already been before the Courts more than once: 21 D.L.R. 870; 36 O.L.R. 551, 30 D.L.R. 613. It was tried before a very experienced Judge and a jury, against whom nothing is or can be said, the trial lasting about five days; and it would be a misfortune if it should be found necessary to grant a new trial.

Nevertheless the plaintiff has its rights; these rights must be respected and given full effect to; and if it has suffered injustice it must have relief; the law is no respecter of persons—or expense.

The plaintiff, a joint-stock company, sues the defendant, another joint-stock company, for libel. The defendant, in addition to alleging that the words complained of do not refer to the plaintiff, sets up "fair comment."

This plea has been sufficiently considered in the present case in 30 D.L.R. 613, 36 O.L.R. 551—it means that all allegations of fact concerning the plaintiff are true and that the remainder of the comments on the plaintiff are fair as justified by facts.

My brother Clute made an order, 21 D.L.R. 870, for the delivery in writing of: (1) Particulars of the allegations of fact that are true in substance and in fact referred to in the 3rd paragraph of the defendant's statement of defence. (2) (*a*) Particulars of the allegations that consist of expressions of opinion

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that are fair and *bonâ fide* comments made in good faith and without malice. (*b*) The facts in said article upon which said expressions of opinion were founded. (*c*) Which of said facts are matters of public interest and the publication of which are for the public benefit."

The defendants obeyed, and, after some skirmishing, particulars were got into shape upon which the case came down to trial, resulting in a general verdict for the defendant.

Upon the appeal before us, the main objections were two in number: (1) the failure to prove the truth of the allegations upon which the alleged "fair comment" was based; and (2) the admission of evidence on behalf of the defendant justified neither by the particulars nor otherwise.

It seems to me that we should approach the consideration of this case by first seeing what charges are made against the plaintiff.

Augustine had what the article calls a "home company," at Buffalo: and he promoted a company—the plaintiff—in Toronto: it is plain that no charge simply against Augustine (personally), or against the Buffalo company (simply), can be complained of in this action—but statements concerning either may indicate such a connection between the two as that what is said of either may be a libel against the plaintiff. (I attach the article complained of.)

1. The first allegation of fact against the plaintiff which I find is contained in the words: "Benjamin F. Augustine, the sleek and smooth promoter of the Augustine Automatic Rotary Engine Company, has taken quite enough money from artless 'investors' in Canada. It is time to close this oleaginous gentleman and his toy engine scheme up, and it should be done in such a way that shareholders in the Augustine Automatic Rotary Engine Company of Canada will get back all of the money that has still stuck to what Augustine calls his treasury."

While this is a direct attack upon Augustine, it is no less an attack upon the plaintiff, indicating as it does, in unmistakable terms, that the shareholders have been defrauded by Augustine, acting for the company, and that the scheme or business of the company was a toy engine scheme.

The comment that the scheme should be closed up and closed

up in such a way that the shareholders should get back at least part of their money would be fair enough, if the allegations of fact were true.

But there was no attempt at the trial to prove the alleged facts—and so the comment must fall also.

(2) The charge that Chatham was about to be victimised by a specious promoter is indeed in form a charge against Augustine; but, reading all the article, it is apparent, I think, that it is intended to be understood that he was acting for the plaintiff. The "scheme" was the scheme of the company, and I think that the defendant is bound to prove that the suggested scheme really was in view. Nothing of the kind was attempted.

(3) While much of the language following is personal to Augustine, there is a plain statement that the stock he is selling is "almost worthless"—this is an attack on the plaintiff. I do not find it proved.

(4) Omitting the purely personal attack on Augustine in the next paragraph, we see it said that "his whole flotation scheme is a yellow calcium glare"—the plaintiff is, to my mind, clearly included, but the defendant does not prove the alleged fact, metaphorically stated as it is.

A great deal of what follows is composed of allegations against Augustine and his Buffalo company, and is not, to my mind, so connected with the plaintiff as that it can complain—but, after an attack on Augustine and his Buffalo company, it is said: "Augustine journeys over the border to Canada, secures incorporation for a Canadian company, on the strength of statements which appear to be untrue, and proceeds to scatter his worthless paper through Ontario and Canada." This plainly alleges two facts: (*a*) that the plaintiff company was conceived and brought forth in fraud; and (*b*) that its stock is worthless.

(5) It is alleged in so many words that the stock of the plaintiff is a "lemon," *i.e.*, a fraud.

Then follows a somewhat lengthened attack upon Augustine, with which this plaintiff has no concern: and the article closes with a statement not unlike No. (1).

(6) "Official action should be taken against Augustine. He should be forced to turn back what is left of the money that has come in to him through the sale of shares in Canada."

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Riddell, J.

It is true that this is in form a comment upon Augustine, but it none the less contains a statement by implication that the money obtained by Augustine for the sale of shares of the plaintiff's stock should be returned, i.e., that the stock of the plaintiff company is worthless.

The defence should have been directed to proving the allegations of fact concerning the plaintiff (see 36 O.L.R. at p. 561, 30 D.L.R. 618).

On this evidence the jury should have been directed to find a verdict for the plaintiff—but, in directing a new trial, we should allow amendments to be made in particulars, pleadings, &c., as the parties may be advised.

Much complaint was made concerning the admission of evidence, and I think properly in most cases. Much of the evidence was alleged to be intended to prove that the matter commented on was of public interest; but, even without an admission by the plaintiff, the evidence went quite beyond the necessities of the case, and could be introduced with no other object than to prejudice the jury.

Some of the evidence, too, was not such as could be justified under the particulars filed under the order of my brother Clute—this evidence should not have been allowed.

I do not enter into particulars of the evidence improperly admitted, as I think upon a new trial a different course must be pursued, with the real issues kept in view: i.e., prove the facts alleged against the plaintiff and then justify the comments. Of course I do not suggest that this is to be the chronological order, but only the logical sequence of the defendant's evidence.

Some part of the difficulty in this case has arisen from the plaintiff's statement of claim including what cannot be considered as applicable to the plaintiff: the plaintiff will be well advised (perhaps) if it amends its claim—this it should have leave to do.

Of course the plaintiff will contend, and with some reason, that it is embarrassed by the form of the article complained of, but I do not think that this will prove an insurmountable barrier.

I think there must be a new trial, and that the defendant must pay the costs of this appeal, costs of the former trial to abide the event—with leave to all parties to amend.

LENNOX, J.:—I have no doubt at all that the financial section of "Saturday Night" has been of great public service. Undoubtedly it has often prevented people, who are ill-qualified to protect themselves, from rash and improvident investments. Neither have I any doubt that in this case, as in others, the defendant company acted in good faith and with a view to the public interest. I regret the conclusion I feel compelled to come to as to the appeal. The defendant company was bound to establish as fact that which it alleged as fact; and, if this ground was not covered by the evidence—I do not mean a mere weakness, but an absence of evidence, as to the truth of the same or any of the substantial and distinct allegations of fact—the plaintiff company was entitled to damages, more or less.

It was strenuously insisted upon the argument of the appeal that there was not evidence at the trial to establish that all the statements that were alleged and published as facts were facts; and it was not shewn that this objection was not well-founded.

In view of the full and very careful judgments of my learned brothers Clute and Riddell, it is not necessary for me to say more, except that parties to an action should be held pretty strictly to the particulars they furnish, particularly where they are furnished under an order of the Court, and that I agree that the parties should be at liberty to amend as they may be advised.

It is manifest that much of the newspaper article complained of cannot be read as referring to the plaintiff company. The statement of claim as framed is unfair to the defendant company. It should be definitely limited to allegations and comments which can be (not necessarily which must be) said to concern the plaintiff company. In so far as it is possible to do so, the plaintiff company should be compelled to eliminate what only touches B. F. Augustine; and, where this cannot be done, the plaintiff company should be required to state specifically what is relied upon both as to allegations of fact and comment. Where anything can be actually eliminated without prejudice to the meaning, it should be done. A fair trial is next to impossible as the pleadings are. It would be better still if the two actions could be consolidated or tried together.

There should be a new trial. I am decidedly of the opinion that the costs should be as provided for by my brother Clute,

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namely, costs of the appeal to the plaintiff, costs of the former trial to abide the event.

Ferguson, J.A.

FERGUSON, J.A., agreed in the result as stated by RIDDELL, J.

Appeal allowed, new trial ordered.

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BROWN v. MENZIES BAY TIMBER Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. April 3, 1917.

COMPANY (§ V E—220)—ACTION BY SHAREHOLDER—INTERNAL MANAGEMENT—CONTROL.

The Court will not interfere with the internal management of companies, as to the control of the majority of the stock, at the instance of a shareholder who has suffered no personal wrong.

Statement.

APPEAL by plaintiff shareholder from an order of Murphy, J., dismissing the action. Affirmed.

E. C. Mayers, for appellant; *H. B. Robertson*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. The wrongs of which the plaintiff complains are not personal wrongs, but are, if well founded, wrongs which could only be righted by the incorporated companies concerned. The principles laid down in *Burland* v. *Earle*, [1902] A.C. 83, apply to this case.

Martin, J.A.

MARTIN, J.A.:—After some hesitation I have reached the conclusion that on the facts of this case the reasons given by the learned Judge below should prevail. While it is clear that a shareholder may have a cause of action to enforce his own individual right—which has been invaded by the directors or others—as in *Pender* v. *Lushington* (1877), 6 Ch.D. 70, 80-1, where he claimed to have his vote recorded—I am unable to take the view that there is anything within that principle established here.

Galliher, J.A.

GALLIHER, J.A.:—I entirely agree in the reasons for judgment of the trial Judge.

McPhillips, J.A.

MCPHILLIPS, J.A.:—This is an appeal from the order of Murphy, J., setting aside the service of the concurrent writ—the order authorizing such service and the writ. In my opinion the Judge arrived at the right conclusion and the appeal should be dismissed. The action attempted to be set up is one of conspiracy to defraud the plaintiff of his interests in the Michigan Puget Sound Lumber Co. Ltd., the Michigan Pacific Lumber Co. Ltd., and the Canadian Puget Sound Lumber Co. Ltd. In *Mogul Steamship Co.* v. *McGregor* (1889), 23 Q.B.D. 598,

(affirmed in the House of Lords, [1892] A.C. 25), Bowen, L.J., at p. 613, said:—

"It is essential to an action of tort," say the Privy Council in *Rogers* v. *Rajendro Dutt*, 13 Moore P.C. 209, "that the act complained of should under the circumstances be legally wrongful . . that is, it must prejudicially affect him in some legal right: merely that it will, however directly, do a man harm in his interests is not enough."

And at p. 616 further said:—

As a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy.

And in the same case, in the House of Lords, Lord Halsbury, L.C., said at pp. 37-8:—

What is the wrong done? What legal right is interfered with . . I think this question is the first to be determined: What injury, if any has been done? What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful.

See also *Hutchins* v. *Hutchins* (Sup. Ct. N.Y., 1845), 7 Hill, 104. Pollock on Torts, 10th ed., 1916, at pp. 337, 338 and 339.

In its highest phase—and I am not agreeing that even that case is established to the degree even that there would appear to be a triable issue—the action the plaintiff is attempting to set up is one only that the companies might bring—not the plaintiff, an individual shareholder. It was held in *Burland* v. *Earle*, [1902] A.C. 83, 71 L.J.P.C. 1 (see L.J. headnote) that—

The Court has no jurisdiction to interfere with the internal management of a company acting within its powers and actions to redress a wrong done or to recover money or damages due to a company, must be brought by the company itself, except where a minority of shareholders complain of conduct on the part of the majority which is either fraudulent or beyond the company's powers. No mere informality or irregularity which can be remedied by the majority of shareholders can of itself entitle the minority to sue.

In the present case there is no proof "that the persons against whom the relief is sought themselves hold and control the majority of the shares in the (companies) and will not permit an action to be brought in the (names) of the (companies)". (Also see *Dominion Cotton Mills Co.* v. *Amyot*, [1912] A.C. 546.) The counsel for the appellant in his careful argument endeavoured to shew that the action sought to be maintained was one that the plaintiff as an individual shareholder could bring independent of the companies—and during the argument I was much impressed

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with this contention, especially in view of the decision of the House of Lords in *Burnes* v. *Pennell* (1849), 2 H.L. Cas. 497.

But when I read the material upon which it is attempted to establish a cause of action it is plain that the action (if any) is one that should be brought by the respective companies and the plaintiff has not brought himself into the position of its being allowable to consider whether a sufficient cause of action is set up, *i.e.*, no proof "that the persons against whom the relief is sought themselves hold and control the majority of the shares in the (companies) and will not permit an action to be brought in the (names) of the (companies)". (*Burland* v. *Earle*, *supra*.)

Apart however from what in my opinion is, at the moment, the insuperable objection that the plaintiff has not taken the steps to be individually heard there remains that which is crucial, *i.e.* the onus is on the plaintiff to bring himself within Order XI in *Strauss* v. *Goldschmid* (1892), 8 Times L.R. (C.A.)512.

Upon careful consideration of all that is alleged, being allegations affecting internal management of the companies, I am not satisfied that the plaintiff has shewn "a probable cause of action;" in any case the plaintiff is not in a position upon the evidence as presented, entitled to be heard and be granted leave to individually sue in respect of the cause of action (if any) alleged.

In my opinion the order of Murphy, J., was right, it would therefore follow, in my opinion, that the appeal should be dismissed. *Appeal dismissed.*

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LEBLANC v. LUTZ.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. November, 24, 1916.

EVIDENCE (§ XIII A—1004)—UNDER PLEA OF PAYMENT—NOTE.

In an action for money due under a contract, evidence of payment by the defendant of a note which he had endorsed for the plaintiff, in connection with the same transaction, is admissible under the plea of payment.

Statement.

APPEAL from the judgment of Landry, J., in an action tried without a jury. A verdict was entered for the plaintiff for $407.39. Reversed.

R. St. J. Freeze, for the defendants, appellants; *C. L. Hanington* and *A. J. Legere*, *contra*.

Grimmer, J.

GRIMMER J.:—In this case the defendants were contractors with the school trustees of the town of Sussex for the erection of a

school building and the plaintiff was a sub-contractor with the defendants for the masonry work, the amount of his contract being $13,679.

After the contract was let some changes were made in the foundation and concrete work which became extras and resulted in this suit, the same being brought for the recovery of the sum of $1,464.20 by the plaintiff for work over and above the terms of his contract. The cause was tried before the late Chief Justice (then Mr. Justice) Landry without a jury at an adjourned sitting of the Westmoreland Circuit Court in the months of November and December, 1909, and a verdict for the sum of $407.38 was found for the plaintiff.

The trial appears to have extended over 5 days during which a large amount of evidence was given. The Chief Justice found that the defendants had paid the plaintiffs, on account of the contract, the sum of $13,967.11; being an over-payment of $288.11; that the defendants admitted extras to the amount of $353, which added to the sum of the contract raised it to $14,032, and that by deducting the amount paid there was still $64.89 due the plaintiff. The Chief Justice then proceeds to deal with the various phases of the case as submitted to him, and finally, after hearing and considering the evidence, makes a finding that the plaintiff is entitled to $695.50 for total extras; which, added to the amount of his contract made the sum $14,-374.50. He then deducts the amount paid as stated and finds the verdict for $407.39. This he states is exclusive of the sum of $265 which the defendants claimed credit for as a payment made by them to the plaintiff under contract.

In my opinion there is sufficient evidence to fully sustain the findings of the Court on the facts and the same should not be disturbed.

The only other matter involved is the question of the payment of the $265. It appears that the plaintiff during the pendency of the contract applied to the defendants for money and was told there was nothing due him. He thereupon arranged to give the defendants his note for $265, which they endorsed. The plaintiff discounted the note and when it became due the defendants paid it and claimed to be entitled to credit for this sum, and interest thereon, which at the time of trial made the note $298.

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Grimmer, J.

The defendants had pleaded "never indebted," "payment before action brought" and "set-off." In dealing with this matter the Chief Justice said:—

I decide that under the pleadings the defendants cannot recover the $265 inasmuch as it must be considered in the nature of a set-off, and no particulars were delivered after a demand for the same was made. But that the Court may deal with these two matters, without ordering a new trial, in case I should be wrong in my decision, under the pleadings, I find that the defendants paid the note of $265, and that such payment was not included in the $13,967.11.

Taking the evidence of the parties in this regard, in my opinion it can fairly be deduced that the transaction related directly to the contract and was so considered by both parties. That the plaintiff in borrowing the money obtained it in view of his contract with the expectation of repaying it thereby and the defendants expected and were content it should be so paid. When the note became due the defendants, being indebted to the plaintiff under the contract, took the note up and paid it; thus relieving the plaintiff to the extent thereof, and it is eminently right and fair that credit should be given to them for this sum. Being, therefore, as it was, a part and parcel of the transactions between the plaintiff and defendants, I am of the opinion the Chief Justice should have allowed credit to the defendants for the sum of $265 paid on the note, but as there was a balance due the plaintiff under the contract, I do not think the claim for interest on the note should be allowed. Under ordinary conditions, when one man is indebted to another, and a payment is made, in the absence of any evidence of appropriation, the law *primâ facie* applies it to the payment of the outstanding indebtedness, and I therefore think the defendants not only had the right to shew, but were entitled to credit for, the amount paid on the note, and the verdict rendered should be reduced by the sum of $265, making it $142.39, and that in view of both parties succeeding in part there will be no costs on the appeal.

White, J.

WHITE, J. (oral):—I think the Judge erred in refusing to allow the amount paid by the defendants in retiring this $265 note as a payment to the plaintiff. There is evidence which I think would have warranted him in finding that this money was a payment, and could properly be treated as a payment, by the understanding between the parties under which this contract was carried out. The defendants supplied the plaintiff with a number of articles,

including bricks and things of that character, which ordinarily in a defence could only be recovered for by way of set-off, but it is conceded that under the contract between the parties these items could properly be treated as payment. The plaintiff himself went upon the stand and asked about the matter, did not deny—indeed I think he practically conceded—that if the defendants in fact had taken up this note it could properly be treated as a payment under the agreement between the parties. He denied however that they had paid the note. Under these circumstances I think the learned Judge should have allowed it as payment.

As to the other items of the Judge's finding I think there is sufficient evidence to sustain the findings which he made. I agree that the appeal should be allowed so far as to strike off from the amount allowed the plaintiff the sum of $265. Both parties have succeeded in part and failed in part; there should be no costs to either party.

McLEOD C.J. agreed. *Appeal allowed.*

Re CITY TRANSFER Co.; Ex parte POTTER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. February 26, 1917.

COMPANY (§ VI F—357)—VOLUNTARY WINDING-UP—PREFERENCES—RENT—DISTRESS FOR.

In a voluntary winding up under the Winding-Up Ordinance (Alta.) there is no right, under secs. 7 (2), 18 (7), to distress, or to any preferential claim, for rent accrued before the winding-up resolution; the proper course, where a preferential claim exists, is by a summary application for a direction to the liquidator to allow such claim out of the proceeds. A subsequent proceeding under the Dominion Act will not vitiate the proceedings under the provincial statute.

[*Re Oak Pitts Colliery Co.*, 21 Ch.D. 322; *Re Jasper Liquor Co.*, 23 D.L.R. 41, 25 D.L.R. 84, 9 A.L.R. 199, applied.]

APPEAL by liquidator from an order of Hyndman, J., dismissing his application to set aside an *ex parte* order for leave to proceed with a distress for rent. Reversed.

G. A. Steer, for plaintiff, appellant; *A. W. G. Bury*, for defendant, respondent.

STUART J.:—It appears that on June 1, 1915, a special resolution of the shareholders of a company called the City Transfer Co. Ltd. was passed for the winding-up of the company under the Voluntary Winding-up Ordinance and appointing one McKinnon as liquidator. At that date the company was indebted

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to Potter in the sum of $3,355.17 for rent. It also appears that the Imperial Bank of Canada held a chattel mortgage on a large portion of the goods and chattels of the company. On August 29, 1915, the bank made a seizure of the goods covered by the mortgage. Potter, so he declares in his affidavit, made no distress for rent because he relied on a verbal understanding with the liquidator that the claim for rent would be treated as preferential and in respect of the goods seized he relied upon being able at any time to arrange with the bank for "preferential treatment" and to make a seizure over their heads if necessary.

On Monday, November 22, 1915, Potter issued a distress warrant and caused the goods and chattels of the company to be seized for arrears of rent. A seizure was made under this warrant on the same day but no leave had been obtained from a Judge for the making of the seizure. On November 26, an order on its face appearing to be *ex parte* but probably in the presence of the parties interested was made by McCarthy, J., giving Potter leave to proceed with the distress. Prior to this, however, on November 9, a petition had been served on Potter who, though the landlord, was also the president of the company and at times, at least, the managing-director for the winding-up under the Dominion Act. On November 29, the sheriff again distrained for rent pursuant to the leave granted by McCarthy, J. The order for winding-up was not made till December 13 when the Imperial Canadian Trust Co. Ltd. was appointed liquidator.

On April 28, 1916, Hyndman, J., made two orders, one expressed to be on the application of the Imperial Bank of Canada, when Potter and the liquidator were represented by counsel, whereby the seizure made by the bank in the previous August under its chattel mortgage was validated without prejudice to the rights of the landlord under his seizure and the parties were to remain in relation to the moneys realized in the same position as in relation to the goods; and another order, expressed to be made on the application of the bank and Potter, whereby the sheriff was given leave to remove and sell the goods and was directed to retain the proceeds until the relative rights of Potter and the bank were determined. These orders were not entered until June 5, 1916.

It now appears that the chattel mortgage did not cover all the goods of the company and that there is a quantity of goods

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worth, so it was stated, some $400 which were seized by Potter but upon which the bank can have no claim. This fact was only discovered by the liquidator after the orders made by Hyndman, J. Therefore in order to contest the validity of the seizure and seizures made by the sheriff under the landlord's warrant the liquidator moved before McCarthy, J., on July 18, 1916, for an order setting aside the *ex parte* order of November 26. The application was dismissed and the liquidator now appeals.

Inasmuch as the distress was made before the date of the winding-up order under the Dominion Act, even though made subsequent to the service of the petition, there is nothing in the Dominion Act which can in any way invalidate it or prevent the proceeds going to the landlord. Sec. 84 applies only to judicial proceedings. *National Trust Co.* v. *Leeson and Lineham*, 26 D.L.R. 422, 9 A.L.R. 245. Sec. 23 is expressly limited to acts done "after the making of the winding-up order."

In *Re Calgary Furniture Store*, 9 W.W.R. 1, and *Re Jasper Liquor Co. Ltd.*, 23 D.L.R. 41, 25 D.L.R. 84, the seizures had been made after the commencement of voluntary winding-up proceedings under the Winding-up Ordinance and without the leave of a Judge. I think the most that the judgment in appeal in the latter case should be taken as deciding is that a distress made after voluntary winding-up proceedings have begun is void at least if not made by leave of the Court. The case does not directly decide that the Court either can or should give such leave. That point was not there raised and it was unnecessary to consider because there had been no leave given in any case.

In the present case the appeal is based directly upon the ground that under sec. 18 (7) the Court cannot give leave to distrain.

The sub-section is substantially the same in terms as sec. 133 of the Dominion Winding-up Act. It does not appear in exactly the same form in the English Act but sec. 142 of the English Act says that when a winding-up order has been made no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. This section is held to qualify sec. 211 of the English Act, which says "where a company is being wound up by or subject to the supervision of the Court any

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attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents and purposes." Palmer Company Precedents, Part II., p. 453. *Re Oak Pitts Colliery Co.*, 21 Ch.D. 322 at 329.

In the latter case Lindley, L.J., used language which may be very usefully quoted:—

The object of the winding-up provisions of the Companies Act, 1862, is to put all unsecured creditors upon an equality, and to pay them *pari passu*. A landlord who has not put in a distress before the commencement of the winding-up is an unsecured creditor. He can prove against the company under sec. 158 for all rent in arrear at the time of his proof, but his right to distrain is taken away by sec. 163, unless circumstances exist which, in the opinion of the Court, require it to give him leave to distrain under sec. 87. In all cases, however, in which a landlord seeks to distrain after a winding-up order, or seeks to be paid his rent in priority to other creditors, he must shew why he should have such an advantage over the other creditors. There are numerous decisions in the books relating to this subject, and to which it may be useful shortly to advert. They may be grouped into two classes, the first relating to rent in arrear at the commencement of the winding-up, the second relating to rent accruing subsequently to that date.

First, as to rent in arrear at the commencement of the winding-up. 1. If the landlord is a legal creditor of the company in respect of rent in arrear at the commencement of its winding up, he is not allowed to distrain for the arrears of rent but must prove his debt like any other creditor: *Re Traders North Staffordshire Carrying Co.*, L.R. 19 Eq. 60; where the distress was for tolls in arrears: *Re Coal Consumers Association*, 4 Ch. D. 625, where the liquidator retained possession but not for any purpose of liquidation: *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250, a case of voluntary winding-up followed by a compulsory order. 2. Moreover in cases of this kind the circumstances that the liquidator has retained possession and carried on the company's works, has been held not to entitle landlord or mortgagee (with a power of distress as and for rent) to distrain for rent in arrear in the winding-up. *Re North Yorkshire Iron Co.*, 7 Ch. D. 661; *Re Brown, Bayley & Dixon*, 18 Ch. D. 649; *Re South Kensington Co-Operative Stores*, 17 Ch. D. 161. If, however, the landlord is not a legal creditor of the company by reason of the company not being his tenant, he is permitted to distrain even for rent in arrear at the commencement of the winding-up: *Re Exhall Coal Mining Co.*, 4 D.J. & S. 377. 4. And in such a case he will be allowed to distrain although the liquidator offers to allow the arrears to be proved as a debt in the winding-up: *Re Regent United Service Stores*, 8 Ch. D. 616.

Secondly, as to rent accruing after the commencement of the winding-up 1. If the liquidator has retained possession for the purposes of the winding-up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding-up: *Re Lundy Granite Co.*, L.R. 6 Ch. 462; *Re North Yorkshire Iron Co.; Re Silkstone and Dodworth Coal and Iron Co.*, 17 Ch. D. 158; *Re South Kensington Co-Operative Stores, supra*, and see *Re Brown, Bayley & Dixon, supra*, per

Fry, J. 2. But if he has kept possession by arrangement with the landlord and for his benefit as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain: *Progress Assurance Co.*, L.R. 9 Eq. 370; *Re Bridgewater Engineering Co.*, 12 Ch. D. 181.

When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding-up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full without reference to the amount which could be realized by a distress. This was the view taken by James, L.J., in the case of the *Lundy Granite Co.*, L.R. 6 Ch. 462, and by Fry, J., *Re Brown, Bayley & Dixon*, 18 Ch. D. 649, and by Kay, J., in the present case. But no authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee. If the landlord had endeavoured to re-enter and the liquidator had objected, the case might be different, but having regard to the provisions of the Companies Act, 1862, we are of opinion that in the case now supposed the landlord must rely on his right, if any, to re-enter and prove for the arrears due to him and that he is not entitled to anything more.

The same general rules are to be found in Palmer, Pt. II., at p. 471. It is to be observed, however, that the two sections I have quoted from the English Act and which as they stood in the Act of 1862 were referred to by Lindley, L.J. apparently refer to a company being wound up either compulsorily or according to the third English method "under the supervision of the Court."

Subject as above (*i.e.*, to the exceptional cases where distress is allowed) the Court restrains distress whether the winding-up be compulsory, under supervision or voluntary.

There is this difficulty, however, about adopting English decisions. There the voluntary winding-up provisions and the compulsory winding-up provisions are comprised in one statute and that of the same legislature.

An example of how different the situation might possibly be with us is presented by the decision in *Thomas* v. *Patent Lionite Co.*, 17 Ch. D. 250. In that case after an extraordinary resolution for the voluntary winding-up of the company had been passed but before a liquidator had been appointed a landlord distrained for rent. Before there was a sale certain debenture holders got an injunction restraining the landlord from proceeding. Then an order for the compulsory winding-up of the company was made. The Court of Appeal held that the distress was void by

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virtue of sec. 163 (the present sec. 211 above quoted) unless sufficient grounds were shewn for exercising the discretionary power given by sec. 87 (the present sec. 142 above referred to). But it will be observed that sec. 163 could only be held to avoid the distress if the words "after the commencement of the winding-up" contained therein referred not to the compulsory winding-up but to the voluntary winding-up. The Court of Appeal took that view quite apparently and though the winding-up had become compulsory yet they held the winding-up had been "commenced" when the resolution was passed for voluntary winding-up. Where the provisions for the different kinds of winding-up are contained in the same statute it is no doubt quite possible and also possibly proper to adopt such an interpretation of the words "commencement" of the winding-up. But it may be otherwise where the provisions for the two kinds of winding-up are contained in separate statutes and these also of distinct legislatures. This is one reason why the problem is not so simple for us as it is for the Courts in England. The company in question here is now being wound-up under the Dominion Act, but there is nothing in that Act which renders void a distress made before the winding-up order. (sec. 23). Under the decision in *Thomas* v. *Patent Lionite Co., ubi supra,* the Court can extend the words of the avoiding clause backward to a period antecedent to the winding-up order, that is, to the date of the voluntary winding-up resolution. It is obviously not possible under our legislation to adopt so simple a course.

The decision in that case declares that a winding-up order does not render the voluntary winding-up void *ab initio* and I think it is a sound view to take of our legislation that a compulsory order under the Dominion Act does not render the voluntary winding-up void *ab initio* either. Of course, if it did then there would be nothing now to vitiate the distress which in this case the landlord made. But I can see no reason for giving any different effect to a compulsory order under our Dominion Act than one under the English Act and the decision in *Thomas* v. *Patent Lionite Co., supra,* ought upon this point to apply here. But though the voluntary winding-up proceedings were valid while not yet superseded the Winding-up Ordinance must be interpreted by itself and without reference to the intervention of proceedings under the Dominion Act. We cannot very well treat the distinct

statutes of different legislatures in exactly the same way as the English Courts are able to treat the provisions of the single Act of their single legislature. Nevertheless, I think, taking our Winding-up Ordinance simply by itself, the same general principles as those laid down by Lindley, L.J., in the passage above quoted should be applied. Sec. 18, sub-sec. 7 of our Ordinance taken with sec. 22 sub-sec. (3) is not different in its ultimate effect as to the rights of the parties from sec. 211 (old sec. 163) of the English Act taken along with sec. 142 (old sec. 87) although there is, I think, a distinction as to the remedies which may be adopted to protect those rights.

The general principles of *pari passu* distribution referred to by Lindley, L.J., as underlying compulsory winding-up proceedings is expressly enacted in our ordinance by sec. 7 (2) which is taken indeed from the English Act but from that part of it which deals with voluntary winding-up. It is obvious that a statutory direction of this kind is necessary in regard to voluntary winding-up proceeding though unnecessary where the winding-up is being carried on by the Court which will itself adopt the *pari passu* rule. This, no doubt, is the reason why the express rule is not laid down in the Dominion Act or in the compulsory provisions of the English Act.

Under the English Act there is apparently a discretionary power to allow an actual distress which power will be exercised according to the principles laid down in the *Oak Pitts Colliery* case. But under our sec. 18 (7), I think the result is that an actual distress is not to be made at all even if there does continue to exist a right to a preferential claim. Instead of taking such a course there must be an application to the Court and the Court, instead of permitting a distress to be made as a remedy, will, in a proper case, and I think, speaking generally, in accordance with the principles of the *Oak Pitts Colliery* case, *supra*, simply direct the liquidator to allow the landlord's claim as a preferential one. In other words, sec. 18 (7) deals merely with remedies and does not by itself alter any of the substantial rights of the parties. If, in order to determine the extent of a claimant's rights it turns out to be convenient to allow an action to be brought, then this may be done under sec. 22 (3) even if a general order has been made staying all actions and I think, notwithstanding anything

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that is involved in the phrase, "not by any action" contained in sec. 18, which deals only with such rights as are included in the term "remedies."

The effect of sec. 7, sub-sec. 2, however, is I think to destroy the right of distress and any right to preferential treatment by the Court in regard to rent accrued before the winding-up resolution if the landlord being a creditor can prove in the winding-up. That is the present case. There was, therefore, never any right to preferential treatment, while even if there had been, there should not even then have been an order made allowing a distress. A summary application to the Court for a direction to the liquidator to allow a preferential claim to the landlord out of the proceeds of the goods which would have been subject to distress would have been then the proper course.

The result is that the appeal should be allowed with costs and the order set aside. But in view of the interpretation given to sec. 18 (7) I think it ought to be added that the liquidator should not allow any preference to the landlord.

Harvey, C.J.
Walsh, J.

HARVEY, C.J., and WALSH, J., concurred with STUART, J.

Beck, J.

BECK, J.:—Omitting two cases of which we are not likely to see any instances a provincial company may be voluntarily wound-up under the Winding-up Ordinance 1903 (ch. 13 of 1903 1st Sess.) (1) when the company has passed a "special resolution" requiring the company to be wound up; or (2) when the company, though it may be solvent as regards creditors, has passed an "extraordinary resolution" to the effect that it has been proved to the satisfaction of the members thereof that the company cannot by reason of its liability continue its business and that it is advisable to wind up the same; or (3) where on the application of a contributory the Court, being of opinion that it is just and equitable that the company should be wound up, makes an order to that effect.

It is not necessary, though usual, that a liquidator be appointed by the resolution authorizing or the order directing the winding-up; the resolution or order as the case may be is the commencement of the winding-up (sec. 6). The company by resolution or the Court by order appoints a liquidator. The company from the date of the commencement of the winding-up is to cease to carry on its business except in so far as may be required for the beneficial

winding-up thereof and the corporate existence and all the corporate powers of the company are to continue until the affairs of the company are wound up. (sec. 7).

The fact that the company is being wound up voluntarily, *i.e.*, at the instance of members or a contributory does not stay proceedings against the company; but by sec. 22, (3), it is provided that the Court may order that no action or other proceedings shall be proceeded with or commenced against the company except by leave of the Court.

The object of the Winding-up Ordinance is to put all unsecured creditors on an equality and to pay them *pari passu* (sec. 7 (2)) subject to priority given to the costs, charges and expenses properly incurred in the winding-up, including the remuneration of the liquidator (sec. 19) and wages of employees within certain limits (sec. 10). "The property of the company" which is to be distributed *pari passu* is of course, so far as encumbered property is concerned, only the margin over the amount of the security. Though the ownership of the property of the company is not changed by the winding-up proceedings the possession becomes the possession of the liquidator and the liquidator is to carry on the company's business so far as may be necessary for the beneficial winding-up of the company and in so doing he may become personally liable to persons with whom he deals or may make the assets of the company liable in such cases. Sec. 18 (7) provides that all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in, or to any effects or property in the hands, possession or custody of a liquidator may be obtained by an order of the Court on summary application and not by any action, attachment, seizure or other proceeding of any kind whatsoever.

This provision on the face of it deals with *remedies* only, not with the ascertainment or determination of rights. I think that the words "effects or property in the hands, possession or custody of a liquidator" make it clear that the reference is to personal property only and that this intent is made clear by the subsequent words "attachment, seizure or other proceeding" and therefore that the clause is intended to restrain proceedings by way of enforcing remedies by way of seizure in any form of personal property in the liquidator's hands, including an action against

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the liquidator for a debt contracted by him on behalf of the company.

Sec. 22 (3) already quashed provides that the Court may order that no action or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court subject to such terms as the Court may impose. There remain to come within purview of this provision, *e.g.*, actions to ascertain and determine the rights (as distinguished from enforcing the remedies) of parties claiming that the company is indebted to them; actions to realize securities on real estate or on personal property not in the hands, possession or custody of the liquidator, etc. In any such cases the Court may and usually would restrain an action against the company and direct, for instance, that the matter in controversy be ascertained by a Master or other referee, but on the other hand it might in a particular case think the claim to be of such a character that it would be best determined in an ordinary action and perhaps in a trial before a jury.

Again, the remedy under sec. 18 (7) is to be obtained by an *order of the Court* on summary application and *not* by any *action attachment, seizure* or other proceeding. So that in the case of, *e.g.*, a chattel mortgage, the mortgagee's remedy would be not by action, not by seizure even by leave but by an order of the Court made on summary application and the Court would upon information as to the property comprised in the mortgage, its value, the amount owing, etc., doubtless direct that the claim of the mortgagee to the whole or a limited amount should be a preferred claim against the assets of the company and be paid by the liquidator accordingly, the mortgaged property going into the general assets of the company.

In the same way in the case of rent, assuming there was a right of seizure for rent but for the winding-up proceedings the remedy by seizure is taken away by the provision quoted and the remedy which the Court would give by order on summary application is substituted; a remedy not by way of leave to seize but by way of order to the liquidator.

In the particular case before us I think that for the reason given in *Re Jasper Liquor Co. Ltd.*, 23 D.L.R. 41, the landlord had no right to distrain at all and therefore that had he made an application under sec. 18, sub-sec. 7, his application would properly

have been dismissed; he remaining of course at liberty to prove his claim as an ordinary unsecured creditor.

The Appellate Division on appeal, 25 D.L.R. 84, 9 A.L.R. 199, without passing upon the view which I there expressed, said that in any event the landlord could only have succeeded in securing a priority by an application under sec. 18 (7). They used it is true an expression which would leave it to be supposed that such an application would have resulted in an order giving leave to distrain; but that was quite unnecessary for the decision.

There was, in my opinion, no right in the landlord to distrain after the winding-up resolution; there was no right in the Court to give him leave to distrain; had he applied for substituted relief under sec. 18 (7) his application should have been dismissed.

I would therefore allow the appeal with costs and set aside the order appealed from and the order giving leave to distrain, and I would give the liquidator the costs, if any, incurred before the Judge of first instance and direct that the claim of the landlord be not allowed as a privileged claim. *Appeal allowed.*

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Supreme Court of Canada, Davies, Idington, Duff, Anglin and Brodeur, JJ. December 30, 1916.

MASTER AND SERVANT (§ II A—65)—EXCAVATION WORK—SAFETY—COMPETENT MANAGEMENT—NEGLIGENCE OF FELLOW SERVANT.

An employer who appoints a competent superintendent over certain work, gives him requisite authority for the performance thereof and supplies him with all necessary material, is not liable at common law for injuries to a workman through the negligence of the superintendent in the discharge of his duties.

[*Western Canada Power Co.* v. *Bergklint*, 24 D.L.R. 565, 22 B.C.R. 241, reversed.]

Ed. Note.—Whether the duty neglected is or is not one of superintendence, for the proper discharge of which the superintendent actually in charge of the work is liable, or a duty for the performance of which the employer is responsible in any case, seems to be in each action a question of fact to be decided in the light of judicial interpretation as to the duties of employers and superintendents respectively.

Statement.

APPEAL from a decision of the Court of Appeal for British Columbia, 24 D.L.R. 565, 22 B.C.R. 241, affirming the judgment at the trial in favour of the plaintiff. Reversed.

Sir C. H. Tupper, K.C., for appellants; *S. S. Taylor*, K.C., for respondent.

Davies, J.

DAVIES, J.:—This is an action brought to recover damages for injuries sustained by the plaintiff while he was engaged with

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two other workmen on a narrow ledge (3 or 4 ft. broad) of an almost precipitous cliff or rock bluff some 85 ft. in vertical height, 35 to 45 ft. above him and 40 ft. or more below him. The work these men were doing was the preparing of a level place on which to stand a power drill in order to blast off a column or jutting of rock on the face of the rock cliff against which it was proposed to build the side of the defendants' power house. The defendants were as a fact at the time of the accident preparing a site for an extensive power plant. The top of this edge on which plaintiff was working was some 35 or 40 ft. above the floor or bottom of the rock excavation which had been made at the base of the cliff for the power house and the companies' operations had been carried on for a period extending over 6 or 7 months, employing 300 to 400 men.

No drilling had been made immediately above the ledge on which plaintiff was working but blasting was necessary to blow out the column of rock which if left would interfere with the building up of the power house wall.

The operation was one incidental to the main work the parties were engaged in of preparing a site for and erecting a power house. As a matter of fact, it took about 9 or 10 hours only to complete and was a mere incident or detail in the general operations or work of construction of the company. That the work in which plaintiff was engaged at the time he fell off this ledge or rock was dangerous work is unquestionable.

That the entire work or operations of the company had been entrusted to a skilled, competent general manager and engineer, Mr. Haywood, was proved beyond any possible doubt as also that he had been furnished with ample powers and with all appliances, material and workmen necessary to carry out the work successfully or the credit, if required, to procure them.

The case had already been tried once and was re-tried by order of this Court.

A number of pertinent questions had been prepared by counsel for submission to the jury; but the latter were told by the trial Judge that it was not imperative for them to answer these questions and that they could find a general verdict.

They did, unfortunately, ignore the questions and found a general verdict "for the plaintiff with $10,000 damages at common law."

We must assume that all questions of fact necessary to sustain that verdict were found in plaintiff's favour and amongst these that the defendants were guilty of negligence which proximately caused the accident and that the plaintiff was not guilty of contributory negligence. What the defendants' negligence consisted in the jury did not find but I assume we must hold that it was in not having placed a barrage of logs along the top of the cliff as contended by plaintiff should have been done. No other negligence is suggested or given in evidence. As a matter of fact, the general manager and engineer gave it as his opinion that such a barrage would increase rather than lessen the plaintiff's danger. In this he was supported by Colonel McDonnell and other witnesses, but I do not think it is possible to say that the jury would not on the whole evidence be warranted in finding that the barrage was a reasonable and necessary precaution for the safety of the plaintiff and his co-workers.

The Court of Appeal for British Columbia sustained the judgment which the trial Judge entered on the verdict for the plaintiff and from that judgment this appeal is taken.

The facts were that this vertical rock 100 feet high on a ledge of which about half way down plaintiff went with two others to do the blasting, was capped by a sloping hillside which plaintiff had been ordered before going on with the blasting below to clear from rocks and loose stone and material and make what was known as a "berm" just above the top of the cliff for his own protection and that of his fellow-workmen when they descended to do the blasting on the ledge below.

His own evidence was to the effect that they had done this work all right and made the necessary "berm" but that nevertheless when he went on the ledge below and was about or in the act of drilling the necessary holes in the ledge for blasting something fell from the cliff above—either stone, sand, or clay, he did not know which, and knocked him off the ledge. The general verdict for the plaintiff rebuts the proof of contributory negligence and therefore it must be assumed that plaintiff and his co-workers had done their duty and efficiently carried out their orders to clear the hillside from all stones and had made a proper "berm" at the edge of the cliff.

The question immediately arose whether reasonable precau-

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tions had under the facts as proved been taken to prevent the falling of this stone, sand or clay and, if they had not, whether their absence was due to the negligence or error of judgment of the superintendent manager for which the company was liable.

The rival contentions were, first, on the part of the plaintiff, that the work being an admittedly dangerous one more than ordinary precautions should have been taken and that in addition to the "berm" being made at the top of the cliff, there should have been a barrier of logs or plank on or slightly above the brink of the rock cliff to prevent rolling stone and other debris from injuring employees working below; that the absence of such a precaution made the place below an "unsafe" one for men to work in and brought the company within the rule which made them liable in case of injury to their workmen whether such was caused by the neglect on their superintendent engineer's part to provide the safety barrage or not.

On the other hand, appellant contends that the plaintiff must fail in maintaining his claim for three reasons; first, contributory negligence; secondly, voluntary assumption of the risk; and thirdly, that negligence, if there was any with respect to the barrage of logs, or error of judgment in not providing such barrage, was that of their superintendent, a fellow-servant of the plaintiff, for which the company was not responsible.

It may be that looking at the jury's finding in connection with the charge of the trial Judge, the first two contentions of appellant should not be sustained.

I am of opinion that his last contention must be given effect to and the appeal allowed.

The general proposition is not challenged that it is the duty of the employer and one which he cannot delegate to another so as to relieve himself of liability to provide his workmen, at any rate in the first instance, with a reasonably safe place to work in and reasonably suitable and necessary materials and appliances to work with. The question immediately arises whether the facts of this case bring it within the rule.

The work the company was engaged in was the construction and installation of a large power house. Some 300 men or more had been engaged for many months preparing the tail race and the foundations for this house. It was intended to build one side

of the power house up against the vertical cliff spoken of. The special work plaintiff was engaged in when injured was a mere detail of that general work. As a fact, the blasting off of this ledge of rock to enable the wall to be erected only took a few hours, 9 to 10. It was work of a kind which obviously had to be carried on under the judgment and control of a skilled manager. The directors of such a company are not as a rule men competent for such a task. It must be delegated. It was work undertaken for the very purpose of carrying out the duty which the law casts upon them of providing a safe place for their men to work in.

If their duty is enlarged further and to the extent contended for and if it extends to the work antecedently necessary to create a "safe place" and done for that very purpose, however necessarily changing from day to day and however incidental to the main work of preparing a "safe place," then it seems to me the doctrine of common employment, as laid down by the House of Lords in *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326, and applied by the Courts ever since would be greatly restricted. I can find no authority for so enlarging the rule as to the absolute liability of the master to provide a safe place for his workmen to work in. The place this plaintiff was working in was admittedly a dangerous one and known to the workmen to be so. The duty of the master was to provide a competent and skilled manager to superintend it who, in his turn, having been supplied with everything necessary, would determine what reasonable precautions were necessary to be taken. I cannot accede to the argument that for an error of judgment on his part in that regard the master would be liable. The work was a mere detail in the preparations for constructing a safe power house.

Mr. Taylor sought to meet the point that the work in question was a mere detail or incident of the work being carried on by contending that it was the company's duty to have had that barrage of logs during all the months the workmen were engaged in preparing the foundations of the power house at the cliff's base. But the necessity for such a protection is disproved by the fact that not a single man was injured of the hundreds employed during these months, when 300 to 400 men were employed, by anything which fell from the cliff above. We are, however, dealing now with the facts of this case, the blasting off of a column

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or shoulder of stone from the cliff's side, a single detail of a vast work; and after considering all the authorities cited I am of the opinion that the facts do not bring the plaintiff's case within the rule excluding the doctrine of common employment.

I do not think the decisions of this Court at variance with that I have reached in this appeal. They affirm the main proposition of the absolute duty which cannot be delegated by the master, of providing a safe place for his workmen to work in. They do not go the length of saying that if a master in the attempted discharge of his duty so to provide a safe place for his workmen employs a skilled and competent man as his superintendent, furnishes him with everything necessary to do his work effectively and provides the "safe place" the law contemplates and does not personally actively interfere with the work, the master is liable to his workmen for damages caused to them from the negligence or error in judgment of such competent manager in carrying out every detail of that work. In the case in this Court chiefly relied upon of *Ainslie Mining and Railway Co.* v. *McDougall*, 42 Can. S.C.R. 420, a majority of this Court held that under the facts there proved it was not open to the employer to invoke the doctrine of common employment. The facts at the time of the accident complained of were as regards the mine-owners' duties to their employees, that the mine owners were there for the first time placing their men at work in a mine which was held not to be at the time a safe place for the workmen to work in.

In the later case of *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412, the Court seems to have held that the damages awarded the injured workman were the result either of a defect in the *original installation* of the engine which caused the damage or in a defective system.

I do not think the principle upon which either of these cases was decided applicable in the present case, where the doctrine of the absolute responsibility of the master is invoked. The work of constructing such a power house was necessarily changing from day to day, the particular work on which plaintiff was engaged was a mere incident or detail in the general work, the control and carrying out of which had been necessarily delegated to a competent engineer and the general work was one undertaken to discharge the master's absolute duty of providing a safe place for the workmen to be employed in his power-house.

I at one time thought the late case decided by the Judicial Committee, *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734, might be applicable, where it was held, as the headnote of the report states:—

> The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.

In that case, the jury found *inter alia* that the accident was due to the company's negligence through their master mechanic in failing to install proper safety appliances and to employ a competent signalman which the Judicial Committee said was not an unreasonable finding under the evidence and they dismissed an appeal from a judgment holding the master liable.

In the case before us, I hold, however, that the master's duty was not, under the circumstances, an absolute one and that it was open to him to invoke the doctrine of common employment. His attention had "not been called by any previous occurrence to the danger" which the absence of the suggested barrage of logs might cause and nothing had occurred to induce him to actively interfere with the management and control he had wisely and necessarily delegated to his competent engineer foreman.

I would, therefore, allow the appeal and dismiss the action.

Idington J.

IDINGTON J. (dissenting):—This case has been tried twice as a result of our disposition of the appeal as reported 50 Can. S.C.R. 39. The pleadings were amended before the second trial and the evidence adduced thereon has tended to clear up some matters relative to the relation of the directorate of appellant to the work in question and their knowledge of how that was being carried on. I need not re-state my view of the law which should govern such cases.

The evidence applicable thereto adduced on the last trial furnishes ample ground for the jury to find the verdict they have and to maintain the judgment entered for respondent.

The work was carried on under the eyes and direction of a local branch of the directorate and thus the case brought well within the decision of this Court in the case of the *Ainslie Mining and Railway Co.* v. *McDougall*, 42 Can. S.C.R. 420, and numerous other cases upon the liability of companies who so install their

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works as to render them unsafe for their workmen employed therein.

The latest case cited of *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734, seems to leave no question upon that part of the matters involved in that branch of the case.

Moreover, the evidence on the second trial brings out more clearly than its presentation on the first trial that it was the original installation of the work that was at fault.

The nature of the work that was being done by the workmen had changed from month to month as the work progressed but the same source of danger existed throughout and needed the same sort of protection, which respondent has urged throughout in order to render the place a reasonably safe one to work in.

On the main ground of the appellant's contention it, therefore fails.

Some minor matters were urged as to misdirection which appellant claimed entitled it to a new trial. I have considered these but can find nothing which would justify ordering a new trial.

Indeed, the appellant seems to me to have very little ground, if any, to complain of the charge of the learned trial Judge.

Anything its counsel objected to on the trial with any semblance of reason was corrected. And the alleged misdirection relative to evidence rejected, or improperly admitted, even if tenable at all which I doubt, cannot be said to have produced any miscarriage.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—This is the second appeal to this Court arising out of the same action each having been brought after a trial before a jury in which the verdict and judgment were given in favour of the plaintiff (respondent). See *Bergklint* v. *Western Canada Power Co.*, 50 Can. S.C.R. 39. The respondent was injured when working as a drill-helper on the side of an excavation which the appellant company was making to provide a site for its power house at Stave Falls in B.C. While engaged in clearing the narrow ledge on which he was standing in order to place the drill he was helping to work he was struck by something coming from the edge of the cliff, some 35 ft. above, and losing his balance in consequence fell to the bottom of the ravine, a distance of

some 50 ft., and was very severely injured. The respondent's complaint upon which the action was based was that the appellant company negligently failed to provide sufficient protection against injury by rock or soil falling from the top of the cliff. The respondent was unable to say precisely what it was that struck him, but it must be taken for the purposes of the appeal that he was struck by rock or gravel or earth with sufficient momentum to throw him off his balance. The excavation was a large one, 400 ft. in length by 100 in width, and the work was in progress many months. The respondent's case was that the appellant company should have provided a barrier at the edge of the cliff to protect the workmen from the danger of falling material. The course actually adopted by the engineer in charge of the work, who was entrusted with full responsibility with respect to such precautions, was from time to time at places where men were about to work on the cliff side to have a gang of men clear away from the top of the cliff such materials as appeared to be possible sources of danger. It has been found by the jury and I shall of course assume it as the basis of this judgment, that the engineer in pursuing this course, in failing, that is to say, to provide something in the nature of a physical barrier at the place where Bergklint was injured, was negligent and that if the appellant company is answerable for his negligence, the respondent is entitled to succeed and the appeal should be dismissed. The appellant company's defence, in so far as it is material in the view I take of the case, was that Mr. Hayward, the engineer in charge of the works, was entrusted by the company with authority and with the responsibility of taking whatever precautions for the protection of the workmen might be required by a proper regard for their safety and that he was supplied with sufficient means to enable him to provide any protection that in his judgment might be expedient and that Mr. Hayward's competence not being really questioned the appellant company had thereby discharged its duty to its employees. In answer to that (it may be mentioned) it was contended that there was sufficient evidence to shew such actual intervention by Mr. McNeil, the vice-president of the company, as to justify the jury in finding that the company was directly responsible through Mr. McNeil. I may say at once, and I dismiss the point with this observation, that I think there is no such evidence.

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The question is: Could the company discharge its duty to its workmen in respect of such precautions by the employment of Mr. Hayward, a competent engineer, and by giving him the authority and the resources which were given to him? On the present appeal the fact that the necessary authority and resources were given to Mr. Hayward cannot be disputed.

The question upon which it is now our duty to pass is in substance the question decided by the majority of the Court adversely to the respondent on the previous appeal. On that occasion the view expressed was that the circumstances of the respondent's employment and of the work in which the appellant company was engaged were such as to take this case out of that class of cases in which the rule is that the owner is responsible not only for taking due care to see that the employee has a safe place to work in but is bound to see that due care is taken by those to whom he commits the performance of the duty; in other words, is responsible for failure on their part to exercise due care to that end. The opinion was expressed, that having regard to the conditions—the character of the work and the physical surroundings—the duty of providing protection for the workingmen from time to time as the work progressed was a duty in the nature of a duty of superintendence requiring the judgment of the man on the spot for its efficient performance and was therefore not one of the duties in respect of which it is said that the master cannot divest himself of the responsibility by delegating it to an employee. The case seemed to fall within the actual decision in *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326, where the owner was held by the appointment of a competent superintendent with adequate means and resources to have discharged or divested himself of his responsibility regarding so grave a matter as providing "local ventilation" in a shaft where workmen were engaged in opening a drift into an unworked seam of coal—an explosion of fire damp having been the consequence of neglect. That, as was pointed out on the previous occasion, was regarded by several of their Lordships as being in the nature of a duty of superintendence and therefore naturally devolving upon the superintendent of the mine.

It may indeed be a question in view of the judgment delivered in the last appeal on this point, whether the respondent is not

estopped from raising the question now. The evidence now before us in so far as it differs from the evidence on the previous trial as stated in the judgments previously delivered, is not in its bearing on this point more favourable than that evidence was to the respondent. On the last trial the respondent strongly pressed the contention that the escape from the top of the cliff of the material that struck him was probably due to the existence of exceptional conditions at the place where it occurred—that the material had been loosened by the action of water, there being, as he alleged, a trickling of water near by. It is true that the judgment directed a new trial only, but this order was made on the ground that the trial Judge had not left to the jury the question whether or not the duty of taking precautions and resources sufficient to enable him to take them effectively had been entrusted to Hayward. There is some authority indicating that where a Court of appeal in granting a new trial decides a substantive question in the litigation, that question for the purposes of that litigation is to be taken to have been conclusively determined as between the parties. I refer without further discussion to the observations of Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin*, [1909] A.C. 615, at 623, and to their Lordships' decision in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*, 11 Ind. App. 37 (see especially p. 41 as to the effect of determinations in interlocutory judgments upon the rights of parties in the suits in which the judgments are given). It seems quite clear that for this purpose we are not confined to the formal judgment; *Kali Krishna Tagore* v. *Secretary of State for India*, 15 Ind. App. 186, at 192, and *Petherpermal Chetty* v. *Mumandi Servai*, 35 Ind. App. 102, at 108.

It is true, however, that the record of the previous trial and appeal are not formally before us and moreover that the point was not taken and has not been argued by counsel. As I think the appeal should be allowed on other grounds, I say nothing more about it.

What I have said touching the ground of judgment given by the majority of the Court on the previous appeal would be conclusive and I should leave the matter there were it not for an argument based upon the decision of the Privy Council in *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734, pronounced since the judgment in the last appeal was given. The judgment

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of their Lordships was delivered by Sir Arthur Channell and in the course of that judgment, at pp. 342-3, he says:—

> The contention of the defendants is that they performed their duty by leaving the selection and care of the plant to a competent man, and they rely mainly on a well-known passage in the judgment of Lord Cairns in *Wilson* v. *Merry*, L.R. 1 H.L.Sc. 326, at 332. Reliance was also placed on *Cribb* v. *Kynoch*, [1907] 2 K.B. 548, and *Young* v. *Hoffman Mfg. Co.*, [1907] 2 K.B. 646. It is, of course, true that a master is not bound to give personal superintendence to the conduct of the works, and that there are many things which in general it is for the safety of the workman that the master should not personally undertake. It is necessary, however, in each to consider the duty omitted, and the providing proper plant as distinguished from its subsequent care, is especially within the province of the master rather than of his servants.
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> In *Cribb* v. *Kynoch*, [1907] 2 K.B. 548, and *Young* v. *Hoffman Mfg. Co.*, [1907] 2 K.B. 646, the question arose as to the duty of a master to have inexperienced persons in his employ properly instructed in the way to perform dangerous work, and that is a matter which it is fairly obvious must in almost all cases be done for the master by others. The supplying of that which in the opinion of a jury is proper plant stands on rather a different footing.

I cannot infer from His Lordship's observations that their Lordships in any way questioned the actual decision in *Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326, at p. 332, and I think there is nothing in their Lordships' judgment or in the decision affecting the considerations upon which the opinion expressed on the previous appeal was based.

One point not previously mentioned calls for a word. The appellant company incorporated by letters patent and governed by the Dominion Companies Act passed certain by-laws which authorized the appointment of executive committees selected from the members of the board of directors and the investing of such committees with such powers as the directors should deem advisable. An executive committee was appointed for Vancouver which consisted of three members of the board of directors and the by-law appointing them at the same time provided that Mr. Hayward, who was not a director, should be authorized to attend the meetings and to take part in all its deliberations and be "*ex officio* a member of the committee." There was also a power of attorney executed by the company conferring large powers upon these four persons to be exercised by any two or three of them. It is argued that Mr. Hayward by reason of being a joint donee of the powers under the power of attorney stood in the same relations to the company for the purposes of this action as the board of directors themselves. The answer to that is that Mr.

Hayward was general manager and engineer in charge and as such exercised only such powers as were vested in him by virtue of his appointment to those offices or otherwise entrusted to him as general manager or engineer in charge; and it was as general manager and engineer in charge that he was entrusted with the duty to provide protection for the workmen.

It was not in the exercise of powers vested in him under the power of attorney jointly with the members of the executive committee proper that he is chargeable with negligence.

The company could not moreover be chargeable with notice through Hayward of the negligence found against him. There is not the slightest evidence of want of good faith on Hayward's part and if notice of the facts known to Hayward be imputed to the company notice also must be imputed of Hayward's opinion that the precautions taken by him were sufficient. In these circumstances and in view of Hayward's admitted qualifications, assuming the company is not responsible for Hayward's omissions it cannot be charged with wrongful neglect in failing to direct that some additional precaution should be provided.

ANGLIN J.:—The facts of this case and its surrounding circumstances are fully set out in the judgments delivered on the former appeal to this Court; *Bergklint* v. *Western Canada Power Co.*, 50 Can. S.C.R. 39; and in assigning reasons for the conclusion which I have reached that the present appeal should be allowed and the action dismissed I find it necessary to add little to what I then said.

The only material variation in the evidence at the new trial is that the plaintiff has now emphasized water conditions on the hillside as a definite and all-important element of danger—a development which I should regard with grave suspicion.

The second trial (in the order for which I reluctantly concurred) has resulted in a general verdict for the plaintiff, his recovery being increased, however, from $5,500 to $10,000.

The sole ground of negligence on the part of the defendants now relied upon is the failure to have provided an overhead barrier or shield of logs for the protection of the plaintiff and the workmen engaged with him—and that is the fault on which it is claimed for him that the jury based their verdict in his favour.

After careful consideration of it, the evidence now before us

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seems to me to establish that the overhead protection of a shield or barrier of logs or planks is required only where sufficient clearing of the hillside is not feasible or is too expensive; that it was entirely practicable in the present case to have thoroughly cleared away all debris and loose stuff above the place where the plaintiff was working when injured; that he and his associate workman had been instructed to so clear it and had assumed to discharge that duty; that there were no conditions present which would render clearing properly done inefficient or inadequate as a protection; and that it was only when assured that the work of clearing had been properly done that the foreman allowed the plaintiff to go upon the ledge in order to proceed with the preparation for drilling at which he was engaged when injured. Apart altogether from any question of contributory negligence or any issue of *volens*, if trying the action I think I should unhesitatingly hold that the facts in evidence would not support a finding that the omission to have a shield of logs placed above the workmen's heads amounted to actionable negligence and that, if it was a mistake at all, it was the result of a mere error of judgment which should not entail liability.

But assuming that it was open to the jury on any theory suggested to have found that it was negligence, it was clearly that of the superintendent Hayward, who was undoubtedly a fellow-employee of the plaintiff.

Counsel for the plaintiff urged that the shield of planks or logs was required as a protection throughout the entire period of the construction of the defendant's works for men working in the valley below and on the hillside, and that its absence should therefore be regarded as a defect in original installation or a failure to make proper provision in the first instance—from liability for which no delegation of duty, however comprehensive, to officials, however competent and well equipped, could relieve the employer. *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734, affords a recent and a very striking illustration of the absolute character of that duty. The evidence before us, however, does not support this contention. The guard or barrier of logs is not dealt with, even by the expert witnesses called by the plaintiff, as such a permanent or relatively permanent requirement.

An attempt to shew knowledge of conditions and control of,

or interference in, the superintendence or management of the works by the directors of the company, or any of them, utterly failed. Everything in the nature of superintendence and management was unqualifiedly entrusted to Mr. Hayward. As the trial Judge put it in his charge:—

> It does not appear that they (the directors) in any way interfered in the practical physical operation of the work. In other words, they were simply business men who left the practical duties to the superintendent and his staff.

Yet the jury may have based their verdict upon a finding—made, of course, without any evidence to warrant it—that the directors did attempt to manage or supervise the work themselves and were negligent in doing so, since, notwithstanding what he had stated as to lack of evidence, the Judge left it to the jury to say whether they had in fact so interfered.

I find nothing in the record to alter the view taken by other members of the Court as well as myself on the former appeal that the provision of suitable protection for employees engaged as the plaintiff was when injured

> could properly be delegated to a competent superintendent or foreman (furnished with adequate means and resources) whose negligence would not render the employer liable at common law.

With my Lord the Chief Justice I thought that upon the case then before us it was clear beyond question that this duty had been so delegated and that the furnishing adequate means and resources to the superintendent was conceded.

A new trial was ordered because in the opinion of my brother Duff, 50 Can. S.C.R. at p. 50, the trial Judge had in effect refused to leave to the jury the question,

> Whether the duty of superintendence was in fact in this case retained by the directors or others having authority to exercise the general powers, or whether, on the contrary, Mr. Hayward had such authority and resources at his command and was under a duty expressed or implied to use them in furnishing the suggested safeguards, if such safeguards were reasonably necessary.

Mr. Hayward's competency has never been in question. Whatever may have been the case upon the former record, his duty and authority in the premises and the adequacy of the resources at his command are put beyond controversy by the evidence now before us. Yet the jury may have found otherwise, since the learned trial Judge, notwithstanding that he had told them that Hayward was a competent superintendent, that the

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duties of superintendence had been left to him and that he and Fraser, the foreman,

had at their command, according to the evidence, for the purpose of fulfilling their duties, the necessary facilities, appliances and funds,

Nevertheless afterwards explicitly left it to them

to determine whether Mr. Hayward, the superintendent, had full authority to superintend the work and whether he had at his command all the necessary appliances and facilities for so carrying on the work,

adding that, if they should so find, the plaintiff could not succeed (at common law) on that branch.

Whether the verdict at common law was based on supposed failure of the directors to charge Hayward with the full duties of superintendence, or to supply him with the necessary means and resources, or upon some personal negligent interference by the directors or some of them, cannot now be known. But upon whatever view the jury may have proceeded the verdict is against the evidence and perverse.

For these reasons (some of them more fully stated in the report of the former appeal at pp. 57-70) I am with respect of the opinion that if there was any fault (I incline to think there was not) on Mr. Hayward's part, it did not entail liability of the company at common law.

In order that the plaintiff should recover under the Employers' Liability Act it would be necessary to treat the verdict as a finding that the failure to protect him and his fellow workmen by a shield of logs was negligence in superintendence on the part of Mr. Hayward. At the former trial this aspect of the case raised on the pleadings was practically abandoned. The trial Judge then told the jury, without objection, that, if the plaintiff should recover at all, it must be at common law. At the second trial, although evidence was given in support of the claim under the Act and the jury was invited to deal with it, they ignored it and merely found "for the plaintiff for $10,000 under the common law." In his factum on the present appeal and at bar in this Court counsel for the respondent made not the slightest allusion to this branch of his client's claim. Moreover, as I have already pointed out, in view of the manner in which the case went to the jury, it is impossible to say that their verdict holding the defendants liable at common law was not based upon a finding that the directors of the company had personally interfered in the man-

agement and supervision of the work and had been themselves negligent therein. There is no assurance that the verdict proceeded upon negligence on the part of Hayward which would be necessary to sustain a judgment under the Employers' Liability Act. If we were otherwise at liberty to deal with the case upon an aspect of it ignored by the jury and not presented in argument before us this uncertainty about the meaning and effect of the verdict would appear to present an insuperable obstacle to our now holding the plaintiff entitled to recover under the Employers' Liability Act.

The appeal should be allowed and the action dismissed. If the defendants ask them, they are entitled to all the costs of the litigation of which we have power to dispose.

Brodeur, J.

BRODEUR, J. (dissenting):—This is an accident case which already came before us, *Bergklint* v. *Western Canada Power Co.*, 50 Can. S.C.R. 39, and in which the majority of this Court was of opinion that a new trial should take place. It was then stated that there was evidence upon which a jury might have found that the duty of providing proper safeguards had been entrusted to a competent person provided with the necessary means of doing so and that the failure of the trial Judge to leave this question to the jury necessitated a new trial.

I was then of opinion that the findings of the jury were sufficiently supported by evidence and warranted judgment in favour of Bergklint.

A new trial has taken place and some of the objections raised against the former verdict have disappeared.

It had been found in the first verdict that the defendants had been negligent in not sufficiently clearing the face of the incline and placing barriers to prevent rolling stones and other debris from causing injury to the employees.

It was decided by the Court of Appeal of British Columbia that this insufficient clearing having been carried out by Bergklint and his fellow workmen that there was contributory negligence on his part and that the verdict in his favour should be set aside.

On the new trial this question of clearing was of course, the subject of evidence and it is shewn very clearly, in my opinion, that the clearing was well done and in the language of the general manager of the company, "it was properly cleared of anything that would drop or break down."

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That phase of the case was not very strongly pressed upon us; but the main question which was argued was that the verdict of the jury under the doctrine of *Wilson* v. *Merry*, L.R. 1 H.L.Sc. 326, could not be supported. In that case it was stated by Lord Cairns that what the master is bound to his servant to do in the event of his not personally superintending and directing the work, is to select proper and competent persons to do it and to furnish them with adequate materials and resources for the work.

It is contended by the respondent on this appeal that barriers should have been erected on the cliff in order to protect the servants of the company working below against rolling stones or debris which might come from that cliff. Blasting was being done constantly and it was necessary that some protection should be used in order that no debris should reach the men.

That question of giving protection to the men by means of barriers is controverted, it being claimed by the appellant company that those barriers would not give proper protection.

According to my opinion, the company was not bound to use all the latest improvements and appliances. It is a question of fact in each particular case whether there has been negligence in failing to install any appliance: *Toronto Power Co.* v. *Paskwan*, 22 D.L.R. 340, [1915] A.C. 734.

The jury in this case has brought in a general verdict of negligence against the company. They evidently found that those barriers would have constituted in the circumstances a proper protection and that the neglect of the company to install these appliances constituted on its part a case of negligence.

There was certainly evidence on which the jury could find such a verdict and I have come to the conclusion that the appeal should be dismissed with costs. *Appeal allowed.*

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Ontario Supreme Court, Lennox, J. January 27, 1917.

1. CONTRACTS (§ II D—157)—TO SUPPLY GAS—"IN THE CITY."
An agreement to supply natural gas for the suitable and sufficient distribution thereof to any person, firm or corporation "in the city," extends to land annexed to the city after the date of the agreement, but not to sales or delivery outside of the city.

2. CONTRACTS (§ II A—125)—INTERPRETATION—SUBSEQUENT ACTS OR CONDUCT.
Where the language of a contract is unambiguous its interpretation cannot be affected by subsequent acts or conduct.

3. ESTOPPEL (§ III A—40)—ESSENTIALS—KNOWLEDGE OF LEGAL RIGHTS.

No estoppel arises where there is no evidence that both the contracting parties were not fully aware of their respective legal rights.

[*Toronto Electric Light Co.* v. *Toronto*, 31 D.L.R. 577, 591, [1917] 1 A.C. 84, 38 O.L.R. 72, followed.]

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Statement.

ACTION for a declaration as to the proper interpretation of an agreement of the 3rd November, 1906, between H. D. Symmes and D. A. Coste and the defendant company, for supplying natural gas for the City of Chatham, and for an injunction and other relief.

J. G. Kerr, for plaintiff company; *T. G. Meredith*, K.C., and *J. M. Pike*, K.C., for defendant company.

LENNOX, J.:—In or about 1915, the Dominion Sugar Company purchased a block of land of about sixty-one acres in the township of Raleigh adjoining the westerly limit of the city of Chatham, and have built a sugar factory upon it.

LENNOX J.

On the 24th November, 1915, the Ontario Railway and Municipal Board, under powers conferred by the Municipal Act, R.S.O. 1914, ch. 192, sec. 21, describing the land therein by metes and bounds, made an order purporting to annex this land to the city of Chatham, and declared that this would take effect on and from the said 24th November. It was afterwards thought that the description of the land was inaccurate, and on the 13th December, 1915, the Board made an order correcting the description. As to the original order, it should be mentioned that, while it contains recitals, it does not recite all the conditions precedent set forth in sec. 21 (1); although, of course, these conditions may have existed nevertheless. The jurisdiction of the Board is purely statutory. As to the amending order, if it can only be regarded as an amending order, I am disposed to think that the Board had not power to make it—that it was too late. Very broad powers of amendment are conferred upon the Board by the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 21, sub-sec. (4). By this sub-section it has the same powers to amend its proceedings as are vested in the Supreme Court. But sec. 21 (2) of the Municipal Act, under which the Board was proceeding, expressly defines the time within which the Board may amend an annexation order, namely, as to certain matters not arising here, the order may be amended "at any time," but as to matters other than those

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specifically mentioned the order may be amended only "before it takes effect." This section (sub-sec. (1)) also empowers the Board in and by its order to declare when the order is to take effect, as the Board did declare.

Any question as to the validity of the orders, if raised by the pleadings or at the trial, necessarily goes to the root of the main question I have to determine, namely, whether the plaintiff company, under its agreement with the defendant company, is bound to furnish natural gas for the operation of the Dominion Sugar Company's plant, as an industry within the limits and forming part of "the City of Chatham;" and, if objection had been taken, I would have had to inquire whether the statutory conditions precedent to the making of the order, although not all recited, were in fact complied with, as they probably were. But the question was not raised, and, in the circumstances, including the long experience and the recognised efficiency of the Board, I think I should as to this invoke the maxim, *Omnia præsumuntur esse acta rite*.

As to amending the description, although the objection that occurs to me appears formidable, it might wholly disappear upon argument, and I am hardly justified in being astute in finding reasons why the action should not be disposed of upon the merits. I should rather endeavour to find some reasonable way to surmount difficulties, real it may be but possibly illusory, of my own making. I think there is a fairly reasonable way. It was evidently deemed expedient, for some cause, to have the description of the property differently worded, but there is nothing before me to shew that the description in the first order, although technically inaccurate, was not substantially all that was necessary; in other words, was not sufficient to identify the property intended to be annexed. If it was, the amending order may properly be disregarded. If, on the other hand, there was essential error in the description, if by the description in the first order the property intended to be annexed could not be identified, there was no land annexed, the order was void *ab initio*, and the proposed annexation did not go into effect on the 24th November or at all; and, although this method is obviously not free from difficulty, there may be no insuperable reason why the order of the 13th December should not, in that event, be treated as *the order* for annexation,

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and the previous order, duly referred to and identified, as it was, read as a document incorporated in it.

I will therefore deal with the questions submitted upon the basis that the sixty-one acres in question have been duly annexed to, are incorporated in, and form part of the city of Chatham.

In 1906 discoveries were made, natural gas became a commercial commodity in the county of Kent, and H. D. Symmes and D. A. Coste, the predecessors in title and contract obligations of the plaintiff company, were engaged in its production. They had sunk several wells, and were endeavouring to obtain markets for their product.

At that time and for many years before, the Chatham Gas Company, incorporated under and for the purposes of C.S.C. 1859, ch. 65, had a franchise for the sale and distribution of manufactured gas to the inhabitants and industries of the city of Chatham, and for lighting its streets, squares, and public buildings. On the 3rd November, 1906, an agreement under seal was entered into between the Chatham Gas Company and Symmes and Coste, reciting that:—

"Whereas the Chatham Gas Company is the owner of a system of mains and pipes laid through, under, and along the streets, squares, and highways, lands and public places, of the City of Chatham, by and with the authority and sanction of the said city, also of certain rights and franchises to distribute and sell gas to the inhabitants of the said city;

"And whereas the producers (Symmes and Coste) own and control gas leases in the townships of Raleigh and East Tilbury, in the county of Kent, and a very large well, known as the Halliday well, and have several other wells being drilled and located in what is known as the Tilbury and Raleigh Oil and Gas Field;

"And whereas the parties hereto have agreed for the supply by the producers to the Chatham Gas Company of natural gas and for the sale and distribution in Chatham aforesaid of the same by the said Chatham Gas Company, on the terms and conditions following," it is provided and agreed:

"(1) The producers shall furnish, through a high pressure line or lines of sufficient capacity for all the requirements of the Chatham Gas Company and its customers, and the Chatham Gas Company shall take from the producers, natural gas delivered

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at the city line of the said city of Chatham, at the corner of Lacroix street and Park avenue.

"(2) That the Chatham Gas Company is to connect its line with the Union line and to provide proper equipment and plant to secure an efficient distribution.

"(3) The producers shall furnish to the Chatham Gas Company, at all times for all the purposes of the Chatham Gas Company's present and future customers and the Chatham Gas Company's own use, and the Chatham Gas Company shall take from the producers, the said natural gas for a period of ten years or for such part of said term of years as the producers shall have a supply from the gas-field aforesaid, or any other field, or for such longer period after the expiration of the said ten years as the producers shall have natural gas in sufficient quantities. The producers shall use due diligence at all times in prospecting and drilling wells for gas, so that the supply may be continuous for all the purposes of the Chatham Gas Company, and the said producers shall make any reasonable expenditure that may be necessary to make the supply continuous.

"(4) The producers will not sell gas in Chatham, and the Chatham Gas Company will buy from no other company, if the producers keep up the supply, and the producers shall not supply natural gas to any person or corporation outside of the city of Chatham, excepting to customers along the high pressure line between the field and Chatham, unless the supply from time to time shall be greater than that required by the Chatham Gas Company for itself and for its customers for all purposes.

"(5) The quality of gas supplied by the producers shall be such that (as?) the Chatham Gas Company may legally supply to its customers for all purposes." . . . .

(6) Detailed provisions as to the manner in which the Chatham Gas Company shall equip and operate its distribution system, and so that it shall be "suitable and sufficient to distribute the gas to be supplied under this contract to any person, firm, or corporation *in the city of Chatham* desiring to use the same," with an exception as to cases of excessive expense; and concluding: "and shall with the best care and diligence carry on and conduct the business of furnishing and supplying such natural gas *in Chatham aforesaid*, and shall use its best endeavours to

manage and conduct its business so as to build up and extend the same and increase the consumption of natural gas from time to time *in the said city*.

"(7) The Chatham Gas Company shall lay such other high pressure lines in the city, and place at such other points in the city such other low pressure regulators, as may be necessary to properly and efficiently distribute the natural gas required by its customers.

"(8) The producers shall take every reasonable care to keep and maintain its supply pipe line in serviceable condition, and to repair the same as soon as possible in case of accidental break therein, but" etc.

The agreement also contains provisions for the keeping of books by the Chatham Gas Company, access thereto by the producers, the prices to be charged to consumers, reading of meters, periodical rendering and payment of accounts by the Chatham Gas Company, investigation of accounts in cases of dispute, the rate to be charged by the Chatham Gas Company to its customers for meters, and periodical ascertainment and division of gross receipts upon a basis of from 60 to 66⅔ per cent. to the producers.

As to the rights and obligations of the parties to this action in relation to a supply of natural gas for all the requirements of the City of Chatham, as the city was bounded and constituted on the 3rd November, 1906, there is no dispute; and the city limits are the same now as they were then, with the exception of the Dominion Sugar Company's property, added in the manner hereinbefore stated.

The substantial issue presented by the plaintiff company, and to my mind the only issue fairly debatable upon the evidence in this action, is the proper interpretation of the expression "the City of Chatham" in the agreement of the 3rd November. Did the parties by this mean the city with its possible increase of population within its territorial limits as they existed in 1906 and nothing more, or did they intend to include as well any other territory added to the city at any time during the time the agreement continued in operation? Counsel for the defence are not content to rest the rights of their client upon the determination of this question alone; and I will refer to the other questions raised later on.

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The Chatham Gas Company, looking to annexation of the Dominion Sugar Company's property to the city, and contending that it had a right under its agreement of 1906 to be furnished by the plaintiff company with natural gas for all the requirements of its customers in territory subsequently added to, as well as customers within the original boundaries of, Chatham (for the broader claims now set up were afterthoughts—though this is unimportant if they are well-founded), entered into an agreement dated the 15th November, 1915, with the Dominion Sugar Company, to supply to this company, through the mains and pipes of the plaintiff company, for so long as natural gas continues to be obtainable, all the gas from time to time required for heating and operating the Dominion Sugar Company's plant. The extent of the increased supply of gas thus made upon the plaintiff company is set out in a letter of the 28th April, 1916, from the defendant to the plaintiff company—accompanying a copy of the agreement—as follows: "The agreement contemplates, as you will note, the furnishing of whatever quantity of natural gas the sugar company may require for their purposes, which they estimate will be as much as five million cubic feet in twenty-four hours for a certain portion of the year, during their campaign, beginning in September, and lasting, usually, some three or four months. The quantity of gas required *might exceed the amount mentioned above, if their production was increased.*"

Counsel for the defence contend that the Chatham Gas Company's right to obtain gas for the sugar company does not by any means depend upon its being determined that "the City of Chatham" means the city as it is constituted or bounded from time to time; in fact, this ground, although taken and very ably argued, appeared to me to be the point least urged, and I thought least relied upon by Mr. Meredith. This may have been because it was the point most relied upon.

In addition to this, counsel for the defence contend: (1) That, without regard to any question of annexation or the boundaries of the city old or new, the agreement of 1906 secures to the Chatham Gas Company an absolute right to a full and sufficient supply of natural gas for all the requirements of all its customers *anywhere*, so long as this supply can be by any means obtained by the plaintiff company from wells in the county of Kent, subject

only to one qualification, namely, that the plaintiff company may diminish the quantity so far as is necessary to supply the wants of its customers along the line between the field and Chatham.

I was surprised when Mr. Meredith assured me that he seriously relied upon this contention, so definitely and broadly stated, as the legitimate construction of the agreement; the error may, of course, be in "the surprise," not in the argument; and yet, with all that was so well said and cited in support of it, I hardly think that this argument will be repeated at any later stage of this action.

As shewing the natural and ordinary meaning of the language of the agreement, I was referred to isolated expressions such as: "for all the requirements of the Chatham Gas Company and its customers"—"shall furnish to the Chatham Gas Company natural gas in sufficient quantities at all times for all the purposes of the Chatham Gas Company's present and future customers"—"The producers shall use due diligence . . . so that the supply may be continuous for all the purposes of the Chatham Gas Company," etc., etc.; and there are many other like expressions contained in the agreement, all equally cogent, and all, I think, carefully pointed out and dwelt upon, as shewing that the agreement must be interpreted in the unlimited way contended for; and all of which, with their contexts, appear in the recitals and provisions of the agreement above set out. There are many, perhaps as many, *equally cogent* expressions in the agreement pointing the other way. I cannot safely interpret the meaning of an agreement or conversation by this method. I must first know what the parties were talking about. I must do more, I must ascertain, if I can, the situation of the parties, and the object and purpose of the agreement—matters which I find expressed with admirable clearness in the agreement itself, and I must ascertain what the parties agreed to by a careful consideration of the whole document: *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158 (C.A.); *Ford* v. *Beech* (1846), 11 Q.B. 842, 866.

No good purpose would be accomplished by repeating here the recitals I have already set out; it is enough to say that nowhere in the agreement is there a suggestion of customers of the Chatham Gas Company outside of the city, or that the acquisition of such

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cutomers was contemplated; on the contrary, the whole agreement was distinctly based upon the corporate and franchise privileges and business in Chatham and the supply of the actual and future customers within the city of Chatham and nowhere else. Without requoting more, I may repeat the summary of the whole basis of contract in the last recital: "And whereas the parties hereto have agreed for the supply by the producers to the Chatham Gas Company of natural gas, and for the sale and distribution *in Chatham aforesaid of the same by the said Chatham Gas Company*, on the terms and conditions following." What I have referred to is, in my opinion, quite enough to answer the argument that the agreement confers a right upon the Chatham Gas Company to obtain natural gas for the supply of customers without reference to the boundaries of Chatham, or, as counsel says, "anywhere." But it is not all. The Chatham Gas Company is not a general trader or dealer in gas; it is a purely local concern, created by municipal action, under the delegated authority of Parliament, for the sole purpose of supplying gas in the city of Chatham, and had not when the agreement was entered into, and has not now (so far as the issues in this action are concerned), a corporate existence or legal authority or right to lay down a yard of distribution-pipe or make an effective contract for the sale or delivery of a cubic foot of gas outside the limits of the city. I need say no more. The exact position of this company will be referred to when I deal with what I regard as the substantial issue in this action.

I decide that the agreement does not provide for a supply of gas for sale or delivery outside of "the City of Chatham."

(2) Again it is argued on behalf of the Chatham Gas Company that, even if the language of the agreement of 1906 would not ordinarily mean that the producers were bound to furnish gas for customers outside the city of Chatham, "customers anywhere," as it is put, yet the plaintiff company and its predecessors in title, by subsequent acts and conduct, have so interpreted the agreement, and are bound by this interpretation; and it is pointed out that, with the knowledge and consent of the producing company, the Chatham Gas Company from time to time extended its lines out into adjoining municipalities, and acquired customers, in all perhaps more than 100, and these have

been and are being supplied with gas furnished by the producing company, and without protest or objection. It is not a question of the right of the Chatham Gas Company to insist upon the continuance of a supply of gas for these customers upon the ground of expenditure, acquiescence, or estoppel; no such question is submitted, nor any evidence upon which I could reach a conclusion; there has been no refusal of a supply of gas for these customers; it is simply that the producers have, by these acts, interpreted the agreement as not being limited to Chatham in any sense, and cannot now refuse to go further and furnish gas for the Dominion Sugar Company, whether this company's property is or is not "in the City of Chatham," within the meaning of the agreement. I cannot give effect to this submission. It is true that where expressions in correspondence or documents are ambiguous, equally open to conflicting interpretations, aid in ascertaining the sense in which the parties must have actually used them may be furnished by evidence of their contemporaneous acts. This was the definitely stated principle of the decision in *Manning* v. *Carrique*, 25 D.L.R. 840, 34 O.L.R. 453. There is no ambiguity in the language of this agreement. It could not, a day or a month after its execution, be read by a person having knowledge of the attendant circumstances at the time of its execution, and it cannot be read now upon a fair construction of the language employed according to its ordinary meaning, as having any reference to any transaction by the Chatham Gas Company outside of Chatham. And, where the language is unambiguous, neither subsequent correspondence nor subsequent acts can affect the interpretation: *Toronto General Trusts Corporation* v. *Gordon Mackay & Co.* (1915), 22 D.L.R. 904, 34 O.L.R. 101. Acts subsequent to the execution of a document are not in fact usually admissible to aid in determining its construction: *Monro* v. *Taylor* (1850), 8 Hare 51, at p. 56.

In *Wallis Sons & Wells* v. *Pratt & Haynes*, [1911] A.C. 394, in the House of Lords, Lord Shaw of Dunfermline, at p. 400, said: "My Lords, the only other observation I desire to make is that I view with some suspicion, if not with repugnance, any system of construing a contract *ex post facto*. In the case of *Ellen* v. *Topp* (1851), 6 Ex. 424, 441, that very learned Judge,

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Pollock, C.B., observed: 'It is remarkable' (and indeed it would be most remarkable) 'that, according to this rule, the construction of the instrument may be varied by matter *ex post facto*.' My Lords, who ever heard in a commercial contract of construing the meaning of two business men by a principle of that kind?"

In *Clifton* v. *Walmesley* (1794), 5 T.R. 564, the lessee covenanted to pay the lessor one-half of all the moneys realised by sale of coal at the pit's mouth. At the date of the covenant and for some years afterwards all sales were made at the pit's mouth. Then it became more profitable to ship and sell at a distance. For ten years or more thereafter the lessee divided the receipts upon the basis of the increased amounts obtained at outside points, and the action was occasioned by his then reverting to a division based on prices obtainable at the pit's mouth. Against this it was contended, as here, that he had interpreted the instrument by acts, and was bound by this interpretation. The Court rejected the evidence, holding that the covenant, not being ambiguous, could not be interpreted by this means.

In *North Eastern R.W. Co.* v. *Lord Hastings*, [1900] A.C. 260, for more than forty years the predecessor in title of the respondent had accepted less rent from the railway company than he was entitled to, according to the meaning of the instrument of agreement construed according to the ordinary and natural meaning of the language employed. The language was not ambiguous, but there was some uncertainty as to why Lord Hastings had not exacted more rent. The argument was, as here, interpretation by conduct. In the Privy Council, the Earl of Halsbury, L.C., at p. 263, said: "The chief argument used to give an unnatural construction of the words is that the parties have so acted during a period of forty years that the only reasonable inference to be derived from their conduct is that they have understood and acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be fairly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous. So far as I am aware, no principle has ever been more universally or rigorously insisted upon than

that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself." And, at p. 266, after referring to the evidence of what the parties had done, he said: "But in truth I do not think I have any right to know what the parties have done. I think in strictness the course they have pursued is not evidence. I think the true view is that laid down by Lord Kenyon in 1794, and I have no right to construe the covenant now in question differently from the mode I should have construed it if the controversy had arisen the day after the agreement had been executed."

The interpretation is not controlled in this case by the subsequent acts referred to.

(3) That, as to the agreement between the Chatham Gas Company and the Dominion Sugar Company, the plaintiff company acquiesced, and is estopped. This is set up in the statement of defence, and proof of it was attempted at the trial. I do not recollect that it was strenuously urged in the end. Acquiescence is not established as a matter of fact. Throughout, the Chatham Gas Company studiously withheld from the plaintiff company information of its negotiations and dealings with the Dominion Sugar Company, and, as I think, flagrantly disregarded its duty to its associated company under the agreement of 1906. I need not refer to the numerous authorities before me. A condition of facts requiring a careful consideration of the doctrine of estoppel has not been disclosed. The situation and attitude of the parties is pretty well revealed by the correspondence on file, exhibits 18 and 19. The relative rights and obligations of the parties are defined by the agreement of 1906. They knew their legal rights, or must be presumed to have known them, and they in fact professed to know them. The whole contention is answered by Lord Atkinson in the Privy Council in delivering the judgment of the Board in *Toronto Electric Light Co.* v. *City of Toronto* (1916), 11 O.W.N. 169, at p. 171, in a single sentence: "No estoppel arises in this case, as there is no evidence whatever" (and there is none here) "that both the contracting parties were not fully aware of their respective legal rights."*

*See the full report in 38 O.L.R. 72, at p. 87, 31 D.L.R. 577, [1917] 1 A.C. 84.

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The plaintiff company asks:—

"1. For construction of the contract of the 3rd November, 1906 . . . and for a declaration that the plaintiff is not bound thereunder to supply gas to the defendant, except for distribution within the city of Chatham as it then existed.

"2. For an injunction restraining the defendant company in terms hereinafter set out."

The consideration of what is here asked includes consideration of the remaining claim set up by the Chatham Gas Company, namely, that the agreement embraces not only Chatham as it was in 1906, but all land subsequently taken in, and necessitates a fuller examination of the surrounding circumstances, particularly the status of the Chatham Gas Company *quoad* the City of Chatham, than I have yet attempted.

I should state here that I am clearly of opinion that, in the main, the sense in which the parties to the agreement of 1906 contracted, and used the language it contains, is to be determined by ascertaining definitely what were the franchises and privileges secured to the Chatham Gas Company, and what incidental obligations were undertaken by that company in relation to the City of Chatham. Stated briefly, if the franchise of this company included the right and obligation to supply gas in territory subsequently acquired, the right to share in the benefit of this franchise was conferred, and the correlative obligation to furnish the additional gas required for customers in the added territory was imposed, upon Symmes and Coste, and so upon the plaintiff company by the agreement of 1906. It might not always be so, but it seems quite impossible, in the circumstances of this case, to hold that "the City of Chatham" means one thing as regards area in relation to the rights and obligations of the Chatham Gas Company and the city corporation, and another thing as regards the rights and obligations of the parties to the agreement of 1906. Why? Because the document of 1906 is in substance and effect a partnership agreement, and practically nothing else. I do not care whether the parties can accurately or technically be denominated "partners;" I am concerned only with the broad outlined purpose and effect of the transaction. The inherent evidence of the instrument itself and the surrounding circumances leave little, if any, room for conjecture.

Paraphrased the agreement was: "The franchise now and hitherto enjoyed, subject to its incidental obligations, and the gas business hitherto carried on solely by the Chatham Gas Company in the city of Chatham, will hereafter be worked out and carried on as a joint undertaking of Symmes and Coste and the Chatham Gas Company. The Chatham Gas Company will be diligent in increasing the sale of the gas, and procuring new customers in the city of Chatham, under and in pursuance of its franchise rights and obligations, and will perform all the services necessary to be performed to this end in the city of Chatham. Symmes and Coste will be diligent, too, in obtaining an adequate supply of gas and in providing suitable and sufficient high pressure pipes for its transmission to the city limit, and will at all times, if by diligence it can be obtained, deliver to the Chatham Gas Company, at the city limit, all the gas required by the Chatham Gas Company for these purposes, and for its own use."

If, upon examination into the franchises, privileges, and obligations of the Chatham Gas Company under the by-laws of the city and agreements founded upon them, the proper conclusion is that these only extend to or include the city as it was in 1906, the agreement of that year based upon conditions so determined, cannot be construed as having any broader meaning or effect; and, on the other hand, if the franchise and its incidental obligations include the city as it now is, the same interpretation must be applied to the agreement of 1906; based as it was upon the status and known and declared purposes and requirements of the Chatham Gas Company at that time—subject always, of course, to the condition that this interpretation is consistent with the language of the agreement.

Before, however, further discussing the facts, it is necessary to refer to a passage in the judgment of Mr. Justice Idington in the case of *Toronto R.W. Co.* v. *City of Toronto* (1906), 37 S.C.R. 430, dealing with the question of the obligation of the Toronto Railway Company to extend its lines into subsequently acquired territory other than that specifically provided for in terms by the agreement. I shall have to quote a few lines from the context as well. At p. 448 the learned Judge said: "I am unable to see anything in the contract binding the railway company in respect

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of future extensions of the city, save so far as is expressed in clause 16 of the conditions of sale incorporated with the agreement and sec. 19 of the Act whereby the appellants became incorporated and bound to execute the agreement entered into by the purchasers. I cannot see how these provisions may be so enlarged as to imply that all the rest of the contract must necessarily be held as intended to become operative in any new territory annexed to the city, whenever and wherever such additions might happen to be made." This is merely introductory. Then follows: "To provide in express terms for such a contract, as operative and binding from the execution thereof, would have been beyond the powers of the municipal corporation."

I am concerned only with the sentence lastly above quoted, and refer to it because, at first, I was disposed to attach to it a broader and more general application than upon careful examination I think it bears, and this might possibly be done again. If by this statement the learned Judge meant to declare as a matter of law that a municipal corporation could not enter into a binding contract to come into operative effect in subsequently annexed territory, in the event of subsequent undefined extensions, and if this was necessarily incidental to the decision of the question then before the Court, I would of course be bound by it, and it would settle at once the proper construction of the agreement in question, for I could not determine inferentially that the municipality granted or intended to grant a franchise which it could not openly and in express terms confer, nor could I determine that the agreement in question contemplated a supply of gas to the Chatham Gas Company for territory in which it had no franchise, actual or contingent, in which it was in no way concerned, and with reference to which it had no corporate existence, or power to contract; and, on the other hand, even if a matter not involved in the question before the Supreme Court, as I am clearly of opinion it was not, I would still be very reluctant indeed to depart from any opinion expressed by this eminent and experienced Judge. I am satisfied that I should be wrong in reading the paragraph quoted as of universal application, or as meaning that a municipal corporation cannot legally enter into a contract which, either by its express terms or as matter of implication upon proper construction of its language, provides for

public utilities in adjacent territory subsequently acquired, even although the territory is not specifically identified or referred to in the contract; or that such an agreement could not take effect, subject to the provisions of sec. 33 of the Municipal Act, R.S.O. 1914, ch. 192, or earlier statutes to the like effect, as the boundaries of the municipality are extended from time to time.

It will be also convenient to state here what I understand as the principal grounds upon which the decision of the Privy Council in *Toronto Corporation* v. *Toronto R.W. Co.*, [1907] A.C. 315, on appeal from the judgment just referred to, is based, namely:—

1. Express inclusion of a specified contemplated extension, and the implication arising from one extension only being provided for. This was, I think, in the opinion of Mr. Justice Sedgewick, the most cogent reason for deciding that other extensions could not be impliedly included, and was almost as pointedly relied upon in the judgment of Mr. Justice Idington.

2. The unanswerable point, if I may say so with the very greatest respect, taken for the first time by Lord Collins in delivering the judgment of the Privy Council—the injustice involved in any other interpretation.

Both grounds are summed up in a few lines ([1907] A.C. at p. 320) as follows: "The reasons given in the judgments of Sedgewick and Idington, JJ., with whom Davies, J., concurred, seem to their Lordships so full and satisfactory as to make it unnecessary to say more than that they adopt and agree with them. The injustice involved in the contrary view, which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances, where the maximum fare chargeable for any distance is 5 cents, seems to their Lordships insuperable."

None of these reasons exist here. There is no provision in terms, either in the contract with the municipality or in the agreement to be construed, as to *any additions;* it is all left at large as a matter of construction, and there is no hardship to anybody if the new territory is held to be included; on the contrary, whatever may be the attitude of the plaintiff company now, at the time of the making of the several contracts I shall have to refer to, it must have appeared to the municipal council, the Chatham Gas Company, and to Symmes and Coste, that the

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wider the scope—the greater the area to be covered—the more advantageous it would be to the city and the more profitable to the other two. I am of opinion that this case is clearly distinguishable in principle from the *Toronto Railway* case referred to. I am not sufficiently familiar with the methods or expense of extending the operations of an electric light company to say that the same considerations would be presented under an electric light contract, but I would think they would be much the same. Mr. Justice Middleton, in giving judgment in *Toronto Electric Light Co.* v. *City of Toronto* (1914), 20 D.L.R. 958, 31 O.L.R. 387, did not consider that the principles underlying the decision in the *Toronto Railway* case referred to could properly be applied in determining the rights of the parties upon the questions he had to decide (pp. 103, 104.) The judgment was reversed by the Appellate Division (1915), 21 D.L.R. 859, 33 O.L.R. 267, but without considering this point, and the judgment remains reversed by the decision of the Privy Council; but, so far as appears by the note in 11 O.W.N. 169,* it was not found necessary to consider it there.

The Chatham Gas Company was incorporated in 1872, under the provisions of C.S.C. 1859, ch. 65, and the Municipal Institutions Act, Upper Canada, 1866, 29 & 30 Vict. ch. 51, for the purpose of supplying what was then the Town of Chatham with gas. The by-law granting the authority or franchise to carry on its operations in Chatham was passed on the 13th May, 1872, and, reciting, amongst other things, that the lighting with gas of the streets and buildings of the town would "add greatly to the comfort and welfare of its inhabitants," confers upon the company the usual rights to trench and open up any or all of the streets, squares, and public places of the town, except one street, and lay down, maintain, and repair pipes therein, subject to the conditions and restrictions in the by-law contained.

One of the conditions is, "that the company shall supply the town council with such quantity of gas as they may require for the lighting of the streets, town-hall, or other public buildings, and to the inhabitants of the town at such rate as shall be charged by the company from time to time to the stockholders thereof, being customers, such rate however not to exceed the average rate charged in Ingersoll, Port Hope, Brockville, Ottawa, Peterborough, Guelph, and London."

* See the full report, 38 O.L.R. 72, 31 D.L.R. 577, [1917] 1 A.C. 84.

The company encountered financial difficulties. To remove doubts as to its corporate powers and rights and privileges it was re-incorporated, and a by-law of the town defining its privileges or franchise, to be read in conjunction with the by-law of 1872, was passed, under the authority of R.S.O. 1877, ch. 157, in 1884; and further to set doubts at rest a special Act of incorporation, 48 Vict. ch. 81, was secured in 1885.

In view of what was done after the company decided to substitute natural for manufactured gas in 1906, it is not necessary to follow carefully the history of the company through its changing fortunes from 1872 to 1906. In the meantime the town had become a city, but without change of boundaries.

This was the situation when, by the agreement between Symmes and Coste and the Chatham Gas Company, these parties proposed to substitute the use of natural gas for manufactured gas, and to carry on the business of supplying the City of Chatham as a joint undertaking. It is not shewn that they asked the sanction of the municipal council. The council thereupon passed a by-law, No. 96, declaring that the Chatham Gas Company had no right to convey or dispose of natural gas in the city or use the streets for that purpose. The Chatham Gas Company states that it does not admit the validity of this by-law. It is not necessary. The inferiority of natural gas for lighting purposes is admitted. Aside from this, the city had a right to what it bargained for, and could not be compelled to accept something else, although it may be as good or even better: *Forman & Co. Proprietary Limited* v. *The Ship "Liddesdale,"* [1900] A.C. 190 (P.C.); *Legh* v. *Lillie* (1860), 6 H. & N. 165; *Wallis Sons & Wells* v. *Pratt & Haynes*, [1911] A.C. 394 (P.C.), at p. 395. I have no doubt as to the validity of the by-law, or that, if arrangements had not been come to, the franchise of the Chatham Gas Company was definitely at an end, and the agreement for joint operation and division of earnings just entered into was consequently useless. The company and Symmes and Coste recognised this, as shewn by their acts.

Negotiations were opened up, and, although quite all desired by the gas people could not be obtained—and without the concurrence of the city council these parties could do nothing—a by-law was passed, and in pursuance of it a very comprehensive

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agreement of the 31st December, 1906, between the Chatham Gas Company and the Corporation of the City of Chatham, substituting natural for manufactured gas, continuing the franchise to the Chatham Gas Company, and containing provisions as to cleansing the gas, the standard of purity and the prices to be charged, was executed.

This necessitated re-adjustment, and accordingly on the 11th March, 1907, an agreement amending the agreement to be construed by making provision for cleansing or purifying the gas and adapting the prices of the city agreement, and in other respects confirming the agreement previously made, was executed. Later three other agreements were entered into by these same parties, which I need not refer to further than to say that they all go to emphasise what I have already referred to, more than once, the essential identity of interest and purpose intended to be established between Symmes and Coste and the Chatham Gas Company; and, although the main agreement is dated, and may have been executed, before the final agreement with the city, it was until then only a piece of paper with nothing to operate upon, and in substance and effect, although perhaps not legally, a *nudum pactum*, until the execution of the agreement amending and ratifying it on the 11th March.

Regarding it then as impossible properly to construe the Symmes and Coste agreement without first or concurrently considering the status of the Chatham Gas Company in relation to the City of Chatham, and the nature and extent of its rights and obligations therein, the date to be regarded as the time of the actual making of this agreement is important, and I have concluded that I should treat it as made on the 11th March, and not the 3rd November, and that I am bound to include the intermediate transactions with the city council, known to and concurred in by both parties and adopted by the amending agreement, as facts and circumstances existing at the time of the making of the agreement to be interpreted. I shall not distinguish between "the town" and the "City of Chatham"—they are equivalents for the purposes of this action.

Our Municipal Acts have always contemplated unions of municipalities, and territorial additions to centres of population, and have provided an easy and inexpensive method for bringing

this about. All the proceedings to incorporate a company for supplying a city, town, or incorporated village with gas or water or both, at the time this company was incorporated, except final registration and notice in the Canada Gazette, were taken in the municipality to be served, and the company's rights and obligations were such as the municipal council determined: C.S.C. 1859, ch. 65. I think it is much the same still. Section 50 provided that the municipality "may subscribe to or take stock in the company, or may loan any sum of money, on mortgage or otherwise, to the company, or contribute in any manner towards advancing the object for which the company has been incorporated."

These provisions point to a local organisation for local convenience, a municipal need affecting all the people, or, to quote from the by-law of 1872, something that will "add greatly to the comfort and welfare of the inhabitants." Parliament was providing for the needs of new and growing centres of population in a new country of unstable conditions, and in its formative stage, as Canada, in fact, still is. The provisions applicable to cities were applicable to incorporated villages as well. The object was to provide for an adjunct of municipal government; and, seeing that all the money required beyond a nominal amount could be provided by the municipality, it would be hardly too much to say that what was aimed at was to provide for a public utility by a quasi-municipal body. I cannot think that Parliament contemplated a duplication of companies, or that, whenever an addition was made to the area of a city or village—perhaps of an acre or less—the council would be compelled or expected to provide a separate system for supplying the wants of the inhabitants of the new area or lighting the streets. This of course is not conclusive.

Whether viewed from the standpoint of the contractor or municipality, there was neither need nor room for two companies or systems of gas service in Chatham in 1872 or 1906, and no municipal councillors alert to the interest of the inhabitants, and no directors alive to the legitimate protection of shareholders, would be likely knowingly to enter into a contract involving such a contingency. In a small community like Chatham, after taking all reasonably possible extensions into account, the

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minimum of cost and a prompt and efficient service of the whole city as it grows in area could only be properly provided for, and can only be accomplished, by making sure that the contingency and misfortune of a duplicate or triplicate system cannot arise. Almost the entire gas service of London, England, with its wide area and enormous population is provided for by three companies. I quite realise that the wisdom of it is to no purpose if it is not the meaning of the language of the contract. Keeping this in mind, and with due regard for the language of the by-laws and agreement and the attendant conditions and circumstances, I cannot bring myself to believe that either the Chatham Gas Company or the municipal council when they entered into the contracts of 1872 and 1884, or at the end of 1906, contemplated that the franchise, and the obligations of the company consequent upon it, were to extend only to the area of the city as it then was, or exclude additions that might be made to it from time to time. On the contrary, I am clearly of opinion that, in so far as the municipal council had power so to enact and provide in reference to subsequently acquired territory, it was intended by both parties that all the rights, privileges, and obligations provided for should apply to and include lands subsequently acquired, and that, construed in the light of the circumstances, this is the proper interpretation of the language of the said several instruments. The power of the municipal corporation in this respect is only limited, if at all, to the extent provided for by sec. 33 of the Municipal Act, R.S.O. 1914, ch. 192. Omitting irrelevant parts, sec. 33 is as follows: "Where a district . . . is annexed to a municipality, its by-laws shall extend to such district . . . and the by-laws in force therein shall cease to apply to it, except those relating to highways . . . and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them."

This statute was in force at the date of annexation. The land annexed was part of the township of Raleigh. Without explanation as to how it affects the matters in question, if at all, an agreement under seal, of the 23rd October, 1906, was put in, exhibit 12, shewing that certain gas franchises in the township of Raleigh, now held by assignment by the plaintiff company,

were granted to Symmes and Coste. It was not stated that this deed affected or applied to the land annexed. I have examined the map and plan filed. It may be otherwise, but it is not shewn, that the power of the city council to grant a franchise to take effect in the annexed territory was or is subject to any limitation as a matter of fact by reason of this unexpired franchise or any other matter in evidence before me. I am therefore of opinion that the Chatham Gas Company is seized and possessed of a franchise of the same character and with the same incidents, obligations, and duties, in the whole of the city of Chatham, as it now is, as this company was seized of and subject to in the area constituting the city of Chatham before and at the date of the annexation.

I have had sufficiently in review the circumstances surrounding the execution of the agreement in question as amended and confirmed and by which these contracting parties associated themselves and their proprietary gas interests—gas-fields, pumping stations, trunk lines, high pressure mains, and flow of natural gas, on the one hand, and franchise rights, distribution system, city equipment, and present and future customers, on the other—and the future activities of both for one common purpose. Considering the whole agreement, and, so far as I am able, giving to each part of it its proper weight and place, and construing it according to the ordinary and natural meaning of the language used, in the light of the circumstances and conditions hereinbefore referred to, I have come to the conclusion that the proper interpretation of the agreement as amended is that its provisions were intended to extend to and include not only the city of Chatham, as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well, and that it does in fact embrace and cover the land annexed by the orders of the Railway and Municipal Board. It follows that the Chatham Gas Company will be entitled to obtain from the Union Natural Gas Company a sufficient supply of natural gas for its customers on the annexed land—customers along the pipe-line in Raleigh being first provided for—or in the proportion that the total available supply of natural gas bears to the total wants of the whole city, if and when the Chatham Gas Company has put itself in a position to make a proper and

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legal demand therefor, according to the true intent and meaning of the said agreement, and a reasonable time, depending on the nature and extent of the demand, has thereafter elapsed. That stage has not yet been reached, and the Chatham Gas Company has nevertheless diverted gas supplied for other purposes under the agreement to the Dominion Sugar Company, and proposes to and will continue to do so unless restrained.

The plaintiff company asks for "an injunction restraining the defendant from diverting gas supplied to it under the said contract to or for the purposes of the defendant's contract with the Dominion Sugar Company." This prayer is based on the assumption that it would be declared that the agreement applies only to the city as it then was. The result imposes upon me the duty, which otherwise would not arise, of considering to some extent the terms of the Dominion Sugar Company agreement.

The agreement with the sugar company is not one which the Chatham Gas Company is, upon a fair construction of the agreement of November, 1906, entitled to call upon the plaintiff company to comply with, or under which the Chatham Gas Company has a right to divert gas to the sugar company against the will of the plaintiff company. A qualified injunction, however, leaving it open to the Chatham Gas Company to secure, if it can, the execution of an agreement such as it is entitled to under its agreement with the plaintiff company, and afterwards to apply to the Court, if so advised, to dissolve the injunction by reason of changed conditions, will best meet the actual issue as it is, and in the end best serve the interests of both parties.

In view of the form of injunction order I propose to direct, it would not be proper for me, if I felt competent to do so, to declare *â priori* what character of sub-agreement is authorised by the agreement of November, 1906. It is enough to say that the sugar company agreement is not within the scope of that agreement, and to indicate, as I will, some of my reasons for saying so. It is quite possible that no difficulty has arisen in the past; the demands from time to time have probably been for comparatively small quantities, none of them, perhaps, occasioning reorganisation or duplication of plant or involving large capital expenditure. In the case of an ordinary customer or many ordinary customers, even of the manufacturing class—the service involving no radical

changes of system or equipment—the specific form of the contract or the maximum and minimum of gas to be provided for, may be matters of little consequence; I do not know. It may even be that, in many cases, whether there is a written contract at all or not is unimportant; I do not know. But, if it comes to be a question of meagre minimum and unlimited maximum, if the total monthly quantity definitely agreed to be taken is only 250,000 cubic feet, of the value of $30 a month, and although there is a provision that *to entitle the customer to obtain a 12 per cent. rate* the total quantity taken in a year must amount to $60,000 at that rate, yet there is no agreement that the customer will take this quantity or as to the rate to be paid in case he does not, and consequently the only possible penalty is that if the customer only requires the total of the monthly quantity *positively* agreed to be taken, or 3,000,000 cubic feet a year, or a larger quantity but still less than 500,000,000 feet, he will then have to pay at the rate fixed by the municipal agreement, that is, at 15 cents instead of 12 cents per thousand cubic feet; if the bargain is not honestly stated, and, by a secret (?) collateral agreement, discriminating against all other manufacturers in Chatham paying at a 12 cent rate, a rebate of from 1 to 1½ cents per 1,000 cubic feet is guaranteed to the customer, and counsel specially retained for this duly comes into Court and strenuously opposes disclosure of the provisions of this controlling agreement, to say nothing of the provisions for promotion of triangular litigation in this agreement contained; if the agreement fixes no limit upon the quantity the producer is bound to provide for, and the customer, in addition to fixing a ridiculously low minimum, having regard to the obligations imposed upon the producer, reserves to himself the right to discontinue partly the use of gas and substitute the use of electricity in certain processes of his manufacturing at any time; if the quantity the producer—the non-concurring party—is called upon to provide immediately is 5,000,000 cubic feet per 24 hours, a quantity greater than the aggregate required for all other purposes in the city of Chatham, and in addition to this the purchaser is notified that, perhaps even before he is able to complete the reorganisation of his system and the duplication of his plant to meet this requirement, he may be compelled to begin again to provide for other uncertainties,

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more gas in unlimited quantities, and although there is an illusory provision as to taking gas to the value of $60,000 a year, yet the customer who wants all these eggs put in one basket for his convenience will only positively bind himself to consume or take the relatively paltry total of 3,000,000 cubic feet a year, producing, for division between the producer and the distributor, as it will at most, a total gross yearly revenue from this source of $450; and if I find, and I cannot do otherwise, that all these one-sided, perplexing, and practically unworkable conditions and provisions, and others not referred to, co-exist in the agreement the Chatham Gas Company saw fit to enter into behind the back of its business associate, radically different considerations arise, and I do know, or think I do, that a transaction of this character was not contemplated by the parties to the agreement of November, 1906, or, to be more specific, the sugar company agreement is not within the intent, meaning, or scope of the quasi-partnership agreement then entered into by the parties under whom the plaintiff company claims.

I am unable, in the face of exhibit 31, and for other reasons, to accept the explanation offered of the attempt persisted in until the eve of trial to give the sugar company a preference over other manufacturers in case of want of pressure or gas shortage; and, if anything turned upon it, I should have had to consider whether, as a matter of law, what has been done is effective to eliminate it. In the event, it is immaterial. Neither is it necessary to determine whether the Chatham Gas Company can legally split up its right to enforce the agreement or its cause of action, as the Kent and Dominion Sugar Company agreements provide. It would be extraordinary if each of the two or three thousand customers is by his contract to be invited to sue the Chatham Gas Company's partner, or if a partner can vest in an outsider the right to sue his co-partner, for breach of the articles of partnership.

Perhaps it is not altogether out of place—to the end that they may not go on creating ludicrous situations—to ask the city council what they meant by declaring by their by-law of October last that by-law 96 is in force in and applies to the annexed territory? If it is, this action has been in vain—nobody has the right to handle or deal in *natural* gas in that part of the city. I am sure they did not consciously take sides; but, had their ac-

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tivities instead been directed to protecting the manufacturers who have helped to build up the city from being discriminated against both in rates and fuel supply, their action would have been commendable.

The plaintiff company has not obtained the interpretation claimed, but has had substantial success, and it may be greater than it seems, for the defendant company may never obtain an agreement which the Court can sanction as coming within the provisions or meaning of the agreement of November, 1906. Both parties have succeeded, and failed, as to interpretations contended for. The defendant company occasioned the litigation. It has not acted fairly by the plaintiff company, or apparently in good faith. I am not altogether sure that the plaintiff company is not entitled to costs, but against this is the fact that, although to my mind it is clearly entitled to an injunction, the injunction is granted upon grounds not argued.

There will be judgment declaring that the agreement in question includes land annexed to the city after its date, and for an injunction upon the lines above indicated.

I do not think an amendment is necessary, but, if otherwise advised, the plaintiff company has liberty to amend so as to conform the prayer for an injunction to the form of injunction granted. There will be no order as to costs.*

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Ex. C.

Exchequer Court of Canada, Audette, J. March 17, 1916.

MASTER AND SERVANT (§ II D—205)—INJURY TO CROWN EMPLOYEE—DISOBEDIENCE OF INSTRUCTIONS.

An injury to an employee of the Crown while adjusting a machine, contrary to instructions and which he knew to be the duty of another, is not attributable to the negligence of any officer or servant of the Crown acting within the scope of his duties within the meaning of sec. 20 of the Exchequer Court Act (R.S.C. 1906, ch. 140).

Statement.

PETITION OF RIGHT for damages arising out of an accident to a workman while employed in the Dominion arsenal in the City of Quebec. Dismissed.

A. Fitzpatrick, for suppliant; *C. Smith*, for respondent.

Audette, J.

AUDETTE, J.:—The suppliant, in his quality of tutor to his minor son, Antonio, brought this petition of right to recover the

*June 12, 1917. On an appeal to the First Divisional Court it was held that the Dominion Sugar Company was a necessary party to the action, and the case was not properly constituted. The case was within rule 134, and unless the parties agreed to add the Sugar Company forthwith and the Sugar Company was willing to have the case decided on the argument already had, a new trial should be ordered.

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sum of $6,420, which he claims as damages, arising out of the loss of the index finger of the said Antonio Girard's right hand, resulting from the unsafe and defective condition of a piece of machinery, and from the negligence of a fellow workman in the course of their employment in the Dominion arsenal, in the City of Quebec, a public work of Canada.

Counsel for the suppliant, in the course of the trial, withdrew the claim for $420 for medical attendance, as having been wholly paid by the Crown. It was also admitted that Girard was paid his wages from the time of the accident up to January 9, 1915, when he left the arsenal.

The accident happened on September 9, 1914, and the petition of right was filed in this Court, on November 9, 1915,—that is, more than 1 year after the accident, a delay within which the right of action would be proscribed and extinguished under the laws of the Province of Quebec. However, it appears, from ex. No. 2, that the petition of right was, under the provisions of sec. 4 of the Petition of Right Act (R.S.C. 1906, ch. 142), left with the Secretary of State on August 9, 1915. Following the numerous decisions of this Court upon the question, it is found that such deposit with the Secretary of State interrupted prescription within the meaning of art. 2224, C.C.P.Q.—See *Saindon* v. *The King*, 15 Can. Ex. 305.

Briefly stated, freed from numerous and unnecessary details, the accident happened under the following circumstances:—On the evening of September 9, 1914, the night shift of the men employed at the Dominion arsenal, at Quebec, began work at about 6.30 p.m. One young Ruel resumed his work on No. 2 folding machine shewn on the photograph filed herein as ex. "A." Ruel at that time was employed in making what is called "chargers." To manufacture a charger three operations are necessary. The first one gives him in the result, the perforated plate marked ex. "D"; the second operation produces ex. "C"; and the third and last operation gives ex. "B".

Now, when a new *block* or *die* was being used in that machine with respect to the third operation, the "charger" was so much pressed against the block, that when working its way out of the block and coming to the end thereof, it would at times jump, instead of falling directly in the box marked "D" underneath the machine. When a charger would thus jump it was liable to

fall in the bed of the machinery of the folding instrument, and was thus liable to block or break the machine.

On the day in question Morin, who was in charge of the plant at the arsenal at the time, watched the folding machine for a while, and then at about 7 o'clock in the evening, he placed Antonio Girard, sitting on a box, at the back of the folding machine, with specific instructions to watch the machine and see if any charger would jump, and when any did jump to tell Ruel to stop the machine; and that Ruel, *who had a wire hook, would remove them.* Morin further contends he told Girard that he had nothing to do with the machine, and that he forbade him to put his hands in or upon the machine. All of this was done, it will be noticed, not to protect any employee from any imminent danger but solely to protect the machine and to prevent the blocking of the same.

After the folding machine had that evening been in operation for about one hour and a half and when—it is well to notice—Girard was at his post behind the machine, but engaged in talking with young Gagne and Thibault,—one "charger" jumped and fell into the machine. Then Girard called out to Ruel, who was the operator, to stop the machine and it was immediately stopped. Ruel had a wire hook for the very purpose of removing the charger; but Girard, who was behind the machine and whom Ruel could not see, came to the machine, in direct contravention to his orders, placed his hand in it and started to remove the charger. Shortly after the order to stop had come Ruel asked if it was "All right," and some one answered: "All right." He then set his machine anew in operation, when Girard, who still had his hand in the machine, had the index finger of the right hand so badly cut that it had to be amputated.

Having thus related the salient facts of the accident, the next question which presents itself is, what was the proximate, the determining cause of this accident?

As a prelude thereto, however, it is well to state the suppliant to succeed must bring the present case within the ambit of sec. 20 of the Exchequer Court Act, and find:—1. A public work; 2. An officer of the Crown who has been negligent when acting within the scope of his duties and employment; and, 3. That the accident was the result of such negligence.

It is admitted that the arsenal, at Quebec, is a public work.

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Now, has there been any such negligence on behalf of an officer of the Crown, from which the accident resulted?

It must obviously be found that had the suppliant complied with his instructions no accident would have happened. The proximate and determining cause of the accident is clearly the result of his disobedience because he had been derelict in the performance of his duty. The act upon which the risk of injury attended and from which the injury sustained resulted, was clearly done outside the scope of his employment by Girard who suffered the injury. *C.P.R.* v. *Frechette*, 22 D.L.R. 356, [1915] A.C. 880. Whatever negligence could be charged here against any employee of the Crown, could not be an *incuria dans locum injuria;* since the negligence which determined the accident was that of Girard. His own negligence was the sole effective cause of the injury he sustained. His duty or his work had been clearly assigned to him, guarding him against the danger of putting his hands in the machine and it was voluntarily that he encountered the danger whereby he sustained the injury complained of.

If the injury is occasioned outside the sphere of the duties of the employee, the infliction of injury does not raise a duty.

In *Herbert* v. *Samuel Fox & Co.*, [1915] 2 K.B. 81, decided by the House of Lords, where an employee whose duty had been assigned to walk in front of the wagons when being shunted, and who instead of so walking in front of them, sat on the front buffer of the leading wagon, and while so placed fell and was injured—it was held that the accident did not arise "out of" the employment, and that the employee by his conduct had exposed himself to a risk, which by express prohibition, was placed outside the sphere of his employment and he was not therefore entitled to compensation. See also *Jibb* v. *Chadwick*, [1915] 2 K.B. 94.

In the present case it is clearly when Girard was acting outside the scope of his duties or employment, when he was transgressing his instructions by disobedience, that the accident happened and he therefore cannot recover.

It is further contended that Girard was 13 years of age at the time of the accident, and that he should not, under secs. 3829 and 3833 (R.S.Q., 1909) have been employed in the arsenal. The present case, if at all affected by the provincial statutes, a

matter unnecessary to decide here, could only come under sec. 2 of sec. 3833, and as the evidence establishes that when he was engaged, Girard was astute enough to give his age to foreman Redding as 14, he cannot now invoke his own turpitude. After having done so, he cannot turn around and say, I deceived you when I told you I was only 13, and you should not have employed me. No,—he who seeks equity must come into Court with clean hands.

Girard is a well developed youth, and not so young, or of such tender age or inexperience, as being unable to understand his instructions and the danger of putting his hand in the machine; and it is not beyond the proportion of his age to exact from him such care and diligence as was required to allow him to understand his instructions. Specific easy work was assigned to him, the scope of his employment was clearly defined and resided in the obedience to the express command of his employer.

At the time of the accident he was engaged in conversation with two other young employees, and when he got up from his box and went to the machine and extracted the charger therefrom he was acting beyond the scope of his employment.

Ruel says he received the order to resume the operation of his machine and that the words "all right" came from behind the machine where the three boys were; but he could not say who said so. The three boys deny having said it. Even Girard goes as far as that. However, witness Gagne says he is certain some one cried "All right," in answer to Ruel as to whether he should start his machine again; but he says he did not say so and he does not know who did it. Thibault says he did not speak. The most interested to deny having said it is the suppliant and it is established someone said it.

I regret to have to come to the conclusion that Girard was the unfortunate victim of his own negligence and disobedience to his orders and instructions, and that he has no legal claim against the Crown since the latter has done him no legal wrong. No negligence on behalf of an officer of the Crown from which the accident resulted has been proved or established.

The suppliant is, therefore, not entitled to any portion of the relief sought herein and the petition of right is dismissed.

Petition dismissed.

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REX v. LEVERTON.

Alberta Supreme Court, Harvey, C.J., and Stuart, Beck and Walsh JJ. March 27, 1917.

1. FALSE PRETENCES (§ I—6)—FRAUD OF EMPLOYEE TENDERING UNDER COVER OF A TRADE NAME—OBTAINING REJECTION OF LOWER TENDER.

Where an employee makes representations to his employer to the effect that a tender for the supply of goods to the latter is an actual *bonâ fide* one from an independent tenderer, whereas it was in fact, although unknown to the employer, the employee's own tender, submitted in a different trade name through such employee's nominee, the employee may properly be convicted of obtaining by false pretences the additional money which, by means of such tender and his employer's reliance on the same as independently made, he obtained for the goods supplied over and above the amount for which the employer would have obtained them by acceptance of a competitive tender which the employee fraudulently caused to be rejected.

[*R.* v. *Cooper*, 2 Q.B.D. 510, 46 L.J.M.C. 219, considered.]

2. INDICTMENT (§ II E—44)—FALSE PRETENCES.

An indictment or charge for obtaining money under a false pretence is not bad for not setting out what the false pretence was or stating to whom it was made. (Code secs. 852, 1152, Code form 64 (*c*).)

[See annotation "False Pretences" following this case.]

Statement.

CROWN case reserved by Hyndman, J., and an appeal from his refusal to reserve other questions.

The accused was tried with a jury on two charges of conspiracy and one of theft on which he was acquitted, being convicted at the same time on the following charge:—

"That he the said Ernest R. Leverton, at Calgary, Alberta, in said Judicial District, between the first day of December, A.D. 1913, and the 30th day of September, A.D. 1914, did by false pretences obtain from the Alberta Farmers Co-operative Elevator Company Limited large sums of money to the amount of about three thousand nine hundred and twenty dollars the property of the said the Alberta Farmers Co-operative Elevator Company Limited, with intent to defraud."

The question which is reserved is:—

"Was there any evidence to support the third charge (*i.e.*, the one on which he was convicted), or should it have been withdrawn from the jury?"

A. A. McGillivray, for the Crown.

J. McKinley Cameron, for accused.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The evidence of the Crown, there being none for accused, is to the following effect: The Alberta Farmers Co-operative Elevator Company was incorporated by Act of the Legislature in March, 1913, and soon thereafter proceeded to

erect and equip a number of elevators. In June, 1913, the defendant, an engineer by profession, was employed by it as engineer and superintendent of construction, and subsequently he became general superintendent and office manager as well. The machinery for the elevators was obtained on his recommendation, and at a meeting of the executive held on January 13th, 1914, he submitted a list of what purported to be tenders for the supply of machinery then required. There were several classes of machinery specified and ten purported tenderers. Two who are shown to have actually submitted tenders were Manitoba Bridge & Iron Works and Midland Machinery Company, who each tendered for the transmission machinery, the tender of the former being at the price of $623 and of the latter at $735, the next lowest tender being $736. This was the price for the supply for each elevator, of which there were thirty-five to be equipped. The schedule submitted bears the following endorsements in the handwriting of accused: 1st, opposite the Midland Machinery tender the words "Agts. of same Company as made our machinery last year—Recommend." 2nd, opposite the tender of the Manitoba Bridge & Iron Works the word "Would not consider this Company's machinery, 'E.R.L.'" and opposite the figures of the tender $623 the words "on part, can't consider quotation."

In addition to these representations in writing accused stated at the meeting that the Manitoba Bridge Company's machinery would not be satisfactory, or, as another witness expresses it, that he had not had the best of satisfaction from that company. He also stated that its tender was in part only and that the trouble his employers would be put to in getting the remainder would make its tender higher than that of the Midland Machinery Company. The result was that the tender of the latter was accepted.

It appears from the evidence that the "Midland Machinery Company" was the accused himself. He had in the preceding month employed one W. W. Wilson who had an office in Calgary to work for him for the three months of January, February and March, 1914, at a salary of $100 a month for the purpose of this tender and the supplying of the machinery, and had given Wilson the name under which the operations were to be carried on, Wilson being employed as correspondence manager. The letter ten-

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dering for the machinery was dictated by accused but signed by Wilson, and is in the following terms:—

"Calgary, January 12th, 1914.

"We have this day submitted our tender on the transmission machinery and manlifts, which you will require in your new elevators, which you are erecting this year

"For your information, we will advise that we are agents for the oldest and best manufacturers of these lines of machinery in Canada and the United States, and if we are successful in securing any of your orders, a large quantity of these goods will be manufactured in Alberta.

"We maintain a stock of all standard parts in Calgary and can give you prompt service and immediate shipment on all repair parts you may require.

"Should our tender not be the lowest, we believe that the quality of our goods, and the service we can render you, will influence you to give us due consideration.

"Thanking you for this opportunity, and soliciting the privilege of tendering on your requirements in the future, we remain,

"Yours respectfully,

"Midland Machinery Company,

"per W. W. Wilson, Manager."

The Manitoba Company had been requested by letter dated January 7, 1914, signed by accused, to tender for this machinery, and its representative called on accused at the Elevator Company's offices and went over the list with him and made the tender for what he understood was the whole of the machinery for $623. He says it was a tender on all he was asked to tender on. He also states that in the discussion accused said he was not familiar with the Manitoba Company's machinery, but witness understood he was satisfied they would furnish it, but that on the afternoon of the day on which the tender was made accused told him he could not accept the tender, "that they had a more advantageous tender, a better price."

On January 15th, some days after the tenders were accepted, accused dictated a letter to the Manitoba Company which was signed by Wilson in the name of the Midland Machinery Company asking for prices for all his transmission machinery except the friction clutches and pulleys, stating that they had secured

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the tender on the basis of furnishing friction clutches as used the preceding year.

The machinery was supplied and paid for during the next few months, practically all but the clutches coming from the Manitoba Bridge Company. The Midland Machinery had no money and its bank account only had to its credit a few dollars furnished by accused for the purpose of paying for stationery. Accused, however, arranged with the Elevator Company to issue cheques direct to the persons who supplied the machinery to the Midland Machinery Company and to the railway company, etc., and cheques for the balance to the Midland Machinery Company. The cheques issued to the Midland Machinery Company were, one for $1,455.98 on May 4th, 1914, one for $3,000 on June 10, 1914, one for $2,269.59 on July 16, 1914, and one for $2,748 on July 30, 1914. These were all endorsed on the back with the name of the Midland Machinery Company by stamp and initialed, "W.W.W.," Prest. or Mangr. But the manager, Wilson, says that the initials are not in his handwriting. The cheques all were deposited on the day of their date or the day following to the personal bank accounts of the accused in two different banks on deposit slips in the handwriting of accused, the accounts being subject to cheque by his wife as well as himself. The bank officials say that they would have required the endorsement of accused himself, and expert evidence was given to the effect that each cheque showed traces of an erased endorsement, on one or two there being sufficient to found the opinion that it was the name and in the handwriting of the accused. Accused remained in the employ of the Elevator Company until October, 1914.

Some time after the tenders were accepted, but before the machinery was supplied or any payments made, owing to something appearing in a newspaper there was a conference between the president and the secretary-treasurer of the Elevator Company and accused, at which after both the others had stated explicitly that they were in no way connected with the Midland Machinery Company accused in answer to the president stated that he did not have five cents invested in the Midland Machinery Company, and if the others thought he was connected with it he was prepared to hand in his resignation at once. The president expressed his satisfaction and the matter dropped.

A false pretence is defined by sec. 404 of the Code as "a repre-

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sentation either by words, or otherwise, of a matter of fact either present or past which representation is known to the person making it to be false and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation."

It is apparent from this that a false representation may be made by conduct, and in *Rex* v. *Barnard* (1837), 7 Car. and P. 784, it was held that: "If a person at Oxford, who is not a member of the University, go to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtain goods, this appearing in a cap and gown is a sufficient false pretence to satisfy the statute, although nothing passed in words."

The case of *Reg.* v. *Cooper* (1877), 2 Q.B.D. 510, 46 L.J.M.C. 219, presents some points of similarity in principle to the present case.

In that case the false pretence was to be found in a letter written by the prisoner to the prosecutor in the following terms:—

"Dear Sir,—Please send me one truck of Regents and one truck of Rocks as samples at your prices named in your letter. Let them be good quality, then I am sure a good trade will be done for both of us. I will remit you the cash on arrival of goods and invoice. Yours truly, William Cooper.

"P.S. I may say if you use me well I shall be a good customer. An answer will oblige saying when they are put on."

The false pretence was set out in the indictment as being "that he the said William Cooper then was a dealer in potatoes and as such dealer in potatoes then was in a large way of business, and that he the said William Cooper then was in a position to do a good trade in potatoes, and that he the said William Cooper then was able to pay for large quantities of potatoes as and when the same might be delivered to him."

The articles ordered in the letter were potatoes, and the prisoner was only a huckster peddling fruit in a cart.

The Court, consisting of five Judges, unanimously held that the conviction should stand. Denman, J., rested his conclusion on the ground that the statement in the letter, "I am sure a good trade will be done," was an actual misstatement of fact.

The other Judges, however, all were of opinion that the words used in the letter might naturally and reasonably convey to the

mind of the prosecutor the meaning alleged in the indictment, and the jury could therefore find that they did.

Lord Coleridge, C.J., after referring to a decision of Blackburn, J., that "It is not requisite that the false pretence should be made in express words, if the idea is conveyed," says, "The question must always be what was intended to be conveyed by the words, acts, conduct, or even silence of the person said to have made the false pretence."

The statement in the present case made to the president that the accused was not interested in the Midland Machinery Company was undoubtedly false and intended to convey and did convey a false impression. It is true it was made after the tender had been let, but it was before any money was paid, and if the truth had been told it cannot be said that any money would have been paid. It was, moreover, a continuing of the false impression already created. It was quite open to the jury to conclude on the evidence that the statement that the Manitoba Bridge Company's tender was for only part was also false, and it was hardly possible for them to come to any other conclusion than that the statement that the trouble in getting the omitted parts would make its tender higher than that of the Midland Machinery Company was untrue. There is thus in this and other details which might be specified evidence of false pretences which are actual statements of fact without considering the representation made by the conduct of the accused from which his employers would naturally conclude that the tender of the Midland Machinery Company was an actual *bonâ fide* tender of an independent tenderer. What the accused is charged with having obtained by his false pretence is the difference between the prices under the two tenders, and it was clearly open to the jury to infer that it was by reason of the false representations that the additional sum was paid which the accused received, and that his intention in making the representations was to obtain the money for his own benefit, or, in other words, to defraud his employers of the money. It seems equally clear that the jury must almost necessarily have inferred that if the false representations were made they were known to be false. There is, therefore, evidence of all the elements necessary to constitute the offence of which accused was convicted, and the question reserved should be so answered.

In addition to the question reserved there were several ques-

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tions which the trial Judge was asked and refused to reserve. Some of these, however, were not pressed on the argument, and there are only a few that it is necessary to consider in detail.

The accused was committed for trial on a charge of conspiracy and not on one of false pretences, and it is objected that the charge of false pretences could not be laid, not being founded on the depositions.

It was decided by the Supreme Court of Canada in *In Re Criminal Code*, 16 Can. Cr. Cas. 459, 43 Can. S.C.R. 457, that a charge may be laid in this province by the agent of the Attorney-General without any preliminary enquiry. But in the present case the evidence which is before us as that taken at the trial contains the deposition of Wilson taken on the preliminary enquiry, and certainly the facts disclosed in it suggest this charge.

It is also argued that the charge is bad in not setting out the false pretence or stating to whom it was made. This argument, however, is completely met by form 64 (c) and secs. 852 and 1152.

Objection is also made that the trial Judge should have ordered further particulars. As already indicated, there were four charges in all, two being of conspiracy. The accused was first arraigned before my brother Walsh, and an application was then made for particulars. Sec 859 provides in what cases particulars may be ordered, and sec. 860 provides that on an application for particulars the Court may have regard to the depositions. The purpose of particulars is for information, and apparently the reference to the depositions is to see whether the information required is already contained therein. My brother Walsh read the depositions and ordered certain particulars in respect of the different charges. There is nothing in the case presented to us to shew what further particulars were applied for, and it is quite impossible, therefore, to conclude that the trial Judge should have ordered such further particulars. There is nothing moreover in the evidence which would indicate that the accused was prejudiced by any want of information that could have been furnished by further particulars.

It is also contended that the offence disclosed is not one of obtaining money but rather one of procuring the execution of a valuable security since it was cheques accused received and not money. The fact is, however, that the amount of the cheques is not the amount the accused is charged with having obtained

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by false pretences, and it was money which he obtained, though he obtained it through cheques which went through the bank.

The situation is exactly the same in this respect as it was in the case of *Rex* v. *Kelly*, which was dealt with in three Courts on various grounds of objection, reported 10 W.W.R. 1345, 11 W.W.R. 46 and 463 [27 Can. Cr. Cas. 94, 54 Can. S.C.R. 220, 34 D.L.R. 311].

I think there is nothing in this objection.

I think that all of the other objections which call for consideration have been dealt with expressly or impliedly in what has already been said, and that none of them can be sustained, and I would, therefore, dismiss the appeal. *Judgment for the Crown.*

Annotation—False Pretences (§ I—6)—Cr. Code sec. 404.

Annotation.

In a charge for obtaining goods by false pretences it must be proved (1) that a false pretence was made, (2) that the prosecutor believed the pretence, and (3) that the goods were obtained by means of the pretence. *R.* v. *King*, [1897] 1 Q.B. 214.

The offence declared by Code sec. 405 of the Criminal Code 1906 applies to "anything capable of being stolen" and which is obtained by any false pretence as defined by sec. 404. And sec. 405A makes it an indictable offence for a person in incurring any debt or liability to obtain credit "under false pretences or by means of fraud." The definition of "false pretense" contained in Code sec. 404 is as follows:—

"404. A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

"(2). Exaggerated commendation or depreciation of the quality of anything is not a false pretense, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.

"(3). It is a question of fact whether such commendation or depreciation does or does not amount to a fraudulent misrepresentation of fact."

The false pretence need not be made in words or writing, it may be made "otherwise" and it will suffice if it is signified by the conduct and acts of the accused. *R.* v. *Létang* (1899), 2 Can. Cr. Cas. 505.

To render a defendant liable, his false representation must have been with regard to a past or existing matter, not to a future undertaking as that he will pay for goods on a certain day. *Mott* v. *Milne*, 31 N.S.R. 372; *Regina* v. *Bertles*, 13 U.C.C.P. 607.

The false pretence must be a false representation, express or implied, as to the past or present existence of some fact; a

Annotation. mere promise as to future conduct, or representation as to future expectations are not sufficient. For instance, the giving a cheque in exchange for goods is ordinarily a representation that the drawer has an account at the bank on which the cheque is drawn, and that that account is in such condition that in the ordinary course of events the cheque will be met. If the drawer knows that these conditions do not exist, the giving of the cheque is in law a false pretence. But representations of future expectations, unless they are representations of existing facts, do not constitute a false pretence, and obtaining goods on credit by means of such representations is not obtaining goods by false pretences. The false pretence may be made in any way, either by words, by writing, by conduct. It is no excuse to say that a person of common prudence could easily have found out the pretence was untrue, nor to say the existence of the alleged fact was impossible, or that it was intended to make compensation for the goods in the future. Tremeear's Criminal Code sec. 404; *R.* v. *Martel*, 27 Can. Cr. Cas. 316.

Where goods are obtained on the faith of the buyer's cheque given in payment therefor, a charge of false pretence of an existing or present fact, as distinguished from a future event, is sustainable, although there may have been funds in the bank to the credit of the drawer at the precise time of delivery of the cheque or of the receipt of the goods, if it be shewn that the drawer issued other cheques at about the same time, the payment of which had been planned to so reduce the fund that the cheque in question would be dishonoured and that the drawer had no credit arrangements with the bank for an overdraft. *R.* v. *Garten*, 22 Can. Cr. Cas. 21, 13 D.L.R. 642.

A charge of obtaining goods by false pretences through the giving in payment by his agent of a worthless cheque against the principal's account will lie against the principal if it be shewn that the latter deliberately planned that the cheque should not be paid for lack of funds at his credit in the bank and had re-sold the goods and applied the proceeds to his own use, and this whether or not the agent was aware of the fraud. *R.* v. *Garten* (1913), 22 Can. Cr. Cas. 21, 29 O.L.R. 56, 13 D.L.R. 642; *R.* v. *Garrett*, 6 Cox C.C. 260; *R.* v. *Hazelton*, L.R. 2 C.C.R. 134, 13 Cox C.C. 1.

The giving of a post-dated cheque implies no more than a promise to have sufficient funds in the bank on the date thereof and is not, in itself, a false representation of a fact past or present. *R.* v. *Richard*, 11 Can. Cr. Cas. 279.

False pretences may be founded on the false idea conveyed fraudulently by the accused; it is not requisite that the false pretence should be made in express words. *R.* v. *Holderman*, 23 Can. Cr. Cas. 369, 19 D.L.R. 748.

A person may be convicted of obtaining the return to himself of his own promissory notes from the payee if such return is obtained under false pretences, and it is not a ground of defence that the notes were overdue when so obtained. *Abeles* v. *The King* (1915), 24 Can. Cr. Cas. 308, 24 Que. K.B. 260.

Annotation.

In Stephen's Digest of the Criminal Law, p. 161, it is said:—

"The words, 'Whosoever shall, by any false pretence, obtain, from any other person, any chattel, and with intent to defraud,' seem simple enough, but they are obviously open to an interpretation which would make any dishonest breach of contract criminal. A man who buys goods, which he does not intend to pay for, may be said to obtain them by a false pretence of his ability and intention to pay. The Courts, however, soon held that this was not the meaning of the statute, and that, in order to come within it, a false pretence must relate to some existing fact. . . A mere lie, told with intent to defraud, and having reference to the future, is not treated as a crime. A lie, alleging the existence of some fact which does not exist, is regarded as a crime, if property is obtained by it."

In *Alderson* v. *Maddison*, 5 Ex. D. 303, Stephen, J., said, and Lord Selborne referred to it, on the appeal, with approval:—

"To say, 'I have cancelled the bond,' when you have not, is to tell an untruth. To say: 'I intend to cancel the bond' is to make a statement as to a present revocable intention. If a person chooses to act on such a representation, without having it reduced to the form of a binding contract, he knows, or ought to know, that he takes his chance of the promisor changing his mind, and therefore he is in no worse position, if the statement is false when it is made, *i.e.*, if the intention is not really entertained, than if it is true when it is made, *i.e.*, if the intention exists, and the person making the statement intends to revoke it, if he pleases."

Where a defendant hired a bicycle, of the value of $20, representing that he wished to use it to go to L., for the purpose of visiting his sister, and, instead of returning the bicycle, sold it to C.:—*Held*, that evidence which shewed these facts, was not sufficient to support a conviction for having "unlawfully, and by false pretences obtained from X. one bicycle, of the value of $20," the prosecutor not having been induced and not intending to part with his right of property in the goods, but merely with the possession of them, and there being no representation as to a present or past matter of fact. *Rex* v. *Nowe*, 36 N.S.R. 531, 8 Can. Cr. Cas. 441. But see Code sec. 347 as to the offence of theft by conversion of the property. Tremeear's Criminal Code, sec. 347; *R.* v. *Kelly*, 27 Can Cr. Cas. 94, 140 and 282, 34 D.L.R. 311.

A person who does not otherwise make a false representation himself but who is present when it is made, knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. *The Queen* v. *Cadden*, 4 Terr. L.R. 304, 5 Can. Cr. Cas. 45.

In order to establish the offence of obtaining money by false pretences it is necessary to prove what was laid down by Buckley, J., in *Re London and Globe Finance Corporation*, [1903] 1 Ch. 728. He said: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive

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by deceit: it is by deceit to induce a man to act to his injury." *R.* v. *Bennett* (1913), 9 Cr. App. R. 146 at 154.

On an indictment for obtaining money by false pretences it is essential that the jury should understand that there should be no conviction without an intent to defraud, and, unless such intent is clear from the facts, they should be directed on the point; they should also be directed that the obtaining must be due to the false pretense alleged. *R.* v. *Ferguson*, 8 Cr. App. R. 113; *R.* v. *Boyd*, 4 Can. Cr. Cas. 219; *R.* v. *Brady*, 26 U.C.Q.B. 13.

But where the statement relied upon and shown to be false could not have been made with any other object than that of defrauding the prosecutor, it is not reversible error that the jury was not instructed specially on the question of intent. *Rex* v. *Carr* (1916), 12 Cr. App. R. 140.

An intent to defraud may be inferred from the wilful use of a forged instrument to support a genuine claim. *Rex* v. *Hopley*, 11 Cr. App. R. 248.

In *Rymal's* case, 17 Ont. R. 227, the defendant, by untrue representations, made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay $240 for seed wheat. The defendant also represented that he was the agent of H. whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his H's favour for the $240. The contract did not provide for giving of a note, and when the representations were made the giving a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered *into* contract. The defendant was indicted for that he, by false pretences, fraudulently induced the prosecutor to write his name upon a paper so that it might be afterwards dealt with as a valuable security; and upon a second count for, by false pretences, procuring the prosecutor to deliver to H a certain valuable security:—*Held*, upon a case reserved that the charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as when obtained and procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H. did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on the first count as being guilty of an offence under R.S.C. ch. 164, sec. 78; *Regina* v. *Rymal*, 17 O.R. 227.

In *Regina* v. *Hope*, 17 Ont. R. 463, the defendant was indicted in the first count of the indictment for obtaining from one H. a promissory note with intent to defraud, and in the second count with inducing H. to make the said note, with like intent. The evidence shewed that on May 4th, 1887, the defendant's agent called on H. and obtained from him an order addressed to defendant to deliver to H. at R. station 30 bushels of Blue Mountain Improved Seneca Falls Wheat, which H. was to put out on

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shares, and to pay defendant $240 when delivered, and to equally divide the produce thereof with the holder of the order, after deducting the said amount. On 23rd May defendant called, produced the order, and by false and fraudulent representations as to the quality of the wheat and his having full control of it, its growth and yielding qualities, and that a note defendant requested him to sign was not negotiable, induced H. to sign the note. Evidence was received, under objection, of similar frauds on others shewing that the defendant was at the time engaged in practicing a series of systematic frauds on the community. The defendant was found guilty and convicted:—*Held*, on a case reserved, that the conviction should be affirmed on the second count, as the evidence shewed that the note was signed by H., not merely to secure the carrying out of the contract contained in the order, but on the faith of the representations made; and it was immaterial that a note was taken when the order called for cash; and, also, that the evidence objected to was properly receivable. *R.* v. *Hope*, 17 Ont. R. 463.

The defendant was foreman of works on roads, and certified to the inspector A. that certain persons had worked under him and were entitled to pay. He also produced orders for this pay purporting to be signed by those persons, but which in fact were not genuine. The inspector A. delivered the money to D. his agent, with instructions to pay it to the defendant if satisfied of the genuineness of the orders. On an indictment for obtaining money under false pretences from D. the defendant was found guilty, and the conviction was upheld on a case reserved. *Regina* v. *Cameron*, 23 N.S.R. 150.

There may be an intent to defraud although the prosecutor got something which was of real value for his money. Where money is obtained by pretences that are false, there is, *primâ facie*, an intent to defraud, although this presumption may by displaced. *R.* v. *Hammerson* (1914), 10 Cr. App. R. 121.

In a New Brunswick case, the prisoner wrote to the prosecutor to induce him to buy counterfeit bank notes. The prosecutor, in order to entrap the prisoner and bring him to justice, pretended to assent to the scheme, arranging a meeting place of which he informed the police, and had them placed in position to arrest the prisoner at a signal from the prosecutor. At such meeting the prisoner produced a box which he said contained counterfeit bank notes, which he agreed to sell the prosecutor on payment of a sum agreed upon. The prisoner gave a box which he pretended to be the one containing the notes to the prosecutor, who then gave the prisoner $50 and a watch as security for the balance which he agreed to pay.

The prosecutor immediately gave the signal to the police and seized the prisoner and held him until they arrested him and took the money and watch from him. On examining the box given the prosecutor it was ascertained that he had not given him the one containing the notes as he pretended, but a similar one containing waste paper. The box containing the notes was

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found on the prisoner's person. It was clear and undisputed that the motive of the prosecutor in parting with the possession of the money and the watch, as he had done, was to entrap the prisoner. The prisoner was found guilty of obtaining the money and watch of the prosecutor by false pretence of giving him the counterfeit notes, which he did not give.

On a case reserved for the opinion of the Court the minority opinion given by Allen, C.J., and Palmer, J., was that in order to complete the crime of obtaining property by false pretence, there must not only be the false pretence but an actual parting and intention to part with the property of the person imposed upon by the pretence; that the prosecutor here never intended to part with his property in the money and watch, and that the conviction should be quashed.

They were also of the opinion that as the prosecutor only expected to receive from the prisoner counterfeit notes which were of no value, it was extremely doubtful whether he could be said to have been defrauded because he received worthless goods of another kind. But it was held by the majority of the Court of six Judges that the prisoner was rightly found guilty, and that the conviction should be affirmed. *Regina* v. *Corey*, 22 N.B.R. 543.

On a charge of obtaining goods by false pretences by giving a bill of exchange due in seven weeks where some of the averments made were that the accused professed to be a man of financial strength and able in due time to meet the bill, it was held to be proper to admit in evidence for the prosecution the bank account of the accused and proof of the number of cheques on it being dishonoured during the time of the transaction. *R.* v. *Fryer* (1912), 7 Cr. App. R. 183.

Upon a trial for false pretences, it is competent, in order to prove intent, to shew that the accused made similar representations about the same time to other persons, and by means of such false representations obtained goods: Wharton, Crim. Law. 8th ed., sec. 1184; and other acts, part of the same system of fraud, may be put in evidence. *Reg.* v. *Francis*, 12 Cox C.C. 612, 43 L.J. Mag. Cas. N.S. 97, L.R. 2 C.C. 128; *R.* v. *Wyatt*, [1904] 1 K.B. 188; Tremeear's Cr. Code, sec. 404.

If there is evidence of two persons acting together and one assents to a false representation made by the other as an inducement to a contract, such assent may amount to a false pretence by conduct. *R.* v. *Grosvenor* (1914), 10 Cr. App. R. 404.

A postmaster transmitted to defendant several post office orders, which defendant in connivance with him presented and got cashed. The orders were fraudulently issued as no moneys had been received by the postmaster for transmission to the defendant, and frauds to a large extent had been thus committed. Defendant was held properly convicted of having obtained these sums with intent to defraud. And, semble, that defendant might also have been properly convicted under another count of indictment charging him with having obtained the money by false pretences. *Regina* v. *Dessauer*, 21 U.C.Q.B. 231.

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When in an indictment for obtaining by false pretences, one of the pretences alleged was that defendant was carrying on a genuine business in buying and selling pigs, the mere fact that he did not keep any pigs in his own possession, nor hold an option of purchase, does not establish falsity of his advertisement offering pigs for sale where he was in the habit of having deliveries made direct by the breeders. If it were open to the jury to find that the advertisement meant that he was ready to supply pigs of the description advertised, although not in his possession or control, the practical withdrawal of that view in the charge to the jury will be a ground for quashing the conviction. *R.* v. *Jakeman* (1914), 10 Cr. App. R. 38.

In *R.* v. *Lee*, 23 U.C.Q.B. 340, the prisoner sold a mare to B. taking his notes for purchase money, one of which was $25 and a chattel mortgage on a mare as collateral security. After this note had matured he threatened to sue, and B. got one R. to pay the money, the prisoner promising to get the notes from a lawyer's office, where he said they were, and give them up next morning. This note, however, had been sold by the prisoner some time before to another person, who afterwards sued B. upon it, and obtained judgment:—*Held*, that the prisoner was properly convicted of obtaining the $25 by false pretences. *Regina* v. *Lee*, 23 U.C.Q.B. 340.

In *Reg.* v. *Cooper*, 13 Cox C.C. 617, 46 L.J.M.C. 219, the accused was charged with falsely pretending that he was a dealer in potatoes, and as such dealer, in a large way of business and in a position to do a good trade in potatoes and able to pay for large quantities of potatoes, as and when the same might be delivered to him. The only evidence thereof was a letter from the prisoner to the prosecutor, reasonably conveying to the mind the construction put upon it in the indictment. Lord Coleridge, C.J., is reported (at p. 620) as follows:—

"The question for the Court, as I understand the case, is whether there was evidence upon which the false pretences alleged in the indictment could fairly be sustained. It was a question for the jury whether the false pretences alleged did or did not reasonably arise from the letter. The true principle applicable to this case was well enunciated by Blackburn, J., during the course of the argument in *Reg.* v. *Giles*, 10 Cox C.C. 44: 'It is not requisite that the false pretence should be made in express words, if the idea is conveyed.'"

Denman, J., at p. 622, said:—

"In *Reg.* v. *Giles*, 10 Cox C.C. 44, the prisoner pretended that she had power to bring the prosecutrix's husband back, and that was held to be a statement of fact. That warrants us in holding that where a man is not in a position to do what he professes he will do at a given time, he is making a false statement of fact. The indictment charges that the prisoner falsely pretended that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that pretence, I think, is proved by the letter."

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And Pollock, B. (*R.* v. *Cooper*, 13 Cox C.C. 617, 622), says:—

"Having heard the whole of the argument, I have come to the conclusion that the conviction should be affirmed. It is not sufficient for the prisoner to shew that the letter might bear another meaning, if it is reasonably capable of bearing the meaning imputed to it in the indictment. It is the duty of the prisoner to shew by special circumstances that it bore the construction he contends for. I think that the false pretences charged may be fairly inferred from the letter, and that the conviction should be affirmed."

In the case of *Edgington* v. *Fitzmaurice*, L.R. 29 Ch.D. 459, at 483, Bowen, L.J., is reported as follows:—

"There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

It is open to a jury to find that a trade name has been assumed with intent to defraud. *R.* v. *Whitmore* (1914), 10 Cr. App. R. 204.

If a person offers in exchange for goods the promissory note of another, he is to be taken to affirm, although he says nothing, that the note has not to his knowledge been paid either wholly or to such an extent as to almost destroy its value. *R.* v. *Davies* (1859), 18 U.C.Q.B. 180.

There are cases where the facts disclose that what was obtained by the false pretence was a contract, and that it was in pursuance of the contract that the goods were obtained; but on such facts a conviction for obtaining goods by false pretences was held to be good. *R.* v. *Kenrick* (1843), Davison & M. 208; 5 Q.B. 49; 12 L.J.M.C. 135.

The case of *R.* v. *Gardner*, 25 L.J.M.C. 100, has given rise to discussion. In that case the prisoner pretended to be a naval officer, and by reason of that false pretence obtained lodging; after he had been there some little time he entered into a contract with the prosecutrix to be supplied with meat and drink on specified terms. It was held that it was in pursuance of the contract, and not of the false pretence, that the goods were obtained; he was indicted for obtaining the goods by false pretences, and in the circumstances the Court held that there had been no continuing false pretence, and that the goods had been obtained, not by means of the original false pretence, but by means of contract.

The decision in *R.* v. *Kenrick*, 5 Q.B. 49, was followed in *R.* v. *Abbott*, 1 Den. C.C. 273, 2 C. & K. 630, in which case a strong Court of ten Judges held that a false pretence knowingly made to obtain money is indictable, though the money be obtained by means of a contract which the prosecutor was induced to make by false pretence of the prisoner; therefore the mere fact that the money was obtained by means of a contract does not seem to

prevent the operation of the law on the ground that the money was obtained equally by the false pretence as by the contract. Annotation.

R. v. *Gardner*, 7 Cox C.C. 136, which followed *R.* v. *Abbott*, 1 Den. C.C. 273, and cannot be said to overrule it, because two Judges were parties to the two decisions, was clearly decided on the ground that there was no continuing false pretence, and therefore, although at first sight the two cases seem a little out of harmony, when the facts are looked at it is not so. Per Coleridge, J., in *R.* v. *Moreton* (1913), 8 Cr. App. R. 214. In the last mentioned case, Coleridge, J., added: "*R.* v. *Martin*, L.R. 1 C.C.R. 56, 36 L.J M.C. 20, leaves the law in no doubt; it was held there that the fact that the goods are obtained under a contract does not make the goods so obtained goods not obtained by a false pretence, if the false pretence is a continuing one and operates on the mind of the person supplying the goods." *R.* v. *Moreton* (1913), 8 Cr. App. R., 214, at p. 217.

The false pretence alleged in a Nova Scotia case was by representing himself to be the owner of a vessel, whereas at the time he had transferred ownership to another person who had again transferred to defendant's wife. The representation to the prosecutor that he was owner was made some three or four months before and was by appending the style "Owner" to his signature to a letter in relation to another matter:—*Held*, that the pretence was too remote to warrant a conviction. And that the term "Owner" has no definite meaning in law, and does not mean "registered owner" of a ship. *Regina* v. *Harty*, 31 N.S.R. 272, 2 Can. Cr. Cas. 103; and see *R.* v. *Brady*, 26 U.C.Q.B. 13.

"Obtaining money or property by false pretences" is an extradition crime within the meaning of the Extradition Act and the extradition arrangement between Great Britain and the United States of America. *Re F. H. Martin* (No. 2), 2 Terr. L.R. 304, 8 Can. Cr. Cas. 326.

OLSEN v. CANADIAN KLONDYKE MINING Co.

B. C.

C. A.

British Columbia Court of Appeal, Martin, Galliher, and McPhillips, JJ.A. April 13, 1917.

MINES AND MINERALS (§ II A—25)—MINING CONTRACT—"DIRT MINED."

In the absence of an express stipulation to that effect, a second handling of tailings cannot be treated as "dirt mined" under an agreement allowing out of the gold recovered a certain sum for every cubic yard of dirt mined.

Appeal by the defendant from the judgment of Black, Co. J., in an action on a mining contract. Affirmed. Statement.

S. S. Taylor, K.C., for appellant; *E. P. Davis*, K.C., for respondent.

MARTIN, J.A., agreed in dismissing the appeal. Martin, J.A.

GALLIHER, J.A.:—The point is probably a close one, but it seems to me that when you contract to mine a certain area and Galliher, J.A.

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for such mining you are allowed a certain sum per yard of the cubic contents of that area, and where in such process a certain portion of the earth or gravel which is passed through the dredges (and paid for once) and deposited as tailings on another portion of the areas than that from which it was taken, it cannot again be charged for though necessary to remove it in the further operations, and in the absence of express agreement in the contract, I would think that this contingency would be assumed to be provided for in the price per yard charged, at least that would be the inference I would draw.

The appeal should be dismissed.

McPhillips, J.A.

McPHILLIPS, J.A.:—This appeal is in narrow compass and involves really only the construction of one clause in the agreement which was assigned to the appellant whereby the sole and exclusive right was given to work and mine creek placer mining claim No. 22 A below Discovery on Hunter Creek in the Yukon Territory, and an undivided two-thirds interest in the adjoining claim No. 22 below Discovery. The mining was done by means of a dredge, which, in its operation, is well known in the Yukon, and it was provided that the mining could be done by dredging or any other method of mining. It would appear that it became a matter of necessity, in the operation of the dredge, to work over again or pass through a second time some 15,835 cu. yards of material otherwise called tailings—and the contention of the appellant is that this is entitled to be charged for a second time under the clause in the agreement which is hereinafter set forth. The reason of the necessity for the doing of this arises from the fact that the dredge in its circuit to mine all the ground has to pass over area upon which these tailings have been deposited in its original course, that is, it became necessary to do this to get flotation for the dredge (the dredge makes its own flotable area to a large extent) and to be able to dig and mine the virgin ground to the side of the cut, as originally made, it not being possible to otherwise get all the bed rock on the claim and mine it, and recover the gold from it, without digging these tailings over a second time; this was only necessary, though, upon the left side of the cut. It was not contended that these tailings were dug over again to recover the gold in them, as it is questionable whether they would carry any gold; if any, it would be really non-appreci-

able; but it was a matter of necessity in the operation of the dredge to do so to thoroughly work the claim, that is, to get at the other unworked ground on the claim. In short, the trial Judge summed up the situation as disclosed by the evidence led at the trial in the following language:—

Now, the evidence is that this 15,835 cu. yds. of tailings was dredged or handled the second time, not for the purpose of recovering gold from the tailings themselves, nor from the ground lying beneath them, for that also had already been mined, but as preparatory work, we may say, and for the purpose of floating the dredge in a manner that would best enable the defendant company to mine and recover the gold from the virgin ground or unmined portion on the right limit of the claim, and lying beyond the cut or excavation in which the defendant company had deposited these tailings in the course of mining them. Quite different, I think, within the meaning of the agreement, from removing the muck in place in order to get at the gravels and bed rock beneath it for the purpose of recovering the gold.

I do not think it can be held that this 15,835 cu. yds. of tailings in this second handling should be treated as "dirt mines" under the agreement. The distribution of the gold recovered, or its value, will therefore be on the basis that the defendant is entitled to retain 20 cents a yard for the 107,275 cu. yds. of dirt mined, and not for the 15,835 yards of tailings handled the second time.

The clause of the agreement requiring construction is in the following terms:—

The terms and conditions are that the said Treadgold may work and mine the said claims in a thorough and minerlike manner until the same are worked out, and out of the gold and gold dust recovered retain thirty cents per cu. yd. for every yard of dirt mined; and this charge of thirty cents per cu. yd. shall be a first charge against the gold recovered from my said claims and shall so remain until fully paid; and the balance of the gold and gold dust mined or recovered from my said claims by the said Treadgold shall be divided equally between us.

The contention put forward by the counsel for the appellant was that every yard of dirt mined means "every yard of dirt (worked)" even if some thereof had to be worked twice, being of necessity worked twice, and relied on *Lewis* v. *Fothergill* (1869), L.R. 5 Ch. 103; and *Wheeldon* v. *Cranston* (1905), 12 B.C.R. 489, but these cases, in my opinion, whilst the best of authority as determining what may be deemed "working in a proper and workmanlike manner" and "minerlike working," do not determine the point at issue in the present case. It is true my brother Martin in *Wheeldon* v. *Cranston*, used this language:—"It is clear from the evidence that it was necessary for the minerlike working of the Owl that a rock cut and drain should be constructed through the Hawk," and upon the facts of that

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case there can be no doubt, as there is no doubt here, that the work was "minerlike working" in going through the tailings twice, it was work of necessity but in the going through the tailings twice, it was not and could not be "dirt mined" as it had already been mined, *i.e.*, the going through of the tailings again was not mining, within the meaning of the clause above set forth, although it was done in the course of mining the other mined ground. In my opinion it is only necessary to state the proposition contended for to see its fallacy, as otherwise it would lead to the absurd result that, if a part of the tailings could be worked and charged for, all could be worked and charged for. It is common ground that the reworking and going through the tailings was not done to recover gold, but was, of necessity, in the recovery of gold in other material that had to be reached by the method adopted. If we could find language in the agreement that provided that thirty cents might be retained for every yard of dirt handled the contention would be understandable, but we find no such language. It is not the province of the Court to make the contract between the parties but merely to interpret it. No words may be added to or taken from the language used. The language used is plain, in no way ambiguous and must be given effect to in accordance with that plain meaning. There can be no question what was admitted to be retained was 30 cents per cu. yard for every yard of dirt mined, in the sense that "mined" must be understood and is understood. "Mined" is not *passed* through the dredge; mined is the initial recovery of the gold from the ground in its virgin state as passed through the dredge: the tailings have been mined and never can be mined again. In other words, to extract the gold is the mining not the handling of the gravel, save in connection with the extraction of the gold. It is the admitted fact, as I look at the evidence, that the tailings would not have been handled twice, save that in the operations, it was, of necessity, in the mining that as to a portion of the tailings they had to pass through the dredge a second time; but that does not make it, of necessity, that the agreement must be interpreted to cover the handling of these tailings, which is not "dirt mined"—as that "dirt" was already mined. We also find the words "worked out" in the clause under consideration, and these words give us the dictionary meaning as supplied by the parties to the agreement; unquestionably the dirt is "worked out" when once

mined and the "dirt mined" is the dirt as first passed through the dredge.

In my opinion the judgment of the trial Judge should be affirmed. I would therefore dismiss the appeal.

Appeal dismissed.

THYKEN v. EXCELSIOR LIFE ASSURANCE Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 28, 1917.

LANDLORD AND TENANT (§ III C—65)—INJURY TO TENANT—USE OF FIRE-ESCAPE—DRYING CLOTHES.

There is no implied invitation or license to use a fire-escape for any other purposes than that for which it was intended, and a landlord is not liable for injuries sustained by a tenant by falling through an unrailed opening of a fire-escape while drying clothes thereon.

[See annotation on negligence, 6 D.L.R. 676.]

Statement.

Appeal of the plaintiffs from a judgment of Simmons, J., whereby he dismissed the plaintiffs' action after a trial by jury and after the jury had answered certain questions submitted to them. The action was for damages for personal injuries suffered by the plaintiff Mary E. Thyken, who is the wife of the plaintiff, H. J. Thyken.

A. L. Smith and *L. H. Miller*, for plaintiffs, appellants; *G. H. Ross*, K.C., for defendant, respondent.

Stuart, J.

STUART, J.:—A company called the Alberta Loan and Investment Co. Ltd. was the owner of a large building on Seventh Ave. in the city of Calgary. The building had been originally constructed as a business block with shops on the first or ground floor and offices in the upper storeys, but latterly some of the rooms above were rented as sleeping or dwelling apartments in which what was called "light housekeeping" was carried on.

The defendant company held a mortgage upon the property and this having fallen in arrear, they took possession about November 1, 1915. One Ferguson had been employed by the owners as caretaker of the building, and was continued in that work by the mortgagees, the defendants, when they took possession.

On November 11, 1915, the plaintiff H. J. Thyken rented two rooms unfurnished upon the first floor next above the ground floor for the purpose of living apartments. There was a considerable number of other tenants on the different storeys who were also

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doing housekeeping, and there were bachelor apartments and still a few rooms occupied as offices.

The rooms occupied by the plaintiffs opened into a corridor at the end of which was a door leading to a fire-escape attached to the outer wall of the building. This fire-escape was constructed of iron, and at the ends of similar corridors in the upper storeys of the building there were railed platforms from which iron railed stairways led downward to the next storey below. At the end of the corridor in question there was a railed platform to which from above a railed stairway led but from which downward there was not a railed stairway. The railed platform at this point had merely an opening in its floor next the wall of the building large enough for a person to go through without difficulty. Its size was in fact 20 inches by 24 inches. Through this hole one could step directly to a ladder attached directly to the face of the wall, which ended a few feet above the ground. There was no railing or guard of any kind on two sides of this hole. On one side was the wall and on the other the railing of the platform.

The plaintiff Mary E. Thyken, on November 25, had hung out to dry, some clothes, which she had washed, upon a cord or string which she had attached across the corner of the railing of the platform. Later on in the day she went out to bring them in, had got them all upon her arm and had unfastened the cord and was turning around to return to the room when she fell through the open hole to the ground below and was seriously injured.

The trial Judge submitted questions to the jury which, with the answers returned, were as follows:—

Q. Was the plaintiff Mary E. Thyken justified in believing that she was entitled or invited by the defendants to make use of the platform in question to hang out clothes? A. That Mary Thyken was, through the general use of the platform or fire-escape, entitled or invited by the defendants to use the platform to hang out clothes. Q. Are the defendants chargeable with negligence arising out of any dangerous feature in the construction of the said platform, and if so of what did the negligence consist? A. That the defendants are chargeable with negligence arising out of the construction of the said platform by the reason of their continuing to maintain a platform which in the opinion of this jury is a dangerous one, through having an opening and ladder instead of a platform complete with the necessary stairway railed leading therefrom towards the ground to within the distance required by law. Q. Is the plaintiff Mary Thyken chargeable with contributory negligence arising out of the occupancy and use made by her of the said platform at the time of the accident? A. Negative. Q. If the plaintiffs are entitled to damages at what amount do you assess the same? A. That Mr. Thyken

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is entitled to damages to the amount of $1,000. That Mary Thyken is entitled to damages to the amount of $3,500.

When the jury returned these answers, counsel for the defendant moved for judgment dismissing the action, and the trial Judge allowed the motion.

It is quite apparent from the course of the argument before him that the reason why the trial Judge dismissed the action was really because he was of opinion, as he was at the close of the plaintiff's case, that there was no evidence from which the jury could reasonably answer the first question in favour of the plaintiff. He was evidently of opinion that if there was such evidence, an affirmative answer to the first question, taken with the other answers, would be sufficient to entitle the plaintiffs to judgment.

The plaintiffs' appeal is therefore directed mainly against the trial Judge's decision that there was no evidence to support the finding upon the first question submitted.

Now what did the jury mean by their answer to the first question? As a matter of fact they did not answer the question which was asked; because the question was whether the plaintiff *was justified in believing* that she was entitled or invited by the defendants to make use of the platform for the purpose of hanging out clothes; while the answer is that she *was entitled or invited* by the defendants to do so. Both the question and the answer contain an alternative. I do not think we need concern ourselves very much with the question except in so far as it may throw some light upon the meaning of the answer. It is to the answer, the statement of finding of the jury contained therein, that attention must be directed. And I think also that the Judge's charge to the jury must be looked at to discover if we can just what fact or facts the jury did find and mean to state by their answer.

There was admittedly no evidence of a specific and direct invitation to use the fire-escape for the purpose in question and for that reason and in view of the way the trial Judge addressed the jury I do not think we should understand the jury as finding any such direct invitation. But there is, no doubt, such a thing as an implied invitation by conduct and also a clear distinction between such implied invitation and a mere license or permission. I can find nothing in the trial Judge's charge which would in any way direct the mind of the jury to an implied invitation. He speaks though of "license" or "consent." Keeping in view the

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words of the trial Judge as well as the language used by the jury in their answer, particularly the words "through the general use of the platform or fire-escape," I think that all the jury intended to say was that the plaintiff was a licensee, that is, that the defendant company knowingly acquiesced in her using the fire-escape for the purpose of hanging out clothes. But if the jury did mean anything more than license and consent and intended an implied invitation I am unable to find anything in the evidence that would justify such a finding. No doubt there was an invitation to use the fire-escape for its proper purpose. Indeed, the law required that it should be put there for that purpose. And the very fact that it was required to be there by the law would seem to me to limit the implied invitation to use it, to a use for the purpose which the law required. The plaintiffs knew what it was and why it was there. The owner or landlord having been obliged by law to put the structure there I am unable to see how there could be said to be any implied invitation to use it for any other purpose.

There was in fact nothing in the evidence to connect the defendants with the matter other than the knowledge of the caretaker Ferguson, who ran the elevator and at times collected rent and interviewed tentatively prospective tenants. He never communicated his knowledge to the principals, though perhaps it should be imputed to them. All he did know was that a few of the tenants had been occasionally but only recently in the habit of hanging out some light washing, such as towels, etc., upon the balcony to dry, and also of dusting their mats there. Ferguson's wife had done this once or twice herself. He said he had no authority from the defendants to give permission. He had in fact given no direct permission. He had simply omitted to forbid it. The plaintiffs had seen this and merely assumed that there was a permission to do so. They had only been there about two weeks and of course knew nothing of what had been done before they came.

Two passages from the Cyclopædia of Law and Procedure seem to me to express the proper rule with substantial accuracy:—

> Where a person has entered on the premises of another under invitation expressed or implied he is bound by that invitation and becomes a bare licensee if he goes to some other part of the premises for purposes of his own, *uses the premises for other purposes than that for which they were intended*, or remains

on the premises beyond a reasonable time after permission has expired. 29 Cyc. p. 452.

While invitation is not shewn by mere toleration of a trespass or passive acquiescence in permitting people upon the premises, or mere permission for them to be there or by use without the owner's knowledge, yet where the use has been so long continued as to lead the public to think the owner invited the use, a liability has been held to arise as from an implied invitation. 29 Cyc. 457.

But taking the jury's finding in the restricted sense of a bare license or permission, I think it is probably the case that there was sufficient evidence to support it. And I think the case may still be disposed of adversely to the appellant on the assumption that the plaintiffs occupied the position of bare licensees which is certainly the farthest the evidence can carry them.

The matter turns upon the question,—what are the rights of a licensee? Halsbury says, vol. 21, p. 392: "A bare licensee is entitled to no more than permission to use the subject of the license *as he finds it*. He must accept the permission with its concomitant conditions and perils. The grantor of a license is in a position similar to that of the donor of a gift, and is not responsible for the safety of the licensee, unless acceptance of the grant involves a hidden peril, wilful suppression of the knowledge of which amounts to a deceit practised on the donee. The licensee has, however, the right to expect that the natural perils incident to the subject of the license shall not be *increased without warning* by the negligent behaviour of the grantor and if they are so increased, he can recover for injuries sustained in consequence thereof."

There were some cases referred to by counsel for the appellant which contain distinguishing elements. *Cook* v. *Midland G.W.R. of Ireland*, [1909] A.C. 229, 78 L.J.P.C. 76, was a case of children habitually playing with a dangerous turntable to the knowledge of the defendants. It is abundantly clear from the judgments that the fact that young children were concerned was a determining circumstance leading to the decision given.

Lowery v. *Walker*, [1911] A.C. 10, was a case where the owner who knew that people were in the habit of crossing his field put a vicious stallion into it and did not warn them. In that case the distinguishing element is that the owner did something *adding* a concealed danger after he knew of the use people were making of his property. In order to make the present case parallel we

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should have to imagine the hole being put in the floor of the platform of the fire-escape *after* people had to the owner's knowledge begun to use it.

In *Gallagher* v. *Humphrey*, (1862) 6 L.T. 684, the judgment was rested upon something *actively done* by the owner or his servants in a negligent way *after* the permitted user had begun. In this case Cockburn, C.J., said:—

> I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is *superadded*. It cannot be that, having granted permission to use a way subject to existing danger, he is to be allowed to do *any further act* to endanger the safety of the person using the way.

In *Ivay* v. *Hedges*, 9 Q.B.D. 80, Lord Coleridge, C.J., said:—

> But if the contract was, as we must take it to have been—I let you certain rooms, and, if you like to dry your linen on the leads (the roof) you may do so—in that case the tenant takes the premises as he finds them (p. 81).

It seems to me that these cases have settled the law quite definitely. A bare licensee, as distinguished from a person invited or there upon the defendants' business as well as his own, must take the premises as he finds them, but the owner must not, after the permission is given, create by a negligent act a new danger not there before.

It may be that even in the case of a bare licensee the owner owes him a duty not to keep in existence a secret hidden trap or peril known to him to be dangerous and not discernible by the licensee even if it had been there before the permission was given, as it is laid down in the passage cited above from Halsbury. In such a case it might be said that the licensee, taking the premises as he *finds* them, does not *find* or discover the secret trap.

But I do not think there was any evidence from which the jury could reasonably find that the opening in question should be so characterized. It is true that one witness expressed his opinion that it was a trap, but it was not a matter upon which a witness should be asked for an opinion. Some attempt was made to shew that owing to the colour of the iron grating and the nature of the spaces between the bars it was difficult to see the opening. But I think we must assume that the plaintiff knew that the place was a way of escape to the ground and that there would be neces-

sarily an opening somewhere for that purpose. Then, again, it must be remembered that the opening was for the very purpose of letting people get through and of letting them get through in haste. A railing to protect it all the way round would have been directly contrary to that purpose, and a railing even on one side might conceivably upon occasion so retard the exit of a number of persons as to put them in danger.

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There was a great deal of discussion at the trial about the question whether the fire-escape complied with the by-laws of the city. Such a discussion could only be relevant where an accident had occurred during the proper use of the fire escape for the purpose for which it was intended. Where the person injured was a bare licensee using the fire-escape for a purpose other than the proper one there is no reason to enquire whether it complied with the by-law or not.

For these reasons I think the appeal fails and should be dismissed with costs.

Harvey, C.J.
Walsh, J.

HARVEY, C.J., and WALSH, J., concurred with STUART, J.

Beck, J.

BECK, J. (dissenting):—It seems that one may make a lease of premises in a dilapidated condition and if the tenant chooses to accept them in that condition without a covenant on the part of the landlord he cannot look to the landlord for damages resulting from injuries arising from the premises being out of repair, and the customer, guest or employee of the tenant will have no action against the landlord, and furthermore, it may be taken as a general rule that the tenant and not the landlord is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition, and the only exceptions to this rule appear to arise when the landlord has either (1) contracted with the tenant to repair, or (2) when he has let the premises in a ruinous condition, or (3) when he has expressly licensed the tenant to do acts amounting to a nuisance: *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C.P.D. 311; *White* v. *Jameson*, L.R. 18 Eq. 303; *Chantler* v. *Robinson*, 4 Ex. 163; *Lane* v. *Cox*, [1897] 1 Q.B. 415.

But another situation is met by the decisions. In *Miller* v. *Hancock*, [1893] 2 Q.B. 177, the defendant was the owner of a building, the different floors of which were let by him separately as chambers or offices, the staircase by which access to them

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was obtained remaining in the possession and control of the defendant, the landlord. The plaintiff, who had in the course of business called on the tenants of one of the floors, fell while coming down the staircase through the worn and defective condition of one of the stairs and sustained personal injuries. It was held by the Court of Appeal that there was by necessary implication an agreement by the defendant, the landlord, with his tenants to keep the staircase in repair, and, inasmuch as the defendant must have known and contemplated that it would be used by persons having business with them, there was a duty on his part towards such persons to keep it in a reasonably safe condition. That case was recognized as a sound decision in *Huggett* v. *Miers*, [1908] 2 K.B. 278, but not applicable so as to charge a landlord under like circumstances with the obligation of keeping a staircase lighted.

It was also recognized as a sound decision in *Powell* v. *Thorndike* (1910), 102 L.T. 600, but not applicable to a lift for carrying goods delivered by tradesmen. The decision was expressly on the ground that the landlord was not bound to supply a lift at all.

It was again recognized in *Dobson* v. *Horsley*, [1915] 1 K.B. 634, where all the cases I have referred to are discussed.

It seems to me that the case of a fire-escape, a thing which the landlord was bound by by-law to maintain, comes near to the principle of *Miller* v. *Hancock*, *supra*, while imposing on the landlord a heavier obligation. A fire-escape has for its very purpose its use by all occupants of the building should occasion arise. It must be easily and quickly accessible at all times. Being so situated it would be unreasonable to hold that tenants reasonably using either the balconies or the stairways forming together the fire-escape for purposes of pleasure or convenience use them not lawfully or rightfully. It seems to me that in such a case there is by reason of the unavoidable exigencies arising from the circumstances a continuous invitation so-called by the landlord to use the fire escape for any reasonable and lawful purpose and that in such a case the landlord would be liable not only to the tenant but to his customers, guests, employees or lawful visitors if this necessary apparatus had as parcel of it anything not necessarily in the nature of a trap but unnecessarily dangerous.

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I think the evidence shews that the particular balcony in question here was more dangerous than was necessary, and I would hold the defendant liable and therefore allow the appeal with costs and give judgment for the plaintiff in accordance with the findings of the jury with costs.

There is an American case, *McAlpin* v. *Powell*, 70 N.Y. 126, which is not available but a note of which is to be found in Underhill on Landlord and Tenant, 549. That decision seems contrary to the view I have expressed, but I am not satisfied with its correctness. *Appeal dismissed.*

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Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. December 30, 1916.

MUNICIPAL CORPORATIONS (§ II A—30) — EXPROPRIATION — CONFLICTING STATUTES—"AVOISINANT"—"ADJOINING."

The sixth section of 6 Edw. VII. ch. 50, authorizing the Town of Fraserville (Que.) to expropriate lands outside its limits, impliedly repealed sec. 193 of 3 Edw. VII. ch. 69, limiting the application of art. 4561 R.S.Q. to expropriation of land within the town, and art. 4561 therefore became applicable to expropriation of lands outside the town.

Statement.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of Letellier, J., in the Superior Court of the District of Kamouraska, which dismissed the plaintiff's action with costs. Affirmed.

St. Germain, K.C., and *St. Laurent*, K.C., for appellant; *Stein*, K.C., for respondent.

Davies, J.

DAVIES, J.:—The single question upon which I have entertained any doubt in this case is whether the appointment of arbitrators to determine the damages to which the appellant was entitled for or by reason of the expropriation by the respondent of certain lands of his outside of the Town of Fraserville should have been made by the Attorney-General under the provisions of the general Expropriation Act or by a Judge of the Superior Court under the articles of the Towns Corporations Act —4561 to 4569—and the subdivision sec. 11, "Expropriation for Municipal Purposes."

The argument for the appellant is that sec. 4561 of these general expropriation sections was "replaced for the Town" of Fraserville by art. 193 of ch. 69, 3 Edw. VII., (1903), amending the charter of Fraserville, that by this amendment the town's power of expropriation was limited to lands, buildings and struc-

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tures "in the town" and that, therefore, the general provisions of the Towns Act relating to the manner of expropriation did not apply to these lands which were outside of the town's jurisdiction and powers.

The respondent, on the other hand, contends that so far as the construction of its electric light works was concerned this limitation on the town's power of expropriation "to lands, buildings and structures within the town" was removed by art. 6 of the amendment to its charter in 1906, and that the methods by which this power of expropriation so extended should be exercised are to be found in the articles 4561 to 4569 of the Towns Corporations Act under the general heading of Expropriation for Municipal Purposes.

The respondent invokes in support of its argument arts. 4178 and 4179 of the Town Corporations Act the first of which declares generally that the provisions of this chapter apply to every town, etc., and "unless expressly modified or excepted they constitute part of its charter," and the latter of which enacts:—

> For any of the provisions of this chapter not to be incorporated in the charter it must be expressly declared that such provisions specifying them by their numbers shall not form part thereof.

Art. 4561 of the Towns Corporations Act, R.S.Q., 1888, title XI., conferring *power* of expropriation upon towns within the scope of the town's jurisdiction was amended, in 1903, by art. 193 of ch. 69, 3 Edw. VII., limiting that power to land, etc., "in the *town*" but this limitation, so far as the construction and maintenance of the electric works of the town were concerned, was done away with by the amendment of 1906 before referred to, and the land of the appellant, outside of the town, was under that amending power legally expropriated for the electric purposes of the town.

This extension of the limitation put upon the town's powers of expropriation then, it is said, necessarily left the provisions of the Towns Corporations Act as to the *method of procedure* applicable and so do not admit of the application of the general Expropriation Act. I admit the difficulties in reaching a conclusion and have given the point much consideration. After reading the carefully prepared opinion of Brodeur, J., I have concluded that his construction of the different statutes is right, that the proceedings taken to appoint the arbitrators under the Towns

Corporations Act were correct and that the appeal should be dismissed with costs.

IDINGTON, J.:—I agree in the main herein with the reasons assigned by the Courts below. But I have had some difficulty in trying to reconcile the enactment of sec. 193 of 3 Edw. VII., ch. 69, of Quebec, with the provisions necessary to be observed in the case of expropriation outside the town.

It is quite clear the peculiar wording of that section never was necessary, for the scope of the jurisdiction of the town, as it stood in the section thus supplanted, covered and was limited to that needed.

I think the sec. 6 of 6 Edw. VII., ch. 50, 3 years later, amending sec. 193 of the first mentioned Act, may be taken as an implied repeal of the limitation implied in the word "town" in said sec. 193, so much in evidence in the argument. I conclude the two cannot stand together and the later one should prevail. Then the general provisions of the Municipal Act relative to town corporations does the rest. I do not overlook the alternative properly and forcibly presented by Mr. St. Germain. His proposition relative to the general enactment providing for the Attorney-General naming the umpire or a sole arbitrator in case of disagreement, does not cover the whole ground involved in the questions raised herein. I need not elaborate. In short, the legislation has to be given some sort of sensible meaning.

At this stage it should not be expected of us to reverse the finding as to amount (especially when two of the board were selected by a Judge) of the award of arbitrators acting within their powers when unanimously maintained by the Courts below.

I admit the appellant has presented some plausible and, possibly, cogent reasons for his contention. But I fail to see anything more therein than what in the last analysis is matter of opinion of what the market value is of that taken.

Special advantages have been and must be tested by their value; not by what the owner may imagine and try to dictate as a price.

There does not seem any good reason to believe all these things were ignored by the majority of arbitrators.

The only other matter of legal principle involved in the appellant's allegations, upon which we could properly act, is that rela-

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tive to the expropriation being in part founded upon a resolution instead of by-law.

He has not so much to complain of in that regard as either plaintiff had in the cases of *Larin* v. *Lapointe*, 42 Can. S.C.R. 521, reversed in the Privy Council under the name of *Lapointe* v. *Larin*, [1911] A.C. 520, and *Robertson* v. *City of Montreal*, 52 Can. S.C.R. 30, 26 D.L.R. 228. In the former the non-observance of forms of procedure as prescribed by statute did not seem of importance in the Court above when the unanimous council in fact had directed something to be done without pursuing the method laid down in the statute; and in the latter case the majority of this Court held a similar departure from the prescribed path by way of a by-law when substituted by using a resolution was not *ultra vires* or at least so far so that a ratepayer or contracting party could complain.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—There is only one point requiring discussion. It arises in this way. The legislative charter of the Town of Fraserville, which is contained in an Act of the Legislature passed in the year 1903, was amended in 1906 in such a way as to provide that, for the purposes of establishing and maintaining a system of electric lighting, the municipality should have compulsory powers of expropriation as regards immovables both within and without the town. (Sec. 183, ch. 69, 3 Edw. VII., as amended by 6 Edw. VII., ch. 50, sec. 6). The municipality in acquiring for these purposes property outside its territorial limits has proceeded on the assumption that the machinery for expropriating land outside as well as that inside the town is the machinery provided by art. 4562 to 4569 of the Towns Corporations Act, R.S.Q., 1888, which with certain immaterial modifications became incorporated in the charter of 1903 by force of art. 4178, R.S.Q., 1888. The appellant denies that these provisions of the Towns Corporations Act, although incorporated in the charter and applicable to expropriations within the town, have any operation when an expropriation of property beyond the limits of the town is in question. Admittedly if the appellant is right in this contention the proceedings now impeached before us are invalid because if these enactments of the Towns Corporations Act are not the enactments by which such proceedings are governed then

the method of procedure which it was the duty of the municipality to follow in such expropriations was that prescribed by the Expropriation Act and admittedly the procedure so prescribed was departed from in essential respects.

The question for determination is: Was the municipality, in expropriations of property outside the town, entitled to avail itself of the provisions of the Towns Corporations Act above referred to?

The point of the difficulty can, I think, be most clearly put by first explaining the contention of the appellant. The arts. 4562 to 4569 of the Towns Corporations Act relating to expropriation which the municipality says are applicable and the appellant denies to be applicable to such expropriations are preceded by art. 4561 which is the first section in a fasciculus under the subtitle Expropriation for Municipal Purposes. This article is in the following words:—

The council may, by complying with the provisions following, appropriate any land required for the execution of works ordered by it within the scope of its jurisdiction: 40 Viet. ch. 29, sec. 386.

The charter of 1903 did not adopt art. 4561 as it stands. The first section of a group of sections of the charter bearing the subtitle "Expropriations," is sec. 193, which deals with that article as follows:—

L'article 4561 des Statuts Refondus est remplacé, pour la ville, par le suivant:

Le conseil pourra s'approprier, dans la ville, le terrain et les batiments ou constructions necéssaires à l'exécution des travaux ordonnés par lui, dans les limites de ses attributions, en se conformant aux dispositions suivantes;

And it will be observed that the article which by this enactment is, as regards the Town of Fraserville, substituted for art. 4561 expressly confines the powers thereby given to cases of expropriation *within the town*.

Now the appellant argues that the effect of this substituted article and especially of the words "le conseil pourra s'approprier dans la ville . . en se conformant aux dispositions suivantes" is to limit the application of the "*dispositions suivantes*," that is to say, of arts. 4562 to 4569 of the Towns Corporations Act to such expropriations. The appellant assuming that point to be safely reached, has, of course, no difficulty in establishing the conclusion, which indeed necessarily follows, that the charter itself neither explicitly nor by reference to the Towns Corporations

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Act provides any machinery for the expropriation of the property outside the town and consequently that for such purposes the municipality must resort to the Expropriation Act.

Not only is this argument a plausible one but it must, I think, be conceded that the view advanced by the appellant of the construction and effect of sec. 193 of the charter of 1903 is an admissible construction; indeed, at the conclusion of the argument I was strongly inclined to think that it was the right construction and that effect ought to be given to it.

There is, of course, some degree of *a priori* probability against the inference that the legislature intended to prescribe in respect of compulsory powers exercisable for the same object and by the same municipality one machinery where the property to be taken is within the municipality and a different machinery where the property to be taken is outside the municipality; where it is admitted that one set of machinery is not better adapted than the other set to either class of expropriation—as is the case here.

I feel at liberty to adopt the respondent's construction if it appear from the point of view of verbal interpretation to be a reasonably admissible one, even though from that standpoint alone the appellant's construction should be in some degree the preferable.

I find no difficulty in holding that the respondent's construction is a reasonably admissible construction. I have already pointed out that sec. 183, which confers compulsory powers simply, neither in the charter of 1903 nor in the amendment of 1906 has anything to say on the subject of machinery. So it must be observed when the article is narrowly examined, that art. 4561 of the Towns Corporations Act is primarily concerned not with machinery but with the conferring of substantive powers. It is a comprehensive provision which declares that when the municipality orders works that it has jurisdiction to order the municipality shall have authority to take the necessary land. It is quite true that the article adds that this may be done by complying with the subsequent provisions, but this phrase adds nothing to the construction which would have been put upon the article and the subsequent provisions if it had been absent and it certainly is not necessary to read it as restricting the scope of the succeeding articles by limiting their application to cases of expropriation by the municipality under the *general* powers con-

ferred by the art. 4561 itself. What effect then is to be attributed to section 193 which declares that art. 4561 is replaced by an article in which the *general* powers of expropriation thereby conferred are limited in their application to those cases in which the property required is situated within the town. The answer to this question is dictated by the fact that the substituted article, like art. 4561 itself, is primarily a provision dealing with substantive powers of expropriation, a comprehensive provision applying to all cases not specifically provided for in which it is necessary to take land for municipal purposes within the town. The charter contains a number of sections conferring such powers for specific purposes. Must we conclude that the machinery provided by the succeeding articles is available only in cases of expropriation under the residuary powers thus conferred? I repeat, such is not the necessary result of the limiting words. There is nothing in the language of the substituted article and nothing in that of arts. 4562 to 4569 which are part of the charter requiring us to hold that the machinery provided by these articles is not available for proceedings in exercise of powers given for specific purposes under other provisions of the charter such as that found in sec. 183.

These in outline are the reasons (they are, I think, in accordance with those of my brother Brodeur) from which I have concluded that we are entitled to hold that the judgment of the Court below was not erroneous.

ANGLIN, J. (dissenting):—In my opinion the appellant is entitled to succeed on the ground that the application of the expropriation provisions of the Towns Act (R.S.Q. 1888, arts. 4561 *et seq.*) is by sec. 193 of the charter of the Town of Fraserville, enacted in 1903, expressly confined to expropriations within the town. The French version of sec. 193 puts this restriction beyond any possibility of doubt.* The method to be pursued in the case

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*R.S.Q., 1888, (French version). Art. 4561.—Le conseil pourra s'approprier le terrain nécessaire à l'exécution des travaux ordonnés par lui dans les limites de ses attributions, en se conformant aux dispositions suivantes.—(English version.) Art. 4561.—The council may, by complying with the provisions following, appropriate any land required for the execution of works ordered by it within the scope of its jurisdiction.

Charter of Fraserville, (1903), 3 Edw. VII., ch. 69. (French version.) Sec. 193.—L'article 4561 des Statuts Refondus est remplacé, pour la ville, par le suivant:—Le conseil pourra s'approprier, dans la ville, le terrain et les

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of expropriations outside the limits of the town, which have, since 1903, been authorized by sec. 182 of the charter for waterworks purposes, and are now by an amendment to sec. 183, passed in 1906, also authorized for the purposes of the town electric lighting system, is not expressly provided for in the charter. If, notwithstanding the fact that art. 4561 of the R.S.Q. (1888) has been "replaced *for the town*" by a section which restricts the application of the method of expropriation provided by the succeeding group of articles in the Revised Statutes to expropriations within the town, that group of articles applies also to expropriations outside the town, the restriction thus imposed would be meaningless and ineffectual—a result so abhorrent to sound construction that it can be accepted only if inevitable. Arts. 4562 *et seq.* of R.S.Q. (1888) were not excluded from the town charter: they necessarily had their place in it subject to the "express modification" made by sec. 193 of the town charter of 1903. Arts. 4178 and 4179 of R.S.Q. (1888), therefore, do not conflict with the view I take of the effect of sec. 193 of the charter, which is that, for the Town of Fraserville, art. 4562 *et seq.* of the Towns Act (arts. 4178 *et seq.*, R.S.Q., 1888), must be read as if art. 4561 had been originally enacted in the terms of sec. 193 of the town charter. So reading them, it would, I think, be clearly impossible to hold arts. 4562 *et seq.* applicable to outside expropriations under sec. 182 of the charter, enacted concurrently with sec. 193, and there is no reason for outside expropriations authorized by the amendment of 1906 being in a different plight so long as sec. 193 of the charter was left unaltered. The corporation in making these outside expropriations, whether under sec. 182 or under the amendment to sec. 183, was thus driven to resort to the provisions of the general expropriation law contained in arts. 5754 (*a*) *et seq.* of R.S. of 1888 (54 Vict. ch. 38, sec. 1), which are expressly made applicable in all cases where powers of expropriation are conferred by a statute that does not determine the mode in which they are to be exercised. Counsel for the respondent contended that inasmuch as

bâtiments ou constructions nécessaires à l'exécution des travaux ordonnés par lui, dans les limites de ses attributions, en se conformant aux dispositions suivantes.—(English version.) Sec. 193.—Article 4561 of the Revised Statutes is replaced, for the town, by the following:—The council may, by complying with the following provisions, appropriate any land, buildings and structures in the town, required for the execution of works ordered by it, within the scope of its jurisdiction.

the power to expropriate outside the limits of the town for the purposes of its electric lighting system was not given by the town charter as consolidated in 1903, but was conferred only by an amendment of 1906, upon the adoption of that amendment the restriction effected by the words "in the town" in sec. 193 of the charter of 1903 should be deemed repealed by implication. I cannot agree with that contention. There is no repugnancy or inconsistency such as it requires as a foundation. It takes no account of the existence in the charter of 1903 of the provision made by sec. 182 for outside expropriations. Such an implied repeal as is contended for might possibly follow if the statutes did not contain the general provision above referred to for cases in which the mode of expropriation is not defined by the law conferring the right. But with that provision available necessity for extending the scope of sec. 193 does not arise, and short of absolute necessity there is no sufficient ground for an implication of repeal of the limitative words which it contains.

The ground of appeal, which should thus, in my opinion, prevail, is, no doubt, technical and, in view of the concluding sentence of art. 5566 of the R.S.Q. (1909), as amended by 1 Geo. V., ch. 56, sec. 19, is of no importance except in the present case. Yet it may not be rejected on that account since it involves the jurisdiction of the arbitrators.

If the provisions of art. 4562 *et seq.* of R.S.Q. (1888), did not apply, the Judge of the Superior Court usurped the jurisdiction conferred by arts. 5754*d* and 5754*e* (54 Vict. ch. 38, sec. 1) on the Attorney-General of the province. The appellant has never acquiesced in the appointments made by Cimon, J., who purported to act as *persona designata*. *C.N.O.R. Co.* v. *Smith*, 22 D.L.R. 265, 50 Can. S.C.R. 476. His order was not appealable. The respondent's plea of *res adjudicata* is, in my opinion, not well founded.

I think I should add that upon the other grounds taken the appeal, in my opinion, fails for the reasons stated by the Chief Justice of the Court of Appeal.

Brodeur, J.

BRODEUR, J. (translated):—In the town of Fraserville, the respondent, desiring to expropriate certain lands belonging to the appellant, which he required for his electric light plant, advised him of the expropriation under the terms of the Towns Corpora-

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tions Act of 1888; and as the appellant refused to name his own arbitrator and the arbitrator of a third party, the corporation respondent called upon a Judge of the Superior Court to make the appointment (art. 4565-4569*a*, R.S.Q., 1888).

The appellant appeared before the Judge, and contested the right of the corporation to expropriate the lands in question on the ground that the said lands lay outside of the territory where the corporation could exercise its rights of expropriation.

The Judge having dismissed the claims of the appellant, and having carried out his last objection; to wit, appointed a arbitrator of the appellant, the party whom he had suggested, and after the same manner appointed the arbitrator of the third party.

The arbitrator of the appellant and the arbitrator of the third party have delivered a claim by arbitration, on which a sum of about $5,000 has been granted to the appellant.

The arbitrator of the corporation was of the opinion that a smaller sum should be paid. The decision of the majority of the arbitrators was accepted by the corporation and the sum was duly offered. It cannot then be a serious question in so far as the amount of indemnity is concerned.

The appellant claimed the right to a larger sum, but as the three arbitrators are of the opinion that the sum offered is sufficient indemnity, and since they proceeded in a legal and equitable manner, the decision of the majority should be maintained.

The appellant demands in addition that the decision be based at the outset on: (1) that the nomination of the arbitrator and that of the third party, should not have been made on the terms of the Towns Corporations Act (art. 4565 and 4569*a*) but under the provisions of the Expropriation Act of 1890 (54 Vict., ch. 38); (2) that the corporation had not the requisite statutory power to expropriate their lands.

1. *Nominations of the arbitrators.* The town of Fraserville was governed at the time of the expropriation in question, in 1908, by a special Act of 1903 (3 Edw. VII. ch. 69) and by the general Act, known as the Towns Corporations Act (art. 4178 *et seq.*; R.S.Q. 1888).

The General Act of Expropriation of 1890 (54 Vict. ch. 38) asserted that its provisions applied to the case where the legislature had not otherwise provided a mode of expropriation.

It was therein asserted that if one party refused to name his arbitrator then the other party might ask the Attorney-General of the Province to nominate an arbitrator. If each party had chosen his arbitrator, the arbitrator of the third party was to be named by the Attorney-General.

In the Towns Corporations Act, the power of expropriation for a town was at first decreed by art. 4561 R.S.Q. (1888), and arts. 4562 to 4570 determine the procedure in expropriations.

In arts. 4565 to 4569*a* it is asserted that if one of the parties refuse to name his arbitrator or the arbitrator of the third party, then the Judge of the Superior Court shall have jurisdiction to make this nomination.

Then the difference between the general Expropriation Act and the Towns Corporations Act is, that in the first case the Attorney-General nominates the arbitrators and in the second case, of expropriations by the towns, they are named by the Superior Court.

The appellant claims that the General Act of Expropriations applies in the present case, because the lands lie outside of Fraserville; in view of that the legislature in the case of Fraserville should have asserted that the method of expropriation of the town corporations should only apply in the case where expropriations should be made, within the town limits.

It is based on sec. 193 of the Special Act of 1903 which has recalled art. 4561 of the Town Corporations and replaced it by a new one.

Art. 4561, such as we find it in the (R.S.Q. 1888), reads as follows—

> The council may expropriate the necessary lands for the carrying on of ordered works within the confines of its own cognizance, by conforming to the following provisions. (The amendment made by sec. 193 of the charter of Fraservile is as follows.) Art. 4561 of R.S.Q. has been replaced for the town by the following.
>
> The council may expropriate in the town, the lands, buildings or constructions necessary for the carrying out of ordered manufactures within the confines of its cognizance, in conforming to the following provisions.

Art 4561 of the revised statutes of 1888 aimed at giving the right of expropriation to the towns.

As it did not refer to buildings it was decided in the case of Fraserville to add these words, "buildings or constructions" to the word "land" to make clearer the right of the town of Fraser-

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ville to expropriate not only the lands, but the buildings erected thereon. It was decreed also at the same time that these expropriations could be carried out only in the town. It was in 1903 that art. 4561 was thus amended. But in 1906 new powers of expropriation were granted to the town for its electric light plant, and this time the town was not restricted to its own territory, but was given the power of going outside of it into the neighbouring municipalities.

The legislature, however, gave it this additional power not by suppressing the words "in the town" of art. 4561 such as it was amended in 1903, but by making a new section. This new sec. is clear and not ambiguous, and no one shall claim that it only makes the restrictions imposed by art. 4561, as amended, of no account.

If by the law of 1903 the town of Fraserville could only expropriate land within the limits of its own territory for its own electric light plant, the amendment of 1906 clearly gives it the right of going outside its own territory for the purpose mentioned above.

These two provisions are then contrary and although art. 4561 such as adopted in 1903 had not been formally repealed in 1906, it became incompatible with the law of 1906; in that case, the last ought to prevail, since it contains the will of the legislature such as it was finally expressed.

Lord Tenterden said in the case of *The King* v. *Justices of Middlesex*, 2 B. & Ad. 818, at 821:—

> Where the proviso of an Act of Parliament is directly repugnant to the purview of it, the proviso shall stand and be held a repeal of the purview, as it speaks the last intention of the makers.

"The usual rule as stated" par sa seigneurie le Juge Farwell dans la cause de *In re Cannings and County Council of Middlesex*, [1907] 1 K.B. 58:—

> Is that where there are two public general Acts with inconsistent provisions the later Act prevails.

The process of expropriation which ought to be followed in the case of lands situated outside of the territory of a town, is that which is set forth in art. 4562 *et seq.* R.S.Q.

In virtue of art. 4178, which is the first article of the Towns Corporations Act, it is asserted that:—

> The provisions of the present chapter apply to all municipalities or town corporations established by the legislature of this province and at the least modification or explicit exception, form a part of the charter.

Art. 4179 is still more explicit and says:—

In order to prevent the incorporation of some articles of the present chapter into the charter, it ought expressly to exclude them, by indicating their numerical order.

Where is the provision in the Fraserville charter which expressly asserts, by numerical indication, that art. 4562 and those following it are not a part of this charter? Is there then in the charter of Fraserville a single provision which expressly declares that arts. 4565 and 4569*a*, which furnish the Judge with the jurisdiction to nominate the arbitrators, are not a part of this charter? There is none.

Art. 4561 invoked by the appellant is not particularly concerned with the procedure followed in expropriations, but determined by the right of expropriation itself.

With regard to the method of procedure which is followed, the provisions of art. 4562 *et seq.* are applicable, and it would be illegal to have recourse to the general expropriation, which does not apply to towns corporations.

The nomination of the arbitrators has been duly and lawfully made by the Superior Court.

The appellant moreover suffers no injustice since the corporation consents to pay him the total sum that his own arbitrator has decided to give him.

2. *Power of expropriation.* Another point which has been equally raised by the appellant is that the town of Fraserville could not expropriate the land because it was not in a neighbouring municipality.

The river and the lake in question are situated about 15 miles from Fraserville. The town in order to maintain its electric light plant was clearly obliged to go outside for the necessary water power. At certain seasons of the year the river from which the town derived its water power dried up, and the necessary light could not be manufactured.

It would appear that the lake and river possessed by the appellant were the sole, favourable possession which existed in the neighbourhood. It is a question of using these lakes and streams as reservoirs for conservation of water that should be distributed in the course of the next summer, when the stream from which the town derived its water power should become dry. The town obtained in 1906 the right to expropriate property outside of its own territory by the statute (6 Edw. VII. ch. 50 sec. 6) which asserted that it shall have the power.

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The proprietors or occupants of all lands or property, in or outside of the town and the neighbouring municipalities, shall be obliged to allow all necessary operations for the construction, maintenance and repairing of the electric light plant, on their property. The council may expropriate all land necessary to this end; the proprietors or occupants, however, reserving indemnity for the actual damages caused to such lands or property.

In the French version "neighbouring (avoisinant) municipalities" is used, in the English version "adjoining municipalities."

The word "adjoining" seems to me a little more restricted than "avoisinant" or "neighbouring," and since in virtue of the charter of Fraserville, sec. 97, it is provided that in the case of difference between the French version and the English version the French version shall be preferably adopted, it is a question of considering very particularly the word "avoisinant."

The word "avoisinant" means to express the idea of "to be," to be in the neighbourhood of a place; it does not necessarily mean to express the idea of "immediately neighbouring." Moreover, the legislature had taken into consideration to such a small degree that idea of the "municipality directly joining"—because there is only one such, which is the parish of the Loup river which surrounds Fraserville.

The lands in question are about 15 miles from the town. It is the only property which the village could expropriate for its lighting plant. It was certainly that property which they had in view when authority was granted them by the legislature. Then there could be no doubt, in my judgment, that the corporation had the right to expropriate the lands of the appellant.

For all these reasons I consider the judgment which has dismissed the action of the plaintiff is well founded, and ought to be affirmed with costs. *Appeal dismissed.*

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DALHOUSIE LUMBER Co. Ltd. v. WALKER.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. November 24, 1916.

CONTRACTS (§ VI A—410)—PRIORITY—THIRD PARTY—RIGHT TO SUE.

An agreement that all logs cut and procured shall be the property of a third person, creates no priority of contract with the latter, and in the absence of written notice of an assignment of the contract to him, as required by the Judicature Act, he cannot sue for a wrongful detention of logs in breach thereof.

Statement.

APPEAL by plaintiffs from the judgment of Crocket, J., in an action for the wrongful detention of a quantity of logs.

A. J. Gregory, K.C., supported the appeal; *A. T. LeBlanc, contra.*

GRIMMER, J.:—In December, 1914, the defendant entered into a contract with John M. Adams & Co. to cut and deliver to it in the Restigouche river in the spring of 1915, 2,000 pieces of spruce and fir logs at prices named per thousand. The logs were to bear certain marks, as specified, and were to be surveyed on the landing by a competent surveyor whose scale should be final. It also contained a clause that the logs cut and hauled thereunder were for the Dalhousie Lumber Co. and should be its property from the stump. Provision was made for interest on advances as the work progressed and for the time of payment of the balance due on the contract. Prior to this and on August 18, 1914, Adams & Co. had made a contract with the Dalhousie Lumber Co. to get out for it some 3 or 4 million feet of spruce, fir, pine and cedar logs, which were to be marked as in the case of the Walker-Adams contract. This contract provided the logs were to be cut on lands held in fee in the Provinces of Quebec and New Brunswick and should be put in the river in time for the corporation drive. It also arranged for cash advances and payment on the final survey of the balance due, and that the logs procured thereunder should become the property of the Dalhousie Lumber Co. from the stump. It further provided that Adams & Co. by this agreement transferred all its interest in all logs cut or procured under any contract or contracts made by it with any other party. No special reference, however, was made to the contract between Adams & Co. and the defendant, and no notice in writing as required by sub-sec. 6 of sec. 19 of the Judicature Act, 1909, of the assignment of the former contract to the Dalhousie Lumber Co. in order to entitle it to sue as assignee was given to the defendant. Proceeding under the contract with Adams & Co. the defendant cut 2,000 pieces on his own land and hauled them to a brow on his own land ready to be rolled into the river. It is alleged that by reason of Adams & Co. refusing or neglecting to make cash advances as agreed, and because defendant had become apprehensive that he might not be paid for the logs, he told Adams & Co. that he would only put in the river sufficient logs to cover the advances he had received. Thereupon the Dalhousie Lumber Co. sent one Babcock to count the logs and on the day this was done defendant put nine hundred logs

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in the river to cover the advances made and refused to put any more in unless he received a guarantee of his pay from the Dalhousie Lumber Co. The company refused to give the required guarantee and commenced this action for the wrongful detention of the 1,100 pieces still on the landing. Under the writ the sheriff took and delivered to the lumber company 747 pieces, all that were on the landing when he made the seizure—the balance having been hauled away and manufactured by the defendant. These pieces were driven to the company's mill in the month of August, too late for the corporation drive. By his defence the defendant denied that the Dalhousie Lumber Co. was entitled to the logs, affirming his ownership in them.

The suit proceeded at first with a jury, but during its progress an agreement was made by counsel whereby John M. Adams & Co. was added as a party plaintiff for the purpose of settling all matters in any way arising out of the Adams-Walker contract, the jury was discharged and the case proceeded before the Judge without a jury. After hearing all the evidence he found that the Dalhousie Lumber Co. had received 1,647 of the logs which Walker had cut under his contract with Adams & Co., but that it was not in a position to maintain the action as originally commenced, and therefore, acting upon the agreement which substantially provided that all matters in dispute between the parties arising under the Walker-Adams contract should be settled upon equitable grounds, the Judge inquired into the cash advances made to the defendant, the damages which had been sustained by reason of the failure of the defendant to deliver all the logs, the claim of the Dalhousie Lumber Co. for the special or extra cost of driving the logs seized, and other matters, and found a balance of $254.16 due the defendant, and made an order that the bond given to the sheriff by the lumber company on the seizure of the logs be delivered up to be cancelled upon payment by the company to the defendant of that sum, but without costs. The plaintiff moves to vary this judgment or for a new trial.

In this I do not think it should succeed. The parties by their counsel made an agreement to govern the trial of the action, and because, upon the finding, the plaintiff is dissatisfied I do not think it should afterwards be allowed to move for a new trial or vary the judgment, particularly when the question is chiefly one of facts upon which the learned Judge carefully passed. The agreement

upon which the case was taken from the jury and left to the Judge is as follows:—

It is agreed between the parties and John M. Adams & Co., that the firm of John M. Adams & Co. shall be added as a party plaintiff to this action, and that all such amendments shall be made to the pleadings as may be necessary for the final determination of all disputes between the plaintiffs, or either of them, and the defendant, arising out of the contract made between John M. Adams & Co. and the defendant on December 3, 1914, for the cutting and delivery of 2,000 pieces of lumber for the Dalhousie Lumber Co. That the jury shall be discharged and the trial proceed as a trial before the presiding Judge for the determination of all such questions aforesiad.

This, I think, is sufficiently large and broad to signify the wish and intention of the parties when it was entered into, and I am entirely unable to find in the judgment rendered wherein the learned Judge had dealt or attempted to deal with the subject in any way foreign to the terms of the agreement. Having examined the evidence I do not observe where the findings of the learned Judge are inconsistent therewith or overwhelmingly or manifestly in error.

I am of the opinion that there was no privity between the Dalhousie Lumber Co. Ltd., and the defendant under his contract with the Adams Co., and that the Dalhousie Lumber Co. could not have succeeded in the action as originally brought for the defendant's failure to put the logs in the river. For the purpose, therefore, of preventing litigation and settling the disputes of the parties in one action the propriety of concluding the agreement recited may well be approved, in that it provided a means or process under which it was possible to deal with all the matters involved under the Adams-Walker contract. I find no reason to interfere with the Judge's findings save in respect to the amount allowed by him to the defendant for the lumber. There is evidently an over-estimate through an error in calculation in quantity which, in the summing up, makes a difference of $14.40 in favour of the defendant. This sum should be deducted from the $254.16 and this appeal should be dismissed with costs.

WHITE, J. (oral):—With reference to plaintiff's contention that the Judge, in making up his judgment, should have allowed the appellants damages arising from the defendant's failure to put the logs in the stream at the time he contracted to put them in, I think it quite clear that so far as the Dalhousie Lumber Co. is concerned they could not recover damages from the defendant on that ground. There was no contractual relation be-

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tween the Dalhousie Lumber Co. and the defendant, and no obligation whatever from the defendant to that company to put the lumber in the stream in time for the corporation drive. As between the defendant and Adams & Co. there was such a contract on the part of the defendant, and a breach of it, and therefore Adams & Company would be entitled to damages for that breach —nominal damages at least; but the measure of the maximum damages to which Adams & Co. would be entitled would be the amount they had to pay, or were legally liable and bound to pay, the Dalhousie Lumber Co. Now, although, at the suggestion of the learned trial Judge, Adams & Co. were brought into the suit as a plaintiff in the action, and it was agreed that the Judge should determine all matters in dispute between the parties arising from the transaction, the learned Judge does not appear to have decided, or to have been asked to decide, any question between the Dalhousie Lumber Co. and Adams & Co. Indeed it would have been difficult for him to do so, because both of these plaintiffs appear to have had the same solicitor. There is no direct finding as to what, if any, damage the Dalhousie Lumber Co. was entitled to recover from Adams & Co. in respect to the failure to have the logs put in the stream in time for the corporation drive, although the learned Judge did give consideration to that matter and has dealt with it in his judgment. He holds that the Dalhousie Lumber Co. could not recover such damage, measuring the amount thereof by what they were forced to pay or what they did pay in having made a special drive of the balance of these logs which were not driven down as part of the corporation drive. He held, and I think the evidence justifies the holding, that the Dalhousie Lumber Co. could themselves have put these logs in the stream so that they would have gone down with the corporation drive. Not having done so, having chosen to acquiesce in the claim which was set up by the defendant that he ought not to put the lumber in until he was paid the amount which was due him, except sufficient to satisfy the advances he had received, having made no demand upon him that the logs should be put in, and having made no attempt themselves to put them in, they could not afterwards recover as damages the extra cost of the special drive. With that finding, under the circumstances, I do not think this Court should interfere. The case appears to have been tried by all parties almost as an arbitration. The

Judge was, in effect, asked to decide what would be equitable and fair to do under the circumstances as between all the parties, and the trial appears to have proceeded that way. The finding seems to me to be just and reasonable, and I think the Court ought not to interfere with it.

I agree that there should be the reduction suggested by my brother Grimmer of $14.40, because there is evidently an error of that amount in calculation on the part of the Judge.

MCLEOD, C.J. (oral):—My view, shortly, is this: the logs became vested in the Dalhousie Lumber Co. from the stump, under the contract made with Walker, which contract Adams & Co. had a right to make by virtue of their contract with the Dalhousie Lumber Co. The same provisions as to ownership of logs when cut were in both contracts—so that the logs at the time they were cut vested in the Dalhousie Lumber Co., and they would have the right to replevy them. Further than that they had no claim against Walker. There was no privity of contract between them, and Walker owed them no duty and was not liable to the Dalhousie Lumber Co. for his failure to put the logs in the stream in time for the spring drive although he may be liable to Adams & Co. for such failure. Therefore I think the appeal must fail.

The finding will be reduced by $14.40 and the appeal dismissed with costs. *Judgment varied.*

Re TOWNSHIP OF MALAHIDE AND COUNTY OF ELGIN.

Ontario Supreme Court, Appellate Division, Garrow, Maclaren and Magee, JJ.A., and Masten, J. February 22, 1917.

BRIDGES (§ I—2)—COUNTY BRIDGE—LENGTH—"MAINTAINING."

The power of a County Court Judge to declare a bridge less than 300 feet in length a "county bridge" (sec. 449 Municipal Act R.S.O. 1914, ch. 192) applies to existing bridges, and does not authorize a declaration in reference to a bridge proposed to be built.

[See also *Re Township of Ashfield*, 34 D.L.R. 338, 38 O.L.R. 538.]

Statement.

AN appeal by the county corporation from an order of the Judge of the County Court of the County of Elgin declaring a certain bridge or proposed bridge to be a county bridge: sec. 449 of the Municipal Act, R.S.O. 1914, ch. 192.*

*449.—(1) A bridge of a greater length than 300 feet in . . . a township may, on the application of the council of such . . . township, be declared to be a county bridge where

(*a*) it is used by the inhabitants of other municipalities;

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RE TOWNSHIP OF MALAHIDE AND COUNTY OF ELGIN.

The reasons for the order of the County Court Judge were given in writing, and were in part as follows:—

The Corporation of the Township of Malahide ask for an order declaring the bridge known generally as Stalter's Creek bridge, in the township of Malahide, to be a county bridge.

The gully to be bridged crosses Nova Scotia street, which is a road running east and west through the township of Malahide, and is the nearest way to Lake Erie, running in that direction. In the bottom of this gully is a small stream, which at low water is about 4 feet wide and 9 inches deep. From the level land, its present depth is about 56 feet. About 25 years ago, it was only 50 feet wide. By erosion the width has increased to over 200 feet. Three bridges have been built there during the last 25 years. All have been washed out—the last, which was about 200 feet long, fell in consequence of erosion of the banks of the gully last August. Borings of the soil in the bed of the gully have been made. What is called by some quicksand, but perhaps is more properly a mixture of sand and clay, very spongy and fluid, prevails for 10 feet; then a bed of surface clay, 3 feet; then 9 feet of a character similar to the first boring; then blue clay is reached. About 70 feet below the top layer of blue clay, the rock is found. The banks of the gully are very steep, and are indented frequently by cross-gullies of considerable length and depth.

(*b*) it is situate on an important highway affording means of communication to several municipalities; and

(*c*) on account of its length, and for the reasons mentioned in clauses (*a*) and (*b*), it is unjust that the burden of maintaining and repairing it should rest upon the corporation of the . . . township.

(2) An order declaring the bridge to be a county bridge may be made by a Judge of the County Court of the county in which it is situate on the application of the council of the . . . township.

. . . . . .

(5) If the Judge is of opinion that for the reasons mentioned in sub-section (1) the bridge should be declared to be a county bridge he shall by his order so declare, and in that case he shall determine whether the expense of maintaining and repairing the bridge shall be borne by the corporation of the county or partly by it and partly by the corporation of the . . . township and if he determines that it should be borne partly by each he shall fix the proportions in which the expense is to be so borne, and his declaration and determination shall be embodied in the order.

. . . . . .

(7) An appeal shall lie from the order of the Judge to a Divisional Court . . .

A plan for the re-erection of a bridge at this point was prepared, at the instance of Malahide, by James A. Bell, C.E., engineer for that township, and also for the County of Elgin, for many years. I have no hesitation in approving of this plan in its entirety. The length of the bridge proper is here laid down as 303 feet, of the approaches 100 feet. To make the bridge lower would be inadvisable, because, if the water ran from the highway on the bridge, the supporting columns and the banks adjacent would be endangered. To make the bridge shorter would simply invite the trouble which has destroyed the other bridges previously erected there. . . .

I therefore find that the length of the bridge proper, to be erected at this point, exceeds 300 feet. In addition, the approaches necessary to be made will be approximately 100 feet in length.

The evidence is overwhelmingly strong that this bridge is used by the inhabitants of other municipalities. It is also proved that it is situated on an important highway affording means of communication to several municipalities. . . .

I find that 85 per cent. of the travel there is due to people who are non-residents of Malahide, and that 15 per cent. is attributable to people who live in that township, and direct that 85 per cent. of the cost of maintaining and repairing a bridge at that point shall be borne by the Corporation of the County of Elgin and 15 per cent. of such cost shall be paid by the Corporation of the Township of Malahide.

The equalized assessment of the County of Elgin is $23,288,345; that of the Township of Malahide is $2,839,210. I have been asked to take the relative assessment of Malahide to that of the whole county into consideration, and to that extent to reduce or eliminate the proportion of the cost of this work payable by Malahide. I cannot accede to this contention.

I have also been asked by counsel for the county corporation to take into account the fact that the county corporation would not be liable to pay any of the cost of this work if the bridge did not exceed 300 feet in length, and to say that the county corporation should not be made liable for more than the excess of the cost over what would be necessary if the bridge were only 300 feet long. I reject this suggestion also.

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Counsel for the county corporation contends that there is no authority for the erection of the bridge proposed by Mr. Bell, and approved by the Council of Malahide, at the expense of the county in whole or in part. He emphasises the fact that the obligation of the county corporation under sec. 449 of the Municipal Act is to *maintain* and *repair* only. He calls attention to the fact that secs. 437 and 438 use the words "*erect* and *maintain*;" that sec. 451 uses the words "shall cause to be *built* and *maintained*;" and sec. 452, "*erect* and *maintain*." He contends further that the county council has no authority to erect a bridge, no matter what its length may be, unless the road is assumed under sec. 436. . . . To *maintain* a bridge over a ravine or river involves the reconstruction of it when it is destroyed. That seems to be the true meaning of the statute.

The question of repair, when the bridge is in existence, is not generally a very acute one, especially if the material used in its construction is iron or cement. If the bridge were a wooden one, and if all cost of reconstruction were thrown upon the township corporation, there might be a disposition on the part of the township authorities to continue the work of repairing, the cost of which would be partly paid by the county, too long. Whether the bridge should be continually patched up, or be replaced by a new structure, might then become a live and serious question in dispute between the township and the county. The Legislature surely never intended to encourage a prolongation of this contest. In the meantime the lives and property of the travelling public would be endangered. Such a state of affairs is contrary to public policy.

I therefore hold that the county corporation are liable to the extent aforesaid, and declare the bridge to be a county bridge.

C. St. Clair Leitch, for appellants.

J. M. McEvoy and *E. A. Miller*, for the Corporation of the Township of Malahide, respondents.

The judgment of the Court was delivered by

Masten, J.

MASTEN, J.:—This is an appeal from the order of the Judge of the County Court of the County of Elgin, dated the 6th May, 1916, declaring that a proposed bridge, known as "Stalter's Creek bridge," and proposed to be located upon the road allowance between the 1st and 2nd concessions in the township of Malahide, in the county of Elgin, is a county bridge; and appor-

tioning between the county and the township the cost of erecting the proposed bridge, and thereafter the cost of maintaining and repairing it. The order is made in pursuance of the authority and duty imposed on the Judge of the County Court under sec. 449 of the Municipal Act, and this appeal is brought in pursuance of sub-sec. (7) of the same section.

The question is, whether, upon the admitted facts, this bridge falls within the words of sec. 449; for, if it does not, there was no jurisdiction to make the order under consideration. The facts are peculiar; and, as they are fully set out in the judgment appealed from, they need not be here repeated at length. It is sufficient to say that, prior to the date of the application to the Judge of the County Court, there had been a bridge at the place in question. The length of this bridge, exclusive of the approaches, was 196 feet, and including the approaches it was less than 300 feet. Owing to erosion in the banks, it fell down some time prior to the 4th December, 1915, when the application to the County Court Judge was launched; and at the date of that application there was no bridge in existence

It is proposed to erect in its stead a new bridge, having a length, including approaches, of about 400 feet, or, omitting the approaches, a length of 303 or 304 feet.

The sole question is one of jurisdiction, upon the interpretation of sec. 449 of the Municipal Act. It is clear, upon the evidence, that this bridge is used by the inhabitants of other municipalities; that it is situate upon an important highway affording means of communication to several municipalities; and that, on account of its length and for the reasons above mentioned, it is unjust that the burden of maintaining and repairing it should rest upon the Corporation of the Township of Malahide alone. The sole question in debate is: does the section apply to a case where there is not now and never has been a bridge 300 feet long? In other words, does the section apply so as to authorise an order to be made in respect of a *proposed* bridge, and thus impose on the county the burden of contributing to the erection, as well as to the maintenance and repair, of the proposed bridge?

The crucial words of the section are "A bridge of a greater length than 300 feet . . . in a township may . . . be declared to be a county bridge." Admittedly, no such declaration could have been made with respect to the bridge that fell,

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for it was less than 300 feet in length. There is not now in existence any bridge to which such declaration can be applied. Can it then be made to apply to the bridge which is at present contemplated, which is to have a greater length than 300 feet? Is the plan of a bridge a bridge? Or is a place where a bridge ought to be a bridge? With great respect for the careful opinion of the Judge of the County Court, I am of opinion that the statute does not cover this case, and that there was no jurisdiction to make the order.

It is sought to support the order now in appeal because, as it is contended, the word "maintain," as used in sec. 449, connotes a duty to erect. I quite concede that, if there had been a bridge more than 300 feet long in actual existence, and if, after having been declared a county bridge, it had fallen, the word "maintain," as used in the section, would be sufficient to impose on the county a duty to rebuild or to share in the cost of rebuilding according to the order of the County Court Judge. I think it is to such a situation that the words of Patterson, J.A., in *Re Townships of Moulton and Canborough and County of Haldimand*, 12 A.R. 503, at p. 536, apply; and a reference to sec. 535 of the then Municipal Act, which was there under consideration, makes it plain that his exposition of the meaning of "maintain," as used in that section, has no bearing on the interpretation to be placed on it in the circumstances of this case. I am unable to understand the application of the term "maintain" where, at the date of the order, there is no bridge. How can the county corporation be ordered to maintain that which does not exist?

Even if the argument founded on the word "maintain" were much stronger than I find it, the opening words of the section seem to me to overbear the interpretation contended for by the respondents. The basis of the section is "A bridge of a greater length than 300 feet." That is a *sine quâ* non, and without it the rest of the section has no foundation on which to stand.

If my view in this respect is correct, it affords an answer as well to the argument of the respondents that the term "county bridge," as used in the section, refers not to a physical structure but to legal attributes such as "300 feet in length," "maintained by the county," etc. I can only say that on the plain meaning of the words the section does seem to me to predicate an actual

physical structure of a greater length than 300 feet as the basis of everything. And why should it not be so? How can a permanent final judgment *in rem*, such as this is, be founded on the plan of an engineer, not adopted by any municipal authority, and which might be changed to-morrow? The engineer called for the county submits a plan for controlling the waters of the creek so as to prevent erosion, and building the bridge 250 feet long. Suppose the bridge is declared to be a county bridge, and the county determine to adopt the plan advised by their witness, the result would be a bridge which for all time is to be maintained and repaired by the county, the bridge being actually 250 feet long, though according to the statute it is necessarily 300 feet long; which is absurd.

For these reasons, I am of opinion that the appeal must be allowed and the order of the County Court Judge vacated, with the usual result as to costs. *Appeal allowed.*

[Mr. Justice Garrow died while the appeal was standing for judgment.]

MONTREAL TRAMWAYS CO. v. McALLISTER.

Quebec King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. November 6, 1916.

1. CONFLICT OF LAWS (§ I C—71)—SUIT BY FOREIGN GUARDIAN.
A foreign guardian has the capacity to sue here with respect to damages for personal injuries to the ward; the validity of the supplementary appointment here is therefore immaterial.

2. DEPOSITION (§ I—4)—FOREIGN COMMISSION—RETURN.
Depositions under a rogatory commission, on the return of the commissioner, need not be received or homologated by the Court, before they can be read at the trial; under art. 387, C.P., the return is to be sealed, and may be opened and published by an order of the Judge.

3. EVIDENCE (§ III—365)—AS TO RULE—PRODUCTION OF.
An objection to allowing a witness to state the purport of a rule without its being produced, though serious, cannot prevail if not put forward in time.

4. NEGLIGENCE (§ II A—75)—CONTRIBUTORY—APPORTIONMENT OF DAMAGES.
Under Quebec law, an injured person will have his damages reduced if his negligence was contributory only; he can recover nothing if his negligence was the cause of the accident and the defendant's negligence was merely contributory; it is not the law that where there is common fault both parties must bear a share of the damages.

Statement.

APPEAL from the judgment of Panneton, J., Superior Court, which is affirmed.

Jury trial in an action for $15,650 against the appellant for damages suffered by the respondent's minor son who had been struck by one of the appellant's tram-cars running eastward of

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Statement.

St. Catherine street, in Westmount, on May 7, 1913. The appellant has been adjudged to pay to the respondent, as tutor or guardian to his son, the sum of $2,400 out of $6,000 of damages suffered by the minor.

The jurors being asked if the accident was caused by the common negligence of the minor and of the Railway Company, answered:—

Oui, il y a négligence des deux côté du garçon, le char n'était pas sous contrôle: il y a beaucoup de négligence du côté du garçon.

The Superior Court maintained the verdict and gave judgment in favour of the plaintiff for $2,400 with costs.

Perron & Taschereau, for appellant; *Dessaulles, Garneau & Vanier*, for respondent.

Cross, J.

CROSS, J.:—The first ground of appeal is that the respondent is not a competent plaintiff in that, being an alien, his appointment as tutor to Francis McAllister made by the prothonotary at Montreal is void.

As regards that ground, it is to be observed that there is evidence that the respondent was named guardian to Francis McAllister by the Court of the latter's domicile in the State of New York, and the action is taken as well in the capacity of guardian as of tutor.

With us, tutorship is an office conferred by the Court, and the Code, declaring the civil law of the province, indicates the Court of the district wherein the minor has his domicile as being the one which should name the tutor, art. 249, C.C. The case of an alien minor desiring to sue is left unprovided for, so far as the Civil Code is concerned. I take it to be a correct view, under international law, that a guardian named by the Court of a foreign country to a minor in the country of his domicile is to be recognized by our law as having a capacity to sue here for recovery of a claim other than a claim affecting immoveable property: Story, Conflict of Laws, Nos. 495, 496, and 500.

One can readily understand that particular circumstances may make it highly important that an alien minor should be provided with a tutor by the Court having local jurisdiction, and the validity of tutorship so conferred has been recognized, Brooke Bloomfield. Where there is evidence of the existence of a foreign guardianship or tutorship, it would doubtless be appropriate that the appointment made here should take the form of a pro-

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visional or supplementary tutorship. Rousseau & Lainé, Dict. Proc. vo. "Etranger" No. 7.

I am disposed to regard the "acte" of tutorship made at Montreal as being a useful proceeding in the way of supplementing or verifying the executory effect of the letters of guardianship issued in New York State. Such appointments were recognized in the old law. In English-law jurisdictions a guardian was not considered to have any right to exercise authority over the chattels of his ward outside of jurisdiction in which he was appointed, and the practice there is to obtain new local letters of guardianship in the place where the authority is sought to be exercised, Story, No. 504. Our rule is different: Art. 79, C.P. There can be no adverse argument drawn from the fact that the right of foreign executors to sue is specially conferred by the Code (art. 80, C.P.), whilst tutors are not mentioned in the same enactment, because the civil law denied to an alien the right to take by succession in France. On the other hand, the office of a tutor was considered to rest upon the effect of the *statut personnel* and to attach to him wherever he might be.

It is clear that the respondent has a title to sue in right of the minor. That being so, it becomes immaterial whether the acte of tutorship made at Montreal is valid in law or not.

I consider, nevertheless, that it is not void. The first objection, consequently, fails.

Second ground: The appellant complains that matter was read to the jury as evidence which was not properly shown to be evidence. The objection relates to the testimony of the witness Raymond Castle which was taken in British Columbia under rogatory commission addressed to H. G. Lawson.

The objection made to the reading of the deposition at the trial is to the effect that the return of the commissioner had not been received or homologated, and art. 415, C.P., is cited in support of the objection. The article, however, applies to reports of experts, accountants or practitioners, that is to say, of persons who report to the Court conclusions upon investigation made by themselves. Reports by them are to be "received" before being acted upon as evidence in the cause.

Evidence taken under rogatory commission, however, is merely transmitted to the Court. In it it is the witness and not the commissioner who speaks, and, as regards the act of the

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commissioner, the rule is that his return is to be sealed and is not to be opened and published without an order from the Judge. (Art. 387, C.P.)

In point of fact the return was ordered to be opened and published by an order made over three months before the trial.

It is further objected that it is not shewn that the commissioner was sworn. The heading of the deposition, however, contains the recital:—

I, the commissioner acting under the said commission, and also the clerk by me employed in taking, writing down, transcribing and engrossing the said deposition having first duly taken the oaths annexed to the said commission according to the tenor and effect thereof and as thereby directed.

Upon this formal return by the person named commissioner, we consider that the Superior Court was warranted in regarding him as having taken the requisite oath. The second ground is therefore not well taken.

Third ground.

In this state of the evidence, counsel for the appellant take the ground in substance that the Judge led the jury to take too exacting a view of the degree of vigilance to be exercised by the motorman, a view not warranted by law. Individual passages are cited in support of the argument, chiefly, one to the effect following:—

Mais quand on voit un char qui est prêt de s'arrêter, s'il n'était pas arrêté tout-à-fait, s'il était presque arrêté, alors le garde-moteur doit immédiatement aller à une allure telle qu'il puisse arrêter presque immédiatement son char, l'avoir sous contrôle, pour pas qu'il arrive d'accident à quelqu'un qui descendrait de l'autre char. Cela doit être, n'est-ce pas, ce à quoi l'oblige la prudence.

In regard to this it is to be said that, if the jury were warranted in fact in treating the occurrence as a case of two cars meeting so near a stopping place that passengers alighting—or other pedestrians for that matter—might be expected to cross the street coming from behind one car and so crossing the track of the other car, then the Judge might quite rightly say to the jury that the motorman who saw the other car slackening speed should have such control of his car as to be able to stop it almost immediately. Looking at the summing up as a whole, the conclusion is that, on this point, the appellant has not shewn that there was misdirection. It was made clear to the jurors that they could take their own view of the facts. The case of cars meeting one another at ordinary speed at places other than stopping places was dis-

tinguished and it was pointed out by the Judge that the motorman in such a case, having reason to believe that nobody would be trying to cross in front of him, would not need to slacken speed. The jury were asked to consider whether in the circumstances the motorman had slowed down promptly enough or not and they were properly enough invited to consider the distance traversed by the car after the collision before it came to a stop, in its bearing upon the matter of speed.

An objection was raised upon what the learned Judge said about a rule of the company to guide its motormen in their duty when meeting cars. The objection has its serious aspects, but we think that it ought not to prevail, because we do not find that it was put forward after the charge and before verdict. In fact, the mention of the rule was volunteered by the motorman Fontaine in his testimony to the effect that he had slowed down the speed of the car in compliance with this rule. The matter was seized upon in cross-examination where the witness was allowed to state what was the purport of the rule without its being exhibited. The objection then made was as follows:—

> Je m'oppose à cette preuve. Je n'ai aucune objection à ce que l'on parle du règlement, puisque le témoin l'a mentionné dans son témoignage, mais je fais mon objection immédiatement à ce que l'on produise le règlement.

An objection to what the Judge said about the rule cannot, in these circumstances, be grounded upon non-production of the rule. The third ground of appeal is consequently not well founded.

Fourth and fifth grounds: These grounds are, in substance, that the verdict is against the weight of evidence, that there is no evidence upon which the jury could find fault on the part of the appellant, and, that the findings of the jury shew that the judgment should have been for the defendant.

I have already stated what the material findings were. I have also, in treating of the objections to the Judge's summing-up, enumerated the substance of the facts proved and indicated the crux of the controversy which emerged at the trial, and need not repeat what has been said.

Counsel for the appellant takes the ground that this is a clear case of a boy who was injured by running in front of a moving tram-car without looking; that the whole cause, or at least the determining cause, of the injury was his own act; that, even if

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the motorman was negligent in not having his car under greater control, that negligence was not contributory, because the boy's own act made the accident inevitable, and they add that the findings of the jury to the effect that the greater negligence was on the part of the boy and that, that being so, he should recover only $2,400 though the damages amount to $6,000 themselves shew that the claim should have been dismissed.

It is in substance asserted that, where the main fault or the weight of the negligence is upon the part of the plaintiff, the latter is really the cause of his own injury, and a lesser fault on the part of the defendant is not a contributory fault: *Volenti non fit injuria*.

Speaking for myself in regard to this, I would say that, in point of principle, it is unsatisfactory and unconvincing to be told whenever it is shewn that the faults of the injured person and of the defendant have operated in the occurrence of the injury, there is to be a fractional apportionment of the damages such that, in a case like the one before us, the faults being, say, two-thirds on the part of the injured person and one-third on the part of the defendant, the latter must pay one-third of the damages to the former who must himself bear the other two-thirds. Negligence or fault is not in fact apportionable in that way and the parties do not contribute by fractions.

I consider that an injured person whose act can truly be regarded as a cause of a nature to produce the whole damage is not to be allowed to say that somebody else contributed and therefore must pay him part of the damage. I take it to be the law that the injured person will have his damages reduced if his negligence has contributed, but that he can recover nothing if his negligence has caused the damage and the defendant's negligence has merely contributed. It is not the law that where there is common fault, both parties must bear a share of the damages. I consider that if each party sets in operation a cause adequate to produce the damage, and both causes have in fact operated, neither should recover from the other, because each can be said to have willed all the consequences.

It will be realized that it is consistent with this view that, on the one hand, where the injured person has merely contributed, he is not on that account deprived of all recourse against the other

party in fault, and it is possible, on the other hand, that the defendant may have been guilty of negligence connected with the damage and yet the injured person can recover nothing because his own negligence, being in itself an adequate cause for all of the damage, he cannot prove that the defendant's negligence did him any harm. How can he prove in such a case that the defendant's negligence caused him any damage when his own negligence has provided a sufficient cause for all the damage?

The possible cases are stated in a passage of Beaudry-Lacantinerie et Barde, Obligations, No. 2881, as follows:—

La victime d'un délit ou d'un quasi-délit peut avoir contribué par sa faute à occasionner le dommage. Cette circonstance autorise le juge à modérer la condamnation, mais, d'après les arrêts les plus récents, elle ne lui permet pas d'affranchir le défendeur de toute responsabilité.

En sens inverse, quand la partie lésée a contribué à produire le dommage, la réparation de celui-ci ne saurait être mise entièrement à la charge du défendeur.

Il est évident que celui auquel on réclame une indemnité ne peut encourir aucune condamnation, s'il prouve que le dommage a été exclusivement causé par la faute du demandeur.

Avons-nous besoin d'ajouter que si la personne qui a subi un préjudice par le fait d'autrui a commis antérieurement une négligence en l'absence de laquelle ce fait n'aurait pas été accompli, elle n'a droit à aucune réparation?

The difficulty which would confront a plaintiff in the last alternative here indicated would be one of fact or of proof. If the injured person has himself set in operation a cause adequate to produce all the damage he cannot prove—in the generality of cases—that the defendant's fault has caused him any injury, and his action should be dismissed.

Now, how is the case before us affected by application of these principles?

For the appellant, it is said, in substance, that, inasmuch as the car from which the boys debarked ran somewhere between 35 and 50 feet, after the other car had come opposite to it, before it came to a stand-still, the motorman of the eastbound car cannot be blamed for not having stopped or even slackened speed since he was clearly well eastward of the stopping place and had reached a point where no car was expected to stop. Consequently, it is concluded, the determining cause of all the damage was the act of the boy; that the motorman had no duty to apply his brake or reverse the power, and even if he was imprudent, his imprudence was not contributory, because the mishap had become inevitable.

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One can see at once that the strength of this argument depends upon its having been proved that the cars met at a point well to the east of the stopping place. But we have seen that upon that very point there is contradiction and disagreement and that even in the testimony of the appellant's servants there was something to lend plausibility to the versions of the respondent's witnesses.

The jury, in such circumstances, could adopt either view. Having found that the motorman did not have his car sufficiently under control, they would appear to have taken the view that the westbound car had come so near the crossing that passengers who had hurriedly alighted from it—or other pedestrians for that matter—might happen to cross from behind it and so come upon the track of the eastbound car.

If it was the view of the jury that that was the way the accident happened, there was clear ground to treat it as a case of contributing faults, fault on the part of McAllister in having ventured upon the track without having looked and listened, and fault on the part of the motorman in not having control of his car sufficient to stop it before it would strike the pedestrian. It might indeed be taken as a typical case of contributing faults; for the defendant cannot say that McAllister's fault was a sufficient cause of the whole damage seeing that the motorman by stopping the car quickly enough would have avoided the damage. Moreover, in so far as McAllister was simply using the street, he was exercising a right.

The appellant therefore fails to shew that the verdict is one which a jury could not reasonably find. Neither can it be said that, upon the findings as they are, the judgment pronounced is unsupported. Upon the whole, the appeal fails.

I have set out in some detail the reasons which have brought me to this conclusion, and might part with the case without further remark, but the issues presented by this action and others of a similar kind make it appropriate to give brief expression to one or two further considerations.

One cannot but be impressed with the conviction that conditions of present day city street traffic are quite unduly adding to the perils of the pedestrian. Formerly he had not much to fear but butchers' carts and run-away horses. Now he must

look out for tram-cars and for silently running motor-vehicles which may come from various directions. Because the great majority of pedestrians, for the sake of bodily safety, run for shelter like hunted animals when they hear the car-gong or motor-horn, people are in danger of coming to think that such vehicles have some sort of right of way over foot-passengers. That delusion may perhaps be strengthened if it be found that traffic regulating police confine their attention to vehicles, as if pedestrians deserved no consideration.

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It should be made clear that such an idea will find no acceptance in a law Court, that the King's highways are for the use of all his subjects and all peaceful wayfarers, and that if there is to be regulation at crossings and busy places, it should be in the way of giving the greatest protection to those who need it most.

The present appeal, however, fails for the reasons set out in the principal part of these observations. *Appeal dismissed.*

REX v. BERRY.

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Alberta Supreme Court, Simmons, J. December 22, 1916.

GAMING (§ I—6)—AUTOMATIC VENDING MACHINE — TRADE CHECKS AS PREMIUMS WITH PURCHASES.

The maintenance of an automatic vending machine so contrived as to issue in irregular and varying quantities at intervals of its operation certain tokens called "trade-checks" which could be re-played into the machine with the chance of gaining more trade-checks will make the person in charge of the premises criminally responsible for permitting the place to be used as a common gaming house (Cr. Code secs. 228 and 228A) if such trade-checks have a value by reason of their being exchangeable for good sand the occupant of the premises permits two persons to repeatedly operate the machine by way of gaming and knowing that they have arranged that the trade-checks received by both in return for the coins each of them has deposited shall go to the one receiving the larger number of trade-checks.

[*R.* v. *Stubbs* (No. 2) 24 Can. Cr. Cas. 303, 25 D.L.R. 424, 9 A.L.R. 26, distinguished; *R.* v. *O'Meara*, 25 Can. Cr. Cas. 16, 25 D.L.R. 503, 34 O.L.R. 467 and *R.* v. *Smith*, 26 Can. Cr. Cas. 398, 30 D.L.R. 587, referred to; see also *R.* v. *Bernier*, 33 D.L.R. 640, and Annotation to same.]

CASE stated by a magistrate on questions of law. Statement.

H. Lunney, for the Crown; *J. J. Macdonald*, for accused.

SIMMONS, J.:—This is a case stated by W. S. Davidson, Esq., Police Magistrate of the City of Calgary, pursuant to sec. 761 of the Criminal Code. The defendant was convicted before the Police Magistrate, for unlawfully keeping and maintaining a Simmons, J.

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disorderly house to wit: a common gaming house, by keeping and maintaining for gain certain premises situate and being —— Avenue West, Calgary, to which persons did then and there resort for the purpose of playing with a certain gambling device, to wit: a slot machine, contrary to sec. 228 of the Criminal Code.

The grounds on which the judgment of the Police Magistrate are questioned are as follows:—

(1) That the judgment was contrary to law.

(2) That having found as a matter of fact, that the machine in question although "somewhat different in construction from the machine in question in *Rex* v. *Stubbs*" (No. 2) 24 Can. Cr. Cas. 303, 25 D.L.R. 424 . . . the principle involved in its operation is practically the same; that is to say, when the machine is in proper working order the operator can ascertain, before playing, before depositing his coin or check, what he will receive, the magistrate should have applied the principle of law as laid down by the Honourable the Judges of the Appellate Division of the Supreme Court of Alberta in the case of *Rex* v. *Stubbs*, namely:—

"(*a*) That an automatic gaming machine which informs the operator before playing his money into the machine, what the result of his operation will be, is not a gambling machine."

"(*b*) Each operation of such machine is in itself a game, and the fact that an inducement is held out that in a future game the operator may receive something more than an adequate return for his money, does not introduce the element of chance."

(3) That the magistrate erred in holding that, although the decision of the Appellate Division of the Supreme Court of Alberta in the case of *Rex* v. *Stubbs*, a machine similar to this one, is not a gambling device *per se*, nevertheless the machine in question was used for gambling purposes.

(4) That the magistrate has no jurisdiction to try the said charge.

The Police Magistrate has found that the machine in question is somewhat different in construction from the machine under consideration in *Rex* v. *Stubbs* (No. 2), 24 Can. Cr. Cas. 303, 25 D.L.R. 424, 9 A.L.R. 26, 8 W.W.R. 902, but the principle involved in its operation is practically the same, that is to say,

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when the machine is in working order the operator can ascertain before playing what he will receive—before depositing his coin or check.

The same question has been under consideration by the Appellate Court of Ontario in *Rex* v. *O'Meara*, 25 Can. Cr. Cas. 16, 25 D.L.R. 503, 34 O.L.R. 467, and by the Appellate Court of British Columbia in *Rex* v. *Smith*, 26 Can. Cr. Cas. 398, 30 D.L.R. 587, 11 W.W.R. 554, and the Court of Appeal in Ontario unanimously, and the Court of Appeal in British Columbia on a division of the Court, came to an opposite conclusion from that of the Appellate Court of Alberta in *Rex* v. *Stubbs*.

If the facts in the present case are the same I would defer to the opinion of the Appellate Court of Alberta in *Rex* v. *Stubbs*. In the above named cases the operation of a machine by a single operator was under consideration; but in *Rex* v. *Berry* this is not the case.

Two witnesses, Irving and Kinsey, were operating the machine under an arrangement that the one receiving the largest number of trade-checks from the machine during the course of the play should receive all the trade-checks won by both of them. It is quite clear that such an arrangement involved the operation of the machine more than once and it would be idle to suggest that the machine gave any information as to who should be the winner at the end of the play. On this ground I think the present case is readily distinguishable from *Rex* v. *Stubbs*, and for this reason I think the conviction should be affirmed.

I wish to add however that I think the machine in question seems to be identical in its general operation with the one under consideration in *Rex* v. *Stubbs*, yet I am not able to conclude that this machine fulfilled the conditions which are attributed to the machine under consideration in *Rex* v. *Stubbs*.

In the latter case Mr. Justice Scott observes: "these machines plainly inform the persons operating them, before depositing their nickels or trade-checks, what the result of the operation will be, that is whether they will receive a package of chewing gum alone or in addition thereto a certain number of trade-checks, that information being given by a notice appearing on the face of the machine."

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Mr. Justice Scott in delivering the judgment of the Court of Appeal, apparently overlooked the fact that the machine does not inform the operator that he will get a different result from depositing a nickel in the slot intended for it and on the other hand depositing a trade-check in the slot intended for it. In the former case the operator will receive gum and the number of trade-checks, if any indicated by the machine. In the latter case the player will receive trade-checks only. There is nothing on the machine to inform the operator of the fact that playing trade-checks may result in the winning of a number of trade-checks, while paying a nickel may win trade-checks and gum. That information will apparently be obtained through operating the machine or might be supplied by some one on the premises explaining to the operator this fact. To my mind that is a very different thing from the conclusion that the machine itself plainly informs the person proposing to operate it that such a difference in the result obtains.

Conviction affirmed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. March 30, 1917.

HIGHWAYS (§ IV A—120)—DEFECTIVE BRIDGE—REFUSAL TO REPAIR—NECESSITY OF TRAVELLING BY DIFFERENT ROUTE—LIABILITY OF MUNICIPALITY.

Loss sustained by the owner of a traction engine through travelling by another route, rather than cross a bridge not considered strong enough to carry his engine, and which the township has refused to strengthen, are not "damages" by "default" of the defendant township within the Municipal Act, R.S.O. 1914, ch. 192, sec. 460, and otherwise the damages were too remote.

Statement.

APPEAL by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff for the recovery of $75 and costs, in an action for damages for injury to the plaintiff's business by the neglect of the defendants to repair a bridge over the Humber river, thus preventing the plaintiff from taking his traction-engine and threshing-machine across it.

W. Proudfoot, K.C., for appellants.

G. S. Hodgson, for plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—Although the duty, in respect of a breach of which this action was brought, has been imposed upon municipalities, by statute, ever since the year 1850; and although there have been, since then, actions innumerable for damages for injuries sustained through a breach of that duty; this is the first attempt, of which I am aware, to impose upon them a liability for breach of such duty in a case such as this: a case which, if the judgment in appeal be upheld, will establish a distinct, and great, enlargement of that which has hitherto been deemed, generally, to be the limit of such liability; and will open a wide door for greater highway litigation.

The duty thus imposed upon municipalities is the ancient one of keeping highways in repair, a duty which, in England, commonly fell upon the inhabitants of the parishes, but sometimes upon individuals in connection with their tenure of the land through which the highway ran, or for other special reasons. But, in addition to that duty, our statute also imposed a liability to which, for various reasons, the inhabitants of parishes were not subject, a liability for all damages sustained by any person by reason of a breach of such duty.

The innumerable actions to which I have referred were all actions for damages for injuries to person or property in a highway

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accident caused by neglect of the duty to keep the highway in repair. Such an action has always been held to lie against such a municipality under such highway legislation.

Two attempts, other than this, are all that I am aware of, which have been made to carry the liability further than that.

The first was made in *Hislop's* case—*Hislop* v. *Township of McGillivray* (1887-90), 12 O.R. 749, 15 A.R. 687, 17 S.C.R. 479—in which the action was based upon a total neglect of the municipality to repair an original allowance for road in front of the plaintiff's land, a neglect which left him without any means of access except to an impassable allowance for road. His contention was: that, as by statute the allowance for road was a highway, and as legislation had put upon the municipality the duty to repair all highways, the municipality were bound to keep in repair that highway; and that, as they had not done so, and as he had sustained very special injury in being cut off from all access to any actual highway, he had a right of action. And he endeavoured to strengthen his position by pointing to the fact that he had purchased his land from the Province as land dependent on the allowance for road for a means of access to it, just as all wild lands purchased by settlers were upon the allowances for road upon which they were situated; and contended that the Legislature of the Province must have intended that all such ways should be kept in repair by the municipalities: that the Province could not have meant to take the double benefit of the price of the land and a new settler and leave him without a passable way in and out of his land unless a municipality, in its discretion, opened his allowance for road.

This case was carried through all the higher Courts of the Province, and through the Supreme Court of the Dominion, but the plaintiff failed everywhere except with the special jury, who had a view of the place, and the Judge at the trial: and eventually it was said, by one of the Judges, that the main grounds upon which the action was brought and fought throughout, and which I have just mentioned, were suggested but hardly argued, and indeed could not well be contended for: Gwynne: J., in 17 S.C.R. at p. 493. The judgment appears to have been given more than six months after the argument.

The effect of *Hislop's* case is: that a land-owner and occupier

has no right of action against a municipality for not repairing an unopened original allowance for road, no matter how much he may suffer specially and directly by reason of the want of such repair.

One of the learned Judges who expressed an opinion in that case said that the action was entirely novel and a mere experiment: Osler, J.A., in 15 A.R. at p. 694; but he had never seen, much less lived upon, Hislop's farm.

Another of such Judges said this, which is very pertinent to this case: "The duty to repair, where it exists, and where it is only the general duty created by sec. 531" (of the Municipal Act of 1883), "can only be enforced by indictment:" Patterson, J.A., in 15 A.R. at p. 692.

Cummings's case—*Cummings* v. *Town of Dundas* (1907), 13 O.L.R. 384—is the next of those to which I have referred. The action in that case was begun 16 years after *Hislop's* case had been finally decided. At the trial it was dismissed, but, upon an appeal to a Divisional Court of the then High Court, composed of three Judges, the judgment at the trial was reversed, and the plaintiff was awarded damages for the special suffering he was put to because of nonrepair by the municipality, who were the defendants in that action. The report of the case does not shew how the damages awarded—$25—were made up, but they were spoken of as "special damage sustained by him as owner of the property in question." A mandamus to repair was refused, it being said (p. 395) that "if he suffers only as one of the general public, then he has his remedy by indictment." But damages had been awarded him for "special damage." It was, however, added (p. 395) that a mandatory order requiring the performance of a specific duty is inapplicable in the case of a general duty to repair.

The question whether the highway in question in that action had been destroyed so as to be unrepairable, or not, was the question mainly dealt with; and so little was said, upon the question involved in this case, that it cannot afford assistance in determining this case here.

But it was followed, five years after, by a similar case which came to and was finally decided in this Court: *Strang's* case—*Strang* v. *Tp. of Arran*, 28 O.L.R. 106, 12 D.L.R. 41; and so it is a

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case binding upon us in so far as it decided any question of law necessary for the consideration of the rights of the parties involved in it; but not binding upon us in respect of any question of fact dealt with in it.

In that case several plaintiffs were awarded damages because "access" to their properties was cut off by the destruction of a bridge which the municipality refused to rebuild; one of the plaintiffs being awarded $5 as nominal damages, though he had "shewn no special damage."

It is difficult for me to understand how access, in its legal sense, in relation to land adjoining a highway, can be said to be cut off by the destruction of a bridge some distance from the land. But in that case the damages were awarded for cutting off access to land, and for that only.

Nor can I understand how a failure to repair could give any right of action in respect of land, or the ownership of land; "all damages sustained by any person by reason of such default," are limited to default in respect of the duty to repair; and the first question is: to whom is that duty owed? for they only can have any right of action; and the duty is manifestly owed to the travelling public and to no one else. Certainly not to the land-owner; he is in truth the person who owes the duty, whether he owes it *ex relatione tenuræ*, or *ex relatione clausuræ*, as an inhabitant of a parish, or as a ratepayer of a municipality: so that to give a right of action to the land-owner would be giving, or very like giving, an action to a person against himself. The duty is owed to all alike, whether resident within, or without, the municipality; all who are making any lawful use of the highway: and so the damages must be such as are sustained whilst so using it: and that cannot be except when upon the highway.

The case of *Hubert—Hubert* v. *Township of Yarmouth* (1889), 18 O.R. 458—was another case of the same character as these last two; and the ruling was the opposite of that which prevailed in them; and so it must be taken to be overruled by *Strang's* case, in so far as it dealt with the questions involved in that case.

The result of *Strang's* case, upon that question, is: that where access to land is "cut off" by default in the performance, by a municipality, of its statute-imposed duty to repair highways in fact as well as in law, an action by the owner of the land

lies against the municipality for all damages so sustained by him within three months of the commencement of the action.

But in this case no claim is really made in respect of access to land; it could not be reasonably made.

The right of access from land to and from a highway is one of immediate access: the right of an owner or occupier to step off the land into the way and from the way into the land. Obstruction of the way, no matter how hampering it may be, provided it does not affect immediate access, gives no right of action in respect of land; once on the way unobstructed the land-owner or occupier becomes merely one of the public, with just the same right as, and no more than, any other one of the public has, even though the other's land might be a thousand miles away or even though he never owned or occupied any land. The cases of *Beckett* v. *Midland R.W. Co.* (1867), L.R. 3 C.P. 82, 93, and *Metropolitan Board of Works* v. *McCarthy* (1874), L.R. 7 H.L. 243, afford instances of land "injuriously affected" by interference with access to and from a highway so as to entitle the land-owner or occupier to compensation in expropriation cases. The cases of *Caledonian R.W. Co.* v. *Ogilvy* (1856), 2 Macq. Sc. App. 229, and *Ricket* v. *Metropolitan R.W. Co.* (1867), L.R. 2 H.L. 175, afford instances of such claims rejected. In the last-named case, Lord Cranworth dealt with this subject in these words (p. 198): "The injury must be actual injury to the land itself, as by loosening the foundation of buildings on it, obstructing its light, or its drains, *making it inaccessible by lowering or raising the ground immediately in front of it*, or by some such physical deterioration."

In a case in which it was said to have been the duty of the defendants, a Local Board of Health, to "provide drainage for every house in the district;" it was held that, though, if it were a case of misfeasance, they would have been liable in damages and to be restrained by injunction, yet, as it was a case of non-feasance only, a neglect to perform the statute-imposed duty to provide a satisfactory and healthy system of drainage, no action would lie by an individual house-owner and occupier in the district for damages or an injunction, although sewage was allowed to fall into a stream near his residence and so as to create a nuisance. And Lord Justice James, the presiding Judge, in discussing this question, said: "It is quite manifest,

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from the form of the claim and the evidence, that the action was not based upon any act whatever done by the defendants. It is based entirely upon their alleged neglect to perform the parliamentary duty cast upon them as the sanitary authority of a particular district. It is said that this is a very serious matter to the plaintiff and to the public generally. It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon which duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not in a similar manner be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would be very much improved. I do not see why, if that be so, every owner of property in London which has not received the benefits it ought to have received from a complete system of sewage carried out by the Metropolitan Board of Works might not say, 'My court or alley is not properly cared for,' and who might not bring an action against the Metropolitan Board of Works or any local board having duties in the district, and why he would not be entitled to bring it on the very day the board was constituted and the duties cast upon it:" *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch.D. 102.

Such words as these apply to this case, notwithstanding that here some right of action is given. The question: what is the nature and extent of that action? is quite as much affected by such considerations. If ownership or occupancy of lands, or the character of the user or enjoyment of them, gave the right of action, where could the line be drawn? Why not damages to the person who lived a thousand miles away, and who in his business sustained a loss of one dollar by once turning back at the bridge because of fear of going over it, as much, in principle, as the owner of land quite close to the bridge who lost $10 a day in the same way?

But the plaintiff's claim is not made as were the plaintiffs' claims in *Strang's* and *Cummings's* cases: this is in truth an attempt to carry a municipality's liability still a step further.

The plaintiff, like many another farmer, owns a threshing-machine, operated by a small steam-engine on wheels, commonly called, and so named in some of the provincial statutes, a "traction-

engine;" and takes them after harvest to such of his neighbours, over a more or less extended district, as employ him to do their threshing.

He lives upon the highway of which the bridge in question forms part; and has occasion to take his engine and threshing-machine over the bridge once in a while.

Thinking that the bridge was not strong enough to carry the weight of the engine, he asked the defendants to strengthen it. On the advice of their engineer, they declined to do more than was done by them; contending that it was strong enough; and assuming any risk in the plaintiff's crossing.

The plaintiff refused to take any risk, and went by a longer way rather than cross the bridge.

The trial Judge has found that the bridge was not strong enough, or rather that, by reason of its limited carrying power, the plaintiff was justified in refusing to cross; and that the plaintiff has sustained loss by reason of going upon his threshing business by some other way.

The finding is, that the defendants failed to perform their duty to keep the highway in repair: and that the plaintiff sustained some loss by reason thereof, in the way I have mentioned.

Has the plaintiff a right of action?

As I have said, although the duty to keep the highways in repair, and the liability "in case of default," upon which this action is based, were imposed upon municipalities 67 years ago, this is the first attempt, of which I am aware, in which it has been sought to bring such a case as this within such liability.

When that obligation and that liability were so first imposed, there was, generally speaking, no liability to individuals for neglect of the duty to repair highways. Accidents happened before that just as now; but the sufferers had to put up with that state of affairs and bear the consequences. But, for misfeasance, a wrongdoer was always liable to those so injured. When the duty to repair was put upon an incorporated body, having power, within certain limits, to raise money for its needs by direct taxation, it was thought proper to remedy that which was generally considered an injustice to the traveller upon a highway and to give him reasonable rights to compensation for injuries sustained through neglect to repair the highways. And,

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ever since that, as I have said, actions for compensation, in the way of damages, for injuries arising out of highway accidents, attributed to want of repair, have been among the most common and frequent of all those with which the Courts of this Province have had to deal: but I am unaware of any attempt to extend the liability beyond cases of that character until *Hislop's* case was brought, about 35 years afterwards: nor am I aware of any extension of the kind of case, in those 67 years, except that covered by the cases of *Cummings* and *Strang*.

In such cases plaintiffs are forced to rely altogether upon cases such as *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486, a case of misfeasance, and of a wrong done by a mere wrongdoer, a stranger, against the rights of those charged with the repair of the road, as well as against the rights of those lawfully using the way, and in some cases against the rights of individuals apart from their common right to use the public way. Manifestly such cases are different from this case, which is entirely one of non-feasance in good faith, upon the advice of a competent engineer, and after an exercise of the best judgment of the council of the municipality.

But, assuming such cases to be applicable, how does the plaintiff bring himself within them?

In *Iveson's* case, Mr. Justice Gould, who was one of the two Judges who held that the plaintiff could recover, spoke thus of such a case as we have now to deal with (p. 489): that, though he agreed that an action would not lie for a public nuisance, without special damage, for avoiding multiplication of suits, and therefore in this case if the plaintiff had concluded only *per quod* his carts or carriages could not pass, it would not have lain nor have been maintainable, yet he was of opinion, etc.

Mr. Justice Rokeby, who agreed with the Lord Chief Justice that in that case the plaintiff could not recover, put it (p. 492) on the ground that, if he could, upon his pleadings as they were, a hundred thousand more might.

All of these cases have been subjected to criticism, and seemed to be overruled in *Ricket's* case: but have been approvingly discussed by some Judges since: see *McCarthy* v. *Metropolitan Board of Works* (1872), L.R. 7 C.P. 508, L.R. 8 C.P. 191; as well as in the House of Lords.

But really are they as helpful as they are likely to be misleading in a case such as this?

It is obvious that the only duty the defendants owed to the plaintiff was precisely the same as they owed to every one making a lawful use of the highway, a duty to keep it in repair; a duty owed as much to the beggar on foot, or the driver of a coach and four, as to the plaintiff: and a duty which any one of them equally might have enforced by laying an information against the municipality. The size or weight of the plaintiff's waggons gave him no special right to enforce the duty. If the repair of the road ought to be sufficient to carry them safely, and if it was not, the man on foot might suffer even more than the owner of the traction-engine; they might both go through the bridge at the same time, and the life of the man was more important than that of the machine; and the man with the coach and four might go down because of the weakening of the bridge by the heavier traffic over it, even days before.

The duty was to all alike; and the right to go some other way was the same.

The case is really not different from that which it would have been if the bridge were down, and the defendants had refused or neglected to rebuild it.

No one of the public could rebuild it; nor could the plaintiff, or any other one of the public, repair or strengthen it as it stood: see *Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518. The right is the general one, and the work cannot be taken in hand by any one to fashion it according to his own notions, under colour of abating a nuisance. So it seems to me that there is no means by which the plaintiff can acquire a separate right of action.

In truth what is desired is not damages, but is compulsion, in some form, upon the municipality: something that will compel them to perform the general duty to keep in repair this part of this highway. And there is and always has been an efficient means of effecting that purpose—indictment; a means which affords to all relief without favouring any one. If the plaintiff have a right of action for damages from day to day, or autumn to autumn, he should have, too, the right to an injunction to prevent multiplicity of actions and to give him that which he is really seeking—repair of the highway: but no one suggests that he can have such relief.

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So, too, if he have such an action as this, why has not any one and every one an action for want of repair; the man that wears shoes, because if he go out into the founderous way they may be ruined, and he is not obliged to go barefoot: or the man with high-spirited horses and highly polished carriages, which would be, or might be, injured, whilst the farm cart and horse might get along well enough? The case of *Harris* v. *Mobbs* (1878), 3 Ex. D. 268, is an instance of the disposition of a horse being a cause of a highway accident arising out of an obstruction to the full use of the highway: and *Ogilvy's* case—*Caledonian R.W. Co.* v. *Ogilvy*, 2 Macq. Sc. App. 229—is one in which, by reason of the land-owner's station in life and the proximity of his place of residence, he must have suffered much more than his neighbours, or indeed any one else, by reason of the railway, yet it was held that they were all within the common rights of the public upon a highway.

There must be great difficulty in endeavouring to reconcile all the decisions, upon this subject, in misfeasance cases, in any quite logical manner; as well as in logically proving that: if injury from a highway accident caused by want of repair give a right of action for special damages, losses occasioned in avoiding such accidents are not also special damages. But the law does not require all its rulings to be carried to all their logical results: in the interests of justice and common sense, it has even the privilege of being more or less illogical.

Such cases as this are not, in my opinion, to be determined upon the question whether the plaintiff has alleged and proved what is known technically as special damage: but this case is to be determined against the plaintiff on the grounds: (1) that the loss he complains of is not "damages" sustained by him by reason of the "default" of the defendants, within the meaning of the enactment in question: and (2), if it were, the damages would be too remote.

Some reasons I have given for thinking that the enactment (sec. 460 of the Municipal Act) really covers only what may be in a general way described as accident cases: and the provisions of the enactment itself add a good deal to those reasons.

In the first place, the municipality's liability is confined (subsec. (1)) to *damages sustained*, not "and losses occasioned,"

whilst here the plaintiff's true remedy is mandamus or injunction, to save him from sustaining such damages, of which he is in fear. Damages sustained by accident without remedy was certainly the mischief that caused the Legislature to apply the remedy which the Act affords, an action for damages sustained by reason of the disrepair of the road. And I have already referred to the evident long-continued impression that that was the scope of the relief afforded.

In the next place, there is no right to recover if the action is brought after three months from the time when the damages were sustained (sub-sec. (2)); a provision not especially applicable to a case such as, for instance, *Strang's*, in which it was said that the injury was a continuing one.

And, in the next place, there is the provision (sub-sec. (4)) that no action shall be brought for any of such damages unless notice of the claim and of the injury complained of are given within the time and in the manner provided for in the enactment. And, as the words are, "no action shall be brought for the recovery of the damages mentioned in sub-section 1," how can any action under that sub-section be excluded?

The provision (sub-sec. (8)) that the municipality shall not be liable to a person claiming damages unless he has sustained particular loss or damage "beyond what is suffered by him in common with all other persons affected by the want of repair," is a somewhat recent addition to the enactment, and was certainly not intended to extend the liability of the municipalities and cannot inferentially do so. It may, however, be observed that the draftsman seems to have observed that the words "liability for damages" might have a restricted meaning, and so added the word "loss," which nowhere else is used in this enactment.

So, too, the Legislature, instead of shewing any disposition to widen the liability created in 1850, has, from time to time, shewn the contrary disposition in limiting in several ways the actions for injuries such as I have said have commonly been brought.

I cannot think that this legislation was ever intended to cover such a case as this.

And that the damages are too remote, I also have no doubt. Is a jury, at the instance of any one who has sustained no direct injury by reason of the condition of the way, to be at liberty to

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measure the extent of the repair that it may deem should have been done, and then find that, because the way was not so repaired, the plaintiff would have sustained injury if he had gone over: and to award to him, as damages, such loss as he may have sustained by not having had the use of it so repaired? Each jury in each case putting such different measure of repair as it sees fit, as that which ought to have been done.

If this action be maintainable, then, to use the words of Mr. Justice Rokeby, a hundred thousand others of the same character may be, though no one seems, until the present day, to have discovered this mine of additional litigation.

The plaintiff is not the only owner of a traction-engine, or other equally heavy vehicle: and any one who pleases may own and use one. Nor are actions such as this confined to traction-engine, or other heavy vehicle, owners; special loss may happen to the four-in-hand, the pair, the single, or the pony, owner, or to the person on foot; and whether it happens in regard to a bridge or to any other part of the highway can make no difference.

The loss, or damages, are quite too uncertain and remote to support a judgment against a municipality under the enactment in question.

Though cases decided in the Courts of the United States of America are not binding here, they are always helpful in leading to a right conclusion in such a case as this: and so I am glad to find that the views I have expressed are in accord with the law there, as stated in such a careful and comprehensive legal publication as the American and English Encyclopædia of Law, 2nd ed., vol. 15, p. 463, in these words: "There is no right of action for injury from defects in a highway, in persons who have not suffered from the defects in a manner different from other persons in the community, and hence one cannot recover damages because deprived by the defects of the use of the highway. The benefit of the statutes giving a right of action for injuries caused by defects in the highway is generally, either expressly or by implication, limited to those who were using the highway for the purpose of travel thereon when injured. It follows that the statute gives no right of recovery for the loss of use of the highway through defects therein. Nor does it authorise a recovery for injuries caused directly to the abutting land by the defective condition of the highway."

In the recent case of *Nash* v. *Rochford Rural District Council*, [1917] 1 K.B. 384, a Court of Appeal in England held that a nuisance created in a highway by highway authorities did not create any "liability to any proceeding for enforcing any duty or for preventing the breach of any duty" until an accident happened.

And in the case of *Winterbottom* v. *Lord Derby*, L.R. 2 Ex. 316, the full Court of Exchequer of England, in the year 1867, held that delay, whether caused by being obliged to go by another way or in removing an obstruction on a highway, even though caused by misfeasance, gave no cause of action.

We are not precluded by *Strang's* case from giving effect to the opinion that the plaintiff has not shewn any good cause of action: and, as I have no doubt that he has not done so, I am in favour of allowing the appeal and dismissing the action.

RIDDELL, LENNOX, and ROSE, JJ., agreed in the result.

Riddell, J.
Lennox, J.
Rose, J.

Appeal allowed.

ANNOTATION—Liability of municipal corporations for non-repair of highways and bridges. **Annotation.**

Sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192—

(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default.

LAWS OF OTHER PROVINCES.

In the Provinces of British Columbia, New Brunswick and Nova Scotia the Municipal Acts contain no such provision as this, but in some special cases the duty of keeping the highways and bridges in repair is imposed upon municipal corporations, and, except in those cases, municipal corporations are not liable for non-feasance, but only for misfeasance.

In Prince Edward Island the roads are kept in repair by the Provincial Government, except in the case of some towns incorporated by special Acts.

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The duty of village corporations is prescribed by s. 73, Stats. 1913, 1st session, c. 5 (R.S. 1915, p. 1283), which enacts that:—

"Every council shall keep in repair all bridges, roads, culverts and ferries and the approaches thereto which have been constructed or provided by the village, or by any person with the permission of a council, or which, if constructed or provided by the province, have been transferred to the control of the council by written notice to that effect, and, in default of the council to keep the same in repair, the village shall be liable for all damages sustained by any person by reason thereof."

The duty of town corporations is prescribed by s. 350 (1) of the Stats. 1911-12, c. 2 (R.S. 1915, p. 999), which enacts that:—

"Every public road, street, bridge, highway, square, alley or other

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public place subject to the direction, management and control of the council, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the town or by any person with the permission of the council, shall be kept in repair by the town, and, on default of the town so to keep the same in repair, the town, besides being subject to any penalty provided by law, shall be liable for all damage sustained by any person by reason of such default."

The duty of rural corporations is prescribed by s. 219, as enacted by s. 14, c. 21, of the Stats. 1913, 2nd session (R.S. 1915, p. 1058), which enacts that:—

"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."

MANITOBA.

The duty of municipal corporations is prescribed by s. 624 of R.S. 1913, c. 133, which enacts that:—

"Every public road, street, bridge and highway, and every portion thereof, shall be kept in repair by the municipality within which it lies."

And s. 625, which enacts that:—

"Subject to the provisions of the next succeeding section, if a municipality makes default in keeping in repair that portion of a public road, street, bridge or highway on which work has been performed or public improvements made by the municipality, it shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default."

QUEBEC.

The obligation to repair municipal roads is imposed by arts. 453 (formerly art. 793) and 478 (formerly art. 788). Art. 453 provides that "every corporation is bound to have the roads, bridges, watercourses and sidewalks under its control maintained in the condition required by law, by the *procès-verbaux* and by the by-laws which govern them, under penalty of a fine of not more than twenty dollars for each infraction thereof.

"It is further responsible for all damages resulting from the non-execution of such *procès-verbaux*, by-laws or provisions of law saving its recourse against the ratepayers or officers in default as the case may be."

This article further provides that "no action for damages nor penal action may be taken against any such corporation without 15 days' written notice of such action being given to the secretary-treasurer of the corporation," and that the notice may be given by registered letter.

It also provides that if the corporation makes the repairs within the 15 days it cannot be prosecuted for the penalty, but is responsible for the costs of the notice.

Provision is also made that, where the road, bridge or watercourse is under the control of several county corporations, they are to be bound jointly and severally.

Art. 478 provides that "every municipal road must at all times be kept in good order, free from all holes, cavities, ruts, slopes, stones, encum-

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brances or impediments whatsoever, with hand rails at dangerous places in such manner as to permit of the free passage of vehicles of every description, both by day and night, except in the case mentioned in art. 553" (formerly art. 389).

"The sidewalks must also be kept in good repair, free from all holes, obstacles and impediments whatsoever, with hand rails at dangerous places."

Art. 553 authorizes the municipal inspector to permit upon "any road, ford, ferry, sidewalk, bridge or watercourse which is under the control of the corporation the performance of any work which may have the effect of obstructing, impeding or rendering inconvenient the passing over such road, ford, ferry, sidewalk, bridge, or watercourse."

In the course of performance of any such work "excavations and other dangerous places must be indicated, both by day and night, in such a manner as to prevent accident": art. 554 (formerly art. 390).

SASKATCHEWAN.

(1) The duty of city corporations is prescribed by s. 510 (1) of the Cit Act, Stats. 1915, c. 16, as amended by Stat. 1916, c. 18, s. 28, which enacts that:—

"Every public road, street, bridge, highway, square, alley or other public place subject to the direction, management and control of the council, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the council, shall be kept in repair by the city, and, on default of the city so to keep the same in repair, the city, besides being subject to any punishment provided by law, shall be civilly responsible for all damage sustained by any person by reason of such default."

(2) The duty of town corporations is the same as that prescribed in the case of cities: Stats. 1916, c. 19, s. 493.

(3) The duty of village corporations is prescribed by s. 167, Stats. 1916, c. 20, which enacts that:—

"Every council shall keep in repair all sidewalks, bridges, culverts and ferries and the approaches thereto which have been constructed or provided by the village, or which, if constructed and provided by the province, have been transferred to the control of the council, and, in default of the council so to keep the same in repair, the village shall be civilly liable for all damage sustained by any person by reason of such default."

(4) The duty of rural corporations is prescribed by s. 220 of R.S. 1909, c. 87, which enacts that:—

"Every council shall keep in repair all bridges, 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; and, in default of the council so to keep the same in repair, the municipality shall be civilly liable for all damage sustained by any person by reason of such default."

CASES. ALBERTA.

In Touhey v. Medicine Hat (1912), 7 D.L.R. 759, 2 W.W.R. 715, (1913) 5 A.L.R. 116, 10 D.L.R. 691, 23 W.L.R. 880, 4 W.W.R. 176, the view of the Ontario Courts as to the nature of the duty to "keep in repair" was followed.

Tweeddale v. Calgary (1914), 20 D.L.R. 277, in which it was held that a corporation is not absolved from responsibility for the unsafe condition of a sidewalk where it must be inferred from the nature of the work on it

Annotation. and the length of time it was carried on before the accident in respect of which the action was brought, that the officials of the corporation having the supervision of the streets must have been aware of the work, although it was not done under their authority, but by persons interested in adjacent lands without a permit, which, by the terms of the corporation's charter, was required.

A municipal corporation is not liable for negligence in not repairing a defect in a sidewalk with sufficient promptness where the defect was caused by a heavy coal waggon passing over the sidewalk a few hours before and the existence of the defect had not come to the knowledge of the corporation.

Since the corporation can be made liable only for breach of a corporate duty, the making and enforcing of ordinances regulating the use of streets brings into exercise governmental and not corporate powers, and, in the absence of a statute providing otherwise, a mere failure to enforce a municipal by-law requiring abutting owners to keep a sidewalk used as a crossing in a proper state of repair will not render the corporation liable for injuries to a pedestrian in consequence of a defect occasioned by its unsuitable condition for the purpose for which it was used.

Jamieson v. Edmonton (1916), 9 A.L.R. 253, 27 D.L.R. 168, 33 W.L.R. 851, 9 W.W.R. 1287, citing 28 Cyc. 1356, and Dillon on Municipal Corporations, 5th ed., s. 1627. (Reversed, 54 Can. S.C.R. 443).

BRITISH COLUMBIA.

No action can be maintained at common law for an injury arising from the non-repair of a highway, but a duty may be cast by statute upon a corporation to repair, and, if that is clearly done, the corporation will be answerable in an action for negligence: Lindell v. Victoria (1894), 3 B.C.R. 400.

In the same case it was held that the Municipal Act of British Columbia (Stats. 1892, c. 33, s. 104 (90)), which empowered a municipal corporation to raise money by way of road tax and to pass by-laws respecting roads, streets and bridges, did not cast upon the corporation the duty of keeping streets in repair.

In Gordon v. Victoria (1897), 5 B.C.R. 553, the accident was occasioned by the collapse of a bridge built by the Provincial Government and afterwards brought within the limits of the municipality. The jury found that the cause of the collapse was the breaking of a hanger supporting one of the floor beams. The corporation had substituted stirrup hangers with welds, made by its orders, on some of the beams in place of unwelded straight hangers. The jury was of opinion that a missing stirrup hanger must have broken at the welds, although there was no evidence that it had done so, and the jury also found that the corporation was blameable for the accident "because, having been made aware of the bad condition of the bridge, through the report of the engineer and otherwise, they attempted repairs, but the work was not done sufficiently well to strengthen the structure," and said that, in the opinion of the jury, "it was their duty to first ascertain the carrying capacity of the bridge before allowing such heavy traffic to pass over it." Upon motion for judgment, it was held that there was no finding of actionable negligence "whereby" the disaster was caused, and that the acts of negligence to which the jury attributed the disaster were mere non-feasance.

The act of a corporation in *de facto* taking over the care and control of a bridge under statutory authority is *primâ facie* a competent corporate act. It lies on the corporation to show clearly that acts done by its officers under their direction were *ultra vires* and illegal, and that conclusion cannot be

Annotation.

reached merely by reason of the council not having passed a by-law vesting the bridge in the corporation. An act done by an officer of the corporation having materially weakened a beam of the bridge, which afterwards broke renders the corporation liable for an injury caused by the consequent collapse of the bridge: Victoria v. Patterson, and Victoria v. Lang, L.R. (1899), A.C 615, affirming (1897) 5 B.C.R. 628.

It had been held by the Court below that a municipal corporation is liable for damages caused by a dangerous nuisance created by it on a highway within the limits of its control, and that the misconduct will be treated as misfeasance and not mere non-feasance if the injury arises from a combination of acts and omissions on the part of the corporation—in the particular case the boring of a beam rendering it more liable to rot and its subsequent non-removal—though the acts without the omissions would not have caused the injury.

A culvert constructed of cedar covered with a few inches of earth, placed on a public road sixteen years previously, which had never been inspected, repaired or renewed during that time, became rotten, in consequence of which a horse stumbled through it and threw out the persons in the vehicle and they were injured, and it was held, following Bathurst v. Macpherson, L.R. (1879) 4 A.C. 256, that the municipal corporation had been guilty of misfeasance in allowing the culvert to become a nuisance, and was, therefore, liable to an action for the damages sustained: Cooksley v. New Westminster (1909), 14 B.C.R. 330, 11 W.L.R. 476, reversing (1909), 10 W.L.R. 106.

In McPhalen v. Vancouver, (1910) 15 B.C.R. 367, (1911) 45 S.C.R. 194, the action was for the recovery of damages for an injury sustained owing to a sidewalk being out of repair.

The Act incorporating the defendant provided that every such public street, road, square, land, bridge, and highway shall be kept in repair by the corporation, but there was no such provision giving a right of action for default in performing this obligation, as is contained in s. 460 (1) of the Ontario Municipal Act, and the sole question was as to the right of the plaintiff to maintain the action. He had succeeded at the trial, and the verdict was sustained by the Court of Appeal on an equal division among the Judges, and was upheld on appeal to the Supreme Court of Canada. In stating his opinion, Duff, J., said that there could be little doubt "that the common law rule under which the inhabitants of a parish through which highways passed were responsible for their repair was never introduced into British Columbia," p. 221, but it was nevertheless held that where, as in this case, a municipal corporation is guilty of negligent default by non-performance of the statutory duty imposed on it to keep its highways in good repair and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect, persons suffering injuries in consequence of the omission may maintain civil actions against the corporation to recover compensation in damages although no such right of action has been expressly provided for by statute, unless something in the statute itself or in the circumstances in which it was enacted justifies the conclusion that no such right of action was to be conferred.

In the opinions of the Judges of the Supreme Court all the most important cases bearing upon the question in issue are collated and reviewed.

This decision is in accord with the view of Mr. Justice Dillon, who speaks of the liability which the Supreme Court declared to exist as an "implied

Annotation. liability:" Dillon on Municipal Corporations, 5th ed., 1638, where it is said that "it is a general principle of law, founded in reason, that where one suffers an injury by the neglect of any duty of perfect obligation owing to another, the person injured has his action. This broad statement must be read subject to what is provided in s. 460 (8) of the Ontario Act, and should be qualified, as it is in Halsbury's Laws of England, vol. 27, par. 942, by limiting it to cases in which it appears to be within the purview of the statute that there should be a right of action.

After the decision in the McPhalen case, the Act of incorporation of the City of Vancouver was amended so as to remove all doubt as to the intention of the legislature to give a right of action to persons who suffered from the corporation's default in fulfilling its duty to repair, and the decision in Vancouver v. Cummings (1912), 46 S.C.R. 457, 2 D.L.R. 253, 22 W.L.R. 164, 2 W.W.R. 66, in which the appellant corporation was held to be liable for injuries caused by a defect in a sidewalk, was under the amended Act.

Vancouver v. Cummings was followed in Tweeddale v. Calgary (1914), 20 D.L.R. 277 (Alta.).

Where a statute vests in a corporation the public roads within the boundaries of a municipality and empowers the corporation to repair, but does not purport to impose a duty to repair or to create a liability on failure to do so, the corporation is not liable for injuries sustained owing to lack of repair due to non-feasance: Von Mackensen v. Surrey(1915), 21 B.C.R. 198, 22 D.L.R. 253, 8 W.W.R. 541.

MANITOBA.

It was held in Wallis v. Assiniboia (1886), 4 Man. L.R. 89, that a statute which provided that "all the roads and road allowances within the province shall be held under the jurisdiction of the municipality within the limits of which such roads and road allowances are situated, and such municipality shall be charged with the maintenance of the same, with such assistance as they may receive from time to time from the Government of the Province," did not impose upon the corporation any liability for damages occasioned by defective highways or bridges.

Where a municipal corporation performs work on a public road to facilitate travel between points on both sides of the place where the work is done so as to provide a completed road between those points for public use, the corporation is liable under the Municipal Act, R.S.M. 1902, c. 116, s. 667 (now R.S.M. 1913, c. 133, s. 625), in case an accident happens by reason of non-repair of the road at any place between these points, although no work has been done at or near that particular place: Couch v. Louise (1907), 16 Man. L.R. 656, 5 W.L.R. 482.

In Davies v. Winnipeg (1910), 19 Man. L.R. 744, 15 W.L.R. 22, where injury was caused to a person by tripping over a loose plank in a sidewalk, and it was shewn that the sidewalk had been constructed ten years before and that the nails in the plank had been broken, but there was nothing to shew how that happened or how long the plank had been loose, and there was evidence that there was an inspection every seven or ten days, it was held that, although the sidewalk was out of repair, it was not shewn that it was so to the knowledge of the corporation, and that the evidence did not raise the presumption of knowledge of the existence of the defect for any stated length of time, that the method of inspection was reasonable, and that there was no evidence upon which negligence could be found.

Annotation.

NEW BRUNSWICK.

In the absence of a statute imposing liability for non-feasance a municipal corporation is not liable in damages for personal injury caused by reason of a sidewalk having been raised to a higher level than a private way or having been allowed to get out of repair: St. John v. Campbell (1896), 26 S.C.R. 1, reversing (1895), 33 N.B. 131.

In an action against a municipal corporation for the recovery of damages sustained in an accident caused by an obstruction on a sidewalk, a pleading which contains an allegation that the corporation wrongfully and negligently allowed the sidewalk to be obstructed and wrongfully and negligently allowed the obstruction to remain there for an unreasonable time without lights or other signals on it discloses a case of non-feasance only, there being no allegation that the corporation had knowledge of the obstruction: Rolston v. St. John (1904), 36 N.B. 574.

NOVA SCOTIA.

A municipal corporation under no statutory duty to light the streets but which has contracted with a company to light them, is not liable for injuries caused by the negligence of the company in performing the service. The relation between the corporation and the company is not that of master and servant, but that of employer and independent contractor: Lordly v. Halifax (1892), 20 S.C.R. 505, reversing (1891), 24 N.S. 1.

Where injuries are caused by the negligence of a contractor employed by the Dominion Government to construct a concrete sidewalk around a post office, and there is no evidence that the municipal authorities participated in the doing of the work or that they were applied to for or gave permission for, the opening up of the sidewalk, although they had knowledge that the work was being done, the corporation is not liable for any act of misfeasance on the part of the contractor or his principal: Hirtle v. Lunenberg (1910), 44 N.S. 277, 8 E.L.R. 187, following Maguire v. Liverpool (1905), 1 K.B. 767, 21 T.L.R. 278.

In the absence of a statutory obligation imposed on municipal corporations an action does not lie against a corporation for injuries caused by mere non-feasance, and, in the absence of evidence that a sidewalk was defectively or negligently constructed in the first instance, the corporation is not liable to an action because of its failure to keep the sidewalk in repair: Cullen v. Glace Bay (1911), 46 N.S. 215.

Where a corporation, in laying a concrete sidewalk, breaks up a portion of the asphalt sidewalk of a crossing street and replaces it with earth and ashes, and the rain washes away the filling, it is misfeasance, and the corporation is liable to a person injured by stepping into the hole: Halifax v. Tobin (1914), 50 S.C.R. 404, 51 C.L.J. 109, affirming (1914), 47 N.S. 498, 14 E.L.R. 143.

There is no liability under the charter of the City of Halifax, s. 532, for injuries caused by mere want of repair: Coleman v. Halifax (1915), 48 N.S. 442, 22 D.L.R. 781.

QUEBEC.

Vaudry v. Montreal (1898), Q.R. 13 S.C. 531. (Where a lane had been used by the public as a thoroughfare for more than twenty years, was inscribed on the homologated plan of the municipality, and the houses on it had been numbered by the corporation, and the council had changed its name and inscribed the new name on the corporation's books, the corporation is bound to keep in repair a footway on the lane.)

Annotation. A municipal corporation, when it has authorized the opening of a street, must keep it in good condition whatever may be its importance or the amount of taxes levied on the adjoining owners, and may be compelled by mandamus to fulfil its obligation: Goulette v. Sherbrooke (1904), Q.R. 25 S.C. 387.

A town corporation subject to public law under the provisions of art. 356 of the Civil Code is civilly responsible for the consequence of an accident due to the improper conditions of a road left open to traffic during the night where the lack of light enhances the risk: St. Louis v. McCray (1909), Q.R. 19 K.B. 333.

Municipal corporations are obliged to maintain their streets and sidewalks in a safe state of repair so as to allow of their use without danger; default in so doing renders them liable for damages which result from the neglect: Leblanc v. Fraserville (1912), Q.R. 42 S.C. 539, 9 D.L.R. 299.

A municipal corporation is not responsible for dangers naturally resulting from the fact that its roads extend along precipices or end at them, and is not bound to erect solid walls capable of resisting the shock of an automobile conducted or drawn out of the way.

The corporation is not bound to do more than to erect barriers or ordinary palisades to protect persons passing at the dangerous places.

Fafard v. Quebec (1916), Q.R. 50 S.C. 226.

SASKATCHEWAN.

It was held by Elwood, J., in Carlton v. Sherwood (1915), 32 W.L.R. 177, 8 W.W.R. 562 (Sask.), that it was misfeasance on the part of a corporation, in repairing a hole in the road, to put manure in it, stamping it down and filling it up to the height of a foot or so above the hole, if such repair fails to sustain vehicles passing over it, by reason of which an accident happens. This decision was reversed (1915), 25 D.L.R. 66, 32 W.L.R. 936, 9 W.W.R. 611, the Court being of opinion that the action was brought for a default in keeping in repair of the highway, and not having been brought within the period prescribed by the statute the cause of action was barred, following Pearson v. York (1877), 41 U.C.R. 378.

The use by a municipal corporation on its street railway, at street intersections, of a grooved rail is not unlawful or negligent, such a rail being in common use and necessary for the purpose for which it was used—to prevent cars leaving the track on the curves. The legislature, in authorizing the building and operating of the railway, must be taken to have authorized the use of such rails as were necessary for its reasonable operation: Regina Cartage Company v. Regina (1916), 29 D.L.R. 420, 34 W.L.R. 1141, 10 W.W.R. 1299.

TERRITORIES.

Where a municipal corporation has by statute jurisdiction over the roads and has cast upon it the duty of maintaining them and is authorized to abate nuisances and is afforded means for raising money for corporate purposes, the corporation is liable for injuries caused to a person falling upon a sidewalk, constructed by the corporation, upon which snow and ice had accumulated and had not been removed within a reasonable time: Cuzner v. Calgary (1888), 1 Terr. L.R., 162.

It was held in Clark v. Calgary (1907), 5 W.L.R. 292, 6 W.L.R. 622, 6 Terr. L.R. 309, that a corporation in which the highways were vested and which was required to keep them in repair was not liable to an action for a default in keeping them in repair.

See also McGillivray v Moose Jaw [1907] 7 Terr. L.R. 465, 6 W.L.R. 108.

THE LIABILITY UNDER THIS SECTION IS NOT CONFINED TO LIABILITY FOR ACCIDENTS. **Annotation.**

The liability extends to damage to property or business: Noble v. Turtle Mountain (1905), 15 Man. L.R. 514; Cummings v. Dundas (1907), 13 O.L.R. 384, (1907) 9 O.W.R. 624; Strang v. Arran (1913), 28 O.L.R. 106, 12 D.L.R. 41.

In the principal case Dick v. Vaughan, (1917), 39 O.L.R. 187, a Divisional Court has held that the owner of a traction engine was not entitled to recover damages for the loss he had sustained through not being able to drive his engine over a highway bridge owing to its being out of repair; the view of the Court being that the damage which the plaintiff had sustained was too remote and was not different in kind from that which all of His Majesty's subjects suffered, and Strang v. Arran (supra) was distinguished on the ground that in that case the access to the plaintiff's property was affected by the want of repair.

"Kept in repair."—The duty of keeping in repair requires that the highway or bridge be kept in such a condition as to be reasonably safe for the purposes of travel, including travel by means of such vehicles as are ordinarily in use. This obligation, which extends equally to a highway or bridge in a newly surveyed and organized township and to a crowded street in the business part of a city, is satisfied by keeping the highway or bridge in such a state as is reasonably safe and sufficient for the requirements of the public, and, in determining whether a corporation is in default, regard must be had to the means at the command of the council and the nature of the ordinary traffic of the locality. A corporation performs this "duty when the travelled way is without obstruction or structural defects which endanger the safety of travellers and is sufficiently level and smooth, guarded by railings where necessary, to enable persons, by the exercise of ordinary care, to travel with safety and convenience": Dillon on Municipal Corporations, 5th ed., sec. 1694. Although this statement is made with reference to the statutory enactments in force in the New England States, it applies also to the enactment contained in this section.

The duty imposed by subs. 1 applies only to roads which have been formally opened and used, and not to those which a corporation, in its discretion, has considered it inadvisable to open: Hislop v. McGillivray (1890), 17 S.C.R. 479; Taylor v. Gage (1913), 30 O.L.R. 75, 86, 16 D.L.R. 686.

A municipal corporation is under no obligation to repair the approaches from the highway to private property constructed by the owner of the property: Hopkins v. Owen Sound (1895), 27 O.R. 43.

A mandatory order requiring the performance of a general duty to repair will not be granted: Hislop v. McGillivray (1886), 12 O.R. 749, (1888) 15 A.R. 687, 17 S.C.R. 479; Hubert v. Yarmouth (1889), 18 O.R. 458; Attorney-General v. Staffordshire L.R. (1905), 1 Ch. 336, 21 T.L.R. 139; Cummings v. Dundas (1907), 13 O.L.R. 384, 395-6.

The law in Quebec appears to be different: Goulette v. Sherbrooke (1904) Q.R. 25 S.C. 387, noted under "Actions by and Against Municipal Corporations," Part XVII.

In Reg. v. London (1900), 32 O.R. 326, it was held that proceedings against a municipal corporation for neglecting to repair and keep in repair one of its streets, thereby committing a common nuisance, should be by indictment, and prohibition was granted to restrain a preliminary investigation of the charge before a police magistrate.

Annotation. Since this case was decided, provision (s. 2 (13)) has been made in the Criminal Code which has been held to have the effect of enabling the prosecution of a corporation to be initiated in the same way as a prosecution of an individual: In re Scholfield and Toronto (1913), 5 O.W.N. 109, 14 D.L.R. 232, 22 Can. Cr. Cas. 93, 50 C.L.J. 30, 25 O.W.R. 331.

The trustees of a police village not created a body corporate under s. 529 are not a corporation separate from the corporation of the township in which the police village is situate, and the township corporation is liable under s. 460 (1) for default in keeping in repair the highways within the limits of the village, although the want of repair is in respect of a sidewalk constructed by the trustees of the police village: Smith v. Bertie (1913), 28 O.L.R. 330, 12 D.L.R. 623.

The following cases bear upon the same question:—

ENGLAND.

Attorney-General v. Great Northern Railway Company, L.R. (1916), 2 A.C. 356, in which the question was as to whether it was the duty of a railway company which was under a statutory obligation to maintain a bridge to improve and strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which might reasonably be expected to pass over it according to the standard of the present day, and it was held that the railway company was not so bound.

The Lord Chancellor (Lord Buckmaster) said:—"I have avoided expressing any opinion upon the question as to how far traffic of an unusually heavy character placed for the first time upon a road constitutes a lawful user of the highway. Traffic may well be of such a nature that its presence would constitute a nuisance, and the use of the highway thereby would be unlawful. But, apart from this, there may be unusually heavy traffic which, originally extraordinary traffic, upon a particular road becomes ordinary owing to the changed circumstances of the district through which the road runs": p. 366.

Earl Loreburn said that he expressed no opinion upon the point: p. 368.

Viscount Haldane said it "was not seriously questioned, in the argument for the respondents, that the body which is charged with the duty of maintaining a highway has to maintain it in a condition which will enable it to carry the ordinary traffic on that highway in whatever form that ordinary traffic may develop": p. 371.

Lord Sumner said that "in the course of the argument a good deal was contended for as to the duties of road authorities in regard to new traffic over a bridge forming part of a highway to which I should not be disposed to assent without further consideration": p. 381.

ONTARIO.

Davis v. Usborne (1916), 36 O.L.R. 148, 28 D.L.R. 397, in which it was held that the defendants' duty to keep a highway in repair was not fulfilled by providing a road reasonably safe for the purposes of travel upon it before the advent of motor vehicles, that it might be that it would have been unreasonable to require a corporation at once after motor vehicles came into use to make its roads, otherwise sufficient, safe for travel under the changed conditions, but that, having regard to the fact that motor vehicles had been in use for several years and were a common means of transportation in general use throughout the province, the statutory duty imposed upon the defendants required them to make the road in question reasonably safe for the purposes of travel and so safe from any additional danger incident to the use of it by motor vehicles.

See also Indiana Springs Company v. Brown (1905), 74 N.E.R. 615-6, in which the same view was expressed. **Annotation.**

BRITISH COLUMBIA.

The owner of a motor car which is not registered and licensed is not entitled to recover damages for injuries sustained owing to a highway being out of repair due to misfeasance, as an unlawful use was being made of the highway: Greig v. Merritt (1913), 24 W.L.R. 328.

MANITOBA.

A municipal corporation was held liable for damages caused by a traction engine breaking through rotten timbers in the approach to a bridge on its highway where, to the knowledge of the officials of the corporation, the engine had been passing over the bridge for the previous two years, and no attempt had been made to stop such traffic or to warn those in charge of the engine of any danger: Curle v. Brandon (1905), 15 Man. L.R. 122, 1 W.L.R. 176, affirming (1904), 24 C.L.T. Occ. N. 279.

NEW BRUNSWICK.

In Portland v. Griffiths (1885), 11 S.C.R. 333, which reversed (1884), 23 N.B. 559, Ritchie, C.J., and Fournier, J., expressed the opinion that a municipal corporation owed no duty, as to keeping in repair the highway, to a woman standing on a sidewalk and engaged in cleaning windows, but in Ricketts v. Markdale (1899), 31 O.R. 180, 616, that view was not entertained by a Divisional Court, and the corporation was held liable for injuries to a child playing upon a highway, the Court being of opinion that a municipal corporation is liable for damages, occasioned by its negligence, to children playing upon a highway where there is no general law limiting this liability in that regard and no local law prohibiting their playing on the highway, and when their presence is not prejudicial to the ordinary uses of the street for traffic and passage.

See also, as to what is a reasonable user of a lane, McLean v. Crown Tailoring Company (1913), 29 O.L.R. 455, 15 D.L.R. 353, in which it was held that using it for unhitching horses was a reasonable use.

QUEBEC.

In Deguise v. Notre Dame des Laurentides (1916), Q.R. 50 S.C. 31, it was held that the existing laws oblige municipal corporations only to make roads for the means of transport existing at the time of the adoption of those laws. If the municipal roads are built and maintained according to these laws, the fact that the municipal authorities have not appropriated them to the use of automobiles and have not provided against the dangers inherent to that new mode of locomotion cannot be attributed to them as a fault. A municipal corporation is not answerable for an automobile accident happening in one of its roads, otherwise in perfect order, because of the fact that the road turns there at a right-angle at the summit of a little hill.

A HIGHWAY IS OPEN TO ALL SUITABLE AND PROPER USES.

Dillon on Municipal Corporations, 5th ed., s. 1165.

"The removal of a building along a highway is a legitimate use of the highway not requiring, in the absence of an ordinance or by-law, the assent or permission of the municipal authorities: Ib. s. 715.

This latter statement was referred to with approval by Hagarty, C.J.O., in Toronto Street Railway Company v. Dollery (1886), 12 A.R. 679, 682, where he said, "The moving of a house along public streets may not be designated as an unlawful user of the highway. . . . It is only, I pre

Annotation. sume, a question of degree between a frame building and a huge van of merchandise, beams of timber, etc."

An engine constructed so as to be able to move itself and draw its tender, containing fuel and water for its own use, may lawfully use the highways: Pattison v. Wainfleet (1902), 1 O.W.R. 407.

This must be read subject to the provisions of The Traction Engines Act, R.S.O. c. 212.

See also notes to "kept in repair" under heading "The following cases bear upon the same question."

OBSTRUCTIONS ON HIGHWAYS.

Where there is an obstacle to the safe user of the highway on or near to it, though placed there by a wrongdoer, if the corporation has notice, express or implied, of its existence and does not remove it or cause it to be removed, the highway is not within the meaning of this subsection kept in repair and the corporation is liable for the damages sustained by any person by reason of its default.

It was held in an early case—Maxwell v. Clarke (1879), 4 A.R. 460—that there could be no recovery where the injury was caused by a horse, which was being ridden on a highway, having taken fright at a pile of wood that had been thrown down a declivity on the side of the road and some of which lay on the bed of the road, and without coming into contact with the wood having, in consequence of the fright, shied and thrown his rider off and injured him.

The view of the Court was that where the object does not block the way of travellers, or even if it obstructs part of the statutory highway, is yet permissible in the locality, its being on the highway does not render the road out of repair.

In O'Neill v. Windham (1897), 24 A.R. 341, which was the case of a horse being driven along a highway taking fright at ties which had been piled on the untravelled part of the highway by a man whose waggon, on which they were, broke down, the Court followed Maxwell v. Clarke. Osler, J.A. (p. 350), after stating what was the effect of the decision in that case, said that "the decision . . . would have been different had the plaintiff suffered in consequence of having come into actual collision with the wood, thus showing that the way had been actually obstructed and damage sustained by reason thereof," and, while he agreed that the case should be followed, said that it was not necessary to say whether he agreed with the decision.

Macdonald v. Yarmouth (1897-8), 29 O.R. 259, was a somewhat similar case, but the tiles which caused the horse to take fright had been piled on the side of the highway by the defendant corporation for the purpose of being used in repairing a culvert. There was a fill of about fourteen feet, with railings on each side, and the tiles were piled in a slight hollow behind the railing, and some boards had been thrown over them and a board which had been nailed between the two boards which formed the railing, so as to further hide the tiles from view. The decision was that this did not constitute evidence of negligence on the defendant's part so as to render it liable to the plaintiff.

In Rice v. Whitby (1898), 25 A.R. 191, which was also a case of a horse taking fright at an obstacle in the highway—a house that was being moved along it—although Maxwell v. Clarke was referred to and as, in that case, there was no impact, it is somewhat singular that the case was not dis-

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posed of on that ground, but on the ground that it was not shown that sufficient notice of the obstruction had been given to the corporation nor had a sufficient time elapsed to impose liability upon it.

Colquhoun v. Fullerton (1913), 28 O.L.R. 102, 11 D.L.R. 469, is the last reported case, and in it the Court appears to have followed Maxwell v. Clarke. It was the case of a horse taking fright at a milk stand on the side of the highway, and the plaintiff's action might well have been dismissed on another ground, which it was held was fatal, viz., that notice to the defendant corporation that the milk stand was there was not proved. While Riddell, J., was of opinion that Maxwell v. Clarke and O'Neil v. Windham were binding on the Court, he said that he was "not satisfied with the reasoning or result" of them: p. 105.

The decision in Maxwell v. Clarke and the reasoning on which it is based are unsatisfactory and lead to anomalous results. If, as was said by Osler, J.A., in O'Neil v. Windham, the corporation would have been liable had there been contact with the wood, it must be because there was default in keeping in repair the highway, and it would seem to follow, if that be the case, that the result should be the same although there was no contact, for *ex hypothesi* the highway was out of repair, and the injury was sustained owing to the want of repair.

It is probable that if and when Maxwell v. Clarke comes to be considered by a Court which is not bound by it, the more reasonable rule which Mr. Justice Dillon deduces from the authorities will be adopted, viz.:—

"For an object in a public street calculated to frighten horses ordinarily gentle, and which causes an accident resulting in an injury, municipal corporations have been held liable, if they have been guilty of negligence in allowing it to remain for an unreasonable time. The decisions to this effect generally rest upon statutory provisions and involve a construction thereof. But such objects may come within the notion of a public nuisance, which it is the duty of the municipality to remove as incident to its duty to keep its streets in a safe condition, for failure to discharge which it may be liable to any one specially injured thereby. Where there is a defect or object in a street which is calculated to frighten horses and an injury occurs by reason thereof without the fault of the driver, the corporation, if it has been negligent in respect thereof, is liable; but objects outside the travelled way, and not near enough to the line of public travel to interfere with or incommode travellers, are not defects in the highway. It is not requisite, as we have already seen, that a highway, in its whole width as located, should be fitted for travel. It is sufficient if it be of suitable width, and in good condition for the needs of the public": Dillon on Municipal Corporations, 5th ed., s. 1702.

See also Macfarlane v. Colam (1908), Court of Sessions Cas. 56, 45 Sc. L.R. 47; McIntyre v. Coote (1909), 19 O.L.R. 9.

The unreasonableness of holding the corporation liable where a horse takes fright at objects on or near the highway such as are mentioned by Patterson, J.A., in Maxwell v. Clarke and in the American cases to which he referred, and as were referred to by Hagarty, C.J., in Rounds v. Stratford (1876), 26 U.C.C.P. 11, must be admitted, but it is clear that in many of the cases referred to by way of illustration it would be held that the risk of a horse taking fright was one of those risks which Blackburn, J., in Rylands v. Fletcher (1866), L.R. 1 Exch. 265, 286, spoke of as inevitable

Annotation. to which persons going upon a highway are subject and the consequences of which they must suffer.

It may be difficult to decide on which side of the line a particular case falls, but the question being one of fact must be determined by the application of sound common sense to the facts in evidence.

The reported cases on subsection 1 are very numerous.

The following is a list of Ontario cases, not exhaustive, but containing the most important and the latest of them. The list does not include those mentioned (*infra*) in dealing with liability for obstructions, or those mentioned (*infra*) when dealing with cases under subsection 3. In this list the cases in which the plaintiff failed are prefixed by a star:—

*Ray v. Petrolia (1874), 24 U.C.C.P. 73 (defect in sidewalk).

Toms v. Whitby (1874), 35 U.C.R. 195, (1875) 37 U.C.R. 100 (no barrier on embankment).

Sherwood v. Hamilton (1875), 37 U.C.R. 410 (defective barrier on hill).

Boyle v. Dundas (1876), 27 U.C.C.P. 129 (defective sidewalk).

Lucas v. Moore (1878), 43 U.C.R. 334, (1879) 3 A.R. 602 (unguarded ditch in highway).

Walton v. York (1879), 30 U.C.C.P. 217, (1881) 6 A.R. 181 (unguarded ditch).

*Bleakley v. Prescott (1886), 12 A.R. 637, reversing (1885) 7 O.R. 261 (injury sustained in crossing from one side to the other of a sidewalk over an accumulation of hard-beaten snow where there was a slight declivity in the sidewalk).

*Goldsmith v. London (1889), 16 S.C.R. 231 (abrupt rise from crossing to sidewalk).

Johnson v. Nelson (1890), 17 A.R. 16 (absence of guard rail or other protection on the approach to a bridge.

Durochie v. Cornwall (1893), 23 O.R. 355, (1894) 21 A.R. 279, (1895) 24 S.C.R. 301 (depression in sidewalk in which water lodged and ice gathered.

Badams v. Toronto (1896), 24 A.R. 8 (non-repair of a sidewalk extending beyond the line of the street over adjoining private property so as ostensibly to form part of the highway).

Foley v. Flamborough (1899), 26 A.R. 43 (large stump at the edge of the travelled way).

Madill v. Caledon (1901-2), 3 O.L.R. 66, 555 (injuries sustained owing to a sidewalk on a highway, built by voluntary subscriptions and statute labour, although the corporation never assumed any control over it nor was the statute labour expended with the knowledge of the corporation, being out of repair where the corporation had knowledge of the existence of the sidewalk and there was opportunity and time to repair it).

Luton v. Yarmouth (1902), 1 O.W.R. 40 (washout and other defects in highway).

Summers v. York (1902), 1 O.W.R. 137 (want of guard).

Pattison v. Wainfleet (1902), 1 O.W.R. 407 (unsound bridge).

*Belling v. Hamilton (1902), 3 O.L.R. 318 (hole in pavement, injury by foot-passenger while crossing).

McGarr v. Prescott (1902), 4 O.L.R. 280 (hole in sidewalk).

Johnston v. Point Edward (1903), 2 O.W.R. 687 (failure to warn of removal of bridge).

*Rogers v. Petrolia (1903), 2 O.W.R. 709 (improper bridge over ditch).

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Dickson v. Haldimand (1903), 2 O.W.R. 969, (1904) 3 O.W.R. 52 (want of guard).

Garner v. Stamford (1903), 7 O.L.R. 50 (stone in footpath).

McInnes v. Egremont (1903), 5 O.L.R. 713 (want of guard to bridge).

*Evans v. Huntsville (1904), 3 O.W.R. 108 (defective sidewalk).

Galloway v. Sarnia (1904), 3 O.W.R. 361, 5 O.W.R. 458 (defective sidewalk).

Boyle v. Guelph (1904), 3 O.W.R. 322, 4 O.W.R. 220 (open ditch).

Cochrane v. Hamilton (1904), 3 O.W.R. 739 (no provision for getting rid of overflow from gully and water freezing).

Holland v. York (1904), 7 O.L.R. 533 (highway covered with water).

*Anderson v. Toronto (1904), 4 O.W.R. 485 (defective sidewalk).

*O'Connor v. Hamilton (1904), 8 O.L.R. 391, (1905) 10 O.L.R. 529 (caving in of sewer).

Thomas v. North Norwich (1905), 6 O.W.R. 13, reversing (1904) 4 O.W.R. 517 (not sufficient warning of bridge having been removed).

*McNiroy v. Bracebridge (1905), 10 O.L.R. 360 (defective sidewalk).

Dodds v. Aurora (1905), 6 O.W.R. 510 (defective street-crossing).

*McKay v. Port Dover (1905), 6 O.W.R. 878, (1906) 7 O.W.R. 292, 758 (defect in sidewalk).

Plant v. Normanby (1905), 10 O.L.R. 16 (want of guard).

*Turner v. Eustis (1906), 7 O.W.R. 238 (alleged defective highway).

*Armstrong v. Euphemia (1906), 7 O.W.R. 552 (defective highway).

Campbell v. Brooke (1906), 8 O.W.R. 292 (want of guard).

Hobin v. Ottawa (1906), 8 O.W.R. 589, reversing (1906), 8 O.W.R. 101 (defect in sidewalk).

Morrison v. Toronto (1906), 7 O.W.R. 547, 607, 12 O.L.R. 333 (open space in sidewalk).

Kew v. London (1907), 9 O.W.R. 224 (defective sidewalk).

*Prue v. Brockville (1907), 10 O.W.R. 359 (danger from electric current).

*Burns v. Toronto (1907), 10 O.W.R. 723 (opening not guarded).

*Breault v. Lindsay (1907), 10 O.W.R. 890 (defect in sidewalk).

Pow v. West Oxford (1908), 11 O.W.R. 115, 13 O.W.R. 162 (defective roadway).

Gallagher v. Lennox & Addington (1908), 13 O.W.R. 227 (pitch-holes and ridges).

*Anderson v. Toronto (1908), 15 O.L.R. 643 (sunken granolithic block in sidewalk).

Sangster v. Goderich (1909), 13 O.W.R. 419 (hole in roadway).

*Bouttete v. Tilbury North (1910), 1 O.W.N. 623 (non-repair of highway).

*Stillwell v. Houghton (1910), 2 O.W.N. 185 (township road too narrow and ditch not guarded).

*Innis v. Havelock (1910), 2 O.W.N. 205, 17 O.W.R. 310, (1911) 2 O.W.N. 871, 18 O.W.R. 508 (defect in sidewalk).

Jackson v. Toronto (1910), 2 O.W.N. 461 (sidewalk slightly raised at crossing).

Young v. Bruce (1911), 24 O.L.R. 546, 20 O.W.R. 87 (unguarded embankments).

Kelly v. Carrick (1911), 2 O.W.N. 1429, 19 O.W.R. 796 (ditch not guarded).

*Brown v. Toronto (1911), 2 O.W.N. 982, 18 O.W.R. 996, (1911) 3 O.W.N. 84 (surface of boulevard below curb).

Annotation. *Armstrong v. Barrie (1912), 4 O.W.N. 64, 6 D.L.R. 851, 23 O.W.R. 243 (hole in highway).

Strang v. Arran (1913), 28 O.L.R. 106, 12 D.L.R. 41 (failure to replace bridge).

Barclay v. Ancaster (1913), 4 O.W.N. 764, 10 D.L.R. 363, 24 O.W.R. 60 (absence of guard).

Armstrong v. Peel (1913), 4 O.W.N. 1031, 10 D.L.R. 169, 49 C.L.J. 336, 24 O.W.R. 372 (defective bridge).

Patterson v. Aldborough (1913), 4 O.W.N. 1346, 11 D.L.R. 437, 24 O.W.R. 638 (excavation not guarded).

Roach v. Port Colborne (1913), 29 O.L.R. 69, 13 D.L.R. 646 (defect in sidewalk).

*Egan v. Saltfleet (1913), 29 O.L.R. 116, 13 D.L.R. 884, 49 C.L.J. 698 (hole in the road).

Glynn v. Niagara Falls (1913), 29 O.L.R. 517, 15 D.L.R. 426, (1914) 31 O.L.R. 1, 16 D.L.R. 866 (electric shock from pole in street).

Connor v. Brant (1913-4), 31 O.L.R. 274 (hole in highway).

*Miller v. Wentworth (1913), 5 O.W.N. 317, 25 O.W.R. 270, (1914) 5 O.W.N. 891 (insufficient guard-rail).

Ackersviller v. Perth (1914), 32 O.L.R. 423, (1915) 33 O.L.R. 598, 22 D.L.R. 666 (unguarded ditch).

Kinsman v. Mersea (1914), 6 O.W.N. 597, 7 O.W.N. 101 (unguarded ditch).

Robinson v. Dereham (1915), 8 O.W.N. 173, 23 D.L.R. 321 (absence of guard rail).

Bradish v. London (1915), 9 O.W.N. 296, (1916) 10 O.W.N. 161 (defect in highway).

Huth v. Windsor (1915), 34 O.L.R. 245, 542, 24 D.L.R. 875 (defect in sidewalk).

Poulin v. Ottawa (1916), 9 O.W.N. 454 (steam roller left on highway).

*Wallace v. Windsor (1916), 36 O.L.R. 62, 28 D.L.R. 655 (defect in sidewalk).

McKinnon v. Wellington (1916), 9 O.W.N. 486 (ridges of ice and dirt in roadway).

Davis v. Usborne (1916), 36 O.L.R. 148, 28 D.L.R. 397 (unguarded ditch).

Cranston v. Oakville (1916), 10 O.W.N. 175, 315 (pitch-hole on highway).

Tremblay v. Peterborough (1916), 11 O.W.R. 62 (injury caused by tripping upon a cap of a water cut-off pipe set in the sidewalk and projecting above it about three-quarters of an inch).

*Ellis v. Toronto (1917), 12 O.W.N. 128.

OTHER PROVINCE CASES.—ALBERTA.

Lusk v. Calgary and Wheatley v. Calgary (1915), 22 D.L.R. 50, (1916) 28 D.L.R. 392, 33 W.L.R. 935, 10 W.W.R. 37 (injury caused by a horse taking fright and falling over an embankment where there was no railing along the side of the road, which was narrow at the point where the accident occurred).

BRITISH COLUMBIA.

Smith v. Vancouver (1897), 5 B.C.R. 491 (constructing a sidewalk and street crossing in such a manner that the crossing is of less width than the sidewalk and considerably lower, constitutes misfeasance, and the corporation is liable to a pedestrian, walking at night on the sidewalk, with reasonable care, who stepped over the outer edge of the crossing and was thereby injured).

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MANITOBA.

Taylor v. Winnipeg (1898), 12 Man. L.R. 479 (falling on ice formed near public wells, of which there were a large number).

Kennedy v. Portage La Prairie (1899), 12 Man. L.R. 634 (pitch holes in a winter road).

Taylor v. Portage La Prairie (1906), 4 W.L.R. 404 (injury caused by a contractor leaving the highway in bad repair and dangerous condition while constructing sewerage and water works for the corporation).

*Forrest v. Winnipeg (1909), 18 Man. L.R. 440, 10 W.L.R. 307 (injury caused by stepping on the end of a loose plank in a comparatively new sidewalk, where the plank had been loose for two or three weeks before the accident, but there was no evidence that any of the city servants or officials had knowledge of it, and many persons, including the inspector of sidewalks in the employ of the city, had walked over it without noticing that there was any defect there).

QUEBEC.

*Legault v. Cote St. Paul (1896), Q.R. 12 S.C. 479 (injury caused by a horse taking fright at a small tree lying on one side of a road, which had been dropped there from a waggon on the previous day, and no evidence that the corporation had knowledge, prior to the accident, that the tree was on the road)

Prevost v. Montreal (1898), Q.R. 15 S.C. 39 (where a municipal corporation permits a railway company to place rails upon a public street upon which there is much traffic, and the rails, which are on sleepers, are raised above the level of the street eight or nine inches and end abruptly without any guard or protection at the extremity of the line, and in winter the rails are not in use and are covered over with snow, the corporation is liable for an injury to a person who, not knowing of the presence of the rails, drives his waggon against them at the end, and cannot escape liability by claiming that the recourse should be against the railway company).

Rousseau v. St. Nicholas (1898), Q.R. 15 S.C. 214 (where there is on a front winter road a single track of about three feet wide and the fences are left standing on both sides of the road, which is curved, and no meeting place has been provided for, as required by law, the corporation is liable for injuries caused to a person who, when meeting a sleigh on the road, was obliged to put his horse into the deep snow, and the horse, in plunging in it, was injured).

*Brunet v. St. Joachim de la Pointe Claire (1898), Q.R. 14 S.C. 278 (injury occurring on a road within the limits of the municipality which is under the control of a turnpike company).

Gaffney v. Montreal (1899), Q.R. 16 S.C. 260 (injury due to a sidewalk being in a bad and dangerous condition where that condition had existed for a period sufficient to allow the municipal authorities to put it in a safe and proper state).

Wong Ling v. Montreal (1913), Q.R. 44 S.C. 339, 10 D.L.R. 558 (injury caused by want of repair of a part of a street used as a crossing place, though not a continuation of a sidewalk).

Spedding v. Montreal (1915), Q.R. 47 S.C. 493, 23 D.L.R. 681 (injury to a pedestrian caused by falling into manhole in a highway, the cover of which had been removed and improperly replaced by persons unknown).

Maltais v. Pointe au Pic (1915), Q.R. 48 S.C. 87 (injury to a horse caused by stepping on *debris* consisting of rusty rails and other waste from the

Annotation. demolition of a sidewalk, deposited by the corporation in the course of repairing a highway).

*Coaticook v. Laroche (1915), Q.R. 24 K.B. 339 (injury caused by the fall of an unsound branch of a tree situate upon a slope at the edge of a sidewalk).

Villani v. Montreal (1916), 29 D.L.R. 321 (the verdict of a jury finding a municipal corporation guilty of negligence in allowing a flagstone in a sidewalk to protrude three-quarters of an inch higher than the others was upheld).

SASKATCHEWAN.

Hutson v. Regina (1913), 6 S.L.R. 126, 14 D.L.R. 372, 25 W.L.R. 628, 5 W.W.R. 395 (injury caused by a broken grating in a sidewalk).

QUEBEC CASES MORE FULLY NOTED.

It is not necessary, to fix responsibility on a municipal corporation for injuries caused by a defective sidewalk, that it should be notified of its defective condition, nor can the corporation escape liability because it was caused by an infraction by a third party of its by-laws, and it is not liable for failure to carry such by-laws into operation: Beech v. Montreal (1897), Q.R. 13 S.C. 187.

Although municipal corporations are bound to maintain the roads under their control in the condition required by law and are responsible for all damages resulting from failure to perform this obligation, Courts are not disposed to apply literally the provisions of the law and to hold that a corporation must at all times, regardless of the season of the year and of special circumstances, keep and maintain the roads under their control in perfect condition, but the spirit of the law must be observed.

Where a road is repaired in May or June, and a hole which caused an accident was allowed to form in the course of the summer and to increase in size until under the effect of the fall rains it had reached proportions which made it dangerous, this is evidence of negligence, and the corporation will be held responsible.

Duclos v. Ely (1898), 5 Rev. de Jur. 177.

A winter road, open to the general public, over which a large number of persons are accustomed to pass and on which there is nothing to indicate that it is private, is a public road, and the corporation of the municipality in which it is situate is liable for accidents happening owing to neglect to keep it in repair: Duchene v. Beauport (1903), Q.R. 23 S.C. 80.

Corporations of rural municipalities are liable in damages for injuries sustained by reason of the want of repair of roads used by the mere permission of the owners of lands. Such roads have the character of municipal roads under the provisions of art. 749 of the Municipal Code (art. 464 of the new Code): Lalonge dit Gascon v. St. Vincent de Paul (1905), Q.R. 27 S.C. 218.

*The owner of a house in a municipality whose by-laws require him to maintain the street and sidewalk opposite to it in a specified manner is liable in damages for injury to a passer-by caused by the defective condition of the street or sidewalk. When the by-law states what means are to be used to obviate danger to passers-by, it is not sufficient to conform with its letter. It is necessary, in addition, to employ the usual means for safety, *e.g.*, if there is glare ice, to cover it with salt, ashes, sawdust or other proper material: Vidal v. The John D. Ivey Company (1912), Q.R. 42 S.C. 509.

Notwithstanding the provisions of art. 849 of the Municipal Code, where a municipal corporation lays out a winter road over a river at a place where

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the ice is too thin and an accident results therefrom, the corporation is liable in damages for the accident: Morency v. L'Ange-Gardien (1913), Q.R. 43 S.C. 537.

Art. 849 provided that "corporations are not liable for accidents or damages occasioned by the breaking of the ice on roads laid out and maintained by them on rivers or other pieces of water."

In Bedard v. Beaulieu (1916), 32 D.L.R. 250, it was held that the corporation was not liable for injuries caused by the breaking of the ice on a road laid out and maintained by it on the River St. Lawrence and art. 849 was referred to.

This article does not appear in the new Code.

THE CASES AS TO THE LIABILITY OF THE CORPORATION FOR NON-REPAIR CAUSED BY OBSTRUCTIONS, EXCAVATIONS, OPENINGS OR OTHER THINGS ON OR NEAR THE HIGHWAY RENDERING IT UNSAFE FOR PUBLIC TRAVEL ARE NUMEROUS, AND MAY BE CONVENIENTLY GROUPED UNDER TWO HEADS:—

(1) When placed or made by the corporation or its officers or servants or by its authority:—

Rowe v. Leeds & Grenville (1863), 13 U.C.C.P. 515 (unguarded heaps of gravel for repair left on road).

*Pearson v. York (1877), 41 U.C.R. 378 (unguarded hole and heap in highway).

Cook v. Collingwood (1903), 2 O.W.R. 966 (unguarded trench).

Kirk v. Toronto (1904), 8 O.L.R. 730 (steam roller negligently operated in highway).

Biggar v. Crowland (1906), 13 O.L.R. 164 (stake planted in highway).

Keech v. Smith's Falls (1907), 15 O.L.R. 300 (heaps of dirt raked up by street cleaners).

Reid v. Toronto (1910), 1 O.W.N. 450, 699 (scantling and boards on sidewalk).

Bateman v. Middlesex (1911), 24 O.L.R. 84, 25 O.L.R. 137, 6 D.L.R. 533, 535, (1912) 27 O.L.R. 122 (unlighted barricade across highway).

Breen v. Toronto (1911), 2 O.W.N. 690 (scoria blocks on footpath).

O'Neil v. London (1911), 3 O.W.N. 345 (weigh scales on highway).

Weston v. Middlesex (1913), 30 O.L.R. 21, 16 D.L.R. 325, (1914) 31 O.L.R. 148, 19 D.L.R. 646 (gravel heaps on highway).

McIntosh v. Simcoe (1914), 5 O.W.N. 793 (object calculated to frighten horses).

Poulin v. Ottawa (1916), 9 O.W.N. 454 (steam roller left on highway).

OTHER PROVINCE CASES.

BRITISH COLUMBIA.

Macpherson v. Vancouver (1909), 14 B.C.R. 326, 11 W.L.R. 501, affirmed (1912), 17 B.C.R. 264, 2 D.L.R. 283, 20 W.L.R. 926, 1 W.W.R. 1114 (injury caused by stepping on a wooden grating in a sidewalk which, when put in, was structurally defective, and was put in by the owner of abutting property by the permission of the corporation).

In this case it was held by Morrison, J., that it was a case of misfeasance but that, if it was not, s. 219 of the Vancouver Incorporation Act, as amended in 1909, imposed upon the corporation liability for non-repair. The Court of Appeal treated the case as one of misfeasance and said nothing as to the effect of the Act.

Tait v. New Westminster (1911), 18 W.L.R. 470 (injury caused by a

Annotation. section of a water-main pipe lying for many months upon a street in a city, and projecting a foot at least into the macadamized and travelled portion of it at an acute angle, so that it was difficult to see it).

Skewis v. Kamloops (1911), 19 W.L.R. 612, 1 W.W.R. 241 (falling into a manhole placed in a highway by the corporation in the exercise of its power to instal and maintain water works, the manhole being structurally defective).

NEW BRUNSWICK.

Glidden v. Woodstock (1895), 33 N.B. 388 (hydrant with two posts around it against which a person after night-fall struck and was injured—there was no light and the street was narrow and irregular and no line of demarcation between the street and the sidewalks).

NOVA SCOTIA.

*Messenger v. Bridgetown (1900), 33 N.S. 291-2, (1901) 31 S.C.R. 379 (injuries sustained owing to a horse having stumbled while passing at night over a mound of earth 8 inches in height, which had been left in the highway after filling up a trench which had been dug for the purpose of laying a pipe across the highway).

McDonald v. Sydney (1912), 46 N.S. 436, 8 D.L.R. 99, 12 E.L.R. 163 (falling into a trench left open in the highway by servants of the corporation).

SASKATCHEWAN.

*Williams v. North Battleford (1911), 4 S.L.R. 75, 16 W.L.R. 301, reversing (1910) 14 W.L.R. 684 (a sidewalk in a not thickly populated municipality, constructed across a street and raised about twelve inches above a ditch on one side so as to constitute an obstruction on that side of the street where there was ample room to pass in the centre of the road without going on the obstructed portion).

(2) When placed or made by others than the corporation, its servants or agents, or by its authority:—

*Vespra v. Cook (1876), 26 U.C.C.P. 182 (lumber on highway).

*Castor v. Uxbridge (1876), 39 U.C.R. 113 (telegraph poles lying on highway and encroaching on travelled part)—the plaintiff failed because of contributory negligence.

*Maxwell v. Clarke (1879), 4 A.R. 460 (wood on highway, but not encroaching on travelled part).

*Howard v. St. Thomas (1889-1890), 19 O.R. 719 (house being moved on highway).

Howarth v. McGugan (1892), 23 O.R. 396 (pile driver and iron hammer left on highway by contractor)—new trial ordered.

*O'Neil v. Windham (1897), 24 A.R. 341 (milk stand on highway).

*Ewing v. Toronto (1898), 29 O.R. 197 (defect in sidewalk).,

*Rice v. Whitby (1898), 25 A.R. 191 (house being moved on highway).

Homewood v. Hamilton (1901), 1 O.L.R. 266 (open and unguarded area under sidewalk).

*Minns v. Omemee (1901), 2 O.L.R. 579, (1902) 8 O.L.R. 508 (trap door in sidewalk left open and unguarded).

Gaby v. Toronto (1902), 1 O.W.R. 440 (unguarded hole dug by contractor).

McIntyre v. Lindsay (1902), 4 O.L.R. 448 (unguarded trench dug by gas company).

*Hemphill v. Haldimand (1904), 3 O.W.R. 605, (1904) 4 O.W.R. 163 (stones unlawfully placed on highway). (The plaintiff failed in this case because

Annotation.

it was not shown that the accident was caused by the stones being on the highway.)

Holland v. York (1904), 7 O.L.R. 533 (materials placed on highway).

Vassar v. Brown (1904), 3 O.W.R. 6, 4 O.W.R. 490 (excavation in highway).

Labombarde v. Chatham (1905), 10 O.L.R. 446 (loose live electric wire)—the plaintiff succeeded as to the Chatham Gas Company.

Kelly v. Whitchurch (1905), 11 O.L.R. 155, (1906) 12 O.L.R. 84 (logs on highway).

Gignee v. Toronto (1906), 11 O.L.R. 611 (planks on sidewalk).

*Gloster v. Toronto Electric Light Company (1906), 12 O.L.R. 413, 38 S.C.R. 27 (improperly insulated electric wire close to bridge)—the plaintiff succeeded as to the electric light company.

*Everett v. Raleigh (1910), 21 O.L.R. 91 (uncovered iron pipe of gas company in highway).

*Howse v. Southwold (1912), 27 O.L.R. 29, 5 D.L.R. 709 (telephone pole in highway).

*Colquhoun v. Fullerton (1913), 28 O.L.R. 102, 11 D.L.R. 469 (milk stand in highway).

OTHER PROVINCE CASES.

MANITOBA.

Mitchell v. Winnipeg (1907), 17 Man. L.R. 166, 6 W.L.R. 31, 7 W.L.R. 120 (accident caused by leaving a pile of lumber on the highway).

Couch v. Louise (1907), 16 Man. L.R. 656, 5 W.L.R. 482 (where a barbed wire fence had been allowed to remain across part of a highway for more than three months at the season of the year during which road repairs would be naturally made, notice of its existence will be imputed to the municipal corporation whose duty it is to keep the road in repair).

Smiley v. Oakland (1916), 31 D.L.R. 566 (personal injuries sustained while travelling in an automobile on a road which was out of repair owing to a wash-out of the earth covering a culvert which it was the duty of the corporation to keep in repair).

PRINCE EDWARD ISLAND.

It was held in McInnis v. Charlottetown (1897), 33 C.L.J. 297, that the corporation was not liable where a sidewalk was properly constructed, but the owner of abutting land, without the knowledge of the corporation, placed over the space between the sidewalk and the steps of his house a plank which projected four inches on the sidewalk and was an obstruction, and a person passing along the street struck her foot against the projecting plank and was injured.

In the foregoing four lists the cases in which the plaintiff failed are marked with a star.

The provisions of subsection 7 must be taken into consideration when dealing with the liability of a corporation.

LIABILITY WHERE DEFECT ARISES FROM AN ACT OR OMISSION OF AN INDEPENDENT CONTRACTOR.

An "independent contractor" is one who merely undertakes to produce a specified result, employing his own means to produce that result, and is entirely independent of any control or interference by the person with whom he contracts: Halsbury's Laws of England, vol. 1, par. 327.

An authority which employs a contractor to carry out work involving

Annotation. interference with a highway does not thereby absolve itself of its duty towards other persons. Although not responsible for his negligence or that of his servants so long as such negligence is merely "casual" or "collateral," the authority is responsible if the contractor fails to do or to get done what it is its duty to do or to get done, *i.e.*, to take the necessary precautions to protect the public from the danger which its operations entail: Ib. vol. 16, par. 238, and cases there cited.

See also Ballentine v. Ontario Pipe Line Company (1908), 16 O.L.R. 654; Dorst v. Toronto (1908), 11 O.W.R. 738, 12 O.W.R. 261; McIntosh v. Simcoe (1914), 5 O.W.N. 793,4, 15 D.L.R. 731; Dillon on Municipal Corporations, 5th ed., ss. 1722-3.

A company which had furnished the blocks to a contractor employed by a corporation to lay a block pavement in a street, and who was under the obligation to keep it in repair, was engaged in making repairs to the pavement. Pitch heated to a high degree was used in the work. It was heated by means of a furnace, which was placed on a nearby street, about three feet from the sidewalk. A workman of the company who had charge of the furnace and the heating of the pitch was not supplied with a proper ladle, but made use of a wooden one for ladling the pitch out of a cauldron into pails. When the ladle got partly filled with pitch, the workman put it into the fire to melt it out, and this practice burned the handle and weakened it. In pulling the ladle out of the fire, the handle broke off, and the ladle was dashed upon a heap of sand and the boiling pitch was splashed on a child who, attracted by what was going on, was standing near the furnace, and his face was burned severely. No precaution was taken to prevent any one from going near the furnace and boiling pitch or to protect children who would be attracted by what was going on. On this statement of facts it was held by Leitch, J., and by a Divisional Court that the corporation was liable for the injuries sustained by the child: Waller v. Sarnia (1912), 4 O.W.N. 403, 890, 8 D.L.R. 629, 9 D.L.R. 834, 23 O.W.R. 831. The ground upon which the decision was based was that "there was a statutory duty on the part of the defendants to keep the street in repair. The defendants themselves could have undertaken the work of repairing the pavement in question, and, if so, would have been under the obligation of taking such precautions in doing it as not to expose the public to danger of injury. The work of heating the pitch and handling it when heated was necessarily dangerous and required care and precaution. Under such circumstances a duty was cast upon the defendants, the responsibility for which they could not escape by delegating it to an independent contractor." It was also held that what had occurred was not of a casual and collateral character, but was something necessary to be done in furtherance of the work of repair.

This case is very near the line, and it may be open to question whether it was rightly decided. While the heating of the pitch was necessary for the purpose of the work, it was not necessary that it should be heated and handled in the manner in, or at the place at, which it was heated and handled, and it would seem that the negligence of the contractor was merely casual or collateral. The result reached was probably right for another reason than that on which the decision was based. What was done in boiling and handling the pitch was done on the highway and was a nuisance for which the defendants were responsible if, as no doubt was the case, they had knowledge of what was being done and permitted it to be done.

Annotation.

In Quebec a municipal corporation is not liable for the acts of a contractor, but is guilty of negligence and is liable for injuries caused by the condition of a highway if it leaves it open for traffic while a contractor is doing work on it if he produces a condition of danger, *e.g.*, by making an excavation in it: Scott v. Quebec (1913), Q.R. 44 S.C. 184.

LIABILITY FOR INJURIES SUSTAINED BY THE BREAKING DOWN OF A BRIDGE WHEN A TRACTION ENGINE IS BEING TAKEN OVER IT.

See The Traction Engines Act, R.S.O. c. 212.

It was held in Goodison v. McNab (1909), 19 O.L.R. 188, (1910) 44 S.C.R. 187, that where planking to protect the bridge as required by this statute is not laid down, the corporation is not liable.

In Linstead v. Whitchurch (1915), 35 O.L.R. 1, 27 D.L.R. 770, affirmed (1916), 36 O.L.R. 462, 30 D.L.R. 431, where the collapse of the bridge was not directly due to the failure to comply with the requirements of the statute the defendant was held to be liable.

Goodison v. McNab, 44 S.C.R. 187, was followed in Marion v. Montcalm (1915), 34 W.L.R. 683 (Man.).

OVERHANGING BRANCHES OF TREES AND FALLING TREES.

Where the overhanging branches of a tree extend over the line of travel so as to interfere with the reasonable use of the highway, the highway is out of repair.

Ferguson v. Southwold (1895), 27 O.R. 66, in which Embler v. Wallkill (1890), 57 Hun (N.Y.) 384, was approved, and it was laid down that anything which exists or is allowed to remain above a highway interfering with its ordinary and reasonable use constitutes want of repair and a breach of duty on the part of the municipal corporation having jurisdiction over the highway.

It had been said before by Hagarty, C.J., in Gilchrist v. Carden (1876), 26 U.C.C.P. 1, 5, 6: "I incline to think that the law which imposes the liability to keep in repair requires the municipality to guard in certain cases against overhanging trees likely to fall upon the road which might naturally imperil the passers-by."

LIABILITY WHERE THE DISREPAIR IS DUE TO CLIMATIC CONDITIONS.

The leading case upon the question of the liability of a municipal corporation to answer in damages for injuries occasioned by defects of this kind in a highway under the control of its council is Caswell v. St. Marys (1869), 28 U.C.R. 247, 254, and the observations of the late Sir Adam Wilson (then a Justice of the Court of Queen's Bench) have been accepted in subsequent cases as a correct statement of the law. He there said: "It must be a question of fact altogether for the jury to say whether the place alleged to have been out of order was dangerous, and, if so, from what cause, and, if from a natural cause or process, whether the persons liable to repair the road could reasonably and conveniently, as regarded expenditure and labour, have made it safe for use. If the obstruction or danger could properly and reasonably have been removed, then the persons on whom the burden lay to keep the road in order should be held to the fulfilment of their duty to make it safe and useful for the public, at whatever season of the year or from whatever cause the impediment or difficulty may have happened."

See also Organ v. Toronto (1893), 24 O.R. 318; Durochie v. Cornwall (1893), 23 O.R. 355, 359, (1894) 21 A.R. 279, 282, (1895) 24 S.C.R. 301, 303; Hogg v. Brooke (1904), 7 O.L.R. 273, 284; Wallace v. Ottawa and Gloucester

Annotation. Road Company (1905), 6 O.W.R. 652; Huth v. Windsor (1915), 34 O.L.R. 245, 250, 24 D.L.R. 875; McKinnon v. Wellington (1916), 9 O.W.N. 486; Cranston v. Oakville (1916), 10 O.W.N. 175, 315.

ENGLISH AND OTHER PROVINCE CASES.

ENGLAND.

Where a tramway company is under a statutory obligation to "at all times maintain and keep in good condition" so much of the road on which the tramway is laid as lies between the rails and eighteen inches beyond on either side, the company is not bound to remove the snow unless the fall is of such a depth as to render the road impassable. The fact that the removal of the snow will render the passage over the road more convenient is not enough to bring the case within the meaning of the statute: Acton v. London United Tramways, L.R. (1909) 1 K.B. 68.

Where the snow has fallen to such a depth as to create a distinct obstruction to the traffic, the duty of repairing the road includes the duty of removing the snow: Amesbury v. Wilts, L.R. (1883) 10 Q.B.D. 480.

MANITOBA.

The mere allowance of the formation and continuance of obstructions or dangerous spots in a highway due to accumulation of snow may amount to non-repair for which the corporation would be liable, but in every such case the question to be determined is whether, taking all the circumstances into consideration, it is reasonable to hold that the corporation should have removed the danger: Taylor v. Winnipeg (1898), 12 Man. L.R. 479.

NOVA SCOTIA.

Where a highway was in bad repair owing to the snow being thrown from the sidewalks into the roadway, causing deep pitch holes, and this condition was aggravated owing to severe storms during the winter, the municipal corporation was held liable for injuries caused by the condition of the highway. It was held that the statutes of Nova Scotia imposed upon the corporation the duty of repairing the streets and liability if the duty was not performed to an action by a person who has suffered any particular injury owing to the neglect to perform the duty: Halifax v. Walker (1885), Cameron's S.C. Cas. 569, affirming (1883), 16 N.S. 371.

In stating his opinion, Strong, J., answering the argument that the duty to repair does not include keeping the streets in good order during the winter season, when the nature of the climate renders this impossible, said:—"I see no reason why the streets which have to be used for traffic whilst the snow is on the ground, as well as at other times, should not be kept in a reasonable state of repair in the winter season as well as at other times. The question of what is reasonable repair is one for the jury, and this includes the removal of snow as well as other obstructions."

The plaintiff, who was the proprietor of an omnibus line plying in certain streets in the municipality under a license, recovered damages for the loss sustained by the wrecking of his carriages, the straining of his horses, the breaking of harness, etc., as well as loss of profits through the diminution of traffic on his omnibus lines.

QUEBEC.

When the bad condition of a street is the result of climatic conditions that the municipal corporation cannot reasonably control, it is not responsible for damages resulting from that condition, especially if the injury could have been avoided by ordinary prudence: Sherbrooke v. Short (1887), 15 Rev. L. 283.

Annotation.

The fall of an unusual quantity of snow does not constitute *force majeure* if it is allowed to remain on a leading thoroughfare for five or six days and no path is cleared on the sidewalk: Leclerc v. Montreal (1898), Q.R. 15 S.C. 205.

A municipal corporation in Quebec is not obliged to remove the snow from a narrow street, its removal being impracticable, and the occurrence of slopes from the centre of the street to the sidewalk being a necessary consequence to the non-removal of the snow and climatic conditions, the corporation is not liable for an injury caused by falling on a crossing under these conditions: Bonin v. Montreal (1899), Q.R. 15 S.C. 492.

To render a municipal corporation responsible for the bad state of a sidewalk, it is necessary that it should have continued sufficiently long for the presumption to arise that the corporation knew of it, especially when it is the case of a sidewalk usually well maintained and of ice having formed in a short time by reason of a sudden frost: Gunlack v. Montreal (1900), Q.R. 17 S.C. 294.

A municipal corporation is bound to keep roads at all times in good order and can be relieved only by proof of *force majeure*. Young v. Stanstead (1902), Q.R. 21 S.C. 148.

This was the case of the blocking of road owing to a severe snowstorm where no steps had been taken to break up or clear the road.

The obligation imposed on municipal corporations to keep the streets and roads in condition suitable for traffic may be affected by climatic conditions, and implies a respective reciprocal obligation on the part of the public to use them with care. Therefore a carter who, in full daylight, drives a heavy cart down a hill which he sees is covered with ice, and who, when the cart has begun to slip, adds to the impetus by an improper direction to the horse, is alone responsible for the accident which results therefrom, and has no recourse against the corporation: Gougeon v. Montreal (1908), Q.R. 34 S.C. 324.

RUNAWAY HORSES.

Where two causes combine to produce the injury both in their nature proximate, the one being the defect in the highway and the other some occurrence for which neither party is responsible, the corporation is liable provided the injury would not have been sustained but for the defect in the highway, and, therefore, where the accident of a horse running away beyond control and the defect in the highway combine to produce the injury, the corporation is liable if the injury would not have been sustained but for the defect in the highway: Sherwood v. Hamilton (1875), 37 U.C.R. 410.

Price v. Cataraqui Bridge Company (1874), 35 U.C.R. 314, and Steinhoff v. Kent (1887), 14 A.R. 12, which may seem to be opposed to this statement of the law, are distinguishable on the ground mentioned by Osler, J.A., in the latter case that the plaintiff could not "complain of the absence of a guard, because at the time of the accident he was not making use of the road in the ordinary way, and that the defendants were only bound 'to provide against the ordinary contingencies of travel,' within which the running away of the horse under the circumstances proved did not come": p. 18.

These cases may also be distinguished on the ground that it did not follow that if the draw of the bridge had been guarded, the accident would have been prevented.

Annotation. See also Thomas v. North Norwich (1905), 9 O.L.R. 666, and Little v. Smith (1914), 32 O.L.R. 518, 20 D.L.R. 399, where the cases bearing on this question are discussed and the rule laid down in Sherwood v. Hamilton (supra) was approved.

In Bell Telephone Company v. Chatham (1900), 31 S.C.R. 61, it was held that a person driving on a public highway, who sustains injury to person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent, uncontrollable speed was the proximate cause of the accident.

"Default."

"The ground of the action is either positive misfeasance on the part of the corporation, its officers or servants, or by others under its authority in doing acts which cause the streets to be out of repair, in which case no other notice to the corporation of the condition of the street is essential to its liability, or the ground of the action is the neglect of the corporation to put the streets in repair or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, in which cases notice of the condition of the street or what is equivalent to notice is necessary . . . to give the person injured a right of action against the corporation:" Dillon on Corporations, 5th ed., s. 1712.

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

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

However, in the recent case of Vancouver v. Cummings (1912), 46 S.C.R. 457, 2 D.L.R. 253, 22 W.L.R. 164, 2 W.W.R. 66, a different view was expressed by Idington, J. After referring to cases where "the forces of nature have suddenly destroyed or put out of repair a road or some one has maliciously or negligently wrought the same result," he went on to say:—"I am, despite *dicta* to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out or apparent wearing out or imperfect repair of the road there arises upon evidence of accident caused thereby a presumption without evidence of notice that the duty relative to repair has been neglected."

Although if a rule were to be laid down for the first time, such a construction of the statute as this learned Judge adopts would appear to be sounder than that which has prevailed in Ontario, when so careful and experienced Judges as the late Mr. Justice Ferguson and Osler, J.A., as well as other members of the Court of Appeal, treated it as not open to question that in the class of case to which Idington, J., referred it was necessary, in order to establish liability, to prove notice to the corporation or facts from which notice was to be presumed or implied, and the late Mr. Justice Maclennan was of opinion that the plaintiff should fail because notice had not been proved (McGarr v. Prescott (1902), 4 O.L.R. 280), it would not be prudent for a plaintiff's counsel to depart from the well-settled and uniform practice of the Ontario Courts.

Annotation.

See also McNiroy v. Bracebridge (1905), 10 O.L.R. 360; Kew v. London (1907), 9 O.W.R. 224; Rushton v. Galley (1910), 21 O.L.R. 135.

KNOWLEDGE BY THE PERSON INJURED OF THE DEFECT.

Knowledge by the person injured of the defective condition of the highway does not necessarily disentitle him to recover. He had the right to use it, and the question is whether, under the circumstances, he exercised such care as a prudent person would reasonably exercise in using it, knowing its condition: Gordon v. Belleville (1887), 15 O.R. 26; Galloway v. Sarnia (1904), 3 O.W.R. 361, (1905) 5 O.W.R. 458; Kew v. London (1907), 9 O.W.R. 224; Roach v. Colborne (1913), 29 O.L.R. 69, 13 D.L.R. 646. See also Copeland v. Blenheim (1885), 9 O.R. 19.

But a corporation is not liable to a person familiar with the locality and having the knowledge that there is close at hand a safe passage-way across a plainly visible shallow trench lawfully and necessarily in the street at the time (in this case in connection with the laying of the ties of a street railway) who is injured while endeavouring to cross the trench in broad daylight: Keachie v. Toronto (1895), 22 A.R. 371, followed in Atkin v. Hamilton (1897), 24 A.R. 389, though it had been distinguished in the Court below as reported in (1896) 28 O.R. 229, where the case is reported as Aikin v. Hamilton.

See also Belleisle v. Hawkesbury (1904), 8 O.L.R. 694, where the plaintiff, who was injured in jumping, in daylight, from a cart on to the completed portion of a sidewalk, which was then to his knowledge in course of construction and unfinished, failed to recover; and Burns v. Toronto (1907), 10 O.W.R. 723.

Gordon v. Belleville (supra) was followed in Touhey v. Medicine Hat (1912), 7 D.L.R. 759, 2 W.W.R. 715, (1913) 5 A.L.R. 116, 10 D.L.R. 691, 23 W.L.R. 880, 4 W.W.R. 176, but a different view was taken in Gunlack v. Montreal (1900), Q.R. 17 S.C. 294, in which it was held that a person who sees before him a sidewalk covered with glare ice, and does not turn aside for fear of losing time, has no recourse against the corporation if he falls when passing over it.

FORGETFULNESS OF A KNOWN DANGER.

Mere forgetfulness of a known danger does not disentitle the person injured to recover: Peart v. Grand Trunk Railway Company (1884), 10 A.R. 191; Copeland v. Blenheim (1885), 9 O.R. 19; Scriver v. Lowe (1900), 32 O.R. 290; Keech v. Smith's Falls (1907), 15 O.L.R. 300.

WHERE NON-REPAIR IS NOT THE PROXIMATE CAUSE OF THE INJURY.

It has been held that where a highway is out of repair, but the proximate cause of the injury is the negligence of a railway company, the company and not the corporation is liable: Marsh v. Hamilton (1903), 2 O.W.R. 480, (1904) 3 O.W.R. 525;

LIABILITY WHERE HIGHWAY DESTROYED.

Where by the forces of nature a highway is so destroyed that it is impracticable to form a permanent and passable road along the old track at a reasonable expense and it is impossible in a commercial sense to repair it—that it "would cost more than the subject-matter of repair is reasonably worth"—the body upon which the duty to repair rests is relieved from that duty.

This is in accordance with the statement of the law made by Blackburn, J., in Reg. v. Greenhow, L.R. (1876) 1 Q.B.D. 703, 708.

Annotation.

This question was considered by a Divisional Court in Cummings v. Dundas (1907), 13 O.L.R. 384, and the law was thus stated by the Chief Justice:—"Such physical injury to a highway as deprives its former owner of any title to it and of the right to repair it, whether the injury be called destruction or not, must necessarily relieve such owner of the obligation to repair; but when, as in the case of Regina v. Greenhow (supra), the question is free from the element of change of ownership, then it becomes a question of fact whether the injury does or does not amount to destruction."

See also Rex v. Landulph (1834), 1 Moo. & R. 393; Reg. v. St. Paul (1840), 2 Moo. & R. 307; Reg. v. Bamber (1843), 5 Q.B. 279; Reg. v. Hornsea (1854), Dears C.C. 291, 302; McCormick v. Pelée (1890), 20 O.R. 288.

PENALTY UNDER THE QUEBEC CODE.

The action for the penalty and that for damages mentioned in art. 793 of the Quebec Municipal Code (art. 453 of the new Code) are independent actions, and the fact that a plaintiff has sued for the penalty for the default in repairing a highway is no bar to an action for damages for the same default: Pageau v. St. Ambroise (1908), 10 Que. P.R. 208.

NECESSITY FOR BY-LAW.

See notes to s. 249 (1).

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

CORRESPONDING PROVISIONS IN OTHER PROVINCES.

ALBERTA.

The corresponding provision to subsections 2, 4 and 5 of the Alberta Village Act is s. 74, which enacts that:—

"No action shall be brought under the provisions of the next preceding section except within six months from the date upon which the cause of action arose and unless notice in writing of the accident shall have been mailed to or served upon the secretary-treasurer of the village within one month after the date upon which the cause of action arose.

"Provided that in case of the death of the person injured or if the Court or Judge before whom the action is tried considers that there is a reasonable excuse for the want or insufficiency of such notice and that the defendants have not thereby been prejudiced in their defence, the want of notice required under this section shall be no bar to the maintenance of this action."

The corresponding provision to subsections 2, 4 and 5 of the Alberta Town Act is s. 350 (2), which is similar to s. 74 of the Village Act.

The corresponding provision to subsections 2, 4 and 5 of the Rural Municipality Act is s. 220, which is similar to s. 74 of the Village Act.

MANITOBA.

The corresponding provision to subsections 2 and 4 in Manitoba is s. 627, R.S. 1913, c. 133, which enacts that:—"Subject to the provisions of the next succeeding section, no action shall be brought to enforce a claim for damages under either of the two preceding sections unless notice in writing of the accident and the cause thereof has been served upon or mailed to

Annotation.

the clerk or mayor (or reeve) of the municipality within seven days after the happening of the accident in a case coming within section 626, and within one month after the happening of the accident in any other case, and in no case unless the action be commenced within three months after the receiving of such notice."

SASKATCHEWAN.

The corresponding provision of the Saskatchewan City Act is s. 512, which enacts that:—"No action shall be brought against a corporation for the recovery of damages occasioned by default in its duty of repair as mentioned in section 510, whether the want of repair was the result of non-feasance or misfeasance, after the expiration of three months from the time when the damages were sustained," and the corresponding provision of the Saskatchewan Town Act is the same (s. 495).

The provision of the Saskatchewan Village Act which corresponds with subsections 2 and 4 is s. 168, which enacts that:—"No action shall be brought under the provisions of the next preceding section except within six months from the date upon which the cause of action arose and unless notice of such action shall have been given to the secretary-treasurer of the village within one month after the date upon which such damage was caused."

The provision of the Saskatchewan Rural Municipality Act which corresponds with sub-sections 2 and 4 is s. 221, which is similar to s. 168 of the Village Act.

CASES UNDER THE CORRESPONDING PROVISION OF THE QUEBEC CODE.

No action for damages or for a penalty based on failure to keep municipal roads in repair can be brought against a municipal corporation before fifteen days' previous notice in writing has been given to the secretary-treasurer, and an action brought without such notice will be dismissed: Belanger v. Boucherville (1910), 11 Que. P.R. 361.

See art. 453 of the new Municipal Code.

If a landowner is under a direct liability to a person injured owing to neglect to keep sidewalks adjacent to his property on the public street in repair or free from snow or ice, as required by a municipal by-law, the neglect of that duty is at the most only a *quasi-delit* of omission on the part of the municipal corporation and the landowner jointly and severally, and the latter may set up the same defence as would be available to the corporation, including the prescriptive limitation by which action against a municipal corporation must be taken within six months after the accident: Batsford v. Laurentian Paper Company (1912), Q.R. 41 S.C. 367, 5 D.L.R. 306, 18 Rev. de Jur. 70.

An action to recover damages from a municipal corporation governed by The Cities and Towns Act, R.S.Q. 5864, will be dismissed on exception to the form, if the notice of suit previously given did not contain the particulars of the plaintiff's claim, or state the place of his residence: Potter v. St. Lambert (1916), 17 Que. P.R. 295.

"Whether the want of repair was the result of non-feasance or misfeasance."

These words were introduced by 3 and 4 Geo. V. c. 43, and have effected an important change in the law. Before this amendment, it had been settled by decision that the subsection did not apply where the condition of the highway was caused by the corporation's misfeasance. In deciding what was misfeasance and what non-feasance, some very fine distinctions were drawn, and it was often difficult to say within which class a particular case

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fell. As an illustration of the fine distinctions that were drawn, two cases may be referred to—Rowe v. Leeds and Grenville (1863), 13 U.C.C.P. 515, and Pearson v. York (1877), 41 U.C.R. 378. In the former the defendants, for the purpose of repairing their road, placed on the side of it heaps of earth, stones and gravel, and took no precautions to prevent persons passing along the road from running against them, and the plaintiff's waggon ran against one of them and was broken, and for the damages thus sustained he brought the action, and it was held that what he complained of was misfeasance and that the limitation provision did not apply. In the other case, the defendants made a hole in the road in order to ascertain whether repairs were required there, but did not replace the materials or fill up the hole or place there any light or means to warn persons using the road, and the plaintiff, while crossing the road, in the evening, struck his foot on some of the materials taken out of the roadbed and fell and was injured. He did not bring his action within three months, and it was held that his claim was barred.

See also Keech v. Smith's Falls (1907), 15 O.L.R. 300, where some of the cases illustrating the distinction are referred to.

The change in the law does not affect cases in which the action was begun before the change came into effect: Glynn v. Niagara Falls (1913), 29 O.L.R. 517, 15 D.L.R. 426, (1914) 31 O.L.R. 1, 16 D.L.R. 866.

This subsection does not apply to actions for negligence in operating a street railway, but the limitation section of The Railway Act applies: Reid v. Sault Ste. Marie (1916), 10 O.W.N. 283.

As the distinction between misfeasance and non-feasance obtains in other provinces, it seems desirable that reference to some of the cases illustrating the distinction should be made.

The leading English cases are:—

Bathurst v. Macpherson, L.R. (1879) 4 A.C. 256; Pictou v. Geldert, L.R. (1893) A.C. 524, 9 T.L.R. 638; Sydney v. Bourke, L.R. (1895) A.C. 433, 11 T.L.R. 403; Bull v. Shoreditch (1901) 18 T.L.R. 171, (1902) 19 T.L.R. 64, (1904) 20 T.L.R. 254; Maguire v. Liverpool, L.R. (1905) 1 K.B. 767, 781, 21 T.L.R. 278; and the following Ontario cases may also be referred to:—

Dickson v. Haldimand (1902) 2 O.W.R. 969; Kirk v. Toronto (1903), 7 O.L.R. 36; Clemens v. Berlin (1904), 7 O.L.R. 33; Read v. Toronto (1904), 4 O.W.R. 310; Armour v. Peterborough (1905), 10 O.L.R. 306; Burns v. Toronto (1906), 13 O.L.R. 109; Biggar v. Crowland (1906), 13 O.L.R. 164; Brown v. Toronto (1910), 21 O.L.R. 230; James v. Toronto (1912), 3 O.W.N. 1007; in addition to the cases noted elsewhere under this subsection.

COMPUTATION OF THE TIMES MENTIONED IN THE SECTION.

The three months mentioned in subsection 2 are calendar months (R.S.O. c. 1, s. 29, cl. (u), and are to be computed from the day on which the injury was met with, though the extent of it cannot be estimated until afterwards. (Miller v. North Fredericksburgh (1865), 25 U.C.R. 31), and exclusive of that day, but inclusive of the last day of the three months—for instance, if the injury occurred on the 5th January, the action must be commenced on or before the 5th April following.

The law of Quebec appears to be the same: Quebec v. Howe (1887), 13 Q.L.R. 315; Hunter v. Montreal (1889) 12 Leg. News 187; Featherston v. Lachine (1895), Q.R. 9 S.C. 37.

The days mentioned in subsection 4 are to be computed without excluding Sundays or other holidays, and are exclusive of the day on which

Annotation.

the injury occurred, but inclusive of the last of the thirty days or of the seven days (as the case may be).

Where the last day of the three months or of the days mentioned in subsection 4 falls on a Sunday or a holiday, the last day is the day next following which is not a Sunday or other holiday: R.S.O. c. 1, s. 28, cl. (h); Ellis v. Toronto (1916), 10 O.W.N. 146.

When the period prescribed is a calendar month running from any arbitrary date and not coinciding with any particular month in the calendar the period cannot exceed in length the number of days in the month in which it starts, and where the second of the two months in which the period falls is a month containing fewer days than those contained in the first month, the number of days in the period may be less than that of those in the first month. Such a period can never extend into a third month: Halsbury's Laws of England, vol. 27, par. 867.

A similar rule is applicable where the period is more than one calendar month. If, therefore, the period is three months and the injury occurred on the 29th or 30th of November, they would end on the last day of February, whether it happened to be the 28th or, as in leap year, the 29th.

Where a corporation is added as a defendant after the commencement of the action, the commencement of the action *qua* the corporation is when it is made a defendant: Burrows v. Grand Trunk Railway Company (1915), 34 O.L.R. 142, 23 D.L.R. 173, 18 Can. Ry. Cas. 183.

The limitation in this subsection does not apply to an action to recover damages for injuries sustained owing to the negligence of a municipal corporation in operating its street railway, but the limitation section of The Railway Act applies: Kuusisto v. Port Arthur (1916), 37 O.L.R. 146, 31 D.L.R. 670.

(3) Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk.

CORRESPONDING PROVISIONS IN OTHER PROVINCES.

MANITOBA.

The corresponding provision to this subsection in Manitoba is s. 626, R.S. 1913, c. 133, which enacts that:—"A municipality shall not be liable for accidents arising from persons falling owing to snow or ice upon the sidewalks, unless in cases of gross negligence on the part of the municipality."

SASKATCHEWAN.

The corresponding provision of the Saskatchewan City Act is s. 511, which enacts that:—"Except in case of negligence a corporation shall not be liable for personal injury caused by snow or ice upon a sidewalk." and the corresponding provision of the Saskatchewan Town Act is the same (s. 494).

"Gross Negligence."

This term has been the subject of much unfavourable judicial comment, and is not adopted in Halsbury's Laws of England, vol. 21, par. 628, note (i).

It is impossible to define "gross negligence," but the Legislature, when it adopted the term, intended that, in the cases to which subsection 3 applies, something more should be proved than is necessary to establish a cause of action under subsection 1.

In Drennan v. Kingston (1897), 27 S.C.R. 46, the meaning of the term

Annotation. was considered, and at page 60 Sedgewick, J., says that, as used in this subsection, he would give it the meaning of "very great negligence."

In the same case the trial Judge, in his charge to the jury, which was approved by the Supreme Court (p. 60), thus dealt with the question:—

"If you think that owing to the condition of that crossing—the snow upon the slope, the condition of the snow, if you think it was dangerous—that that danger was a manifest danger to anybody who was caring to look—if that state of things had existed in a central portion of the city where many people were passing—in one of the most frequented parts of the city—if that condition had existed for many days; if the means of preventing that condition of things was simple; if the corporation neglected to discharge the duty of applying that simple remedy—then I think the case would be one of gross negligence. I will ask you, therefore, to say whether you think there was negligence on the part of the corporation or whether you think there was gross negligence": p. 54.

Perhaps what was said in that case and in the cases afterwards referred to may afford a guide as to the application of the subsection.

"Snow or ice upon a sidewalk."—A change in the wording of this subsection as it stood in 3 Edw. VII. c. 19, as s. 606 (2), has been made. That subsection read:—"No municipal corporation shall be liable for accidents arising from persons falling owing to snow or ice upon the sidewalks unless in case of gross negligence by the corporation," and its provisions were first enacted by 57 Viet. c. 50, s. 13, which came into force on 1st September, 1914.

The meaning of the subsection has been considered and it has been applied in several cases. The list which follows is not exhaustive, but contains the principal cases, and those in which the plaintiff failed are marked with a star:—

Drennan v. Kingston (1896), 23 A.R. 406, (1897) 27 S.C.R. 46.
McQuillan v. St. Marys (1899), 31 O.R. 401.
*Ince v. Toronto (1900), 27 A.R. 410, (1901) 31 S.C.R. 323.
*Stevens v. Chatham (1902), 1 O.W.R. 199.
*Mann v. St. Thomas (1902), 1 O.W.R. 480.
*Mahoney v. Ottawa (1904), 3 O.W.R. 695.
Ludgate v. Ottawa (1906), 8 O.W.R. 257, 865.
*Lynn v. Hamilton (1907), 10 O.W.R. 329.
Merritt v. Ottawa (1908), 12 O.W.R. 561.
Bell v. Hamilton (1910), 1 O.W.N. 644, 784.
Joncas v. Ottawa (1910), 1 O.W.N. 737, 2 O.W.N. 168.
Yates v. Windsor (1912), 3 O.W.N. 1513, 3 D.L.R. 891.
*Gauthier v. Caledonia (1914), 7 O.W.N. 171, 19 D.L.R. 879.
Edwards v. North Bay (1915), 8 O.W.N. 119, 22 D.L.R. 744.
*Palmer v. Toronto (1916), 38 O.L.R. 20, 32 D.L.R. 541. Affirmed by Supreme Court of Canada, 1st May, 1917 (not yet reported).
Killeleagh v. Brantford (1916), 38 O.L.R. 35, 32 D.L.R. 457.
*German v. Ottawa (1917), 11 O.W.N. 331, since reversed by a Divisional Court (1917), 39 O.L.R. 176; post 632.
*Ellis v. Toronto (1917), 12 O.W.N. 128.

See also Carlisle v. G.T.R. Co. (1912), 25 O.L.R. 372, 1 D.L.R. 130, where the meaning of "gross negligence" is considered and explained.

"Sidewalk."—A street crossing for the purpose of passing from one sidewalk to another is a "sidewalk" within the meaning of subsection 3: Kingston v. Drennan (supra), pp. 59, 60.

Annotation.

(4) No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head, or the clerk of the corporation, in the case of a county or township within thirty days, and in the case of an urban municipality within seven days after the happening of the injury, nor unless where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time.

CORRESPONDING PROVISIONS IN OTHER PROVINCES.

As to Alberta and Manitoba, see notes to subs. 2.

SASKATCHEWAN.

The corresponding provision of the Saskatchewan City Act is s. 513, as amended by Stats. 1916, c. 18, s. 28, which enacts that:—"No action shall be brought for the recovery of such damages unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the mayor or city clerk within thirty days after the happening of the injury," and the corresponding provision of the Saskatchewan Town Act is the same (s. 496).

As to Villages and Rural Municipalities, see notes to subs. 2.

OTHER PROVINCE CASES UNDER PROVISIONS SIMILAR TO SUBS. 4.

MANITOBA.

In Iveson v. Winnipeg (1906), 16 Man. L.R. 352, 4 W.L.R. 53, 5 W.L.R. 118, a notice which stated that an action would be brought to recover for injuries sustained through the omission and default of the corporation to keep in repair a public sidewalk on the east side of Main Street between Polson and Bannerman Avenues, the accident having happened at a point between Polson Avenue and Atlantic Avenue, which is between Polson and Bannerman Avenues, was held to be sufficient.

In Mitchell v. Winnipeg (1907), 17 Man. L.R. 166, 6 W.L.R. 31, 7 W.L.R. 120, a notice delivered to the chairman of the Board of Works, which came to the hands of the clerk in due time, was held to be sufficient.

QUEBEC.

In Pageau v. St. Ambroise (1908), 10 Que. P.R. 208, it was held that, in an action for damages occasioned by default in repairing a highway, it is not necessary to allege that the notice required by art. 793 of the Municipal Code (art. 453 of the new Code) has been given.

A right of action for damages against the corporation of the city of Montreal, being based primarily on the sufficiency of the notice as to the place where the accident occurred according to art. 536 (a) of the charter of that city, a notice stating that the accident occurred on a sidewalk on the corner of two streets, when, in fact, it occurred on the crossing between those two streets, is insufficient: Seybold v. Montreal (1909), 10 Que. P.R. 377.

In Batsford v. Laurentian Paper Company (1912), Q.R. 41 S.C. 367, 5 D.L.R. 306, 18 Rev. de Jur. 70, it was held that the failure to give notice to the clerk of the municipality within sixty days of an injury sustained

Annotation.

on a defective sidewalk without an explanation sufficient to justify the Court in permitting the maintenance of the action after that period or the failure to begin action for the injury against the corporation within six months of the date of the accident, as required by art. 5864 of The Cities and Towns Act, R.S.Q. 1909, will bar an action not only against a municipal corporation, but also against a property owner who is answerable to the corporation under subs. 20 of art. 5641 of the same Act for failure to maintain the sidewalk in a safe condition, as required by a by-law of the municipal council, whether the liability created by that subsection renders the property holder liable to the public as well as to the municipal corporation or only gives the right to the municipal corporation to call him in as a warrantor.

In order to entitle a person injured owing to the failure of a municipal corporation to keep a highway in repair to maintain an action for the recovery of damages for the injury, notice of claim containing particulars as to time, place and date must be served on the corporation within a fixed delay from the date of the accident. A notice had been served stating that the injured person had fallen opposite a public building fronting on two streets, the name of one being added after the designation of the building, and after the expiry of the time allowed for serving the notice it was amended by stating that the injured person fell opposite the same building, but on the other street, and it was held that the corporation, not having been prejudiced, could not escape liability by pleading irregularity in the notice, especially as it had obtained full possession of the facts and had proceeded "in warranty for indemnity" against the owners of the building opposite to which the injured person fell.

The statute requiring notice of action against a municipal corporation was not enacted to allow corporations to escape liability on technical grounds, but to enable them by investigation to come into possession of all facts so as either to compromise or properly prepare their defence.

West v. Montreal (1912), 9 D.L.R. 9.

Scott v. Quebec (1913), Q.R. 44 S.C. 184, in which it was held that failure to give notice of action should be invoked by a preliminary plea. Filing a defence to the action is a waiver of want of notice.

In Robertson v. Montreal (1916), Q.R. 50 S.C. 208, 30 D.L.R. 312, it was held that in a notice of action slight variations as to the exact spot where the accident took place are not sufficient to render the notice null if the corporation is sufficiently informed as to the place where the accident happened, that the word "*vis-a-vis*" or "opposite" includes by its natural meaning both sides of a street, and, therefore, a notice which described the place where the accident happened as being opposite ("*vis-a-vis*") 56 Wellington Street, which number was on the south side of the street, and the place where it actually happened was on the north side of the street, and there was no number opposite on the north side of the street, was sufficient.

In the same case it was said by Archibald, J., acting Chief Justice, delivering the judgment of the Court: "The object of giving notice to the city of these accidents is to give the city the opportunity of an early investigation, so that it may be in a position to meet the evidence produced on the part of the plaintiff. It has been held over and over again that slight variations as to the exact spot where the accident happened will not be sufficient to nullify a notice, providing the object of giving the notice is sufficiently accomplished—that is to say, that the city is sufficiently informed as to the place where the accident happened": p. 211.

ONTARIO CASES UNDER SUBS. 4. Annotation.

The requirement of notice is not limited to the cases mentioned in subsection 3; it is required in all cases to which subsection 1 applies: Aldis v. Chatham (1897), 28 O.R. 525, 527.

The notice is sufficient if it affords reasonable information to enable the council to investigate: Young v. Bruce (1911), 24 O.L.R. 546. It should state the time and place with reasonable particularity so as to identify the occasion: per Street, J., in McInnes v. Egremont (1903), 5 O.L.R. 713, 715. "It is not necessary to state the cause of action, but only that which will enable" the corporation "to have substantial notice of what has occurred, so that" it "may make proper inquiries and may come to trial prepared to meet the plaintiff's case": per Field, J., in Clarkson v. Musgrave (1882), 9 Q.B.D. 386, 390, quoted by Middleton, J., in Young v. Bruce (supra), p. 550.

The notice is sufficient if it is plain and intelligible to an ordinary understanding: Davignon v. Stanbridge Station (1899), Q.R. 14 S.C. 116; Jones v. Nicholls (1844), 13 M. & W. 361, 153 E.R. 149, referred to by Ritchie, C.J., in St. John v. Christie (1892), 21 S.C.R. 1, 7.

Notices have been held to be sufficient:—

(1) Although the date of the accident was stated to be the 7th when it should have been 8th May, but the place where it occurred was clearly described: McInnes v. Egremont (supra).

(2) Where the place was described as "between Underwood and Port Elgin," the road between those places being 10 miles in length: Young v. Bruce (supra).

(3) Where the notice gave the name of the street, but not the particular side of it: per Boyd, C., in Breault v. Lindsay (1907), 10 O.W.R. 890, 892.

(4) Where the notice was of claim "for smashing plaintiff's automobile by car No. 46 on Cumberland Street North this morning": Kuusisto v. Port Arthur (1916), 37 O.L.R. 146, 31 D.L.R. 670.

(5) Where there was a mistake as to the exact place where the accident happened and the date of it was not given: Killeleagh v. Brantford (1916), 38 O.L.R. 35, 32 D.L.R. 457.

See also Pipher v. Whitchurch (1917), 12 O.W.N. 87, 39 O.L.R. 244, post.

It would be safer, notwithstanding these decisions, to state with accuracy the date when the injury was met with, the place where the accident occurred, giving the name of the road and the place on it described so as to enable the corporation to identify it, and it would be well to add what the defect was.

The following form may be safely used:—

Take notice that on the day of 19
I met with an accident on street
in the (*or* on the road allowance between the
and concessions of the township of) at
(*stating the spot where the accident happened with reference to houses or distances with as much particularity as practicable*) and that the accident was occasioned by (*stating the nature of the defect, e.g., an unguarded ditch, a broken plank in the sidewalk, a hole in the roadway, an obstruction consisting of in the roadway (or on the sidewalk), etc.*).

Annotation.

Dated 19

A. B.

To the Corporation of
the of

If the notice is given by someone else on behalf of the injured person, as it may be, there should be substituted for the word "I" in the form the name of the injured person.

(5) In case of the death of the person injured, failure to give the notice shall not be a bar to the action, and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice shall not be a bar to the action, if the court or Judge before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that the corporation was not thereby prejudiced in its defence.

CORRESPONDING PROVISIONS IN OTHER PROVINCES.

ALBERTA.

See notes to subs. 2.

MANITOBA.

The corresponding provision of the Manitoba Act is s. 628, which enacts that:—"When death results from any such accident as aforesaid, the want of the said notice shall not be a bar to an action, and in all other cases the want or insufficiency of the notice shall not be a bar to an action if the Court or Judge before whom the action is brought considers that there was reasonable excuse for such want or insufficiency, and that the municipality has not thereby been prejudiced in its defence."

SASKATCHEWAN.

The corresponding provision to this subsection of the Saskatchewan City Act is s. 514 (1), which enacts that:—"In case of the death of the person injured, failure to give such notice shall not be a bar to the action; and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice shall not be a bar to the action, if the Court or Judge before whom the action is tried is of opinion that there is reasonable excuse for the want or insufficiency of the notice, and that the corporation was not thereby prejudiced in its defence," and the corresponding provision of The Saskatchewan Town Act is the same, omitting the exception as to injury caused by snow or ice (s. 497).

ONTARIO CASES UNDER SUBS. 5.

REASONABLE EXCUSE FOR THE WANT OR INSUFFICIENCY OF THE NOTICE.

The cases as to what will constitute such an excuse are very unsatisfactory and no principle can be extracted from them.

In the latest reported case, Wallace v. Windsor (1915-16), 36 O.L.R. 62. 28 D.L.R. 655, the Divisional Court was equally divided upon the question. There the notice which should have been given within seven days was not given until nearly a month after the injury was received, and the excuse for the failure to give due notice was that the person injured believed that the injury was

Annotation.

only a sprained ankle, and, although she suffered great pain, which she alleged incapacitated her from giving notice, she did not contemplate bringing an action until more than three weeks after, when she consulted a doctor, and, having found that there was a fracture of the fibula and another injury at once gave the notice. This was held by the trial Judge not to be a reasonable excuse within the meaning of the subsection, and his view was upheld by a Divisional Court upon an equal division, Meredith, C.J.C.P., and Masten, J., being of opinion that it was right and Riddell and Lennox, JJ., being of contrary opinion. Many of the cases under the subsection and under analogous provisions of other statutes were referred to and commented on.

It would appear to be unnecessary to refer to all the cases on the subject. It will suffice to mention the principal ones, and the following is a list of them—in it those in which the reasonable excuse was held not to have been shewn are marked with a star:—

Drennan v. Kingston (1896), 23 A.R. 406, (1897) 27 S.C.R. 46.

*Biggart v. Clinton (1903), 2 O.W.R. 1092, (1904) 3 O.W.R. 625.

*O'Connor v. Hamilton (1904), 8 O.L.R. 391, (1905) 10 O.L.R. 529 (though the plaintiff failed on another ground also).

Morrison v. Toronto (1906), 12 O.L.R. 333, 7 O.W.R. 547, 607.

*Anderson v. Toronto (1908), 15 O.L.R. 643.

Young v. Bruce (1911), 24 O.L.R. 546.

*Egan v. Saltfleet (1913), 29 O.L.R. 116, 13 D.L.R. 884.

It must be borne in mind that cases in which the injury was caused by snow or ice upon a sidewalk (subs. 3) are excepted, and that in them, except in case of the death of the person injured, failure to give the prescribed notice is fatal.

The conflict of judicial opinion which has been mentioned affords reason for the suggestion, not now made for the first time, that the requirement of reasonable excuse should be eliminated from the subsection, and that a municipal corporation would be amply protected if all that was required were that it should appear that it was not prejudiced in its defence by the want or insufficiency of the notice. The object of requiring the notice is to enable the corporation to investigate and to be prepared to meet the injured person's case. If the subsection were amended in a case where no notice or an insufficient notice had been given and the corporation was not in possession of the information which the notice is required to give, it would, no doubt, be held that the corporation was thereby prejudiced in its defence. As the subsection stands, it is a pitfall, and has often worked serious injustice, as it undoubtedly does when the corporation has knowledge of the defect and of the injury, but there is no reason beyond that for the failure to give the notice or for the insufficiency of it, because mere knowledge by the corporation of the accident is, standing alone, not enough to excuse the want of the notice: per Osler, J.A., in O'Connor v. Hamilton (1905), 10 O.L.R., at p. 536.

Such a change in the law as is suggested would not be an unreasonable one, not only for the reasons that have been mentioned, but also because the three months' limitation is a departure in case of corporations from the general law as to the limitation of actions.

(6) This section shall not apply to a road, street or highway laid out or to a bridge built by a private person or by a body

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corporate until it is established by by-law of the council or otherwise assumed for public use by the corporation.

CORRESPONDING PROVISIONS IN OTHER PROVINCES.

ALBERTA.

The corresponding provision of The Alberta Town Act is s. 351, which enacts that:—"The last preceding section shall not apply to any road, street, bridge, alley or square, crossing, sewer, culvert, sidewalk or other work made or laid out by any private person until the same has been established as a public work by by-law or has been assumed for public use by the council."

MANITOBA.

The corresponding provision of the Manitoba Act is s. 630, which enacts that:—"Section 624 shall not apply to any road, street, bridge or highway laid out by any private person; and the municipality shall not be liable to keep in repair any such last mentioned road, street, bridge or highway, until established by by-law or otherwise assumed by public user by such municipality."

SASKATCHEWAN.

The corresponding provision of The Saskatchewan City Act is s. 510 (2), which enacts that:—"This section shall not apply to any road, street, bridge, alley or square, crossing, sewer, culvert, sidewalk or other work made or laid out by a private person until the same has been established as a public work by by-law or otherwise assumed for public use by the corporation," and the corresponding provision of The Saskatchewan Town Act is the same (s. 493 (2)).

ONTARIO CASES.

It was held in Reg. v. Yorkville (1872), 22 U.C.C.P. 431, that the corresponding provision of The Municipal Act of 1866 (s. 399) did not apply so as to relieve the corporation from the duty of keeping in repair a bridge connecting two highways, which was dedicated to the public and in public use for nine or ten years, during which time it had been repaired by and at the expense of the corporation, although no by-law had been passed establishing or assuming it.

The language of the provision then was: "This section shall not apply to any road, street, bridge or highway laid out without the consent of the corporation by by-law until established and assumed by by-law."

OTHER PROVINCE CASES.

ALBERTA.

The obligation of the corporation under s. 158 of the Calgary (Alta.) Charter of keeping in repair highways and bridges "belonging to the city" extends to a bridge forming part of a highway, notwithstanding the statutory obligation of a railway company under The Irrigation Act (R.S.C., c. 61, s. 25) for its safe maintenance and the failure of the corporation to provide the bridge with proper railings renders it liable for injuries sustained by a traveller owing to the absence of such railings: Lusk v. Calgary, and Wheatley v. Calgary (1915), 22 D.L.R. 50, (1916) 28 D.L.R. 392, 33 W.L.R. 935.

Annotation.

QUEBEC.

In order that a street may be considered public so as to render the corporation liable for injuries resulting from the failure to keep it in a safe condition, it is not necessary that it should be indicated on the plan or the registry of the municipality. It is sufficient that it is free for public passage and that the public use it for that purpose: Montreal v. Gamache (1915), Q.R. 24 K.B. 312, 25 D.L.R. 303.

SASKATCHEWAN.

It was held in Jones v. Swift Current (1915), 8 S.L.R. 310, 23 D.L.R. 11, 31 W.L.R. 899, 8 W.W.R. 1100, under a similar provision of The Town Act, R.S. Sask., c. 85, s. 384, that a municipal corporation is not bound to keep in repair a highway laid out by a private person unless it has been assumed by the corporation.

In this case the plaintiff failed to recover because he was driving an unbroken team of horses in contravention of a by-law, and the injuries he sustained by reason of a defect in the highway were met with while so doing.

(7) Nothing in this section shall impose upon a corporation any obligation or liability in respect of any act or omission of any person acting in the exercise of any power or authority conferred upon him by law, and over which the corporation had no control, unless the corporation was a party to the act or omission, or the authority under which such person acted was a by-law, resolution or license of its council.

It was held before the enactment by 59 Viet. c. 51, s. 22, of what is now this subsection that a corporation whose duty it was to maintain a highway or bridge was not absolved from its liability to maintain a bridge and its approaches by means of which the highway is carried over a railway although the duty of keeping them in repair is cast upon the railway company: Mead v. Etobicoke (1889), 18 O.R. 438; Fairbanks v. Yarmouth (1897), 24 A.R. 273.

The effect of this subsection is that in such a case the corporation is not liable, except in the circumstances mentioned in the last three lines: Holden v. Yarmouth (1903), 5 O.L.R. 579.

In Carty v. London (1889), 18 O.R. 122, it was held that a municipal corporation was liable for injuries caused by the want of repair of a highway, although it was occasioned by the default of a street railway company, operating its railway under the authority of a by-law of the council, in keeping in repair that part of the highway which was out of repair which it had contracted to keep in repair.

The decision in that case probably would have been the same if the provisions of this subsection had been in force when the plaintiff's injuries were sustained.

CORRESPONDING PROVISIONS IN OTHER PROVINCES.

SASKATCHEWAN.

The corresponding provision of the Saskatchewan City Act is s. 510 (4), which enacts that:—"Nothing herein contained shall cast upon the city any obligation or liability in respect of acts done or omitted by persons exer-

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cising powers or authorities conferred upon them by law, and over which the city has no control, where the city is not a party to such acts or omissions and where the authority under which such persons proceed is not a by-law, resolution or license of the council," and the corresponding provision of the Saskatchewan Town Act is the same (s. 493 (4)).

(8) A corporation shall not be liable for damages under this section unless the person claiming the damages has suffered by reason of the default of the corporation a particular loss or damage beyond what is suffered by him in common with all other persons affected by the want of repair.

CORRESPONDING PROVISIONS IN OTHER PROVINCES.

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ONTARIO CASES.

A landowner who suffers a peculiar and specific injury from an obstruction of a highway which prevents free egress to and regress from his land may, without making the Attorney-General a party, maintain an action against the wrongdoer to have the *locus in quo* declared to be a public highway and to obtain the removal of the obstruction: O'Neil v. Harper (1913), 28 O.L.R. 635, 13 D.L.R. 649.

See also Drake v. Sault Ste. Marie Pulp and Paper Company (1898), 25 A.R. 251; Peake v. Mitchell (1913), 4 O.W.N. 988, 10 D.L.R. 140, 24 O.W.R. 291.

A municipal corporation is liable for damages caused to an owner of abutting land by interruption to his business where the corporation does not exercise reasonable expedition in completing the restoration of a highway after the putting in of a sewer and the damages are occasioned by its failure to do so: Rickey v. Toronto (1914), 30 O.L.R. 523, 19 D.L.R. 146.

Laying the rails of an extension of a street railway on the streets of a municipality under the authority of a municipal by-law without the sanction of the Ontario Railway and Municipal Board having been obtained is unlawful, and an action lies by a person the access to whose house and lot is rendered difficult and who is otherwise inconvenienced in the use of them by such acts to restrain the continuance of them: Mitchell v. Sandwich, Windsor and Amherstburg Railway Company (1914), 32 O.L.R. 594, 611, 22 D.L.R. 531.

See also Strang v. Arran (supra); and Dick v. Vaughan (supra).

OTHER PROVINCE CASES.

BRITISH COLUMBIA.

The right of ingress from and egress to a public highway passing a person's land is a private right differing not only in degree but in kind from the right of the public to pass and repass along the highway, and any disturbance

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of the private right may be enjoined in an action by the landowner: Harvey v. British Columbia Boat and Engine Company (1908), 14 B.C.R. 121, 9 W.L.R. 415.

QUEBEC.

A municipal corporation has no right to change the natural level of the ground to the injury of an abutting landowner, except for a reason of public utility, and then subject to the obligation of indemnifying him for any loss therefrom: Audet v. Quebec (1896), Q.R. 9 S.C. 340.

A person owning land abutting on a highway, who is deprived of the direct access which he has to it, suffers special damage by the closing and obstruction of the road, and has, in consequence, a right of action in his own name to compel the removal of the obstruction: Meloche v. Davidson (1902), Q.R. 11 K.B. 302, affirming (1901), Q.R. 20 S.C. 26.

A municipal corporation is not liable to pay damages for the decrease in the volume of business of a merchant which he attributes to the fault of the corporation in obstructing the street in which he carried on his business at a distance of more than 1,000 feet from his place of business. The loss in such a case is not the direct or immediate consequence of the action complained of: D'Ambrosio v. Montreal (1914), Q.R. 45 S.C. 282.

A municipal corporation having power to close a bridge forming part of a highway is responsible for the immediate damage caused by the closing of it to an abutting owner, who is entitled to be indemnified for the loss of access and the losses directly resulting from the closing of the road: Bedard v. Lochaber West (1916), Q.R. 49 S.C. 459, 29 D.L.R. 312.

(9) Where a bridge which it is the duty of a corporation to repair is destroyed or so damaged that it is necessary to rebuild it the Municipal Board may, upon the application of the corporation, relieve it from the obligation to rebuild the bridge, if the Board is satisfied that it is no longer required for the public convenience or that the re-building of it would entail a larger expenditure than would be reasonable, having regard to the use that would be made of the bridge if it were re-built.

(10) The relief may be granted on such terms and conditions as the Board may deem just, and such notice of the application shall be given as the Board may direct.

(11) The next preceding two subsections shall not affect the costs of any pending action. 3-4 Geo. V. c. 43, s. 460.

EXAMINATION OF PERSONS INJURED.

MANITOBA.

In Manitoba provision is made for the examination before a special examiner of persons injured: s. 629, R.S. 1913, c. 133.

The provision is as follows:—

"The municipality may, at any time after it has received notice of any such claim for damages or become aware that an accident has taken place, and either before or after an action has been begun, examine the claimant or person who met with the accident concerning the accident and the injury

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complained of and the damages claimed, before a special examiner of the Court of King's Bench or a County Court clerk or a police magistrate, who shall administer the appropriate oath to such claimant or person.

"Provided that if a duly qualified medical practitioner, not being the medical heath officer of the municipality, certifies that the person who met with the accident is not in a fit state to be examined owing to personal injuries, he shall not be compelled to be examined.

"(2) The proceedings leading up to such examination and in the conduct thereof shall be, as far as practicable, the same as those prescribed for examination for discovery under 'The King's Bench Act.'"

PHYSICAL EXAMINATION OF PERSONS INJURED.

ONTARIO.

S. 70 of The Judicature Act, R.S.O., c. 56, makes provision for the physical examination by a duly qualified medical practitioner of any person for or in respect of whose bodily injury an action is brought to recover damages or other compensation.

The section is as follows:—

"(1) In any action or proceeding for the recovery of damages or other compensation for or in respect of bodily injury sustained by any person, the Court which, or the Judge, or the person who, by consent of parties, or otherwise, has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury damages or compensation are sought shall submit himself to a physical examination by a duly qualified medical practitioner who is not a witness on either side, and may make such order respecting the examination and the costs of it as may be deemed proper.

"(2) The medical practitioner shall be selected by the Court, Judge, or person making the order, and may afterwards be a witness on the trial unless the Court, Judge or person before whom the action or proceeding is tried otherwise directs."

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Saskatchewan Supreme Court, Elwood, J. January 22, 1917.

LICENSES (§ II C—33)—SALES BY SAMPLE—COMMERCIAL TRAVELLERS.

Where the enabling statute authorizes a by-law to be passed by a city for licensing commercial travellers for non-resident traders selling directly to consumers, a by-law which is not restricted to non-residents is *ultra vires* because it is broader than the statute authorizes, and a summary conviction thereunder will be quashed although the trader whom the accused represented was a non-resident.

Statement.

MOTION for a *certiorari* to remove and quash a summary conviction under a municipal by-law.

F. L. Bastedo, for applicant.

James Robinson, for the informant, the magistrate and the City of Saskatoon.

Elwood, J.

ELWOOD, J.:—The applicant for a writ of *certiorari* in this matter was convicted for that he at Saskatoon, in the Province of Saskatchewan, did, being a commercial traveller, offer for sale

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goods, wares or merchandise by sample, cards and specimens for or on account of a merchant, manufacturer or other person, to wit: Business Systems, Ltd. of Toronto, Ontario, selling directly to the consumer, without having a license therefor from the City of Saskatoon.

The by-law of the city under which the conviction was made is by-law 1025, amending by-law 890, and the part of the by-law to be considered is as follows:—

"19. A license shall be taken out by every Commercial Traveller selling goods, wares or merchandise or other effects of any kind whatsoever, or offering the same for sale by sample, cards, specimens or otherwise for or on account of any merchant, manufacturer or other person selling directly to the customer."

It was contended that ss. 62 of s. 204 of the City Act of 1915 (Sask.) only gave power to pass a by-law to license commercial travellers who were selling or offering for sale on account of a merchant, or manufacturer selling directly to the consumer, *not having his principal place of business in the city*, and that the by-law in question, not being limited to those selling or offering for sale on account of a merchant or manufacturer not having his principal place of business in the city, was broader than authorized by statute and was *ultra vires*. Sub section 62 is as follows:—

"62. Controlling, regulating and licensing livery, feed and sale stables, motor liveries, real estate dealers and agents, intelligence offices or employment offices or agents, butcher shops or stalls, skating, roller or curling rinks and all other businesses, industries or callings carried on or to be carried on within the municipality, or commercial travellers or other persons selling goods, wares, merchandise or other effects of any kind whatsoever or offering the same for sale by sample cards, specimens or otherwise for or on account of any merchant, manufacturer or other person selling directly to the consumer, not having his principal place of business in the city; and collecting license fees for the same."

It seems to me that if it were intended to confer upon the municipality power to license all commercial travellers, irrespective of the principal place of business of the principal, that intention would have been clearly indicated, and the section

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having named certain commercial travellers who may be licensed, it must be taken to exclude all other commercial travellers.

In *Blackburn* v. *Flavelle*, 6 A.C. 628 at 634, Sir Barnes Peacock quotes the following:—

> "'If there be any one rule of law clearer than another as to the construction of all statutes and all written instruments (as, for example, sales under powers in deeds and wills) it is this: that where the Legislature or the parties to any instrument have expressly authorized one or more particular modes of sale or other dealing with property, such expressions always exclude any other mode, except as specifically authorized.' That appears to their Lordships to be a correct exposition of the law, and it is substantially carrying out a principle similar to that expressed in the maxim *expressio unius est exclusio alterius*."

The by-law being broader than authorized by the statute is *ultra vires*. *Dyson* v. *London & North Western Railway* (1881), 7 Q.B.D. 32, 50 L.J.M.C. 78; *Huffam* v. *North Staffordshire*, [1894] 2 Q.B. 821, 63 L.J.M.C. 225.

The conviction will be quashed with costs to be paid by the informant to the applicant. *Conviction quashed.*

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GERMAN v. CITY OF OTTAWA.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. March 30, 1917.

1. HIGHWAYS (§ IV A 4—145)—SIDEWALK—SNOW AND ICE—INJURY TO PEDESTRIANS—NEGLIGENCE—LIABILITY.

Sec. 460 (3) of the Municipal Act, R.S.O. 1914, ch. 192, was passed to curtail the right of action for injuries caused by snow or ice upon a highway, which it had been held the Act had given, and being remedial legislation must be given full effect as such.

2. NEGLIGENCE (§ I D—70)—DANGEROUS PLACE ON HIGHWAY—INEFFECTUAL ATTEMPT TO REMEDY.

Failure to sand an icy sidewalk before 10 o'clock in the morning is not negligence, if the corporation has done all that could reasonably be expected to make it safe, by putting sand on the dangerous place a day or two before, if on account of weather conditions the work has been rendered ineffectual. [See annotation, *ante* p. 589.]

Statement.

APPEAL from a judgment of Britton, J. in an action for damages for injury sustained by the plaintiff by a fall upon an icy sidewalk in Besserer street, in the city of Ottawa, on the 2nd February, 1916. Reversed.

The judgment appealed from was as follows:—

Britton, J.

BRITTON, J.:—The plaintiff, W. M. German, K.C., M.P., on the 2nd February, 1916, while walking upon the street

named Besserer, one of the streets of the city of Ottawa, slipped and fell, and broke the upper bone, called the humerus, of his left arm, causing great bodily injury, from which he has not yet recovered.

The plaintiff alleges that that part of Besserer street where he fell was in a condition dangerous to pedestrians owing to the accumulation of ice which had been allowed to remain on the street.*

The plaintiff had rooms at 550 Besserer street. He left there a little after nine o'clock in the morning of the 2nd February, and walked west on the south side of Besserer street, intending to take the street railway car at the corner of Besserer and Charlotte streets, but the accident happened before reaching Charlotte street. A lady was walking beside the plaintiff when he fell. She did not fall, nor, so far as appears, did she slip.

Taking the plaintiff's account of the condition of that part of the street, it had been before the time of the accident a neglected street. The employees of the defendant have sworn on the contrary that it was not neglected, but was carefully watched and attended to. During the week, the defendants watched the street, sprinkled sand upon it, and cut through the ice to make a passage for the escape of water from the south toward the north. The defendants say that, knowing the condition of that part of Besserer street, they proposed, as early as the Monday morning previous to the accident, to get sand ready and men to spread it upon Besserer street and other streets near-by; at 2.30 that morning, they began to heat the sand; by 9, the sand was drawn and sprinkled; but I am not satisfied by the evidence that sand was sprinkled or spread in such a way as to render the walk reasonably safe.

The employees of the defendants, as early as Monday, knew of the danger, and the dangerous condition was allowed to remain until Wednesday, when the plaintiff was injured. That was

*Municipal Act, R.S.O. 1914, ch. 192, sec. 460.—(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and, in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default.

. . . . .

(3) Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk.

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gross negligence within the meaning of the statute. During the days from Monday to Wednesday inclusive, the weather was uncertain—raining, but freezing, snow, sleet, rain. It was not only a general condition that for the safety of the public required attention, but it was a dangerous condition as to the place of the accident, a condition about which the defendants knew or ought to have known.

If sand was actually placed upon the walk where the plaintiff slipped, it must have been spread in the water and washed away immediately, or if, being heated sand, it caused a melting of the ice beneath it, it may well be that water, flowing from the south, or following a rain, froze over the sand, so that none was in sight, and was not then of any use to render the walk more safe for persons walking upon the street. This was not a case of slippery ice over all except small areas, which might, without gross negligence, escape the persons spreading sand. The danger zone was "all slippery."

I quite agree with counsel in his able presentation of the defendants' case, that they have a difficult and expensive proposition, involving the expenditure of large sums of money to keep miles of streets in a reasonably safe condition; this case, however, is not an attack upon the defendants' system, but upon the carrying-out of it. It is simply gross negligence in not doing what it was intended should be done; or in not providing for the weather conditions or other conditions at the place where the accident occurred.

This case is, in some respects, not unlike *Huth* v. *City of Windsor* (1915), 24 D.L.R. 875. I have carefully considered *City of Kingston* v. *Drennan* (1897), 27 S.C.R. 46. Each of these cases supports the plaintiff's right to recover.

The plaintiff was not, in my opinion, guilty of contributory negligence. Of course, the plaintiff need not have gone by that part of Besserer street, but it was a public street, with no notice or barricade against its use. There was an invitation by the defendants to the public to use the street. The plaintiff was not careless, so far as appears.

It is not evidence of the plaintiff's being guilty of negligence that the lady accompanying him did not fall. Furthermore, a reasonably prudent man might, and no doubt would, use the street if it were a direct way to his destination.

The damages which the plaintiff has sustained are large. The plaintiff's expenditure in the case is over $1,000, and the end is not yet. He has practically lost the use of his left arm. His loss cannot be accurately estimated, but it will be at least what I shall allow.

There will be judgment for the plaintiff for $2,250 damages, with costs.

F. B. Proctor, for the appellants. The only question involved is, whether the defendants were guilty of "gross negligence" which caused the injury. The defendants had not been guilty of any negligence at all. Considering the sudden climatic changes which were taking place about the time of the accident, the defendants were doing all they reasonably could to protect the citizens from falling on the pavements. He referred to the following authorities in support of his contention that no gross negligence had been shewn: *Palmer* v. *City of Toronto* (1916), 32 D.L.R. 541; *Killeleagh* v. *City of Brantford* (1916), 32 D.L.R. 457; *Ince* v. *City of Toronto* (1900-01), 27 A.R. 410, 31 S.C.R. 323; *Lynn* v. *City of Hamilton* (1907), 10 O.W.R. 329; Dillon on Municipal Corporations, 5th ed., vol. 4, pp. 2965, 2966.

H. H. Dewart, K.C., for the plaintiff, respondent, argued that there was sufficient evidence to justify the finding of the trial Judge that there had been "gross negligence" on the part of the defendants, and that was enough to hold the decision: *City of Kingston* v. *Drennan*, 27 S.C.R. 46; *Joncas* v. *City of Ottawa* (1910), 1 O.W.N. 737; *Merritt* v. *City of Ottawa* (1908), 12 O.W.R. 561; *Huth* v. *City of Windsor*, 24 D.L.R. 875, 34 O.L.R. 542.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The statute law of this Province (now found in the Municipal Act, R.S.O. 1914, ch. 192, sec. 460) has imposed upon the appellants the duty of keeping in repair "every highway and every bridge" within its territorial limits; and the single question involved in this appeal is: whether they were guilty of gross neglect of that duty in respect of the place, in one of such highways, where the respondent fell and was injured, at the time when he so fell and was injured.

The appellants do not assert that the condition of the highway, there and then, was not the cause of the respondent's fall and

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injury; nor do I understand them to contend that he was guilty of negligence causing, or contributing to, such injury. His own story is, that he was wearing good "rubbers;" and that he had not gone to the horse-road for better footing, because it seemed to him, and to the person with whom he was walking, to be in a condition even more slippery and less safe than the sidewalk upon which they were walking. Although he was doubtless less able to watch all his own footsteps because walking and conversing with another person, there is nothing in the evidence which proves any want of ordinary care upon his part in guarding against danger from the ice upon the walks and road.

Then has it been proved: that the icy condition of the ways, at that time, was the result of, or that the absence of anything placed upon, or done to, them was, a neglect of the duty I have mentioned?

Negligence alone gives no right of action; that is so expressly provided, now, in the statute creating the duty: "(3) Except in case of gross negligence a corporation shall not be liable for any personal injury caused by snow or ice upon a sidewalk:" Municipal Act, sec. 460. This provision of the enactment was passed to curtail the right of action, for injuries caused by snow or ice upon a "highway," which, it had been held, the Act had given; and, being remedial legislation, must be given full effect as such.

It has sometimes been said that it is difficult to define the meaning of the word "gross" in connection with negligence, and difficult to give it effect under this enactment. But why so; any more than the word "negligence" alone? What is ordinarily considered a neglect of duty is negligence; and what is ordinarily considered a great neglect of duty is gross negligence. Judges, jurors, and persons generally, do not hesitate to speak of slight negligence, negligence, great negligence, and gross negligence; and in the facts to which the words are applied there is never very much difficulty in understandng that which is meant. So, too, of other things, such, for instance, as gross, or great, ignorance.

And the facts of this case seem to me to make it very plain how the words, used in the statute, "negligence" and "gross negligence," should be applied to it

If the same condition of the sidewalk, or a like condition, as that which existed when the respondent fell upon it, had

continued for a considerable number of days, negligence, and even gross negligence, would have been proved, if that condition could practicably have been prevented. It would be plain that the efficient means which the appellants had thought necessary for the performance of their duty, and had provided for that purpose, had not been employed by reason of the negligence of those they had employed to apply them, and, being a statute-imposed duty, it could not be performed by supplying the men and means to perform it only.

But that was plainly and admittedly not so. The condition there existing was the work of nature in the preceding day and night. The weather, for about a week before, had been extraordinary for that time of the year—mid-winter—in Ottawa. It had been warm enough to rain and thaw, so that water ran over the snow and ice in the highways, in the day-time; and, at night, the temperature lowered so that all was frozen hard again, with a consequently slippery surface everywhere in the morning. The respondent described it thus:—

"Q. That would be a matter of six days? A. I think it was six days.

"Q. During that time there was a pretty steady downpour of rain and sleet? A. No, it was off and on; it would rain a little in the day and turn and freeze, and it kept that way until the Tuesday before the accident; it settled into more cold steady weather.

"Q. What condition was the street in, did you notice?

"A. The whole street was icy all the way across.

"Q. When you came out of your house and noticed that the south side was slippery, I suppose, as a matter of prudence, you would look round to see if there was any safe way. A. I did look to see if it was safer in the middle of the street or across the street, and it was all the same. I felt as safe in one place as another."

The only witness called on the respondent's behalf, Mr. Burns, a "civil servant," told of the weather in the day and night before the accident, in these words:—

"Q. It was raining on that day, Tuesday the 22nd, according to your recollection? A. Raining for three or four days round that period.

"Q. And the rain kept going throughout Tuesday, and on

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Wednesday it froze up? Was it on Tuesday it stopped? A. I think it did, because it turned cold Tuesday night.

"Q. It was a very heavy downpour of rain, was it not? A. Yes."

The appellants' duty was not to insure the respondent's safety from accident and injury. Their duty was to take all reasonable means to keep the highway in repair; to do that which reasonable men charged with such a duty would do in the performance of it in order to keep the highway in a condition sufficient for the needs of the traffic over it.

It was well proved, and not denied, that the appellants' methods and means provided for the performance of this duty were good. I should have no hesitation in saying, more than such as are ordinarily provided; and, during this exceptional week, ending on the day of the accident, the usual road-gang had been doubled; and, according to the testimony of those connected with it, testimony which is not questioned by other testimony or by any circumstance, there had been unusual vigilance and care during that trying weather; but a vigilance and care that the weather rendered ineffectual to prevent icy conditions of the ways. This is all in accord with the views of the trial Judge upon this subject, thus expressed: "This case * * * is not an attack upon the defendants' system, but upon the carrying-out of it. It is simply gross negligence in not doing what it was intended should be done; or in not providing for the weather conditions or other conditions at the place where the accident occurred."

But the difficulty in which the learned Judge's reasons for his judgment leave me is, that he has not defined what the appellants omitted to do or provide.

At the trial the respondent's case seems to have been rested upon two definite grounds: (1) that the sidewalk had not been sprinkled with sand; and (2) that it had not been harrowed. The trial Judge does not seem to have thought the latter ground of any importance; it is not even mentioned in his reasons for judgment; the other ground seems to me to be that upon which the judgment is based, though it is not so expressed.

The learned Judge was unable, apparently, to find that the sidewalk in question was not "sanded," as the witnesses for the defence testified that it was; but said that, if it were, he was not

satisfied that the "sand was sprinkled or spread so as to render the walk reasonably safe;" meaning of course safe at the time of the accident; the "sanding" having been done, as proved by the witnesses for the defence, on the Monday of the week in which the accident happened.

But how could it be so done in the thawing and raining—very heavy downpours of rain—in the interval? What was not washed off would have sunk in the water and be useless in the morning if put there even the day before. As the learned Judge put it: "It may well be that water, flowing from the south, or following a rain, froze over the sand, so that none was in sight, and was not then of any use to render the walk more safe for persons walking upon the street."

There was no evidence that "sanding" on Monday or on Tuesday would have prevented the condition existing at the time of the accident, nor any suggestion of a means of preventing sand being washed off by downpours of rain or from sinking in water, and I am quite unable to suggest any.

So too as to harrowing; the marks would be washed out, or filled in, by the rain or melted snow and ice each day, and frozen over each night. No witness testified that, in the conditions existing, either sanding or harrowing on Tuesday would have changed the condition of the walk, so as to make it in any way safer on Wednesday morning. And the testimony of the respondent shews plainly that it could not, because even the horse-road, broken up by sharp-shod horses and by vehicles, and having the litter of ordinary traffic upon it, was, in his judgment, more dangerous to walk upon than the sidewalk; the washing away and sinking must have been greater there than it would have been on the sidewalk, if sanded and harrowed.

No one could reasonably assert that the failure to "sand" or to "harrow" the miles upon miles of sidewalks needing it before 10 o'clock in the morning of Wednesday was anything like evidence of negligence, gross or slight; and so the action should have been dismissed at the trial.

But another point is now made, by Mr. Dewart, for the first time; and, as it seems to me, it is the only logical one open to the respondent. It is: that the appellants should have so constructed and maintained their sidewalks as that the rain or melted ice or snow could not destroy the effect of protection-methods—

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sand and harrowing. There is, however, no evidence, of any kind, upon which defective construction, or want of keeping-up, of the sidewalk could be supported. If there be a means by which that can be accomplished in this country, it has not yet been made known: see *Papworth* v. *Battersea Corporation*, [1916] 1 K.B. 583.

In my opinion, there was no evidence of negligence, not to speak of gross negligence, on the part of the appellants; but, on the contrary, there was uncontradicted evidence that the appellants took more than ordinary care to keep the highways in Ottawa in repair generally, and especially during the unusually trying weather conditions immediately before and at the time of the respondent's unfortunate accident.

I would allow the appeal and dismiss the action.

Rose, J.

ROSE, J.:—I agree.

Lennox, J.

LENNOX, J.:—The appellants have about 250 miles of streets to look after; that meant that, when very exceptional weather conditions developed towards the end of January and beginning of February, 1916, they had to distribute their care and energy and their resources in men, material, and equipment, as best they could, not evenly, but unevenly, and according to the special hazards and requirements of each section, over vastly more than 250 miles of sidewalk coated with snow and ice. The weather conditions were general, although exceptional; snow and ice covered the whole sidewalk mileage of the city; but it does not follow, by any means, that the appellants would be discharging their obligation to keep the highways in repair by distributing their energies evenly over the whole area or endeavouring to overcome exceptional climatic conditions without discriminating as to exceptional needs and hazards by reason of topographical, structural, or other peculiar local conditions. I tried to point out this distinction in *Palmer* v. *City of Toronto*, 38 O.L.R. 20, saying, at p. 32: "It is quite clear, I think, that the Legislature did not intend that the statutory obligation of corporations to repair would be the same in all municipalities, or as to *all sidewalks* in the same municipality, or as to *all parts of the same sidewalk;* in other words, snow or ice upon a sidewalk at a certain point may be evidence of 'gross negligence,' and, with the same weather conditions, snow or ice at another point may not be evidence of negligence at all."

It is not pretended that the appellants did not make reasonable

and careful preparation in advance to meet winter conditions, or that their system was improper or inadequate. This was not a sidewalk of exceptional character, nor was it a place of peculiar hazard. It was, like other miles and miles of streets in Ottawa, a level, ordinary walk. Improper construction is not alleged. It is shewn that a double force was employed, that the fires were lighted at 2 o'clock, and the men and teams were at work on the streets by 4 o'clock on Monday morning, and kept regularly on at work until the time of and after the accident, doing all that they could do; and as to ordinary level streets doing more, I venture to think, than the statute demands.

It is shewn that, while an effort was being made to make all the streets safe and convenient for persons requiring to use them, they were acting judiciously, and as their duty was, in giving special attention to places of peculiar difficulty and hazard, such as peaks, slopes, and places of this type. Ottawa, no doubt, like every other city, has special problems to deal with where snow and ice, conjoined with structural conditions or peculiar formations, create imminent danger. These must have care in proportion to the obvious risk, and be first attended to.

Section 460 (1) of the Municipal Act says that: "Every highway . . . shall be kept in repair . . . and in case of default the corporation is liable for damages;" but it does not stop there. Snow or ice upon a sidewalk, whether sanded or scraped or not, is not *per se* evidence of want of repair; and, even if it is the direct cause of an injury, does not necessarily give rise to a cause of action. Why? Because the statute says that it is not *per se* want of repair.

Section 460 (3) enacts: "Except in case of gross negligence a corporation shall not be liable for a personal injury *caused* by snow or ice upon a sidewalk." With great respect for eminent opinion to the contrary, I am of opinion that the expression "gross negligence" is peculiarly apt in this connection, and, properly interpreted, will effectually secure the intention of the Legislature. There are many conditions in cities and towns which, conjoined with the existence of snow or ice, may justify the inference of gross negligence. This case, in my opinion, is an instance.

I am prepared to accept the conclusions of the learned Judge in so far as they are finally or definitely expressed on matters of

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fact. "It must be an extraordinary case in which the appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial Judge who has seen and watched them, whereas the appellate Judge has had no such advantage"—as was said in the judgment of the Privy Council delivered on the 25th January, 1917, in *Wood* v. *Haines*, 38 O.L.R. 583, 33 D.L.R. 166 There was little conflict of evidence here; and, where there was any, it is of little importance which side was right.

Here it is more a question of law than of fact—the proper interpretation of the statute. The learned Judge does not say that sand was not spread upon the walk as asserted; but rather that, assuming that it was, its effect had been neutralised by intervening weather conditions. The judgment rests upon the hypothesis that the appellants had to sand this walk, and keep it effectively sanded, despite the weather conditions, or be guilty of gross negligence—in effect, that the water which becomes ice in the night must be scraped ice or ice covered with sand before any one steps upon it in the morning; and, if this is true in this case, it is true in all cases, for there was nothing whatever peculiar or exceptional about the sidewalk on Besserer street. There may be exceptional conditions which impose upon a corporation the duty of harrowing or chopping or covering or completely removing ice or snow from the sidewalk; the Legislature evidently contemplated the possibility that such cases might arise; but this is not a case of this character; and the appeal should be allowed.

Riddell, J.

RIDDELL, J.:—I agree. *Appeal allowed.*

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GIROUX v. THE KING.

Quebec King's Bench, Trenholme, Cross, Pelletier, Charbonneau (ad hoc) and Mercier (ad hoc) JJ. April 28, 1916.

1. APPEAL (§ XI—721)—LEAVE TO APPEAL CONJOINTLY WITH RESERVED CASE —CRIMINAL APPEALS.

Where a reserved case is applied for on several questions of law and granted only as to some of them by the trial Judge, the Court of Appeal, on granting leave to appeal on one of the questions which the trial Judge refused to reserve, will ordinarily direct that the reserved case shall stand over to be considered at the same time so that the entire appeal may be disposed of in one judgment.

[Compare *R.* v. *Bela Singh*, 27 Can. Cr. Cas. 40, 22 B.C.R. 321.]

2. APPEAL (§ IV G—140)—STENOGRAPHIC NOTES OF REASONS FOR JUDGMENT —CRIMINAL APPEAL.

The Court of Appeal, in granting leave to appeal in a criminal case, may direct that the whole record should be transmitted by the trial Court, and that the latter shall add a statement declaring whether the

stenographic notes of the reasons for the judgment appealed against are correct.

Statement.

MOTION for leave to appeal and for a direction to the trial Court to state a case for the consideration of the Court of King's Bench, Appeal Side, upon the following question, along with the other questions upon which the trial Court had granted a reserved case:—

"Was the accused found guilty solely upon doubts or suspicions or was the conviction based upon legal evidence?"

Giroux was charged before the Court of Sessions of the Peace with the theft of public documents. On the 4th of February, 1916, he was found guilty. On the 8th of February, he presented two motions, one for appeal from the conviction as being against the evidence, the other to have eleven questions of law reserved.

On the 16th of February, Judge Choquette, who had been the Judge at the trial, dismissed the first motion, but reserved the two following questions for the decision of the Court of Appeal:—

"1. The accused, Emile Giroux, having been indicted by the grand jury directly upon the charge of theft in the first place mentioned, without a previous complaint having been made before a magistrate, without preliminary investigation, could he, after the charge had been declared well founded by the grand jury, after having pleaded 'not guilty' to the said charge and furnished bail for his appearance, at the time for trial fixed for the 17th of May, validly declare that he desired to be tried summarily before a Judge of sessions?

"2. In view of the facts stated in the first question, the order of the Honourable Judge Lavergne, presiding in the Court of King's Bench, Crown Side, supported by the consent of the substitute of the Attorney-General of this province, granting permission to the accused to declare his option for a summary trial, could this confer jurisdiction on the Judge of sessions presiding at summary trials to hear and adjudicate upon this case?"

N. K. Laflamme, K.C., and *A. Germain*, K.C., for accused; *Lafortune* and *Walsh*, for the Crown.

THE COURT entered judgment as follows:—

"Considering that this case has been submitted to this Court (1) for answers to two questions reserved by the learned

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Judge Choquette, and (2) upon a motion asking for leave to appeal upon other questions which the learned Judge refused to reserve;

"Considering that, without giving any formal opinion upon the merits, this Court is of opinion that it is expedient to grant leave for an appeal upon one of the questions which the learned Judge refused to reserve, and to consider at the same time and render only one judgment upon the two questions reserved by the Judge *a quo* and upon the additional question in regard to which leave was granted on the present appeal;

"Considering that when evidence exists against a person accused, the question of the appreciation of such evidence is not one in respect of which this Court may review the opinion of the first Judge, but that the question whether or not there was or was not such evidence, or whether suspicions or doubts might take the place of evidence, is a question of law in regard to which this Court has jurisdiction;

"The two questions reserved by the Judge *a quo* will be re-argued before this Court at the same time as the following question, upon which leave to appeal is granted, that is to say:—

"Has the accused, Joseph-Emile Giroux, been convicted only upon the doubts and suspicions which might exist against him, or upon evidence of facts which might legally serve as the basis of a finding which would justify a conviction?

"It is, in consequence, ordered that the whole record should be transmitted to this Court for examination upon the appeal on these three questions, and that the Judge *a quo* should add thereto a statement declaring whether the stenographic notes of the remarks which he made in pronouncing his judgment are correct in the form and tenor in which they appear in the printed factum upon which the motion for leave to appeal was argued. Costs are reserved."

Direction accordingly.

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MAYNE v. GRAND TRUNK R. Co.

Ontario Supreme Court, Appellate Division, Riddell and Lennox, JJ., Ferguson, J.A., and Rose, J. February 26, 1917.

CARRIERS (§ II G—70)—PASSENGER STEPPING OFF MOVING TRAIN—INVITATION TO ALIGHT—NEGLIGENCE OF CONDUCTOR.

The conductor of a vestibuled car, in the service of the defendant company on a dark night, after announcing the station, said to a passenger,

"this is your station; this is where you get off," and opened the door of the car, and going into the vestibule, opened the trap or outside door, and the passenger followed down the steps, unwarned by the conductor and stepped off the train while it was still in motion, and was fatally injured. The court was equally divided as to whether or not the defendant company was guilty of negligence.

[Discussion on the question of an "invitation to alight" and review of authorities.]

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Statement.

APPEAL by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, upon the findings of a jury, in favour of the plaintiff.

The action was brought by the widow of William J. Mayne, under the Fatal Accidents Act, to recover damages for the death of her husband, caused, as she alleged, by the negligence of the defendants. The deceased was a passenger upon a train of the defendants; he stepped off in the dark while the train was in motion, and sustained injuries from which he died. The negligence alleged was in effect that the conductor of the train had invited the deceased to alight when and where he did.

The judgment was for $4,000 damages and costs.

D. L. McCarthy, K.C., for appellants;

T. N. Phelan, for plaintiff, respondent.

Riddell, J.

RIDDELL, J.:—William Mayne, a farmer of about forty years of age, had given up his farm near Whitby, and intended to remove to the western part of Ontario. On the 13th November, 1915, he had been, with his wife and family, at Whitby, and with them mounted the passenger train of the defendants at Whitby, intending to get off at Dunbarton, a flag station a short distance west of Whitby. The train was a "vestibuled" train. Mayne asked the conductor to tell him when they were at Dunbarton station; he was little in the habit of travelling on trains, though this was not his first experience.

When near Dunbarton station, Mayne was notified by the conductor that Dunbarton was the next stop, and in a few moments the conductor again spoke to Mayne, "Dunbarton station, that's the place where you get off." After a little delay, Mayne went to the rear of the car upon the platform; finding the trap-door up, he went down the steps and stepped off. The train was still moving, and Mayne received such injuries that he died five days afterwards.

The plaintiff, his widow, sues under "Lord Campbell's Act," on behalf of herself and her children, for damages. At the trial

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before the Chief Justice of the King's Bench and a jury at Cobourg, the jury found, in answer to questions, as follows:—

Q. 1. Was the accident which resulted in the death of the plaintiff's husband caused by any negligence of the defendant company? A. Yes.

Q. 2. If so, wherein did such negligence consist? A. By the conductor not remaining at the door of the car until the train stopped.

Q. 3. Or was the deceased guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. No.

Q. 4. If you answer "yes" to the last question, wherein did his negligence consist? (No answer.)

Q. 5. In case the plaintiff should be entitled to recover, what sum do you allow? A. $4,000.

Upon these answers the learned Chief Justice directed judgment for $4,000 and costs (the $4,000 to be paid into Court for apportionment, etc.)

The defendants now appeal.

The charges of negligence made in the statement of claim seem to reduce down to: (1) "the conductor made no effort to prevent the deceased stepping off;" and (2) "gave no warning, although the intention of the deceased to alight was apparent;" (3) "the conductor indicated to the deceased that he had reached his station and could safely alight;" and (4) "did in fact invite the deceased to alight."

The jury have negatived the first two charges—and rightly so: there is no evidence to support them; and, moreover, there is no legal duty cast upon a railway company to prevent any passenger (not previously invited) from getting off a moving train.

But it must be considered that the jury's finding implies that the negligent act which they do find, viz., the conductor going away from the door of the car before the train stopped, was in effect (if not "in fact") an invitation to alight at that point.

We must examine the facts to see whether this conclusion is warranted.

The passenger, having with him his wife, of about 37 years of age, and his children, seven in all, was sitting three or four seats from the rear of the coach. He had asked the conductor if he would please tell him when they were at Dunbarton station.

Knowing that Dunbarton was a flag station, he had asked the conductor to stop there, and the conductor had agreed to do so.

When the train was approaching Dunbarton station, the following took place, according to the plaintiff's story:—

"The conductor came through the car and called out 'Dunbarton is the next stop.' Then in a few moments he came back again, the conductor came back again, and came to my husband and touched him on the shoulder, and he said, 'Dunbarton station, that's the place where you get off.'

"Q. Touched him on the shoulder and said to him what? A. 'Dunbarton station, this is where you get off.'"

On cross-examination, the story is not materially different:—

"Q. Do you remember on that occasion, as he passed your husband, that he touched him on the shoulder and said, 'This is your station, boss?' A. I know he said, 'This is your station, this is where you get off.'

"Q. Do you remember him saying, as he passed your husband on that occasion, 'This is your station, boss,' as he touched him on the shoulder? A. Yes.

"Q. You remember that? A. Yes."

Then follows:—

"Q. What happened then? A. The children were going to get up, and he said, 'No, sit still.'

"Q. Who said? A. My husband said 'Sit still a moment,' and they did so.

"Q. What for? A. Because he told them to sit still till the train stopped."

Then in a moment or two, he said, "Now, come on:" he picked up the baby and walked to the rear of the car, followed by his wife, who, finding the bundles too heavy, called for him to come back. He brought back the baby (he had got outside the car-door) and gave him to his mother—then he picked up the heavy parcels and started towards the door, followed by his wife; both got out on the platform without seeing the conductor: when they got on the platform they saw the conductor, "just on the edge of the platform," "just at the back of it, right straight behind us when we were going out the door." "We went by him when we went out." "He was standing inside." What the plaintiff really means is "inside the vestibule."

After some indefinite answers, the plaintiff makes it plain that

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what she means is that the conductor, after speaking to her husband, went out the car-door, and was seen by her going out the car-door, when she got up to go out with the bundles; that he was then lost sight of, and was not seen again till the two (husband and wife) got on the platform—he was then right in the vestibule where they were.

The deceased, "as soon as he got on the platform, walked down the steps and stepped right off."

With this must, however, in justice to the plaintiff, be taken what she says at another place. She says that when she walked to the door (of the car) "the conductor went out and we heard the door open—the outside door in the vestibule . . . the conductor . . . opened the door and stepped back . . . in the vestibule . . . right to the edge of the platform . . . of our car . . . (then) my husband went out and down the steps, and I followed, and he went down and stepped right off."

It must be borne in mind that there are two doors, the one the car-door, leading from the body of the car to the vestibule, the other the "outside door in the vestibule," leading from the vestibule outside the car altogether.

The story, therefore, is, that the deceased went to the rear end of the car; finding the car-door open, he went out upon the platform into the vestibule; the conductor, being then in the vestibule, went to the outside door in the vestibule, opened it, and stepped back—and that thereupon the deceased stepped down and off.

The jury have found no negligence in the conductor opening the "outside door in the vestibule"—nor could they. It is the well-known practice and duty of some one, porter or conductor, to open this door (and the trap-door) when approaching a station, in order to save time in disembarking passengers.

What the jury have found as negligence is the conductor not remaining at the car-door till the train stopped.

In the first place, he could not have done so and done his work—the vestibule exit had to be attended to.

Nor is it in any case negligence on the part of a conductor not to prevent a passenger going from car to vestibule—or to leave a door open: *Campbell* v. *Canadian Pacific R.W. Co.* (1901), 1 Can. Ry. Cas. 258, and cases cited.

The riding on the platform, indeed, was against the prohibition

by the railway's printed regulations posted up on the door of the car: Dominion Railway Act, secs. 282, 307 (*f*); and in respect of the company it was the duty of the conductor to prevent passengers being on the platform when the train was in motion; but that was not a duty toward the passenger. In other words, there is no duty cast by law upon the company to prevent passengers violating a company's rule.

Nor was what was done an invitation by the company to alight—an invitation to alight by calling out stations, etc., is, in the absence of special circumstances, an invitation to alight when the train stops: *Edgar* v. *Northern R.W. Co.*, 11 A.R. 452, at p. 455, *per* Patterson, J.A. Of course there may be special circumstances, *e.g.*, the train not stopping long enough, as in *Keith* v. *Ottawa and New York R.W. Co.*, 5 O.L.R. 116, or an omission to open vestibule-doors, as in *McDougall* v. *Grand Trunk R.W. Co.* (1912), 27 O.L.R. 369, 8 D.L.R. 271. See also the cases mentioned in Parsons' Liability of Railway Companies, pp. 94-103; Browne & Theobald's Law of Railway Companies, 4th ed. (1911), pp. 328, 329.

But, in the absence of special circumstances, "Calling out the name of a station, I understand, and have always understood, to mean this, that it is an intimation to all who are travelling by the train that the station at which the train is about to stop is that particular station:" *per* Blackburn, J., in *Lewis* v. *London Chatham and Dover R.W. Co.* (1873), L.R. 9 Q.B. 66, at p. 70. "Calling out the name of a station in not an invitation to alight:" *ib.*, at p. 71. It is at the most an "intimation that the passengers may on the stopping of the train alight:" *Bridges* v. *North London R.W. Co.* (1874), L.R. 7 H.L. 213, at p. 234.

Had the conductor known—or possibly if he should have known—that the passenger, unaccustomed to railway travel, took his warning as a statement that the train was stopped at the station, he might have had imposed upon him the duty to disabuse the mind of the passenger; but this was not the case—the passenger knew that the train had not stopped, but (at the most) that it was about to stop.

The leaving the car-door open was not an invitation to alight—our cars are not as the English coaches considered in *Praeger* v. *Bristol and Exeter R.W. Co.* (1871), 24 L.T.R. 105, followed in *Cockle* v. *London and South Eastern R.W. Co.* (1872), L.R. 7

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C.P. 321, 323, 324, in which the car-door "leads direct to the outside." Consequently any invitation that could be inferred from leaving the car-door open could not be an invitation to alight.

It is common experience that the porter or the conductor, when the train is approaching a station, announces the station, goes to one end of the car, opens the door (or leaves it open), and busies himself with the exit-door; all this cannot be considered an invitation to alight at once—at most it is an invitation to alight when the train comes to a stop.

The jury have rightly negatived any other charge of negligence on the part of the conductor.

On the whole case, I think the appeal should be allowed and the action dismissed, both with costs if asked.

Rose, J.

ROSE, J.:—I agree.

Lennox, J.

LENNOX, J.:—The word "traffic," when used in the Dominion Railway Act, R.S.C. 1906, ch. 37, includes passengers: sec. 2(31).

By sec. 284:—

"The company shall, according to its powers,— . . .

(*c*) without delay, and with due care and diligence, receive, carry and deliver all such traffic; and,

(*d*) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering such traffic. . . .

"(7) Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence of the company or of its servant."

William Mayne, a farmer, not much accustomed to travelling upon a railway, boarded a second class vestibuled coach of the company's, on the evening of the 13th November, 1915, at Whitby station, with his wife and seven children, the eldest being a girl of 15, and the youngest a boy called "the baby," about three years of age. He had tickets for Dunbarton, a flag station a few miles further west. He was not acquainted with the country, and it was about eight o'clock and a dark night. The baby had to be carried on and off the car. They entered at the rear of the coach and took seats three or four seats up from the rear end door.

When the tickets were taken up, Mayne asked the conductor to tell him "*when we are at* Dunbarton station" or "tell us *when it was at* Dunbarton station." Immediately to the rear of the car the Maynes were on, was a first class coach.

The train was travelling west. It was late, and the evidence of the conductor shews that he was trying to make up time by rapid travelling, by having everything ready, by quick disembarkation and a short stop at Dunbarton. The conductor called, "Dunbarton station next stop." His evidence is not definite as to what he afterwards said to Mayne, but at all events he immediately proceeded to the rear end of the car, left the end door standing open, proceeded at once to lift the trap and open the outer or side door, an operation taking 15 to 20 seconds, and had opened up an unobstructed passage for Mayne and his family to pass out and alight while the train was still running 20 or 25 miles an hour and while it was yet more than one quarter of a mile out from Dunbarton station. As this witness is not definite as to what he said to Mayne, I will refer to the evidence for the plaintiff, which the jury probably believed.

The plaintiff, Mayne's wife and widow, says that, a few minutes after the conductor called the Dunbarton station as the next stop, he came and touched her husband on the shoulder, and said: "Dunbarton station, this is where you get off." Gertrude Mayne said: "After we had passed Pickering station, the conductor came through the train and called out 'Dunbarton,' and he went on out through and after a short time he came back and he touched my father on the shoulder and said, 'This is your station, *this is where you get off*;' and we all went to get up, and father told us to keep still for a minute, the train was not stopped, and after a matter of a few seconds after he said, 'All right now, come on.' We all got up and he took the baby up and mother took the parcels, and he followed the conductor down the aisle, mother coming after him, we children following. We got just to the door, and mother and he changed parcels and the baby, and we went right out, father going ahead, and he walked right out and walked down the steps and stepped off, and we were all following him, and the conductor when we went out was standing in the vestibule of our car just near the edge between the two platforms of the two cars." The evidence of Archie Mayne, a boy of about thirteen, is to the same effect.

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After the delay of a few moments, the family followed the conductor to the open door, the father passed out ahead, carrying a valise in one hand and a large bundle under the other arm, and turned to the right. About two steps from the door took him to the steps; without hesitating, he went down the five steps, stepped off into the darkness, and was so injured that he was never afterwards conscious, and died within three or four days. The car and vestibule were well lighted.

The action is brought by the plaintiff on her own behalf and on behalf of her children, being the children also of the said William Mayne, for damages, under the provisions of Lord Campbell's Act, and the statutory provisions above set out. These questions were submitted to the jury:—

Q. 1. Was the accident which resulted in the death of the plaintiff's husband caused by any negligence of the defendant company? A. Yes.

Q. 2. If so, wherein did such negligence consist? A. By the conductor not remaining at the door of the car until the train stopped.

Q. 3. Or was the deceased guilty of negligence which caused the accident, or which so contributed to it that but for his negligence the accident would not have happened? A. No.

The fourth question as to what was the contributory negligence was not answered, and damages were assessed at $4,000.

The contention of the defendant company is, that the answer to the second question is not a finding of negligence, or a finding of legal negligence, which I take to be the same thing. Negligence is a relative term. The degree of care to be exercised is necessarily gauged by the circumstances or conditions existing and known to exist at the time. What would shew gross negligence in reference to "A" might not be evidence of negligence at all in reference to "B." Negligence has been often defined, and may, possibly, be often defined again, but there can be no all-comprehensive *à priori* declaration as to what is or is not negligence; as each case arises, it must be governed by its own facts, and it is "always a question for the jury upon the evidence, but guided by proper instructions from the Court. . . . The relative degree of care, or the want of it, grows out of the circumstances and conduct of both parties"—as said by Mr. Justice Agnew in *Philadelphia and Reading R.R. Co.* v. *Spearen* (1864),

47 Penn. St. 300, at p. 305. The definition of Willes, J., in *Vaughan* v. *Taff Vale R.W. Co.* (1860), 5 H. & N. 679, at p. 688, "the absence of care, according to the circumstances," will cover a great many cases, and is distinctly pertinent to what we have to determine here.

Mr. McCarthy, if I understood his argument, contended that a jury cannot be allowed to say how a railway is to be manned, managed, or operated, and he cited the case of *Mallory* v. *Winnipeg*, 29 D.L.R. 20, 53 Can. S.C.R. 323, in which the jury's finding of negligence was set aside. It is quite clear without authority that where the statute, or the Railway Board, or its inspectors, engineers, or experts, under the authority of the statute, specifically prescribe how the road-bed, yards, or rolling stock, or other appliances of the railway are to be constructed, maintained, or operated, it is not competent for a jury to declare that some other or additional thing should have been done or that the railway should have been operated in some other way; and to assign negligence because this other or additional thing was not done or the railway was not operated in this other way, and it certainly requires no authority to establish that the findings of a jury must have evidence to support them; and these are the only grounds covered by the *Mallory* case. The decision is simply an application of the principle upon which *Canadian Pacific R.W. Co.* v. *Roy*, [1902] A.C. 220, and *Montreal Water and Power Co.* v. *Davie* (1904), 35 S.C.R. 255, were decided. No question of this nature is involved in this appeal.

Subject to the provisions of Parliamentary enactments, and regulations and provisions pursuant to their authority, if there is any evidence from which negligence can be inferred, the question of negligence causing injury in a railway case, as in all other jury cases, is absolutely and exclusively for the consideration of the jury; and, although their conclusion may not be quite satisfactory, it will not be interfered with if, in the opinion of the Court, there was evidence upon which reasonable men might have come to that conclusion. In this sense juries can and do determine how railways shall, or at least ought to, be operated. It would obviously be absurd to quote authorities in support of this. No week passes in Britain or Canada without its long list of illustrations; and as, in the majority of cases, facts which can properly be submitted to the jury when found are conclusively determined by their verdict,

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it is the constant effort of Courts to define clearly where the control of the Judge ends and the exclusive functions of the jury begin: *Fraser* v. *Drew* (1900), 30 S.C.R. 241; *Clouston & Co. Limited* v. *Corry*, [1906] A.C. 122; *Toronto R.W. Co.* v. *King*, [1908] A.C. 260. In *Bridges* v. *North London R.W. Co.*, L.R. 7 H.L. 213, Mr. Justice Brett, at p. 236, says: "If such decisions may be overruled on the mere ground that courts or Judges do not agree with them, juries are bound to matters of fact by the view of the Judges as to facts. This cannot be."

If, however, by his argument Mr. McCarthy meant no more than to affirm that a jury ought not to be allowed dogmatically to affirm that in all cases, unless a certain specific thing is done, the company, without regard to other circumstances, is guilty of negligence, as for instance that a porter, conductor, or other official must always be at the door of the car when passengers are alighting or about to alight, I would certainly be disposed to agree with him. The cases do not shew that juries can make regulations as to the operation of railways, and all that the Railway Act contemplates or provides for is that "the company shall *according to its powers* . . . with due care and diligence . . . carry and deliver" their passengers upon and from their trains. It is conceivably quite possible for a railway company to shew, even in an exceptional case like this—and, in my opinion, casting upon the company the duty of exceptional care—that such instructions and warnings had been given or such precautions had been taken, or such other duties of paramount importance or urgency were imposed upon the conductor, particularly if their intervention could not be anticipated, as to preclude the inference of negligence. The existence of such conditions was for the company to shew if they could, and, with contributory negligence negatived, a finding in which I entirely concur, in the absence of such evidence and on the undisputed evidence in this case, I find it impossible to think that the jury were wrong in finding the absence of the conductor, wherever he was, from the place in which he could, and under the circumstances ought to, have been at the time when the last chance to save this man had come, and his marvellous silence as he saw him turn from the door and step by step go down to his death, was the negligence causing the casualty —the last link in a chain of negligence and reckless indifference

to the safety of Mayne and his family, beginning when he tapped him on the shoulder and said: "This is Dunbarton, this is where you get out." The general announcement had been made some little time before, and it must be made in all the local cars, when the train is about to stop, and without reference to whether there are passengers to get off in the car where the announcement is made or not, as otherwise there would constantly be passengers getting off by mistake, before they had reached their destination. I therefore attach no importance, under the circumstances of this case, to the call "Dunbarton, next stop." In our system, and for the reasons I have mentioned, amongst others, it does not in itself necessarily mean an invitation to alight at once: *Edgar* v. *Northern R.W. Co.*, 11 A.R. 452; and at all events it did not influence the action of Mayne in any way. He had told the conductor that he had not travelled much, had put himself as it were in the conductor's charge, and depended upon him to tell him "when he was at Dunbarton" and when to get off. "Invitation to alight" is a nicely turned and convenient phrase, but like other good servants is liable to be overworked. The broad question in each case is: Was the conduct of the company's servant such as reasonably to induce the passenger to believe that he was expected to alight and could then alight in safety? If by any act or acts of the servant of omission or commission this belief is induced, it is incumbent upon the company's servant to counteract it by notice, warning, physical intervention, or otherwise, in time to prevent the passenger from acting upon it; and, if he fails to do so and injury results, the company are liable: *Crowther* v. *Lancashire and Yorkshire R.W. Co.*, 6 Times L.R. 18; the *Bridges* case above referred to, where the warning "keep your seats" came too late; *Edgar* v. *Northern R.W. Co.* (above), judgment by Patterson, J.A., at p. 455, Osler, J.A., at p. 456; and, if once the company's servants create the impression that the passenger may safely alight, it would seem that the belief must be actually dispelled and the subsequent act must be effective, or the company will still be liable: *Rose* v. *North Eastern R.W. Co.* (1876), 2 Ex. D. 248, 46 L.J. Ex. 374. In that case the train was at a standstill, but not opposite the platform; and, although the porter called out "Keep your seats," the plaintiff did not appear to have heard him, and the warning had not the effect of actually counteracting the impression created by the stoppage of the train. The

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verdict was upheld upon appeal. The same principle was adopted by the House of Lords in the *Bridges* case.

The conductor, knowing that Mayne was waiting to be told when he was at the station, having told him "This is Dunbarton, this is where you get off," having fastened back the end-door, for car-doors will not stay open without being fastened, as the jury would know, and having opened the trap and the outer door, there was the clearest intimation to Mayne that it was safe and the time for him to alight; and Mayne having come to the platform with his bundles and family, and proceeding without hesitation across the platform and down the steps in the ordinary way of alighting, was unequivocal notice to the conductor that Mayne believed the train had stopped and intended to and thought he should get off at that time. Notwithstanding this, the conductor went away from the steps where he ought to have been, as will hereinafter appear, and where he would necessarily offer a physical impediment to passengers in passing out (but not for the cause he alleges), and let this man go to his death without one word to disabuse his mind of the erroneous belief that he had actively created. I cannot think that the finding attacked ought to be set aside. The conductor says that when he saw Mayne come upon the car-platform he did not tell him that the train was not yet stopped because he believed he was going back into the first class coach. Did he still believe it when he saw him cross the platform and go down the steps? Did he believe it at all? Does a man, unused to travelling, manifestly nervous and anxious, who arranges to be specifically informed when he should get off, with bundles upon each arm, and a wife and baby and six other children to care for, and several moments after he has been told, "This is where you get off," do that kind of thing; or is this the story of a man who finds it difficult to account for his conduct? Would twelve intelligent jurors, would any juror, be likely to believe him? And, if not, it goes to the root of the conductor's credibility throughout. This witness says that he was not on the lower step, as the common practice is and the jury would know, as he had to open the trap and door of the adjoining vestibule. For what purpose? There were no passengers for this flag station on that car, the Maynes were the only people he had to look after at that time, and he does not suggest that there were others. He is contradicted as to the fact by the plaintiff

and her two children, who favourably impressed the learned Judge at the trial; and there is the cogent evidence of two expert witnesses for the defence as to what he should have done and where he ought to have been, all to be considered.

It was all matter for the jury to weigh and determine; was it true that the conductor was engaged as he says; was it necessary or prudent to open two adjoining and communicating vestibules for a flag station; was it a paramount duty, in the circumstances of this case, seeing that he knew that these people were getting off in the belief of safety which his conduct had inspired; and, granting it all, was there anything to prevent him when he saw Mayne on the platform from saying, "Stay there until the train stops?"

It is possible that the conclusions of the jury might be better and more fully expressed than they are, but I do not undertake to say so. Possibly they might have given the several matters of antecedent or original and continuing negligence, culminating in the ultimate negligence assigned, as additional causes of the casualty; but is it to be expected that juries will always express their conclusions fully and with technical accuracy? Their findings are not to be scrutinised and treated like a document prepared by a solicitor and revised by eminent counsel—otherwise we had better revert to the old practice of a general verdict. It ought to be enough that their meaning, in the light of the evidence and the Judge's charge, is evident—is within their province, and is supported by evidence.

A recent authority for saying this is to be found in *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719. The jury said, in answer to the second question, that the company's negligence consisted in: "Excessive speed under the circumstances: namely, a single track was in use for both-way passengers, and it was proved that passengers were waiting whose destination was unknown to the motorman or conductor. Therefore, the speed should have been slackened and the car brought under complete control approaching the station. Insufficient space between the orchard and station for observing the approach of cars from the north." It is to be observed that the only relevant finding under question 2 was excessive speed. There was nothing in the finding as to a defective brake; and the decision of the Privy Council for the plaintiff rests upon the car being taken out in the morning

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with a defective brake, combined with excessive speed. In delivering the judgment of the Board, Lord Sumner, at p. 5, said: "The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of vehicles being on the road, there can be no mistake in the matter, and their finding stands."

I understood the door spoken of in the answer called in question to be the vestibule-door or what might be called the outer or side door of the car, but either way it would matter little if the conductor had not remained mute. "Hey" when the man was on the lowest step or in the air was not calculated to prevent the disaster, and did not prevent it.

Mr. McCarthy argued that it was not the duty of the conductor to be on or about the steps. Well, if there was no duty, no duty could be violated, and no negligence could be inferred. There is no prescribed or precise way in which companies are to exercise care in the carriage of passengers; in each case it is a question of antecedent or concurrent conditions or circumstances, and there may well be instances in which what is here referred to by counsel would not constitute negligence. In this instance, however, I am of opinion that there was abundant evidence for the consideration of the jury pointing to a reckless disregard of duty, beginning when the conductor told Mayne, "This is where you get off," continuing in unbroken sequence until the disaster occurred, and affording, I would think, cogent evidence of negligence which a jury could not properly ignore. It is common knowledge that the practice on all Canadian railways is that the conductor, porter, or brakesman is at the opening where the passengers are to disembark to assist them to alight. The defendant company called three expert witnesses—two of them gave evidence about this point, and one of them as to the number of doors to be opened.

This is from the evidence of Robert Scott on cross-examination:—

"Mr. Phelan: Do you follow the same rule as the Grand Trunk does, to have an official of the train go to each platform as it is approaching a station? A. On what class of train?"

After several irrelevant answers, this question is read to the

witness, and he answers: "We try to have the conductor and brakesman at the platform.

"Mr. Phelan: As I understand, they usually try to use only one or two platforms at the station? A. One or two as the traffic demands.

"Q. And some official goes to that platform as the train is approaching the station? A. Yes.

"Q. There is nothing to prevent that official telling passengers to remain inside the car till the train comes to a stop, is there? A. Of course he has other duties to perform.

"Q. You stand in there to assist passengers going in and out of the car? A. Yes.

"Q. To see that they get off the car safely, that is his duty? A. If he can get there before the passengers, yes."

The conductor got there in time on this occasion.

"Q. It is his duty to get there how long before the train stops? A. As the train comes into the yard. . . .

"Q. His duty is to go to the platform about a quarter of a mile away from the station and to see to the safe disembarkation of the passengers? A. Yes.

"Q. There is nothing to prevent that man as he gets there asking passengers to remain inside the door until the train stops? A. Not as a rule, and that is done as a rule.

. . . . .

"Q. I suppose you agree with the conductor, with the Grand Trunk conductor, that it is that official's duty to see that passengers do stay inside the car as long as the train is in motion? A. If you can do it, yes."

Here the conductor did not try to keep them in, but the contrary.

And this is from the examination in chief of expert John D. McMillan:—

"Mr. McCarthy: What do you say as to the practice adopted by the Grand Trunk with reference to opening trap-doors on vestibule-cars approaching stations? A. The practice is that the conductor or brakesman is required, some short distance before arriving at a station, to announce the name of a station, and a short time after that to open up the vestibules and to be on hand to assist the passengers off."

Cross-examined by Mr. Phelan: "What I understand you to

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say is, when the train is moving, the trap-door has its purposes of safety? A. Yes.

"Q. And, I suppose, when the trap-door is lifted up, the duty of the conductor is increased so far as looking after the safety of the passengers is concerned? A. It is more or less increased, yes.

"Q. That is, you take away one safeguard when you open the door, and you counterbalance that by saying to the conductor, 'You have to be more careful when the door is open?' A. No, we do not say he has to be more careful, because we expect him to be careful at all times, as careful as he can be.

"Q. May I put the question this way, that the passengers get into the habit of relying upon the conductor or the official on the platform when the trap-door is open? A. There are a certain class of passengers who do and others that do not.

"Q. That is those who are accustomed to travelling and looking after themselves? A. Not at all.

"Q. There are the two classes anyway? A. There are."

The jury accepted and acted upon the evidence of these expert witnesses for the defence as to the propriety of opening the vestibule at the time it was opened, and it was not unreasonable that they should also be confirmed in their common, every day, experience of manning the outlets when trains are approaching a stop, the number of doors usually opened, the additional unavoidable danger, and the need of increased vigilance at such times, by the evidence of these same witnesses. Without reference to any of the antecedent circumstances, I think the answer complained of is well sustained upon the evidence of these experts alone.

In the carefully considered answers of five of His Majesty's Judges to the House of Lords in the *Bridges* case, Brett, J., at p. 232, said: "Negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances, or in the omitting to do some act which a person of ordinary care and skill would do under the circumstances. The final and full and strict direction to a jury therefore in such case is contained in the following questions: Have the defendants or their servants done anything in the conveyance of the plaintiff to his destination which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? Have they or their

servants by such act of commission or omission caused injury to the plaintiff?" And at pp. 234, 235: "What men of ordinary care and skill would or would not do under certain circumstances is matter of experience, and so of fact, which a jury only ought to determine."

My excuse, if an excuse there can be, for stating my opinion at such tiresome length, is that I have the misfortune to differ from the weighty opinion of my experienced and learned brother Riddell. Indeed, though radically different in their settings, including the absence of contributory negligence in this case, I cannot but feel that in more skilful hands this appeal might be disposed of upon the reasoning of the judgment of the Privy Council in *British Columbia Electric R.W. Co.* v. *Loach*, 23 D.L.R. 4.

The appeal should be dismissed with costs.

FERGUSON, J.A.:—This appeal turns upon the meaning of three of the answers of the jury:— FERGUSON, J.A.

"Q. 1. Was the accident which resulted in the death of the plaintiff's husband caused by the negligence of the defendant company? A. Yes.

"Q. 2. If so, wherein did such negligence consist? A. By the conductor not remaining at the door of the car until the train stopped.

"Q. 3. Or was the deceased guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. No."

Read together and with the evidence, these answers, to my mind, mean that the deceased, in leaving his seat in a moving train, walking to the platform of the car and down five car-steps, and from there, in the dark of the night, either stepping or falling off the train, was not guilty of negligence; and that, in the circumstances of this case, the train conductor was negligent in not preventing the deceased from doing what he did, by remaining at the car-door.

That the jury should make such findings of course required special circumstances to be proven, and I think they were proven as follows:—

The deceased, his wife, and seven children, entered the train at Whitby, destined for a flag station called Dunbarton. The deceased requested the conductor to let him know when they were at that station; accordingly, as the train approached Dunbar-

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ton, the conductor came through the car and called out, "Dunbarton is the next stop." Shortly afterwards the conductor returned, and, touching the deceased on the shoulder, said, "This is Dunbarton, this is where you get off." The deceased was entitled to conclude from these words that he had arrived, but he appears to have construed them only as notice to get ready at once to get off, because, on the children rising to go, the father told them to "sit still till the train is stopped;" but, almost immediately afterwards, he said, "Now, come on," and all started for the door. As the wife and husband reached the car-door, the conductor stepped out, and, in the hearing of the husband and wife, and perhaps in the sight of the husband, who was ahead, opened the trap-door in the vestibule and the outside door; and there, in sight of both, stepped back, whereupon the deceased walked down the steps. To give effect to the jury's finding of no contributory negligence, it must be concluded that the deceased was misled by the conductor's action into the belief that the train was at its destination and stopped at the place where the deceased was to get out.

If such be the necessary result of the answer to question No. 3, then it follows that in the answer to question No. 2 the jury have found the means that should, in their opinion, have been adopted to prevent the deceased from acting on the erroneous impression created by the acts and words of the conductor.

I would dismiss the appeal.

Appeal dismissed with costs—the Court being divided.

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REX v. COVERT.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck and Hyndman, JJ. December 23, 1916.

1. CONSTITUTIONAL LAW (§ II A—275)—PROCEDURE IN CRIMINAL MATTERS—PROVINCIAL CRIMES.

A provincial legislature has exclusive legislative authority to regulate matters of procedure and evidence in prosecutions under the provincial statutes even where the offence may be termed a "provincial crime" because punishable by fine or imprisonment. The exclusive control given by the B.N.A. Act (sec. 91) to the federal Parliament in respect of "procedure in criminal matters" does not include procedure with reference to the so-called "provincial crimes."

[*Re McNutt* (1912), 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, 10 D.L.R. 834, considered.]

2. CERTIORARI (§ II—24)—NATURE AND EXTENT OF REVIEW—ONUS OF PROOF SHIFTED BY STATUTE—WEIGHT OF EVIDENCE—MATTERS OF CONFESSION AND AVOIDANCE.

Where *certiorari* is not taken away by statute, a superior Court, exercising powers of supervision and revision is ordinarily confined, when deal-

ing with the question whether there is evidence to justify a summary conviction, to the evidence for the prosecution; but where the evidence for the prosecution justifies a conviction only on the ground of natural inference or statutory legal presumption and the evidence for the defence does not contradict the facts from which the inference or presumption arises, but proves the existence of other facts which shew that the inference, otherwise rightly drawn, ought not to be drawn when the whole facts are known, the Court is bound to consider also such defence evidence in determining whether there was evidence to justify the conviction.

3. INTOXICATING LIQUORS (§ III G—89)—CONDITIONAL STATUTORY PRESUMPTIONS—REVIEWING EVIDENCE IN ANSWER ON CERTIORARI.

On *certiorari* in respect of a summary conviction for keeping liquor on premises other than a private dwelling-house in contravention of sec. 24 of the Alberta Liquor Act, the Court is bound to examine the evidence on the part of the accused, not to weigh any contradictions, but, assuming the truth of the evidence for the prosecution, to ascertain whether the accused has negatived the statutory presumption raised by sec. 54 of the Act on *primâ facie* proof being given of his possession, charge or control of the liquor, whereby the onus of disproving the offence is, by said sec. 54, then thrown on the accused.

4. SUMMARY CONVICTIONS (§ I—10)—PROVINCIAL CRIMES—DOCTRINE OF REASONABLE DOUBT.

The principle that an accused person ought not to be convicted unless upon the whole case it is shewn that he is guilty beyond a reasonable doubt is applicable to summary conviction proceedings for an offence created by provincial law and punishable thereunder by fine or imprisonment.

5. WITNESSES (§ IV—60)—CREDIBILITY—UNCONTRADICTED TESTIMONY—DEMEANOUR.

A Judge or magistrate cannot legally refuse to give credit to testimony if the following conditions are fulfilled: (1) That the statements of the witness are not in themselves improbable or unreasonable; (2) that there is no contradiction of them; (3) that the credibility of the witness has not been attacked by evidence against his character; (4) that nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and (5) that there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.

[*R.* v. *Minchin*, 22 Can. Cr. Cas. 254, 15 D.L.R. 792, and *Browne* v. *Dunn* (1894), 6 R. 67 (H.L.), referred to.]

6. CERTIORARI (§ I A—5)—STATUTORY RESTRICTION—ALBERTA LIQUOR ACT.

Section 41 of the Alberta Liquor Act has not the effect of taking away *certiorari* except in the two cases of charges against or respecting a "vendor" or a druggist (sub-section 2) and not then unless an appeal would not afford an adequate remedy (sub-section 8).

Statement.

MOTION by way of *certiorari* to quash a summary conviction made under the Liquor Act of Alberta.

F. E. Varley, for the accused.

W. F. W. Lent, and *Popple*, for the Crown.

Beck, J.

The judgment of the majority of the Court was delivered by

BECK, J.:—The defendant was convicted for that on the 14th day of September, 1916, at —— Street, Calgary, he, not being a vendor, did unlawfully have or keep intoxicating liquor on the said premises, such premises not being a private dwelling-house, contrary to section 24 of the Liquor Act of Alberta.

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The applicant raises directly this question:—

When a provincial legislature creates a (provincial) crime, has it power to provide the procedure for the enforcement of the fine, penalty or imprisonment imposed?

Mr. Justice Clement, in his "Canadian Constitution," 3rd ed. (1916), p. 551, says: "That provincial legislatures have exclusive authority to regulate the procedure in prosecutions for offences against provincial statutes is now recognized as the law in all the provinces."

Mr. Crankshaw, in his Criminal Code, 4th ed. (1915), pp. 1292-3, says:

> "When under the limited authority conferred upon them, provincial legislatures impose a fine or a penalty or imprisonment, for disobedience of a provincial law, they do not thereby create the criminal offence involved in such disobedience. Disobedience of a statute is a crime under the common law. It is a crime under the general criminal law of the country and the Criminal Code itself (by section 138) expressly makes it an indictable offence to unlawfully disobey any Act of any legislature in Canada and enacts that the offender shall be liable to one year's imprisonment, unless there is some other punishment expressly provided by law.
>
> "Surely the mere fact that the provincial legislatures are granted a limited right, to the extent of fixing the punishment in the case of a criminal offence which contravenes a provincial statute, does not give them the further power to regulate, in regard to such offences, the criminal procedure, over which the Dominion Parliament is given exclusive control; such exclusive control being so given to the Dominion Parliament in order, no doubt, to secure in the trial of criminal offences uniformity of procedure and evidence all over Canada.
>
> "It is not easy to reconcile the decisions in some of the cases which have arisen upon this subject; but there seems a good deal of reason in the contention that, when the subject matter of a proceeding before a Justice or Magistrate is in the nature of a criminal offence, it should have applied to it the general law of criminal procedure and evidence, whether it is based upon an infraction of a provincial law or otherwise."

Mr. Lefroy, in his "Canada's Federal System" (1913), p. 331, says:—

"But the Dominion Parliament cannot of course regulate the procedure under a provincial statute."

Mr. Lefroy had evidently come to the same conclusion in his "Legislative Power in Canada" (1897), pp. 463 *et seq.*

In *Pope* v. *Griffith* (1872), 16 L.C. Jurist 169, 2 Cart. 291, Ramsay, J., distinctly holds that a Provincial Legislature has power to regulate procedure affecting penal laws which such legislature has authority to enact. He says:—

"It will not be denied that, in one sense of the word, the act of which the appellant is accused (a breach of the Intoxicating Liquor clause of the Quebec License Act) is a crime; but it is equally certain that it is not a crime in the sense of sub-sec. 27, sec. 91, of the B.N.A. Act ('The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters'). Now, if the signification attached to the word 'criminal' is restricted, when referring to law in this sub-section, why should it be used in a different sense when applied to *procedure*? It cannot be presumed that in one short paragraph, particularly a paragraph of an enumeration of powers, the legislature should have intended to apply two different meanings to the same word, especially when by doing so they would be transferring the legislation with regard to a purely local matter to parliament."

In *Ex parte Duncan* (1872), 16 L.C. Jurist 188; 2 Cart. 297, Dunkin, J., in dealing with the pedler clauses of the Quebec License Act came to the same conclusion. I do not, however, agree with his opinion that under the Constitutional Act an offence against a provincial Act may not be, having regard to its nature, a criminal offence and properly designated as a provincial crime; but only that is not criminal within the meaning of that word as used in sub-sec. 27 of sec. 91 of the B.N.A. Act. The learned Judge points out that in 1868 Parliament at its first session by the Act 31 Vict. c. 71 provided that any wilful contravention of any provincial Act, not otherwise constituted an offence of some other kind, should be a misdemeanor. For this, was subsequently substituted the provision (Crim. Code sec. 164) making disobedience to a provincial statute an indictable offence "unless some penalty or other mode of punishment is expressly provided by law;" so that now the wilful breach of a provincial statute is

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not made a crime within the meaning of sec. 91, sub-sec. 27, if fine, penalty or imprisonment is imposed by provincial law.

The learned Judge also points out that the first Dominion Summary Conviction Act (32-33 Vict. ch. 31) in express terms limits its operation to matters "over which the Parliament of Canada has jurisdiction." The same express restriction is contained in Part XV. "Summary Convictions," sec. 706 of the Criminal Code.

In *Pope* v. *Griffith* (1873), 17 L.C. Jurist 302, 2 Cart. 308, Sanborn, J., came to the same conclusion.

Again, in *Cote* v. *Chauveau* (1880), 7 Que. Law Rep. 258; 2 Cart. 311, Casault, J., reached the same conclusion and in a note in 2 Cart. it is said that this judgment was affirmed by the Court of Appeal.

Reg. v. *Roddy* (1877), 41 U.C. Q.B. 291; 1 Cart. 709, was a case of a conviction under an Ontario Liquor License Act for selling intoxicants on Sunday, an offence punishable by fine or imprisonment with hard labor. The Court (Harrison, C.J., Morrison and Wilson, JJ.) said:—

> "The conclusion which we draw from the decisions is, that the accusation against the defendant here was so far of a criminal nature that he ought not to have been compelled to give evidence against himself and therefore that the conviction must be quashed."

In coming to this conclusion, the Court held that a provision in the provincial Act, making the party opposing or defending any proceeding in a matter or question under the Act in question or a number of other Acts or any proceeding, matter or question before a Justice of the Peace, etc., *not being a crime*, a competent and compellable witness to give evidence in such proceeding, matter or question was excluded from application to the proceeding in question by reason of the words "not being a crime."

The Court concluded by saying: "Although it is not possible to reconcile the decisions, it would seem that where the proceeding, although before Justices of the Peace, is not simply for the recovery of money payable to some individual informant but for the punishment of an offence against social order, and where the punishment may be not only the imposition of a fine but imprisonment and that at hard labour, the offence by whatever legislature created, or assumed to be created, is to be looked

upon as a crime and the prosecution a criminal prosecution, so as to exclude the testimony of the accused for or against himself."

In *Regina* v. *Lawrence* (1878), 43 U.C. Q.B. 168 Ib. 164, 1 Cart. 742, Gwynne J., the Judge of first instance, and the Court of Queen's Bench (Harrison, C.J., Wilson and Armour, JJ.) held that a province in legislating in regard to a matter within provincial jurisdiction has no power, by way of enforcing its legislation, to make provision for the trial or punishment of offenders in respect to acts which would be criminal offences at common law, *ex. gr.*, tampering with a witness upon a prosecution under the Provincial Act. The implication is that the Provincial Legislature may so act, if this restriction is observed.

These cases were followed in many subsequent cases. *Reg.* v. *Robertson* (1886), 3 Man. L.R. 613; *Reg.* v. *Mason* (1889), 17 Ont. A.R. 221; 4 Cart. 578, where the Court having first held that the provincial legislation there in question was within the competence of the Provincial Legislature held that the Provincial Legislature had power to regulate the procedure and as a consequence a provision relating to appeal was valid; *Reg.* v. *Bittle* (1892), 21 O.R. 605; *R. ex rel. Brown* v. *Simpson* (1896), 28 O.R. 231; *Lecours* v. *Hurtubise* (1899), 2 Can. Cr. Cas. 521, 8 Que. Q.B. 439; *R.* v. *McLeod* (1901), 4 Terr. L.R. 513; *Kavanagh* v. *McIlmoyle* (1901), 6 Can. Cr. Cas. 88, 5 Terr. L.R. 235; *R.* v. *Miller* (1909), 15 Can. Cr. Cas. 156, 19 O.L.R. 288.

It is suggested that doubt is thrown upon this long and uniform line of decisions by the case in the Supreme Court of Canada, *Re McNutt* (1912), 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, 10 D.L.R. 834.

In that case the defendant had been convicted and sentenced to three months' imprisonment for breach of a provincial law (Nova Scotia). He applied to a Judge for a writ of *habeas corpus*. The Judge, instead of granting the writ, made an order under the provincial Liberty of the Subject Act calling on the goal keeper to return the date and cause of the detention. On the return to this order, he refused to discharge the prisoner and this refusal was affirmed by the Court *en banc*. The prisoner then appealed to the Supreme Court of Canada. The appeal was quashed or dismissed.

The Supreme Court Act provides for an appeal "from the

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judgment in any case of proceedings for or upon a writ of *habeas corpus* . . . *not arising out of a criminal charge.*"

The dismissal of the appeal was put by Fitzpatrick, C.J., Davies, J., and Anglin, J., on the ground that the proceedings arose out of a criminal charge; by Idington, J., and Brodeur, J., on the ground that the proceeding was not "for or upon a writ of *habeas corpus*," and by Duff, J., on the merits.

It is, however, quite clear that the three learned Judges first named fully recognized the existence of what for convenience has often been termed "provincial crimes," that is where a provincial legislature has made a law "in relation to any matter coming within any of the classes of subjects enumerated in section 92" of the B.N.A. Act and has exercised its power of imposing "punishment by fine, penalty or imprisonment for enforcing" such law (sub-sec. 15).

The Chief Justice says [21 Can. Cr. Cas. at 161]:

"Such legislation if enacted by the Imperial Government would be denominated 'criminal' and fall within the category of 'criminal law' and I fail to understand how the element of criminality disappears merely because the Act is competent to the provincial legislature."

Davies, J., says [21 Can. Cr. Cas. at 164]:—

"I conclude therefore that the offence for which the appellant was convicted and imprisoned came within the classification of public wrongs or crimes. The only question remaining is whether Parliament intended, when exempting from our jurisdiction in sub-sec. (*c*) of sec. 39 of the Supreme Court Act, proceedings 'not arising out of a criminal charge' to embrace in the exemption cases arising under provincial legislation. I see no reason for reading any limitation into the general words of the exemption and to confine them either to criminal charges at common law or under Dominion legislation."

Anglin, J., says: [21 Can. Cr. Cas. at 179]:—

"Why, then, should we restrict the meaning of 'criminal charge' in sec. 39 (*c*) to a charge of an offence such that only the Dominion Parliament could create or deal with it."

When one understands the reasoning of those learned Judges it is at once seen that it is not only in no wise inconsistent with the numerous cases to which I have already referred but is based upon the same fundamental principles.

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This being the law, all objections to the conviction in the present case on the ground that the provisions of the Liquor Act relating to procedure or evidence are *ultra vires* of the provincial legislature fail.

The remaining objection is that there is no evidence to justify the conviction.

The charge is one of having or keeping intoxicating liquor. The defendant kept a "jitney bar," that is a place for selling "soft" drinks. The evidence for the prosecution was in substance as follows:

Detectives passed the front door of the defendant's premises and saw only a girl, apparently employed there, standing in the doorway between the business part of the premises and laughing and talking as if to people in the kitchen, the next room. The detectives entered the kitchen by the back door and found there four soldiers, some sitting at, and some standing around, a table. One bottle of wine was on the table and one of the soldiers had an eggcup full of wine. Three bottles, practically empty, were also in the kitchen.

Then they noticed the defendant behind the counter in the business part of the premises and going there they found behind or under the counter one bottle uncorked containing some wine. I gather that the bottle was on the floor behind the counter.

The soldiers, when the detective interfered, said they had brought the liquor with them. They were all more or less under the influence of liquor. The accused, when asked by the detectives about the partly full bottle found behind the counter, said that he had just come in and that he did not know it was there. The detectives could not say whether or not the defendant had only just come in.

One of the detectives says he thinks there was a man sitting at a table in the front part of the premises.

The prosecution being for a crime, the guilt of the accused being a matter not of direct proof but only of inference, and the inference being met by a voluntary explanation given at the time which was not unreasonable or improbable, the evidence for the prosecution, in my opinion, would not justify a conviction if it were not for the legal presumptions which the statute declares shall arise from the existence of certain conditions and circumstances.

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Section 48 provides that any house, shop, room or other place, in which it is proved that there exists a bar or counter, etc., similar to those found in hotels and shops where liquors are accustomed to be sold or trafficked in, shall be deemed to be a place in which liquors are kept or had for the purpose of being sold, bartered or traded in, in contravention of this Act, *unless the contrary is proved by the defendant in the prosecution.*

Section 54 provides that if in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or having or purchasing or receiving of liquor, *primâ facie* proof is given that such person had in his possession or charge or control any liquor in respect of, or concerning which, he is being prosecuted, *such person shall be obliged to prove that he did not commit the offence with which he is so charged.*

There are a number of other sections constituting certain conditions and circumstances *primâ facie* proof which seem to be applicable to the present case.

As I read sec. 41 of the Act, *certiorari* is not taken away except in the two cases of charges against or respecting a "vendor" or a druggist (sub-sec. 2) and not then unless an appeal would not afford an adequate remedy (sub-sec. 8).

Where *certiorari* is not taken away, and therefore lies, as in my opinion it lies in the present case, I think that this Court, exercising its powers of supervision and revision, though ordinarily and *primâ facie* confined, when dealing with the question whether there is evidence to justify the conviction, to the evidence for the prosecution, is not so confined, and is entitled, and is bound, to consider also the evidence for the defence where the evidence for the prosecution justifies a conviction only on the ground of natural inferences or statutory legal presumption and the evidence for the defence does not contradict the facts from which the inference or presumption arises, but proves the existence of other facts which shew that the inference, otherwise rightly drawn, ought not to be drawn, when the whole facts are known, or, in other words, when the defence is wholly by way of confession and avoidance.

To deal with the evidence from this point of view is not to weigh it, but to test whether the onus of *primâ facie* proof on the

one side or the other has been sustained. The distinction is obvious.

The position is parallel to that of a magistrate holding a preliminary enquiry on a criminal charge. The accused is entitled to give evidence if he sees fit (sec. 686).

As is said in Crankshaw's Criminal Code, 4th ed., p. 773, "If the case established at the close of the evidence for the prosecution is such that any proof to be adduced on the part of the accused will only amount, at most, to a *conflict of evidence*, it will not be advisable to make use of it at this stage, since, although the preponderance would, if the accused's witnesses were examined, be in his favour, the justice would in all probability commit for trial it being no part of his duty to determine as to the guilt or innocence of a party under such circumstances. There are, however, many cases of *primâ facie* guilt which the accused may, by calling witnesses, be enabled so to *explain* as to clear up at once the imputation against him. Thus, upon a charge of theft, it may be that the only proof of guilt against him is his possession of the stolen property; and it may happen that he is in a situation to shew, by highly respectable testimony, that he became possessed of the property in a perfectly fair and honest manner. Indeed, in all these cases where the criminality of the party accused rests merely upon the *presumption of law* which the accused is able to *explain* by evidence, such evidence may be adduced with a reasonable expectation of success.

R. v. *Meyer*, 11 P.R. (Ont.), 477, was a case of a prosecution for refusing to provide necessary clothing and lodging for the accused's wife and children. The magistrate refused to hear the evidence on the part of the accused and committed him for trial. Wilson, J., on a motion for *habeas corpus* said:—

> "The section is evidently intended to enlarge the powers and duties of magistrates in cases of this nature, and, although I do not say they may or should undertake to try such cases, I think they are not at liberty to decline the duty of taking the defendant's evidence. It is in the interest of justice they should hear what the accused has to say on oath. To deny him such a hearing might often be the means of inflicting great hardship and injustice, especially if those in whose power he is for the time being are ignorant, prejudiced and vindictive. In the present case, for example, it is suggested by the

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wife's cross-examination that she was unfaithful to her husband. If she was, it would be an answer to the charge so far as she is concerned, as he would be no longer bound to support her. He might be in a position to prove her infidelity before the magistrate beyond any question. So he might also be fully prepared to shew that, at the time he left her, he gave her the most ample means of support for herself and her children. Surely, as the Act stands, the magistrate would not be justified in refusing to accept such evidence."

That the like distinction is to be observed, when this Court is considering the evidence when returned upon *certiorari*, is, I think, evident from an examination of the cases to which I made reference in the case of *R.* v. *Emery*, 27 Can. Cr. Cas. 116.

The expression constantly recurring is "the weight of evidence"; an expression clearly interpreted for instance by Cockburn, C.J. [*Ex parte Vaughan*, L.R. 2 Q.B. 114] where he uses the expressions "evidence on one side and the other"; a "conflict of evidence"; Mellor, J., "preponderance of evidence"; Lush, J., "Evidence for and against the charge."

The duty of the Court is not to weigh conflicting evidence but, while being careful not to do so, is to see that the accused has been convicted only upon legal and sufficient evidence.

In this view I am clearly of opinion that in the present case this Court is entitled to and therefore bound to examine the evidence on the part of the accused; not to weigh any contradictions but, assuming the truth of the evidence for the prosecution, to ascertain whether the accused has disproved the presumption or mere inference, which it may be assumed was established against him by *primâ facie* evidence.

First, there has to be taken into account the facts that the soldiers promptly and voluntarily asserted that it was they who had brought the liquor on to the premises, and that the accused likewise asserted that he had just come in and implied, by that, that he knew nothing about it, and that there was a man in the front room at the time the detectives arrived.

One McArthur gave evidence to the effect that he was in the front room—just coming into it from the toilet—when two of the soldiers came in by the front door and went into the kitchen; that immediately the two other soldiers came into the kitchen by the back door; that the accused was not in when the soldiers

came in; but that he had met one or two of the soldiers during the day and they had given him a "drink" in the alley adjoining the premises.

The two soldiers who entered by the front door gave evidence to the effect that the accused was not there when they came in; that they went in to the kitchen where the two other soldiers were and that the latter had liquor which they all drank; that none of it was got on the premises; one of them said he saw one of the others stand a bottle behind the counter, doing this, as I understand, merely by reaching through the doorway.

The girl gave evidence that two soldiers came in the front door and went to the kitchen; that she did not see the other two come in; that she knew of no liquor being ever kept or sold on the premises and had instructions not to allow it to be used on the premises, and although she does not explicitly say that the accused was not there at the time the soldiers came in, it seems to be implied in her evidence.

The accused gave evidence, in effect, that he came into the building just about the time the detectives came into the kitchen; that he had not sold liquor on the premises; that the liquor in question was not got by the soldiers on the premises; that he had told the girl not to allow liquor on the premises; that he did not know how the bottle found behind the counter got there, but it could easily be thrown in there; that the other soldiers could not be got as witnesses because they had left the city with their battalion.

We are bound to presume the accused was innocent, until proved guilty; he gave all the available evidence and that evidence, if true, explained away the inference or presumption against him.

It will be objected, of course, that the magistrate may have disbelieved entirely the evidence on behalf of the accused, and that it was open to him to do so; but in my opinion it cannot be said without limitation that a Judge can refuse to accept evidence. I think he cannot, if the following conditions are fulfilled:—

(1) That the statements of the witness are not in themselves improbable or unreasonable;

(2) That there is no contradiction of them;

(3) That the credibility of the witness has not been attacked by evidence against his character;

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(4) That nothing appears in the course of his evidence or of the evidence of any other witness tending to throw discredit upon him; and

(5) That there is nothing in his demeanour while in Court during the trial to suggest untruthfulness.

To permit a trial Judge to refuse to accept evidence given under all these conditions would be to permit him to determine the dispute arbitrarily and in disregard of the evidence, which is surely not the spirit of our system of jurisprudence.

The correctness of the proposition which I have laid down is fairly established by the principles laid down in the cases of *Browne* v. *Dunn* (1894), 6 R. 67 (H. L.) lengthy extracts from which appear in *Rex* v. *Minchin* (1914), 22 Can. Cr. Cas. 254, 15 D.L.R. 792, 7 Alta. L.R. 148 at 155, *et seq.*, and in *Peters* v. *Perras* (1909), 42 Can. S.C.R. 244, a fuller report of the reasons for judgment in which appear in *Park* v. *Schneider* (1912), 6 D.L.R. 451 at 454, 5 Alta. L.R. at 426.

Where evidence is reported to an appellate tribunal, especially where, as here, it appears that the evidence was taken by a stenographer, that tribunal has not, of course, the advantage of observing the demeanour of the witness when giving his evidence; but in the first place, if his demeanour has been the sole ground upon which the trial Judge has rejected the witness's evidence, it is reasonable to expect that at least some indication of it will appear in the material reported to the appellate tribunal; for instance, in the reasons for the decision (if reasons are given), in the form the witness's answers take, or even in the form of the questions put to him (though care should be taken to satisfy one's self that questions imputing misconduct are not put unfairly and without some foundation), or in observations by the trial Judge during the course of the case.

All this is of special force in a criminal case in which, it is unnecessary to repeat, the accused ought not to be convicted unless upon the whole case it is shewn that he is guilty beyond a reasonable doubt.

A most important recent decision emphasizing at once this rule, and the regard which the Court is bound to give to a defence by way of confession and avoidance, is *Rex* v. *Schama* (1914), 84 L.J. Q.B. 396, 11 Cr. App. R. 45, 112, L.T. 480, 79 J.P. 184, (which I adverted to in *Rex* v. *O'Neil* (1916), 25 Can. Cr. Cas.

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323, 9 Alta. L.R. 401) where the English Court of Criminal Appeal said, in a case where the accused was shewn to have recent possession of goods recently stolen, he was entitled to be acquitted if he gave a *reasonable* explanation of his possession which *might* be true *though the jury were not convinced that it was true*.

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Applying these principles to the present case I think the magistrate was in justice bound to accept the evidence on the part of the defence, even though not convinced of its truth, as at least leaving the guilt of the accused in doubt and therefore entitling him to an acquittal; for in these cases of provincial crimes the rules of evidence and adjudication are precisely the same as in the case of crimes at Common Law or under the Code.

For these reasons I think the conviction should be quashed.

Scott, J. Hyndman, J

SCOTT and HYNDMAN, JJ., concurred with BECK, J.

Stuart, J.

STUART, J. (dissenting):—At the close of the argument I was satisfied that there was nothing in the objection that a Provincial Legislature had no power to regulate the procedure in prosecutions for violation of the provisions of a provincial statute. There are cases where the same word used twice in the same section of an Act must necessarily be given a different meaning in each place.

The use of the word "applicable" in section 12 (old section 11) of the North West Territories Act is an instance of this, see *Brand* v. *Griffin*, 1 A.L.R. 510, 9 W.L.R. 427. But unless the context makes a different interpretation necessary, I think a word twice used in a section of an Act should be given the same meaning in both places. The word "criminal" is used twice in section 91 of the B.N.A. Act and I think it must be interpreted in the same way in the last case as in the first.

Everyone knows that the efficacy of an enactment may depend entirely upon the sufficiency of the procedure for enforcing it. Special procedure may be absolutely necessary if the enactment is not to be nugatory. And just as the Courts have decided that the exclusive power given to the provincial legislatures to pass legislation upon certain subjects necessarily involves, if the legislation is to be effective at all, the power of imposing penalties, so it must involve also, I think, the power to regulate the procedure for the infliction of the penalties. This is just the reason why the Dominion Parliament was given power to deal with criminal procedure, that is, in order that its own legislation could be made effective.

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Indeed, sufficient significance has not in this case been given to the circumstance that the Provincial Legislatures have the power to establish and erect Courts of civil and criminal jurisdiction, and to give them their sphere of jurisdiction. The Dominion, for certain purposes, may add to this jurisdiction but it cannot take any away. So the Provincial Legislatures, for the purposes of enforcing their legislation, could, if they saw fit, establish tribunals of a new kind altogether and not leave it to magistrates or justices of the peace. They could establish a tribunal, if they saw fit, to which the procedure provided in the Code for summary proceedings before magistrates and justices of the peace could not possibly apply and before which it could not be workable at all. Then if the applicant's contention were correct, the Dominion Parliament would have to keep following up the enactments of each of the nine legislatures and providing procedure for every special tribunal that these legislatures saw fit to create.

The authorities collected by Mr. Justice Beck clearly settle the matter in any case.

I wish to add that I do not agree that the provisions of secs. 50 and 48 of the Liquor Act of 1916, which are the only ones really in any event applicable to the facts of this case, in regard to procedure, can properly be called procedure. The effect of the enactment in sec. 50 is that the occupant of any house, shop, etc., in which liquor is sold, kept, etc., is to be personally liable even though the prosecution cannot shew that it was done under his directions. That is not procedure. It is, so far, substantive law. The section then proceeds—"and proof of the fact of such sale, etc., by any person in the employ of such occupant or who is suffered to be or remain in or upon the premises of such occupant or to act in any way for such occupant shall be *primâ facie* evidence that such sale, etc., took place with the authority and by the direction of such occupant."

There indeed does seem to be some inconsistency between the first part of the section and the latter. By the first part the occupant is made personally liable even though the prosecution cannot, and therefore does not, prove that the act was done by the defendant's directions. That scarcely, by itself, implies that the defendant may get off by shewing that it was *not* done by his direction. Yet the latter part of the section does seem to indicate

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that the defendant may shew this and so establish a defence. But, in my view, this section deals with the constituents of the offence and impliedly creates a legal ground of defence for the accused, viz., the fact that the act was not done by his direction. This is all substantive law, as it seems to me, not procedure at all.

A defendant always had to prove the facts which in law constitute a defence to an action or a charge unless he simply denies the facts which are alleged by the plaintiff or the prosecution and which, under the substantive law, constitute legal liability.

I think the same applies to the provisions of section 48.

Upon the merits I think there was sufficient evidence to convict. I would not myself have believed that the accused did not know that the soldiers were drinking intoxicating liquors on his premises. He was there at least some time before the detectives came. I think from the evidence that he knew the men were in the kitchen and just what he thought four soldiers were doing in his kitchen at the back, not in the place where his customers were usually served, I fail to understand. At least there was enough to justify the magistrate in refusing to accept his denial.

I would affirm the conviction.

Conviction quashed, STUART, J., *dissenting*.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. March 30, 1917.

PARTITION (§ I—1)—WIDOW ENTITLED TO DOWER—CANNOT COMPEL PARTITION—RULE 615.

Rule 615 (Con. rules, Ont.) applies only to persons who can compel partition, and until a widow decides to take under the Dower Act, and not under the Devolution of Estates Act, she is not such a person, and there is no power to make any order under this rule.

A widow although entitled to dower out of the whole of her deceased husband's lands, has only a right of action to have her dower assigned to her (upon which her right of possession arises) and cannot "compel partition" under rule 615, this being limited to those who have a right to possession of their shares in lands.

Statement.

AN appeal by the defendant Philip Morrison from the order of CLUTE, J., 38 O.L.R. 362.

I. Hilliard, K.C., for appellant.

H. S. White, for plaintiff, respondent.

The judgment of the Court was read by

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—This is a partition matter, and involves several questions of considerable importance.

The respondent applied in the High Court Division for par-

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tition, under Rule 615, which provides that: "An adult person entitled to compel partition of land or any estate or interest therein," may so apply.

Upon the application the appellant contended, among other things, that the respondent was not a person entitled to compel partition; but the learned Judge who made the order now in appeal held that she was; he, however, delayed the partition until after the trial of an issue, which he directed, to determine whether the appellant has acquired title to the land in question under the provisions of the Statute of Limitations; a direction the propriety of which is also called in question in this appeal.

The only interest the respondent has in any of these matters is as the lawful widow of Alexander Morrison, deceased, who is said to have died, intestate, on the 9th day of January, 1915, seized in fee simple of the land in question, leaving the appellant, his brother, and three sisters, and one nephew and one niece, his only heirs at law and next of kin, and the respondent, his lawful widow, him surviving.

The land was at one time let by Alexander Morrison to the appellant; but the appellant now asserts that he has had such possession of it, since that time, as to give him title to it.

That, in these circumstances, such an issue as I have mentioned should have been directed to be tried seems, at first sight, to be extraordinary.

The widow is made the plaintiff in that issue, and the heirs at law, and next of kin, defendants.

But no one disputes the widow's right to dower—nor could under the Statute of Limitations; her husband died only two years ago. So that, as directed, the issue could be only a useless proceeding.

It is, therefore, obvious that the issue must have had some indirect purpose, not disclosed in it; and that purpose was to determine, if possible, whether the appellant has acquired title to the land, not against the widow, but against his co-heirs, so that she might be in a better position to make an election, under the 9th section of the Devolution of Estates Act, R.S.O. 1914, ch. 119, whether to take under or against the provisions of that enactment.

But what power was there to make use of this partition Rule for any such purpose? It is applicable only to one entitled to

compel partition; and is to be used only for the purpose of making partition. If entitled to partition at all, the respondent could be entitled to compel partition only if she were not taking under the Act.

And again, such an issue could not aid such a purpose. It is answered already; the appellant has not acquired title under the Statute of Limitations; he admits that, and, as I have said, it is obvious. The plaintiff, being the widow only, the only question that could be tried is, whether title had been acquired against her. There is no issue directed between the appellant and the other heirs at law; none could be directed against their will.

And, if there were, it would be improper and it might be useless. The land, if it were the intestate's at the time of his death, has not yet devolved upon the heirs at law, it has devolved upon his personal representative. So that the simple and obviously proper way of proceeding is: for the widow to become such personal representative, and then bring an action to recover possession of the land from the appellant; and, as she is not required to make any election under the Devolution of Estates Act until six months after she has been required, in writing, by the personal representative to do so (sec. 9(2)), the whole thing seems to be in her own hands, and there is not a shadow of excuse for these irregular and improper proceedings.

The learned Judge seems to have overlooked the fact that only a person entitled to *compel* partition comes within Rule 615; and that, unless and until a widow decides to take under the Dower Act, R.S.O. 1914, ch. 70, and not under the Devolution of Estates Act, she is not such a person, and there is no power to make any order under that Rule. It is not a question which has to be tried; it is a matter in her power altogether; and any application before she has made up her mind upon it is premature and must be dismissed. So, too, she can hardly have counted the cost; for if, after the trial of an issue, she chooses to abandon these proceedings and take under the Devolution of Estates Act, she should be compelled to pay all costs taken in partition proceedings by one who finally chooses to take the position of one never entitled to take them. The Courts should not permit any one to put its machinery in motion to produce a result which may be abandoned at the will or caprice of the person who put it in motion.

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Another irregularity should be referred to. All the heirs at law mentioned in the affidavits have been made parties to these proceedings, and the order for the issue has been made against them, although, as appears from an affidavit of the respondent's solicitor, the appellant only has had notice of these proceedings. That should not have happened; even the officer who issued the order should have taken such care that it could not. The names of all who had not had due notice should have been struck out. A right to proceed against "one or more persons" could hardly have been thought to be a right to proceed against more than one upon serving one only.

This issue ought not to have been directed; and must be set aside with the order directing it.

But, if the respondent have a right to partition—and that is all her application asked for—it must be granted. She has admittedly a right to dower, which, as to this land, has not been extinguished. That is, she has a right to dower in the whole, not in an undivided part of the land, and that right is in no way affected by any question that may, or may not, arise between the appellant and the other heirs at law.

The law regarding the right of partition, in such a case, has for many years been in an unsettled and unsatisfactory state, in this Province; and it may be in other respects also. But as, in perhaps 99 cases out of every 100, all persons concerned—dowress, tenant by the courtesy, life-tenant, remainderman, etc., etc.—are all only too anxious for a conversion into money of the property in question and a division of the proceeds, rather than a partition of the property, little contention has arisen, and much may have been done under colour of partition that the law of, and practice in, partition may have been far from warranting. Cases, however, do arise, and this is one of them, one of the few in number, in which it becomes necessary to consider what are the strict rights of the parties; and, in doing so, what partition means, and who are they who can compel partition against the will of any or all others concerned in the property.

As I have said, it is generally not partition that is sought, but sale; not property, but money; and so it comes to be forgotten that there can be no sale except there could be partition; that the right to sell has been added by statute only as an aid to partition, so as to give to all persons concerned in the property fuller

benefit from it when a sale would "be more advantageous to the parties interested."

Then is a widow, entitled to dower out of the whole of the land, but which has not been assigned to her, a person who can "compel partition of land?"

There is an obvious difference between the case of a right to dower out of the whole of the land, and a right to dower out of an undivided part of it. In the former case, it is immaterial whether the ownership is in one person or more persons; the right is to dower out of the whole land, however held; in the latter, it depends entirely upon an undivided share the owner of which is entitled to partition; a share which cannot be held in severalty until it has been partitioned.

The respondent is admittedly entitled to dower out of the whole of the land in question. Is she entitled to enforce that right in partition proceedings under Rule 615?

I should have thought that the answer should unhesitatingly have been "No," for more than one plain reason.

It was well-settled, and well-understood, law that only those who were entitled to possession of their shares in land could have partition; that is the law in England now, and always has been, though its statutes in regard to partition and sale are wide and liberal: see *Dodd* v. *Cattell*, [1914] 2 Ch. 1, in which counsel for the party seeking partition on being asked by the Court, "Can a person entitled in remainder expectant on a life estate obtain a partition?" answered, "No, there must be possession," shewing how well-settled and well-understood the rule there is. And in the United States of America, it seems to have been equally so well-settled and well-understood. The rule there is thus stated in the Cyclopædia of Law and Practice, vol. 30, p. 182: "It was the rule both at common law and in Chancery that none but estates in possession were subject to compulsory partition. This rule prevails in the United States except where it has been abrogated by statute." And, until money instead of land was brought in sight by legislation, it is difficult to understand why partition would be made, or sought, except to give possession in severalty.

The general impression in this Province may be, that legislation has changed here that rule; but a general impression which, if it exist, seems to me to have arisen very largely, if not altogether,

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from the power to sell conferred by that legislation, in forgetfulness that power to sell can arise only when there is a right to partition.

Partition, as provided for in the Consolidated Statutes of Upper Canada of 1859, ch. 86, expressly limited the right to partition, of an intestate's land, to those who were "entitled . . . to the immediate possession" (sec. 6) of their shares and interests; but did not so expressly limit it as to joint tenants, tenants in common, and co-parceners whose interests in land did not arise out of an intestacy. And it expressly gave to a guardian of any minor the same rights as were given to such co-tenants, etc.

The Provincial enactment of 1868-9, 32 Vict. ch. 33, repealed the enactment contained in the Consolidated Statutes and re-enacted it with a good many changes, putting its provisions upon the subject I am now dealing with in very much the same language as that in which they appear in the latest enactment upon the subject, the Revised Statutes of Ontario, 1914, ch. 114.

The 6th section of the enactment of 1868-9 provided that "any party interested in any land in the said Province, or the duly authorised agent of any such party, by the guardian (duly appointed by any Surrogate Court) of any infant entitled to the immediate possession of any estate therein, can and may file a petition . . ."

In the year 1884, it was decided, in the case of *Murcar* v. *Bolton*, 5 O.R. 164, that the provisions of the partition enactment then in force, R.S.O. 1877, ch. 101, did not give power to sell life-estates in lands other than those of testators or intestates; and it was hinted that the provisions as to immediate possession, if applicable only to a guardian of an infant, may have become law through inadvertence: see p. 184. And there does seem to be much to be said in support of the suggestion that "entitled to the immediate possession" should not be limited to such a guardian. "It is not easy to see why there should be any difference," are the words of Hagarty, C.J. (p. 184). If the section be, as it was held to be in that case, applicable to the cases of estates of deceased persons only, and as, under the enactment which this Act re-enacted, it was expressly provided that the land of persons dying intestate could be partitioned only by those entitled to immediate possession, it seems probable that the provision was

to be retained and extended to the land of persons dying testate; for why make any difference between the two? And what convincing reason can be suggested for applying it to a guardian only, in view of the fact that under the earlier enactment the guardian was given expressly the same rights as any joint tenant, tenant in common, or co-parcener? It is easy to see how the present otherwise unexplainable state of affairs may have been brought about. The simple misplacement, or omission, of a comma, by any one concerned in the drafting, copying, or printing of the enactment, might have caused the whole difficulty; the simple process of inserting a comma after the word "infant" would solve all difficulties even in a most literal interpretation. That there was a great lack of care in the printing and proof-reading of the enactment is made very plain by the insertion of the word "by" for the word "or," in the very words in question, a mistake which makes it still easier, literally and otherwise, to hold that the words "entitled to the immediate possession" govern all that has gone before them. And so good sense would be made of the words used and of the power they confer.

A suggestion made by the dissenting Judge in the case of *Murcar* v. *Bolton*, that the words "entitled to the immediate possession of any estate therein" should be read "entitled to a vested estate," seems to me to be without substantial foundation, and more plainly so as the Act is now than it was then. We must not take "prodigious liberties" with either contracts or enactments; we must give the Legislature credit for knowing, quite as much as Courts, how to express their intention, at all events well enough not to use the words "entitled to immediate possession" for "entitled to a vested interest," in a matter in which the law generally required a right to immediate possession of the land. And the words used in the Consolidated Statutes of Upper Canada seem to me to make it quite plain that "immediate possession" meant immediate possession.

I can find no warrant for the assertion of the same Judge in that case that under the enactment 2 Wm. IV. ch. 35, reversioners and remaindermen could compel partition: the very purpose of a partition seems to me to be against any such notion; and the law seems to me to be clear that, unless conferred by statute, no such right ever existed; and I know of no statute in England or here by which it has ever been conferred.

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There are few enactments out of which some inconsistency cannot be imagined; but that is no reason for disregarding the plain meaning of plain words, or endeavouring to bend them to fit better with preconceived notions.

In the Act as it now is, the Partition Act, R.S.O. 1914, ch. 114, sec. 7, provision is made—among other things—for the sale of a life-estate, if the person entitled to that estate is a party to an action or proceeding for partition or administration; and in sub-sec. (2) it is provided that the purchaser of land sold in such action or proceeding shall take the premises free from such life-estate, whether in the whole or in an undivided part, if the land has been sold under this section free from it. From that it may be contended that a remainderman must have a right to partition, else how could there be a sale of a life-estate in the whole? But the section in the first place requires that the life-tenant shall be a party to the action or proceeding; and that he cannot be if his estate is not subject to partition proceedings. And it will be observed that such a tenant is not named in sec. 4 among those who can be compelled to make partition; a tenant by the courtesy, however, is. It is difficult to see how a tenant for life could be a proper party to partition between remaindermen. What concern could that be to him, who could not be disturbed in his life-tenancy? And, as I have said, the power to sell follows only upon the right to partition.

Then as in the Act, in this section, provision is made for administration as well as partition, are not all its words given effect to in considering that the rights conferred as to life-estates affect, in partition matters, life-estates in undivided interests, only, but in administration matters the whole?

It is, I think, impossible to point to anything in the Act, as it now is, substantially consistent with a ruling that a right to possession must exist to entitle any one to compel partition.

My opinion is, and always has been, that the law of this Province, in this respect, is in accord with that of England; that all alike, no matter how they take, stand upon a like footing; that none but those entitled to possession, that is, none but those who really need it, are entitled to partition.

But it is said that, even if that be so, yet this respondent is entitled to partition; that she has an interest in land and is

entitled to immediate possession in accordance with the meaning of those words as the Legislature has written them in the Partition Act.

I am unable to agree in that, in either respect.

It is obvious that she is not entitled to immediate possession; just as obvious as it is that a tenant in common of land, not subject to any prior right of possession, is; he may go into possession of the whole. He cannot be prevented from taking possession of an undivided part. If others, having like rights with him, cannot agree with him as to possession, or division, a case for partition arises. A widow has no right to any kind of possession, except as to quarantine in cases in which she is entitled to quarantine. She has only a right of action to have her dower assigned to her; her right to possession arises upon such assignment, and not until then: see *Rex* v. *Inhabitants of Northweald Bassett* (1824), 2 B. & C. 724; and the Dower Act, secs. 2 and 4. And, when her dower is assigned to her, partition is out of the question; partition has taken place in the assignment of her dower. Nor can I think the widow a "person interested in land," within the meaning of those words in sec. 5 of the Partition Act. "Interested in land" must refer to a property-interest in it. Not merely an interest in land in a popular sense. And the words "an interest in land" must have reference to the purposes of the enactment; there are scores of interests in land to which partition is inapplicable; so the interest must necessarily be a partitioning interest; an interest held in unity, which law, or equity, deems that justice requires may be enjoyed in severalty at the instance of any one entitled to a share in it. And, as I have said, a widow entitled to dower is not in such a position.

Then, although the Partition Act expressly provides (sec. 4) that a dowress may be compelled to suffer partition; it does not so confer any right to compel partition. And why should it? The law has always provided expressly and plainly for the assignment of dower; so that there could be no need of partition for that purpose; and the law has not yet seen fit to permit a woman entitled to dower to have, at her own instance, money in lieu of dower. If it had, the provisions for assignment of dower would have fallen into great disuse.

Not only does the Dower Act make such provision, but the Rule next but one following that upon which this application is

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based—Rule 617—also provides for its assignment in a case, such as this, in which the right to dower is not disputed.

Nor do the cases relied upon afford authority for a partition instead of an assignment of dower.

In the case of *Devereux* v. *Kearns* (1886), 11 P.R. 452, Ferguson, J., dismissed the application, though he expressed the opinion that an assignment of dower might be had by way of partition in such a case as this.

In the case of *Fram* v. *Fram*, 12 P.R. 185, Robertson, J., after giving expression to his own views as being opposed to those expressed by Ferguson, J., in the earlier case, followed that earlier case in dismissing the application as a matter of discretion; and, when that case was reheard before a full Court composed of those two Judges and Boyd, C., the order refusing the application was affirmed, but it is to be gathered, I think, from the remarks of the Chancellor, that he, like Robertson, J., was not in accord with Ferguson, J., in his opinion—an opinion however given effect to—that an order for partition might be made in such a case as this. So, if those cases were well decided, instead of being in the respondent's favour, they are against her. She cannot *compel* partition, and so is not within Rule 615.

The point whether the Court had any power to refuse, in its discretion, partition to one who was within her right in seeking it, does not seem to have been dealt with in either of these cases; though it has long been held that even the Court of Chancery has no power in such a case to refuse it: see *Baring* v. *Nash* (1813), 1 V. & B. 551, 554; and the Partition Act contains nothing to the contrary, indeed it rather points that way—every person interested may take partition proceedings, that is, every one having partitioning interest may enforce it. If the learned Judges who heard *Devereux's* case and *Fram's* case had deemed that they had no power to refuse in their discretion, there can be no doubt that the result would have been the same, that Boyd, C., and Robertson, J., would have held that there was no right in the plaintiff to partition, that dower must be assigned in the usual way.

The position of a person entitled to dower in an undivided interest in land is very different from that of one entitled to dower out of the whole of the land. She may come to this Court

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to have her dower assigned, but, after that, she must be yet like the owner of the undivided interest without the separate enjoyment of it; but, having it assigned, and so acquiring a right to possession, she has a partitioning interest and can compel partition; and, being entitled to the two rights in the one Court, she may have both in the one application.

The whole subject seems to me to be quite accurately summarised by Mr. Holmested in his work upon the Judicature Act, at p. 1263, in these words: "A dowress in the whole estate is not entitled to partition or sale: . . . but where the dower is claimed out of an undivided share, the dowress would seem entitled to partition or sale."

And on yet another ground the respondent's application should be dismissed. Under the Devolution of Estates Act, sec. 3, "all real and personal property" of an intestate or testator devolves upon and becomes vested in the intestate's or testator's "personal representative" as trustee for the persons beneficially entitled to it, subject to the payment of the intestate's or testator's debts; and it is to be administered, dealt with, and distributed, as if it were personal property, subject to some exceptions inapplicable to this case.

The personal representative is not at all in the position of a trustee with a mere power of sale. It is his duty to sell land as well as goods, if the due administration of the estate require it; and, under sec. 21, the powers of sale conferred upon him by the Act may be exercised not only for the purpose of paying debts, but also of distributing or dividing the estate among the persons beneficially entitled thereto, whether there are or are not debts; and it is not necessary to obtain the concurrence of the persons beneficially entitled to the land except where the sale is made for the purpose of distribution only.

Under sec. 13, speaking generally, the land, not disposed of by the personal representative, is not to vest in the persons beneficially entitled to it until three years after the death of the intestate or testator.

An application such as this, not only made within the three years, but before a personal representative has been appointed, seems to me to be not only unwarranted but inexcusable.

Courts do not sit for the purpose of making orders, entailing

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great expense, which may be useless: orders for partition of land at the instance of a person or persons who may never become entitled to any share or interest in the land; and of land that may be sold notwithstanding the partition order or anything that could be done by the Court under its partition jurisdiction. The Court has no right to interfere in partition proceedings with the lawful possession of such land by the personal representative or with any lawful disposition he may make of it.

It was suggested, in this case, that there are no debts in this Province, but there is no evidence of it; if, however, that were so, and if that could have any effect in such a case as this, there is no suggestion that there are not debts in the United States of America, where the intestate was domiciled, and resided, at the time of his death, and for many years before.

The provisions (sec. 5 (2)) of the Partition Act prohibiting proceedings under it until a year after the death of the intestate or testator in whom the land sought to be partitioned "was vested," are not in conflict with the view that, as long as the land is vested in the personal representative, to enable him to perform his duties, there can be no right to compel partition. The prohibition contained in the Partition Act was passed at a time when the land of an intestate and testator did not devolve upon the personal representative, but did devolve upon the persons beneficially entitled; and so gave at once a right to partition of partitioning interests; and the prohibition was of the exercise of that legal right, and the prohibition of it so that a reasonable time might be given to learn whether the land would be needed for the payment of debts; in which event administration of the real estate would follow ordinarily and render partition, if had, useless. Now, not only is the time extended, but the right to the land which formerly gave the right to partition is taken away, and given to the personal representative. There is no need for a prohibition of the exercise of a right to compel partition when that right does not exist.

I would allow this appeal, discharge the order for the trial of an issue, and dismiss the application to compel partition.

Appeal allowed.

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Quebec Superior Court, District of Montreal, Allard, J. December 4, 1916.

CRIMINAL LAW (§ II A—49)—ELECTION OF SUMMARY TRIAL—CR. CODE SEC. 778.

The procedure of taking the election of the accused for summary trial as enacted by Cr. Code sec. 778 applies to the offence of theft by a servant or agent under Cr. Code sec. 359 although the value is alleged to be under $10; it is not enough that the accused pleaded not guilty where his consent to summary trial was not asked in conformity with sec. 778.

Statement.

MOTION for discharge of prisoner on *habeas corpus*.

Dagenais, and *Caron*, for prisoner; *D. A. Lafortune*, K.C., for the Crown.

Allard, J.

ALLARD, J.:—The petitioner was on the 4th day of February condemned by magistrate Lanctot, upon a complaint, that he did in the month of September, 1916, being a servant of the Grand Trunk Railway, steal 16 baskets of fruits of a value of about $7, the property of the Grand Trunk Railway Company, his employer. He was sentenced to six months' imprisonment.

The record shews that the petitioner appeared before the magistrate on the 4th of October; the complaint was read to him; he pleaded not guilty, and the magistrate proceeded to try him summarily, and without his consent.

The charge as laid against the accused comes under sec. 359 of the Criminal Code, sub-sec. (*a*):—

"Every one is guilty of an indictable offence and liable to fourteen years imprisonment, who being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, steals anything belonging to, or in the possession of his master or employer."

It is true that the thing stolen is laid in the information and complaint, as being of a value of $7, and presumably the magistrate proceeded to try the accused under sec. 773 of the Code, which provides that whenever any person is charged before a magistrate with theft, and where the value of the property does not in the judgment of the magistrate exceed $10, the magistrate may, subject to the subsequent provisions of this part, hear and determine the charge in a summary way.

By secs. 774 and 775, in certain cases, the magistrate has absolute jurisdiction, and that jurisdiction does not depend upon the consent of the accused. The cases provided for do not cover theft of something the value of which is under $10.

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Sec. 778 declares that whenever the magistrate, before whom any person is charged, as aforesaid, proposes to dispose of the case summarily, under the provision of this part, such magistrate, after ascertaining the nature and extent of the charge, but before the examination of the witnesses for the prosecution, and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him; and then follows sub-sec. 2, as contained in 8-9 Edw. VII. ch. 9, sec. 2:—

"If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused (*a*) that he is charged with an offence (describing it); (*b*) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction."

Sub-sec. 3 provides that if the accused consents to the charge being summarily tried and determined, as aforesaid, or if the magistrate has jurisdiction without the consent, he shall reduce the charge to writing, and ask the accused to plead.

None of these formalities were followed by the magistrate in the present case: he assumed absolute jurisdiction, did not ask whether the accused consented to be tried by him but proceeded to try him.

I find no provision in the Code giving a magistrate absolute jurisdiction to try an offence under sec. 359. Under that section the gravamen of the offence is not the value of the thing stolen, but it is the fact that the person charged is the servant, and the value of the thing stolen is immaterial. See *Rex* v. *Conlin*, 1 Can. Cr. Cas. 41, 29 Ont. R.28. In that case the consent of the accused was obtained.

I am of opinion that the magistrate had no jurisdiction whatever to try the accused. He required something to give him jurisdiction, which he did not obtain, viz., the consent of the accused, and the writ of *habeas corpus* will be obtained, and the prisoner will be liberated. See *R.* v. *Bonin*, 20 Can. Cr. Cas. 180.

The judgment of the Court was entered as follows:—

"The Court having heard the petitioner upon his petition for a writ of *habeas corpus* and upon the merits of the said writ having examined the pleadings and documents and deliberated:—

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"Seeing the accused by his petition for writ of *habeas corpus* alleges in substance: that on the 4th of October, 1916, he was convicted on a charge of theft as a servant, and was sentenced to six months in gaol, where he now is; that the magistrate did not obtain his consent, but proceeded to try him summarily without his consent, and without giving him any information as to what his rights were;

"Considering that the accused was charged that being a servant he stole from his employer goods of a value of about $7;

"Considering that on said charge he pleaded not guilty, and the magistrate, before whom he was, proceeded to try him summarily without his consent and without informing him that he had a right to be tried by a jury;

"Considering that the magistrate was without jurisdiction to hear and determine the said case, and the conviction which intervened is illegal, and null, and should be quashed:

"Doth maintain the said writ of *habeas corpus;* doth declare null, and doth quash the said conviction, and doth order the immediate liberation of accused". *Prisoner discharged.*

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell and Lennox, JJ. and Ferguson, J.A. March 1, 1917.

MUNICIPAL CORPORATIONS (§ II A—30)—MAINTENANCE OF INDIGENT PERSON IN HOSPITAL—LIABILITY FOR—LOCAL MUNICIPALITY AND COUNTY MUNICIPALITY—HOSPITALS AND CHARITABLE INSTITUTIONS ACT, R.S.O. 1914, CH. 300.

The corporation of the municipality in which an indigent person, admitted to a hospital, is resident, within the Hospitals and Charitable Institutions Act, R.S.O. 1914, ch. 300, sec. 23(1), means the town, village or township municipality, not the county municipality.

Statement.

APPEAL by the defendants the Corporation of the Town of Barrie from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiffs in an action in the County Court of the County of York.

Hazel Thomas was born in the township of Vespra, n the county of Simcoe, in 1902; her mother died in 1910 and her father in 1911; she then went to Collingwood, where she lived with her paternal grandmother for a short time. In April, 1911, by the order of the Police Magistrate for the Town of Collingwood, she was committed to the care of the Barrie branch of the Children's Aid Society for the County of Simcoe (Children's Protection Act

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of Ontario, R.S.O. 1914, ch. 231, sec. 9 (5)). The magistrate also ordered (sec. 12 (1)) that the Corporation of the County of Simcoe should pay $2 per week for her support. In October, 1912, she was removed to the shelter of the society at Barrie. She remained at the shelter and in houses in Barrie where she was employed, for some years and until, on the instructions of an official of the plaintiffs, she was taken to the King Edward Sanitarium, Weston, as she was suffering from tuberculosis.

The girl being still in that Sanitarium, this action was begun in January, 1916, against the Corporations of the Town of Barrie and County of Simcoe to recover $1 per day for board and medical treatment of the girl down to the 30th December, 1915.

The County Court Judge gave judgment against the town corporation, and dismissed the action as against the county corporation.

The defendants the town corporation appealed; the plaintiffs did not appeal as against the county corporation.

W. A. Boys, K.C., for appellants.

J. M. Godfrey, for plaintiffs, respondents.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The appellants do not question the respondents' right to recover from some municipal corporation the amount in question in this action; they admit that sec. 23* of the Hospitals and Charitable Institutions Act covers the case; but they contend that they are not the corporation made liable by that legislation.

The facts are not in dispute. The child, out of whose hospital treatment the respondents' claim arises, is an orphan; she has no parental home, but had lived with her grandmother in the town of Collingwood, which forms part of the county of Simcoe, for some time; and was then, under the provisions of the Children's Protection Act of Ontario, delivered to the Children's Aid Society for the Town of Barrie, which town also forms part of the county of Simcoe, as a "neglected child;" and from that time until she was removed to the respondents' hospital, about three years, remained in charge of that society and lived always in the town of Barrie, part of the time in the children's shelter there.

*23.—(1) The corporation of the municipality in which an indigent person admitted to a hospital receiving aid under this Act is at the time of his admission resident shall be liable to pay to the governing body of the hospital the charges for his treatment. . . .

Under the provisions of the last-mentioned enactment, it became the duty of the Corporation of the County of Simcoe to provide a children's shelter, and it may be said that under such duty they did provide the shelter in Barrie to which the child was taken, and where she was living at the time of her removal to the hospital. This corporation was also, under the provisions of this enactment, made liable for and paid $2 a week to the Children's Aid Society for the maintenance of the child whilst she was in Barrie.

The liability in question is thus imposed, in sec. 23 of the Hospitals and Charitable Institutions Act: "23.—(1) The corporation of the municipality in which an indigent person admitted to a hospital . . . is at the time of his admission resident shall be liable . . ."

Residence, of the person so admitted to the hospital, is, therefore, the only test; and, for the appellants, it was contended that the liability in question in this action, which the County Court has placed upon them, ought to have been placed upon (1) the Corporation of the Town of Collingwood, or (2) upon the Corporation of the County of Simcoe.

But it is out of the question to shift the liability to Collingwood. The grandmother was under no obligation to maintain the child there. Her residence with her grandmother ended completely when the child was sent to Barrie; and it is equally plain that the child's residence at the time of her admission to the hospital was in Barrie; and, as Barrie is part of the county of Simcoe, her residence was also in Simcoe, as well as in the Province of Ontario, and so on.

The words "is . . . resident" should be given their ordinary meaning; and, having regard to the charitable purposes of the enactment in which they occur, should be given a wide meaning among "indigent persons," so that they may not be deprived of the benefit of the legislation which must have been intended to comprehend all indigent persons in every municipality in the Province. To say that the Act is applicable only to those capable of choosing, and who have voluntarily chosen, a residence, would exclude many to whom the benefits of the Act ought first to be given: see *Edinburgh Parish Council* v. *Local Government Board for Scotland*, [1915] A.C. 717. "Is . . .

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resident" would, no doubt, be better expressed, "Is . . . residing;" the meaning given to each expression should be the same; and must include residing, whether compulsorily or voluntarily. The child must have been residing somewhere; and it would be futile to contend that she did not reside in Barrie. She comes well within Mr. Justice Bayley's often-quoted definition of the word *resides*: "What is the meaning of the word '*resides*?' I take it that that word, when there is nothing to shew that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep:" *Rex* v. *Inhabitants of North Curry* (1825), 4 B. & C. 953, 959; as well as within the colloquial dictum that "A person who has no home, or other place of residence, resides wherever he happens to hang up his hat at night."

Obviously, I should have thought, the child was residing in Barrie at the time of her admission to the plaintiffs' hospital; was so residing within the meaning of sec. 23 of the enactment in question.

Then was she also so residing in the county of Simcoe? The Act does not contemplate such a dual, nor, going further, triple or quadruple, residence. One or other of these municipalities must apparently "foot the bill." Why should it be shifted from the "local" to the county municipality?

Not because the liability under the Children's Protection Act of Ontario falls upon the county, for in it the liability does not depend upon residence; the county is expressly made liable by it. Indeed as, in the Act in question, the language is changed from the corporation of every county, in the other Act, to the corporation of the municipality in which the indigent person is resident; and, as the latter Act expressly provides that "municipality" shall mean only a county, city, or separated town, and the former does not, the provisions of the Children's Protection Act of Ontario go a long way to exclude the county from liability under the provisions of the other Act.

Then the Municipal Act, R.S.O. 1914, ch. 192, provides, in sec. 2(*l*), that the word "municipality" shall mean a locality, the inhabitants of which are incorporated; and sec. 3 of the Interpretation Act, R.S.O. 1914, ch. 1, provides that the interpretation section of the Municipal Act—sec. 2—shall extend to all Acts relating to municipal matters. But sec. 8 of the Muni-

cipal Act provides that the inhabitants of a county, as well as of a city, town, village, and township, shall be a body corporate for the purposes of the Act. The fact, however, is, that a county is really a compound of all its "local," or minor, municipalities; the council being composed of the reeves and deputy reeves of these minor municipalities, the inhabitants of which are numbered as inhabitants of it, and the population of the county is only the aggregate of the inhabitants of its local municipalities so numbered; so too the property of such inhabitants is assessed by the local municipalities, and all taxes are collected and levied by them; it is the local municipalities only that are directly in touch with the inhabitants; the county connection is more remote.

And it may well be that in the much smaller matter of neglected children's shelters and maintenance the obligation should be put upon the county; it indeed may be said to be almost necessarily so placed, because it could not be put upon each of the local municipalities, that would be excessively overdoing the need; and being put upon the counties, and the local municipalities being obliged to pay all the county taxes, and, probably, the cost being so little that it would be something after the fashion of the proverbial "two bites to a cherry" to keep a separate account against each of the local municipalities for its residents, if any, aided, it causes no surprise that the obligation has been placed, just as it has, upon the counties.

But as to indigent persons requiring and receiving hospital treatment, there seems to be no good reason why one local municipality should pay for the residents of another, to any extent; why each should not pay, and attend to its own affairs in regard to, that statute-imposed liability.

If the county be liable, then no local municipality can be, for all of its inhabitants are necessarily inhabitants of the county of which it forms part.

In addition to all this, the amendment, at the last session of the Legislature, to sec. 23 of the enactment in question, makes it plain that the Legislature meant to put the liability in question upon the local municipalities: sec. 46 of the Statute Law Amendment Act, 1916, 6 Geo. V. ch. 24, providing that certain township municipalities shall not be liable under sec. 23 unless the indigent person has been admitted to the hospital upon a written order

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signed by the reeve, deputy reeve, or a councillor of the township.

I would dismiss the appeal.

RIDDELL, J.:—An appeal from the decision of His Honour Judge Denton in favour of the plaintiffs.

The facts are not in dispute, and the whole question is one of law, viz., the interpretation to be put upon sec. 23 (1) of the Hospitals and Charitable Institutions Act, R.S.O. 1914, ch. 300.

Hazel Thomas, born in the township of Vespra in 1902, was orphaned of mother in 1910 and of father in 1911; she then went to Collingwood, where she resided with her paternal grandmother for a short time. In April, 1911, she was, by the order of the Police Magistrate for Collingwood, committed to the care of the Barrie branch of the Children's Aid Society for the County of Simcoe (Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 9(5)), and an order made (sec. 12 (1)) that the Corporation of the County of Simcoe should pay $2 per week for her support.

She was not removed immediately, but remained with her grandmother until the fall of 1912, when, in October, she was removed to the Shelter of the Children's Aid Society at Barrie. This Shelter, it is suggested, was provided by the society itself. However that may be, the county corporation being under a statutory duty to provide a Shelter (sec. 6 (1))—it is said this statute has been amended, but there is no amendment to this section—it must be taken that the county adopted this Shelter as though it had been provided by the county.

The secretary of the society took the girl to his own home, giving her board and lodging, but no wages. After remaining with the secretary about 10 months, she went to another place, also in Barrie, on the same terms—remaining there about 14 months; she was then taken back to the Shelter and remained there for a few months, when she was taken to the King Edward Sanitarium, Weston, on the instructions of an official of "The Toronto Free Hospital for Consumptives," as she was suffering from tuberculosis. There she still remains.

In this action, begun early in January, 1916, the Toronto Free Hospital sue Barrie and the County of Simcoe for $1 per day for board and medical treatment down to the 30th December, 1915. His Honour Judge Denton gave judgment against Barrie,

and dismissed the action against Simcoe: Barrie now appeals, but there is no appeal against Simcoe.

The facts being thus clear, it will be seen that, if Barrie should, under the true interpretation of R.S.O. 1914, ch. 300, sec. 23 (1), be the municipality in which the girl was resident at the time of her admission, the appeal must fail; if otherwise, it should succeed.

Upon the hearing I was impressed by the argument that we might read ch. 231 as in some degree *in pari materiâ* with ch. 300, and give to the word "municipality" in this chapter the same meaning as the same word in that. But further consideration has convinced me that this is impossible: ch. 300 is perfectly general, and the fact that it is a child, who has been dealt with under ch. 231, who is the person whose "residence" is to be determined, is a mere incident. I think ch. 300 must be interpreted by itself and its own provisions.

"Municipality" may mean a county, a township or a town: Municipal Act, R.S.O. 1914, ch. 192, sec. 2 (*c*), (*l*); either the larger and more inclusive county "locality" or the smaller and less inclusive "locality" of town or township. I think that the provisions of ch. 300, sec. 23 (3), (4), indicate the smaller "locality." Notice is given to the clerk of the municipality, and he must, within 14 days, make all inquiries as to the residence within his municipality of the patient, and give notice (if such be the claim) that the patient is not a resident of his municipality. This time is not unreasonable for a smaller municipality: but it seems to me quite unreasonably short for inquiring throughout a whole county; sub-sec. (6) looks in the same direction.

The next question is as to residence in Barrie, as distinguished from Collingwood and Vespra.

Were "residence" and "domicile" identical, a very interesting question would arise, not yet conclusively settled in England, where it would seem the better opinion is that the domicile of the father at the time of his death fixes the domicile of the child until its majority, unless the mother changes it: *Potinger* v. *Wightman* (1817), 3 Mer. 67; *Johnstone* v. *Beattie* (1843), 10 Cl. & F. 42; *In re Beaumont*, [1893] 3 Ch. 490. A mere guardian, it would seem, cannot make the change of domicile: Dicey's Law of Domicile (1879), p. 101, note (*u*); Story on Conflict of

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Laws, para. 506 and notes; Eversley on Domestic Relations, 3rd ed., pp. 655, 656.

Here, however, we have no question of domicile, with its troublesome distinctions—residence is to be dealt with.

"Residence," "resident," have no technical meaning: *Edwards* v. *City of St. John* (1882), 22 N. B. R. 287, 305; *Mellish* v. *Van Norman* (1856), 13 U.C.R. 451, 455; *In re Ladoucer* v. *Salter* (1876), 6 P.R. 305, 306; *United States* v. *Nardello* (1886), 4 Mackey (D.C.) 503, 512; *Bank of Toronto* v. *Fanning* (1870), 17 Gr. 514, 516. For the purposes of this statute it may be considered that the residence is the place where one habitually sleeps: *Wanzer Lamp Co.* v. *Woods* (1890), 13 P.R. 511, 513; *Attenborough* v. *Thompson* (1857), 2 H. & N. 559, 563; or sleeps and lives: *Cesena Sulphur Co.* v. *Nicholson* (1876), 1 Ex. D. 428, 452.

I can have no manner of doubt as to the power of any one *in loco parentis* of a child, to change the residence of the child, and I think that the Children's Aid Society was placed *in loco parentis* of this child.

The proceedings whereby she was committed or handed over to the care of the society are not criminal proceedings: 22 Cyc., p. 523, E.1., and cases in note 94; nor is the handing over or commitment of the child a punishment for some offence; it is an appointment of a guardian. The child was not sentenced by the Police Magistrate to be imprisoned or kept at Barrie, but simply placed in charge of the society, who, in the exercise of their discretion and in view of the child's best interests, took her to Barrie. This, I think, was an effective change of residence to Barrie; the child never left Barrie until she was conveyed to the plaintiffs' hospital; so that we need not consider what effect, if any, her living with some one outside of Barrie, but on the orders of the Children's Aid Society, would have.

I think the child was a resident of Barrie at the time of her admission: and that the appeal should therefore be dismissed with costs.

Ferguson, J.A.

FERGUSON, J.A.:—I agree.

Lennox, J.

LENNOX, J.:—When the Legislature expresses its will in definite language, it must be taken to mean what it says. Section 23 of R.S.O. 1914, ch. 300, is not ambiguous or indefinite. The fair interpretation is that, if an indigent person is taken into

an hospital of this character and treated, the municipality in which the patient is resident at the time of admission is liable.

The term "municipality" should not have an exceptional meaning assigned to it merely because the girl happened to be under the control of the Children's Aid Society at the time.

I have examined the Children's Protection Act of Ontario to see if something could not be found there to prevent a county from imposing the burden of derelicts from the whole territory upon a local municipality by establishing a shelter there. There is no comfort to be got from this Act, but rather the contrary. The "shelter" is made "the home" of the neglected child until a "foster-home" is provided, and is the home to which she returns if for any cause she is removed from the intended permanent or foster-home.

After her father died, this girl had no home—domicile—and she continued to live with her grandmother. She became "a resident" for the time being of Collingwood. The order committing her to the care of the Children's Aid Society gave them the *right to her custody;* but, for so long as she remained with her grandmother, she continued to be a resident of Collingwood, notwithstanding the order; and, if taken thence to the hospital, without living in Barrie, Collingwood, and not Barrie, would have had to pay the bill. There is no distinction in the Act between children and adults, as possibly there ought to be. It is intended to embrace and embraces all indigent persons admitted and treated pursuant to the terms of the Act. If Mrs. B., an indigent tuberculous patient, residing in Barrie as her home, is admitted to the hospital, can there be any doubt, if the Act is reasonably construed, as to the liability of the town? If, when Mrs. B. is taken to the hospital, her daughter under 16 years of age, thereby left without home or care, is or becomes a proper inmate for an hospital, and at the time is "making out" as best she can, or is being looked after by the Children's Aid Society as an indigent and neglected child in Barrie, Orillia, Collingwood, or where you like, are the same statutory provisions to be construed as meaning something else, or must the place where she actually "eats, sleeps, and drinks," as the Chief Justice says, be the determining factor in fixing liability?

Are the two cases as to liability to be treated differently? I think not. "Residence" is not to be confounded with "domi-

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cile;" the latter usually means a man's home, and as a rule is not lost without an intention to abandon it and take up a new home. Naturalisation is one test. Our soldiers are still domiciled in Canada, although residents for the time being of England, France, or Saloniki, as the case may be.

The specific provisions of sec. 9, sub-sec. (7), and sec. 12, of the Children's Protection Act of Ontario, are opposed to the idea that we can say that sec. 23 of ch. 300 is to have one meaning as to adults and a different meaning as to neglected children. Mr. Boys, in a very able argument, if I may say so, certainly said everything that could be said in support of the appeal; but, after very careful consideration, and although the conclusion is not the one I desired to come to, I think the judgment of the learned Judge of the County Court must stand.

Personally, I would prefer to see the burden of the county's misfortunes ratably distributed over the county municipality, and collected by a county levy, as in other cases; but where, as in this case, the intention of the Legislature is reasonably clear, I have no right to legislate. If the Act does not express what the Legislature actually intended or desired, it is matter for amendment.

The appeal should be dismissed. *Appeal dismissed.*

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GELINAS v. JOLIN.

Quebec Superior Court, District of Three Rivers, Désy, J. November 3, 1916.

1. CERTIORARI (§ II—26)—SECURITY FOR COSTS—DEPOSIT OF FINE.

To obtain a *certiorari* in respect of a summary conviction under the Quebec License Law for illegal sale of liquors without a license, the defendant must within eight days after the conviction deposit with the Clerk of the Peace the amount of the fine and costs and a further sum of $50 as security for future costs (R.S.Q. 1909, art. 1166), and, in default, his petition for *certiorari* will be dismissed.

2. INTOXICATING LIQUORS (§ III A—55)—SALES IN PROHIBITED DISTRICT—QUEBEC LICENSE LAW.

A district collector of provincial revenue in Quebec may prosecute for illegal sales of liquor without a license in a municipality having a local option by-law without first giving a notice to the municipality requiring them to prosecute under art. 1108, R.S. Que. 1909; but he is to give that notice if he wishes to charge the municipality with the costs of a prosecution instituted by him in case of its default.

Statement.

PETITION for the issue of a writ of *certiorari*.

The petitioners alleged that they have been prosecuted before the district magistrate of the District of Three Rivers by the respondents, joint collectors of the revenue for the said district,

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for selling alcoholic liquor without license; that the prosecution was instituted on the 25th September, 1916, and decided on the 13th October following; that they were condemned to a fine of $50 and costs, and, in default of payment, to three months' imprisonment; that this condemnation is arbitrary, illegal and void, because the procedure in the case contained grave irregularities and the magistrate had no jurisdiction; in particular that the prosecution was premature and could not be instituted by the respondents when no notice of such prosecution had been given to the corporation of the town of Grand'Mère, and that it was not shewn that that corporation had refused or neglected to take proceedings, there being a prohibitory by-law in force in the municipality where the alleged offence was committed; lastly, that the petitioners are keepers of a lodging-house and are not liable to the penalty of $50 to which they have been condemned, but to a penalty of from $100 to $200. The petition concludes by asking that a writ of *certiorari* issue ordering the magistrate of the district to transmit to this Court the judgment and the record in the case instituted before him, and that all should be ordered according to law.

The respondents have shewn cause against this petition, which has been rejected for the following reasons.

Talbot & Beaudoin, for petitioners; *J. E. Methot*, K.C., counsel. *Raoul Ducharme*, for respondents.

DESY, J., directed judgment to be entered as follows:— Désy, J.

"Considering that, notwithstanding the provisions of article 1108 of the Revised Statutes, 1909, it is the duty of the collector of revenue for the province to prosecute each time he has reason to believe that a violation of the license law has been committed and that such prosecution can be maintained;

"Considering that the judgment given against the petitioners justifies the collector of revenue and shews that it was his duty to prosecute the said petitioners;

"Considering that article 1108 does not impose upon the collector of revenue an obligation to give to the council of a municipality where a by-law for prohibition is in force notice of violations of the license law in such municipality, although he can give such notice in order to render it responsible for the costs if he afterwards prosecutes pursuant to the refusal or neglect of the said municipality to do so after the receipt of such notice;

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"Considering that the magistrate Marchildon had a right to dispose of the objection of the petitioners and that it was indeed his duty to do so;

"Considering that the petitioners have been accused and found guilty of having sold intoxicating liquors without the license required by law;

"Considering that for the said violation the petitioners are liable to the penalties provided for by article 981 of the Revised Statutes, inasmuch as it has been established that a prohibitory by-law was in force at the time and place in which the said violation was committed;

"Considering that the petitioners for their said violation were and are liable to a penalty of not less than $50 or more than $100;

"Considering that the magistrate Marchildon had the right at his discretion to impose a fine of only $50;

"Considering that to obtain by *certiorari* the evocation to the Superior Court of the prosecution brought by the collector of revenue or of the judgment rendered by the magistrate Marchildon against the petitioners, the latter should within eight days from the 13th October, 1916, have deposited with the Clerk of the Peace for the District of Three Rivers the full amount of the fine and costs and of the further sum of $50 as security for the payment of the costs that might be incurred (Art. 1166, R.S.Q. 1909);

"Considering that the petitioners have not deposited the said sum of $50 with the Clerk of the Peace;

"Considering that the respondents specially took this objection at the hearing;

"The Court dismisses the said petition with costs."

Certiorari refused.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A. April 3, 1917.

HIGHWAYS (§ IV A—150)—NON-REPAIR OF—COLLAPSE OF BRIDGE—INJURY TO TRACTION ENGINE—LIABILITY OF MUNICIPALITY FOR—MUNICIPAL ACT, R.S.O. 1914, CH. 192, SEC. 460(4), (5).

It is a sufficient compliance with R.S.O. 1914, ch. 192, sec. 460(4), the Municipal Act, for the person making the necessary repairs to damaged machinery, to send to the reeve of the municipality, at the request of the owner, a statement of the account for making the repairs, with a request that the municipality pay the account; no formal notice is necessary.

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Statement.

AN appeal by the defendant township corporation from the judgment of the County Court of the County of York, pronounced by COATSWORTH, Jun. Co. C.J., after the trial of the action without a jury, in favour of the plaintiff.

The action was brought by the owner of a traction-engine to recover damages for the injury done to it when a bridge over which it was being driven collapsed. One who was seated on the engine was killed, and an action brought under the Fatal Accidents Act, to recover damages for his death, was decided in favour of the plaintiff: *Linstead* v. *Township of Whitchurch* (1916), 36 O.L.R. 462, 30 D.L.R. 431.

The determination of the questions raised in that case concluded the same questions in this case; but in this case there was the additional defence that the notice prescribed by sec. 460 (4) of the Municipal Act, 3 & 4 Geo. V. ch. 43, R.S.O. 1914, ch. 192, was not given to the defendant corporation.

James McCullough, for the appellant corporation.

K. F. Lennox, for the respondent.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the County Court of the County of York, dated the 7th August, 1914, which was directed to be entered by a Junior Judge (Coatsworth) after the trial before him sitting without a jury on the 4th and 5th May, 1914. Meredith, C.J.O.

The action arises out of the same occurrence as was in question in *Linstead* v. *Township of Whitchurch*, 36 O.L.R. 462, 30 D.L.R. 431, and we withheld judgment until that case should be finally determined.

The respondent was the owner of the traction-engine, and sues to recover for injury done to it when the bridge over which it was being driven collapsed, and the *Linstead* action was by the personal representative of a person who at the time when the accident happened was, by permission of the owner of it, driving the engine.

The liability of the appellant for the consequences of the accident having been established in the *Linstead* case, the only question remaining is as to whether this action must fail because, as is contended, the prescribed notice of the accident was not given to the appellant. That ground of defence is based on the provisions of sub-sec. (4) of sec. 460 of 3 & 4 Geo. V. ch. 43, now

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sec. 460 of ch. 192 of R.S.O. 1914. The sub-section provides that "no action shall be brought for the recovery of the damages mentioned in sub-section 1 unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or clerk of the corporation in the case of a county or township within thirty days . . . after the happening of the injury. . . ."

The respondent contends that the notice required by the sub-section was given; but that, if it was not, or if the notice was insufficient, it should be held that there was reasonable excuse for the want or insufficiency of the notice, and that the appellant was not thereby prejudiced in its defence (sub-sec. (5)).

It was admitted on the argument that the person in charge of the engine was killed as a result of the accident, and that due notice in writing of the claim of his personal representative and of the injury complained of was given by the personal representative within thirty days after the happening of the accident. The Reeve of the municipality was informed of the accident, and visited the scene of it on the morning after the accident happened, and he then learned of the injury that had been done to the respondent's engine, of the death of the person who was in charge of it, and that the injury and death had been caused by the collapse of the bridge.

No formal notice in writing of the respondent's claim or of the injury complained of was served within thirty days of the happening of the injury; but, on the 20th August, 1913, and within the thirty days, a letter was written by Charles A. Thompson & Company to the Reeve informing him that Thompson & Co. were instructed to look after the respondent's engine and have it tested to 250 lbs.; that that had been done, and it was now in proper running order, and that they enclosed "an account of all repairs, etc., on same;" and that, if everything was satisfactory to the council, and the money sent to the writers, they would see that all the items were paid.

The account that was enclosed is headed "Whitchurch County in account with Chas. A. Thompson," and the items of the account, aggregating in amount $207.65, are headed, "Account for Repairs to L. Pipher's Engine," and one of these items is "getting engine out of bridge, hauling blocks and man and team."

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On the 19th September, 1913, the clerk of the municipality wrote to Thompson, informing him that he had been "instructed by the Reeve and council to acknowledge receipt of your letter to the Reeve and account for repairing Mr. Pipher's engine, and to notify you that the council disclaims any liability in the matter and refuses to pay the account."

According to the testimony of the respondent, he instructed Thompson to send the account which Thompson sent to the Reeve.

I am unable to say that the learned Junior Judge was wrong in holding that, under the circumstances, the notice given by Thompson was a sufficient notice to satisfy the provisions of the statute. The notice was given by direction of the respondent; it was in form a claim for the expense incurred in repairing the engine; and the account shewed by its heading, and the item I have quoted from it indicated, that the repairs were rendered necessary by something that happened to the engine which made it necessary to get it out of a bridge; and, as I have stated, it was known to the Reeve that the respondent's engine had broken through the bridge; and therefore there was no doubt as to the claim having reference to that event, and its being based on the liability of the appellant to make good the loss; and it was apparently so treated by the council, as evidenced by the clerk's letter to Thompson of the 19th September, 1913.

If, however, the notice was not sufficient, I am of opinion that there was reasonable excuse for the want or insufficiency of the notice, and that the appellant "was not thereby prejudiced in its defence."

That the appellant was not prejudiced in its defence is beyond question; and, although it is not so clear that there was the reasonable excuse which is requisite, I am of opinion that reasonable excuse within the meaning of the statute is made out.

Notice of the claim was given in due time by Thompson, acting for and by the direction of the respondent, and it was reasonable, I think, for the respondent to believe that the sending in of Thompson's account, which shewed that it was for repairs to the respondent's engine, and indicated that these repairs were necessary in consequence of the happening of the accident the occurrence and results of which were known to the Reeve, was sufficient, and that a more formal notice was not necessary;

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and, although the cases have gone a long way towards making the curative provisions of the Act useless in most cases, there is no decided case which makes it necessary for us to hold that, under the peculiar and special circumstances of this case, reasonable excuse has not been shewn.

I would affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

REX v. BENFORD.

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D. C.

District Court of Edmonton, Alberta, Taylor, Dist. Ct. J. February 13, 1917.

INTOXICATING LIQUORS (§ III A—58)—LIABILITY OF CARRIERS—EXPRESS AGENT DELIVERING AT EXPRESS OFFICE INSTEAD OF CONSIGNEE'S STREET ADDRESS.

The effect of sec. 25 of the Liquor Act, Alta., is that only the consignee himself is entitled to take delivery of liquor during its transit by express from a place outside of Alberta to an address in Alberta where the law permits it to be received and kept; and where the express agent had attempted to make delivery at the street address to which the consignment was billed, but, finding that the consignee was no longer there, sent an advice note by mail addressed to him, and, on the advice note being brought in by a person representing himself to be the consignee, delivered the liquor to him at the express office, the express agent is liable to conviction for an infringement of the Act, if it be shown at the trial that the person to whom delivery was made was not the consignee himself, but someone else whom he had sent to get the liquor. The delivery not being at the street address, which was the destination of the package, the accused would be liable whether or not he took reasonable precaution in having the person producing the advice note and receiving the goods identified as the consignee.

Statement.

APPEAL by the Attorney-General from a dismissal by Belcher, J.P., of a charge under the Liquor Act, Alta.

F. D. Byers, for Attorney-General (appellant).

N. D. MacLean, for the accused (respondent).

Taylor, J.

JUDGE TAYLOR:—One Sawka, sent to Saskatchewan for a consignment of intoxicating liquor. The liquor was sent to him addressed to 249 Picard Street. The Canadian Express Company, the carriers, attempted to make delivery at this place, but found the consignee had left the place. Later the Express Company sent out a card notifying the consignee that the package had arrived. This card was brought to the company's office by a man who said his name was Sawka.

The accused in his evidence says: "There was a gentleman came in on the afternoon of the 12th and he laid the card on the counter, and I asked him, 'are you Mr. Sawka?' and he said, 'yes.' I was sitting at the desk when the door opened, and I cannot see the door from where I sit, but I walked down and there

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were two men in the office; I could not tell whether they came into the office together, and I asked him for identification, and he pointed out the other man. I had known that his name was Kune about four years ago; I had seen him last winter; he was driving a coal waggon in town, and I said, 'Is this Sawka?' and he said, 'Yes,' and I asked Sawka to sign, and he said, 'I cannot write,' and he made his mark."

"Q. Is that his mark? A. It is his own mark.

"Q. How about the signature of Kune? A. I asked him to write and he said he could not write, and I asked him to make his mark, and that is his mark."

Antoniuk, who got the package, admitted that he told the accused his name was Sawka, but that he did not make his mark in the book nor did he know who the man was who was in the office with him, nor did he see this other man make his mark in the book.

The man Kune was not called to give evidence.

Shortly after leaving the Express Company's office, Antoniuk was taken into custody. He had in his possession at the time two cases. They were unbroken, but the police afterwards opened them and one contained one gallon of brandy and one-half gallon of alcohol. The other contained one quart bottle of brandy, one gallon of port and two bottles of port.

The charge is laid under section 25 of the Liquor Act. This section, so far as it applies to this case, reads:—

> "Nothing in section twenty-four contained shall prevent common carriers or other persons from carrying or conveying liquor from a place outside of the Province to a place where the same may be lawfully received and lawfully kept within the Province . . . but no person during the time such liquor is being carried or conveyed as aforesaid shall open or break or allow to be opened or broken any package or vessel containing the same, or sell, give or otherwise dispose of any of said liquor to any person other than the consignee thereof."

In this case, the liquor was being conveyed from a place outside the Province to 249 Pickard Street, a place where I will presume it may lawfully be received, and lawfully kept.

The charge reads: "For that the said Ernest Benford, on or about the 12th day of October, 1916, at Edmonton, in the said Province, unlawfully gave or disposed of to a person other than

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the consignee thereof, liquor, during the time the same was being carried or conveyed, as provided in section 25 of the Liquor Act for Alberta."

I have quoted the evidence quite fully for the reason that it was argued for the defence that the accused had taken reasonable precautions in delivering the package, and again, that the man Antoniuk was the agent of the consignee, and that the package could be delivered to an agent.

I find that I cannot agree with the counsel for the defence in that reasonable precaution was taken.

The accused seems to have known very little about the man who identified Antoniuk as Sawka. He had known about four years ago that his name was Kune, and last winter he had seen him driving a coal waggon in town.

This does not seem to me to be even a reasonable precaution. Apart, however, from this, the section of the Act says that: "No person during the time the liquor is being carried or conveyed shall sell, give or otherwise dispose of any of said liquor to any person other than the consignee thereof."

The liquor was still being carried or conveyed, for its destination was 249 Pickard Street. Hence it must follow that the only person who could get it from the carrier while in transit must be the consignee.

Therefore, whether the accused was careless in identification or not, he did not deliver the liquor to the consignee, and must be found guilty.

I do not think that even had the accused proved Antoniuk the agent of Sawka it would make any difference. The delivery, in my opinion, must be to the consignee only.

I will, therefore, allow the appeal, and will find the accused guilty.

I will reserve the question as to the amount of the fine and the costs. *Defendant convicted.*

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BILLINGTON v. HAMILTON STREET R. Co.

Ontario Supreme Court, Appellate Division, Riddell and Lennox, JJ., Ferguson, J.A., and Rose, J. February 26, 1917.

CARRIERS (§ II G—70)—STREET RAILWAY—CONDUCTOR STOPPING CAR SUDDENLY WHEN NOT AT REGULAR STOPPING PLACE—INJURY TO PASSENGER—NEGLIGENCE—LIABILITY.

The stopping of a street car in the middle of a block, not being necessary or justifiable under the circumstances, a jury is justified in finding negligence, where the car was brought to a violent or sudden stop, which caused a passenger standing in the car to fall and sustain injuries.

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Statement.

APPEAL by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, upon the findings of a jury, in favour of the plaintiff.

The action was for damages for injuries sustained by the plaintiff (a woman) while a passenger on a car of the defendants, by reason of the negligence of the defendants' servants, as the plaintiff alleged. The plaintiff was standing in the car or walking through it to find a seat, when the car stopped, with a sudden and violent jerk, as she alleged, and she fell on the floor and was injured.

The questions left to the jury and their answers were as follows:—

1. Were the injuries sustained by the plaintiff caused by any negligence of the defendants? A. Yes.

2. If so, wherein did such negligence consist? A. In the defendants' employees bringing their car to a sudden stop at an irregular stopping-point without first considering the passengers' safety, which was the direct cause of the accident to the plaintiff.

3. Was the plaintiff guilty of negligence which caused the accident or which so contributed to it that, but for her negligence, the accident would not have happened? A. No.

4. If you answer "Yes" to the last question, wherein did her negligence consist? (No answer.)

5. If the plaintiff should be held entitled to recover, at what sum do you assess the compensation to be awarded to her? A. $6,000.

Judgment was directed to be entered for the plaintiff for $6,000 and costs.

D. L. McCarthy, K.C., and *A. Hope Gibson*, for appellants.

G. S. Kerr, K.C., for plaintiff, respondent.

Lennox, J.

LENNOX, J.:—There was no legal obligation on the defendants to stop the car at the time complained of, but it was not negligent, or, to my mind, improper, for them to do so if the stop could be and was accomplished without endangering the safety of passengers who were exercising reasonable care. With straps provided for the use of passengers walking or standing in the aisle, contributory negligence is not, in my opinion, negatived by a person who does not use them, saying, "I was not anticipating a stop between crossings." Any one who reflects for a moment knows that at any point in the journey contin-

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gencies may arise necessitating the application of the emergency brakes, the reversal of the power, and the use of every checking device with which the car is equipped; and consequently the sudden and violent stopping of the car. This contingency did not arise in this case, but it is an emergency which every one who goes upon a car should contemplate and as far as possible provide against. If this condition were the cause of the plaintiff's misfortune, she would manifestly be without a remedy. As it is, the jury could upon the facts of this case very reasonably have come to the conclusion that "the plaintiff could, by the exercise of reasonable care, have avoided the casualty." But it was a question for the jury, and they have not so found.

If the plaintiff, as the jury find, was not the author of her own misfortune, although the stopping was not negligence *per se*, the defendants are liable if the stop was effected in a negligent way and caused the injury. I would not, upon a careful reading of the evidence, have come to the conclusion the jury reached, but this of course is not enough. A violent or sudden stop was not necessary or justifiable in the circumstances of this case, and there was evidence to this effect which the jury had to consider and were at liberty to accept and act upon. They have found that the car was brought to a sudden stop without precaution or warning and that this was the cause of the injury. However unconvincing it may be to me, I cannot say that ten or twelve reasonable men could not have answered the questions as the jury have answered them. I think the appeal must be dismissed.

Riddell, J.

RIDDELL, J.:—I agree, and would add that it would be well for the plaintiff to amend the pleadings pursuant to the leave given by the Chief Justice of the King's Bench—he informs me that leave was given to amend as advised.

Ferguson, J.A.

FERGUSON, J.A.:—I agree.

Rose, J.

ROSE, J.:—About 10.20 in the evening of the 28th December, 1915, at the corner of King and James streets, in Hamilton, the plaintiff entered a car of the defendants which was about to proceed easterly along King street. The car started just as the plaintiff entered. She walked forward to find a seat, and had proceeded some nine or ten feet, when the conductor, seeing a soldier running to catch the car, rang the bell once, as a signal to the motorman to stop; the motorman stopped the car, the soldier got on, the conductor rang the bell twice as a signal to

proceed, and the car went on. When the car stopped, the plaintiff fell to the floor of the car and sustained the injuries of which she complains in this action.

About the facts already stated there is no dispute, but it is said that there is a difference between the plaintiff, on the one hand, and the conductor and the motorman, on the other, as to the distance that the car had proceeded before the conductor gave the signal to stop. I do not discover any material difference on this point. The conductor says, "We had just nicely got started," had gone about half a car length; the motorman says, "I should judge about ten feet." The plaintiff does in one place say, "It had started, and went, I should say, almost to the middle of the block;" but she also says that whatever distance it travelled, it travelled while she was walking nine or ten feet, and that she "could not say just how far it had gone, but seen it was between blocks;" and, in answer to a question, "Did the car travel more than half its own length?" she says, "I would think it did, a little." Of course, evidence that the car had gone so many feet, or half a car-length, or a car-length, is necessarily approximate only; and I think that the fair result of all the evidence on this point is that, while the plaintiff *thinks* the car travelled a little further than the conductor does, there is no real contradiction of the conductor's statement that they "had just nicely got started."

There is little, if any, contradiction as to the speed that the car had attained. The plaintiff says it was unnecessary for her to take hold of a strap, "because the car was not going fast enough;" "it was just going at a medium rate—at the ordinary rate it goes after it once starts—it did not go with any great force when it first started." The conductor says it was not running more than two miles per hour; the motorman says about one mile.

The motorman says that, before getting the signal to stop, he had "fed his controller up one notch"—an expression the meaning of which is well-known—and that, when he got the signal, he "threw the power off and let it" (the car) "roll," and that it came to a stop in "about a car-length." The conductor puts it that the stop was in about half a car-length. Both conductor and motorman deny that the stopping of the car was attended by any sudden shock; and, if their evidence as to the distance the car had gone and the speed it had attained and the motor-

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man's evidence as to the means taken of stopping it be accepted, it necessarily follows that their statement as to the absence of shock is true. As I have said, there seems to me to be no real contradiction of their evidence about distance and speed; of course there cannot be direct evidence contradicting the motorman as to what he did.

One fact about which there is no dispute seems to me strongly to corroborate the evidence of the conductor and motorman, viz., the fact that the car was stopped in answer to one bell. We all know that when a car has got fairly away from the place at which passengers have been taken on, one bell will be treated by the motorman as a signal to stop at the next stopping-place, not as a signal to stop at once; one's own observation teaches that the conductor stated the practice fairly when he said: "If you are leaving a crossing like this was at this time and he has only reached about half a car-length and we pull a bell to stop, the motorman sometimes knows that we do stop for people that are running, and therefore he will stop, otherwise if I would have went on farther, say in the centre of the block, and then pulled the bell, he would have gone to the next stop."

Against the foregoing we have the fact that the plaintiff fell, and that she says that "the car stopped suddenly," with a "terrific jolt," a "terrible jolt;" and that the plaintiff's witness Miss Curtis also speaks of a jolt. The plaintiff, having fallen, would be almost certain to believe that there was an unusual jolt.

I am not sure that I know what the jury meant by their finding. Of course, if they have accepted the plaintiff's statement that there was "a terrific jolt," or "a terrible jolt," that is the end of the case, because street railway companies owe it to their passengers to avoid that sort of thing, whether at regular or "irregular" stopping-places; and, although a finding that there had been such a jolt would seem to me to be opposed to the evidence taken as a whole, I do not think a Court could say that it was a finding that no reasonable men could have made. But the finding does not, in so many words, adopt the plaintiff's statement; and, taking the view that I do of the evidence, I do not think that we ought to read into the finding such an adoption of that statement, if without doing so we can give a fair construction to the whole finding. I think a fair interpretation can be given to the finding without reading into it any characterisation

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of the stop as unusually or unduly violent. Of course the learned Chief Justice did not tell the jury that when once a car starts from the place at which it has been standing to receive passengers it must not stop again until it reaches the next place at which it is usual to set down or receive passengers; but he did tell them that he knew of no obligation on a conductor to stop his car to take on a passenger at any place that is not a regular stopping-place, and added that in a city, at all events, it would be inconvenient that people should be allowed to stop cars at any place at all to take on a casual passenger; moreover, that a conductor's first duty ought to be to the passengers already on board, and that this conductor, if he was inside the car, as the plaintiff's witness alleged, was in a position to know whether the passengers would probably be affected by any jolt in stopping or starting. I think that the jury, giving to this statement a meaning that the learned Chief Justice did not intend it to bear, came to the conclusion that it would be actionable negligence to stop a car without making certain that those passengers who were not sitting down were so supporting themselves as that there was no possibility of their being thrown off their balance by the stopping of the car, even if there was no unusual jerk in such stopping. More than once in the course of the charge it was pointed out to them that the plaintiff asked them to find that the car was stopped "*too* suddenly;" they do not so find—they find a sudden stop at an irregular stopping-point. I think the "irregularity" was the prominent thing in their minds, and that by a "sudden stop" they mean a stop of which no warning was given—not an unduly violent stop. If this is what they do mean, it seems to me that the plaintiff is not entitled to judgment upon the finding. There is no law that prohibits a stop at any place; as a matter of fact various contingencies necessitate stops elsewhere than at street intersections; *e.g.*, persons heedlessly crossing the street in front of the car; and passengers who are standing ought to take precautions against being thrown down by any stop that is not unusually violent. If they do not take such precautions and are injured by a stop made in the ordinary way, I should say that the fault is theirs, not the company's.

I have said that there is no real contradiction of the evidence of the conductor and motorman as to how far the car ran before the stop in question. That evidence shews that the car never

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in reality got away from the usual stopping-place. I think, therefore, that there is no evidence to support the finding of the jury that the stop was at an "irregular" place, and on that ground also I would set aside the judgment. But, while I make that observation, I want to be understood as deciding primarily on the broad ground that the jury do not find any undue violence in effecting the stop, but proceed upon a mistaken view as to the obligation of the defendant company towards their passengers in the operation of their cars.

Appeal dismissed; ROSE, J., *dissenting.*

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LANCASTER v. CITY OF TORONTO.

Ontario Supreme Court, Kelly, J. January 10, 1917.

INSURANCE (§ VI D—385)—FOR BENEFIT OF SOLDIERS—"RESIDENT."

Where insurance policies are effected by a municipal corporation upon the lives of soldiers who were *bonâ fide* residents of the city at the time of declaration of war, a policy issued in the name of a soldier, who prior to the war has lived outside of the city though worked within it, does not entitle his widow to recovery thereon.

Statement.

ACTION by the widow of Henry Richard Lancaster to recover $1,000 in respect of an insurance upon his life. Dismissed.

A. G. Slaght and *T. H. Barton*, for the plaintiff.

C. M. Colquhoun, for the defendant Corporation of the City of Toronto.

H. S. White and *F. C. Carter*, for the defendant the Metropolitan Life Insurance Company.

Kelly, J.

KELLY, J.:—The plaintiff's claim is to recover $1,000 alleged to be due by the defendants in respect of a policy of life insurance in the Metropolitan Life Insurance Company on the life of the plaintiff's husband, Henry Richard Lancaster, who died at Toronto on the 5th February, 1916.

The action is against the life insurance company and the Corporation of the City of Toronto. The policy was issued under conditions not found as the basis of ordinary contracts for life insurance.

On the 14th August, 1914, Henry Richard Lancaster enlisted at Toronto for war service, and was attached to the battalion known as the Princess Patricia's Canadian Light Infantry, and in such service left Toronto a day or two afterwards for the Province of Quebec, preparatory to his battalion going overseas.

Soon after the outbreak of the war, the project was conceived by the city council, or members of it, of placing insurance on the

lives of certain persons enlisting from Toronto, for the benefit of their families or next of kin, under certain conditions. Negotiations were entered into with the defendant insurance company for that purpose. The first written record we have of these negotiations is a communication from the company's superintendent at Toronto, dated the 25th September, 1914, to the City Board of Control, submitting for the Board's consideration a proposition to insure "the entire contingent" on terms then set out, one of which was to make the Patriotic Fund Committee the beneficiary under all policies.

There was an evident desire on the city's part to bring the insurance into effect at as early a date as possible, but it was not possible, in the unusual conditions under which the large amount of insurance was being issued, to settle at once upon many important details. What was meant at the time by "the entire contingent" in the above mentioned proposal was not then defined in writing.

On the 5th October, 1914, the city council adopted report No. 37 of the Board of Control. That report which referred to the proposition of the defendant company "to underwrite policies for the citizens of Toronto now with the Canadian overseas contingent and those citizens who are reservists and have gone to the front," recommended that the offer should be accepted, and declared that the Patriotic Fund Committee be named as the beneficiaries of the policies, and that it was estimated that about 2,500 "citizens of Toronto enrolled in the Canadian overseas contingent and in addition the reservists."

This was followed by a receipt dated the 14th October, 1914, from the defendant company's local superintendent to the city for $100,000 (in the form of bonds of the city) given in consideration of the application for insurance policies of $1,000 each "on every member of the Toronto contingent of volunteers engaged in active service;" the payment being accepted and the receipt given to and accepted with the understanding that the insurance would be in force from that date. A reply of the same date by the acting Mayor stated that it was understood that the insurance "is immediately in force without awaiting the completion of the details of application etc.," and the writer, while stating that the city "considers the contract closed," added that all the details of the transaction would be reported to the city council on the

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following Monday, "in order that every detail may have their approval." Further important light is thrown on the intention of the contracting parties by a communication from the Vice-Chairman of the Board of Control to the defendant company's representative on the 20th October, 1914, in which it is stated that the insurance effected by the city with the company "is intended to cover the lives of all members of the Canadian overseas contingent who were *bonâ fide* residents of Toronto previous to the declaration of war, and who have since enlisted; and also British reservists etc."

One of the difficulties which confronted the contracting parties was to ascertain whether those who had enlisted were citizens or residents of Toronto or came within the class intended to be insured. The investigation under this heading continued for many months, during which there was no formal act of the city, so far as the evidence shews, approving of the insurance. There being no official list available of names of men who had enlisted or who were citizens of Toronto, or residents of Toronto, resort was had to lists published in the newspapers, to the lists prepared by the Patriotic Fund Committee, and to the records in the Department of Militia at Ottawa, where representatives of the city went for the purpose of getting such information as was there obtainable.

The policy issued in Lancaster's name, though bearing date the 14th October, 1914, the day as of which the defendant company assumed liability under its contract with the city, was not issued or delivered out by the company until months after that date. The formal separate application for Lancaster's insurance was made on the 16th December, 1914, and was signed, not by him, but by the Treasurer of the City of Toronto.

As the work of settling upon the list of those to be insured progressed, it was found that many whose names were on the original list made use of by the defendants were not within the insurable class, and these names were eliminated and policies which had been written in respect of them were surrendered. It was found, too, that in hundreds of instances there was duplication—names on closer investigation having been found in respect of which more than one policy had been issued. Lancaster, in the opinion of the defendants, fell within both of these classes.

The plaintiff is the widow of Henry Richard Lancaster, and,

as his only dependent, claims to be entitled to the benefit of policy No. 158157 A., which was issued on his life. There was no contract directly between him and either of the defendants in respect of this insurance. He did not enlist or leave the city with his battalion with any knowledge or information that insurance on his life was contemplated by the defendants. Except what was said by the plaintiff, it is not in evidence that, when he left Canada, or at any time, he knew that insurance was being placed on residents of Toronto who had enlisted.

The plaintiff says she saw her husband in Levis, Quebec, in September, 1914, and there learned from him of insurance of $1,000 in the Metropolitan Life Insurance Company, payable to his next of kin. In re-examination she says this happened in October, 1914. Her evidence in this, as in other matters of importance to which I shall refer later, lacks certainty, and I am not convinced that her evidence of the date on which she now says this happened can be relied upon. The earliest mention of insurance of which we have a record is in the defendant company's communication to the city of the 25th September.

By the form of the policy, subject to payment of the premium and compliance with specified conditions, the defendant company promised to pay $1,000 to Henry Richard Lancaster on the 14th October, 1964, "if he be then living," or, upon receipt of due proof of his prior death, to the City of Toronto, without the right of revocation.

A question of much importance in determining whether Lancaster was within the class of persons intended to be insured is, whether he was a "resident" of the city of Toronto; though the plaintiff, while relying upon his being such resident, also contends that, when the insurance was effected, it was not restricted to residents only, but covered as well those who, though non-resident, were members from Toronto of the Canadian overseas contingent; her position also being that, even though no direct contract was made between her husband and the defendants or either of them, it should be declared that insurance to the extent of $1,000 was entered into by the city corporation in trust for her benefit.

The position of the defendants, on the other hand, is, that it was never the intention of the defendants to place insurance on

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Lancaster's life, and that this policy was issued and the premium paid by mistake and under the ill-founded belief that Lancaster was at the time a resident of the city of Toronto, which, they say, turned out not to be the fact.

The defendant company sets up that, at the time the insurance was effected, there was no power in the city corporation to contract for insurance upon Lancaster's life, and that no by-law intending to give such authority had been passed, and that the city had not the right to pass any such by-law without express legislative authority, which authority was not given until the Act of the Legislature passed in 1915, 5 Geo. V. ch. 37, to which assent was given on the 8th April, 1915; the city, while it does not rely upon the absence of a by-law, argues that any contract attempted to be made in 1914 was without power, and that only such contract as was made after the coming into force of the 1915 statute could have any binding effect.

Passing over for the time being the question of the city's power, let us see what it was that the city and the defendant company intended to contract for. The proposal of the 25th September, 1914, was to insure "the entire contingent," whatever that meant, and that the Patriotic Fund Committee be made the beneficiary under all policies. That proposal was, no doubt, preceded by communications or negotiations, which are, however, not evidenced by any writing before the Court. The city's reply threw light upon what was in the minds of those members of the council who had the matter under consideration, and narrows the language of the company's letter, where it states that the company's offer is "to underwrite policies for the *citizens of Toronto* now with the Canadian overseas contingent and those citizens who are reservists and have gone to the front;" and, further on in the report of the Board of Control, reference is again made to the number of "citizens of Toronto" enrolled with the Canadian overseas contingent. To my mind, it is clearly indicated that from the very beginning the city's representatives had in mind to effect insurance on a class much more restricted than what the plaintiff insists upon; and this is in accord with the position of the defendants that what both contracting parties had in mind was just what they now contend for—that the insurance (except where it refers to reservists) was confined to those members of the Canadian overseas contingent who were *bonâ fide* residents

of the city of Toronto. That view is materially and perhaps conclusively supported by the language of the letter of the Vice-Chairman of the Board of Control to the defendant company's representative, dated the 20th October, 1914, where emphasis is laid on the fact that it was intended to cover the lives of all the members of the Canadian overseas contingent who were *bonâ fide residents of Toronto* prior to the declaration of war, and who had since then enlisted, etc. That was accepted by both the contracting parties, without objection or comment, as the real basis of the contract, so far as it defined the class of persons to be insured, and it is not inconsistent with what is expressed in the documents which passed between the defendants on the 14th October, 1914, and prior thereto, where the reference was to "citizens of Toronto," taking that designation as applying in its ordinary acceptation to persons who enjoy the privileges and franchises of the city or possess civic rights and privileges, a designation which it cannot be contended can apply to any and every person who happens for the time being only to be within the city and to be associated with citizens as so designated.

In my judgment, there can be no doubt that, apart from reservists, with whom the present controversy has nothing to do—Lancaster not having been a reservist—what the defendants intended from the very beginning to contract for was insurance upon those who, at the time of the declaration of war, were *bonâ fide* residents, and who after that time had enlisted.

A point is attempted to be made of the use of the expression "previous to the declaration of war" as shewing that all those who were residents of Toronto at any time prior to the declaration were to be included. The absurdity of such a proposition is apparent when one considers that to give that effect to the language the insurance could be made to cover every one who at any time, no matter how long before the declaration, had been a *bonâ fide* resident of Toronto, and who enlisted after the declaration. That would be an unreasonable view and one which the language does not necessarily involve. It cannot have meant more than to include those who were *bonâ fide* residents at the very time of the declaration of war or immediately preceding it. But, assuming all this against the position of the plaintiff, she still claims that in the circumstances her husband must be con-

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sidered as a *bonâ fide* resident at the time of the declaration. His claim to that title rests on this foundation.

The plaintiff and her late husband were married in England in 1903, and came to Toronto in 1910. From that time until June, 1912, they lived in Toronto, in lodgings in four different places successively, after which they for the first time took up their residence in a separate house on Ryerson avenue in Toronto, whence they moved to another house, also in the city, where they remained till the spring of 1913. In March of that year, they went to reside in a house which they rented on Vaughan road —outside of the city—and there they continued to reside until the husband enlisted in August, 1914; the plaintiff continued her residence there until April, 1915.

Lancaster was a labourer, and, though occupying a residence outside of the city, continued to work with his employers in Toronto, returning every night to his residence. Was he a *bonâ fide* resident of Toronto such as the defendants negotiated to cover with insurance?

In its ordinary acceptation, "resident" means one who resides or dwells in a place permanently or for a considerable time, and "residence" in law means an established abode fixed for a considerable time, whether with or without a present intention of ultimate removal. A "dwelling" is a habitation. "Residence" in law must be distinguished from "domicile," which denotes something of a more permanent nature, and is not so easily subject to change. "Residence" and "place of abode" are flexible and must be construed according to the object and intention of the particular legislation where they are used.

Lancaster had his place of abode, the place which he could call "home," and where his wife resided, for nearly a year and a half prior to the declaration of war and at that time, outside of Toronto; and, so far as the evidence shews, his absence was only while following his employment during the working hours of the day. It is not satisfactorily shewn that there was any intention on his part not to make that his place of abode, though the plaintiff speaks of an intention to make Toronto their home at some future time. There was not any definite plan to do so, any more than there is certainty from the plaintiff's evidence just why their residence was established outside of Toronto, she at

one time saying it was because of their desire to be near their friends and at another time because of her health.

I can find nothing in anything that has occurred in the present transaction, or in the course of life or conduct of the plaintiff or her husband, to give to the word "resident" other than its ordinary meaning.

In *Rex* v. *Inhabitants of North Curry* (1825), 4 B. & C. 953, at p. 959, Bayley, J., said: "I take it that that word (resides), where there is nothing to shew that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep."

In *Regina* v. *Norwood Overseers* (1867), L.R. 2 Q.B. 457, where the question of the husband's place of residence was of importance, Blackburn, J., said, (p. 459): "The real question in such a case as the present, in which the husband lives in one place and his wife and family in another, is, where was the husband, the head of the family, resident? *Primâ facie*, no doubt a man's home is where his wife lives, and so he may be said to be resident there." In that case, however, the husband had been residing for several years at an asylum in the parish of N., where he was surgeon; he married, and, being required to board and lodge in the asylum, took lodgings for his wife in another parish, where he visited her weekly and remained with her from the Saturday evening until the Monday morning; it was held that he "had not changed his residence from the parish of N."

Reference is also made to *The Oldham Case* (1869), 1 O'M. & H. 151, 158; to *The Northallerton Case* (1869), 1 O'M. & H. 167, 170, and 171; and *Re Ingilby, Croskell* v. *Ingleby* (1890), 6 Times L.R. 446.

In *Guardians of Holborn* v. *Guardians of Chertsey* (1884), 14 Q.B.D. 289, a poor-law case, Hawkins, J., lays this down (p. 294): "Mere bodily presence or actual dwelling in a parish, though *primâ facie*, is not absolutely, sufficient to satisfy the statute; more is required. The residence must be such as to satisfy the tribunal before which the question arises, that the place of it was the home and fixed place of abode of the person whose settlement is disputed. If a person having a home of his own of which he is the head . . . quits it for a mere temporary purpose, intending on leaving and during all his absence to return to it

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so soon as the object of his absence is accomplished, and then to live in it as before—such more temporary physical absence does not operate as a break in his residence . . . ; though physically absent his residence continues."

The Canadian cases are to the same effect as the English. In *Mellish* v. *VanNorman* (1856), 13 U.C.R. 451, Robinson, C.J., who delivered the judgment of the Court, said (p. 455): "The term 'resident,' or 'resident inhabitant,' is differently construed in courts of justice, according to the purposes for which inquiry is made into the meaning of the term. The sense in which it should be used is controlled by reference to the object." See *In re North Renfrew* (1904) 7 O.L.R. 204, where the late Chief Justice Moss held that "resides" means where the person eats, drinks, and sleeps; also *Re Sturmer and Town of Beaverton* (1911), 24 O.L.R. 65; *In re Ladouceur* v. *Salter* (1876), 6 P.R. 305.

On none of the grounds advanced can the plaintiff succeed. At no time was there an agreement or an intention on the part of the defendants to insure any member of the overseas contingent who did not answer to the description of a *bonâ fide* resident of the city of Toronto at the time of the declaration of war; and anything in the policies having any semblance of an intention to the contrary was the result of mistake, and can be and is accounted for by the desire of the city authorities, under conditions of difficulty, to place insurance promptly upon those whom they desired such insurance should cover, and by the difficulty there was in singling out and identifying each individual who fell within the class intended to be insured. No privity of contract existed between Lancaster and either of the defendants; and, even had he come within the favoured class, it would be difficult to hold that either of the defendants, on the theory of a trusteeship by the city for the benefit of the plaintiff, could be reached legally in an action for payment of these insurance moneys. Nor can it be held that what happened between officials or employees of the city after Lancaster's death, when the plaintiff approached them with a view to making proof of her husband's death, and when they did not have before them and indeed were not aware of the real facts of the case, has any effect as an admission or acknowledgment, binding upon the city, of any right in the plaintiff.

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Entertaining these views, I think it unnecessary further to consider the question of the city's authority at the time the policy was issued to make a contract such as the plaintiff now seeks to enforce.

The action must be dismissed with costs. *Action dismissed.*

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Alberta Supreme Court, Scott, J. February 8, 1917.

COSTS (§ II—26)—*Counsel fees—Solicitor suing or defending in person.*]—Appeal by defendant from a taxation order of the Master allowing the plaintiff the usual counsel fees. Affirmed.

J. A. Clarke, for respondent; *H. H. Hyndman*, for appellant.

SCOTT, J.:—This is an action for slander. The plaintiff, who is a solicitor, appeared by another solicitor. Upon the examination of the defendant for discovery, he refused to answer certain questions. Plaintiff then applied to Walsh, J., for an order directing the defendant to answer the questions. The application was dismissed and plaintiff gave notice of appeal to the appellate division. He had previously given notice to defendant's solicitors that he would in future act as his own solicitor. All the proceedings upon the appeal were conducted by him as solicitor in person and he personally argued the appeal. The appellate division allowed the appeal with costs (32 D.L.R. 366). Upon taxation of the costs of appeal, the Master allowed the plaintiff the usual solicitor's and counsel fees.

The defendant now appeals from the taxation on the ground that the plaintiff, as solicitor in person, is entitled to tax disbursements only.

In *McArdle* v. *Howard*, 21 D.L.R. 409, Stuart, J., shews that in England, as well as in Ontario, it is the practice to allow a solicitor prosecuting or defending an action in person the same costs as if he had employed a solicitor, except as to such charges as are rendered unnecessary by his acting in person, and he held that that practice should be followed here.

Our r. 739 (No. 16 of the rules as to costs) which was referred to by counsel for the appellant, does not appear to me to have any bearing upon the question. It enlarges rather than restricts the meaning of the term "costs." Its intention and effect is merely to make it applicable to certain matters which otherwise might not be included in that term.

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It was also contended that our r. 744 (No. 31 of the Rules as to costs) precludes such a practice here. That rule is as follows:—

> No party to any proceeding shall be entitled to recover against any other party any sum for costs in excess of the sum for which he or some other person would in any event of the proceedings have become or be liable to any barristers and solicitors retained by him; provided that in the absence of any rule or any agreement by any party to the contrary, such party shall be deemed to have become or be liable for costs at least to the amount which he may be found entitled to recover for costs against any other party.

It is difficult to determine what was the intention of this rule or what its effect is. If the intention had been to deprive a barrister or solicitor acting in person of costs other than those out of pocket, I think it would have been expressed in clearer terms. A reasonable interpretation of it is that it was intended to apply only to cases where a party retains another barrister or solicitor and not to cases where a party who is a solicitor acts in person.

I would dismiss the appeal with costs, but if the costs have been taxed according to schedule C and no deduction has been made from the items allowed according to that schedule for charges which were rendered unnecessary by reason of the plaintiff acting as solicitor and counsel in person, such reasonable deduction should now be made. (See *McArdle* v. *Howard*, *supra*.)

Appeal dismissed.

DENIS v. TOWN OF MORINVILLE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Walsh and Beck, JJ. March 30, 1917.

LAND TITLES (§ IV—40)—*Compensation by way of damages for filing or continuing caveat without cause—Enforcement—By action—Counterclaim—Land Titles Act (Alta.) sec. 94.*]—Appeal from a judgment of Hyndman, J.

Edwards, K.C., for plaintiff; *McCaul*, K.C., for defendant Town of Morinville; *L. A. Giroux*, for defendant Houle.

The judgment of the Court was delivered by

BECK, J.:—This appeal was on the hearing dismissed with costs for reasons clearly indicated during the course of the argument. Some discussion, however, arose as to the necessity or propriety of asking by way of counterclaim for the removal from the register of a caveat registered for the purpose of preserving the plaintiff's rights. We have been asked to say something in this connection for the information of the profession and we accordingly do so.

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Sec. 94 of the Land Titles Act (ch. 24 Alta. (1906)) reads:—

> Any person, other than the registrar, filing or continuing any caveat without reasonable cause shall be liable to make compensation to any person who may have sustained damage thereby; and such compensation may be recovered by action, if the caveator have withdrawn such caveat and no proceedings have been taken by the caveator or caveatee as herein provided; but if such proceedings have been taken, then such compensation shall be decided by the Court or Judge in such proceedings whether the caveat have been withdrawn or not.

The proceedings referred to in this section evidently are either proceedings by the caveator by way of originating summons (or notice, rule 429), or action to enforce the claim on which the caveat is founded (sec. 89) or proceedings by the caveatee by way of originating summons (or notice), calling upon the caveator to shew cause why the caveat should not be discharged (sec. 91).

The result seems to be this:—1. If there is no claim for compensation by way of damages sustained by reason of the filing or continuing of the caveat there is no need for a counterclaim as the caveat will necessarily be disposed of as incidental to the plaintiff's claim. 2. If there is a claim for compensation by way of damages it is proper to set up a counterclaim for such compensation, whether the caveat has been withdrawn or not, remembering that the cause of action to be set up in the counterclaim is filing or continuing the caveat without reasonable cause, and, it would appear, thereby causing the caveatee actual damage.

There is a New Zealand case, *Kaihu Valley R. Co.* v. *Kauri Timber Co.*, 11 N.Z.R. 403, of an action for such compensation and the corresponding Australasian statutes are referred to in Hogg's Torrens System, p. 749. It seems well to take this occasion to point out that under our practice when a question of costs arises in relation to a counterclaim, that question is not intended to be governed by quite the same considerations as are applied under the English practice.

The combined effect of rules 65 and 68, and rules 730 and 742 seems to be that a counterclaim arising out of the same transaction as the claim is intended to be looked upon as only raising an issue, just as a defence raises an issue, and that the costs should ordinarily be made the subject of directions, from that point of view, under rule 742.

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PATTERSON v. CANADIAN PACIFIC R. Co.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 9, 1917.

PLEADING (§ I U—155)—*Election of remedies—Action for wrongful discharge—Conspiracy.*]—Appeal by plaintiff from the judgment of Hyndman, J., requiring him to elect as to remedy. Affirmed. (See also 33 D.L.R. 136.)

J. E. Varley, for plaintiff; *J. W. Hugill*, for the C.P.R.; *A. M. Sinclair*, for individual defendants.

HARVEY, C.J.:—This action is brought against the defendant company and the individual defendants claiming damages for wrongful dismissal by the defendant company and damages from the defendants for conspiracy to procure such dismissal. An application was made to Mr. Justice Hyndman to require the plaintiff to elect whether he would proceed with the action against the company for breach of contract or against the other defendants for conspiracy. Although this is all the notice of motion calls for the application was apparently extended on the argument, as appears by the learned Judge's reasons for judgment, to include in the alternative one for separate trials and it was this latter alternative he adopted directing that the two causes of action should be tried separately.

The sole ground for this appeal by the plaintiff is that the Judge was in error in concluding that the plaintiff did not include the defendant company as one of the defendants charged with conspiracy. There is no pleading filed except the statement of claim which is dated June 14, 1916. It is ambiguous in its expression. It may be that the plaintiff did intend to charge his employers with conspiring with others to induce themselves to discharge him, but it is difficult to see how any one would be supposed to think such a charge was intended unless it were expressed in clear language. The plaintiff had abundant opportunity before the application, on the application and since the application to amend his statement of claim to make clear what he did intend but he has contented himself with maintaining that that is what the statement of claim says. It is clear that the order made only applies to the case as made out by the statement of claim as interpreted on this application and would not apply to a case which it has always been entirely within the plaintiff's power to set up.

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In my opinion the appeal is absolutely frivolous and I would dismiss it with costs.

STUART and WALSH, JJ., concurred.

BECK, J.:—I concur in the result. *Appeal dismissed.*

GUSKY v. ROSEDALE CLAY PRODUCTS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 9, 1917.

APPEAL (§ III G—100)—*Security for costs*—"*Special circumstances*"—*Poverty.*]—Motion under Rule 335 for security for costs. Refused.

L. H. Millar, for plaintiff; *C. A. Adams*, for defendant.

The judgment of the Court was delivered by

WALSH, J.:—The defendant, who succeeded at the trial, moves for security for costs of the appeal from that judgment which the plaintiff has set on foot. The motion is made under rule 335 which says: "No security for costs shall be required in appeals unless by reason of special circumstances such security is ordered by a Judge." The special circumstance here alleged is the poverty of the plaintiff which is admitted by him.

The Court *en banc* of the North-West Territories in *Morton* v. *Bank of Montreal*, 3 Terr. L.R. 14, held under the then existing rule, which is in substance the same as our rule 335, that poverty is a special circumstance entitling the successful party at the trial to security for costs of appeal. This follows the English authorities under a rule which though different in phraseology from is in substance the same as ours. I think we should follow *Morton* v. *Bank of Montreal*. I do not think, however, that it is an inflexible rule that security must be ordered once the poverty of the appellant is established.

In *Rourke* v. *White Moss Colliery Co.* (1876), 1 C.P.D. 556, the Court under the circumstances of that case, which are fully set out in the report, thought the plaintiff ought to be allowed to appeal to the Court of Appeal without giving security for costs.

In *Usil* v. *Brearley* (1878), 3 C.P.D. 206, Cockburn, C.J., in delivering the judgment of the Court of Appeal, said, at 207:—

> I think that in considering the question we are justified in taking into account not merely the pecuniary position of the plaintiff, but also the other circumstances of the case. If the Court were of opinion that the plaintiff had any reasonable ground for going on with his action they should not allow mere poverty to stand in the way of his appeal . . We may fairly take into consideration the character of the action and the questions involved.

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In my opinion the rule thus enunciated is the proper one to be adopted by us in such applications. The successful litigant should be entitled to an order for security upon proof of the appellant's poverty unless the appellant satisfies the Judge or Court to whom the application is made that the case is one in which an appeal may properly be taken with some reasonable prospect of success. Each case should be dealt with upon its own merits and for this reason it seems impossible to lay down the rule with any more precision.

In this case the appellant's counsel did not come before us prepared to deal with the motion from this point of view and we therefore did not learn from him enough of the facts or the law of the case to enable us to deal with it upon the lines above indicated. The appeal, however, is from the Chief Justice and from him we learn that the case is one in which under the rule as above laid down security for costs of the appeal should not be exacted.

There will, therefore, be no order for security. The appellant applied for an order extending the time for proceeding with his appeal in the event of the motion for security failing. The order will go extending the time for setting down the appeal to the first day of the next sittings at Calgary. *Motion refused.*

ANDERSON v. MORGAN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. April 21, 1917.

VENDOR AND PURCHASER (§ I C—27)—*Right to set aside conveyance for fraud—Action for deceit—Evidence.*]—Appeal from the judgment of Simmons, J., dismissing plaintiff's action to set aside for fraud a conveyance of land and title thereto, or in alternative for damages. Affirmed.

A. S. Watt, for appellant; *H. H. Parlee*, K.C., for respondent.

HARVEY, C.J.:—The mother of the plaintiff, of whose estate she is administratrix, was the owner of a quarter section of land in this province which she exchanged with the defendant for a house and lot in a village in Idaho in January, 1915. The exchange was completed by the execution and delivery of the conveyances and the defendant is now the registered owner of the quarter section. The mother died in March following the exchange, and this action was begun in January, 1916, to set aside the transaction and for cancellation of the defendant's certificate

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of title or in the alternative for damages on the ground of fraudulent misrepresentation.

The plaintiff conducted the negotiations on behalf of her mother or herself, as it appears that she considered herself beneficially interested in the quarter section, and she also had the advice and assistance of a brother and brother-in-law. The action was tried by my brother Simmons without a jury, and after having heard the oral testimony of 15 witnesses and the commission evidence of 6 more, the latter of whom, however, did not speak with reference to the negotiations, he dismissed the plaintiff's action. He expressed his reasons very shortly as follows:—

> The plaintiff in this action has not succeeded in establishing the allegations as to misrepresentation which are the basis of her claim, and the action must therefore be dismissed with costs.

The alleged misrepresentations were sworn to by the plaintiff who was corroborated in part by her witnesses and were denied by the evidence for the defence.

The trial Judge has not in fact said that he believed or disbelieved any particular witness, but his finding cannot, in my opinion, mean other than that, having heard all the evidence, he cannot accept as true the evidence on behalf of the plaintiff as to the misrepresentations. The advantages the trial Judge has in such a case have been repeatedly pointed out and there is certainly nothing in this case which would warrant an appeal Court in deciding that he should have believed the evidence for the plaintiff and disbelieved that for the defence, and unless an appellant can make out such a case he cannot succeed.

The appellant has sought to convince us that the finding of the trial Judge may mean no more than that he did not consider that what was alleged to be misrepresentations really amounted to misrepresentations, some of them being representations of value which might be considered matter of opinion. The language of the trial Judge, however, seems clear and I can attach no meaning to it other than as I have stated.

I would, therefore, dismiss the appeal on this ground, without considering any of the other difficulties the appellant would have to meet.

The respondent should have the costs of the appeal.

STUART, J., concurred with HARVEY, C.J.

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BECK, J.:—I concur, with the greatest hesitation, in the result arrived at by three other members of the Court, but I desire to guard myself against being supposed to accept what may, perhaps, be thought to form at least some part of the grounds of their decision, in view of the various arguments presented to us. The action was grounded on fraud. If, eliminating the charges of fraud, the plaintiff established a case for relief, she was entitled to succeed and the only penalty for alleging fraud and failing to prove it is being deprived of or visited with costs. 20 Hals. tit. Misrepresentation and Fraud, sec. 1746, and the cases there cited to which may be added *Nocton* v. *Lord Ashburton*, [1914] A.C. 932 (H.L.)

It was urged that the transaction of purchase having reached the stage of actual conveyance, it could be set aside only on the ground of actual fraud.

That, speaking generally, is the settled rule in England, but as I read the cases, it is evident that that rule came to be established owing to the complicated and more or less risky character of titles to land there, and in Scotland and Ireland, where, by reason of the character of titles, title deeds are, generally speaking, privileged from production and one in possession of land is entitled by way of defence to an action for the recovery of the land to plead by way of a general issue merely that he is in possession and the doctrine of actual or constructive notice may have so far reaching and disastrous results.

I think the rule ought not to be recognized at all in this jurisdiction where, none of these reasons for it existing owing to our Land Titles system, our titles are simple and secure.

There is some, but no binding and, to my mind, no persuasive, authority extending this rule to any executory contract which has become executed by reason of all the various things contracted to be done on one side and the other having been done.

Such a rule is, in my opinion, not founded on good sense and justice. Why should it be impossible to set aside a contract on the ground of grievous mistake or gross, though innocent, misrepresentation, because ten-tenths of the things contracted to be done, have been done, when it is not impossible to do so, when only nine-tenths of these things have been done; provided that a substantial *restitutio in integrum* can be made by the party seeking relief.

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In my opinion, therefore, the fact that the bargain between the plaintiff and the defendant had taken the form of conveyance was no obstacle to the plaintiff succeeding if otherwise entitled.

Even if it should be established that the English rule, which I reject as inapplicable in this jurisdiction, should be established here, it seems to me that, since the decision of the House of Lords in *Nocton* v. *Lord Ashburton*, *supra*, to have become subject to the exception, there established, to the general rule that actual fraud is necessary to ground an action for deceit.

That case as I read it excludes from the rule in *Derry* v. *Peek* (1889), 14 App. Cas. 337, all cases of "constructive fraud" arising from the relationship of the parties. It is not necessary that that relationship should arise by reason of a previous contractual or quasi contractual relationship (per Lord Shaw, p. 971) but applies to such a case as *Waters* v. *Donnelly*, 9 O.R. 391, cited by my brother Walsh which holds that if two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, and advantage is taken, the transaction will not be allowed to stand.

Boyd, C., says that the method of investigation is to determine first whether the parties were on equal terms; *if not*, and the transaction is one of purchase, and any matters requiring explanation arise, *then it lies on the purchaser* to shew affirmatively that the price given was the value. Because, as I feel satisfied, the trial Judge did not conduct the trial in this aspect of the case, his findings and conclusion are of little, if any, assistance to me in coming to a decision.

WALSH, J.:—The plaintiff's case as disclosed by her pleadings is one of deceit. Every representation of which she complains in her statement of claim is alleged to have been made falsely and fraudulently and with intent to defraud and deceive. The action was tried on that basis and the judgment plainly proceeded upon the assumption that the plaintiff had undertaken to prove the fraudulent misrepresentations of which she complains and had failed to do so. The reasons for judgment are exceedingly brief. The Judge simply said, "The plaintiff in this action has not succeeded in establishing the allegations as to misrepresentation which are the basis of her claim and the action must therefore be dismissed with costs." He was unquestionably right in treating

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the action as one for deceit not only from the frame of the pleadings but also from the course that the trial took. Looking at it therefore from the only point of view that was presented at the trial, I thoroughly agree with the Chief Justice that the appeal must fail.

The impression that I formed of the case during the hearing of the appeal, though not from anything advanced by counsel in argument, was that the plaintiff by her pleadings and at the trial had assumed a much heavier burden of allegation and of proof than was necessary to entitle her to the relief that she sought. The transaction which she attacks and seeks to set aside is one by which she exchanged with the defendant her quarter section in Alberta for a house and three lots in Genesee, Idaho. She knew absolutely nothing of the Genesee property except what the defendant told her of it for she had never seen it nor had she any report of it from any one but him. He on the contrary not only knew his own property thoroughly but had every opportunity to perfectly acquaint himself, as I think he did, with the plaintiff's property before closing the deal. He was living in that neighbourhood then and had acquired other property there and he made an inspection of this land before beginning his negotiations for it. He was familiar with its characteristics and had a good idea of its value before he first discussed a trade with the plaintiff. They were therefore not dealing upon even terms at all so far as knowledge of the respective properties is concerned. I am inclined to think that in such a case a minimum of evidence would be required of the plaintiff to shift the burden of proof to the defendant and to require him to prove the honesty and accuracy of his representations respecting his Genesee property and the fairness of the exchange instead of imposing upon her the obligation to establish the dishonesty and inaccuracy of his statements and the unfairness of the transaction. The judgments in *Waters* v. *Donnelly*, 9 O.R. 391, and in the cases there cited, explain more fully the principle to which I am making this passing reference. If that principle could be applied to this case and that view of it had been presented to the trial Judge he might have reached a different conclusion and it is for this reason I have hesitated to concur in a dismissal of this appeal.

After a careful reading of the evidence, however, I have

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reached the conclusion that it is idle to speculate further upon the subject, for even if the onus of proof was as I have suggested upon the defendant the trial Judge might with perfect propriety have held that he had completely satisfied it and I for one could not concur in a reversal of his judgment even under this new view of the onus. If upon further consideration it should appear that this view should prevail the best that we could do for the plaintiff would be to grant her a new trial which should only be upon terms of the payment by her of the costs of the former trial and of this appeal, an indulgence so costly for a result so uncertain that I would almost deem it a kindness to her to refuse it to her if she asked for it, which she has not done.

I think the appeal must be dismissed with costs.

Appeal dismissed.

JOHNSON INVESTMENTS Ltd. v. GRUNWALD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 9, 1917.

APPEAL (§ VII L—485)—*Conclusiveness of Judge's findings upon questions of fact—Credibility of testimony.*]—Appeal by defendant from the judgment of McCarthy, J., dismissing an action for arrears of rent. Affirmed.

J. Barron, for respondent; *J. J. McDonald*, for appellant.

HARVEY, C.J.:—The plaintiff is the assignee of one Johnson, the original lessor. The lease is one for 10 years from October 20, 1913, and for a year the rent was paid according to the terms of the lease, but the defence to the present claim is that in November, 1914, Johnson, who was then still the landlord, agreed with the defendant that he would reduce the rent during the continuance of the war to such sum as would be sufficient to meet the interest on the mortgage on the property and the insurance premium and taxes. The only direct evidence of any such agreement was that of the defendant himself and it was absolutely denied. There was no evidence whatever to support that of the defendant as to the exact terms of the alleged agreement though there was evidence supporting the view that a reduction of rent had been made.

McCarthy, J., who tried the case without a jury, having heard all the evidence, dismissed the action on the ground that the defendant had failed to prove the alleged agreement.

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It is clear that the trial Judge could not have come to this conclusion if he had accepted the evidence of the defendant as true and indeed, in his reasons, he states that he is not prepared to believe all the evidence for the defence and disbelieve that of Johnson.

The advantage of the trial Judge over the Judges of appeal in such cases has been often pointed out in this and other Courts. A comparatively recent decision in the House of Lords being *Lodge Holes Colliery* v. *Wednesbury*, [1908] A.C. 323.

A perusal of the evidence for the defence is far from convincing me that, even if the defendant's story were not denied, implicit confidence should be placed in it. It is quite impossible therefore for me to conclude that the trial Judge was wrong in rejecting it when it was denied, and the appellant cannot succeed unless he is able to satisfy the Court of that fact.

I would therefore, without considering any of the questions of law referred to by the trial Judge, dismiss the appeal with costs.

BECK, J.:—I would allow the appeal with costs and find in favour of the defendant.

STUART and WALSH, JJ., concurred with HARVEY, C.J.

Appeal dismissed.

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CITY OF VICTORIA v. CORP. OF DIST. OF OAK BAY.

British Columbia Supreme Court, Murphy, J. January 12, 1917.

SCHOOLS (§ IV—70)—*The Public School Act, B.C., secs. 2, 12, 15—"Public school"—High School—"Municipal school district"—"Another."*]—Action for school rates.

Mayers, for municipality of Oak Bay; *Hannington*, for City of Victoria.

MURPHY, J.:—In my opinion "public school" in sec. 15 includes High School. By sec. 2 "public school" means a school established under the provisions of the Act. The third paragraph of the case stated admits that the High School in question here was so established and has been maintained in accordance with the Act. I can see nothing in sec. 15 indicating that the defined meaning of "public school" is not to be given to those words as used therein. Likewise, I think since sec. 15 directs payment to the municipal corporation of the municipality in which

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the school which non-resident pupils attend is situate the plaintiffs can maintain this action at any rate in view of the case stated, which obviates any question that might arise under sec. 16.

The main point is the construction of sec. 15. It is argued that the occurrence of the word "another" in the second line compels the Court to define "municipal school district" appearing antecedently in the section as meaning district municipality school district only. As plaintiff corporation is a city school district it would follow that it could not claim the benefit of the section. There would be a great deal in this contention if the words in the second line were "district municipality school district." Then these words would be referring to territorial divisions made under the School Act as the antecedent phrase "municipal school district" does as appears from sec. 12. But "district municipality" as appears from sec. 2 refers to territorial division brought about by incorporation not under the provisions of the School Act. A district municipality school district and a district municipality may be two very different things, as shewn by sub-sec. (*a*) of sec. 12. Therefore there is no relation between the two phrases which would justify cutting down the meaning given by the Act to the antecedent phrase "municipal school district" because of the subsequent appearance of the words "another district municipality." If this be so, although the use of the word "another" seems anomalous, it does not, in my opinion, prevent plaintiffs from recovering, for they can bring their case within the words of sec. 15. Their school is, in my view, "a public school in a municipal school district." The pupils from Oak Bay reside in a district municipality. The word "another" seems to have been inaptly used to express the idea that the children for whom payment is to be made must be residents of some territorial division other than the municipal school district in which is situate the school which they attend. The facts of plaintiffs' case meet this requirement also. In my opinion they are entitled to judgment. *Judgment for plaintiffs.*

NORTH AMERICAN LIFE v. GOLD.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. April 3, 1917.

MORATORIUM—*War Relief Act (B.C.)—Volunteers and their dependants—Mother.*]—Appeal by defendant from the judgment of

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Hunter, C.J., B.C., in an action for foreclosure of mortgage. Reversed.

Rubinowitz, for appellant; *Sir Charles Hibbert Tupper*, K.C., for respondent.

MACDONALD, C.J.A.:—This case is similar to that of *Parsons* v. *Norris*, 33 D.L.R. 593, in which judgment has just been handed down. As in that case the defendant is the widowed mother of the volunteer. This action is brought to foreclose a mortgage on her property. She pleads the War Relief Act. That she is a dependent member of the volunteer's family is sworn to by her and her son, and they have not been cross-examined upon their affidavits.

The rents from the property in question are fairly substantial, amounting to $100 per month—less, however, than the sum mentioned in sec. 9 of the Act. Had it been contested it might have been a question for the Court to decide whether a person, other than the wife, could be said to be a dependant when in the receipt of rents of that value, but she has sworn in her affidavit that part of the rents have to be expended in up-keep and rates. I think we must accept the unchallenged evidence that she is a dependant.

The question of law is the same as in *Parsons* v. *Norris*, *supra*, and I adhere to the opinion expressed in that case.

The appeal, therefore, in my opinion, should be allowed.

MARTIN, J.A.:—As I read the section in question there are under it four classes of persons who cannot be sued or otherwise proceeded against as therein provided, viz.: (1) volunteers, being residents of British Columbia and enlisting in the forces of Canada; (2) volunteers from Canada joining the Navy or Army of His Majesty or his Allies; (3) wives of such persons, and (4) "any dependent member of the family of any such person." There was much discussion upon the meaning of the word "family." It is an elastic term having various meanings in varying circumstances and must be considered in relation to the particular subject-matter, and I think the wider meaning should be given to it here, in a case of remedial legislation of this most exceptional kind; the preamble of the Act recites that "it is desirable to pass this Act for the protection and relief of all such persons and their families, etc." It would be undesirable to attempt to define the

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whole scope of the word as employed here and I do not propose to do so. As Moss, J.A., said in *Morrison* v. *Grand Trunk R. Co.* (1902), 5 O.L.R. 38, 43, "there is always danger in even attempting to define a term which permits of so many varying descriptions." It is, however, clear to me, at least, with all due respect for other views, that it includes the present appellant and I think she is entitled to the relief she asks since she has made out a *primâ facie* case of dependency. I may say, shortly, that I have considered the divided views of the six Judges in Manitoba in *Shipman* v. *Canadian Imperial Trust Co.*, 29 D.L.R. 236, 31 D.L.R. 137, and am disposed to adopt that broader conception of the scope of the Act taken by Mathers, C.J.K.B., and shared by Richards and Haggart, JJ.A., while fully appreciating the able analysis of the section contained in the judgment of Perdue, J.A., in support of his contrary opinion.

The appeal, therefore, should be allowed.

GALLIHER, J.A.:—As a majority of the Court as constituted held in *Parsons* v. *Norris*, 33 D.L.R. 593 (in which judgment has just been handed down), that the War Relief Act applied, and as my brother Martin takes the same view in the case at bar, we have thus a majority decision of this Court on the point which, I think, may be treated as binding on me. *Appeal allowed.*

MONCREIFF v. BARNETT-McQUEEN Co. Ltd.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. April 3, 1917.

MASTER AND SERVANT (§ II E—255)—*Employers' Liability Act—Negligence of foreman.*]—Appeal by defendant from the judgment of Murphy, J., in an action under the Employers' Liability Act. Dismissed by divided Court.

S. S. Taylor, K.C., for appellant; *Joseph Martin*, K.C., for respondent.

MACDONALD, C.J.A.:—I would allow the appeal. After careful consideration I am unable to find any evidence of negligence brought home to the defendant company. The plaintiff's own evidence does not establish it, but on the contrary shews that the system adopted of pulling down the frames was not a negligent one. There is no satisfactory proof of how the accident actually happened. It may have happened without negligence on the part of anyone, or it may have happened from the negli-

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gence of the plaintiff himself. There is to my mind no evidence upon which reasonable men could come to the conclusion that it happened through the negligence of the defendant.

MARTIN, J.A.:—During the argument we said that there could only be a recovery under the Employers' Liability Act, and reserved judgment to consider that aspect of the case. After further consideration I am of the opinion that the judgment can and should be supported on that ground, the case, though not in all respects as satisfactory as I should like, is at least as strong as *Tecla* v. *Burns*, [1917], 1 W.W.R. 639.

GALLIHER, J.A.:—I adhere to the view I took at the argument and would allow the appeal.

MCPHILLIPS, J.A.:—This is an appeal from the judgment at the trial of Murphy, J., in a negligence action—the trial Judge finding for the plaintiff—under the Employers' Liability Act (R.S.B.C. 1911, ch. 74). It was fairly arguable upon the facts that what took place constituted negligence at common law but notwithstanding and with deference to the able argument of counsel for the appellant upon this point in support of the cross-appeal I feel constrained to say that I am not disposed to differ from the trial Judge in this respect. I am, however, clearly of the opinion that the trial Judge was right in coming to the conclusion that negligence was established under the Employers' Liability Act. No evidence was called upon the part of appellant. The work that was being carried on was the construction of a grain elevator on Burrard Inlet in the City of Vancouver; the respondent was a carpenter and was at the time of the accident assisting in the taking down of wooden framework placed in connection with the construction of a cement roof and had loosened some of the forms so that they could be pulled down by other workmen on the floor of the building by means of ropes attached to the forms and was in the act of walking away on a plank upon a scaffold to a place of safety when the workmen, under the direction of the foreman present at the time, precipitately pulled on the ropes, and before the respondent, who was in full view of the foreman, had arrived at a place of safety, resulting in the carrying down of the plank, the falling forms striking it—upon which the respondent was—the respondent being carried with it, to the floor below in which fall the respondent sustained serious injuries. Mr. Taylor, in his very forceful argument, endeavoured to demon-

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strate that all was conjecture and that there was no evidence from which it could be assumed that the respondent fell consequent upon the pulling away of the forms, and that it was all a matter of inference and it was as consistent upon the facts that the respondent fell from off the plank upon which he was quite independent of and wholly apart from the pulling down of the forms, urging that there was no evidence that the falling forms struck the plank upon which the respondent was, and the pulling away of the forms was not the *causa causans* of the accident. Further, that there was no evidence that there was negligence in the foreman, and that if anything, all that was established was negligence of fellow workmen, not negligence of anyone in superintendence. It cannot be said that the evidence is so complete that doubt may not be present as to the exact happening and what actually precipitated the respondent to the floor below, but I think it may be fairly taken that in the balance of probabilities, taking the evidence as a whole, it was the negligence of the foreman in superintendence, in not seeing to it that the respondent was in a place of safety, before giving the word to pull away the forms, and it is not open to much doubt that the falling forms carried down the plank upon which the plaintiff was. All occurred at one and the same time, and there must be some frailty always in evidence as to what actually occurred in the carrying on of work, which was certainly in its character most dangerous, apparently the carrying out of "rush orders" hurried work at the possible and likely expense of life and limb to the employees. The nature of the respondent's injuries were such, and the effect has been such, that he cannot give a very precise statement of what actually threw him to the floor other than with the general collapse of the forms he was carried down, and the forms undoubtedly upon the evidence carried down the plank upon which he was at the time. The respondent's work was the sawing off of the horizontal cross pieces or braces near the roof and at the time of the accident he had just cut the last of these, and whilst in the attempt of getting away from the danger of the falling forms the plank upon which he was caught by the falling forms, resulting in throwing him in the air and down upon the floor. The foreman, according to the evidence of the respondent, was present at the time and saw him and it was the foreman who always gave the orders for the pulling away of the forms, and sufficient time was not given to the res-

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pondent to get to a place of safety. On other occasions sufficient time was given and the respondent was working under this foreman's instructions. This is the case of an employer delegating its duties to the superintendence of others and if it be that such other persons, in the present case the foreman McLennan, are negligent in the performance of those duties, liability is imposed therefor under the provisions of the Employers' Liability Act. The case of *Osborne* v. *Jackson* (1883), 11 Q.B.D. 619, is somewhat in point in the present case, there:—

> The plaintiff, a bricklayer, in the employment of the defendants, was at work near a shoring while a scaffold was being taken down by their other workmen. Thomas, the defendants' foreman, himself handled a scaffold plank to Collier, a labourer, and called to him to take it. Collier took the end of it, but was so far off that he could not hold the plank and the foreman letting his end go the plank slipped and knocked down the shoring which fell upon the plaintiff and hurt him.

Denman, J., at p. 620, said:—

> . . In the present case the foreman was generally superintending the work on which the plaintiff and Collier were employed. The foreman called to Collier, who was under his orders, to take the plank when it was impossible to do so safely. That was superintendence, and the Judge might find, and has found, that it was negligence within the meaning of sub-sec. 2. I think it was so although Thomas was at the time supplying as a volunteer the place of another workman.

This is a plain case of the negligence of the foreman, a superintendent in charge of what was unquestionably dangerous work. No question arises in the present case, nor could there be, that the foreman McLennan was not a person who had superintendence entrusted to him, the system was certainly one that partook of great danger and would most certainly have been an improper system if some one was not in superintendence, and that superintendence was in the hands of the foreman McLennan, and the accident took place by reason of the negligence of the foreman McLennan whilst in the exercise of such superintendence (Employers' Liability Act, R.S.B.C. 1911, ch. 74, sec. 3, sub-sec. 2) in not giving sufficient time to the respondent to get to a place of safety. I would dismiss the appeal.

Appeal dismissed; Court equally divided.

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DOMINION SUPPLY CO. v. ROBERTSON.

Ontario Supreme Court, Clute, J. April 27, 1917.

CONTRACTS (§ III E—275)—*Restraint of Trade—Sale of Goods by Manufacturers—Condition as to Prices at which Sales to be Made*

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by Vendee to Customers—Criminal Code, sec. 498 (b), (d)—Unduly Preventing or Lessening Competition.]—Action to recover damages for the non-delivery of a balance of 15,000 kegs of nails purchased by the plaintiff (one Samwell, carrying on buisness in the trade name of "The Dominion Supply Company"), from the defendant company, in November, 1915.

The defendant company delivered 2,581 kegs. Specifications were put in for 7,500 kegs which were not delivered, and the defendant company refused to deliver the same, and assumed to cancel the contract, upon the ground that the plaintiff had become disentitled to receive further delivery, owing, as it was alleged, to his breach of contract in selling under the association price.

The defendant company pleaded that its contract with the plaintiff was subject to a condition that the plaintiff would sell the nails to his customers at the association price; that the plaintiff sold at a price below the association price; and had thus broken the contract. The defendant company counterclaimed for $1,000 agreed upon as the amount due under the contract.

In reply, the plaintiff said that, if there was any such condition, it was illegal and in contravention of sec. 498 of the Criminal Code, and therefore not binding on the plaintiff.

The action and counterclaim were tried without a jury at Kingston.

J. L. Whiting, K.C., for the plaintiff.

J. B. Clarke, K.C., for the defendant company.

CLUTE, J., in a written judgment, said that the plaintiff admitted that he sold at prices less than the association prices, and asserted a right to do so. He denied that there was any such limitation in the contract as was alleged by the defendant company.

In the view of the learned Judge, the whole correspondence between the parties was so connected as to be admissible to shew what the contract was; and from the correspondence it clearly appeared that the contract was subject to the provision alleged by the defendant company. Having regard to all the facts and the nature of the contract and what took place between the parties after the defendant company heard of the breach of contract by the plaintiff, the defendant company was justified in regarding the plaintiff's action as a repudiation of his part of the contract and a refusal in advance to be bound by it, and the defendant

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company was justified in treating it as cancelled and in refusing to fill the further specifications after the breach.

If sec. 498 of the Criminal Code was applicable, and the illegal part of the contract could not be separated, but formed part of the consideration, the whole contract was void; the plaintiff, being a party to it, could not sue upon it, and so the plaintiff's action would fail.

The learned Judge, after quoting sec. 498 of the Code, making it an indictable offence to conspire, combine, agree, or arrange with any other person (*b*) "to restrain or injure trade or commerce in relation to any . . . article or commodity . . . (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, . . . or supply of any . . . article or commodity," referred to *Hately* v. *Elliott* (1905), 9 O.L.R. 185; *Rex* v. *Elliott* (1905), 9 O.L.R. 648; *Wampole & Co.* v. *F. E. Karn Co.* (1906), 11 O.L.R. 619; *Rex* v. *Beckett* (1910), 20 O.L.R. 401, 427; *Weidman* v. *Shragge* (1912), 2 D.L.R. 734, 46 Can S.C.R. 1; *Stearns* v. *Avery* (1915), 33 O.L.R. 251; and to a number of English and American cases.

The result of a consideration of all the cases was to shew that sec. 498 was not to be construed as in accordance with the common law, but in the way indicated by the Canadian cases.

The contract between the parties included the agreement on the part of the plaintiff to maintain association prices. It was because the plaintiff refused to be bound by this clause of the contract that the defendant company refused to make further deliveries.

The agreement was made on the 14th May, 1914, between some fifteen firms and companies, of which the defendant company was one.

The learned Judge set out the principal provisions of the agreement; and said that, in his opinion, the contract between the parties, including as it did the limitations provided by the association agreement, was *ex facie* a breach of clauses (*b*) and (*d*) of sec. 498. Having regard to the scope of the association, including all Canada, the fixing of the prices of the manufacturers, the wholesalers, and the jobbers, to retailers, precluded competition in the trade of the entire product of this industry in Canada; and it must, therefore, unduly restrain and injure trade and commerce in re-

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lation to such articles, and unduly prevent or lessen competition in the purchase, barter, and sale of the same. The agreement was contrary to public policy and in breach of the Code.

The plaintiff was, therefore, not entitled to sue the defendant company for a breach of the contract; and the defendant company was not entitled to recover the $1,000 agreed upon as the amount due under the contract.

If the plaintiff should elsewhere be held entitled to recover, his damages should be assessed at $1 per keg for the number specified, in addition to the 2,500 delivered.

Both action and counterclaim should be dismissed; and, as both parties were *in pari delicto*, there should be no order as to costs.

COLUMBIA GRAPHOPHONE Co. v. UNION BANK OF CANADA.

Ontario Supreme Court, Middleton, J. December 30, 1916.

BANKS (§ IV A—70)—*Liability to depositors for forged cheques paid—Statement of account—Acknowledgment—Estoppel.*]—Action by a customer of the defendant bank to recover the aggregate amount of a number of cheques forged by one Ott, a clerk of the plaintiff company, and paid by the bank.

MIDDLETON, J., in a written judgment, described the ingenious method adopted by Ott to cover up his crimes, and also the system in regard to having the customer sign acknowledgments of the statement of account. These acknowledgments contained a confirmation of the customer's account with the bank, and were signed by either the manager or the assistant manager of the customer company, and Middleton, J., said that he could see no reason why these acknowledgments and agreements should not bind the customer.

They were in the following form:—

"Toronto, May 30, 1914.

"The undersigned customer of the Union Bank of Canada hereby acknowledges receipt of his pass-book or statement of current account, shewing a balance to the end of the month, May 30, 1914, of $1,598.50 at credit, together with vouchers for all debit items against the undersigned appearing therein since the date of the last statement of account; and, for valuable consideration, the undersigned agrees with the said bank that he will, within ten days from the date hereof, examine the said

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vouchers and check the debit and credit entries in the said pass-book or statement of account (and especially all debit entries purporting to be represented by such vouchers), and will in writing point out to the said bank any errors therein, and from and after the expiration of the said period of ten days, except as to improper charges or errors previously pointed out, it shall be conclusively settled as between the bank and the undersigned that the vouchers in respect of all such debit items are genuine and properly chargeable to and charged against the undersigned, and that the undersigned was not entitled to be credited with any sum not credited in the said pass-book or statement of account.

"Columbia Graphophone Co.
"J. C. Doran, Asst. Manager."

They were intended to be real agreements, and to define the relation between the parties, and relieved the bank from all liability down to May 30, 1914; after that date, no acknowledgments were signed by the customer, and although letters were sent asking its signature, no response was made.

The fundamental principle is, that the relation of the bank to its customer is contractual; and that, in the absence of any other express agreement, the contract of the bank is to pay the money intrusted to it, to the customer or upon his order. For this reason, the bank does not discharge itself from its liability if it pays upon a forged cheque, and it is a matter of no importance that the customer has so conducted his business as to render forgery by a clerk easy, or that he has so carelessly drawn a cheque as to facilitate its alteration. A forged cheque is not justification to the bank for parting with the customer's money—it is mere nullity.

Any conduct on the part of the customer after he has knowledge that a forged cheque has been issued, or that a genuine cheque has been altered, which is calculated to mislead or deceive the banker, or which will facilitate the commission of a fraud upon the banker, will preclude the customer from asserting that his signature is not genuine; but all these cases rest upon the existence of a duty or obligation which it is assumed arises from the knowledge of the existence of the forged document. This duty or obligation arises generally from the contractual relationship of the parties, but the Supreme Court of Canada found that it may also arise, when there is no contractual relation from

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moral and commercial obligation: *Ewing* v. *Dominion Bank* (1904), 35 S.C.R. 133, [1904] A.C. 806.

But the obligation cannot arise unless there is knowledge, and *à fortiori* when the fraud is perpetrated by one who has the skill and ability to conceal his fraud from both parties.

Here the case was in one aspect a hard one on the bank, but the bank could have protected itself in any one of three ways. It might have, in the first place, insisted upon a contract with the customer imposing upon him the duty to state accounts monthly and to accept as genuine all items not objected to in a reasonable time—or it might have insisted upon the regular signature of the monthly acknowledgments—or it might have delivered the statements and vouchers into the hands of the manager, instead of to the fraudulent clerk. *Kepitigalla Rubber Estates* v. *National Bank of India*, [1909] 2 K.B. 1010, referred to.

An estoppel could not be based upon the request of the bank for an acknowledgment and a refusal—for the neglect was equivalent to a refusal—to give it. That which is not done cannot be treated as done. Nor could the retention of the vouchers by the plaintiff be regarded as an acknowledgment of their genuineness. They were delivered to the fraudulent clerk, and never came to the knowledge of the plaintiff.

The result was that the plaintiff should recover for all the cheques after May 30, 1914, less the true amount of the five raised cheques, with such interest as the bank would have allowed up to the date of the writ, and with 5 per cent. interest from the date of the writ to judgment and costs. *Judgment accordingly.*

UNITED STATES PLAYING CARD CO. v. HURST.

Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. April 3, 1917.

TRADE MARK (§ IV—21) — *Infringement — Design — Trade Name—Intent to Deceive—Passing off—Damages.*]—Appeal by the defendant from the judgment of MIDDLETON, J., 31 D.L.R. 596, 37 O.L.R. 85, 10 O.W.N. 207. Varied.

J. H. Moss, K.C., and *A. C. Heighington*, for the appellant.

D. L. McCarthy, K.C., and *Britton Osler*, for the plaintiff company, respondent.

HODGINS, J.A., read the judgment of the Court. He said that the chief contention arose over the trade mark No. 46/11090,

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which consisted of the use of the word "Bicycle." By the judgment in appeal, the use of this word was prohibited, and two card-designs (Imperial Club, Bicycle Series, 1 and 8) were declared to be an infringement of the trade mark. As to this particular mark it was contended by the appellant that the word was and is publici juris; that it is not a valid trade mark; that, if there was any infringement, it had been discontinued, pursuant to arrangement, in 1905; and that there had not, since then, been any interference with the respondent's rights.

The word "Bicycle" was not printed on the appellant's cards, but on the packages. A special trade mark, in the words of the certificate of registration, was granted as a mark "to be applied to the sale of playing cards." This particular mark was not infringed by the cards sold by the appellant.

Reference to *Partlo* v. *Todd* (1888), 17 Can. S.C.R. 196.

If the designs on the back of the cards contain a bicycle or parts of it, there is nothing in the respondent's trade mark to prevent the use of the word by the appellant as properly describing that design, if he does not apply that word to the article itself, or to the packages in which it is sold, and on the sale thereof, as designating the class of card itself. Nor does the solitary word "Bicycle" prevent the pictorial representation of that aid to locomotion being used in ornamental design.

Reference to *Singer Manufacturing Co.* v. *Loog* (1882), 8 App. Cas. 15, 27.

The use of an ordinary word such as "Bicycle" as describing merely the design on the back of a card becomes prohibited because it is forbidden if applied to the article itself or to any package containing it.

Reference to sec. 5 of the Trade Mark and Design Act, R.S.C. 1906 ch. 71.

The respondent company's witnesses all agreed that the word "Bicycle" was adopted to indicate a particular class, quality, or style of card of a specific finish and price, but having upon the individual cards numerous and differing designs, most of which, if not all, possessed bicycles, or parts thereof, wheels, etc., as ornamentations thereon. The use of these designs, except where they are copies or imitations, is not interdicted or affected by possession or registration of a trade mark, unless that trade mark is one that covers the identical design. There is no reason why the

only word which can appropriately describe such a design cannot be used, provided that it is not applied to the article produced or offered for sale as descriptive of the whole product.

But, with regard to passing off, it was proved by reasonable evidence that, before registration, the respondent company had established the word "Bicycle" as having acquired a significance referable only to its own manufacture of a class, quality, style, and price of card, both in the United States and Canada, and that the word had not, by reason of the circulation of the other cards prior to 1902, lost that significance. It had become identified with these particular cards as the manufacture of the respondent company. See *Provident Chemical Works* v. *Canada Chemical Manufacturing Co.* (1902), 4 O.L.R. 545, 549.

It was not suggested that any of the respondent company's immediate customers were, or could be, deceived by anything done by the appellant. But it was contended that the appellant was attempting to pass off his cards as those of the respondent company by using in connection with class names, such as "Imperial Club," the term "Bicycle Series" as indicating back designs.

There was no evidence of any passing off having been accomplished. Even retail customers would not be easily taken in. See *National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.*, [1894] A.C. 275; *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A.C. 78.

No purchaser (so far as appeared) had been misled into buying the cards which the appellant was selling, instead of the respondent company's; and, but for the single advertisement produced, the respondent company had not made out its right to interfere with the appellant company on this branch of the case. This advertisement was apparently a breach of the undertaking given in 1905, and was sufficient to warrant an injunction against its repetition, though not the award of damages made.

The respondent company should be restricted to an inquiry as to damages, if it insists upon more than nominal damages, and the costs of the inquiry should be reserved.

The judgment below should also be modified so as to limit the declaration in para. 1 and the injunction in paras. 5 and 7 to using the word "Bicycle" on the tuck cases and cartons and to advertising and selling these cards as "Bicycle Cards." As to para. 4, the declaration should be confined to trade mark 46/11091.

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The respondent company had not lost its right to enforce its trade marks through non-interference with infringers.

Judgment below varied accordingly, and otherwise affirmed. No costs of appeal.

TOUGH OAKES GOLD MINES v. FOSTER.

Ontario Supreme Court, Kelly, J. March 29, 1917.

COMPANIES (§ VG.—295)—*Election of Directors—Ontario Companies Act, R.S.O. 1914, ch. 178, secs. 5 (4), 44, 45, 50, 54, 60, 72, 73, 118, 123—Meeting—Persons Entitled to Vote—Registered "Shareholder"—"In his own right"—"Absolutely"—Beneficial Holding.*—Action by the above-named company and seven individuals as plaintiffs against Clement A. Foster and five other individuals and the Bank of Ottawa, defendants, to restrain the individual defendants from acting as directors, and for other relief.

R. McKay, K.C., and *A. G. Slaght*, for the plaintiffs.

I. F. Hellmuth, K.C., and *Grayson Smith*, for the defendants (*E. A. Wright* appearing with them for the defendant Kearney, and *S. J. Birnbaum* with them for the defendant the Bank of Ottawa.)

KELLY, J.:—This action was tried with the action of C. A. Foster and the plaintiff company against Myrtice Oakes and Winifred Robins. To avoid repetition and for the purpose of convenience, I refer to the facts set forth in the reasons for judgment in that case, and incorporate herein the findings in those reasons, so far as they are here applicable or as they are necessary to an understanding of the present case.* The plaintiffs, other than the company, are the seven persons who claim to have been elected on the 26th January, 1916, as directors of that company. The plaintiffs allege that the individual defendants, namely, Clement A. Foster, John H. Tough, Thomas B. Tough, George Tough, Edwin W. Kearney, and W. H. M. Jones, were, prior to the 26th January, 1916, directors of that company, and that on that day the individual plaintiffs were duly elected directors for the year then commencing; that immediately thereafter the newly elected directors met and elected officers; that the defendants refused to comply with the demands made upon them for the delivery of the seal, books, papers, documents,

*The result of the judgment of Kelly, J., of the 29th March, 1917, in *Foster* v. *Oakes*, is noted in 12 O.W.N. 76.

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and assets of the plaintiff company, or to relinquish control of the company's rights, properties, and assets; and that they continue without legal right or authority to act as directors.

The plaintiffs ask: (1) that the individual defendants be restrained from acting or assuming to act as directors and from exercising or assuming to exercise the powers of directors, and from dealing with the company's assets or managing its business; (2) for an order directing the defendants to deliver to the plaintiffs the company's seal, books, papers and documents, and control over the company's rights, properties, and assets; (3) an order restraining the defendants and their agents, etc., from drawing cheques on the company's account in any bank and from dealing with the company's bank account, and restraining the defendant bank and the company's bankers from honouring cheques signed by any person other than those authorised by the individual plaintiffs as directors of the company; (4) an order directing the defendant bank to transfer the moneys of the company on deposit with it in accordance with the directions of the individual plaintiffs as such directors; (5) an accounting by the defendants of their dealings with the company's assets since the 26th January, 1916; (6) damages; and (7) general relief.

The individual defendants set up that they and the plaintiff Harry Oakes are, and have been since the organisation of the company, the directors thereof; and that the defendant Foster has been, and is, the company's president and managing director, and the defendant Kearney its secretary.

In a word, the real contest is as to whether there was on the 26th January, 1916, a regularly convened legal meeting of the company's shareholders who had the right and the power to elect the individual plaintiffs as directors, and whether these plaintiffs were at such meeting duly elected.

It is common ground between the parties that of the total of 600,000 shares of the company's capital stock, 531,500 shares were subscribed for at the date of the meeting.

The following enactments by by-law number 1 of the company were in force at the time of the meeting:—

"The business of the company shall be managed by a board of seven directors, who shall be elected by the shareholders, either by ballot or by a show of hands, at any general meeting of the company assembled.

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"The qualification of each director shall be the holding absolutely in his own right of at least one share of the capital stock of the company.

"Certificates of shares of the capital stock of the company, when fully paid-up, shall be granted and issued to the proprietors thereof upon demand, and such certificates shall be in the form required by the Ontario Companies Act.

"The shares of the company shall be transferable only by the recording on the stock-book of the company, at the head office of the company, by the shareholder or his or her attorney, of the transfer thereof, and of the surrender of the certificate of such shares, if any certificate shall have been issued in respect thereof, on the making of such transfer. The transferee shall be entitled to all the privileges and subject to all the liabilities of the original shareholder;" with added provisions entitling the directors to decline to register a transfer of shares belonging to a shareholder who is indebted to the company; and, in case of loss of certificate, for registration of the transfer without production of the original certificate, and for authorising the issue of a duplicate certificate in place of that lost.

"The annual meeting of the shareholders for the election of directors and the transaction of general business shall be held at the head office of the company, or at such other place as the directors may determine, on the fourth Wednesday in the month of January (not being a legal holiday) in each and every year. In case of the fourth Wednesday being a legal holiday the meeting shall be held on the next Wednesday which is not a legal holiday.

"At the annual general or special general meetings of the company a shareholder or shareholders representing at least one-third of the shares of the stock of the company subscribed for must be represented either in person or by proxy to constitute a quorum for the transaction of business.

"Any meeting of the company at which one or more shareholders are present, but at which there is no quorum, may be adjourned by such shareholder if only one person, or by the majority in value of those present, to any time and place.

"At all meetings of the company, whether annual general or special general, every shareholder shall be entitled to as many votes as he holds shares in the company, and all questions arising in any such meeting shall be decided by the majority of votes.

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"Shareholders may be represented by and vote by proxy at any meeting of the company, provided the authority for that purpose be given to another shareholder in writing.

"The instrument appointing a proxy shall be in writing under the hand of the appointor or his attorney duly authorised in writing, or, if the appointor is a corporation, either under the common seal or under the hand of an officer or attorney so authorised," etc.

The annual meeting was duly called for Wednesday the 26th January, 1916. No exception is taken to that.

To constitute a quorum it was necessary that at least 177,167 shares should be represented, either in person or by proxy—being at least one-third of the 531,500 shares subscribed for.

In an action in England, in which the defendant Foster is a defendant, certificates for 280,562 shares, 195,000 of which were referred to as his personal holdings, were ordered to be deposited in Court, and at the time of the meeting on the 26th January, 1916, they were still on deposit. At the opening of the meeting Foster acted as chairman, and requested the defendant Kearney, who was the secretary of the meeting, to ascertain the names of shareholders present and the number of shares held by each, and the number of shares represented by proxies. The secretary's report was that 54,593 shares were represented in person and 89,363 by proxy—a total of 143,956 shares—considerably less than the number which the by-law required to constitute a quorum. Foster's name did not appear in that list except as representing 534 shares. In another English action brought by Tough Oakes Gold Mines Limited (an English company), and in which Foster is a defendant, an injunction had been granted, amongst other things restraining Foster and his co-defendant, Herbert George Latilla, from voting or exercising any voting rights in respect of or in any way dealing with these 280,562 shares "save as the plaintiffs may direct."

Of the 450,000 shares referred to as pooled shares in the reasons for judgment in the other action (*Foster* v. *Oakes*), 25,000 were the property of Myrtice Oakes and 15,000 the property of Winifred Robins; and certificates for these, endorsed in blank by the holders, were sent to England, when Foster, one of the three trustees of the pooled shares, was about to deal with them there.

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For some of these shares on two occasions Myrtice Oakes and Winifred Robins received cash, and in May, 1915, certificates for a number of shares which were said to represent the balance of these blocks were delivered to them or their representatives at Haileybury. These certificates were not for any part of their shares, certificates of which had been sent to England. In May, 1915, Myrtice Oakes received a certificate for 15,926 shares and Winifred Robins for 9,556. For the reasons given and as I have found by the judgment in the other action, Myrtice Oakes was entitled to a further 833 shares and Winifred Robins to an additional 500 shares; they were at the time, and before, misled by Foster, and by his manipulations of the stock entrusted to him, into the belief that a larger number of shares had been disposed of or optioned in England than really was the case.

At the time of the meeting of the 26th January, 1916, the original blocks of 25,000 and 15,000 shares were standing on the share-register of the plaintiff company in the names respectively of Myrtice Oakes and Winifred Robins, to part of which, at least, they were still beneficially entitled. On that date there was also standing on the share-register in the name of Myrtice Oakes further shares to the amount of 5,000, and in the name of Winifred Robins to the amount of 9,996, to their ownership of which and their right to vote thereon no exception is taken. The secretary's report of shares at the opening of the meeting included these two amounts of 5,000 and 9,996 shares, but it took no account of the other two blocks of 25,000 and 15,000, though, so far as the register shewed at the time, they were also held by these two holders.

Myrtice Oakes and Winifred Robins were represented at the meeting by Harry Oakes, admittedly a shareholder, as their proxy duly appointed in writing. Claim was made that they, as registered holders of the two blocks of 25,000 and 15,000, were entitled to represent these shares, which it was contended should be added to the number of shares reported as being represented. If this was the proper course, and had it been followed, then more than the required one-third of subscribed shares would have been represented and a quorum would have been present. Foster objected to the counting of these shares. Kearney, as secretary, in his minutes of the transaction, states that Foster

declared that an injunction had been issued against the company, prohibiting these shareholders (Myrtice Oakes and Winifred Robins) from voting at any meeting in respect of these two blocks and prohibiting them from being represented, and that he (Foster) ruled that these shares were not represented, that the meeting was not properly constituted for want of a quorum, and that no business could be done. Unavailing protests were made by several shareholders who took the view that the meeting was properly constituted, and insisted that the business for which it was called should be proceeded with. Foster refused to submit a motion that the meeting proceed, and against his ruling that there was not a quorum present.

No injunction had been issued in any Canadian Court respecting these shares which it was claimed Myrtice Oakes and Winifred Robins were entitled to represent; and there was no injunction in the English actions enjoining these two holders from voting upon or representing these shares.

Following upon the chairman's declaration, and while all the parties were still assembled in the meeting-room, those present, other than Foster and Kearney, and against their protests, proceeded with the meeting, having first selected as chairman Harry Oakes, a holder of 47,768 shares, apart from the shares he claimed to represent by proxy. A secretary of the meeting, Mr. Murdoch, was also appointed. Foster and Kearney remained in the meeting-room during all the subsequent proceedings, but desired it noted that they did not intend to take part in the proceedings, which they considered irregular. Counting in the two blocks of 25,000 and 15,000 shares, and omitting the shares represented by Foster and Kearney (534 shares and 1,202 shares as shewn by the list prepared by Mr. Kearney at the opening of the meeting), the record of the meeting over which Harry Oakes presided, after Foster had declined to go further, shewed that 183,570 shares were represented.

The crucial question then is, whether these two blocks of 25,000 and 15,000 shares were properly represented at the meeting. Foster's objection was, no doubt, based upon the view he entertained, that Myrtice Oakes and Winifred Robins had ceased to be beneficial owners of the two blocks over which the contest has arisen.

Leaving out of consideration for the time being that these

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two holders had not parted with all their beneficial ownership in their pooled shares, it is important to determine what is a shareholder, and what are the rights, powers, and privileges of one whose name appears on the share-register of a company as a holder of shares.

The Ontario Companies Act, R.S.O. 1914, ch. 178, contains many provisions in which the word "shareholder" is used, but its meaning is not therein interpreted. In the earlier revised Act (the Companies Act, R.S.O. 1897, ch. 191, sec. 2 (*e*)), "shareholder" is interpreted to mean "every subscriber to or holder of stock in the company, and shall extend to and include the personal representatives of the shareholder." This is omitted from the present Act.

Notice of holding meetings of the company shall be given to each shareholder (sec. 44); the directors of the company shall, unless otherwise provided by the company's by-laws (sec. 45 (4)), send to every shareholder a report (sec. 45 (2)). There are also other sections in which "shareholder" is referred to without any express qualification or limitation of its meaning. But in more than one place in the Act the word is qualified or restricted: as, for instance, in sec. 5 (4), which declares that each petitioner for the incorporation of a company (that is, a company having a capital divided into shares) shall be a *bonâ fide* subscriber in his own right for the shares he agrees to take; and in sec. 87, where it is enacted that no person shall hold office as a director unless he is a shareholder absolutely in his own right and not in arrear in respect of any call, and where any director ceases to be such a shareholder he shall thereupon cease to be a director. It is evident that the intention was that "shareholder" should have a meaning different from and broader than "shareholder in his own right."

Section 118 (*b*) provides for the company recording in a book or books the names of all persons who are or have been shareholders or members of the corporation; and sec. 123 that such books shall be *primâ facie* evidence of all facts purporting to be therein stated, in any action or proceeding against the corporation or against any shareholder or member. The certificate to which every shareholder by sec. 54(1) is entitled, stating the number of shares held by him, shall be *primâ facie* evidence of

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the title of the shareholder to the shares mentioned in it (sec. 54(2)).

The English Act (the Companies Consolidation Act of 1908), where it refers to the same matters, substantially follows the Companies Act of 1862, on which many important decisions are based; and it contains provisions much to the same effect and almost in the same words as the language of the Ontario Act. For instance, sec. 23 of the English Act declares that a certificate under the common seal of the company, specifying any shares or stock held by any member, shall be *primâ facie* evidence of the title of the member to the shares or stock. That Act also makes use of the word "member" in many places where the Ontario Act says "shareholder." In such instances the words are synonymous. There is nothing that I can find compelling a narrower or more restricted meaning to be given to "shareholder" in our Act than to "member" where used in the English Act.

It seems to be the case that persons in whose names shares stand in the share-register of a company, unless there be expressly something to the contrary, are to be deemed to be the holders of the shares for such purpose as the right to be present at meetings of the company and to vote upon the shares, and that that right continues so long as their names are so on the register.

A person may cease to be a member of a company by transferring his shares to another person, in which case the transferor ceases to be a member so soon as the transferee is registered, but not before: *Heritage's Case* (1869), L.R. 9 Eq. 5.

A transfer is incomplete until registered: *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20; *Roots* v. *Williamson* (1888), 38 Ch.D. 485. Until the registration of the transfer the transferor is a trustee for the transferee: *Hardoon* v. *Belilios*, [1901] A.C. 118, particularly at p. 123.

Pending the registration the transferee has only the equitable right to the shares transferred to him; he does not become the legal owner until his name is entered on the register in respect of the shares so transferred.

Halsbury's Laws of England, vol. 5, p. 192, para. 316, lays it down that until the instrument of transfer is registered the transfer is not complete; and the transferor is the legal owner of the shares; and (p. 193) the legal duty of the transferee is to obtain

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registration. Other parts of the Ontario Companies Act are in line with these decisions.

Section 60 declares that no transfer of shares, unless made by sale under execution, or under the order or judgment of a competent court, until entry thereof has been duly made, shall be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, etc. This negatives any power or right in the company or the presiding officer, at a meeting of the company, to question the right of the registered holder to exercise the privilege of voting. Under such conditions it is not for the company to object. As between the transferor and the transferee the transfer is of service in shewing their rights towards each other, but the mode of determining these rights, while the register remains unaltered, is not by appeal at the meeting to either the company or the presiding officer. A provision in the English Act is that no notice of any trust, express, implied, or constructive, shall be entered on the register in the case of companies registered in England or Ireland. Many of the decisions in the English Courts have been made with reference to that Act. The Ontario Act puts it even more strongly when it expressly relieves companies from any obligation to recognise trusts of shares. Section 72 declares that a company shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which any share is subject: and that the receipt of the person in whose name the same stands on the books of the company shall be a sufficient discharge to the company for any payment made in respect of such share, whether or not the company had notice of such trust. As further shewing how far the registered holder is recognised, even when he has not the sole beneficial interest in the shares, it is declared by sec. 73 that every person who mortgages or hypothecates his shares may, notwithstanding, represent them at all meetings of the company and may vote as a shareholder, unless, in the instrument creating the mortgage or hypothecation, he has expressly empowered the holder of the mortgage or hypothecation to vote thereon.

Section 50 of the Ontario Act declares that, subject to the special Act, letters patent, supplementary letters patent, or by-laws, at all meetings of shareholders every shareholder shall be entitled to as many votes as he holds shares in the company.

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A reference to the extracts from the by-laws already cited shews that this provision is there repeated.

It is urged that a shareholder, even though appearing as such, is not entitled to exercise this voting privilege unless he is at the time a beneficial owner of the shares standing in his name. That question was dealt with in *Pender* v. *Lushington* (1877), 6 Ch.D. 70. There the articles of association provided that the company should not be affected with notice of any trust, and they contained provisions that every member should be entitled to one vote at any meeting for every ten shares, but should not be entitled to more than 100 votes in all; and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto. It was held that, according to the articles, a member of the company was a person whose name was on the register of shareholders; that the register was the only evidence by which the right of members to vote at a general meeting could be ascertained; and that at a general meeting no votes of shareholders properly qualified and whose names had been three months on the register should be rejected on the ground that their shares had been transferred to them by other shareholders for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that the holders were not the beneficial holders of the shares. The action was brought by a shareholder whose vote was rejected, on behalf of himself and all others who had voted with him, naming the company as co-plaintiff, against the directors, for an injunction restraining them from acting on the footing of the votes being bad; and it was held that the plaintiffs were entitled to the injunction. In his reasons for judgment, Jessel, M.R., in considering how it is to be ascertained who is to vote at general meetings, points out (p. 77) that under the Act (the English Companies Act) "member" *primâ facie* means "registered shareholder or stockholder;" and, referring to the manner of giving a member notice of a meeting, he says: "You can only give him notice by referring to the register, . . . So that a member is a man who is on the register." And, having declared that it was registered members who were entitled to notice of a general meeting, he asks, How otherwise would it be possible to work a company in any way, "for how else could the company hold meetings or demand a poll?" He might also very

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properly have asked, Can it be satisfactorily determined who is entitled to the privilege of voting if the register is to be ignored, and controversies between individuals each claiming ownership of or interest in the shares are left to be disposed of by an officer of the company? On p. 78 he says: "It comes, therefore, to this, that the register of shareholders, on which there can be no notice of a trust, furnishes the only means of ascertaining whether you have a lawful meeting or a lawful demand for a poll, or of enabling the scrutineers to strike out votes." Discussing the position of the company itself as to disputed shares and its right to deal with the beneficial ownership of shares, the same learned Judge in the same case, at p. 78, says: "The result appears to me to be manifest, that the company has no right whatever to enter into the question of the lawful beneficial ownership of the shares. Any such suggestion is quite inadmissible, and therefore it is clear that the chairman had no right to inquire who was the beneficial owner of the shares, and the votes in question ought to have been admitted as good votes independently of the inquiry as to whether the parties tendering them were or were not, and to what extent, trustees for other persons beneficially entitled to the shares."

In *Reese River Silver Mining Co.* v. *Smith* (1869), L.R. 4 H.L. 64, Lord Cairns, at p. 80, has this to say with reference to the share-register of companies: "It is . . . as a matter of policy of very great importance, in these cases, to make the register of any one of these companies as conclusive as, consistently with the proper interpretation of the Act of Parliament, you are able to do;" and then he goes on to say that you cannot make the register absolutely conclusive in cases such as where names are put upon it without any authority of the owners, in which case persons whose names are so placed are in no way responsible; or where there has been default in performance by the executive of the company of its duty in removing names after the owners of those names have ceased to be shareholders; or where the name of any person is without sufficient cause entered on or omitted from the register of the members of the company; in all such cases it would be but proper that the register should be rectified. These instances, however, introduce conditions which do not enter into the present case.

In *Nanney* v. *Morgan* (1887), 37 Ch.D. 346, the view is ex-

pressed that a transfer is not complete until everything has been done which is necessary to put the transferee into the position of the transferor.

But the authorities carry the rights of the registered holder still further, for in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610, where the articles of association of a company provided that no person should be eligible as director unless he held as registered member in his own right capital of the nominal value of £500 at least, it was held that beneficial ownership was not necessary for a qualification, and that a registered holder of the required capital, though he had transferred his shares to another, was properly eligible. If, therefore, a director holding shares under such circumstances was not disqualified from being a director, why should a registered holder of shares, even though he has executed a transfer, which has not been registered, be disqualified from voting?

In *Bainbridge* v. *Smith* (1889), 41 Ch.D. 462, Cotton, L.J., indicates what is meant by a shareholder in his own right, when (at p. 471) he says: "In my opinion 'holding in his own right' is something more than 'holding,' and it must be shewn that he has not only the legal title which being on the register gives him, but that he is an independent holder, and has got the beneficial ownership of the shares. In my opinion, if a man gives an equitable mortgage of his shares, he is still beneficial owner, and still holds them as long as he holds them in his own right. But if a man is simply put on the register as a mere name, the right to the shares being in somebody else, he is not holding in his own right, but holding as a name in the right of somebody else." And then, while questioning some of the expressions of the Master of the Rolls in the judgment in *Pulbrook* v. *Richmond Consolidated Mining Co.* (*supra*), Cotton, L.J., agrees with that judgment on the only point that was really to be there decided. In the same case Lindley, L.J. (at pp. 474 and 475), expresses the opinion that "holding shares in his own right" has a conventional meaning which he thus defines: "I think that conventional meaning is this, that a person 'holding shares in his own right' means holding in his own right as distinguished from holding in the right of somebody else. I do not think the test is beneficial interest, the test is being on or not being on the register as a member,

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i.e., with power to vote, and with those rights which are incidental to full membership. It means that a person shall hold shares in such a way that a company can safely deal with him in respect of his shares whatever his interest may be in the shares."

These cases were followed by *Cooper* v. *Griffin*, [1892] 1 Q.B. 740, and *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502. In these cases the Court had under consideration the meaning of the words "in his own right" in cases dealing with charging orders.

In *Howard* v. *Sadler*, [1893] 1 Q.B. 1, it was held that a director might have possession of shares in his own right without being the beneficial owner; but in *Ritchie* v. *Vermillion Mining Co.* (1902), 4 O.L.R. 588, Maclennan, J.A., expressed the opinion (p. 597) that, by reason of the use of the word "absolutely" in the Ontario Act then under consideration (R.S.O. 1897, ch. 191), the language of that Act was stronger than that of the English Act, and he thought that it ought to be held that "absolutely in his own right," as used in sec. 42 of the Ontario Act, meant a beneficial holding.

Whether the qualification "in his own right" or "absolutely in his own right" means beneficial holding or not, all these cases go to shew that there is a marked distinction between merely being a shareholder (or a holder of shares) and a holder "in his own right." Those who by the present Ontario Companies Act (sec. 50) are entitled to vote at all meetings of shareholders of a company are (subject to the special Act, letters patent, supplementary letters patent, or by-laws) "shareholders," not "shareholders in their own right," or "shareholders" limited by any other qualification, except that a shareholder in arrear in respect of any call shall not be so entitled. The letters patent and by-laws of this company do not impose any such qualification on that right. The authorities to which I have referred, and others as well, do not negative, but approve, the proposition that a person whose name stands without qualification on the share-register as a holder of shares has the right to represent and vote in respect of such shares, and I can find no authority to the contrary.

Myrtice Oakes and Winifred Robins were the registered holders of the shares in question, and as such they were entitled to recog-

nition as shareholders to whom notice of meetings of the company should be given; and it was not within the province of the president or presiding officer to sit in judgment in respect of that right as between them and any others claiming these shares, and to declare against the right of these two holders to attend or be represented and to vote at such meetings. If that course were permissible, then how would it be possible to carry on such business of a company as must necessarily be transacted at a meeting of its shareholders? for never would there be certainty as to who is properly entitled to appear at a shareholders' meeting and take part in its deliberations.

The defendant Foster has abandoned his claim to have it declared that he is the owner of these shares; in so far as his attempt went to declare the registered holders disentitled, he was wrong, first because they were the registered holders, and, secondly, because they still were beneficially entitled to some of these shares.

They were represented at the meeting of the 26th January, 1916, by another shareholder whom they had in writing appointed their representative, conformably with the requirements of the Companies Act and the by-laws. No exception is taken to the form of these proxies, nor to the person so appointed being a shareholder entitled to fill that office. Harry Oakes, their proxy, was thus clothed with authority to represent them and to vote at the meeting in respect of their shares. His right to do so was not dependent upon the further authority which it is urged was conferred upon him by Burt, as attorney for Tough Oakes Gold Mines Limited (English company). In the action brought in England by that company, in which Foster is a defendant, he and his co-defendant, Latilla, were, by order of the 2nd November, 1915, restrained, amongst other things, from voting or exercising any voting rights in respect of the shares in Court in England, save as the plaintiffs in that action might direct. The ownership of these shares, as between that company and Kirkland Lake Proprietary Limited and Foster and Latilla, was then, and, as I am advised, is still, in dispute in the English Courts; and it had not been determined who, if either or any of them, was or is entitled. On the 11th January, 1916, an order was made in that same action restraining the defendants therein, Tough

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Oakes Gold Mines Limited (Canadian company), from transferring, assigning, parting with, disposing of, or accepting any votes tendered either personally or by proxy in respect of or in any way dealing with such of the shares standing in the names of any of the defendants comprised in the two blocks of shares in Court, "save as the plaintiffs may direct."

The meaning of the first of these orders I take to be that any power or right then in Foster or Latilla to vote or exercise voting rights in respect of these shares, or any of them, was not to be exercised unless with the consent or approval of the plaintiff company (in the English action) or as that company might direct; but it is a misconception of the meaning of the order to assume that the plaintiff company's rights, if they had any, were enlarged or extended by the order. These rights were not thereby enlarged; Foster's and Latilla's were curtailed; that is, if they had any of the rights which the order assumed to restrict. The plaintiffs in the present action seem to have assumed that, by reason of the form of the English injunction order, some right was conferred upon Tough Oakes Gold Mines Limited (English company) to direct the manner in which these shares should be represented. That was not the case, except in so far as it applied to any attempt by Foster or Latilla to do any of the acts which the order restrained them from doing.

The order of the 11th January, 1916, was not effective against the plaintiff company in the present action so as to prevent any voting at the meeting of the 26th January, 1916, upon the shares of which Myrtice Oakes and Winifred Robins were the registered holders. That company was not within the jurisdiction of the order; but, had it been so, there is the further fact that the plaintiff company in the English action, if it did not actually direct the plaintiff company in the present action to receive votes, was in accord with its receiving votes of the registered holders by their proxy in respect of these two blocks of shares. Burt, the attorney of the English company, was present at the meeting, and not only did not object, but approved. I mention this merely as a statement of fact, and not as intimating that it was by reason of that approval that the shares could be voted.

During the argument stress was laid on what was urged as a distinction between the right to represent shares at a meeting

and the right to vote in respect of them, upon the theory that it is possible for a shareholder, though prevented from voting in respect of his shares, still to have the right to represent these shares at a meeting and have them counted in the number necessary to be represented so as to constitute a quorum. In the view I have taken, that Myrtice Oakes and Winifred Robins are entitled both to represent and vote, it is not necessary to determine that question here.

Objection is also taken to the procedure adopted by some of the plaintiffs leading up to the meeting of the 26th January, 1916. On the 25th January, in an action in this Court by Kirkland Lake Proprietary Limited against Thomas B. Tough, John Henry Tough, Robert R. Tough, and George Tough, an injunction order was issued restraining these defendants, their servants or agents or any one on their behalf, from voting or exercising any other rights of ownership in respect of shares of the capital stock of Tough Oakes Gold Mines Limited (Canadian company), standing in their names, or the names of some of them, and forming part of the two blocks of shares, certificates of which were then on deposit in Court in England as already referred to. These parties are not recorded as having been represented at the meeting, and no attempt was made to vote in respect of their shares. The indications from the evidence are that, had they been represented, they would have been arrayed on the side of Foster and Kearney, and against the individual plaintiffs, who were there elected as directors. Had there been no injunction against them, and had these shares of theirs been represented and votes in respect thereof been offered and accepted, and assuming that those who composed the meeting (both personally and by proxy) at which the individual plaintiffs were elected were opposed to Foster and Kearney (which seems to have been the case), not only would there have been a quorum present at the meeting, but Foster and his party would have been defeated; that is, assuming that the shares in Court in England treated as belonging to Foster personally were not voted upon; he acted in obedience to the injunction order in the English action restraining him from voting on these shares, for he made no attempt to vote upon them. The same would have been the result even if votes in respect of the two blocks of 25,000 and 15,000 shares respectively of Myrtice Oakes and Winifred Robins were excluded.

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For some time prior to the January meeting, Messrs. Holden & Grover, of Toronto, acting as solicitors for Tough Oakes Gold Mines Limited (English company), and at times at the instance as well of Kirkland Lake Proprietary Limited, were most insistent in correspondence with and notices to the Tough brothers that they should not vote in respect of the shares standing in their names and comprising part of the blocks of shares deposited in Court. In letters of the 6th January, 1916, it was sought to ascertain from these parties if it was their intention to vote at the approaching annual meeting; and the letters warned them that, unless the writers received assurances in due course that it was not the intention so to vote, steps would be taken to prevent such action on their part. Assurances were not given, and the injunction of the 25th January followed. It has been suggested that this correspondence contained what was equivalent to an admission by the writers that any shares similarly situated to the two blocks of 25,000 and 15,000 respectively could not be voted by those in whose names they stood. Such is not the case. Apart from any other reason, it is a fact to be remembered that Holden & Grover were not at that time representing Myrtice Oakes and Winifred Robins, but were the solicitors for the English companies and acting in that capacity. Mr. Holden candidly admitted in his evidence that his desire was that the shares in Court standing on the share-register in the names of Myrtice Oakes and Winifred Robins should be voted upon at the meeting, while shares similarly standing in the names of the Toughs should not be voted upon. If this could be accomplished, it would, in his judgment, be to the advantage of the English companies he or his firm represented. Whether or not this plan of his is open to the criticism which has been directed against it, is immaterial so far as Myrtice Oakes and Winifred Robins are concerned, for they were not the parties on whose behalf it was conceived and put into effect.

It is true that strong opposition had developed against Foster. Months before this time, the Messrs. Tough, or some of them at least, shared this opposition, but later on, and before the annual meeting, they experienced a change of heart. That opposition developed is not surprising, if one considers Foster's breach of duty towards those who had trusted him, and this may well account for the motive of those of his opponents who frankly admit

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that they desired to oust him from a commanding position in the company. The motive, however, is immaterial so long as the proceedings are legal.

In *Ritchie* v. *Vermillion Mining Co.*, 4 O.L.R. 588, at p. 594, Maclennan, J.A., discussing a ground taken by the appellants, that "a sale would be injurious to the plaintiffs," said: "The answer to that is that the affairs of the company must be managed according to the judgment of the majority of shares, by which the directors, the executive body, are elected; and so long as what is done is legal, it cannot be prevented or undone merely because it may be disadvantageous to a minority of the members." See also *Menier* v. *Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350; and *Pender* v. *Lushington*, 6 Ch.D. 70.

One other matter remains. It has been objected that some of those elected as directors at the January, 1916, meeting, are the holders of only a very small number of shares. That, in itself, is not a valid objection to their becoming directors—the question being, do they or does each of them hold, as required by the letters patent and the by-laws of the company, the requisite number of shares to qualify them for that position? If they do, then the election is not on that score irregular. No one, however, has assumed to carry the objection to the extent of saying that any of these persons is not a holder of the number of shares necessary to qualify him. The qualification was established by those who undertook and who had the right to legislate for the manner in which the company's affairs would be administered; and, if the parties now claiming to have been elected are within the qualification which, as to the number of shares held, the by-laws required, the objection is not valid. Foster was one of the promoters and original shareholders of the company, and had to do with the passing of the by-law which established the qualification of each director to be the holding absolutely in his own right of at least one share of the company's capital stock.

The result is that the plaintiffs succeed; and there will be a declaration that the individual plaintiffs were duly elected directors of the plaintiff company at the meeting on the 26th January, 1916.

Evidence was not gone into on the question of the damages claimed; perhaps it could not satisfactorily have been gone into

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at that stage. If the plaintiffs desire it, there will be a reference to the Master in Ordinary to assess these damages. Subject to this, the plaintiffs are entitled to judgment for the relief they have asked, with costs against the defendants, other than the bank, whose costs also will be payable by its co-defendants. If the reference is proceeded with, further directions and costs of the reference will be reserved until after the Master's report.

MAPLE LEAF LUMBER Co. v. CALDBICK AND PIERCE.

Ontario Supreme Court, Clute, J. March 31, 1917.

LEVY AND SEIZURE (§ III A—40)—*Sale of Logs under Execution—Neglect of Sheriff to Ascertain Quantity—Breach of Duty—Liability of Purchaser—Measure of Damages—Relief over against Sheriff.*]—Action against George Caldbick, the Sheriff of the District of Temiskaming, and Charles Pierce, the purchaser of logs at a sale by the defendant Caldbick under execution, to set aside the sale and for damages.

The defendant Pierce served the defendant Caldbick with a third party notice; and Reamsbottom and Edwards, creditors of the plaintiffs, who had also been made third parties, were, upon their written consent filed, added, at the trial, as plaintiffs.

Gideon Grant and *P. E. F. Smily*, for the original plaintiffs.

McGregor Young, K.C., for the added plaintiffs.

H. M. Mowat, K.C., and *F. L. Smiley*, for the defendant Caldbick.

J. Y. Murdoch, for the defendant Pierce.

CLUTE, J.:—The plaintiffs bring this action against the sheriff, George Caldbick, and Charles Pierce, who purchased from the sheriff a certain quantity of logs at a sheriff's sale. Pierce, if liable, seeks to recover over from the sheriff as third party; and Reamsbottom and Edwards, creditors of the plaintiffs, applied to be added as party plaintiffs, but the Master, wrongly, I think, added them as third parties. A consent signed by Reamsbottom and Edwards to become plaintiffs was filed at the trial, and I allowed the application to add them as co-plaintiffs. As creditors, they desire on behalf of themselves and other creditors to set aside the sheriff's sale, or to have it declared that he is liable in damages for the sale of the logs in the woods.

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The main objection to the sale is, that the sheriff advertised, in addition to certain logs in the water, about 300 logs in the woods. As a matter of fact, there were over 4,000 logs in the woods.

At the sale, the sheriff was asked as to the number of logs in the woods. He did not know how many there were. He had made inquiry from a Frenchman who was supposed to have some knowledge of the fact, and was informed that there were about 300, and, without further inquiry or knowledge and without going to the woods, some 4 or 5 miles distant, he advertised them as about 300. At the sale, he was asked as to the number in the woods, and he said he was selling whatever the Maple Leaf Lumber Company had there, 300 more or less. If there were less, the buyer would pay for 300; if there were more, he would get them; and, on this understanding by the bidders, the defendant Pierce became the purchaser of the logs in boom at the mill, about 900, and the logs in the woods, for $410. The sale was subject to certain Government dues which had not been paid, amounting to $253.44.

Before the sale, I find, the sheriff did not know how many logs there were in the woods, but believed there were about 300. I further find that he took no reasonable care in ascertaining the quantity, and did not go to the woods himself, nor send any one, nor use other means to ascertain the number of logs and to make seizure there.

The purchaser, Pierce, did make inquiry from the neighbours as to the number of logs, and ascertained that there were supposed to be over 3,000, of which 1,000 were of good quality and 2,000 were not so valuable. He did not, however, have them counted. These do not include the 900 or 1,000 that were in the boom in the bay near the mill. There was also a certain amount of lumber.

The logs at the mill were included with the logs in the woods, and were sold as one lot. The logs at the mill have been sawn up and sold by the defendant Pierce, and he realised from their sale more than sufficient to recoup him for what he paid for the whole lot. He afterwards, in the summer, undertook to have the logs taken out. This was the most expensive time, and he says that he expended some $4,000 or $5,000 in the effort. The logs are now lying in the water, in the boom near the mill.

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In my opinion, what took place amounted to a seizure of the logs in the woods: *Gladstone* v. *Padwick* (1871), L.R. 6 Ex. 203; and I am further of opinion that the property passed by the sale: Halsbury's Laws of England, vol. 14, pp. 54, 55, 56; 17 Cyc. 1087. See *Osborne* v. *Kerr* (1859), 17 U.C.R. 134, 141; *Paterson* v. *Todd* (1865), 24 U.C.R. 296; *Jarvis* v. *Brooke* (1854), 11 U.C.R. 299; *Ross* v. *Malone* (1884), 7 O.R. 215, affirmed, 7 O.R. 397; *McDonald* v. *Cameron* (1867), 13 Gr. 84; *Lee* v. *Howes* (1870), 30 U.C.R. 292; *Laing* v. *Matthews* (1867), 14 Gr. 36, at p. 39; *McNichol* v. *McPherson* (1907), 15 O.L.R. 393.

I think the sheriff did not exercise reasonable care to ascertain the quantity of logs, and that he is responsible for any damages which arose directly from his neglect: *Wright* v. *Child* (1866), L.R. 1 Ex. 358. I am also of the opinion that in his position as sheriff it was his duty, in executing the writ in his hands, acting as an official, to guard the interests of any execution or other creditors who might claim an interest in the proceeds of the sale under the Creditors Relief Act; and his obligation in this respect, as compared with that of an ordinary trustee, is rather *à fortiori*, as stated by Mowat, V.-C., in *McDonald* v. *Cameron*, 13 Gr. at p. 92; and it was a breach of his duty as such official to neglect taking reasonable care in ascertaining what he was selling. Even without the number of logs or the quantity of lumber, he could have sold at so much per thousand in the log by measure.

I am further of opinion that the defendant Pierce, knowing the capacity in which the sheriff was acting, and that to sell 4,000 logs as "about 300 logs" would be a breach of duty, and would operate as a fraud on the other creditors, was not a *bonâ fide* purchaser for value without notice, and that he is liable with the sheriff for the damages which the plaintiffs and the creditors have suffered.

The evidence differed widely as to the value of the logs in the bush. I think the measure of damages is the difference between what they did sell for and what they would have sold for if they had been properly advertised and the purchaser had known what he was buying.

The defendant Pierce's counsel seemed to think that 50 cents a log would be a fair price, though his client said that they were not worth more than 15 to 20 cents a log. The plaintiffs gave

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some evidence that they were worth $1 a piece in the woods. The evidence upon this point was not satisfactory on either side. The logs have not been measured, although they might easily have been measured after they were brought out, to ascertain the quantity of lumber; which would have been some basis on which to fix the price. After the best consideration that I can give, upon the evidence before me, I fix their value at 60 cents in the woods. If either party is dissatisfied with this assessment of damages, there may be a reference to the Local Judge having jurisdiction in that locality, at the risk of costs to the person taking the reference.

There should be judgment against the defendants for $2,400—being 4,000 logs at 60 cents a log in the woods.

I do not think this is a case where the defendant Pierce is entitled to claim over against the sheriff.

The plaintiffs are entitled to the costs of the action.

I make no other order as to costs. *Judgment for plaintiff.*

CANADIAN MORTGAGE & INV. Co. v. SOLICITORS.

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Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. March 10, 1917.

SOLICITORS (§ II A—20)—*Liability for negligence—Non-compliance with instructions as to remittances causing abortion of mortgage sale—Measure of damages—Costs of advertising.*]—Appeal by defendants from a judgment for plaintiff in an action for damage caused by the negligence of the defendants in performing certain services as solicitors for plaintiffs. Varied.

H. E. Sampson, K.C., for appellants; *P. H. Gordon*, for respondents.

The judgment of the Court was delivered by

NEWLANDS, J.:—It is admitted by the defendants that they were verbally retained by plaintiffs to collect certain rents of properties mortgaged to the plaintiffs. Thereafter by letter the plaintiffs instructed defendants to remit the amounts collected to them and notify their solicitors in charge of sale proceedings against said mortgaged property, immediately upon receipt of any sums collected by them.

It was proved at the trial that defendants did not notify plaintiffs' solicitors of the sums collected by them and the Judge found that the result was that plaintiffs' solicitors were compelled

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to abandon on the return the application to confirm the sale, in view of the changed state of the mortgaged properties.

The damages allowed were the costs thrown away, the principal item being for advertising the land in the daily *Phœnix*, published at Saskatoon, for 2 months.

In the first instance contributory negligence was pleaded, but this plea was struck out by order before the trial. Some evidence was given on this question at the trial, and the defendants on the appeal sought to shew that the negligence of the defendants was not the proximate cause of the damage sustained by the plaintiffs.

The trial Judge held that contributory negligence was not pleaded. It was therefore improper, in my opinion, to receive any evidence upon the subject and the trial Judge was right in ignoring same. Defendants cannot now get in such evidence by trying to shew that their negligence was not the proximate cause of the damage but that some negligence on the part of the plaintiffs or their solicitors was equally a cause for the damages sustained. This is simply another way of trying to raise the issue of contributory negligence without pleading it.

I think it is sufficient for the purposes of the judgment in this case that the defendants were negligent and that their negligence was a sufficient cause for the sale becoming abortive and plaintiffs losing the costs of such abortive sale.

As to the amount of damages, the only complaint is as to the cost of advertising the land for sale.

The order for sale was in the usual form, No. 131, of the Rules of Court. It contained the provision given in the form: "Two months' notice of the time and place and conditions of sale to be given in the *Phœnix*, a daily newspaper published in the City of Saskatoon."

Plaintiffs' solicitors, who took out this order, interpreted it to mean that the notice of sale was to be published in the daily issue of the *Phœnix* for two months previous to the date of sale, and it was so published, incurring a bill for advertising of $333. Defendants' solicitor contends, although he did not seriously argue, that one publication two months prior to the sale would comply with the terms of the order.

I am not concerned very much with the literal meaning of this order, because the practice under it has been established for some

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years and it is, that, under such an order, the advertisement is inserted once each week in the newspaper designated, for the two months prior to the sale.

This is the only publication the plaintiffs' solicitors were entitled to make under this order, and, therefore, it is only the cost of publishing the notice once each week for the two months with which the defendants can be charged, and the damages should be reduced accordingly. I would refer this question to the local registrar.

The judgment should be varied to this extent and appellant should have the costs of appeal. *Judgment varied.*

McIVOR v. COLDWELL.

Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., Newlands, Brown and Elwood, JJ. March 10, 1917.

PARTIES (§ III—120)—*Third party procedure—Trespass—Agreement to indemnify.*]—Appeal by the Canadian Northern Ry. Co. from an order making them parties to an action for trespass to land under a third party notice. Dismissed by divided Court.

G. A. Ferguson, for appellant; *P. M. Anderson*, for respondent Fraser.

HAULTAIN, C.J., concurred with ELWOOD, J.

NEWLANDS, J.:—This is an application to join the Canadian Northern R. Co. as a third party to an action for trespass brought by the plaintiff against defendant for entering on certain lands of the plaintiff's and taking away a house therefrom. This house was sold by the C.N.R. Co. to J. H. Fraser, and by him sold to defendant. Fraser, who has been added as a third party, applies to have the C.N.R. Co. added as such.

The liability of the C.N.R. Co., if any, is upon the following contract:—

Winnipeg, Man., Aug. 20, 1915.

J. H. Fraser, Esq., Fraser, Keenleyside & Co., Regina, Sask.

Dear Sir,—I beg to acknowledge receipt of your letter of the 16th inst., enclosing cheque $125 for the brown house on Albert St. This letter will be your authority to remove the house.

R. M. Mitchell (Right of Way Agent).

This contract was to sell Fraser a house and to authorize him to go upon certain land and take it away. A failure to make title to the house or of the authority to enter and take same away would be a breach of contract for which the seller, the C.N.R. Co., would be liable in damages.

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The plaintiff's action is for trespass upon the land on which Fraser was authorized to enter by the C.N.R. Co., and for moving the house which plaintiff claims is hers.

In order that the C.N.R. Co. could be added as a third party, there must be a contract on the part of the C.N.R. Co., either express or implied, to indemnify Fraser against the cause of action upon which plaintiff is suing: *Constantine* v. *Warden*, 73 L.J. 450, per Smith, L.J., at p. 451.

As, however, Fraser has an action for damages against the C.N.R. Co. for breach of contract, he cannot have an indemnity.

In *Birmingham and District Land Co.* v. *London and Northwestern R. Co.*, 34 Ch.D. 261, Bowen, L.J., at 274, said:—

> The defendants here have no right to anything at all against the Boulton trustees, be it observed, except what arises out of their contract of sale. I think it tolerably clear that the rule, when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract; by express contract if it is given in terms by the contract between the parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do. . . 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.

The appeal should, therefore, be allowed with costs.

BROWN, J.:—The plaintiff's claim alleges that she, the plaintiff, is the registered owner of lots 23 and 24, in block 251 in the City of Regina, together with the buildings and fence which were erected thereon, and that the defendant trespassed upon the said lots and wrongfully removed therefrom a certain frame dwelling house and the said fence; and in consequence she seeks to recover from the defendant $2,050 in damages.

The defendant claims to have purchased the said house from J. H. Fraser and C. B. Keenleyside, doing business as Fraser, Keenleyside & Co., under and by virtue of the following agreement:—

> Messrs. Fraser, Keenleyside & Co. Regina, Sask., August 7, 1915.
>
> Referring to house on the west side of Albert St., first north of the subway,

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I will give you $173 for this house and remove the same, paying therefor $50 cash cheque herewith and the balance on the 1st of October, next.

M. J. Coldwell.

We accept the above, J. H. Fraser. Witness: C. Rattray.

Upon application by the defendant, Fraser and Keenleyside were brought in as parties to the action by way of third party notice. Fraser and Keenleyside claim that they purchased the house in question from the C.N.R. Co., and as evidence thereof produce the following agreement:—

J. H. Fraser, Esq., Winnipeg, Man., Aug. 20th, 1915.

I beg to acknowledge receipt of your letter of the 16th instant enclosing cheque $125 for the brown house on Albert St. This letter will be your authority to remove the house. R. M. Mitchell, Right of Way Agent.

They have applied for and obtained leave to serve a fourth party notice on the C.N.R. Co. and ask to be indemnified by the C.N.R. Co. against the claim of the defendant as set out in the third party notice. The C.N.R. Co. appealed from the order so making them parties, contending that this is not a proper case for such procedure.

Our rule of Court No. 74 is the one providing for third party procedure, and it reads as follows:—

Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge, to be obtained *ex parte*, issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal with which writs of summons are sealed; a copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his defence. Such notice may be in the form or to the effect of form No. 3 in appendix hereto with such variations as circumstances may require and therewith shall be served a copy of the statement of claim.

There are a number of decisions by the Courts in England bearing on the English marginal rule No. 170, which is exactly the same as our rule No. 74. It will, I think, suffice to refer to two of these decisions.

In *Speller & Co.* v. *Bristol Steam Navigation Co.*, 13 Q.B.D. 96, the plaintiff's goods were damaged while on board a vessel of the defendant's on a certain voyage by reason of the vessel being unseaworthy. The defendants had hired the vessel from a third party with a warranty that she was tight, staunch, strong, and fitted for the service. Action having been brought against the defendants by the owner of the goods for damages the de-

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fendants applied for leave to issue a third party notice claiming to be indemnified by the third party. Their application was refused.

In *Birmingham & District Land Co.* v. *London & N.W.R. Co.*, 34 Ch.D. 261, 56 L.J. Ch. 956, the rule as laid down in the *Speller* case was followed.

Can we then say in the case at bar that there was any contract of indemnity on the part of the C.N.R. Co., either express or implied? This contract is a contract for the sale of the house in question with authority to remove same from the premises on which it is situated. Ordinarily the house would be part of the realty and there would be no right of sale or removal apart from ownership of the lots. The company by so selling, I take it, impliedly warranted and contracted that they have the right to sell and remove the building, and if it turns out that they have not that right they are liable in damages for breach of contract.

I find nothing in the contract which amounts to an express or implied agreement to indemnify the purchasers against any action on the part of a third party. If I am correct in this view there is not even a *primâ facie* case for indemnity made out, and, therefore, the appeal should be allowed and the fourth party notice set aside.

ELWOOD, J.:—The plaintiff's statement of claim claims damages as follows:—(a) As special damages the value of the said house and fence as above mentioned, $1,500; (b) Interest by way of damages on the value of said house and fence from the date of said trespass until payment or judgment; (c) In the alternative to (a) and (b) special damages for the severance and removal of the said house and fence, $1,550; (d) General damages for said trespass and wrongful removal, $500. Costs of this action.

The defendant obtained a third party notice claiming compensation for any and all of the above damages, and the third party obtained an order adding the respondent as a fourth party claiming compensation. Objection was made that before obtaining this fourth party notice, the third party should have shewn that he had been served with the third party notice.

I am of the opinion, however, that the fourth party, by having entered an unconditional appearance to the notice, is now precluded from raising that objection.

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The whole argument before us practically turns upon the effect of the following letter: (See judgment of Newlands, J.)

This letter was written on behalf of the fourth party. It was contended on behalf of the appellant that the only effect of this letter, if any, is to give rise to a claim for damages for breach of contract. If this *is* the effect, then, it seems to me quite clear on the authorities, that the third party had no right to join the fourth party and that the appeal should succeed.

I am, however, of the opinion that the letter above quoted goes further than is contended for by the appellant.

In *Birmingham & District Land Co.* v. *London & N.W. R. Co.*, 34 Ch.D. 261, 272, I find the following:—

> 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.

It seems to me that the letter of August 20 was an express authorization to commit the trespass for which damages in part are claimed. The letter is more than a sale of the house. If it had been merely a sale of the house there would, of course, be no liability to indemnify. If it authorizes the commission of a trespass, then there is a liability to indemnify. The difference between the two positions can be illustrated as follows: If A. sells to B. a horse, said to be in the livery stable of C., this merely authorizes B. to get the horse if he can without committing a trespass, but does not authorize him to commit a trespass to get it; but if A. sells the same horse to B. and A. at the same time authorizes B. to go into the livery stable and take that horse, then, it seems to me, he authorizes a trespass to be committed and is liable to B. for the consequence of the trespass. That seems to me to be the case here.

In *Wynne* v. *Tempest*, [1897] 1 Ch. 110, 66 L.J. Ch., p. 83, the following test is put, viz.: "If the plaintiffs fail in the action, would the defendant's claim against the third party be thereby defeated?" That does not appear to me to be an absolute test, but it is one of the tests, and in this case the claim of the third party against the fourth party—as far as the damages for trespass are concerned—would be defeated if the plaintiff were unsuccessful.

It appears to me that the only claim for compensation would

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be with respect to par. (d) above quoted, but the mere fact that compensation is claimed for more than the third party is entitled to, cannot, in my opinion, affect the question if there is some compensation that can be granted.

In *Carshore* v. *N.-E. R. Co.*, 29 Ch. D. 344, 54 L.J. Ch. 760, at 762, I find the following:—

> But it is the object of the third party rules to try as between all parties at one and the same time *any one issue of fact in which all are interested.*

And our Rule 78 provides that:—

> On the application for direction a Judge may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed in whole or *in part*, order the question of such liability to be tried, etc.

The case of *Baxter* v. *France*, [1895] 1 Q.B. 591, 64 L.J.Q.B. 337, at 339, seems to be authority for the proposition that on the application to a Judge for directions, the Judge, if he saw fit, might refuse to order the question to be tried, on the ground that the action might not finally dispose of all questions between the third and fourth parties. For instance, there might be a liability for breach of contract as well as a liability for the authorization to trespass. The liability for breach of contract would not be one for indemnity, and, consequently, could not be tried under a third party notice. The liability for the authorization to trespass could be tried under the third party notice. After the trial of this action there might, therefore, be the question of liability for breach of contract to be determined, and the Judge, therefore, on the application for directions, might very properly refuse to direct an issue to be tried, and from such an order I apprehend that an appeal would not be successful. *Baxter* v. *France*, *supra*.

That, however, cannot affect this application so long as there is some issue with respect to which indemnity can properly be claimed.

I may say, in passing, that it does seem to me that the defendant was not entitled on the material to serve a third party notice. That question, however, was not raised on the argument before us, nor do I think it affects this application. It might, however, affect an application for directions.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed; Court equally divided.

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WORDS AND PHRASES—*continued.*